

CALIFORNIA JUDGES BENCHGUIDES

**Benchguide 58**

**MOTIONS TO SUPPRESS AND  
RELATED MOTIONS: CHECKLISTS**

[REVISED 2007]



ADMINISTRATIVE OFFICE  
OF THE COURTS

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This benchguide provides checklists and charts for judges who hear motions under [Pen C §§1538.5 and 1524\(c\)](#) that litigate the applicability of the Fourth Amendment exclusionary rule. In addition, the benchguide provides checklists for motions under [Pen C §1536.5](#) (access to copies of seized business records).

The benchguide is designed mainly for judges with limited experience in hearing such motions. It should be used together with California Judges Benchbook, *Search and Seizure* (2d ed 2002), hereafter Benchbook, and its 2005 Update, hereafter Benchbook Update.

**II. MATTERS GENERALLY APPLICABLE TO PEN C §1538.5 MOTIONS****A. Prehearing Study of Motion****1. [§58.2] Functions of Prehearing Study**

In addition to familiarizing the judge with the substance of the motion, reading the moving and opposing papers of a [Pen C §1538.5](#) motion may raise and shed light on questions such as:

- Am I the appropriate judge to hear the motion?
- Do I have all the documents I need?
- Are there procedural issues and how can they best be handled?
- Who has the burden of proving what?
- Is it clear what evidence defendant seeks to exclude?
- Was there an earlier ruling and, if so, what is its effect on the present motion?
- What do I need to take up with counsel at the beginning of the hearing?

**2. Checklist: Previewing the Motion Before the Hearing****a. [§58.3] Motion Papers and Documents**

Read the moving and opposing papers, as well as any response filed by defendant.

- ☛ **JUDICIAL TIP:** You may want to check with the clerk when the file does not include a reply by the prosecution or a response by the defendant. [Penal Code §1538.5](#) does not require one for the most common motions. [Pen C §1538.5\(f\), \(i\)](#); *People v Britton*

(2001) 91 CA4th 1112, 1116, 111 CR2d 199; see *In re Justin K.*  
(2002) 98 CA4th 695, 697–698, 120 CR2d 546.

Obtain and read documents to which the motion papers refer, particularly

- Search and arrest warrants,
- Affidavits in support of them, and
- Transcripts of any previous [Pen C §1538.5](#) hearing.

#### b. [§58.4] Proper Judge To Hear Motion

Consider whether you are the proper judge to hear the motion. Check for

- Challenges filed against you. See Benchbook §6.101.
- Requests that the motion be heard by the magistrate who issued the search warrant involved in the motion. [Pen C §1538.5\(b\)](#) (motion should first be heard by magistrate who issued search warrant); Benchbook §6.100 (statutory provision is recommendation, not mandate).

*Comment:* [Penal Code §807](#) defines a magistrate as an officer having the power to issue an arrest warrant. All California trial judges, judges of the courts of appeal, and justices of the Supreme Court are magistrates. [Pen C §808](#). A judge acts as a magistrate when he or she issues a search warrant. [Pen C §1523](#); Benchbook §2.3.

- Requests that a relitigated motion be heard by the judge who granted the previous motion. [Pen C §1538.5\(j\), \(p\)](#) (when magistrate grants motion and prosecution dismisses and refiles, subsequent motion shall be heard by judge who initially granted motion, if available); Benchbook Update §6.100.

*Comment:* The prosecution may not challenge the judge who heard the earlier motion under [CCP §170.6](#). *People v Superior Court (Jimenez)* (2002) 28 C4th 798, 801, 123 CR2d 31; Benchbook Update §6.101.

#### c. [§58.5] Timeliness of Service

Consider any objection to timeliness of service. See Benchbook §§6.47–6.53. The following summary of notice requirements is from Benchbook §6.53.

Charge	Motion Under	Time
Felony (and misdemeanor charged with felony)	<a href="#">Pen C §1538.5(f)</a>	Motion—5 court days Response—2 court days
	<a href="#">Pen C §1538.5(i)</a>	Motion—10 court days Response—2 court days

Charge	Motion Under	Time
	Pen C §1538.5(j)	Probably: Motion—10 <i>calendar</i> days Opposition—5 <i>calendar</i> days Reply—2 <i>calendar</i> days
	Pen C §1538.5(h)	Advance notice not required
Misdemeanor (other than misdemeanor charged with felony)	Pen C §1538.5(g)	Probably: Motion—10 <i>calendar</i> days Opposition—5 <i>calendar</i> days Reply—2 <i>calendar</i> days
	Pen C §1538.5(h)	Advance notice not required

- ☛ **JUDICIAL TIP:** Resolve claims of untimely service as you would with any motion. Grant a continuance if necessary. Continuances are preferable to denials without prejudice because they involve less wasted effort and delay. When a continuance is requested, consider the feasibility of holding the evidentiary part of the hearing, followed by supplemental memos.

#### d. [§58.6] Specificity of Motion

Consider any objection concerning the specificity of the motion in light of the following (Benchbook §§6.42–6.45):

- Defendant has the burden of raising the issues, regardless of who has the burden of proof. Benchbook §6.44.
- The moving papers relating to a warrantless search or seizure need only assert the absence of a warrant. *People v Williams* (1999) 20 CA4th 119, 130, 83 CR2d 275; Benchbook §6.45. Exception: Defendant must set out any contentions that are independent of the lack of a warrant, *e.g.*, knock-notice violations. *People v Williams, supra*.
- The moving papers should state the grounds on which defendant challenges a search conducted under a warrant. Pen C §1538.5(a)(1)(B), (2).
- Any reply brief by the defendant should clearly pinpoint the issues the defense raises. *People v Oldham* (2000) 81 CA4th 1, 14, 96 CR2d 343. The defendant is permitted to do this orally when the motion is heard instead of filing a brief. *People v Smith* (2002) 95 CA4th 283, 300, 115 CR2d 483. The burden of proving justification for a warrantless search remains on the prosecution. 95 CA4th at 300.

- JUDICIAL TIP: When the papers are unobjectionable but unenlightening, ask counsel at the outset of the hearing to state their positions. Ask defense counsel to counter any justification for the search that the prosecution set out in its written response to the motion and that was not covered in defendant’s reply memo, if any.

#### e. [§58.7] Other Procedural Objections

Consider other objections to the motion, such as the ones discussed in §§58.8–58.13.

##### (1) [§58.8] No Fourth Amendment Claim

Consider any contention that [Pen C §1538.5](#) is inapplicable because it only covers Fourth Amendment claims and the case at hand involves an illegality, if any, other than a Fourth Amendment violation.

*Illustrations:* DUI prosecution. Motion to suppress results of blood test (or evidence of refusal) on the ground that the police denied the defendant a choice of tests. Benchbook §6.20 ([Pen C §1538.5](#) motion improper because the denial of a choice of tests may violate due process but does not violate the Fourth Amendment; common law suppression motion is proper method for challenging due process violation). Similarly, a motion to suppress a statement on *Miranda* or voluntariness grounds cannot be brought under [Pen C §1538.5](#), but a motion to exclude a statement on the ground that it is the result of an unlawful detention or arrest falls within [Pen C §1538.5](#). Benchbook §§6.16–6.17. The underlying principle is that [Pen C §1538.5](#) motions are limited to those that make a Fourth Amendment claim, subject to rare exceptions. Benchbook §§6.13–6.27.

- JUDICIAL TIP: In dealing with a [Pen C §1538.5](#) motion that should have been brought as a common law motion, deny the motion rather than treating it as a common law motion. Very different rules govern the two types of motion; transmuting one motion into the other is likely to create confusion and error. See Benchbook §6.15. When a motion includes Fourth Amendment and other grounds, rule only on the former and so state on the record.

##### (2) [§58.9] Statute Improperly Invoked for Other Reasons

Consider any contention that a [Pen C §1538.5](#) motion may not be made at the particular stage of the case or in the particular proceeding. Benchbook §§1.15–1.24, 6.5–6.9; see chart in [§58.16](#).

☛ JUDICIAL TIP: In dealing with such a contention, determine whether the motion was brought

- (1) by a defendant in a criminal action,
- (2) who seeks to exclude evidence
- (3) offered at defendant’s preliminary hearing or potentially offered at defendant’s trial,
- (4) on the ground that the evidence was obtained in violation of the Fourth Amendment.

If the answer to any of these questions is no, deny the motion. [Pen C §1538.5\(a\), \(f\)–\(i\)](#); Benchbook §6.5.

### (3) [§58.10] Motion Made Too Late

Consider any objection that the motion is untimely, *i.e.*, that it comes too late. Benchbook §§6.2–6.3, 6.47–6.52.

*Comment:* Motions on the eve of trial or, worse, during trial are strongly disfavored. For trial motion checklists, see §§58.56–58.68.

### (4) [§58.11] Impermissible Relitigation

Consider any objection that the motion attempts to relitigate a prior [Pen C §1538.5](#) motion in a manner not authorized by the statute. Benchbook §§6.58–6.59, 6.74–6.76. The defendant is generally entitled to only one evidentiary hearing. *People v Bennett* (1998) 68 CA4th 396, 398–399, 80 CR2d 323.

☛ JUDICIAL TIP: Obtain and read the record of any prior [Pen C §1538.5](#) motion and consider whether the earlier ruling

- Precludes you from hearing the present motion on the merits (Benchbook §§6.74–6.76);
- Limits the evidence and issues you may consider ([Pen C §1538.5\(f\), \(i\)](#); Benchbook §§6.60–6.73); or
- Has no effect on your authority (*e.g.*, prior motion not decided on merits or not made by present defendant).

### (5) [§58.12] “Standing”

Consider any objection that the defendant lacks “standing” to bring the motion.

*Comment:* The prosecution may try to raise lack of “standing” as a procedural bar to the motion. But “standing” is not a procedural problem. It requires a determination on the merits “whether the defendant, rather than someone else, had a reasonable expectation of privacy in the place

searched or the items seized.” *People v Ayala* (2000) 23 C4th 225, 254 n3, 96 CR2d 682; Benchbook §6.28. For discussion of reasonable privacy expectations, see Benchbook §§5.2–5.47.

- ☛ JUDICIAL TIP: (1) Avoid “standing” language and request counsel to do the same; use “reasonable expectation of privacy” instead. See *People v Ayala, supra*. (2) Consider whether it might make the hearing clearer if evidence on other issues were offered first. See Benchbook §6.123 (judge may vary order of proof).

#### f. [§58.13] Warrants

Consider whether the motion involves a search or arrest warrant. If so,

- Read the warrant, supporting affidavit(s), and return of the warrant.
- ☛ JUDICIAL TIP: When the papers are extensive, consider asking counsel to pinpoint key portions at the hearing.
- Consider whether the motion challenges the supporting affidavit on the ground of material misstatements or omissions. If so, see checklist in §§58.17–58.21.

#### g. [§58.14] Identification of Evidence

Check whether the motion identifies the evidence that defendant seeks to exclude.

- ☛ JUDICIAL TIP: Ask yourself if you could make an order identifying the particular evidence. If you could not, ask counsel at the hearing to pinpoint the evidence in question. When counsel does it by referring to a document, such as a search warrant return, make sure that the document is admitted at the hearing or becomes a physical part of your order. Bear in mind that a [Pen C §1538.5](#) hearing may extend to intangible evidence such as observations. See Benchbook §6.11.

### B. [§58.15] Chart: Burden of Proof

*Introduction:* The prosecution has the burden of proving the validity of a warrantless search or seizure, after the defendant has established that there was no warrant. The defendant has the burden of proving the invalidity of a search or seizure under a search or arrest warrant. The standard of proof is a preponderance of the evidence. Benchbook §§6.105–6.106, 6.111. The chart below shows who has the burden of proof in a variety of situations.

<b>Issue</b>	<b>Burden</b>	<b>Benchbook §</b>
Abandonment	People	5.41
Arraignment, delay of		
Confession as product of delay	Defendant	4.94
Justification for delay	People <sup>1</sup>	4.94
Physical evidence, not tainted by	People	4.94
Attenuation	People	6.121
Consent to search	People <sup>2</sup>	6.107–6.110
Exigent circumstances (emergency), existence of	People	2.128, 5.84–5.101
Fruit of poisonous tree		
Attenuation	People	6.121
Causal link	Defendant <sup>3</sup>	6.121
Independent source	People	6.112, 6.121
Good faith exception to warrant requirement	People <sup>4</sup>	6.112
Independent source	People	6.112, 6.121
Information from other officers, reasonable basis for	People	6.109
Introduction of additional defense evidence at Pen C §1538.5(i) hearing	Defendant	6.67
Knock-notice		
Excuse for noncompliance	People	2.90–2.109
Noncompliance	Defendant	4.62
Misstatements or omissions in search warrant affidavit	Defendant <sup>5</sup>	6.113
Reasonable expectation of privacy		
Existence of	Defendant <sup>6</sup>	6.118
Relinquishment of	People	5.41
Search or arrest warrant		
Improper execution of	Defendant	6.111
Invalidity of	Defendant	6.111
Lack of	Defendant	6.105
Search without, validity of	People	6.106
Showup identification, validity of	People	6.108
Temporary detention		
Adequacy of grounds for	People	3.51
Validity of search during	People	3.51

1. When the delay is shorter than two days, the defendant has the initial “burden of producing evidence suggesting that the arraignment delay” was unreasonable. *People v Cook* (1982) 135 CA3d 785, 792, 185 CR 576.
2. The prosecution has the burden of proving the voluntariness of the consent and the actual or apparent authority of the person who consented. Benchbook §§6.101, 6.110.
3. But the prosecution must raise the issue so that defendant has the opportunity to prove a causal link between the illegal police conduct and the evidence in question. Benchbook §6.120.
4. After defendant shows the invalidity of the warrant.
5. Defendant must first make a specific offer of proof. Benchbook §§6.113–6.114.
6. But the prosecution must raise the issue so that defendant has the opportunity to prove it. Benchbook §6.120.

**C. [§58.16] Chart: Applicability of Exclusionary Rule and Pen C §1538.5 to Various Proceedings**

<b>Proceeding</b>	<b>Exclusionary Rule Applies</b>	<b>Pen C §1538.5 Applies</b>	<b>See</b>
Administrative	Varies	No	Benchbook §§1.24, 6.9
Civil action	No	No	Benchbook §§1.23, 6.8
Civil narcotics commitment	Yes	No	Benchbook §§1.23, 6.8
Conservatorship	No	No	Benchbook §1.23
Deportation	No	No	Benchbook §1.23
Forfeiture	Yes, except to items that are clearly contraband	No	Benchbook §6.155
Juvenile court	To delinquency, but not dependency proceedings	No	<a href="#">Welf &amp; I C §700.1</a> ; Benchbook §§1.22, 6.7, 6.143
Parole or probation revocation	No, except possibly to items previously suppressed	No	Benchbook §1.21
Post-arrest determination of probable cause	Yes	No	<a href="#">Pen C §991</a> ; Benchbook §§1.16, 4.95-4.102

**D. Checklist: Attack on Warrant for Misstatements or Omissions**

**1. Discovery**

**a. [§58.17] Showing**

Determine whether defendant's discovery request

(1) Casts reasonable doubt on the veracity or completeness of the statements in the affidavit(s);

(2) Specifies, if possible, the basis for defendant's belief that the information sought exists, and the purpose for which defendant seeks it; and

(3) Raises a substantial possibility that the allegedly untrue or omitted statements are material to the determination of probable cause to issue the

warrant. *People v Luttenberger* (1990) 50 C3d 1, 20–24, 265 CR 690; Benchbook §6.115.

*Comment:* This is a lesser showing than the one defendant must make before he or she may have an evidentiary hearing on whether there actually were material misstatements or omissions. Benchbook §§6.114–6.115. For discovery purposes, defendant need not show that the affiant acted in bad faith; a blanket denial that the key events described in the affidavit occurred is sufficient. *People v Estrada* (2003) 105 CA4th 783, 793, 129 CR2d 589; Benchbook §6.115. “Material” means relevant to the existence of probable cause. Benchbook §§2.44–2.48.

If you decide that the showing for discovery is adequate, proceed to §58.18; otherwise, deny the challenge to the warrant.

#### b. [§58.18] In Camera Inspection

(1) Conduct an in camera inspection of the documents defendant seeks, determine their materiality, and delete any information that might identify an informant. *People v Luttenberger* (1990) 50 C3d 1, 20, 265 CR 690; Benchbook §5.116.

(2) Order only production of documents relevant to material inaccuracies asserted by defendant. 50 C3d at 23; Benchbook §5.116.

### 2. Evidentiary Hearing

#### a. [§58.19] Preliminary Showing

Determine whether defendant has made an adequate offer of proof. Benchbook §§2.44, 6.113–6.114. If yes, proceed to (b); if no, deny challenge to warrant. To be sufficient, the offer of proof must be

- (1) Specific and factual, rather than conclusory;
- (2) Accompanied by declarations of witnesses or by an explanation of their absence;
- (3) Sufficient to prove that the affiant’s misstatements or omissions were deliberate or reckless, and that they are material to the finding of probable cause to search; and
- (4) Limited to statements of the affiant, rather than those of an informant. *Franks v Delaware* (1978) 438 US 154, 171–172, 98 S Ct 2674, 57 L Ed 2d 667; Benchbook §§6.113–6.114.

☛ **JUDICIAL TIP:** Unless defendant makes an adequate threshold showing in his or her moving papers, do not permit defendant to cross-examine the affiant about the accuracy or completeness of the affidavit or call other witnesses in an effort to attack the affidavit. Deny the challenge to the warrant.

**b. [§58.20] Hearing**

When defendant's preliminary showing is adequate

(1) Hold an in camera hearing whenever defendant seeks disclosure of an informant's identity.

(2) Determine

- Whether the informant's identity should be kept confidential and, if so,
- Whether the informant made material statements to the affiant that the affiant misstated or omitted. To make this determination, interview the informant in camera under oath, and have the interview reported and sealed. Benchbook §6.116.

(3) Announce the results of the in camera hearing in open court.

(4) Hold the evidentiary hearing.

**c. [§58.21] Decision**

After the evidentiary hearing and argument, determine (Benchbook §6.113):

(1) Whether the affidavit contains any misstatement or whether matters were omitted from it. If so, proceed to (2); if not, deny the challenge to the warrant.

➤ **JUDICIAL TIP:** Identify misstatements or omissions on the record.

(2) Whether any of the misstatements or omissions are material. If so, proceed to (3); if not, deny the challenge to the warrant.

➤ **JUDICIAL TIP:** Identify *material* misstatements or omissions on the record.

(3) Whether the misstatements or omissions are those of the affiant. If so, proceed to (4); if not, deny the challenge to the warrant.

(4) Whether the affiant made any of the material misstatements or omissions deliberately or recklessly. If so, proceed to (5); if not, deny the challenge to the warrant.

(5) Whether the affidavit shows probable cause to search when the misstatements determined in (4) are disregarded, and the omissions determined in (4) are added to the affidavit.

**III. PRETRIAL MOTIONS****A. Checklist: Motion at Preliminary Hearing (Pen C §1538.5(f))****1. [§58.22] Prehearing Study**

Study the motion before the hearing. See §§58.2–58.14.

*Comment:* Careful advance study is particularly advisable for [Pen C §1538.5\(f\)](#) motions for at least two reasons. (1) Most judges see them infrequently, if at all, because legislative changes made them unattractive to defendants. See [Pen C §1538.5\(f\), \(i\)](#); Benchbook §§6.54, 6.60. (2) Hearing a motion concurrently with a preliminary hearing is more difficult than hearing a motion by itself. See Benchbook §6.124.

## 2. At the Outset of the Hearing

### a. [§58.23] Transfer of Case

At the outset of the hearing, consider any question of transferring the case to another judge. [Pen C §1538.5\(b\)](#); [CCP §170.6](#); Benchbook §§6.100–6.101; see also [§58.4](#).

*Comment:* Search warrant cases “should first be heard by the magistrate who issued the search warrant. . . .” [Pen C §1538.5\(b\)](#). This provision is a recommendation, not a mandate. *Cuevas v Superior Court (1976) 58 CA3d 406, 409, 130 CR 238*. In contrast, it is mandatory for the judge who granted the earlier motion, subject to the availability of the judge, to hear the motion in a refiled case. [Pen C §1538.5\(p\)](#); see *People v Superior Court (Jimenez) (2002) 28 C4th 798, 801, 123 CR2d 31*.

- **JUDICIAL TIP:** A transfer is often impractical; make sure that the magistrate is or shortly will be free and nearby before you grant one. Other judges are no more enthusiastic about having their calendars disrupted than you are. If you do grant a request for transfer to the issuing magistrate, transfer the entire case, rather than the suppression motion alone. The motion cannot be litigated apart from the preliminary hearing because [Pen C §1538.5\(f\)](#) limits the motion to evidence that the prosecution offers at the preliminary hearing and specifies that the motion be heard “at the preliminary hearing.” [Pen C §1538.5\(f\)](#). Deny a transfer request made after you have held the preliminary hearing. For additional suggestions, see Benchbook §6.100.

### b. [§58.24] Continuance Requests

Consider any requests for a continuance. [Pen C §1538.5\(f\)\(2\)](#) (defendant is entitled to continuance to file suppression motion on showing lack of awareness of evidence or suppression grounds); Benchbook §6.56. The continuance must be for at least 5 court days. [Pen C §1538.5\(f\)\(2\)](#).

### c. [§58.25] Requests To Exclude Witness or To Close Hearing

(1) Grant a request to exclude witnesses, except the investigating officer and the defense investigator. [Pen C §1538.5\(c\)\(2\)–\(4\)](#).

(2) On request, order witnesses not to talk to each other until they have all been examined.

(3) Grant a request to keep witnesses separate from each other to the extent feasible.

(4) Consider any request for a closed hearing. See *Press-Enterprise Co. v Superior Court* (1986) 478 US 1, 13–14, 106 S Ct 2735, 92 L Ed 2d 1; Benchbook §6.103 (closing permitted only on express findings of substantial probability that open hearing would prejudice defendant’s right to fair trial and that no reasonable alternative would adequately protect this right).

### d. [§58.26] Clarification of Issues and Evidence

Briefly discuss with counsel any issues that appear unclear after your study of the motion and any uncertainty you have of what evidence the motion seeks to suppress.

#### ☛ JUDICIAL TIP:

- Ask, do not tell. It is counsel, not you, who initially need to formulate the issues.
- Do not let the prosecution block a suppression hearing by arguing that it will not present any physical evidence. All evidence, physical or otherwise, that links defendant to the charges is subject to a [Pen C §1538.5](#) motion. Benchbook §§6.11, 6.55.
- When defendant attacks a search warrant affidavit for alleged misstatements or omissions, begin with the question of whether defendant has made an adequate preliminary showing to entitle him or her to an evidentiary hearing. See [§§58.17–58.21](#).

### 3. [§58.27] Hearing

Conduct the hearing. For disputes over what side should proceed first, see Benchbook §6.123; for discussion of the burden of proof, see Benchbook §§6.105–6.122 and [§58.16](#).

#### ☛ JUDICIAL TIP:

- Take notes in a way that differentiates evidence germane to the preliminary hearing, to the motion, or both. For a worksheet, see [§58.30](#).

- Deal with relevance objections by asking, if necessary, to what issue the evidence is relevant. Do not accept vague answers like “probable cause.” Instead, ask counsel to specify what cause he or she is referring to—*e.g.*, cause to arrest, search, or detain. Benchbook §6.124. For hearsay objections, see Benchbook §§6.125–6.127.
- Do not permit a defendant who has not filed a [Pen C §1538.5](#) motion to raise a search or seizure issue by objection. Summarily overrule such an objection with a brief, clear statement that no suppression issue is properly before the court. A statement of this kind helps to avoid confusion down the line.

#### 4. [§58.28] Argument

Hear argument.

- **JUDICIAL TIP:** When necessary, clarify the issues and the evidence that defendant seeks to exclude. Generally grant requests for additional briefing as long as it is completed within a few days. Defer ruling on the preliminary hearing until you rule on the suppression motion. Set a definite decision date.

#### 5. [§58.29] Decision

Decide and rule on the [Pen C §1538.5\(f\)](#) motion and on the preliminary hearing. If you do not reach the merits of the motion, explain on the record.

*Comment:* A decision on “standing” is on the merits.

If you do reach the merits, decide also:

(1) Whether you will make express findings on the motion and/or state the reasons for your ruling.

*Comment:* You are not required to make express findings or state the grounds for your ruling, but it is often helpful in subsequent proceedings to have such findings or statements. Benchbook §§6.57, 6.130; see [§58.40](#).

(2) How your ruling will identify the evidence to which it pertains. See [§58.41](#).

**B. [§58.30] Worksheet: Suppression Motion at Preliminary Hearing**

People v \_\_\_\_\_

Charge(s): \_\_\_\_\_

Witness	Summary of Testimony	Relevant to <sup>1</sup>	
		Prelim.	Motion
Ex. No.	Summary of Exhibit		

1. May be relevant to both.

### C. Checklist: Motion After Filing of Information or Indictment (Pen C §1538.5(i))

#### 1. [§58.31] Prehearing Study

Preview the motion before the hearing, following the checklist in §§58.2–58.14.

- JUDICIAL TIP: Noting whether the defendant previously made a suppression motion under Pen C §1538.5(f) is especially important because it determines the nature of the hearing on the present motion. Benchbook §§6.50–6.73.

#### 2. [§58.32] At the Outset of the Hearing

At the outset of the hearing, take up matters raised by your study of the motion or by counsel (see §§58.23–58.26), other than the effects of any earlier suppression motion under Pen C §1538.5(f) (motion at preliminary hearing). As to the latter, see §§58.33–58.35.

- JUDICIAL TIP: It is often useful to ask counsel to briefly state the issues, especially when the motion papers indicate confusion or disagreement over what the issues are. Keep this discussion focused, brief, and as nonargumentative as possible.

#### 3. Procedure in Event of Prior Pen C §1538.5(f) Motion

##### a. [§58.33] Initial Steps

Take the following initial steps whenever there was a prior suppression motion at the preliminary hearing:

- Resolve any dispute as to what legal theories you may consider. Benchbook §6.61 (defendant may only advance theories litigated at the earlier hearing).
- Ascertain whether defendant will seek to introduce additional evidence and, if so, whether defendant wants an in camera hearing and whether the prosecution objects to the introduction of new evidence.

*Comment:* Defendant is limited to evidence that could not reasonably have been presented at the preliminary hearing. Pen C §1538.5(i); Benchbook §§6.62–6.68. Defendant is entitled to an in camera hearing to show that the proffered evidence comes within this limitation. Pen C §1538.5(i); Benchbook §6.69. See §58.34 below.

##### b. [§58.34] In Camera Hearing

- (1) Conduct the hearing outside the prosecution's presence.

- (2) Order a court reporter to transcribe the hearing.
- (3) Order that the transcription be sealed and that only the court shall have access to it.
- (4) Hear defense counsel's explanation of the evidence he or she wants to present and the reasons why counsel could not have done so at the preliminary hearing.
- (5) Consider giving the prosecution an opportunity to rebut the showing, but only if this can be done without disclosing the defense evidence.
- (6) Rule in open court whether defendant may present additional evidence. State reasons.

*Comment:* Defendant has the burden of proving by the preponderance of the evidence that he or she could not have presented the evidence in issue at the preliminary hearing. Benchbook §6.67. Such evidence includes testimony that would have been inadmissible at the preliminary hearing and testimony unavailable at the earlier proceeding. Benchbook §§6.63–6.64. The prosecution is entitled to rebut. Benchbook §6.65.

### c. [§58.35] Determining Effect of Prior Ruling

Hear argument and determine to what extent you are bound by the ruling on the earlier [Pen C §1538.5\(f\)](#) motion. Benchbook §§6.70–6.73.

- **JUDICIAL TIP:** If you admit additional evidence, defer this phase until the testimony has been completed. For discussion of the effect of such evidence on earlier findings, see Benchbook §6.73 (issue is whether magistrate would have found differently in light of the added testimony).

### 4. [§58.36] Attack on Warrant

Ascertain whether the defendant contends that an affidavit in support of a search or arrest warrant contains material misstatements or omits material facts. If so, proceed in accordance with [§§58.17–58.26](#). If not, proceed to [§58.37](#).

### 5. [§58.37] Hearing

Hear testimony.

*Comment:* Usually there will have been no prior [Pen C §1538.5](#) hearing and you will hear from one or more law enforcement officers. There may be additional witnesses. Testimony by the defendant at the hearing may not be used against him or her at trial except for impeachment. Benchbook §6.129. For discussion of resolving disagreements on which side should proceed first, see Benchbook §6.123 (party with burden of proof initially

has burden to produce evidence; court has discretion to vary order of proof).

## 6. [§58.38] Argument

(1) Hear argument.

- **JUDICIAL TIP:** Additional memos are occasionally helpful. The defense often has not had an opportunity to submit a closing brief by the time of the hearing. Keep the time for filing any supplemental memos to a few days. Consider requesting that the parties focus on particular issues. This is especially useful when the parties seem to disagree on what the issues are.

(2) If necessary, clarify the evidence defendant seeks to suppress so that you can make a clear order, whether you grant or deny the motion. See §58.41.

## 7. [§58.39] Decision and Ruling

Decide and rule on the motion either at the close of argument or at a later time that you set in the event of further briefing. See §58.38.

### a. [§58.40] Findings; Statement of Reasons

Decide whether you will make express findings and/or state the reasons for your ruling.

*Comment:* Findings are often helpful, especially when you find facts in favor of one side but rule against that side as a matter of law. Benchbook §6.57. Even when there are no factual disputes, many judges briefly state the grounds(s) on which they rule in order to facilitate the work of reviewing courts. Benchbook §6.130.

### b. [§58.41] Pinpointing Evidence

Decide whether your ruling needs to pinpoint the specific evidence for which you grant or deny the motion and, if so, in what manner you will do that.

- **JUDICIAL TIP:** Specify the evidence unless the moving papers or the record make it clear what evidence is involved. This is advisable whether or not you grant the motion. Avoid references such as “all evidence found as a result of ...” Instead, whenever possible, refer to specific exhibits. *E.g.*, “all items listed in People’s Exhibit 2.”

## D. Checklist: Prosecution Motion After Suppression Granted at Preliminary Hearing (Pen C §1538.5(j))

### 1. [§58.42] Introduction

The prosecution may bring a motion to relitigate a suppression motion granted at the preliminary hearing if the defendant was held to answer. The relitigation is de novo. Pen C §1538.5(j); Benchbook §§6.85–6.89. The motion is a precondition to dismissal and refile by the prosecution. Benchbook Update §6.85.

### 2. Prehearing Study

#### a. [§58.43] In General

Study the motion before the hearing. Consider the matters in §§58.2–58.14 and also in §§58.44–58.45 below.

#### b. [§58.44] 15-Day Rule

Ascertain whether the motion was made “within 15 days after the preliminary hearing” as required by Pen C §1538.5(j).

- JUDICIAL TIP: If the motion does not comply with the 15-day rule, deny it summarily; the time requirement is jurisdictional. Benchbook §6.50.

#### c. [§58.45] Challenge to Right to De Novo Hearing

Ascertain whether the defendant contends that the prosecution is not entitled to a de novo hearing because the defendant does not have a corresponding right under Pen C §1538.5(i). See *People v Weaver* (1996) 44 CA4th 154, 158–160, 51 CR2d 602 (rejecting contention, but for a reason that no longer exists); Benchbook §6.86.

### 3. At the Outset of the Hearing

#### a. [§58.46] Continuance

Consider and grant request by the defendant for a continuance, if one is made. Pen C §1538.5(j) (defendant entitled, as a matter of right, to continuance up to 30 days).

#### b. [§58.47] Other Matters

Consider other matters for which the motion preview indicates a need for action or clarification, or which counsel bring to your attention. If you proceed to the merits, ask counsel to briefly state the issues.

#### 4. [§58.48] Hearing

Conduct the hearing. For discussion of which side should proceed first, see Benchbook §6.123; for discussion of burden of proof, see Benchbook §§6.105–6.122 and §58.15.

#### 5. [§58.49] Argument

Hear argument. See §§58.37–58.38.

#### 6. [§58.50] Decision and Ruling

Decide and rule on motion. See §§58.39–58.41.

### E. Checklist: Motion in Misdemeanor Cases (Pen C §1538.5(g))

#### 1. [§58.51] Prehearing Study

Preview the motion before the hearing. See §§58.2–58.14.

*Comment:* This is a pretrial motion. Pen C §1538.5(g). For discussion of notice, see Benchbook §§6.52–6.53; for discussion of specificity, see Benchbook §§6.43–6.46.

Penal Code §1538.5(g) applies to all misdemeanors except those charged with a felony. Benchbook §§6.94–6.98. It governs felonies that have been reduced to misdemeanors. Benchbook §6.94. When a misdemeanor is charged with a felony, the motion should be brought under Pen C §1538.5(f) (at preliminary hearing) or §1538.5(i) (after filing of information or indictment), unless the felony was dismissed. In that event, Pen C §1538.5(g) governs the surviving misdemeanor(s). Benchbook §§6.95–6.98.

For discussion of the application of the Fourth Amendment to DUI cases, see Benchbook §§3.62, 3.89–3.90, 4.11, 4.30, 4.76–4.77, 6.19–6.21.

#### 2. [§58.52] At the Outset of the Hearing

Deal with matters for which the motion preview indicates a need for action or clarification, or which counsel bring to your attention. See §§58.23–58.26. Ask counsel to briefly state the issues and the evidence that the defendant seeks to exclude.

#### 3. [§58.53] Hearing

Conduct the hearing. For discussion concerning what side should proceed first, see Benchbook §6.123; for discussion of burden of proof, see Benchbook §§6.105–6.122 and §58.15.

#### 4. [§58.54] Argument

Hear argument.

- JUDICIAL TIP: When necessary, clarify the issues and the evidence that defendant seeks to suppress. See also §58.28.

#### 5. [§58.55] Decision and Ruling

Decide and rule on the motion. Decide whether you will make express findings and/or state reasons for your ruling. Decide how you will refer to the evidence affected by your ruling. See §§58.39–58.41.

### IV. MOTIONS AT TRIAL

#### A. Checklist: Defendant’s Motion at Trial (Pen C §1538.5(h))

##### 1. [§58.56] Prehearing Study

Study the motion papers, if any.

*Comment:* Motions made in the course of a trial on the basis of developments during the trial are usually oral. In limine motions, designed to be heard immediately before the trial starts, are often written. Defendant might make a suppression motion at either time. Pen C §1538.5(h); Benchbook §6.78. The statute does not require written notice.

##### 2. Ascertaining Basis for Motion

###### a. [§58.57] In General

Ascertain the grounds for the motion.

*Comment:* The only permissible grounds for the motion are a change in the applicable law and the discovery of new evidence that could not have been obtained earlier by using due diligence. Benchbook §6.78. See §§58.58–58.61.

###### b. [§58.58] Law Change as Basis for Motion

Determine whether the change on which the defendant relies—usually a recent decision—constitutes a genuinely new rule or applies the reasoning of one or more prior decisions. Benchbook §6.80.

- JUDICIAL TIP: Consider the merits of the motion only in the event of the former.

### c. [§58.59] New Evidence as Basis for Motion

Ascertain whether the defendant could reasonably have discovered the evidence earlier. Benchbook §§6.79–6.80. Consider the merits of the motion only if the answer is no.

- **JUDICIAL TIP:** Even when defendant learns of certain evidence for the first time at trial, you still need to determine whether the defendant could reasonably have learned of it sooner. Benchbook §6.79.

### d. [§58.60] Reconsideration

Deny a motion for reconsideration of a prior [Pen C §1538.5](#) ruling that is not based on the grounds discussed in [§§58.58–58.59](#).

*Comment:* Suppression motions at or on the eve of trial are strongly disfavored because they thwart a major purpose of [Pen C §1538.5](#), *i.e.*, to provide for earlier determination of such motions. Benchbook §§6.3, 6.77. Accordingly, trial courts generally do not have the authority to reconsider [Pen C §1538.5](#) motions except on the narrow grounds provided by [Pen C §1538.5\(h\)](#) and discussed in [§§58.58–58.59](#). See Benchbook §§6.74–6.76.

### e. [§58.61] Confessions and Admissions

Hear and decide a motion to exclude a confession or admission on the ground that it was involuntary or violated defendant’s right to counsel. Benchbook §6.83.

*Comment:* This kind of motion is not within [Pen C §1538.5](#) because it does not rest on the Fourth Amendment. It is, rather, a common law motion properly made at trial. Benchbook §§6.16–6.18, 6.83. But a motion to exclude a defendant’s post-arrest statements on the ground that the arrest was unlawful does rest on the Fourth Amendment. Accordingly, it must comply with [Pen C §1538.5](#) and is too late when made at trial except as discussed in [§§58.58–58.59](#). See Benchbook §6.83.

## 3. [§58.62] Hearing and Decision

Hear and decide the merits of the motion if it is based on a cognizable ground. See [§§58.57–58.61](#).

**B. Checklist: Prosecution Motion at Trial (Pen C §1538(j))****1. [§58.63] Introduction**

Under certain conditions, the prosecution may relitigate at trial a [Pen C §1538.5\(i\)](#) motion in which defendant had prevailed. [Pen C §1538.5\(j\)](#); Benchbook §§6.90–6.91. The conditions are discussed in [§§58.64–58.67](#).

**2. Ascertaining Basis for Motion****a. [§58.64] Prior Successful Pen C §1538.5(i) Motion**

Ascertain whether the defendant previously made a successful suppression motion under [Pen C §1538.5\(i\)](#). If yes, proceed to [§58.65](#); if no, deny motion.

*Comment:* This type of [Pen C §1538.5\(j\)](#) motion is available to the prosecution only to challenge a prior ruling under [Pen C §1538.5\(i\)](#). It is not available to relitigate rulings under subsection (f) or (g). As to the former, [Pen C §1538.5\(j\)](#) gives the prosecution the right to relitigate the ruling but at a much earlier stage of the case. See [§§58.42, 58.44](#).

**b. [§58.65] No Prior Appellate Review**

Ascertain whether the prosecution sought appellate review of the [Pen C §1538.5\(i\)](#) ruling. If yes, deny motion; if no, proceed to [§58.66](#).

*Comment:* Relitigation of the suppression motion at trial is not available to the prosecution when it sought appellate review. [Pen C §1538.5\(j\)](#).

**c. [§58.66] New Evidence**

Determine whether the prosecution has evidence that it did not present at the earlier [Pen C §1538.5\(i\)](#) hearing. If yes, proceed to [§58.67](#); if no, deny motion.

**d. [§58.67] Good Cause**

Determine whether the prosecution had good cause for not presenting the evidence at the [Pen C §1538.5\(i\)](#) hearing. If yes, proceed to [§58.68](#); if no, deny motion.

*Comment:* The applicable standard is due diligence. Benchbook §§6.78, 6.90.

**3. [§58.68] Hearing and Decision**

Hear the additional evidence. Decide whether the previous ruling should be changed in light of all of the evidence, including the newly presented evidence.

## V. MOTIONS UNDER PENAL CODE §1524(c)

### A. [§58.69] Introduction

Special procedures apply to the service of search warrants on lawyers, doctors, and certain other professionals not suspected of criminal activity. The procedures include appointment of a special master who is present at the execution of the warrant. [Pen C §1524\(a\)–\(f\)](#); Benchbook §§2.5, 6.144–6.148. For a checklist for issuing search warrants under the special master procedure, see Benchbook §2.7.

Below are checklists for hearings under [Pen C §1524\(c\)](#) that take place when the person whose papers are being searched tells the special master that an item should not be disclosed. [Pen C §1524\(c\)\(2\)](#). The issues are often more complex than in [Pen C §1538.5](#) hearings because they may involve claims of privilege in addition to Fourth Amendment issues. As to privileges, see California Judges Benchbook: Civil Proceedings—Discovery (hereafter Discovery Benchbook) §§4.1–4.140 (Cal CJER 1994).

### B. [§58.70] Checklist: Prehearing Study

(1) Review the search warrant, supporting affidavit(s), and the return. See [§58.13](#).

(2) Study the motion papers.

- JUDICIAL TIP: When you do not have such papers because the hearing was set within three days of the service of the warrant (see [Pen C §1524\(c\)\(2\)](#)), grant a request for continuance.

(3) If the motion challenges the adequacy of the supporting affidavit(s) on the ground of material misstatements or omissions, consider:

- Whether the moving papers seem to meet the conditions for discovery; and
- The procedure you will use. See [§§58.17–58.21](#).

(4) Make sure that the disputed documents are in court and sealed. [Pen C §1524\(c\)\(2\)](#); Benchbook §6.145.

- JUDICIAL TIP: Do *not* preview the documents. They must remain sealed until the hearing. Benchbook §6.145.

## C. Checklist: At the Outset of the Hearing

### 1. [§58.71] Continuances

Consider and rule on requests for a continuance, bearing in mind that the parties must be given sufficient time to obtain counsel, make motions, and present evidence. [Pen C §1524\(c\)\(2\)](#); Benchbook §6.146.

- JUDICIAL TIP: If there was little time to file moving papers, consider a continuance of 10, 5, and 2 days. See §58.5. Testimony may be needed for Fourth Amendment issues, for laying the foundation for privilege and work product claims, and for showing exceptions to a privilege such as the crime/fraud exception to the attorney-client privilege.

### 2. [§58.72] Transfer of Case

Consider and rule on any request to transfer the case to another judge. See §58.23.

*Comment:* [Penal Code §1524\(c\)](#) does not expressly make [Pen C §1538.5\(b\)](#) (search warrant cases should be heard by judge who issued warrant) applicable to motions under the special master procedure. But the same policy considerations apply and are easier to honor in [Pen C §1524\(c\)](#) cases because the issuing magistrate also sets the hearing date.

### 3. [§58.73] Exclusion of Witnesses; Closed Hearings

Consider and rule on requests to exclude witnesses or close the hearing to the public. See §58.25.

- JUDICIAL TIP: Bear in mind that the privacy rights of innocent or at least uncharged persons are involved.

### 4. [§58.74] Statement of Issues

Ask both attorneys to briefly state, but not argue, the issues. See §58.26.

- JUDICIAL TIP: Some judges start by stating their own perception of what the issues are. Consensus on this point is especially useful in special master cases because they often involve privilege claims as well as search and seizure issues. See §58.75.

### 5. [§58.75] Separation of Issues

When the motion raises both Fourth Amendment and privilege issues, consult with the attorneys about the order of proceeding and settle the sequence in which the issues will be heard.

- JUDICIAL TIP: It often works best to start with issues that will involve testimony.

## 6. [§58.76] Burden of Proof

Allocate the burden of proof.

*Comment:* The party whose records were seized has the burden of proving the invalidity or faulty execution of the search warrant (see §58.15), as well as any claim of privilege. When the respondent asserts that a privilege is negated by an exception, such as the crime/fraud exception, respondent must establish a prima facie case of fraud and a reasonable relation between the fraud and the communication for which the privilege is claimed. Benchbook §2.6. The crime/fraud exception does not apply to the protection of work product. California Judges Benchbook: Civil Proceedings—Discovery §4.39 (Cal CJER 1994).

### D. Checklist: Hearing

#### 1. [§58.77] Search Issues

Resolve Fourth Amendment issues as you would in a hearing under Pen C §1538.5.

#### ➤ JUDICIAL TIPS:

- Do so without unsealing documents if there is an assertion that they are privileged. If you conclude that you need some or all of the seized records to deal with the search issue, get a stipulation or examine them in camera.
- When a party claims that a supporting affidavit contains material misstatements or omissions, begin with the question of whether the moving party has made an adequate preliminary showing so as to be entitled to an evidentiary hearing. See §§58.17–58.21.

#### 2. [§58.78] Privilege Claims

(1) Examine the documents in camera. A reporter, but no parties or counsel, may be present. Order the transcription sealed. Benchbook §6.116.

#### ➤ JUDICIAL TIPS:

- You will need a reporter only if you plan to make a statement in camera, or to talk with any person.
- When you are faced with computer records that you cannot read (at least in a reasonable time), try to get a stipulation about their privileged status or a summary of their contents. An indication that

you may have to order the records transcribed at the parties' expense may induce reason. An indication that you may need to appoint a referee might also be effective.

(2) Decide what documents, if any, are privileged or protected by the work product rule.

- **JUDICIAL TIP:** Differentiate clearly between application of the attorney-client privilege and the work product rule. See §58.76.

### 3. [§58.79] Decision and Order

(1) Return to the courtroom.

(2) Announce your decision, taking care not to reveal the substance of privileged documents in the process.

(3) Order privileged records returned to the moving party, unless there is an unresolved contention that an exception negates the privilege. In the event of such an unresolved contention, conduct an evidentiary hearing to determine whether the claimed exception applies and then rule.

## VI. MOTIONS UNDER PENAL CODE §1536.5

### A. [§58.80] Introduction

When a law enforcement agency seizes business records under a search warrant, the business is entitled to copies, subject to conditions and limitations. [Pen C §1536.5](#); Benchbook Update §§6.156A–6.156I.

The statute provides for a demand for copies by the business ([Pen C §1536.5\(a\)](#)) and for two motions, both brought by the government agency that seized the records. One seeks an extension of time to respond. [Pen C §1536.5\(b\)](#); Benchbook Update §6.156E; for checklists, see §§58.81–58.90. The other seeks an order denying the demand for copies. [Pen C §1536.5\(d\)](#); Benchbook Update §§6.156F–6.156I; for checklists, see §§58.91–58.111.

### B. Motion for Extension of Time To Respond

#### 1. Checklist: Prehearing Study

##### a. [§58.81] Venue

Determine whether the motion was filed in the court that issued the warrant. [Pen C §1536.5\(h\)](#); Benchbook Update §6.156E. If yes, proceed to §58.82; if not, make a note to deny the motion without prejudice.

*Comment:* There is no requirement that the motion be heard by the magistrate who issued the search warrant. Nor is there a compelling reason that it should be: [Pen C §1536.5](#) does not involve Fourth Amendment issues.

**b. [§58.82] Timeliness**

Determine, if possible, whether the government filed its motion within 10 court days from service of the demand for copies. [Pen C §1536.5\(b\)\(6\)](#); Benchbook Update §6.156E. If yes, proceed to [§58.83](#); if not, make a note to deny motion in the absence of a very good excuse by the government.

**➤ JUDICIAL TIPS:**

- The denial should be with prejudice. Otherwise it is meaningless, resulting in more delay and in effect letting the moving party extend its own time.
- When timeliness is unclear from the moving papers, take up this issue as one of the first matters at the hearing.

**c. [§58.83] Notice**

Check whether the moving papers include a return of service of the motion. Do not hear the motion in the absence of a return unless the other side is present.

**d. [§58.84] Hardship**

Study the showing of hardship, *i.e.*, that the seized records are so voluminous that to review or copy them within 10 court days from service of the demand would create a hardship on the government agency. [Pen C §1536.5\(b\)\(6\)](#).

- JUDICIAL TIP: Providing timely copies is rarely a hardship because the agency has the alternative of making the records available to the business for copying. See [Pen C §1536.5\(b\)\(2\)](#). However, voluminous records may give rise to the agency's need for more time to determine whether it has valid objections to the demand.

**2. Checklist: At the Outset of the Hearing****a. [§58.85] Matters Raised by Prehearing Study**

On request, hear and decide matters related to venue, timeliness of filing, and notice. See [§§58.81–58.83](#).

- JUDICIAL TIP: When the business entity is not present, proceed only if your prehearing study showed that you may properly do so. Put any concerns on the record.

**b. [§58.86] Continuance**

Consider and rule on requests for a continuance.

- **JUDICIAL TIP:** View a request by the moving party skeptically. It should normally be ready to argue its motion and any opposing evidence.

**c. [§58.87] Other Matters**

Hear and rule on any other matters raised by a party that do not go to the merits of the motion, *e.g.*, a request to transfer the case for reasons other than venue.

**3. [§58.88] Checklist: Hearing and Argument**

Hear any evidence that may be offered by either side and consider any supplemental declarations. Hear argument.

- **JUDICIAL TIP:** Permit the business to show and argue countervailing hardship from the lack of records. This goes to the length of any extension you grant.

**4. Checklist: Decision and Order****a. [§58.89] Granting the Motion**

If you grant the motion, set two dates after consulting counsel:

- A date by which the agency must produce copies of the records or make them available for copying or file a motion to deny the demand for copies. [Pen C §1536.5\(b\)\(6\)](#); Benchbook Update §6.156E.
- A hearing date for any subsequent motion designed to keep these proceedings within a reasonably tight time frame.

**b. [§58.90] Denying the Motion**

If you deny the motion, order the agency to produce copies or make the records available for copying at the following time:

- Within 10 court days from service of the demand for production, assuming your order is made before this period has run; or
- Immediately.

Ascertain who wants to do the copying. Resolve any disagreement about this and associated costs. [Pen C §1536.5\(g\)](#); Benchbook Update §6.156C.

## C. Motion To Deny Copies

### 1. Checklist: Prehearing Study

#### a. [§58.91] Preliminary Matters

Check that venue is proper, the motion was filed in time, and proper notice of the motion was given. §§58.81–58.83.

Check whether the hearing date is not more than two days after the motion was filed, unless the parties have agreed otherwise or the date was assigned by the court. [Pen C §1536.5\(e\)](#); Benchbook Update §6.156G.

- ☛ JUDICIAL TIP: Consider denying the motion if the moving party exceeded the two-day limit without a good reason.

#### b. [§58.92] Issues

Study the issues raised by the motion and the factual allegations in support and opposition of each issue. See §§58.93–58.100.

- ☛ JUDICIAL TIP: Make notes, especially when there are multiple issues or a request by the government for an in camera hearing.

#### (1) [§58.93] Demand by Qualified Person

The motion may contend that the demand for copies did not come from a “business.” A business is an entity, including a sole proprietorship, that operates legally in California and offers goods or services to customers. [Pen C §1536.5\(i\)\(2\)](#). The most likely contention is that the business is not operating legally.

- ☛ JUDICIAL TIP: Hear narrower grounds first when possible.

#### (2) [§58.94] Nature of Records

The motion may contend that the records of which copies are sought are not business records.

*Comment:* This issue should arise infrequently in view of the broad definition of business records in [Pen C §1536.5\(i\)\(3\)](#).

#### (3) [§58.95] Adequacy of Declaration

The motion may contend that the declaration in support of the business entity’s demand for copies is inadequate on its face.

*Comment:* The declaration is adequate when it makes a prima facie case that the ongoing loss of records would impair or impede specific business activities or the discharge of legal obligations. [Pen C §1536.5\(a\)](#); Benchbook Update §6.156F.

☛ JUDICIAL TIPS:

- Decide this issue before any of the issues discussed below because a finding of inadequacy disposes of the motion. See [Pen C §1536.5\(c\)](#).
- In deciding this issue, ask whether the declaration makes it reasonably clear what records are needed to carry on what particular activities and why that is so.
- The standard is “impair” or “impede”; do *not* make the business prove that loss of records would unduly interfere with its ability to do business. See [§58.96](#).

**(4) [§58.96] No Undue Interference**

The motion may contend that denial of the demand for copies will not unduly interfere with entity’s ability to conduct its business or fulfill its legal obligations.

*Comment:* [Penal Code §1536.5\(c\)\(1\)](#) makes such lack of undue interference a defense to the demand for copies, provided that the government agency proves it by a preponderance of the evidence.

☛ JUDICIAL TIPS:

- Decide this issue before any of the ones discussed below because a ruling in favor of the agency disposes of the motion.
- Do not let the agency use the motion as a discovery tool for subsequent proceedings. Consider making appropriate protective orders on request.

**(5) [§58.97] Risk of Ongoing Criminal Activity**

The motion may contend that possession of the records by the entity will pose a significant risk of ongoing criminal activity.

*Comment:* [Penal Code §1536.5\(c\)\(2\)](#) makes such a risk a defense to the demand for production, provided that the government proves the risk by a preponderance of the evidence.

☛ JUDICIAL TIPS:

- Do not rely on the search warrant affidavit(s); they involve different issues and a lesser standard of proof.
- Look for something more than past criminal conduct to infer a “significant” risk of future misconduct.,. *e.g.*, extensive, recent criminal activity plus the presence of equipment used for it, or incriminating statements by an employee of the business.

**(6) [§58.98] Contraband**

The motion may contend that the records are contraband.

*Comment:* Records that are contraband need not be produced. [Pen C §1536.5\(c\)\(2\)](#). This probably includes records that were stolen or used to commit a felony. See [Pen C §1524\(a\)\(1\)–\(2\)](#).

**(7) [§58.99] Evidence of Criminal Conduct**

The motion may contend that the records are evidence of criminal conduct.

*Comment:* Records that constitute such evidence need not be produced. [Pen C §1536.5\(c\)\(2\)](#).

- **JUDICIAL TIP:** When this issue is raised, you will need to determine what records, if any, would be admissible in a trial to prove specific criminal charges. See [Evid C §140](#). Do not rely on search warrant affidavits. See [§58.97](#).

**(8) [§58.100] Sexual Conduct by Minor**

The motion may contend that the records depict actual or simulated sexual conduct by a minor as defined in [Pen C §311.4\(d\)](#).

*Comment:* Records depicting such conduct need not be produced. [Pen C §1536.5\(c\)\(2\)](#).

**c. [§58.101] Request for In Camera Hearing**

Ascertain whether the moving papers include a request for an in camera hearing. If they do, review the stated grounds. [Pen C §1536.5\(f\)\(1\)](#); Benchbook Update §6.156H. The two grounds for an in camera hearing are discussed in [§§58.102–58.103](#).

**(1) [§58.102] Target of Investigation**

Ascertain whether the moving papers allege that the business entity is, or is likely to become, a target of the investigation that led to the seizure of the records. [Pen C §1536.5\(f\)\(1\)](#).

- **JUDICIAL TIP:** Grant the request when such an allegation is made.

**(2) [§58.103] Ongoing Criminal Investigation**

Ascertain whether the moving papers

- Allege that a hearing in open court would impede or interrupt an ongoing criminal investigation, and if so,

- Make a particular factual showing that a hearing in open court would have such an effect. [Pen C §1536.5\(f\)\(2\)](#).
- JUDICIAL TIP: Do not decide whether the showing is adequate until you have heard argument.

## 2. Checklist: At the Outset of the Hearing

### a. [§58.104] Continuances; Other Preliminary Matters

Consider and rule on a request for a continuance. Benchbook Update §6.156G. Take up any preliminary matters indicated by your prehearing study (see §§58.81–58.83, 58.91) or raised by counsel.

### b. [§58.105] Stipulations; Statement of Issues

Ask counsel to state any stipulations and to indicate briefly what the issues are and whether they are contested.

- JUDICIAL TIPS: Do not permit argument about the merits at this stage, nor attacks on the opponent. Clarify any statement that appears to differ from the motion papers.

### c. [§58.106] Burden and Quantum of Proof

Settle any question about the burden or quantum of proof.

*Comment:* The business entity has the burden of making a prima facie case of need for copies in its initial declaration. [Pen C §1536.5\(a\), \(c\)](#); see [§58.95](#). The government agency has the burden of proving any ground for not providing copies by a preponderance of the evidence. [Pen C §1536.5\(c\)\(1\)–\(2\), \(f\)\(2\)](#).

## 3. Checklist: Hearing

### a. [§58.107] In Open Court

The following sequence is likely to work well in many cases.

(1) Hear any contention that

- The respondent is not a business within the meaning of [Pen C §1536.5](#);
- The records involved are not business records; and
- The entity's initial declaration is insufficient. See [§§58.93–58.95](#).

(2) Rule on the foregoing matters. Your ruling may dispose of the motion.

(3) Hear and rule on any contention that denial of copies will not unduly interfere with the entity’s ability to conduct its business or meet its legal obligations. See §58.96.

(4) Hear and rule on any contention that the records

- Are contraband (see §58.98); or
- Are evidence of criminal conduct (see §58.99); or
- Depict sexual conduct by a minor (see §58.100).

(5) Hear and rule on any contention that the showing for an in camera hearing is insufficient. See §§58.101–58.103.

- If you find the showing inadequate (or if the agency did not request an in camera hearing), hear and rule on any contention that possession of copies of the records will pose a significant risk of ongoing criminal activity. See §58.97. Otherwise, this contention has to be heard in camera. Pen C §1536.5(f)(2).
- If you find the showing sufficient, conduct an in camera hearing. See §§58.108–58.110.

#### **b. In Camera**

##### **(1) [§58.108] Ex Parte; Reporter**

Conduct the hearing ex parte, outside the presence of the business entity, its representatives, and counsel. Pen C §1536.5(f)(1). Have a reporter present and instruct him or her to transcribe the entire in camera proceedings.

##### **(2) [§58.109] Evidence**

Hear any evidence that granting the demand for copies

- Would pose a significant risk of ongoing criminal activity and/or
- Interfere with an ongoing criminal investigation. Pen C §1536.5(f)(2).

☛ **JUDICIAL TIP:** Be careful about relying on the second of these grounds as a basis for denying access to the records. It is not listed among the grounds for denial in Pen C §1536.5(c).

##### **(3) [§58.110] Sealing**

Order the transcription and any physical evidence presented at the in camera hearing sealed. Pen C §1536.5(f)(3).

- ☛ **JUDICIAL TIP:** Instruct the reporter and court personnel that only a court may have access to the sealed material, unless a court orders otherwise.

**c. [§58.111] Resumption of Hearing in Open Court**

- (1) Give the business entity an opportunity to present evidence on issues heard in camera.
- (2) Hear argument on these issues and any others not argued earlier.
- (3) Rule on the motion. If you deny the motion, see §58.90 for compliance dates and costs of copying the records.

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