

HOW TO KEEP SEALED CRIMINAL RECORDS OUT OF COURT

- Common Errors:*
- (1) Unsealed arrests or dispositions
 - (2) Arrests without dispositions
 - (3) Open Warrants that should be vacated

What Criminal Dispositions Should Be Sealed?

**“Favorable Dispositions” should be sealed under CPL § 160.50
(DCJS, police, prosecutor, and court records are sealed)**

(Dispositions after 11/1/1991 are sealed automatically. Prior records require an application to the court.)

Acquittal	Decline Prosecution (Nolle Prosequi)
Dismissal, including:	Decline to File Accusatory Instrument (by Police)
Dismissal by Grand Jury, No True Bill	Order Setting Aside the Verdict
Dismissal in Interests of Justice, Clayton Motion	Order Vacating a Judgment
Dismissal of Information	Habeas Appeal
Adjournment in Contemplation of Dismissal, ACD (*Dismissed as Covered is <u>not</u> sealed)	Conviction for 221.05 – Unlawful Possession of Marijuana (After 3 yrs. if no later drug convictions)

**Violations and Traffic Infractions should be sealed under CPL §160.55
(DCJS, police, and prosecutor records are sealed, but not court records)**

(Convictions after 11/1/1991 are sealed automatically. Prior records require an application to the court.)

*All Traffic Infractions and Violations, except for DWAI (VTL § 1192(1)) and two specific
Loitering violations (PL § 240.35(3) & 240.37(2)) are sealed.*

Common Penal Law Violations

100.00 – Criminal Solicitation, 5°	240.35 – Loitering (Not 240.35(3) “in a deviant manner” or 240.37(2) “for prostitution”)
140.05 – Trespass	240.40 – Appearance in Public Under Influence of Narcotics or Drug other than Alcohol
145.30 – Unlawfully Posting Advertisements	245.01 – Exposure of a Person
215.58 – Failing to Respond to Appearance Ticket	245.02 – Promoting Exposure of a Person
240.20 – Disorderly Conduct	245.05 – Offensive Exhibition
240.26 – Harassment, 2°	

Common VTL Infractions

509 – “Violations” (general infractions)	511-a – Facilitating unlicensed operation, 3°
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Other Sealed Dispositions*

Youthful Offender Adjudications (CPL § 720.35)	Family Court Finding Sealed by Motion** (Fam. Ct. Act § 375.2)
Criminal Case Removed to Family Court (CPL § 725.15)	Family Court Expungement (Fam. Ct. Act § 375.3)
Juvenile Delinquency Favorable Termination (Fam. Ct. Act § 375.1)	Restricted Use of Family Court Records (Fam. Ct. Act § 381.2)
Privacy of Family Court Records (Fam. Ct. Act § 166)	

* This handout describes only the effects and mechanics of CPL §§ 160.50 & 160.55, not these additional provisions.

** FCA § 375.2 permits sealing of records when there is an actual finding of delinquency that is less than a designated felony. Sealing is not automatic, the respondent must file a formal motion with the court, and the motion cannot be made until the respondent’s sixteenth birthday. Records sealed pursuant to 375.2 are available if there is a subsequent adult conviction.



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What Happens When a Case is Sealed?

(a) Favorable Dispositions

- Clerk of court must **send notification** of qualifying disposition to DCJS and relevant police agency.
- Every **photograph, fingerprint, or palmprint** taken must be returned to the person who received the favorable disposition or be destroyed. Also, police departments and law enforcement agencies must track down and have returned or destroyed copies of any photographs, fingerprints, or palmprints that may have been shared with other agencies or jurisdictions. CPL § 160.50(a) & (b).
 - Digital fingerprints may be retained if the person already has a fingerprint on file that has not been sealed. CPL § 160.50(e).
- **All official records and papers**, including copies but not including published judicial decisions or opinions, shall be sealed and “**not made available to any person or public or private agency.**” CPL § 160.50(c).
 - Only under certain narrowly defined circumstances can the sealed records be released by court order. CPL § 160.50(d).
 - A record of a sealed arrest will remain in a confidential file at DCJS and can be accessed if:
 - 1) The client requests it.
 - 2) The client applies for a gun license.
 - 3) The client applies for a job as a law enforcement or peace officer.
 - 4) The client is arrested while on parole or probation.
 - 5) If a prosecutor or law enforcement official establishes that “justice requires.”

(b) Violations or Infractions

- Those convicted of a violation or infraction are protected by substantially similar statutory language as those who received a favorable disposition. The major exception is that **court documents are not sealed** under CPL § 160.55(c).
- Because court records of charges and convictions are not sealed under CPL § 160.55, these records are publicly available in courthouses and, more important, through OCA’s statewide Criminal History Record Search. Potential employers and landlords frequently use this OCA search, which is statewide and available to anyone with a name, date of birth, and a \$52 fee.

• **Practice Tip:** Because OCA now sells access to criminal histories online, **attorneys should no longer assure defendants that records of violations convictions will be sealed.** Always warn defendants that employers and others can easily discover the arrest underlying a sealed violation conviction because the court records remain public. Despite a recent OCA change in policy, the OCA Criminal History Record Search (CHRS) **still reports sealed violation arrests.**

What Does This Mean for My Case?

If the ADA, opposing counsel, or the court mentions a disposition that qualifies to be sealed, argue that the sealing statutes explicitly prohibit DCJS (which prints the rap sheets), the police, and the prosecution from providing any information about qualifying cases to any public or private agency, including the courts. Moreover, the New York Court of Appeals has recently held that sealed records cannot be considered or unsealed for the purposes of sentencing. See *Katherine B. v. Cataldo*, 5 N.Y.3d 196 (2005). See below for a number of other prohibited uses of sealed records.

The sealing statutes use mandatory language and operate automatically to seal qualifying dispositions. Therefore, the sealing provisions apply regardless of whether dispositions are marked administratively as “sealed.”

(a) Favorable Dispositions

- The case for inadmissibility is stronger because court records are sealed and CPL § 160.60 applies.
- Cite and quote CPL § 160.60, and have the Court take judicial notice of it:

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Upon the termination of a criminal action or proceeding against a person in favor of such person, . . . the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution.

(b) Violations or Infractions

- Beware because anything in the criminal court file remains unsealed under CPL § 160.55.
- Pay careful attention to how a document is authenticated. If the source of the document is a police or prosecuting agency, it should be excluded.

Legal Argument for Exclusion

1. Sections 160.50 and 160.55 of the Criminal Procedure Law are part of a **broad public policy** of protecting those who have been charged with a criminal offense, **but never convicted of a crime**, from collateral consequences arising from the prosecution.
2. The sealing statutes absolutely **require the sealing** of all official records and papers relating to an arrest or prosecution that ends in a favorable termination or conviction of a non-criminal offense.
 - a. The sealing statutes **explicitly prohibit** DCJS (which prints the rap sheets), the police, **and the prosecution** from providing any information about qualifying cases to any public or private agency, including the courts.
 - b. The sealing statutes use **mandatory language** and **operate automatically** to seal qualifying dispositions. Therefore, the sealing provisions apply regardless of whether dispositions are marked administratively as “sealed.”
3. The official records and papers from sealed criminal cases are **inadmissible** at trial and may not be used even to **refresh the recollection** of a witness.
 - a. Parties are free to testify from memory about, and adduce **independent evidence** of, the conduct leading to criminal charges in a case that was sealed.
 - b. Note that independent recollection by police officers of any specific past arrest is unrealistic – make sure to cross-examine extensively on whether testifying officers reviewed sealed records. Adduce testimony on the average arrests of the officer, how many since the incident, etc.
4. **Preserve the record** with specific objections to each sealed record and point of testimony, including every time a witness refreshes her recollection from or refers to a sealed record.
 - a. In summations and argument, emphasize that no independent evidence (including unrefreshed recollection) supports the opposing party. (This strategy also makes a record concerning prejudice.)

Limits on Use of Sealed Records

- ◆ No unsealing or use in criminal **sentencing**. *Katherine B. v. Cataldo*, 5 N.Y.3d 196 (2005).
- ◆ No unsealing or use in **employment** disciplinary proceedings. *Matter of Joseph M. v. New York City Board of Education*, 82 N.Y.2d 128, 134 (1993); *In the Matter of Scott D.*, 13 A.D.3d 622 (2d Dept. 2004); *Application of Police Commissioner of the City of New York*, 131 Misc. 2d 695 (Sup. Ct. N.Y. Co. 1986).
- ◆ No unsealing or use in **eviction** proceedings. *People v. Manauri R.*, NYLJ 21, col. 1 (Sup. Ct. Bronx Co. Oct. 22, 2004); *People v. Canales*, 174 Misc. 2d 387 (Sup. Ct. Bronx 1997).
- ◆ No unsealing or use in property **forfeiture** proceedings. *Property Clerk v. Bonilla*, NYLJ 20, col. 1 (Sup. Ct. New York Co. Nov. 25, 2002).

- **Warning:** The DA Narcotics Eviction Units have made *ex parte* motions in Supreme Court to have criminal cases unsealed under CPL §§ 160.50 & 160.55 for use in drug eviction proceedings. The statutes arguably may *not require notice* to your client.
- Make an effort to discover which judge in your borough is signing these orders. Ask the judge if you can oppose these motions, or at least educate him or her on the law.
 - Drug evictions are an insufficient basis for unsealing, *see People v. Manauri R.*, NYLJ 21, col. 1 (Sup. Ct. Bronx Co. Oct. 22, 2004); *People v. Canales*, 174 Misc. 2d 387 (Sup. Ct. Bronx 1997).
 - If your client’s case has been unsealed, make a motion in the court that issued the order to reconsider or vacate the unsealing order.

Other Information about Sealing

• **Administrative Process:** If a disposition is not marked as sealed on the Certificate of Disposition, then the automatic sealing process has failed (a fairly common occurrence). You should obtain a certified copy of the disposition and mail it to DCJS, demanding that the record be sealed. Send the letter to the following address:

DCJS
Record Review Unit
4 Tower Place
Albany, NY 12203-3764

• **Certificate of Disposition** (necessary for sealing all cases except Decline Prosecution and Voided Arrests): Available from the court clerk in the court where the case was heard.

• **Affidavit in Support of Declining/Deferring Prosecution** (necessary for sealing Decline Prosecution cases) (often still called a **343-Dismissal Form**): Available by contacting the District Attorney's office where the case was referred and requesting a Decline Prosecution Form / 343-Dismissal Form. In police decisions to decline to file accusatory instrument ("voided arrests"), you must contact the head of the arresting agency.

• **Arrest Report** (necessary for sealing arrests voided at the police precinct): Available through FOIL for your client.

• **Time Frame:** It will probably take up to three months for records to be sealed administratively.

• Records cannot be expunged or erased in New York.

• **Felony & misdemeanor convictions cannot be sealed**, but NY law does provide for Certificates of Relief from Disabilities and Certificates of Good Conduct, which can mitigate many of the hidden consequences of criminal convictions. See Corr. L. §§ 701-703; 703-a - 703-b; *Certificates to Demonstrate Rehabilitation: Why They Are So Important and How to Get Them* (The Bronx Defenders, February 2008).