



Putting the best face on your client – “warts and all”

Nobody’s perfect; it takes creativity for the attorney to present the flawed client in the best light

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The “perfect client” – elusive as a unicorn, and perhaps as imaginary. We learn to take our clients as they are, and once we become their counsel there is much we can do to keep them on track. The harder question is what can we do about past indiscretions which could be used to devalue them as human beings and in turn devalue their cases?

This article captures decades of collective trial experience representing clients with “warts” – which can range from felony convictions to a stint in drug rehab to involvement in other court proceedings.

Felony conviction

•Relief under Penal Code section 1203.4

Under most circumstances, a felony conviction will impeach your client at trial. Evidence Code section 788 states: “For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of judgment that he has been convicted of a felony unless...” There are limited exceptions to this rule, which essentially require a pardon or statutory relief from the conviction. This section focuses on one form of statutory relief available in California under Penal Code section 1203.4. This important exception can make or break your client’s credibility at trial.

Expungement under Penal Code section 1203.4 allows the felony charge to be dismissed even after conviction by trial or plea. Given the relative speed of the criminal justice system compared to the



civil justice system, it is likely you will be able to accomplish an expungement before your client responds to form interrogatories and before her deposition is taken.

To qualify for expungement, your client must have successfully completed probation and paid any restitution and restitution fines. (*People v. Covington* (2000) 82 Cal.App.4th 1263.) Have your client obtain a rap sheet from each county where he thinks he may have suffered criminal consequences. The rap sheet will inform you whether and when your client successfully completed probation.

The rap sheet will also reveal the charges that underlie each and every conviction. This is important as not every client remembers or fully understands his

criminal history. It is not uncommon for a client to suffer a conviction as a young adult and assume the passage of time erases his criminal record.

Not all offenses qualify for relief under section 1203.4. A careful review of the rap sheet will reveal if there are any non-qualifying convictions, which include many felony child molestation offenses, some sex offenses, some traffic offenses, and infractions.

Once you have determined the appropriateness and scope of your petition for relief, you can help your client gather documentation in support of the petition. The court has discretion to set aside a felony conviction in the interests of justice, and may consider conduct during the probationary period as well as post-probation conduct. (*People v. McLernon* (2009) 174 Cal.App.4th 569, 571.) The point is to demonstrate to the court that your client has been an upstanding citizen for a significant period of time demonstrating atonement and rehabilitation. To that end, letters from clergy, community leaders, employers, and even family members are helpful. Diplomas, awards, certifications and other forms of public recognition may also convince the judge of your client’s rehabilitation.

The petition is filed in the jurisdiction where the conviction occurred. The district attorney must be given 15 calendar days’ notice of the petition. Depending on the county, the hearing may take several weeks to get on calendar.

The hearing is informal and it is customary, although not necessary, for the client to represent themselves in pro per.

If relief is granted, the court record will reflect that the charge was



“dismissed.” The record is not actually purged or sealed. However, once expunged, a felony conviction can no longer be used to impeach your client.

• **Motions in limine**

If trial is around the corner and you don't have time to seek an expungement, your next line of attack is through motions in limine to preclude any mention of the prior felony conviction.

There are limits on the use of prior convictions to impeach. (*People v. Castro* (1985) 38 Cal.3d 301) Among the pertinent restrictions are that the prior must involve moral turpitude (*People v. Collins* (1986) 42 Cal.3d 378, 389) and that the prior must survive an Evidence Code section 352 analysis in that the risk of undue prejudice in allowing the impeachment must not substantially outweigh its probative value. (*People v. Castro*, *supra*)

• **Crimes of moral turpitude.** A crime need not be a crime of dishonesty to be a crime of moral turpitude. Moral turpitude simply means a readiness to do evil. A court will look at the least adjudicated elements of the crime – the elements of the statute, and not the actual conduct of the accused – to determine if the crime is one of moral turpitude. Decades of case law have resulted in a long list of crimes that are crimes of moral turpitude.

Among them are perjury, possession for sale of controlled substances and marijuana and spousal abuse. Simple possession of a controlled substance, simple possession of marijuana and simple assault are among the shorter list of crimes that are not crimes of moral turpitude as a matter of law.

• **352 and “Beagle” factors.** “[The] court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352; *People v. Cardenas* (1982) 31 Cal.3d 897, 904.) Undue prejudice occurs when evidence uniquely tends

to evoke an emotional bias against a party and has very little effect on the issues. (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-09.)

People v. Beagle (1972) 6 Cal.3d 441, 453 sets forth a list of factors a trial court should use when conducting its section 352 analysis. Most pertinent are whether or not the prior conviction reflects on honesty or veracity and whether the prior conviction is near or remote in time. Remoteness is guided by four factors: the time that has elapsed since the conviction; the time the client was free between offenses and not in prison (*People v. Burns* (1987) 189 Cal.App.3d 734, 738); the client's age at the time of the offense (if your client was young at the time of the conviction, and the conviction is old, the prior is less probative of credibility); and the client's subsequent conduct, whether law-abiding or not.

Finally, if motions in limine fail to exclude the evidence of felony conviction, build the issue into your jury selection. Redemption can be a powerful theme. There are plenty of jurors, however, who will hold a criminal conviction against your client and believe them to be unworthy of redemption and unworthy of compensation. Find out if prospective jurors know anyone who did something regretful when they were young, paid the consequence, and learned from it. A “no” answer is a red flag those jurors will hold your client's past misdeed against him.

Drug abuse and addiction

A history of drug abuse can turn off a prospective juror. This is especially true in cases where pain management is a category of future damages and you seek compensation to provide your client with a lifetime supply of narcotics.

If your client still struggles with a drug problem, get him into a program. Do whatever you can to get him clean and sober by the time of trial. It is a rare juror that will vote to provide compensation to someone who has a track record of spending money to get high.

Assuming your client is currently clean and sober, do not downplay the serious nature of drug abuse. That will surely backfire. A better strategy is to highlight the struggle. Ask prospective jurors if they know someone who has fought drug addiction? Did they fall along the way? Did they relapse? Did they come to a point where they looked death in the face and then chose to change?

Believe it or not, the same strategy can hold true if your client is a smoker. Not only does a smoking habit have the potential to shorten your client's life expectancy, but smoking is a habit that many people consider ugly and dirty. Find out if your jury will punish your client for his two-pack a day habit; if they will acknowledge his battle with smoking; if they will understand that despite his current addiction to cigarettes his habit has nothing to do with liability and is not part of that discussion.

Divorce

Divorce itself is not uncommon and on its face may seem benign. The trap for the unwary is that divorce and other family court proceedings can be very charged and nasty. There may be public documents related to the divorce file that contain horrible allegations about your client.

You must copy the divorce file from family court. Most accusations are not relevant but will come out during the pendency of the case. In our experience, we have had clients accused in court documents of frequenting massage parlors and other places of ill repute, being abusive to their children, abusing alcohol, and committing acts of domestic violence.

These issues must be dealt with in limine motions, and those issues lost in limine must be the subject of extensive voir dire.

The neutral statement

Finally, issues that are not kept out with motions in limine can be built into the neutral statement, which the judge



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reads to the jury at the beginning of the case. For example, in a case won at trial, our neutral statement referred to the fact that our 20-something client had an underage girl in the car who was drinking at the time our client was involved in a car accident. The imprimatur of neutrality accomplished by the judge's reading of these potentially damaging facts reduced the effect of negative juror impact. This was reflected in the jury's favorable verdict.

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William Veen founded The Veen Firm, P.C. as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates and honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003. See www.veenfirm.com.