

**BAIL MOTIONS
IN SUPERIOR COURT AND COURT OF APPEAL:
PRACTICE TIPS**

(SEE GENERALLY [ADI CRIMINAL APPELLATE PRACTICE MANUAL](#),
CHAPTER 3, § 3.37 ET SEQ.)

An application to the superior court for bail or release on own recognizance is a necessary prerequisite to filing a motion in the Court of Appeal. (Cal. Rules of Court, rule 8.312 (b) [“The application must include a showing that the defendant sought relief in the superior court and that the court unjustifiably denied the application”].)

In both courts, the showing in the bail motion will be very similar. It requires application of the factors set forth in Penal Code section 1272.1, which provides:

Release on bail pending appeal under subdivision (3) of Section 1272 shall be ordered by the court if the defendant demonstrates all the following:

(a) By clear and convincing evidence, the defendant is not likely to flee. Under this subdivision the court shall consider the following criteria:

- (1) The ties of the defendant to the community, including his or her employment, the duration of his or her residence, the defendant’s family attachments and his or her property holdings.
- (2) The defendant’s record of appearance at past court hearings or of flight to avoid prosecution.
- (3) The severity of the sentence the defendant faces.

(b) By clear and convincing evidence, the defendant does not pose a danger to the safety of any other person or to the community.

Under this subdivision the court shall consider, among other factors, whether the crime for which the defendant was convicted is a violent felony, as defined in subdivision (c) of Section 667.5.

(c) The appeal is not for the purpose of delay and, based upon the record in the case, raises a substantial legal question which, if decided in favor of the defendant, is likely to result in reversal.

For purposes of this subdivision, a “substantial legal question” means a close question, one of more substance than would be necessary to a finding that it was not frivolous. In assessing whether a substantial legal question has been raised on appeal by the defendant, the court shall not be required to determine whether it committed error.

In making its decision on whether to grant defendants’ motions for bail under subdivision (3) of Section 1272, the court shall include a brief statement of reasons in support of an order granting or denying a motion for bail on appeal. The statement need only include the basis for the order with sufficient specificity to permit meaningful review.

The requirement for the possibility of reversal is common sense. If counsel has considerable confidence in multiple issues that will reduce a 50 year sentence to five years, appellant will still have five years to serve, and there is no rationale for release.

If the effect of potential appellate relief would be a reduction of sentence such that appellant could be facing serving dead time, an argument could very well be made that the legislative intent is that bail is the appropriate relief even if the judgment is literally not “reversed.” Additionally, constitutional arguments based on Eighth Amendment (excessive bail) and/or state analogs (Cal. Const., art. I, §§ 12, 15) may be made.

A motion to the Court of Appeal must show that the trial court “unjustifiably” denied the application. Counsel will have to demonstrate what finding, legal conclusion, or monetary amount was unjustified and why the trial court abused its discretion.

One potential difference between the motions to the superior court and the Court of Appeal may be the progress in counsel’s research. For instance, if the motion is made very early on in the superior court before one has completed research and/or drafting the opening brief, the thrust and the strength of the arguments could very well appear different to the superior judge whose judgment is being appealed, as compared with the appellate audience who will be deciding the appeal. In other words, the exposition of the issues could be in a position to be developed better by the time bail motion is filed in the Court of Appeal.

Finally, rule 8.312(a)(2) provides the defendant may apply “For bail, to reduce bail, or for release on other conditions.” The Supreme Court has used the terminology “bail pending appeal” and “release pending appeal” interchangeably. (*In re Pipinos* (1982) 33 Cal.3d 189, 192, fn. 1, citing *In re Podesto* (1976) 15 Cal.3d 921, 925-926, fn. 1 [mentioning Pen. Code, § 1318, on release on recognizance].) Therefore, although Penal Code section 1272.1 refers only to “bail” pending appeal, the bail motion filed in

the superior court may seek release on own recognizance or at least a very low monetary amount.