

# THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE

A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS,  
CIVIL LEGAL SERVICES ATTORNEYS,  
AND OTHER REENTRY ADVOCATES

(April 2015 Edition)

## General Practice Tips

- The U.S. Supreme Court held in Padilla v. Kentucky that defense counsel must give affirmative, competent advice to clients about the risk of all penalties “enmeshed” with the criminal charges or potential pleas. 599 U.S. 356 (2010). The Court recognized that preserving rights, including but not limited to immigration status, may be more important to the defendant than any jail sentence.
- Always apply for a Certificate of Relief from Disabilities at sentencing if your client has one or fewer felony convictions.
- Talk to your clients. There is a good chance that they are making statements on the record about relevant facts in ancillary civil proceedings.
- Broaden your strategy. Consider using these ancillary civil proceedings as a way of getting discovery for the criminal case.
- Always explore relevant treatment programs – drugs, alcohol, anger management – as soon as possible. Such evidence of rehabilitation will later prove invaluable for obtaining or keeping a job, housing, or immigration status.

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**DISCLAIMER**

**This Guide was developed in conjunction with an intensive training offered by the Civil Action Practice at The Bronx Defenders. While we recommend using this guide as a compliment to training, it may be used on its own.**

**Nothing contained in this publication should be considered legal advice. We have attempted to provide information that is current and topical. Because the law changes rapidly, however, we cannot guarantee that this information will always be up-to-date or correct.**

Please contact the Civil Action Practice with any questions or  
if you are interested in scheduling a training.

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## CIVIL CONSEQUENCES OF CRIMINAL PROCEEDINGS

*In March 2010, the U.S. Supreme Court in Padilla v. Kentucky held that for evaluating the effective assistance of counsel, the Sixth Amendment does not distinguish between the “direct” and “collateral” consequences of pleas—the relevant inquiry is the extent to which the penalty is enmeshed with the criminal process or charges.*

*Padilla v. Kentucky*, 599 U.S. 356 (2010)

*In June 2006, the New York Penal Law § 1.05(6) was amended to add a new goal, “the promotion of [the convicted person’s] successful and productive reentry and reintegration into society,” to the four traditional sentencing goals of deterrence, rehabilitation, retribution, and incapacitation.*

*2006 N.Y. Laws 98.*

***Use the Padilla decision and the Penal Law amendment to re-frame your criminal case advocacy, from bail arguments to plea negotiation to sentencing.***

### UNDERLYING THEMES

- 1. So-called “collateral” consequences are not at all collateral in effect.** Courts have labeled them as such to remove them from the realm of constitutional protections in criminal law, including effective assistance of counsel, voluntariness of pleas, proportionality of punishment, adequacy of notice, and retroactivity of application.<sup>2</sup>
  - a. In reality, these consequences are the predictable but often hidden results of criminal proceedings. Many are effectively hidden from practitioners, judges, criminal defendants, and the public, scattered across dozens of sections of state statutes, local laws, and state and local agency regulations and policies.
  - b. Legislators can create them to seem “tough on crime,” to generate revenue (e.g. fees and fines), or with good but misguided intentions of promoting public safety.
  - c. Many of these sanctions are much more severe in their impact than the “direct” criminal punishment.<sup>3</sup>
- 2. These punishments are not limited to felony convictions.** In 2013 in New York State, 71% of adult arrests were for misdemeanors, while less than 8% were for violent felonies.<sup>4</sup> This disparity is even starker in disposition data.<sup>5</sup> And yet even with misdemeanor convictions, the consequences can be draconian:

<sup>2</sup> This was the position of the Kentucky Supreme Court in Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky 2008). Reversing the Kentucky court, the United States Supreme Court took note of other cases where courts had reached similar conclusions. Padilla v. Kentucky, 599 U.S. 356, 365, n.9 (2010).

<sup>3</sup> “[I]n cases like these, traditional sanctions such as fine or imprisonment are comparatively insignificant. The real work of the conviction is performed by the collateral consequences.” Gabriel J. Chin & Richard W. Holmes, Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 CORNELL L. REV. 697, 700 (2002)

<sup>4</sup> New York State Division of Criminal Justice Services, Adult Arrests, 2004-2014, at <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/>. Numbers were very similar for New York City in 2013: 71.4% of adult arrests were for misdemeanors and only 8.5% of adult arrests were for violent felonies. *Id.*

<sup>5</sup> New York State Division of Criminal Justice Services, Dispositions of Adult Arrests, 2009-2013, at <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/index.htm>.

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- a. A plea to a Class B Misdemeanor, such as possession of graffiti instruments or less than an ounce of marijuana, results in at least a three-year period of ineligibility from NYCHA public housing, running from *after* the completion of any sentence of incarceration.<sup>6</sup>
- b. Two convictions for turnstile jumping make a lawful permanent resident (greencard-holder) deportable.<sup>7</sup>
- c. Simple possession of a marijuana cigarette cuts off federal student loans for a year.<sup>8</sup>
- d. Criminal history background checks are now commonly used to limit access to employment, sometimes closing the door completely. The New York Department of State will not issue a security guard license to anyone with a felony conviction unless that person has a Certificate of Relief from Disabilities.<sup>9</sup>

- 3. These punishments are not even limited to convictions.** Significant consequences flow simply from arrest. To provide some context, in New York City, nearly 40% of people arrested are never convicted of any crime or offense,<sup>10</sup> but they still suffer drastic consequences from their arrests.
- a. Police routinely fingerprint individuals upon arrest. The arrest information is then sent to the FBI, where it might never be subsequently updated with disposition information, leaving them in jeopardy when they apply for jobs in the future.<sup>11</sup>
  - b. Data sharing among government agencies has increased exponentially, and there is widespread availability of criminal history data despite various sealing regimes.

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<sup>6</sup> New York City Housing Authority Applications Manual, Chapter V, Eligibility Division, Public Housing Program (Rev. 10/15/2013), 23. The ineligibility period is extended to four years for Class A Misdemeanors. *Id.* at 23. Additionally, the Supreme Court’s decision in Dep’t of Housing & Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002), permits public housing authorities to evict entire families for criminal activity even if the tenant did not know of, could not foresee, or could not control the behavior of other occupants or guests. Exclusion from subsidized housing often results in homelessness for the family, particularly in expensive, urban rental markets such as New York City. See Andrew Scherer, Why People Who Face Losing Their Homes in Legal Proceedings Must Have A Right to Counsel, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 699, 701-02 (2006).

<sup>7</sup> INA § 237(a)(2)(A)(ii); 8 U.S.C. § 1227(a)(2)(A)(ii). See also Gill v. I.N.S., 420 F.3d 82, 89 (2d Cir. 2005) (synthesizing the Board of Immigration Appeals’ approach to defining “moral turpitude”); Mojica v. Reno, 970 F. Supp. 130, 137 (E.D.N.Y. 1997) (“turnstile jumping in the New York City subway system leading to a ‘theft of services’ misdemeanor conviction is considered a crime of ‘moral turpitude’”).

<sup>8</sup> 20 U.S.C. § 1091(r)(1) makes “[a] student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance” ineligible for federal financial aid for a period of one year upon the student’s first conviction, if the offense occurred while the student was enrolled and receiving federal financial aid. Possession of even a small amount of marijuana is a violation under N.Y. Penal Law § 221.05.

<sup>9</sup> See N.Y. Gen. Bus. L. § 89-f (13) (enumerating the felony convictions that make an applicant ineligible for a security guard license).

<sup>10</sup> New York State Division of Criminal Justice Services, 2009-2013 Dispositions of Adult Arrests: New York City, at <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nyc.pdf>. Statewide, 31.9% of people arrested in 2013 were never convicted of any crime or offense. New York State Division of Criminal Justice Services, 2009-2013 Dispositions of Adult Arrests: New York State, at <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nys.pdf>. This data is collected by the agency that only tracks fingerprintable offenses, and thus does not even include the hundreds of thousands of people arrested or given criminal court summonses who are charged with non-fingerprintable offenses. See Crim. Proc. L. § 160.10.

<sup>11</sup> Madeline Neighly and Maurice Emsellem, Wanted: Accurate FBI Background Checks for Employment 7, National Employment Law Project, July 2013, available at <http://www.nelp.org/page/-/SCLP/2013/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf>, at 2.

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- c. A 2012 survey indicated that 83% of large corporations and 69% of small businesses perform background checks on job applicants. Of the respondents to that survey, 42% either never allowed applicants to explain the results of the background check, or did so only after a decision whether or not to hire had been made.<sup>12</sup>
  - d. Landlords increasingly run background checks as well, and criminal convictions appear with increasing frequency on routine credit histories.
- 4. There is little practical distinction between “automatic” and “discretionary” consequences.** Most immigration, public housing, and employment decisions technically require the intervening decision of an independent court, agency, or official. But the result is the same.
- 5. A perfect storm:** The steady accumulation of collateral sanctions has combined with the exponential increase in the availability of criminal history data and the growth of the criminal justice system to create a “perfect storm.”
- a. Many commentators have noted that the last twenty years have witnessed an unprecedented accumulation of collateral sanctions that restrict a person’s ability to meet even basic needs.<sup>13</sup>
  - b. During those twenty years, misdemeanor arrests in New York more than doubled.<sup>14</sup>
  - c. In addition, technology has provided unparalleled access to an ever-increasing range of criminal history data.
    - i) Hundreds of private, commercial background screening businesses access official data sources and create their own repositories, a process made even easier as criminal background information finds its way online.<sup>15</sup>
    - ii) The FBI currently maintains criminal record information for more than 75 million people and responded to approximately 17 million requests for employment and licensing background check requests in 2012 alone, a *sixfold* increase over the number of requests made in 2002.<sup>16</sup> Yet, the U.S. Attorney General reported in 2006 that approximately half of the records in the FBI’s Interstate Identification Index, the system that provides the raw data for FBI background reports, are incomplete and do not contain final disposition information.<sup>17</sup>

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<sup>12</sup> See Society for Human Resource Management, [SHRM Survey Findings: Background Checking—The Use of Criminal Background Checks in Hiring Decisions](#) (July 19, 2012);

<sup>13</sup> See, e.g., Gabriel J. Chin, [The New Civil Death: Rethinking Punishment in the Era of Mass Conviction](#), 160 U. PA. L. REV. 1789 (2012); Christopher Gowen, Erin Magary, [Collateral Consequences: How Reliable Data and Resources Can Change the Way Law Is Practiced](#), 39 FORDHAM URB. L.J. 65 (2011); Leonard Noisette, “Risks of Permanent Punishment,” N.Y. Times, Nov. 15, 2011, at <http://www.nytimes.com/roomfordebate/2011/11/14/taking-and-restoring-the-rights-of-felons/the-risks-of-permanent-punishment>.

<sup>14</sup> Brennan Center for Justice, [How New York City Reduced Mass Incarceration 20](#), available at [http://www.brennancenter.org/sites/default/files/publications/How\\_NYC\\_Reduced\\_Mass\\_Incarceration.pdf](http://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf).

<sup>15</sup> National Consumer Law Center, [Broken Records: How Errors by Criminal Checking Companies Harm Workers and Business](#) 11, available at <http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf>.

<sup>16</sup> Neighly & Emsellem, *supra* note 11 at 9.

<sup>17</sup> The FBI conducted approximately 2.8 million background checks for employment and licensing purposes in 2002. *Id.* at 9 (citing U.S. Dept. of Justice, Office of the Attorney General, [The Attorney General’s Report on Criminal History Background Checks](#) (June 2006), available at [http://www.justice.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.justice.gov/olp/ag_bgchecks_report.pdf)). The 2006 report contains the most recent publicly-available data on this point.

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- iii) Reporting agencies continue to notify potential employers of sealed or expunged records, diminishing applicants' abilities to dispute the inaccuracies or "unring the bell."<sup>18</sup>
6. **Breaking the cycle:** These hidden punishments trap low-income clients in recurring encounters with the criminal justice system. These sanctions illustrate that **reentry is a process that begins at arrest**, and each stakeholder in the criminal justice system – prosecutor, judge, defense attorney, and more – has an important role to play.<sup>19</sup>
7. **Other Jurisdictions:** While this guide is focused on the civil consequences of criminal prosecutions in New York State, there are various resources available that provide a national approach. *See, e.g.* MARGARET COLGATE LOVE, ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2013).
- a. The National Association of Criminal Defense Lawyers has recognized the importance to criminal law practitioners of understanding and minimizing the civil consequences of arrests, and they have produced a valuable 54-jurisdiction (50 states plus federal, Washington, D.C., Puerto Rico and the U.S. Virgin Islands) database of the laws and practice surrounding relief from collateral consequences. The database can be found here: <https://www.nacdl.org/rightsrestoration>
  - b. The Collateral Consequences Resource Center was launched in 2014. This resource provides the latest reviews and information on collateral consequences throughout the country, including an interactive 50-state map, articles, blog posts, and information on how to obtain relief from these consequences. It can be accessed here: <http://ccresourcecenter.org/>

**GENERAL CONSIDERATIONS**

**1. Better results for Criminal Case**

- a. Knowing these hidden civil consequences may help you persuade prosecutors and judges to alter their bail, plea, or sentencing decisions.
  - i) **The Supreme Court Requires it:** In March 2010, the U.S. Supreme Court ruled in *Padilla v. Kentucky*, 599 U.S. 356 (2010) that defense counsel must give affirmative, competent advice to clients concerning the risk of **all penalties “enmeshed” with criminal charges or potential pleas.**
    - (1) The Court held that the Sixth Amendment does not distinguish between the “direct” and “collateral” consequences of pleas when evaluating the effective assistance of counsel – the relevant inquiry is the extent to which the penalty is enmeshed with the criminal process or charges.
    - (2) The ruling concerned deportation specifically, but other serious penalties enmeshed with criminal charges include public housing termination, loss of employment, sex offense registration, disenfranchisement, and student loan ineligibility. These penalties share with deportation the same unique characteristics outlined by the Supreme Court. Legislatures across the country have “intimately related” these penalties and the availability of these programs or rights to criminal charges and convictions. The penalties are “succinct, clear, and explicit.” Legal changes over the last few decades

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<sup>18</sup> National Consumer Law Center, *supra* note 15, at 20-21.

<sup>19</sup> *See* McGregor Smyth, “Collateral” No More: The Practical Imperative for Holistic Defense in A Post-Padilla World . . . or, How to Achieve Consistently Better Results for Clients, 31 ST. LOUIS U. PUB. L. REV. 139, 150 (2011); McGregor Smyth, Holistic is Not a Bad Word, 36 U. TOL. L. REV. 479, 501 (2005).

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have made ineligibility for these programs and termination of these rights nearly an automatic result for a broad class of people.

- (3) The Court explicitly encouraged creative pleas to avoid these enmeshed penalties. 599 U.S. at 373.
- ii) **The Penal Law Requires It.** On June 7, 2006, Penal Law § 1.05(6) was amended to add a new goal, “the promotion of [the convicted person’s] **successful and productive reentry and reintegration into society**,” to the four traditional sentencing goals of deterrence, rehabilitation, retribution, and incapacitation. (2006 N.Y. Laws 98.) For more on this change in the law, see [http://www.communityalternatives.org/justice\\_strategies/ReintJust.html](http://www.communityalternatives.org/justice_strategies/ReintJust.html).
- b. **Warning:** clients will often testify or give written statements in collateral proceedings (employment hearings, Housing Court, Family Court) about the underlying facts.
- i) These statements can obviously affect the criminal case.
- ii) You have to be familiar with the hidden consequences so that you can anticipate and control these statements.
- iii) At times, the collateral proceedings can be a useful source of discovery for the criminal defense attorney, providing an opportunity to cross examine a complaining witness or arresting officer before the criminal trial date.

## 2. Benefits for Your Client

- a. Particularly with **misdemeanor** charges, many clients would rationally choose even a short term of incarceration to avoid some harsh “collateral” consequences.
- b. Look at the big picture: the collateral damage of being arrested often falls most heavily on family members.
- c. Help the client and other criminal justice stakeholders consider these long-term hidden effects of a plea before accepting it.

## 3. Remember the **differing burdens of proof**.

- a. The fallout of criminal proceedings occurs in the civil or administrative realm, and without the basic constitutional protections afforded at criminal trials.
- b. Therefore, acquittals or dismissals *do not* necessarily mean that your client will suffer no further consequences.
- i) Of course, guilty pleas are conclusive evidence of the underlying facts.<sup>20</sup> *Warn* your clients of this effect – many clients think that they can later deny the facts because they pled guilty only for pragmatic reasons.
- ii) Many collateral proceedings look to the underlying facts and will essentially re-litigate the criminal case, this time with a lower evidentiary standard (and usually without assigned counsel for the defendant).

## CRIMINAL RECORDS

### 1. Background

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<sup>20</sup> Hopefully, the greater political movement toward a recognition of the problems within the criminal justice system will also lead to a recognition that innocent people are frequently pressured to plead guilty, which will permit some civil courts to look beyond a guilty plea in determining facts. See Jed Rakoff, “Why Innocent People Plead Guilty,” *New York Review of Books*, Nov. 20, 2014, available at <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/>

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- a. Well over **7 million** adults in New York State – as much as 37% of the total population – have a criminal record.<sup>21</sup>
- b. In 2013, there were 550,033 arrests in New York State;<sup>22</sup> 129,891 resulted in some term of incarceration.<sup>23</sup>
  - i) Statewide, these arrests resulted in 153,505 adult felony or misdemeanor convictions. An additional 145,447 arrests resulted in convictions for non-criminal offenses (i.e. violations and infractions).<sup>24</sup>
  - ii) The FBI estimates that there were over 11.3 million arrests in 2012 nationwide.<sup>25</sup>
- c. A recent study by the National Employment Law Project estimates that more than 600,000 job-seekers per year are adversely affected by common inaccuracies in federal background checks, such as the failure to report the outcome of a case, or the misreporting of cases that have been resolved favorably to the accused.<sup>26</sup>

## **2. Access to Criminal Records**

- a. Technology has provided unparalleled access to an ever-increasing range of criminal history data. Data sharing among government agencies has increased exponentially, and there is widespread availability of criminal history data despite various sealing regimes. In New York State, dozens of agencies maintain their own computerized records of arrests and prosecutions, including DCJS, OCA, New York state police, and local law enforcement.
- b. **FBI**
  - i) The FBI maintains its own criminal history files for federal proceedings and many state proceedings. Federal law requires states to maintain accurate records in their central repositories, and to update these records to reflect disposition information within 90 days of the disposition.<sup>27</sup> These dispositions must then be reported to the FBI's Interstate Identification Index (III) within 120 days of the disposition.<sup>28</sup> However, a 2006 study of this process revealed that approximately half of the records did not contain disposition

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<sup>21</sup> As of December 31, 2012, there were 7,379,600 individuals with criminal background information reported in the New York state criminal history file. The total number of individuals with criminal records nationwide was estimated to be over 100 million. *See* Bureau of Justice Statistics, [Survey of State Criminal History Information Systems, 2012](#), Table 1 (January 2014); U.S. Census Bureau, [Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2013](#) (estimating that the population of New York state in 2012 was 19,576,125).

<sup>22</sup> New York State Division of Criminal Justice Services, [Adult Arrests: New York State, 2004-2013](http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYorkState.pdf), at <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYorkState.pdf>.

<sup>23</sup> New York State Division of Criminal Justice Services, [2009-2013 Dispositions of Adult Arrests: New York State](http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nys.pdf), at <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nys.pdf>. Incarceration rates were determined based on data for sentences to prison, jail, time served, and a combination of jail and probation.

<sup>24</sup> *Id.*

<sup>25</sup> Uniform Crime Reporting Program, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/arrestmain.pdf>.

<sup>26</sup> Neighly & Emsellem, *supra* note 11 at 9-10.

<sup>27</sup> 28 C.F.R. § 20.21(a)(1).

<sup>28</sup> 28 C.F.R. § 20.37.

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- information. The FBI has since stated that it does not collect statistics regarding the accuracy of the records contained in the III.<sup>29</sup>
- ii) In 2012, the FBI responded to approximately 17 million background check requests for employment and licensing purposes, more than six times the number of requests it received in 2002.<sup>30</sup>
- c. **Division of Criminal Justice Services (DCJS)**
- i) Official state repository; maintains information regarding arrests and prosecutions for “fingerprintable” offenses, which are listed in CPL § 160.10—all felony charges and Penal Law misdemeanors and all non-Penal Law misdemeanors that become felony charges when they are charged in a subsequent arrest.
    - (1) Arrests where the top charge is a violation or a non-Penal Law misdemeanors are not fingerprintable and thus are not maintained by DCJS. When a person is issued a summons on the street (as opposed to a precinct), regardless of the top charge, they are not fingerprinted. However, pursuant to CPL § 130.60, if the summons charges a printable misdemeanor (or felony!) the defendant must submit to fingerprinting at their first court appearance. Also, if a person is issued a summons after a fingerprint-based warrant or identification check, or along with an on-line offense, the violation charge and data is sent to DCJS.
    - (2) When fingerprints are sent to DCJS for a violation charge (e.g. when police bring someone to a precinct for a warrant check and then decide to issue a summons instead of putting the arrested individual "through the system") they are not stored as part of a person's official DCJS criminal record.
  - ii) DCJS releases a variety of information depending on who is requesting the rap sheet.
    - (1) Criminal justice rap sheets sent after arrests contain the most information (but do not contain sealed arrests). They do contain Youthful Offender adjudications.
    - (2) Civil inquiries – DCJS rap sheets are available to employers and licensing agencies that are authorized by state, or local law. These contain much less specific information about arrests and periods of incarceration than reports prepared for court purposes. These inquiries do not contain sealed arrests *or* Youthful Offender adjudications.
    - (3) Personal Criminal History Record Review Program – Individuals may request copies of their own DCJS rap sheets, **which will include all information (including sealed records)**.
      - (a) **Warning:** Advise your clients that they should never give a copy of a rap sheet obtained through personal record review to a potential employer or anyone else.
      - (b) For more information: <http://www.criminaljustice.ny.gov/ojis/recordreview.htm>.
  - iii) Most DCJS rap sheets are fingerprint-based, but certain agencies are authorized to search using the New York State ID (NYSID) Number, which is linked to an individual’s fingerprints.
- d. **OCA Criminal History Record Search.** The Office of Court Administration offers a statewide criminal history record search for \$65.<sup>31</sup> OCA will not waive this fee to permit low-income clients to verify their own records.
- i) All that is needed to request a search is an individual’s full name and date of birth. Anyone can make this request. The search does not require consent from the subject.

<sup>29</sup> Neighly & Emsellem, *supra* note 11 at 5, n.5.

<sup>30</sup> *Id.* at 9.

<sup>31</sup> The search can be initiated online at <http://www.nycourts.gov/apps/chrs/>.

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- ii) The OCA record will reveal pending cases and convictions for unsealed violations. It also reveals summons warrants. ***The OCA record will also list the original arraignment charges.*** It may erroneously show dispositions that should be sealed under CPL § 160.50. Outright errors are extremely common. These include errors of *underreporting*, which can lead potential employers to assume that an applicant who honestly discloses prior incidents is confused or lying because the applicant’s own report conflicts with the background check obtained by the employer.<sup>32</sup> Potential employers may legally deny employment to applicants who lie about or omit certain information on job applications.<sup>33</sup> New York courts have issued unfavorable decisions regarding inaccurate reporting of criminal history information.<sup>34</sup>
- iii) Landlords and private employers use this search routinely. Online tenant screening agencies often report past involvement with criminal court in addition to any housing court actions.<sup>35</sup>
- iv) In 2007, OCA modified its policy to restrict access to violation convictions. Although under CPL § 160.55, court records are **not** sealed from the public, OCA does not include sealed violations in its CHRS results.
- v) In 2014, Chief Judge Jonathan Lippman announced in his “State of the Judiciary” speech that OCA would no longer list misdemeanor convictions on CHRS results, provided that the subjects had each only been convicted of **one** misdemeanor, at least ten years prior, and that they “have not been re-arrested.”<sup>36</sup>
- vi) ***Practice Tip:*** Because of the easy access to OCA criminal histories, attorneys should **warn clients that records of violation convictions may not be fully sealed.**
  - (1) Always warn clients that violations do not seal *until the conditional discharge term has expired*—thus the convictions will appear on background checks during that time.
  - (2) Always warn clients that employers and others might discover the original charges underlying a sealed violation conviction because the court records remain public.
- e. **OCA – WEBCRIMS**
  - i) The New York State Unified Court System website<sup>37</sup> gives detailed information on all **pending** cases in all criminal courts in New York City and Nassau and Suffolk Counties, the County Courts in the Ninth Judicial District (which includes Westchester, Rockland, Orange, Putnam and Dutchess Counties), the County Court in Erie County, and the Buffalo City Court.
  - ii) The website also displays universal summons case information for New York City as long as
    - a) there is a future court date **and**
    - b) the top charge is a misdemeanor. *Per OCA written*

<sup>32</sup> Alison Wilkey, Youth Represent, New York – On the Record: Criminal History Information and its Accuracy 26-27 (June 2012), available at [http://www.youthrepresent.org/wp-content/uploads/2013/10/New-York-On-the-Record-Youth-Representfinal\\_web.pdf](http://www.youthrepresent.org/wp-content/uploads/2013/10/New-York-On-the-Record-Youth-Representfinal_web.pdf).

<sup>33</sup> Legal Action Center, Criminal Records and Employment: Protecting Yourself from Discrimination at p. 6 (2011), available at <http://www.reentry.net/ny/library/attachment.202969>.

<sup>34</sup> See, e.g., Johnson v. Ass’n for the Advancement of Blind & Retarded, 21 Misc. 3d 268 (Sup. Ct., N.Y. Cnty. 2008) (ordering plaintiff, who sued employer for wrongful termination after background check revealed plea to a violation, to turn over and unseal these records because she had put them at issue by bringing suit).

<sup>35</sup> See, for example, a model tenant screening report published by On-Site.com, one significant provider of tenant screening information in New York, available at <http://www.on-site.com/online-leasing/qualify-and-screen/>.

<sup>36</sup> Johnathan Lippman, The State of the Judiciary: Vision and Action in our Modern Courts, 13 (Feb. 11, 2014), available at <http://www.courts.state.ny.us/whatsnew/pdf/2014-SOJ.pdf>. OCA put this policy into practice effective April 1, 2014.

<sup>37</sup> Log in as a guest at [https://iapps.courts.state.ny.us/webcrim\\_attorney/jcaptcha](https://iapps.courts.state.ny.us/webcrim_attorney/jcaptcha)

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*policy*,<sup>38</sup> no top-charge violation summons information is available in WebCrim. However, many summonses with violation charges and future court dates are in fact .

**f. Local Law Enforcement**

- i) NYPD maintains its own database containing criminal histories of all NYC arrests (electronic arrest paperwork).
- ii) For \$50, a person can request a fingerprint-based Certificate of Conduct (formerly called a Good Conduct Certificate) which will list all NYC arrests and summonses, even those that have been sealed.<sup>39</sup> This does not contain any disposition information and **should not be confused with a “Certificate of Good Conduct”** (see Certificates to Demonstrate Rehabilitation,” *infra* at 16).
  - (1) The Certificate of Conduct only includes Criminal Court Summonses and Arrests from the five boroughs of NYC. It does not include traffic summonses.

**g. Private Databases & Credit Reporting Agencies**

- i) Hundreds of private, commercial background screening businesses access public data sources and create their own repositories. These businesses operate in a largely unregulated environment, and no reliable information exists as to exactly how many companies are in operation.<sup>40</sup> The federal Consumer Financial Protection Bureau publishes a list of major Credit Reporting Agencies (which also contains a lot of useful information about the laws surrounding credit and background check), available at [http://files.consumerfinance.gov/f/201501\\_cfpb\\_list-consumer-reporting-agencies.pdf](http://files.consumerfinance.gov/f/201501_cfpb_list-consumer-reporting-agencies.pdf).
- ii) Records of criminal convictions can remain on a background report indefinitely. These records are frequently inaccurate or incomplete, and can include violations. Credit and consumer agencies maintain criminal history information pursuant to the federal and state Fair Credit Reporting Acts (FCRAs).
  - (1) Because violation conviction records are not sealed in the court system, background checking agencies may easily access people’s violation convictions and summons convictions, even those sealed pursuant to CPL § 160.55, from the court clerks.
- iii) The market for these services is tremendous: in 2013, one of the largest criminal background check providers in New York State reported revenue of nearly \$250 million, up from just \$7.5 million in 2001.<sup>41</sup>

**3. Errors in Criminal Records**

- a. The problems arising from increased availability of criminal history data are compounded by serious questions about reliability.
- b. **DCJS**
  - i) Recent estimates based on analyses of criminal records in New York City suggest that at least one-third of criminal records in New York contain errors.<sup>42</sup>

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<sup>38</sup> See [https://iapps.courts.state.ny.us/webcrim\\_attorney/AttorneyHelp](https://iapps.courts.state.ny.us/webcrim_attorney/AttorneyHelp)

<sup>39</sup> For more info, go to [http://www.nyc.gov/html/nypd/html/record\\_inquiries/public\\_inquiry.shtml](http://www.nyc.gov/html/nypd/html/record_inquiries/public_inquiry.shtml) or call (646)610-5541 ext. 2

<sup>40</sup> National Consumer Law Center, *supra* note 15, at 8.

<sup>41</sup> Aaron Elstein, “Background-Check Industry Under Scrutiny as Profits Soar,” *Crain’s New York Business*, June 23, 2013, available at <http://www.crainsnewyork.com/article/20130623/finance/306239972/background-check-industry-under-scrutiny-as-profits-soar#>.

<sup>42</sup> Legal Action Center, *The Problem of RAP Sheet Errors: An Analysis by the Legal Action Center 1-2*, available at [http://www.lac.org/doc\\_library/lac/publications/LAC\\_rap\\_sheet\\_report\\_final\\_2013.pdf](http://www.lac.org/doc_library/lac/publications/LAC_rap_sheet_report_final_2013.pdf) (2013) (noting that Legal

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- ii) The majority of these errors are not because of DCJS itself, but rather the individual agencies that report information to DCJS (NYPD, District Attorneys, OCA, and the New York Division of Corrections and Community Supervision). Requests for correction must be made directly to the agency responsible for the error.
  - c. **FBI**
    - i) Currently, at least 1,600 state statutes across the country mandate FBI background checks for various occupations. This is in addition to a number of federally-mandated FBI checks.<sup>43</sup> The number of FBI background check requests for employment and licensing purposes has ballooned in recent years, with approximately 17 million such requests registered in 2012.<sup>44</sup>
    - ii) A recent report by the National Employment Law Center estimated that errors in FBI criminal background check reports negatively affect more than 600,000 job-seekers each year and suggested that the FBI already has systems in place that would allow it to begin correcting these errors at a national level.<sup>45</sup>
    - iii) FBI search requests query the Interstate Identification Index, which maintains some limited information and also refers back to criminal history information held by individual states.<sup>46</sup>
    - iv) As of December 31, 2012, New York State reported that final disposition information was posted in the state registry for 89% of all arrests. Nationwide, only 18 states reported final disposition information for 80% or more of arrests. Massachusetts reported the greatest amount of disposition information, for 99% of arrests, while Mississippi reported the least, providing final disposition information in only 13% of all arrests.<sup>47</sup>
  - d. **Private Databases**
    - i) Significant problems include false positives and mismatches based on non-biometric background checks; as well as negligence or outright attempts to evade FCRA compliance by commercial vendors.<sup>48</sup>
- 4. Reviewing the Rap Sheet:** Review the rap sheet with your client to make sure that it is accurate and that all relevant records have been sealed properly.
- a. Criminal defense attorneys: you will receive a copy of your client's rap sheet as a matter of right under CPL § 160.40.
  - b. Review it for errors ASAP so that you can correct them and note the error on the record during the bail application.
    - i) **Practice Tip:** Recent studies in New York estimate that **at least one third** of DCJS RAP sheets contain some kind of error.<sup>49</sup>
    - ii) Errors on the rap sheet affect bail, plea negotiations, and sentencing.
  - c. **Common errors**

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Action Center conservatively estimated a 30% error rate, while a 2007 study by the Bronx Defenders estimated a 62% error rate with 32% of records containing multiple errors).

<sup>43</sup> Neighly & Emsellem, *supra* note 11, at 7.

<sup>44</sup> *Id.* at 8.

<sup>45</sup> *Id.* at 10.

<sup>46</sup> Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2012*, v-vi, available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf> (Jan. 2014).

<sup>47</sup> *Id.* at Table 1.

<sup>48</sup> National Consumer Law Center, *supra* note 15 at 15-16.

<sup>49</sup> Legal Action Center, *supra* note 42 at 1-2.

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- i) Arrests without dispositions, which may result in an assumption that the case is still open;
  - ii) Unsealed arrests or convictions (for example, Violations and Adjournments in Contemplation of Dismissal);
  - iii) Incorrect entries as a result of typographical and other errors;
  - iv) Open bench warrants; and
  - v) Underreporting of criminal history information.<sup>50</sup>
- d. **Warning:** The failure to seal records can lead to *serious consequences*, often without any legal remedy.
- i) **\*\*If** a person is identified from a mugshot or fingerprint that should have been removed from the police file and destroyed under the sealing statute, then there is *no remedy* in the criminal case. You cannot suppress the ID.<sup>51</sup>
- e. **Practice Tip:** After arraignment is a good time to get Certificates of Disposition for the incorrect items from the Court Clerk. Once a corrected Certificate of Disposition has been issued, send it via certified mail to DCJS and request that the error be corrected.

**5. Sealing Records for People Charged as Adults (CPL §§ 160.50, 160.55, 160.58, & 720.35)**

- a. New York State does not delete or expunge any records – it only seals them.
  - i) Sealing is automatic for favorable dispositions (CPL § 160.50) and convictions for petty offenses (CPL § 160.55) after November 1, 1991.
  - ii) For pre-1991 dispositions, the person must get a sealing order from the sentencing court (but the sealing remains a matter of right). The procedure varies, so contact the clerk of court of the sentencing court for instructions.<sup>52</sup> See [www.Reentry.net/ny](http://www.Reentry.net/ny) (login required) for a model sealing motion.
- b. **Favorable Dispositions:** CPL § 160.50 seals arrests that resulted in a disposition favorable to the defendant (*e.g.*, acquittal, dismissal, decline prosecution, ACD)<sup>53</sup>.
  - i) **Legal Nullity:** Under CPL § 160.60, “[u]pon the termination of a criminal action or proceeding against a person in favor of such person, as defined in subdivision two of section

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<sup>50</sup> See, *e.g.*, Legal Action Center, Your New York State RAP Sheet: A Guide to Getting, Understanding & Correcting Your Criminal Record 15-16, available at <http://www.reentry.net/ny/search/attachment.202966> (2011).

<sup>51</sup> C.P.L. § 160.50 requires, among other things, that any photographs and fingerprint plates related to a criminal proceeding resolved in a person’s favor and sealed in accordance with that section be destroyed or returned to the person at the end of the proceeding. However, New York courts have repeatedly held that identifications based on photographs or fingerprints that should have been destroyed or returned pursuant to C.P.L. § 160.50 do not implicate constitutional rights and do not give rise to constitutional causes of action, as, for example, under 42 U.S.C. §1983 or the Fourth or Fifth Amendments. See D.S. v. City of Peekskill, 12-CV-4401 KMK, 2014 WL 774671 (S.D.N.Y. Feb. 27, 2014) (summarizing People v. Patterson’s chilling effect on constitutional claims for violations of C.P.L. § 160.50), *aff’d on other grounds*, 581 F. App’x 65, 66 (2d Cir. 2014); Grandal v. City of New York, 966 F. Supp. 197 (S.D.N.Y. 1997) (granting City’s motion to dismiss over Grandal’s constitutional claims where photograph that should have been destroyed was used to identify him in subsequent matter); People v. Patterson, 78 N.Y.2d 711 (1991) (concluding that violation of C.P.L. § 160.50 does not implicate constitutional rights and denying motion to suppress in-court identification testimony where initial arrest was based on photograph that should have been destroyed).

<sup>52</sup> For sample letters and motions, see Appendices A-C of Legal Action Center, Your New York State RAP Sheet, *supra* note 50.

<sup>53</sup> See The Bronx Defenders, Sealing Criminal Records: How to Review a Rap Sheet for Errors (October 24, 2011), available at <http://www.reentry.net/ny/library/attachment.205501> & Legal Action Center, Your New York State RAP Sheet, *supra* note 50.

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- 160.50 of this chapter, 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. The arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession, or calling. Except where specifically required or permitted by statute or upon specific authorization of a superior court, no such person shall be required to divulge information pertaining to the arrest or prosecution.” (Emphasis added).<sup>54</sup>
- ii) *See also* Employment section on Rights & Protections for sealed cases, *infra* at 35.
  - c. **Misdemeanor and felony convictions** can **never** be sealed, except under the Rockefeller Drug Law reform provisions of C.P.L. 160.58 (addressed in subsection 5.g *infra*).
    - i) Unsealed convictions remain on a person’s criminal record for life.
    - ii) Address these convictions with certificates that promote rehabilitation (see next section).
    - iii) A 2010 provision under CPL § 440.10(1)(i) permits vacatur of some convictions related to a person’s status as a victim of sex trafficking. Criminal courts have allowed vacatur even of non-prostitution convictions pursuant to C.P.L. § 440 where the trafficked individual can show that these convictions were related to the trafficking.<sup>55</sup>
  - d. **Violations:** CPL § 160.55 seals police, prosecutor, and DCJS records of arrests that led to a conviction for any non-criminal offense (violation or VTL infractions), EXCEPT convictions for DWAI (VTL § 1192(1)) and loitering for the purpose of prostitution (PL § 240.37).
    - i) **Warning:** Private criminal records searches may reveal convictions for violations because court records are NOT sealed under CPL § 160.55.
    - ii) In 2009, the Legislature amended CPL § 160.55 to permit access to **sealed records related to domestic violence harassment offenses (P.L. § 240.26)**, for “law enforcement” purposes only. The otherwise sealed records are now available to “a police agency, probation department, sheriff’s office, district attorney’s office, department of correction of any municipality and parole department, *for law enforcement purposes, upon arrest* in instances in which the individual stands convicted of harassment in the second degree, as defined in section 240.26 of the penal law, committed against a member of the same family or household as the defendant, as defined in subdivision one of section 530.11 of this chapter, and determined pursuant to subdivision eight-a of section 170.10 of this title.” CPL § 160.55(1)(d). Related fingerprints can be retained as well. CPL § 160.55(1)(a). Within 15 days of arraignment, the District Attorney must serve notice on the defendant that the allegations fall under the 530.11 definition of domestic violence. CPL § 170.10(8-a).

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<sup>54</sup> This has been interpreted as giving people the leeway to say “no” when they are asked “Have you ever been arrested?” *See First American Corp. v. Al-Nahyan*, 2 F. Supp. 2d 58 (D.D.C., 1998); *People v. Ellis*, 184 AD2d 307 (1st Dep’t 1992). *But see State v. John S.*, 23 N.Y.3d 326 (2014) (holding that in determining whether a sex offender should be civilly committed, Mental Hygiene Law § 10.08 supersedes C.P.L. § 160.60 and allows courts to look into prior arrests); *Wilson v. New York City Police Dep’t License Div.*, 115 A.D.3d 552, (1st Dep’t 2014) (Although favorably terminated and thus a “nullity” pursuant to CPL §160.60, applicant for firearm license still had to disclose arrest to N.Y.P.D. licensing division.); *Romero v. State*, 33 Misc. 3d 599 (Ct. Cl. 2011) (finding that C.P.L. 160.50 implicitly creates a private right of action and that state owes claimants a special duty with respect to sealed records but dismissing Romero’s claim for failing to establish prima facie negligence case)

<sup>55</sup> *See People v. L.G.*, 41 Misc. 3d 428 (Crim. Ct., Queens Cnty. 2013) (vacating convictions for disorderly conduct and criminal possession of a weapon where L.G. was trafficked beginning at age 12 and carried a weapon for protection); *People v. G.M.*, 32 Misc. 3d 274 (Crim. Ct. 2011) (vacating four trespass and drug possession convictions along with two convictions for prostitution pursuant to 440.10 motion but noting G.M.’s “unique circumstances”).

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- e. **Marijuana Violations:** CPL § 160.50(3)(k) seals arrests that led to a **marijuana violation** under P.L. § 221.05 (after waiting 3 years from date “the offense occurred”). \*\*Note that although P.L. § 221.05 is a violation, it seals under CPL § 160.50 and not CPL § 160.55, meaning that the records of the court should also be sealed and CPL§ 160.60 applies.
- f. **Youthful Offender Adjudications** (CPL § 720.35)
- i) YO Adjudications are confidential, but do appear on DCJS rap sheets issued for criminal justice purposes (e.g. the rap sheets produced for criminal prosecutions) and may be used for sentencing. Notice of the adjudication is also issued to a “designated educational official” at the youth’s primary or secondary school.<sup>56</sup>
  - ii) Criminal Procedure Law §720.35(1) states “a youthful offender adjudication is not a judgment of conviction for a crime or any other offense, and does not operate as a disqualification of any person so adjudged to hold public office or public employment or to receive any license granted by public authority.”
  - iii) The confidentiality afforded by the statute extends beyond the record itself, protecting an individual with a YO Adjudication who refuses to answer questions regarding the arrest, investigation, or any plea or disposition of a matter as a YO Adjudication. However, the individual will not be entitled to refuse questions relating to the underlying facts of the incident, even if those facts are what gave rise to the YO Adjudication.<sup>57</sup> Additionally, an individual can unintentionally waive the protections of 720.35 by voluntarily disclosing otherwise protected information.<sup>58</sup>
  - iv) Some courts have held that § 720.35 does not create a private right of action for wrongful disclosure of a YO Adjudication,<sup>59</sup> while others have dodged the question.<sup>60</sup>
- g. **Conditional Sealing** (CPL § 160.58)
- i) Please visit [www.communityalternatives.org](http://www.communityalternatives.org) and [www.reentry.net/ny](http://www.reentry.net/ny) for more resources.
  - ii) **Eligibility**
    - (1) Person convicted of any drug, marijuana, or Willard-eligible offense;
    - (2) Completion of judicial diversion or similar judicially sanctioned substance abuse program;
    - (3) Eligible after completion of sentence;
    - (4) On motion from defendant or the court *sua sponte*;
    - (5) Sealing order comes from sentencing court;
    - (6) Sealing then available for up to 3 prior drug or marijuana misdemeanor convictions
      - (a) Notice & hearing rights for District Attorney
  - iii) Records automatically unsealed when charged with new crime – permanently unsealed if subsequently convicted
    - (1) Re-sealed if new charge results in a CPL § 160.50 (favorable termination) or §160.55 (petty offense conviction) sealing.
  - iv) The statute affords the court significant discretion in determining whether to permit sealing.<sup>61</sup>

<sup>56</sup> Youthful Offender Adjudications **can** be used in sentencing calculations by federal courts. See United States v. Driskell, 277 F.3d 150 (2d Cir. 2002).

<sup>57</sup> Castiglione v. James F.Q., 115 A.D.3d 696 (2d Dep’t 2014); Barnett v. David M.W., 22 A.D.3d 575 (2d Dep’t 2005).

<sup>58</sup> E.g., Matter of Sean K., 50 A.D.3d 1220 (3d Dep’t 2008).

<sup>59</sup> E.g., Anderson-Haider v. State, 29 Misc. 3d 816 (Ct. Cl. 2010).

<sup>60</sup> *Id.* (citing Perez v. State, 75 A.D.2d 683, 684 (3d Dep’t 1980)).

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- v) Allows sealing of convictions that predate the statute. *See* People v. M.E., 121 A.D.3d 157 (4th Dep't 2014)
- h. **Juveniles arrested for certain prostitution offenses:** In 2014, the legislature added §170.80 to the Criminal Procedure Law, which permits the conversion of the prosecution of individuals who are 16 or 17 at the time of their arrest for prostitution offenses into “Persons in Need of Supervision” (PINS) cases. Any “adverse finding and all records of the investigation and proceedings relating to such charge shall be promptly expunged upon the person’s 18th birthday or the conclusion of the proceedings, whichever occurs later.” CPL § 170.80.
- i. **Practice Tip – Limitation on Use of Sealed Records**
  - i) The Court of Appeals has noted that “we have been careful when considering whether to permit access to sealed records so that we do not undermine the legislative goals of CPL 160.50, and make unsealing of records the rule rather than a narrowly confined exception.”<sup>62</sup>
  - ii) No unsealing or use is permitted for criminal sentencing (or bail).<sup>63</sup>
    - (1) **Note** that it is illegal to use **Domestic Incident Reports (DIRs)** from sealed arrests (including voided arrests, declined prosecutions, dismissed cases, or sealed violations) for any purpose in another case, including a new criminal case.
  - iii) No unsealing or use is permitted for employment disciplinary proceedings.<sup>64</sup>
  - iv) No unsealing or use is permitted for eviction proceedings.<sup>65</sup>
  - v) No unsealing or use is permitted for property forfeiture proceedings.<sup>66</sup>
  - vi) No unsealing or use is permitted for administrative agency hearings.<sup>67</sup>

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<sup>61</sup> For some sense of how courts have responded to C.P.L. § 160.58 motions, *see* People v. Brocki, 42 Misc. 3d 53 (App. Term, 2d Dep't 2013) (spelling out factors for courts to consider in exercising discretion granted by C.P.L. § 160.58); In re K., 35 Misc. 3d 742 (Sup. Ct., N.Y. Cnty. 2012) (evaluating whether a particular program constitutes “another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision”); People v. Modesto, 32 Misc. 3d 287, 291 (Sup. Ct., Bronx Cnty. 2011) (denying relief where conviction was for a felony and Modesto was not “an addict”).

<sup>62</sup> New York State Com'n on Judicial Conduct v. Rubenstein, No. 99, 2014 WL 2573391 (Ct. App. June 10, 2014);

<sup>63</sup> Matter of Albany County Dist. Attorney's Off. v William T., 88 A.D.3d 1133 (3d Dep't 2011) (affirming that “justice requires” exception in C.P.L. 160.50(1)(d)(ii) permits unsealing for prosecutorial purposes only in “singular circumstance” outlined in 160.50(1)(d)(i)); Katherine B. v. Cataldo, 5 N.Y.3d 196 (2005) (“[T]his case boils down to whether the ‘law enforcement agency’ exception in CPL 160.50(1)(d)(ii) is broad enough to encompass an ex parte request by a prosecutor to unseal records for purposes of making sentencing recommendations. We conclude that it is not.”).

<sup>64</sup> Lino v. City of New York, 101 A.D.3d 552 (1st Dep't 2012) (finding that plaintiffs with records resulting from stop and frisk practices had standing to bring action for sealing before suffering any resulting employment-related harm); People v. Siddons, 34 Misc. 3d 1240(A) (Dist. Ct., Nassau Cnty. 2012) (exercising court’s “inherent power” to seal its own records, despite plea waiving right to sealing, where record substantially complicated employment); Matter of Scott D., 13 A.D.3d 622 (2d Dep't 2004) (reversing order to unseal for administrative hearing); Application of Police Com'r of the City of New York, 131 Misc. 2d 695 (Sup. Ct., N.Y. Cnty. 1986).

<sup>65</sup> People v. Diaz, 15 Misc. 3d 410 (Sup. Ct., N.Y. Cnty. 2007) (reversing order to unseal criminal records for use in eviction case); People v. Canales, 174 Misc. 2d 387 (Sup. Ct. Bronx Cnty. 1997).

<sup>66</sup> Property Clerk v. Bonilla, NYLJ 20, col. 1 (Sup. Ct., N.Y. Cnty. Nov. 25, 2002).

<sup>67</sup> Reed v New York City Dept. of Hous. Preserv. & Dev., Index No. 400552/2013, 2013 NY Slip Op 33142(U) (Sup. Ct., N.Y. Cnty., Schlessinger, J., Nov. 7, 2013), *available at* <http://statecasefiles.justia.com/documents/new-york/other-courts/2013-ny-slip-op-33142-u.pdf?ts=1387406766>.

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**6. Juvenile Records**

- a. Juvenile Delinquency prosecution—all favorable terminations (dismissal, acquittal, etc.) are sealed automatically (Family Court Act § 375.1).
- b. Family Court Finding Sealed by Motion
  - i) Fam. Ct. Act § 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.
- c. Family Court Expungement (Fam. Ct. Act § 375.3)
  - i) In addition to the court’s power to *seal* juvenile records pursuant to Fam. Ct. Act §§ 375.1 and 375.2, section 375.3 contains the court’s “inherent power to order the *expungement* of court records” (emphasis added).<sup>68</sup> This allows, in extreme cases, for the complete destruction of court records, after which the records can never be recovered. In Matter of Dorothy D., the controlling case on the scope of this power, the Court of Appeals emphasized that “the power to expunge should not be indiscriminately employed, particularly where, for example the adjudication which terminates the arrest is for reasons not consistent with complete innocence.”<sup>69</sup>
- d. Privacy of Family Court Records (Fam. Ct. Act § 166)
  - i) Section 166 affords the court discretion in allowing access to what are often assumed to be confidential Family Court documents. Case law on this point is sparse and often inconsistent.<sup>70</sup>
- e. Restricted Use of Family Court Records (Fam. Ct. Act § 381.2)
  - i) Section 381.2 makes records regarding prior presence at a hearing, confessions, admissions, or statements inadmissible as evidence in proceedings in other courts, except for the purposes of adult sentencing if the records have not already been sealed pursuant to Fam. Ct. Act § 375.1.<sup>71</sup>

**CERTIFICATES THAT PROMOTE REHABILITATION**

**1. In General**

- a. These certificates are critical tools for avoiding the fallout of convictions.
- b. They remove statutory bars imposed because of convictions, and provide a rebuttable “presumption of rehabilitation.”<sup>72</sup>

<sup>68</sup> N.Y. Fam. Ct. Act § 375.3 (McKinney)

<sup>69</sup> Matter of Dorothy D., 49 N.Y.2d 212 (1980).

<sup>70</sup> N.Y. Fam. Ct. Act § 166 (McKinney); Practice Commentary.

<sup>71</sup> N.Y. Fam. Ct. Act § 381.2 (McKinney). *See also* People v. Campbell, 98 A.D.3d 5 (2d Dep’t 2012) (holding that Board of Sex Offenders exceeded its authority by adopting Guidelines that include juvenile delinquency adjudications for the purpose of determining a sex offender’s criminal history).

<sup>72</sup> For cases interpreting this presumption, *see, e.g.*, Thomas v. New York City Dep’t of Educ., 46 Misc. 3d 308, 313 (N.Y. Cnty Sup. Ct. 2014); Dellaporte v. New York City Dept. of Bldgs., 106 A.D.3d 446 (1st Dep’t 2013); Matter of Gil v. New York City Dept. of Bldgs., 107 A.D.3d 632(1st Dep’t 2013).

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- i) While they generally will **not avoid deportability or inadmissibility** for non-citizens, they **may** have a positive effect on some forms of discretionary relief in immigration proceedings.
  - c. They (ought to) appear on a person's rap sheet beside relevant convictions. See [www.reentry.net/ny](http://www.reentry.net/ny) for links to applications, sample forms, and tips for helping clients prepare applications.
- 2. Certificate of Relief from Disabilities (CRD)** (Corr. L. §§ 701-703) – Intended to *promote* (rather than reward) rehabilitation by removing statutory barriers imposed because of convictions.
- a. *Eligible Persons*: Granted to persons with only one felony and/or any number of misdemeanor convictions (you must get a certificate for each conviction). Includes out-of-state and federal convictions.
  - b. *Effect*: Relieves most automatic forfeitures and disabilities, including felony disenfranchisement, that are automatically imposed by law as a result of the conviction.
    - i) It can be limited to relieve particular disabilities, or specifically except certain disabilities, such as those against firearms possession or working with young children.
    - ii) The court or DOCCS may at any time issue a new CRD to enlarge the relief granted.
  - c. *Considerations*: The issuing court or DOCCS must determine that the relief to be granted by the CRD is consistent with (1) the rehabilitation of the person, and (2) the public interest.
    - (1) **Note**: On June 7, 2006, Penal Law § 1.05(6) was amended to add a new goal, “the promotion of [the convicted person’s] **successful and productive reentry and reintegration into society**,” to the four traditional sentencing goals of deterrence, rehabilitation, retribution, and incapacitation. (2006 N.Y. Laws 98.)
  - d. **Issuance by Court of Sentencing** (Corr. L. § 702)
    - i) *Eligible Convictions*
      - (1) All misdemeanors and violations;
      - (2) Single felony that did not result in incarceration in a state correctional facility (*e.g.*, sentence was probation, conditional discharge, suspended sentence, or city jail).
    - ii) *Procedure*
      - (1) *At Sentencing*
        - (a) Court can grant a CRD at the time of sentencing.
        - (b) CRD here can grant relief from forfeitures as well as disabilities.
        - (c) Section 200.9 of the Uniform Rules for NYS Trial Courts **requires** that courts **either** grant a CRD at sentencing **or** advise the defendant of his or her eligibility to apply later. 22 NYCRR § 200.9.
        - (d) **New** statutory language added in 2011 to Corr. L. § 702(1): “[T]he court, upon application and in accordance with subdivision two of this section, shall initially determine the fitness of an eligible offender for such certificate prior to or at the time sentence is pronounced.”
      - (2) *Any Time After Sentencing*
        - (a) Client must make a verified application to the court. Usually, the court refers the application to the local probation department, which investigates and then issues a report with a recommendation. Many courts require an applicant to submit their fingerprints for a full criminal history screening.
          - (i) Check with the Clerk of the court of sentencing for the local application procedures.

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- (ii) Different probation departments have very different attitudes and levels of experience with CRDs.
- (b) **Practice Tip:** It is always recommended to help a client submit **Evidence of Rehabilitation** along with their post-sentencing application. Help them write a personal statement that explains the context of the conviction and expresses remorse. Have the client collect letters of recommendation from jobs or clergy or other references. Any certificates of completion of drug treatment or other programs will be viewed favorably by probation and the deciding court.
- (c) CRD after sentencing can only grant relief from disabilities, not forfeitures.
- iii) **Temporary Certificates:** If the court has imposed a revocable sentence (e.g. probation or Conditional Discharge), the CRD will be temporary until the court's authority to revoke the sentence has expired.
  - (1) The court *may* revoke the temporary certificate for violations of conditions of the sentence, and *must* revoke it if the defendant is remanded to a *state* correctional institution. (e.g. Violation of Probation)
    - (a) Revocation shall be upon notice and after the defendant has an opportunity to be heard.
    - (2) If the certificate is not revoked, it automatically becomes permanent at the expiration of the probation or CD.
    - (3) At the **very least**, ask the court to grant a CRD relieving Housing, Employment, and Voting disabilities.
    - (4) **Priorities:** Judges have proven resistant to large-scale grants of CRD's, particularly at arraignments. If you must make a reasoned choice of when to request CRD's at sentencing, the *top priority* should be those clients who have *no prior record* or those facing an immediate statutory disability (e.g., loss of an employment license or termination from public housing). (A client with multiple convictions must apply for a CRD for each offense.)
  - iv) **Myth:** Some judges believe that they cannot issue CRDs for violations. In fact, CRDs are often **most** useful for violations convictions, and Corr. L. § 701(1) explicitly authorizes issuance of CRDs for any crime or "offense." It can be helpful to provide the court with a copy of the statute.
  - v) **Myth:** Some judges and prosecutors oppose CRDs because they think criminal records will be sealed as a result. In fact, CRDs have nothing to do with sealing, and they do not restrict access in any way to the records of criminal convictions.
- e. **Issuance by Department of Corrections and Community Supervision (Corr. L. § 702)**
  - i) **Eligible Persons** (only one felony conviction permitted)
    - (1) Persons who have been incarcerated in a state correctional facility, and have been released;
    - (2) Persons who reside in New York with convictions from any other jurisdiction (including federal).
      - (a) **Warning:** *Out-of-state residents* who want a N.Y. employment license but have federal or out-of-state convictions may not be eligible!
  - ii) **Procedure:**
    - (1) Request an application from DOCCS website (available through <http://www.Reentry.Net/NY>) or from:  
New York State Department of Corrections and Community Supervision  
Certificate Review Unit  
Harriman State Campus, Building 2

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1220 Washington Avenue  
Albany, NY 12226  
(518) 485-8953

- (2) Applicant will be investigated by DOCCS. The process usually takes several months. Wait times of up to a year are normal. Recommend keeping in contact with DOCCS.
- (3) The CRD can be issued at the time of release from the NYS institution or any time thereafter.
- iii) *Temporary Certificates*: If issued while person is still on parole or supervised release, the CRD is temporary until discharge and can be revoked by DOCCS for violation of the conditions of parole or release.
- f. **Practice Tip**: If a client is still on probation or parole, or has not finished her sentence, talk to her probation/parole officer. She can start the application process and have a temporary certificate issued.
- g. **Limitations**
  - i) Generally, does not affect driver's license suspensions—absent “compelling circumstances.” Corr. L. § 701(2).
  - ii) Does not lift any felony bars to holding public office. (See *infra* “Employment” at 32) Corr. L. § 701(1). (The Certificate of Good Conduct can lift bars to holding public office).
  - iii) Does not trump discretionary considerations in employment and licensing (“good moral character,” etc.).
- h. **Forms**
  - i) CRD Application:<sup>73</sup> Single page form to apply at sentencing court—otherwise use application to DOCCS.<sup>74</sup>
  - ii) Form for judge to sign is different—in general it is prepared by the local probation dep't.

**3. Certificate of Good Conduct** (Corr. L. §§ 703-a & 703-b)

- a. *Eligible Persons*
  - i) Any person “previously convicted of a crime in this state.” Corr. L. § 703-b(1).
  - ii) Any person “previously convicted of a crime in any other jurisdiction.” Corr. L. § 703-(b)(2).
    - (1) Persons convicted of a crime in another jurisdiction must have “specific facts and circumstances and specific sections of New York state law that have an adverse impact on the applicant and warrant the application for relief to be made in New York.” (*Id.*)
  - iii) Therefore, this Certificate can be granted for any “crime,” but not for non-criminal offenses such as violations.
- b. *Effect*: The CGC has the same effect as the CRD, except that it is the only certificate that lifts felony or misdemeanor bars to “public offices.”
  - i) Public Offices: Examples: police officer; firefighter; court officer; law enforcement jobs; notary public (but see 2(g)(ii) *supra*); some elective offices.
    - (a) Should ask the employer or licensing agency whether it's a public office and whether there's a bar for felony or misdemeanor convictions. If so, the only way to lift the bar is (probably) a Certificate of Good Conduct.
  - ii) If person is applying for a “public office,” she can apply for this certificate even if she has only one felony conviction or only misdemeanor convictions.

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<sup>73</sup> Available at <http://www.reentry.net/ny/library/attachment.144557>.

<sup>74</sup> Available at <http://www.reentry.net/ny/library/attachment.255584>.

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- c. *Waiting period* (based on most serious conviction): Must wait an amount of time after last conviction, payment of fine, or release from prison or parole, whichever is later:
  - i) A & B felonies, 5 years from completion of sentence;
  - ii) C, D, E, 3 years;
  - iii) Misdemeanors only, 1 year.
  - iv) Applicants must demonstrate that they have conducted themselves “in a manner warranting such issuance” for the waiting period.
  - v) Note that DOCCS will not issue a Certificate of Good Conduct if there are any convictions during the waiting period, even if the conviction is for a misdemeanor. These convictions re-start the clock for the waiting period.
- d. Temporary certificates are available, per statute, but given the waiting period requirements they are very rare.
- e. *Process*: Apply to the same NYS Department of Corrections and Community Supervision office listed above (*Supra* at p. 18, Section 2.e.ii).
  - i) Process takes at least 6 months, but may be faster if the applicant or his attorney attaches a letter explaining need for expediting (*e.g.*, when a job or occupational license is at stake).
  - ii) In 2006, DOCCS issued approximately 250 Certificates of Good Conduct.
  - iii) **Practice Tip**: Here even more than with the CRD application, clients should be encouraged to submit **Evidence of Rehabilitation** along with their application. The DOCCS application specifically asks for evidence of paying taxes—1040s *and* W-2s. Obviously these are not available in all cases, and they are not required for DOCCS to process the application. However, encourage applicants to show how they are supporting themselves in order to head off inquiries about unlawful means of earning a living.
  - iv) **Practice Tip**: As a matter of policy, DOCCS issues all Certificates with two explicit exemptions from relief: (a) firearms, and (b) holding public office. Therefore, a person must specifically ask for relief from these disqualifications in her Certificate application.
- 4. **Appeals**: While there is no specific process delineated in any statute or court rule for appealing denials of Certificates of Rehabilitation, at least one court has found these denials appealable by an Article 78 petition taken at the Supreme Court in the county where the sentencing court is located, if it was a CRD denied by a court, or in the Albany County Supreme Court, if it was a CRD or CGC denied by DOCCS. See *Figel v. Dwyer*, 75 A.D.3d 802 (3d Dep’t 2010), *but see Matter of Waldbaum, Inc.*, 190 A.D.2d 810, (2d Dep’t 1993) (finding no statutory authority for an appeal from a denial of a CRD).

**CIVIC PARTICIPATION**

- 1. **Voting** (Elec. L. §§ 5-106(2)-(5))
  - a. The right to vote is determined by the law of the state in which one seeks to vote.
  - b. *Felonies*: In NYS, people convicted of felonies who are sentenced to imprisonment (incarceration in a state facility) may vote or register to vote as soon their maximum sentences expire, they are discharged from parole, or they are pardoned.
    - i) Therefore, individuals who are currently incarcerated in state prison or are on parole may not vote.
    - ii) Disability does NOT apply if there was no sentence of imprisonment or if the sentence has been suspended.
      - (1) Therefore, the right to vote is not affected by felony convictions resulting in sentences to incarceration in local jails.

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- iii) The right to vote is not affected by misdemeanor convictions.
- c. **Practice Tip:** For individuals still on parole, a Certificate of Relief from Disabilities (see *supra* at 17) does restore a citizen’s right to vote if she is not currently incarcerated. (See Corr. L. § 701.) Once the CRD is granted, she can register to vote.
- d. In New York, the restoration of the right to vote is *automatic* upon release from prison or discharge from Parole, and does not require a Certificate of Relief from Disabilities, regardless of what some Boards of Elections claim.
- e. **New York Election Law automatically restores the right to vote to individuals convicted of a felony once they have served their maximum sentences or have been discharged from parole.** Individuals who are sentenced to probation or convicted of misdemeanors never lose the right to vote. The law imposes no additional burdens, conditions, or qualifications on who may vote, aside from the usual age, citizenship, and residency requirements. However, misinformation about voting rights for those with criminal convictions is rampant. Individuals involved in the criminal justice system are not informed about whether they can or cannot vote and when their voting rights are automatically restored. Local boards of elections are equally misinformed, providing inaccurate information to the public about voter eligibility laws and illegally rejecting voter registration applications from eligible voters with criminal convictions. This misinformation prevents countless eligible voters in New York from voting and severely dilutes the votes of the African-American community.

2. **Elected Office:** See *infra*, “Employment” at 33.

3. **Jury Service**

- a. **State** – Jud. L. § 510(3): Persons convicted of felonies may not serve on juries in NYS.
  - b. **Federal** – 28 U.S.C. § 1865(b)(5): Persons with charges pending for or who have been convicted of state or federal crimes that carry maximum sentences of over one year are disqualified from serving on federal grand or petit juries, unless their “civil rights” have been “restored.”
4. **Surrogate’s Court Act:** A person convicted of a felony is ineligible to act as an executor with respect to a last will and testament of a deceased or as an administrator of the estate of someone who dies without a will. Surrogates Ct. Proc. Act §707.<sup>75</sup>

**DRIVERS’ LICENSES**

- 1. **NYS Driver’s License** (VTL §§ 510, 510-a, 510-b, 510-c, 1192-1194)
  - a. Certificates of Relief from Disabilities are generally **ineffective** in lifting suspensions or revocations. (VTL § 1193.)
  - b. **Alcohol and Drug Violations**<sup>76</sup>

<b>AGGRAVATED DRIVING WHILE INTOXICATED</b>			
A-DWI (.18 and higher Blood Alcohol Content [BAC])			
<b>CONVICTION</b>	<b>MANDATORY</b>	<b>JAIL SENTENCE</b>	<b>MANDATORY LICENSE ACTION**</b>

<sup>75</sup> Thanks are given to Gary Schoer, Esq., for this addition.

<sup>76</sup> <http://dmv.ny.gov/tickets/penalties-alcohol-or-drug-related-violations>. See also [http://dmv.ny.gov/sites/default/files/legacy\\_files/broch/c-39ddl-web.pdf](http://dmv.ny.gov/sites/default/files/legacy_files/broch/c-39ddl-web.pdf).

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	<b>FINE*</b>		
1st Offense (Misdemeanor)	Minimum \$1,000 Maximum \$2,500	Up to 1 Year	Minimum 1-year revocation
2nd Offense Within 10 years (Class E Felony)	Minimum \$1,000 Maximum \$5,000	Up to 4 Years; minimum 5 days jail or 30 days of community service if within 5 years of first offense	Minimum 18-month revocation
3rd Offense or more Within 10 years (Class D Felony)	Minimum \$2,000 Maximum \$10,000	Up to 7 Years; minimum 10 days jail or 60 days of community service if within 5 years of prior offense	Minimum 18-month revocation**
<b>DRIVING WHILE INTOXICATED</b> DWI (.08 and higher Blood Alcohol Content [BAC] or other evidence of intoxication) or <b>DRIVING WHILE ABILITY IMPAIRED BY A SINGLE DRUG</b> DWAI-Drug or <b>DRIVING WHILE ABILITY IMPAIRED BY A COMBINATION OF ALCOHOL OR DRUGS</b> DWAI-Combination			
<b>CONVICTION</b>	<b>MANDATORY FINE*</b>	<b>JAIL SENTENCE</b>	<b>MANDATORY LICENSE ACTION**</b>
1st Offense (Misdemeanor)	Minimum \$500 Maximum \$1,000	Up to 1 Year	DWI: Minimum 6-Month Revocation DWAI-Drug: Minimum 6-Month Suspension
2nd Offense Within 10 years (Class E Felony)	Minimum \$1,000 Maximum \$5,000	Up to 4 Years; minimum 5 days jail or 30 days of community service if within 5 years of first offense	Minimum 1-Year Revocation
3rd Offense or more Within 10 years (Class D Felony)	Minimum \$2,000 Maximum \$10,000	Up to 7 Years; minimum 10 days jail or 60 days of community service if within 5 years of prior offense	Minimum 1-Year Revocation
<b>DRIVING WHILE ABILITY IMPAIRED BY ALCOHOL</b> DWAI (more than .05 up to .07 Blood Alcohol Content [BAC])			
<b>CONVICTION</b>	<b>MANDATORY FINE*</b>	<b>JAIL SENTENCE</b>	<b>MANDATORY LICENSE ACTION**</b>
1st Offense (Traffic Infraction)	Minimum \$300 Maximum \$500	Up to 15 Days	90-Day Suspension
2nd Offense Within 5 years	Minimum \$500 Maximum \$750	Up to 30 Days	Minimum 6-Month Revocation

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(Traffic Infraction)			
3rd Offense Within 10 years (Misdemeanor)	Minimum \$750 Maximum \$1,500	Up to 180 Days	Minimum 6-Month Revocation
<b>ZERO TOLERANCE***</b> Drivers Under 21 (DMV administrative finding of .02 to .07 Blood Alcohol Content [BAC])			
	<b>CIVIL PENALTY</b>	<b>LICENSE ACTION</b>	<b>ADDED FEE</b>
1st Offense	\$125	6-Month Suspension	\$100 Suspension Termination Fee
2nd Offense	\$125	1-Year Revocation or until age 21, whichever is longer	\$100 Re-Application Fee
<b>CHEMICAL TEST REFUSALS</b> Drivers who decline chemical tests (normally testing blood, breath, or urine)			
	<b>CIVIL PENALTY</b>	<b>LICENSE ACTION</b>	<b>ADDED FEE</b>
Chemical Test Refusal	\$500	Minimum 1-Year Revocation	
Refusal within 5 years of previous DWI charge or refusal	\$750	Minimum 18-Month Revocation or 1-Year or until age 21 for drivers under 21	
Zero Tolerance Law	\$300	Minimum 1-Year Revocation	\$100 Re-Application Fee
Second or subsequent Zero Tolerance Law	\$750	Minimum 1-Year Revocation	\$100 Re-Application Fee
<p>* Conviction fine only. Does not include mandatory conviction surcharge or crime victims assistance fee. The surcharge for misdemeanors is generally \$260; the surcharge for felonies is generally \$400, depending on the court of conviction.</p> <p>** For license revocations, the Department of Motor Vehicles determines when your license can be returned. Its return or reinstatement, based on state law or regulation, is not automatic. You must reapply for your license and may have to take a test. Three or more alcohol or drug-related convictions or chemical test refusals within 10 years can result in a <b>permanent revocation</b>, with a waiver request permitted after at least five years.</p> <p>*** Note that, for drivers under the age of 21, revocation periods for second and subsequent A-DWI, DWI, DWAI-Drug, and DWAI-Combination offenses are typically 12-18 months <i>or until age 21</i>, whichever is longer.</p> <p><b>Mandatory Screening</b> - If you are charged with or convicted of certain alcohol-related offenses, the courts will order an alcohol screening and/or an alcohol evaluation, prior to sentencing.</p> <p><b>Mandatory "Ignition Interlock" Program</b> – Drivers convicted of misdemeanor or felony alcohol-related</p>			

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offenses will be required to install and maintain ignition interlock devices at the driver's own expense for any vehicles the driver owns or operates. These devices connect to the vehicle's ignition system and do not allow the vehicle to be started unless the driver's breath passes acceptable alcohol content standards.

**c. Other Alcohol and Drug-Related Laws**

- i) Chemical test refusal revocations
  - (1) Separate from and in addition to those for alcohol- or drug-related violations.
  - (2) If the refusal is later confirmed at a DMV hearing, license is revoked for at least one year and a civil penalty of at least \$500 is assessed.
  - (3) If the person refuses a chemical test within five years of a previous alcohol or drug-related violation or refusal, her license will be revoked for at least 18 months.
  - (4) If the person is under 21, a second refusal within five years or refusal within five years of a previous DWI-related charge requires license revocation for a least one year or until she turns 21, whichever is longer.
- ii) If the person illegally purchases alcoholic beverages by using a New York State driver license or Non-Driver ID card as proof of age, state law requires suspension of driver license, or privilege of applying for a license.

**d. Other Offenses and Crimes<sup>77</sup>**

Homicide, assault, or criminal negligence resulting in death from the operation of a motor vehicle	<b>6-month revocation</b>
False statement on an application for a license or registration, or substitution by another driver for a road test:	
Conviction in criminal court	<b>6-month revocation</b>
Finding by a DMV Administrative Law Judge	<b>1-year revocation</b>
Speed contest	<b>6-month revocation</b>
Second speed contest within 3 years	<b>1-year revocation</b>
Three speeding and/or misdemeanor traffic violations committed with 18 months	<b>6-month revocation</b>
Three violations for passing a stopped school bus within 3 years	<b>6-month revocation</b>
Leaving the scene of a fatal or personal injury accident	<b>6-month revocation</b>
Writing a bad check for DMV fees, Failure to pay a Driver Responsibility Assessment, Failure to satisfy a court judgment that results from a traffic crash, Failure to file an accident report, or Failure to pay child support	<b>Indefinite Suspension (until condition corrected)</b>

<sup>77</sup> [http://dmv.ny.gov/sites/default/files/legacy\\_files/broch/c-12.pdf](http://dmv.ny.gov/sites/default/files/legacy_files/broch/c-12.pdf).

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**e. For-Hire and Commercial Motor Vehicle (CMV) Violations**

- i) The penalties that apply to drivers of commercial motor vehicles, including trucks, taxis, and buses, may be different and are usually more severe. *See* the New York State Commercial Drivers Manual (CDL-10), available at most DMV offices and online.<sup>78</sup> For example:
- (1) Commercial licenses (VTL § 510-a(1)-(2)): suspension for at least one year for certain felony drug convictions. (VTL § 1192.2(5).)
  - (2) CDL holders who refuse to submit to chemical tests (including breathalyzer) are subject to at least a \$500 civil penalty and mandatory revocation of their CDL license *as a first offense* for at least 18 months, *even if the license holder was operating a personal, non-commercial vehicle at the time of the refusal*. CDL holders who are deemed to refuse chemical tests as repeat offenders face permanent CDL revocations. (VTL § 1194(2)(d)(1)(c))
  - (3) Excerpt from: **CDL-10, 1.6.2 – Alcohol, Leaving the Scene of an Accident, and Commission of a Felony**
    - (a) It is illegal to operate a CMV if your blood alcohol concentration (BAC) is .04% or more. If you operate a CMV, you shall be deemed to have given your consent to alcohol testing.
    - (b) You will be put out-of-service for 24 hours if you have any detectable amount of alcohol under .04%.
    - (c) You will lose your CDL for at least one year for a first offense for:
      - (i) Driving a CMV if your blood alcohol concentration is .04% or higher.
      - (ii) Driving any vehicle under the influence of alcohol.
      - (iii) Driving any vehicle while under the influence of a controlled substance.
      - (iv) **Refusing to undergo blood alcohol testing.**
      - (v) Leaving the scene of an accident without reporting.
      - (vi) Committing a felony involving the use of a vehicle.
      - (vii) Operating a CMV while your CDL is revoked, suspended, or canceled for prior violations, or after having been disqualified from operating a CMV, or after having been convicted for causing a fatality through negligent operation of a CMV, including but not limited to crimes of vehicular manslaughter or criminally negligent homicide.
    - (d) You will lose your CDL for at least three years if the offense occurs while you are operating a CMV that is placarded for hazardous materials.
    - (e) You will lose your CDL for life if convicted a second time for any of the offenses listed above.
    - (f) You will lose your CDL for life if you use a CMV to commit a felony involving controlled substances.
- ii) **Special Endorsements for CDL holders operating large, passenger vehicles.**<sup>79</sup>

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<sup>78</sup> New York State Commercial Driver's Manual CDL-10 (7/13), available at <http://dmv.ny.gov/commercial-drivers/new-york-state-commercial-drivers-manual> [hereinafter New York CDL Manual]. Manual is available in both English and Spanish.

<sup>79</sup> In addition to completing the requirements for obtaining and maintaining a CDL, CDL holders may apply for additional endorsements that permit them to operate large, passenger vehicles. A "P" endorsement is required to operate a vehicle that is designed to transport 15 or more adult passengers (not including the driver) or that is defined as a bus under VTL § 509-a. New York CDL Manual § 4.1. School bus drivers must have both a "P" endorsement and an additional "S" endorsement. *See* New York CDL Manual § 10; "Get a CDL 'S' endorsement for school bus drivers," available at [http://dmv.ny.gov/commercial-drivers/get-cdl-\"s\"-endorsement-school-bus-drivers](http://dmv.ny.gov/commercial-drivers/get-cdl-\).

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(1) There is a range of license classifications for passenger vehicles.

<b>NON-SCHOOL BUS DRIVERS</b>			
<b>Conviction</b>	<b>Disqualifications</b>	<b>Exceptions/Removability</b>	<b>Miscellany</b>
Violation of section 130.30, 130.35, 130.45, 130.50, 130.60, or 130.65	Permanent	Not applicable if individual was employed as a bus driver on 9/15/1985 and committed the offense before 9/1/1974	
		Discretionary waiver if 5 years have passed since release from incarceration AND applicant has a CRD	
Violation of section 1192 while driving a bus in the employ of a motor carrier or in furtherance of commercial enterprise	5 years		
Two violations of section 1192 in the past 5 years	5 years		
Two violations of section 1192 in any ten-year period after 15 September 1985	5 years		
Violation of section 600, subsection 2	5 years		If conviction was on or before 9/15/1985, disqualification is 3 years
Violation of section 120.04, 120.04-a, 125.13, 125.14 or 235.07	5 years		
Violation of section 511.3	5 years	Not applicable if individual was convicted on or before 9/15/1985	
<b>SCHOOL BUS DRIVERS</b>			
<b>Conviction</b>	<b>Disqualifications</b>	<b>Exceptions/Removability</b>	<b>Miscellany</b>
Violation of section 130.30, 130.35, 130.45, 130.50, 130.60, or 130.65	Permanent	Not applicable if individual was employed as a bus driver 9/15/1985 and committed the offense before 9/1/1974	
		Discretionary waiver if 5 years have passed since release from incarceration AND applicant has a CRD	CRD, if court-granted, must be issued by convicting court. All certificates must show that authority has considered the bearing of your act on your fitness as a school bus driver
Violation of sections 125.12, 125.13, 125.14, 125.15, 125.20, 125.21, 125.22, 125.25, 125.26, 125.27, 130.30, 130.35,	Permanent	Discretionary waiver if 5 years have passed since release from incarceration AND applicant has	CRD, if court-granted, must be issued by convicting court. All

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130.45, 130.50, 130.65, 130.66, 130.67, 130.70, 130.75, 130.80, 130.90, 130.95, 130.96, 135.25, 150.20, 230.30, 230.32, 230.34, 235.22, 263.05, 263.10, 263.11, 263.15, 263.16 of the penal law or an attempt to commit any of the aforesaid offenses under section 110.00 of the penal law		a CRD	certificates must show that authority has considered the bearing of your act on your fitness as a school bus driver
Violation of sections 100.13, 105.15, 105.17, 115.08, 120.12, 120.70, 125.10, 125.11, 130.40, 130.53, 130.60, 130.65-a, 135.20, 160.15, 220.18, 220.21, 220.39, 220.41, 220.43, 220.44, 230.25, 260.00, 265.04 of the penal law or an attempt to commit any of the aforesaid offenses under section 110.00 of the penal law	Permanent	Mandatory waiver if 5 years have passed since release from incarceration AND applicant has a CRD	CRD, if court-granted, must be issued by convicting court. All certificates must show that authority has considered the bearing of your act on your fitness as a school bus driver
		Commissioner has discretion to grant CRD and remove disqualification at any time	
Violation of sections 100.10, 105.13, 115.05, 120.03, 120.04, 120.04-a, 120.05, 120.10, 120.25, 121.12, 121.13, 125.40, 125.45, 130.20, 130.25, 130.52, 130.55, 135.10, 135.55, 140.17, 140.25, 140.30, 145.12, 150.10, 150.15, 160.05, 160.10, 220.06, 220.09, 220.16, 220.31, 220.34, 220.60, 220.65, 221.30, 221.50, 221.55, 230.00, 230.05, 230.06, 230.20, 235.05, 235.06, 235.07, 235.21, 240.06, 245.00, 260.10, subdivision two of section 260.20 and sections 260.25, 265.02, 265.03, 265.08, 265.09, 265.10, 265.12, 265.35 of the penal law or an attempt to commit any of the aforesaid offenses under section 110.00 of the penal law WITHIN THE PAST FIVE YEARS	5 years	Discretionary waiver if 5 years have passed since release from incarceration AND applicant has a CRD	CRD, if court-granted, must be issued by convicting court. All certificates must show that authority has considered the bearing of your act on your fitness as a school bus driver
		Commissioner has discretion to grant CRD and remove disqualification at any time	701.3 still applies
Violation of section 1192 while driving a bus in the employ of a motor carrier or in furtherance of commercial enterprise	5 years		
Two violations of section 1192 in the past 5 years	5 years		
Two violations of section 1192 in any ten-year period after 15 September 1985	5 years		
Violation of section 600, subsection 2	5 years		If conviction was on or before 15 September 1985,

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			disqualification is 3 years
Violation of section 120.04, 120.04-a, 125.13, 125.14 or 235.07	5 years		
Violation of section 511.3	5 years	Not applicable if was convicted on or before 15 September 1985	

f. **New York City Taxi drivers and others licensed by the Taxi and Limousine Commission**

- i) There are several different classifications of vehicle operators who are regulated by the New York TLC.<sup>80</sup>
- ii) Please note that there is a good chance that your client will be suspended by TLC pending the resolution of any criminal cases.
  - (1) Taxicab License holders (“Licensees”) are required to notify TLC *immediately* upon “any criminal conviction of the Taxicab Owner” and include a Certificate of Disposition for the case from the clerk of court. TLC Rule 58-15(g) (covering Medallion Taxicab Service).
  - (2) **Practice Tip:** If your client has had her TLC license suspended pending the outcome of the case: 1) try to get an ACD or dismissal; 2) try to get a violation plea (but NOT the DWAI infraction) such as Disorderly Conduct; OR 3) try to get the assigned District Attorney to call the TLC at 212 676 1130, and inform them that the case is a “LIKELY” or “PROBABLE” violation disposition (or dismissal). As soon as the ADA calls this number, the TLC can immediately turn on your client’s license and the client can start driving right away!
    - (a) \*NOTE that many Taxi drivers have similar names so if you can convince the D.A. to do this, you should give him/her your client's TLC license number.
  - (3) In 2011 the TLC promulgated new rules regarding license suspension and revocation of a TLC license based on criminal charges where the “chairperson believes that the charges, if true, would demonstrate that continued licensure would constitute a direct and substantial threat to public health or safety.”<sup>81</sup>
- iii) **Warning:** Your client may be given a chance to testify at a hearing to try to reinstate her TLC license during the pendency of the case. As tempting as this may sound, it is NOT a good idea. The testimony can be used against your client in her criminal case and the TLC almost never reinstates a license before the case has a disposition.

g. **Fees, and Civil Penalties**

- i) These are separate from and in addition to any fines paid upon conviction.
- ii) If your license is **suspended**, you must pay a \$50 fee to have a suspension terminated, unless it is an indefinite suspension or a suspension pending a hearing, prosecution, or investigation.
- iii) Violations of New York’s Zero Tolerance Law entail a \$100 suspension termination fee.
  - (1) The fee is \$70 for failure to answer a traffic ticket to pay a fine, mandatory surcharge, or crime victim assistance fee.
- iv) If your license is **revoked**, you may not apply for a new license until you pay a \$100 non-refundable re-application fee. The fee does not apply to drivers whose licenses are revoked for not having insurance, or those who complete New York State’s Drinking Driver Program.

<sup>80</sup> For a listing of TLC Rules and Local Laws, please see <http://www.nyc.gov/html/tlc/html/rules/rules.shtml>.

<sup>81</sup> See rules at <http://www.nyc.gov/html/nycrules/downloads/rules/F-TLC-8-11-11-a.pdf>.

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- v) After some revocations, you must pay a **state-mandated civil penalty on top of waiting the applicable revocation or suspension period** before your application for a new license can be accepted:
  - (1) No-Insurance or Uninsured Accident Revocation - \$750 civil penalty
  - (2) Chemical Test Refusal Revocation - at least \$500 civil penalty
  - (3) Chemical Test Refusal With Prior Refusal or Alcohol-Related Violation in Previous 5 Years - \$750 civil penalty<sup>82</sup>
- vi) For a more extensive discussion of fees, fines, and surcharges, see “Sentencing for Dollars” (Center for Community Alternatives) at [www.communityalternatives.org/articles/sentencing\\_dollars.html](http://www.communityalternatives.org/articles/sentencing_dollars.html).
- h. **Waivers of Suspension** (VTL § 510 & 530)
  - i) **Court:** The sentencing court can grant waivers of suspension in certain cases.
    - (1) Under VTL § 510(2)(b)(v), the sentencing court can waive suspension for drug offenses if (1) the license holder receives a Youthful Offender or other juvenile adjudication and (2) the court determines that there are “there are compelling circumstances warranting an exception.”
  - ii) **Conditional or Restricted Use Licenses** (VTL § 530)
    - (1) The DMV can grant a conditional use license when a license is required for employment, business, trade, occupation, or profession; for travel to and from a class or course at an accredited school, college, university, or state-approved institution of vocational or technical training; or for travel en route to and from a medical examination or treatment as part of necessary medical treatment for an individual or a member of his household.
      - (a) **Practice Tip:** conditional licenses are generally easier to get from the DMV than a waiver from the court.
      - (b) **Warning:** The DMV will revoke the conditional license if the holder is convicted of any other moving violation, such as an illegal U-turn or speeding ticket. *See* VTL § 530(3).
    - (2) **DMV Waiver Office:** (518) 474-0774.<sup>83</sup>
    - (3) An individual can get a **conditional license** while her criminal case is pending.
      - (a) The DMV can issue a conditional license to a driver who qualifies and who has a NYS license that is suspended or revoked because of an alcohol or drug-related violation. The driver must attend a Drinking Driver Program (DDP) approved by the DMV. If driver qualifies, the DMV sends instructions about how to enroll in the DDP with the suspension or revocation notice.
        - (i) Enrollment in the DDP requires payment of a \$75 non-refundable enrollment fee, plus up to \$225 for the DDP course. Failure to attend classes and other required events or to pay these fees results in being dropped from the program, loss of the conditional license, and entails a \$50 reinstatement fee to continue with the program.
      - (b) After plea and sentencing, court will revoke conditional license, but DMV will re-issue it automatically without a fee.
        - (i) However, the individual then often must get a letter from her Probation Officer affirmatively stating that the officer does not object to the license.

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<sup>82</sup> For more information, *see* “Suppose Your License Was Taken Away: A Guide to Suspension and Revocation of Driving Privileges in New York State,” available at [http://dmv.ny.gov/sites/default/files/legacy\\_files/broch/c-12.pdf](http://dmv.ny.gov/sites/default/files/legacy_files/broch/c-12.pdf)

<sup>83</sup> *Id.*

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- (4) When a driver with a **Commercial Driver's License (CDL)** is convicted for DWI in a *non-commercial vehicle*, the CDL is revoked and he or she cannot pursue his livelihood.
- (a) Under **prior law**, the driver could get a **conditional license** through the Drinking Driver Program that is valid for the operation of a commercial vehicle *only if*
- (i) he received a Certificate of Relief from Disabilities (CRD), and
- (ii) he took the CRD to the DMV when he applied for entry into the Drinking Driver Program and the conditional license.
- (b) **Warning:** Effective September 30, 2005, people with CDL licenses are **no longer eligible** for conditional licenses with commercial privileges, even if a court issues a CRD.<sup>84</sup> See Chapter 60 of Laws of 2005, codified at VTL §§ 510-a, 530(5), 1193, 1194, & 1196.

**2. Non-Resident Drivers**

- a. An individual with an out-of-state license can lose her privilege to drive in New York State for any of the reasons above.
- b. To request that privileges be restored after the mandated revocation period has passed, out-of-state residents **must** write to the State Department of Motor Vehicles:
- NYS Department of Motor Vehicles  
6 Empire State Plaza  
Albany, NY 12228  
Attn: Driver Improvement Unit, Room 336
- c. The request<sup>85</sup> must be accompanied by a \$25 restoration fee in the form of a check or money order made out to the Commissioner of Motor Vehicles. Any civil penalties for refusing to take a chemical test or for driving without insurance also must be paid before the request can be considered.

**EMPLOYMENT**

- 1. In General:** Employment is at risk from the moment a client is taken into custody—regardless of whether or not the arrest results in a conviction. Unemployed individuals who are looking for work are also at risk during the pendency of a case. A report by the National Employment Law Project documented the rampant discrimination faced by job applicants with criminal records.<sup>86</sup> Every state and city agency and nearly all private employers use criminal background checks to screen job applicants.
- 2. Public Employers:** An individual who is employed by a public agency or municipality is likely to face consequences from just an arrest, not just from a conviction.
- a. Examples
- i) Any State, City, Town, or Village employee
- ii) MTA or NYCTA
- iii) Department of Education

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<sup>84</sup> Thank you to Glenn Edward Murray, Esq., of Buffalo for noting this change in the law.

<sup>85</sup> Clients should complete Form DS-115, available at <http://dmv.ny.gov/forms/ds115.pdf>.

<sup>86</sup> Michelle Natividad Rodriguez & Maurice Emsellem, "65 Million "Need Not Apply:" The Case for Reforming Criminal Background Checks for Employment, National Employment Law Project, available at [http://www.nelp.org/page/-/65\\_Million\\_Need\\_Not\\_Apply.pdf?nocdn=1](http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1) (March 2011).

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- b. **Information Sharing:** State and municipal agencies are authorized by law to screen employee applicants using the DCJS fingerprint-based system.<sup>87</sup> DCJS then stores the fact of the background check on the applicant's criminal record, and automatically notifies most public employers and licensing agencies about all subsequent arrest charges<sup>88</sup> of their employees or licensees.
- i) **Practice Tip 1:** Ask your client if they have been fingerprinted for their job or license. If so, the job or licensing agency likely knows about any arrests that happened after the fingerprinting.
  - ii) **Practice Tip 2: Check the client's DCJS rap sheet for "Job/License Information";** any agency that is listed has already been notified of the **arrest** charges (NOT arraignment charges and not dispositions!)
- c. **Immediate Suspension**
- i) Often, due to DCJS's automatic notification of the employing agency, an arrest leads to immediate suspension.
  - ii) **Hearing:** Usually, the employee can request a hearing on the suspension, but to be successful your client might be forced to waive her 5<sup>th</sup> Amendment rights at the hearing and testify about the alleged criminal activity.
    - (1) You must make a strategic decision about how to proceed, depending on the potential impact on the criminal case and your client's priorities.
    - (2) **Practice Tip:** You *may* be able to obtain discovery through administrative subpoenas or if the police officers or complaining witness testify.
    - (3) **Warning: Clients will often try to have their suspension lifted by sending written explanations of the alleged criminal incident to the licensing agency.**
  - iii) **Mandatory Hearing:** Occasionally, especially where the underlying criminal charges relate to conduct that occurred on the job, a public employee will be forced to testify at an employment hearing. "Under both the State and Federal Constitutions, a statement made under threat of dismissal is protected by the privilege against self-incrimination and automatically immunized from use in criminal proceedings."<sup>89</sup> The immunity attaching to a compelled statement bars the People from using in any way the statement itself or any evidence derived directly or indirectly from it."<sup>90</sup>
- d. **Broad Discretion by Employer:** Most public employers are entitled to terminate or suspend based on any "immoral conduct," and this gives them immense discretion.
- i) A favorable termination in the criminal proceeding will often lead to reinstatement (and sometimes back pay, especially if the employee has complied with all requirements to give the employer notice of an arrest). However, because the employer only has to satisfy an administrative burden of proof, the employer *can* terminate based only on hearsay (e.g., a criminal complaint).
  - ii) Some agencies are better than others – find out the character of the agency (the Union rep or legal department is often your best source of information).
  - iii) The apparent relevance of the conviction to the position will be important for informal advocacy in this area. Correction Law Article 23-A and NYS Human Rights Law protections

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<sup>87</sup> See, e.g. N.Y. Executive Law §845-b; N.Y. Comp. Codes R & Regs. tit. 9, §6051.2 (2014)

<sup>88</sup> Note that DCJS only sends out **arrest charges** and not arraignment charges, indictment charges, or dispositions.

<sup>89</sup> See Matter of Matt v. Larocca, 71 N.Y.2d 154, 159 (1987); Lefkowitz v. Turley, 414 U.S. 70, 79 (1973)

<sup>90</sup> People v. Corrigan 80 N.Y.2d 326, 329 (1992)

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- apply only to convictions—not to open arrests or the underlying allegedly criminal conduct. (see below).
- e. **Practice Tip 1:** Contact your client’s union legal department to determine the effect of future pleas in the case. **Get them involved as soon as possible!** Some public employers, such as the New York City Housing Authority, will attempt to terminate based on ACD’s.
  - f. **Practice Tip 2:** Find out if your client has a **duty to report** new arrests to his public employer. An employer will often find out through routine reporting from the Police Department or DCJS, but **the failure to report can be an independent cause for discipline, including termination.**
- 3. Licensing Regimes:** Well over 100 jobs and professions require some type of license or background check through a state or city agency
- a. Examples
    - i) NYS Department of State (licenses security guards, alarm installers, realtors, notaries, and many other professions)
    - ii) NYC Department of Education (Conducts background checks of private and public school teachers and staff, including custodial staff)
    - iii) NYC Taxi & Limousine Commission (Licenses taxi and livery cab drivers)
    - iv) New York City Department of Consumer Affairs (licenses locksmiths, home improvement contractors, plumbers)
    - v) New York State Department of Health (conducts background check for home health aides and certified nursing assistants)
    - vi) For commercial driver’s licenses & taxi drivers, see Drivers’ Licenses section, *supra* at 25.
  - b. All of the points about public employers also apply to licensing agencies. In particular, those who are licensed/screened by the Dep’t of Health, the Taxi & Limousine Commission, and the New York City Department of Education are very likely to be suspended pending the criminal case.
  - c. The Legal Action Center has a compilation of the licensing regimes and their bars to eligibility. The “Occupational Licensing Survey” is available on Reentry.Net/NY (<http://bit.ly/1k23vTJ>).
  - d. **Federal agencies** also conduct background checks for a number of professions and licenses. One relatively recent example, promulgated by Congress at the height of the foreclosure crisis, is a minimum standard for state-licensed loan originators which categorically prohibits licensing any individual with any felony conviction or plea (whether guilty or nolo contendere) in the past seven years.<sup>91</sup>
    - i) Some Federal Agencies, such as the Federal Deposit Insurance Corporation (FDIC), consider even *sealed ACD’s* to be convictions that bar applicants from a professional license.<sup>92</sup>
  - e. For information regarding commercial driver’s licenses and other occupations involving driving, see “Drivers’ Licenses” section, *supra* at 25.
- 4. For enlistment in the U.S. Armed Forces,** see “Additional Consequences,” *infra* at 88
- 5. Public Offices:** There is no bright line rule in New York that a person with a criminal conviction may not hold public office, although a person holding public office who has been sentenced to a state

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<sup>91</sup> 12 U.S.C. § 5104. Congress has increasingly used its authority to enact statutes mandating federal background checks for a wide range of occupations. See Madeline Neighly and Maurice Emsellem, National Employment Law Project, *Wanted: Accurate FBI Background Checks for Employment 7*, available at <http://www.nelp.org/page/-/SCLP/2013/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf?nocdn=1>.

<sup>92</sup> See Smith v. Bank of America, 865 F. Supp. 2d 298 (E.D.N.Y. 2012).

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correctional institution (*see* Civil Rights Law §79(1)), or who has been convicted of a felony or a crime involving violation of the oath of office (*see* Public Officers Law § 30(1)(e) forfeits that office.

- a. There is no clear definition of “Public Office.” Not all public employees fall under this label. Some examples: election official, police officer; firefighter; court officer; law enforcement jobs; notary public; some elective offices.<sup>93</sup>
- b. The client should ask the employer or licensing agency whether the relevant position is a public office and whether there’s a bar for felony or misdemeanor convictions.
  - i) If so, because the Correction Law specifically excepts the right to seek or retain public office from the rights restored by a Certificate of Relief from Disabilities, Corr. L. § 701(1), the only way to lift the bar is a Certificate of Good Conduct (*see supra* at 19).
- c. **Serving elected office**
  - i) A person who has a criminal conviction is not necessarily barred from running for elected office after serving their sentence (although they may be, if the conviction was for certain bribery or corruption offenses, *see, e.g.*, Pub. Officers L. § 77-a.)
  - ii) Elec. L. § 6-122: A person shall not be designated or nominated for a public office or party position who (1) is not a citizen of the state of New York; (2) is ineligible to be elected to such office or position; or (3) who, if elected will not at the time of commencement of the term of such office or position, meet the constitutional or statutory qualifications thereof or, with respect to judicial office, who will not meet such qualifications within thirty days of the commencement of the term of such office.
  - iii) N.Y. Const. Art. 13, § 5 mandates a provision for removal of public officers for misconduct.

## **6. Employment Discrimination – Rights and Responsibilities**

- a. ***Disparate Impact on the Basis of Race (Federal law)***
  - i) Under Title VII of the Civil Rights Act of 1964, the EEOC has determined that an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records, absent business necessity, has an adverse impact on African-Americans and Latinos in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population.
  - ii) An employer can show business necessity when the applicant has engaged in conduct that is particularly egregious or related to the position in question.
  - iii) This cause of action is often called the Griggs theory of the disparate racial impact of any policy under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k).
- b. EEOC guidance from April 2012 [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) provides more direction and guidance to employers on best practices, and also makes it clear that complete bans on hiring people with convictions violate the law (mirroring New York State law).
  - i) The original EEOC guidance on this issue states that screening based on arrest/conviction records is facially neutral but has a disproportionate impact, given the disproportionality of

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<sup>93</sup> *See, e.g., Caraccilo v. Village of Seneca Falls, N.Y.*, 582 F.Supp.2d 390, 402 (W.D.N.Y., 2008) (“A ‘public officer’ has been described as ‘an independent officer whose position is created, and whose powers and duties are prescribed, by statute and who exercises a high degree of initiative and independent judgment.’ O’Day v. Yeager, 308 N.Y. 580, 586 (1955).”); Dawson v. Knox, 231 A.D. 490, 492 (3d Dep’t 1931) (“The line between a public office and public employment has not been too clearly marked by judicial expression, probably because the distinction is not too clear. The holder of a public office is in the employment of the public, but all those who are in the public employment are not public officials and do not hold public office. The duties of a public official involve some exercise of sovereign power—those of a public employee do not. The one has independent official status; the other has rights under a contract of employment.”).

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- incarceration rates. “[A]n absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII.”<sup>94</sup>
- ii) EEOC requires individualized assessment taking into account:
    - (1) The nature and gravity of the offense or offenses;
    - (2) The time that has passed since the conviction and/or completion of the sentence; and
    - (3) The nature of the job held or sought.<sup>95</sup>
  - iii) Recently-filed suits for violation of this policy include:
    - (1) Arroyo v. Accenture, Case No. 10-civ-3013 (S.D.N.Y., filed April 8, 2010)
    - (2) Hudson v. First Transit, Inc., Case No. C10-03158 (N.D.Cal., filed July 20, 2010)
    - (3) Mays v. Burlington Northern Santa Fe Railroad Co., Case No. 1:10-cv-00153 (N.D. Ill., filed Jan. 11, 2010)
    - (4) Johnson, et al. v. Locke (suit against U.S. Census Bureau), Case No. 10-cv-3105 (S.D.N.Y., filed April 13, 2010)
- c. **Federal and State Fair Credit Reporting Acts (FCRA)** (Employment & Housing)
- i) Most private employers and landlords receive criminal history information from a variety of consumer reporting agencies (CRAs), rather than official sources. A number of national studies have shown that reports from these CRAs are notoriously incorrect or incomplete. FCRA establishes standards of accuracy and procedural rights if a report is the basis for adverse decisions. See 15 U.S.C. § 1681 *et seq.*
    - (1) **Practice Tip:** Under FCRA, your client has the *right to see a copy of any background check* an employer has run on them BEFORE that employer makes an adverse hiring decision based on a criminal record. Applicant also has right to correct errors.<sup>96</sup>
  - ii) New York State’s FCRA prohibits reporting non-criminal convictions, such as violations. See Gen. Bus. L. § 380 *et seq.*
  - iii) These protections can be used to promote fairness in both employment and housing decisions.
  - iv) Both the state and federal FCRA’s contain causes of action if the CRA reports inaccurate information in a negligent or reckless manner.<sup>97</sup> Some recent cases filed:
    - (1) Williams v. Prologistix, Case No. 1:10-cv-00956 (N.D. Ill., filed Feb. 11, 2010);
    - (2) Smith v. HireRight Solutions, et al., Case No. 4:10-cv-444 (N.D. Okla., filed July 7, 2010);
    - (3) Henderson v. HireRight Solutions, et al., Case No. 10-cv-443 (N.D. Okla., filed July 7, 2010);
    - (4) Hunter v. First Transit, Case No. 1:09-cv-06178 (N.D. Ill.; filed Oct. 5, 2009);
    - (5) Joshaway v. First Student, Case No. 2:09-cv-02244 (C.D. Ill., filed Oct. 5, 2009);
    - (6) Ryals v. HireRight Solutions, et al. Case No. 3:09-cv-00625-RLW (E.D. Va., filed Oct. 5, 2009).

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<sup>94</sup> The U.S. Equal Employment Opportunity Commission, Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1982), Feb. 4, 1987. See also Federal Trade Commission, “Background Checks: What Job Applicants and Employees Should Know,” at <http://www.consumer.ftc.gov/articles/pdf-0143-background-checks-what-job-applicants-employees-need-know.pdf>

<sup>95</sup> *Id.*

<sup>96</sup> 15 U.S.C. § 1681b(b)(3))

<sup>97</sup> Noam Weiss, Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act, 78 BROOK. L. REV. 271 (available at [http://practicum.brooklaw.edu/sites/default/files/print/pdfs/journals/brooklyn-law-review/volume-78/issue-1/blr\\_v78i\\_5.pdf](http://practicum.brooklaw.edu/sites/default/files/print/pdfs/journals/brooklyn-law-review/volume-78/issue-1/blr_v78i_5.pdf)). See also <http://www.reentry.net/ny/library/attachment.190723>

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- v) The Attorney General of New York has recently conducted several major investigations of private background check companies. If you see a systemic problem with a particular company, you may file a civil rights complaint by calling (212) 416-8250, emailing [civil.rights@ag.ny.gov](mailto:civil.rights@ag.ny.gov) or visiting [www.ag.ny.gov](http://www.ag.ny.gov).
- d. **Arrests without convictions (Favorable Dispositions)**
- i) NYS Human Rights Law (Exec. L. § 296(16)) prohibits public and private employers and occupational licensing agencies from denying any individual a job or license (or otherwise discriminating against or “acting adversely upon” that person) because of any arrest that did NOT result in a conviction. (These arrests should be sealed under CPL § 160.50 or 160.58 and viewed as a legal nullity under CPL § 160.60.)
  - ii) Does NOT apply to police or law enforcement jobs or firearm licenses.
  - iii) NYC Human Rights Law (NYC Admin. Code § 8-107(11)) offers similar protection.
  - iv) Where federally mandated (such as by overriding SEC or FDIC regulations), employers may inquire about arrests related to specific character traits (such as dishonesty, misuse of funds or fraud).<sup>98</sup>
- e. **Convictions**
- i) Provisions: Corr. L. §§ 750-755 (Art. 23-A) and NYS Human Rights Law (Exec. L. § 296(15) & (16)). There are numerous cases analyzing Correction Law Article 23-A. *See, e.g., Matter of Acosta v. New York City Dept. of Educ.*, 16 N.Y.3d 309 (2011); *Matter of Arrocha*, 93 N.Y.2d 361 (2009); *Bonacorsa v. Van Lindt*, 71 N.Y.2d 605 (1988); *Thomas v. New York City Dept of Educ.*, 46 Misc. 3d 308 (N.Y. Cnty Sup. Ct. 2014)
  - ii) **Youthful Offender Adjudications, Violations Convictions, and Conditionally-Sealed Convictions:** the Human Rights Law prohibits private and public employers and licensing agencies from asking job-seekers about **Youth Offender adjudications and sealed violations** (petty offense convictions). The statute specifically states that employers and licensing agencies cannot “make any inquiry about, whether in any form of application of otherwise, or to act upon adversely to the individual involved” any Youthful Offender adjudication or sealed violation. (2007 N.Y. Laws 639). In 2009, these protections were extended to convictions that have been **conditionally sealed** under CPL §160.58.
    - (1) This provision does not apply to an application for employment or membership in any law enforcement agency or for a firearm license.
  - iii) It is illegal for employers and licensing agencies to have a policy of not hiring any person with a criminal history – they must consider each applicant individually.
  - iv) It is illegal for employers and licensing agencies to deny any person with a criminal record a job or license because of his past conviction(s) UNLESS:
    - (1) The conviction(s) are “directly related” to the job in question, or
    - (2) Hiring or licensing that person would create an “unreasonable risk” to the safety of people or property.
    - (3) Corr. L. § 753 lists eight factors that must be considered in determining whether a conviction meets the above criteria:
      - (a) The public policy of New York to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
      - (b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.

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<sup>98</sup> See *Smith v. Bank of America*, 865 F.Supp.2d 298 (E.D.N.Y. 2012), *In re Ruggiero*, 263 A.D.2d 554, 556, 693 N.Y.S.2d 266, 268 (1999).

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- (c) The bearing, if any, that the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
  - (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
  - (e) The age of the person at the time of occurrence of the criminal offense or offenses.
  - (f) The seriousness of the offense or offenses.
  - (g) Any information produced by the person, or produced on his behalf in regard to his rehabilitation and good conduct.
  - (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.
- (4) Courts will generally not reweigh these eight factors unless there is a finding that that the employer's or licensing agency's decision was unreasonable or capricious.
- (a) Unreasonableness is proven by showing that there is no rational basis for deciding the way the employer or licensing agency did after weighing the eight factors.
- (5) Certificates of Rehabilitation (see *supra* at 16):
- (a) Corr. L. § 753 also mandates that a certificate of rehabilitation creates a presumption of rehabilitation, but the certificate of rehabilitation does not create a prima facie entitlement to the license the person is applying for.<sup>99</sup>
  - (b) The presumption of rehabilitation will be rebutted only by evidence proving lack of rehabilitation.<sup>100</sup>
  - (c) The rebuttal of this presumption **must** be done by reviewing the factors of §753 (1).
- (6) Some statutes create an exception and will render Corr. L. §§ 750-55 inapplicable.
- (a) E.g. Banking Law § 599-e(1)(b)(ii) prohibits the issuance of a MLO license if the applicant has been convicted of a felony and, in the event the conviction was more than seven years before the application, “if such felony involved an act of fraud, dishonesty, or a breach of trust, or money laundering.”<sup>101</sup>
  - (b) E.g. Exec. L. § 130 prevents individuals with a prior felony conviction for one of the types of felonies listed in that section to receive commission as a notary public unless they have received a certificate of good conduct or a pardon.
- v) Applicant can demand a written statement from employer or licensing agency detailing reasons for denial. The statement must be sent within 30 days. (Corr. L. § 754.)
- vi) NYC Human Rights Law (NYC Admin. Code § 8-107(10)) offers similar protection.
- (1) In June 2014, NYC Council expanded the Human Rights Law provisions to include interns (N.Y. State law has been interpreted to exclude them.<sup>102</sup>). See NYC Admin Code §§ 8-102(28), 8-107(23).
- vii) In 2008, the NYS Legislature created a liability shield for employers that comply with Article 23-A: “there shall be a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervising a hiring manager, if after learning about an applicant or employee's past criminal conviction history, such employer has evaluated the factors set forth in section seven hundred fifty-two of the

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<sup>99</sup> Dempsey v. New York City Dep't of Educ., 108 A.D.3d 454, 455 (1st Dep't 2013).

<sup>100</sup> Robles v. LiMandri, 107 A.D.3d 592 (1st Dep't 2013).

<sup>101</sup> DeRaffele v. State of New York Banking Dep't, 104 A.D.3d 557, 558, (1st Dep't 2013).

<sup>102</sup> Wang v. Phoenix Satellite Television, 13 Civ. 218, 2013 U.S. Dist. LEXIS 143627 (S.D.N.Y. Oct. 3, 2013).

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- correction law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.” (Exec. L. § 296(15).)
- f. **Warning:** these protections generally only apply to job *applicants*, not current employees. Current employees or license-holders are protected from termination only if the convictions preceded their employment or the granting of a license and they did not misrepresent their criminal histories at application. The anti-discrimination purpose of this statute does not extend to termination of employees, only to refusals to grant licenses to or hire an applicant who was previously convicted of a crime.<sup>103</sup>
- g. **Pre-Employment Inquiries**
- i) Employers and licensing agencies may ask whether the job applicant has been convicted of any crime.
- (1) **Practice Tip:** Remember that *violations are NOT “convictions of crimes.”* N.Y. Pen. L. § 10.00(3) & (6). But they will show up on background checks until they are sealed.
- (2) **Practice Tip:** Applicants are NOT protected by New York’s anti-discrimination statutes if they lie about their conviction histories on employment applications. Thus it is crucial that clients understand their criminal records.
- ii) Employers may NOT ask about any arrests that did not result in a conviction. N.Y. Exec. L. § 296(16); CPL § 160.60.
- (1) Exceptions:
- (a) Government licensing agencies regulating guns, firearms,<sup>104</sup> and other deadly weapons;
- (b) Applications to become a police officer or peace officer as defined in CPL § 1.20(33) & (34).
- (2) **Practice Tip:** A job application in New York State that asks about arrests is illegal, and under CPL §§ 160.50 & 160.60 client can legally answer “no” about any arrest that led to a “favorable termination” as defined in CPL § 160.50.
- h. **Enforcement**
- i) The New York Human Rights Law, Exec. L. §§ 296(15) & (16); 297, permits a private right of action against employers who act adversely upon applicants because of a sealed arrest (whether that arrest was sealed under the Youthful Offender law, or under CPL § 160.50, § 160.55, or § 160.58).
- (1) There is a one year statute of limitations to bring a claim against a private employer. Exec. L. § 297(5).
- ii) You can also sue an employer that does not abide by the requirements of Corrections Law Art. 23A, which protects those who have criminal convictions (see *supra* section 6.e).
- iii) To vindicate these rights, an individual may file a complaint against a private employer with the State Division of Human Rights (call (888) 392-3644) or the New York City Commission on Human Rights (call (212) 306-7450 (or 311)). Instead of going to these agencies, she may choose to pursue an employment discrimination claim for damages in the appropriate civil or supreme court. Exec. L. § 297

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<sup>103</sup> See Martino v. Consol. Edison Co. of New York, Inc., 105 A.D.3d 575, (1st Dep’t 2013); Green v. Wells Fargo Alarm Service, a Div. of Baker Protective Services, Inc. 192 A.D.2d 463 (1st Dep’t. 1993).

<sup>104</sup> See Wilson v. New York City Police Dep’t License Div., 115 A.D.3d 552, (1st Dep’t 2014) (Although favorably terminated and thus a “nullity” pursuant to CPL §160.60, applicant for firearm license still had to disclose arrest to N.Y.P.D. licensing division.)

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- iv) **However** if the employer is a public employer, then an applicant can only challenge the action in an Article 78 proceeding in Supreme Court, **which carries a 120-day Statute of Limitations.**
- v) Note: Person alleging employment discrimination within Article 23-A has the burden of proof.<sup>105</sup>

## **7. Actual Employment Practices**

- a. Despite the protections afforded by the law, there is a demonstrated preference for hiring people without a record. In a research study conducted by Professor Devah Pager, the focus was on the effect of a criminal record on employment opportunities and the comparison of that effect between African-Americans and whites.<sup>106</sup> The study made the following findings:
  - i) 34% of whites without criminal records received callbacks, relative to only 17% of whites with criminal records. This demonstrated that a criminal record reduced the likelihood of a callback by 50%.
  - ii) Among African-Americans without criminal records, only 14% received callbacks, relative to 34% of white non-criminals (which was also less than whites **with** criminal records – 17%) and only 5% of African-Americans with criminal records received callbacks.
  - iii) Among those who receive call-backs or are offered a job following the interview, there is also considerable racial discrimination in positions for which minority applicants will be hired.<sup>107</sup>

## **8. Alcohol or Drug Dependence**

- a. **Federal law** – Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*
  - i) Prohibit discrimination by public or private employers (with 15 or more employees) against persons with a past or current disability (or those who are perceived to have a disability) who are otherwise qualified to perform the job they seek or hold. These laws also require reasonable accommodation to this disability.
  - ii) **\*\*This law does NOT protect those who “currently engage in the illegal use of drugs.”**
  - iii) However, those in treatment, including methadone treatment, are covered.
- b. **State law** – NYS Human Rights Law, Exec. L. §§ 290 *et seq.*
  - i) Reaches more employers (four or more employees) and protects a broader range of people than federal laws.
  - ii) Definition of disability is broader.
- c. NYS Division of Human Rights has recognized alcoholism, a history of drug abuse, and participation in a methadone maintenance program as disabilities.
- d. **\*\*Protects those currently using illegal drugs IF they can safely perform their job duties.**

## **FAMILY LAW**

### **1. Family Court In General**

- a. New York Family Courts hear the following types of cases:
  - i) Abuse and Neglect

<sup>105</sup> Rossetti v. Aretakis, 78 A.D.3d 1148 (2d Dep’t 2010).

<sup>106</sup> Devah Pager, The Mark of a Criminal Record, 108 AM. J. OF SOCIOLOGY 5, 937-75 (March 2003).

<sup>107</sup> Devah Pager et al., Employment Discrimination and the Changing Landscape of Low-Wage Labor Markets, 1 University of Chicago Legal Forum 317 (2009)

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- ii) Custody
  - iii) Guardianship
  - iv) Termination of Parental Rights (and Surrenders)
  - v) Adoption
  - vi) Voluntary Placements in Foster Care
  - vii) Persons in Need of Supervision (PINS)
  - viii) Juvenile Delinquency
  - ix) Child support
  - x) Paternity
  - xi) Family Courts do not handle matrimonial cases. All matrimonial (divorce) cases are heard in the Supreme Court. Custody disputes with concurrent matrimonial disputes are usually heard in the Supreme Court.
- b. Family Court Records
- i) The records of any proceeding in the Family Court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. (See Family Court Act (“FCA”) § 166)
  - ii) While Family Court is generally open to the public (See 22 NYCRR § 205.4), the general public may be excluded from any hearing in an abuse or neglect proceeding and only persons (and the representatives of authorized agencies) who have an interest in the case will be admitted to the courtroom. (See FCA § 1043)
  - iii) A criminal defense attorney should be able to gain access to many parts of the Family Court records (including the ability to order transcripts of Family Court testimony) by presenting a notarized release, signed by the attorney’s client.
- 2. Abuse and Neglect Cases (Article 10 of the FCA)**
- a. In other jurisdictions, these are called “dependency cases.” In New York State, they are referred to as “abuse and neglect” or “Article 10” cases.
  - b. **Practice Tip:** If your client is charged with a crime involving a child (such as Endangering the Welfare of a Child) or charged with any crime that may have put her children at risk, it is likely that she will also have an Article 10 case in Family Court.
  - c. Family Court prosecutions are filed by municipal child protective agencies (in New York City, the Administration for Children’s Services, or “ACS<sup>108</sup>”) against parents and other caretakers, accusing them of neglecting or abusing the children in their care.
  - d. The goal of Article 10 cases is to **reunify** families! Where families are separated, child protective agencies are required to make “reasonable efforts” toward reunification.
    - i) Limited exceptions: Where, for example, one parent has killed the child’s other parent, the child protective agency may move for an order “excusing” its statutory obligation to make “reasonable efforts” toward reunion.
  - e. Definitions:
    - i) Definition of Neglect: A child who is less than 18 years of age whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his or her parents or other person legally responsible for his care to exercise a minimum degree of care. (See FCA § 1012)
    - ii) Definition of Abuse: A child less than 18 years of age whose parent or other person legally responsible for his care inflicts or allows to be inflicted upon such child physical injury by

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<sup>108</sup> Throughout this section, we will use “CPS” to refer to the government agency that prosecutes these cases. If you practice in NYC, you should assume we are referring to ACS when we use the term “CPS.”

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- other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of any bodily organ. (See FCA § 1012)
- iii) **“PLR”**: To be a “respondent” in an Article 10 case, the parent must be a parent or a “person legally responsible.” That a respondent is neither a parent nor a PLR can be a successful defense, as only parents and PLRs are seen to have a caretaker’s duty of care to the child.
- f. Preliminary Matters:
- i) **Pleadings**: The pleadings are called “petitions,” and they contain the child protective agency’s allegations against the parents.
- (1) **Liberal construction of pleadings**: Practitioners should note the failure of “facial insufficiency” arguments that may be available in other venues. The Family Court will liberally grant leave for the petitioner to amend the pleadings, curing any defects and even adding completely unrelated causes of action. Even after trial, the Family Court will likely “conform the pleadings to the proof,” thereby rendering relevant all evidence that falls outside the scope of what was pleaded, subject to very little limitation.
- ii) **Service of Process**: Parents and PLRs are entitled to service with a summons and the neglect or abuse petition. In most cases, they are merely instructed to come to court. It is nearly always in a parent’s interest to appear in the action on the first court date, which is the same date that the petition is drafted and filed, thus arguments about defects in service are likely to be futile.
- (1) **Practice Tip**: Where the parent is arrested and that police activity instigates a child protective investigation, much of the preliminary process may take place while the parent is held in jail, pre-arraignment. Especially in NYC, parents are well advised to go straight from arraignments to the Family Court to inquire about their children’s whereabouts, whether cases have been filed, and whether they can speak to attorneys, even though they will not have been served with process at that time.
- g. Removals
- i) **Removal of children**: At the time a petition is filed, parents and PLRs may already have had their children removed. Whether or not pre-petition removal has taken place, the petitioner may still ask the Family Court to remove the children from the home at the first opportunity.
- (1) **Emergency removal powers**: The law requires that child protective agencies obtain a court order before removing children. When the child protective agency does not have the opportunity to seek a court order, however, the agency has statutory authority to remove children using its “emergency removal” powers. If they remove children, however, they are required to file a petition in Family Court within 24 hours.
- (a) In reality, most removals happen as “emergency” removals, after courthouse hours.
- h. **Post-arraignment investigation; no right to remain silent**
- i) **Criminal practitioners must understand that—despite being represented by counsel in criminal court or beyond—there is no legally recognized prohibition on municipal child protective workers’ ability to question your clients fully about the circumstances of their arrests, the allegations, or the criminal charges.**
- ii) CPS may come to your client’s home during the investigation phase and often are accompanied by the police. Though the police will likely not question your client if there are already criminal charges pending in court, nothing prevents CPS from sharing information with the police.
- i. All parents accused of neglect and/or abuse are entitled to an attorney (See FCA § 262)
- i) **Note**: No parent will have a court-appointed attorney assigned to represent him or her **until** an abuse or neglect petition is actually filed in Family Court **and** the parent appears in front of

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- a judge. (Nothing prevents a parent from seeking advice of counsel during a CPS investigation, but they will not be advised that it is in their interest to do so and, often times, they will be advised that they should not bring advocates to investigative meetings.)
- (1) What does this mean?
    - (a) A parent will usually NOT have an attorney when CPS comes to investigate.
    - (b) A parent will usually NOT have an attorney when CPS comes *with the police* to search her home and interrogate her.
    - (c) If a parent goes to any conferences with CPS she will be unrepresented.
  - (2) Sometimes CPS monitors and investigates a family for months before ever filing anything in Family Court.
    - (a) What does this mean?
      - (i) Your clients will be interrogated about EVERYTHING in their lives without an attorney.
      - (ii) They will be told that they can keep their children at home if they just tell CPS what happened.
      - (iii) They will be asked to make admissions about every detail concerning their criminal cases and will often make admissions that can later be used against them in their criminal cases.
- j. Who will be represented once a petition is filed in Family Court?
- i) Every respondent (a parent or PLR)
  - ii) Some non-respondent parents (parents not being accused of abuse or neglect).
    - (1) **Note:** In domestic violence cases this means that your complaining witness may be assigned an attorney in the concurrent Family Court case arising from the same event.
      - (a) Quick investigation of the criminal case is thus valuable (often there can be a lapse of a few days), and
      - (b) Consult ethical rules governing communication with a person represented in a related matter. (New York Rules of Professional Conduct, 4.2(a))
  - iii) All children will be assigned lawyers at arraignments
    - (1) **Note:** This is particularly important for investigation of your criminal case if your case involves a child as a complaining witness
- k. When will CPS come knocking?
- i) Sometimes CPS has already spoken with your client before you met him at arraignments.
  - ii) Sometimes CPS comes immediately after an arrest.
  - iii) Sometimes CPS comes many months later
- l. **What can a criminal attorney do at arraignments?**
- i) Find out where your clients' children are, if their children have been removed.
    - (1) If the client does not know where his/her children are, obtain the names and phone numbers of friends or family members who would be able to care for the children in the event that reunification is not immediate.
      - (a) Information you should obtain about "kinship resources" to propose a "kinship"-based placement:
        - (i) Phone number & address
        - (ii) Name and DOB of the resource, and every adult living in that person's home
        - (iii) A brief summary of criminal history, CPS history, and any open cases. Though most prior CPS "indicated" cases may render a person ineligible to formally become a foster parent (with subsidies paid), in many cases the person may take care of the children with a court order of "temporary release" despite some criminal and/or CPS history.

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- ii) Notify your client that CPS may come to investigate if:
  - (1) This is a case involving a child related to them in some way (i.e. biological child, step-child, child that they live with, child that they care for on a semi-regular basis)
  - (2) This is a case between your client and the mother or father of their child (i.e. domestic violence cases)
  - (3) There is an endangering charge
  - (4) A child was present when the alleged crime was committed
  - (5) Your client lives with a child
- iii) Ensure that any criminal Order of Protection (O/P) allows for the Family Court to work toward reunification. Make sure your client has a copy of the O/P.
  - (1) **Practice Tip:** Potential solutions include:
    - (a) Convincing the criminal court to only render a “limited” O/P;
      - (i) Remember that if it is a limited O/P then the parent can see the child without further Family Court involvement.
    - (b) Convincing the criminal court to add this clause: “subject to Family Court modification.”
      - (i) This allows Family Court to potentially allow your client to remain with his or her child despite the criminal order of protection or, at the very least, to begin a longer process of reunification. When the Family Court’s ability to reunite a family is hampered by a criminal court order of protection, justice in both venues promises to be slow.
- iv) Counsel your client to contact you immediately if CPS makes contact with them.
- v) Counsel your client not to speak about her criminal case with ANYONE other than her attorney.
  - (1) **Practice Tip:** It is uncanny how much a client’s politeness to CPS staff can win the day, especially when declining to answer questions or citing his/her interest in having an attorney present. CPS workers will often dissuade your client from seeking advice of counsel, and suggest that it is in their interest to “comply” with all aspects of the investigation. Maintaining a cordial relationship with a CPS worker—to the extent possible (and often it simply is not possible)—can prove incredibly valuable. Though sometimes counterintuitive, a parent is well-advised to decline questioning politely while also expressing that they will continue to participate in the process.
- vi) If your client is assigned a Family Court attorney, get in touch with that attorney immediately.
- vii) Find out when any meetings with CPS will take place and talk to your client about how to discuss the criminal charges
  - (1) **NYC: Child Safety Conferences.** In NYC, ACS routinely holds Child Safety Conferences (CSCs) before filing an Article 10 case in court, purportedly to make decisions about where the children should live (though decisions are often already made before these conferences begin). It is usually in your client’s interest to attend those conferences with a parent advocate (subject to the caveat below) and friends or family there for support. ACS often takes the position that attorneys are not allowed at those conferences.
    - (a) What do these conferences look like?
      - (i) They are often between 2 and 4 hours, sometimes longer.
      - (ii) Your client will be questioned about the allegations for which you have just been assigned to represent him or her in the criminal court. Despite that, a parent may

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still opt to attend and should be well prepared about how to handle those questions.

- (iii) Parents are entitled to bring friends, family members, and community support.
- (iv) A well trained parent advocate knows to re-direct the investigative conversation to a forward-looking conversation about mitigation of any perceived risk of harm to the children, and finding creative ways to allay ACS's concerns without disrupting the family unit and while preserving a client's silence about the allegations.
- (v) Parents are always outnumbered by ACS staff which will include, at a minimum, a CPS ("child protective specialist," in this context, which means caseworker), his or her supervisor, a "facilitator" purporting to be a neutral party, and other staff.
- (vi) Every decision—often hours in the making—is subject to change once ACS staff brings it to the CPM (child protective manager) and/or legal department
- (vii) ACS staff present may or may not include a "parent advocate"
  - 1. **Beware** that these parent advocates work for ACS!
  - 2. These "parent advocates" are trained that their involvement is limited to the hours of the conference. They are by and large unreachable by parents' attorneys when the case has gone to court. And they often misleadingly identify themselves to your clients (e.g. "I am like a lawyer for you, only I am not a lawyer).
- (viii) Your clients will be questioned about every intimate detail in their life and will make numerous admissions. Therefore a parent, parent advocate, and Family Defense lawyer should be in constant communication with the criminal defense attorney to establish an approach to the conference and to inform the criminal attorney of what statements their client made in the CSC.
- (ix) More often than not, a decision about where the child should be removed has already made before the Child Safety Conference.

**m. Consequences of the criminal case in Family Court**

- i) **Warning:** If the allegations in the criminal case are the same as those in the Family Court case, remember that a guilty plea, depending on the allocution, could mean an automatic finding of neglect or abuse in criminal court.
- ii) **Practice Tip:** A dismissal in the criminal case does not mean that the Family Court case is over, because in the Family Court, the prosecutor's burden of proof is "preponderance of the evidence."
- iii) A Family Court case often outlives a criminal case by years.
- iv) A parent may be required to or may elect to participate in many "rehabilitative" services in Family Court. Get copies of your client's certificates and if they are doing well, request copies of the court reports. This will often help resolve your criminal case more favorably.

**n. Path of a Family Court Article 10 Case**

- i) Family Court cases often last for many years.
- ii) Even if children are home (having been returned, or never removed), families remain under intense supervision for years.
- iii) There will be many court conferences and appearances in front of a judge (and his/her court attorney, referee, JHO) before and after trial.
- iv) A win at trial does not guarantee a child's return home.
- v) **What if no Family Court case is ever filed but CPS continues to call your client?**

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- (1) While your client has rights to say no to CPS, those rights have consequences and can at times mean the initiation of a Family Court case or even a child's removal.
- (2) Prior to a case being filed, your client may be asked to participate in a number of services, known as "preventive services." These are not mandatory, but again the decision to participate must be made on a case-by-case basis. Sometimes CPS pressures a client to participate in a designated service "voluntarily." Your client may decide that he or she is willing to accept that referral, with an eye toward avoiding court involvement.
- (3) *In New York City*, if your client is being monitored by ACS but has no lawyer, have your client reach out to Child Welfare Organizing Project (CWOP), <http://cwop.org/> or 212-348-3000, or to an agency that exclusively represents parents in neglect and abuse cases for help.

### **3. Custody/Guardianship**

#### **a. Informal arrangements of care and custody of children**

- i) Especially in low-income communities, courts often prefer that there be a court order formalizing any informal family arrangements (e.g., two parents' informal custody/visitation schedules, and other family members' roles caring for children). Courts often forget that existing family and community structure can sufficiently meet the needs of children, without court intervention.
- ii) At the time of client's arrest, or any time thereafter, client can arrange to have her child in the care of a responsible adult. Though this point is often lost in practice, an arrest should not automatically trigger a child's removal or child welfare involvement, especially if there is a safe place for the child to be while the parent is incarcerated.
- iii) Though somewhat confusing, family arrangements and many Article 10 orders placing children with relatives or other people are not the same as "custody" orders. Any custody/guardianship cases will be held in abeyance until the Article 10 reaches disposition, and a court may enter an order of custody/guardianship at disposition or after.
  - (1) Example: If children are removed from their mother and then "released" to their father, that is not the same as an order of "custody." When supervision under the Article 10 case ends—unless a custody petition has been filed—there is no order of "custody" preferring one parent over the other.
  - (2) Example: A child's "temporarily release" (aka: "parole") to a maternal grandmother during an Article 10 case does not confer custodial rights upon her, such as the ability to make important decisions about the child's religion, healthcare, or education.
  - (3) Example: A parent whose child is placed in foster care retains her right to make important decisions about her child and if the agency caring for the child disagrees, the agency can seek to "override" the parent's decision (or lack of decision).
- iv) ASFA consideration: For reasons detailed below in the section discussing Termination of Parental Rights (TPR), under the federal Adoption and Safe Families Act (ASFA), it is usually highly preferable for your client's child to be with family either informally or by court order "temporarily releasing" the child to those family members, as opposed to "remanding" or "placing" the child in kinship foster care. (Family members often are convinced to become formal foster parents for their kin, as the federal and state governments offer significant subsidies to foster parents unavailable to non-foster kin.)
  - (1) **If there is no child welfare involvement**, time with a relative or friend does not count as time in foster care under ASFA

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- (a) Another benefit: Parent does not have to go to court to regain custody, unless the informal custodian refuses to return the child.
  - (2) **If there is child welfare involvement**, time with a relative or friend, if that relative or friend is not receiving foster care funds and is not a certified foster parent, **may not** count as time in foster care under ASFA.
  - (3) **Warning: a “Voluntary Placement Agreement,”** which transfers custody of the child to the local child welfare office or Department of Social Services is not an informal agreement and DOES count as time in foster care and could lead to termination of parental rights. When a parent signs a voluntary agreement, that parent still has an obligation to plan for that child and to be involved with the foster care agency that is caring for the child. A parent will be assigned an attorney by the court if they sign a voluntary placement agreement, and the court will monitor the child’s placement at least every 6 months. (See Soc. Serv. L. § 358-a)
- v) **How to create an informal custody arrangement**
- (1) Describe the custody arrangement in writing.
  - (2) Both the parent and the caretaker should sign it and, if possible, have it notarized.
  - (3) The Department of Correction should have forms that parents can use, called “Temporary Acknowledgment of Custody.”
- b. **Formal Custody Agreements**
- i) Custody Petitions in Family Court (governed by Article 6 of the Family Court Act; see FCA § 651(b))
    - (1) A parent is entitled to an attorney in any custody proceeding regarding his or her child (See FCA § 262)
    - (2) Who can file?
      - (a) Anyone who has an established relationship to the child has standing to file for custody, although custody petitions are most commonly filed by parents and relatives.
    - (3) The legal standard for determining custody depends on who is filing for custody.
      - (a) Parent v. Parent: Simple “best interests of the child” standard is applied
        - (i) If the custody petition is requesting to modify a previous order of custody, petitioner must make a threshold showing of a “substantial change in circumstances” to justify the modification.
        - (ii) Incarceration or arrest can be a change in circumstance and the court might elect not to hold a custody hearing when another parent files for a modification of custody based on the changed circumstances of incarceration.
      - (b) Nonparent v. Parent: Because it is presumptively in the child’s best interest to be raised by at least one parent, nonparents must carry a threshold burden
        - (i) Nonparent must first demonstrate “extraordinary circumstances”
          - 1. Examples: Parental unfitness, surrender, abandonment, persistent neglect (see statutory language which is rather specific).
            - a. *Note*: An adjudication of neglect does not necessarily support an “extraordinary circumstances” finding
            - b. *Note for incarcerated parents*: Repeated or prolonged incarceration may be deemed extraordinary circumstances.
          - (ii) The nonparent must then demonstrate it is in the child’s best interests to be in the nonparent’s custody
    - (4) In order to modify a legal order of custody, one must return to court.

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- (a) *Note:* Often a relative with an order of custody will return a child willingly to his or her parent, and that transfer of custody is never detected. Some orders of custody (especially those that originally stemmed from CPS involvement) have terms written in that require notice to the court, CPS, and/or counsel for the child before any transfer of custody is made.
- c. **Guardianship Petitions** (Governing law: Surrogate’s Court Procedure Act (“SCPA”) § 1701 (for property and person), FCA § 661 (for person only), New York Mental Hygiene § 81.02, and case law. Even when the proceeding is filed in Family Court, the governing law is SPCA Art. 17).
- i) It is within the discretion of the court to appoint an attorney to a parent who is the respondent in a guardianship petition. One can argue “a judge may assign counsel to represent any adult in a proceeding under this act if he determines that such assignment of counsel is mandated by the constitution of the state of New York or of the United States.” (See FCA § 262)
  - ii) Anyone can file a Guardianship Petition. The Legal Standard is Best Interests of the child.
  - iii) **Subsidized Kinship Guardianship Assistance Program** (known as “KinGAP,” this took effect in April 2011 and the governing law is FCA §§ 1055(b) and 1089(b); Soc. Serv. L. § 458)
    - (1) KinGAP is the legislature’s recognition that adoption subsidies created an incentive for termination of parental rights, which often was not in the community’s interest. (E.g., the high ratio of “failed” adoptions creating legal orphans, the problem of aging caregivers, the reality that many older children do not wish to be adopted). KinGAP is a way of granting guardianship of a child to a nonparent, ceasing court and CPS involvement, and allowing the nonparent guardian to receive the same subsidy as though the child had been legally orphaned and then adopted until the child turns 18 (or 21 if the petition is filed after the child was already 16). From parents’ perspective, there can be many benefits to KinGAP, as the parent-child relationship is not legally severed.
    - (2) KinGAP can only happen when there is an open Family Court case, either through a voluntary placement or a neglect petition.
    - (3) Legal Standard: Best Interests of the child
    - (4) The process
      - (a) There must be a finding against the parent in Family Court, and the most recent permanency planning hearing goal must be “referral for legal guardianship”
      - (b) The prospective KinGAP resource must be a blood relative
      - (c) The relative must have cared for the child as a foster parent for at least six consecutive months prior to the application for the agreement
      - (d) The relative must have entered into a signed guardianship assistance agreement with the local social services department (which goes through several stages of approval with CPS)
      - (e) The relative must then file a guardianship petition in Family Court.

#### **4. Visitation**

- a. Visitation Petition (Governing Law: FCA § 651)
- i) Before advising a client to file a visitation petition, find out whether there are any orders of protection in place between the parent and the child or between the parent and the custodian of the child. If there are, they must be “limited” or rendered “subject to Family Court orders” (see more about orders of protection *supra*, in the neglect/abuse section at 2.1.iii).
  - ii) Legal Standard: Best Interest of the child
    - (1) If there is a pending neglect or abuse case, all parents have a right to “regular and reasonable” visitation unless evidence shows visitation will endanger a child. There must

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- be a showing of compelling circumstances bearing on the child's best interest to deny visitation, and the parent can have a hearing to challenge that drastic measure.<sup>109</sup>
- (2) A long-standing rule is that visitation between the child and her non-custodial parent is presumed to be in the child's best interests and will be suspended only by introducing substantial evidence that visitation will be detrimental to the child's welfare.<sup>110</sup>
- (3) In private visitation disputes, parental visitation of the non-custodial parent is considered to be in a child's best interests in the absence of proof that it will be "harmful" to the child or "detrimental . . . to the child's welfare." Visitation is considered "detrimental" when "exposure of a child to a parent presents a risk of physical harm or of causing 'serious emotional strain or disturbance,'" and in such cases, visitation should be denied. However, to justify deprivation of reasonable visitation, the evidence of risk to the child must be "real and objective."<sup>111</sup>
- iii) Full denial of visitation is a drastic remedy and the courts favor allowing at a minimum supervised contact between parents and their children.
- (1) While the denial of visitation to a noncustodial parent is a drastic result, it is warranted where compelling reasons and substantial evidence show that visitation would be detrimental to the child.<sup>112</sup>
- b. Cases with allegations of domestic violence
- i) In many cases, your client will have a child in common with the complaining witness in a DV case. Parenting contact between your client and the child can be difficult if not impossible when that complaining witness has an order of protection against your client and refuses to allow your client to have contact with the child.
- ii) When CPS files an Article 10 case, your client may seek orders of visitation on that docket.
- iii) When CPS does not file an Article 10 case, the question is: To file or not to file?
- (1) There are many special considerations for filing for visitation with children in these types of domestic violence cases.
- (2) First and foremost, does the criminal O/P permit visitation without court order?
- (a) If so, consider not filing, as court intervention may escalate an already tense family dynamic, or unintentionally send your case to an integrated domestic violence court part, which may be damaging to your criminal case.
- (i) *In NYC*, the integrated domestic violence (IDV) part hears cases with DV allegations for which there are criminal charges and either an Article 6 (custody, guardianship, visitation) case or an Article 8 (family offense petition).
- (3) Does the O/P permit the Family Court to order visitation?
- (a) If not, advance the case and attempt to have the criminal judge render the criminal O/P "subject to Family Court orders." Explain that the Family Court will have the power to order supervised visits only if the criminal judge is worried about safety.
- (4) Is the custodial parent the complaining witness and how will a filing in Family Court affect the criminal case?
- (a) As above, will it escalate the family dynamic and incite cooperation by the complaining witness?

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<sup>109</sup> Corey L. v. Martin L., 45 N.Y.2d 383 (1978).

<sup>110</sup> *See, e.g., Culver v. Culver*, 82 A.D.3d 1296 (3d Dept. 2011), appeal dismissed 16 N.Y.3d 884 (2011).

<sup>111</sup> In the Matter of Pablo C., 108 Misc. 2d 842 (N.Y. Fam. Ct., Bronx Cnty. 1980).

<sup>112</sup> Matter of Brett K. v. Brian L., 6 A.D.3d 349, 351-52 (1st Dep't 2004).

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- (b) Will it send your criminal case to an integrated domestic violence part that does not make strategic sense for your particular case?
  - (5) Your client will not be provided an attorney if he chooses to file for visitation. This means he may make many inconsistent statements or admissions on the record in front of the Family Court judge unless you plan to appear with him.
  - (6) The court may notify the local Child Protective Services agency about the family, and any issues alleged, and request that investigative reports be prepared and filed. This could result in CPS filing a neglect petition against the parent.
  - (7) There is a presumption that visitation between children and their parents is best for children. This means that despite all the negative consequences that can possibly come from the filing of a visitation petition, there is a high likelihood that your client will get some form of visitation. However, this cannot be guaranteed.
  - (8) See LIFT Custody and Visitation Guide at. [http://www.liftonline.org/pdf/en\\_custody.pdf](http://www.liftonline.org/pdf/en_custody.pdf) (also available in other languages at <http://www.liftonline.org/resource-guides.html>)
- c. **Incarcerated Parents** (see also TPR section, *infra* at 5.f.)
- i) All respondents shall be granted reasonable and regularly scheduled visitation unless the court finds that the child's life or health would be endangered thereby, but the court may order visitation under the supervision of an employee of a local social services department upon a finding that supervised visitation is in the best interest of the child. (See FCA § 1030).
    - (1) It is generally still presumed to be in the child's best interest to have visitation with his or her parent regardless of whether that parent is incarcerated.
      - (a) In NYC the ACS Office of Family Visiting program called "CHIPP" (Children of Incarcerated Parents Program) works to arrange for children to be brought to all facilities in the state to see their parent. An incarcerated parent can call this hotline collect: (212) 341-3322.
  - ii) The Court of Appeals has recently upheld the visitation rights of incarcerated parents, affirming an order granting periodic visits when the parent demonstrated that he was involved in a meaningful way in the child's life and the child was of sufficient age to travel to and from the prison without harm.<sup>113</sup>

## 5. Termination of Parental Rights (TPR)

- a. If reunification with a parent or other "permanency" options fail, the State will move to terminate the rights of a parent in order to "free" a child in foster care for adoption. Parental rights may be terminated only in specific situations:
  - i) Where the agency has made "diligent efforts to encourage and strengthen the parent-child relationship," but nevertheless
    - (1) The parents have abandoned the child (for a period of 6 months or more), *or*
    - (2) The child is "permanently neglected" due to the parent's failure to meaningfully plan for the child. See NYS Social Services Law § 384-b
  - ii) The parents are unable to care for the child due to "mental illness or mental retardation," or
  - iii) The parents have severely or repeatedly abused the child.

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<sup>113</sup> *Matter of Granger v. Misercola*, 21 N.Y.3d 86 (2013). In *Granger* the father had been moved to a different, more distant prison while the appeal was pending, a not unusual occurrence (people in prison do not choose their place of confinement). The Court of Appeals held that any change in visitation could only be determined in a new modification action.

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- b. New York State requires both a fact-finding hearing (to establish one or more of the above-referenced causes of action) and a dispositional hearing (to determine if it is in the child's best interests to have the parent's rights terminated and free that child for adoption) to terminate a parent's rights.
  - i) Post-adoption contact.
    - (1) As of the time of this writing, New York law does not provide for "open adoption" after a TPR.
    - (2) Note that once a TPR is sustained, the Family Court does not have the jurisdiction to render any order of post-adoption contact, even when all parties agree that it is in the child's best interest.
    - (3) A parent facing a TPR petition may elect to voluntarily surrender his or her parental rights, with conditions (e.g. that an agreed-upon person adopts, and/or that post-adoption contact continues).
      - (a) In Matter of Hayley ZZ, 19 N.Y.3d 422, 446 (2012), the Court called upon the legislature to rectify this obvious failing. Until the law is changed, this means that a parent who challenges her TPR case loses her ability to negotiate an order of post-adoption contact. Only by agreeing not to fight the TPR case (e.g., by executing a surrender of parental rights) may she seek a negotiated order of post-adoption contact.
- c. The federal Adoption and Safe Families Act (ASFA) **requires** the commencement of TPR proceedings (Soc. Serv. L. § 384-b(1)(i)), where:
  - i) A child is in foster care for 15 out of the most recent 22 months,
  - ii) The Court has determined the child to be abandoned, *or*
  - iii) A parent has been convicted of certain crimes (e.g., the homicide of the child's other parent or sibling) See Soc. Serv. L. § 384-b(8)(a)(i-iii) for the full list of crimes.
  - iv) *Exceptions* to the requirement that an agency file to terminate the rights of the parents despite the existence of the above conditions:
    - (1) A child is being cared for by a relative or relatives
    - (2) There exists a compelling reason why termination would not be in the child's best interests
    - (3) The agency has not provided the parent with the services necessary to safely return the child home (unless such services have been deemed not legally required)
    - (4) **The parent or parents are incarcerated** or participating in a residential substance abuse treatment program and the parent has actively participated in planning for the child's future.
- d. A TPR petition usually is filed after a neglect or abuse case has been pending for some time. At times, however, an agency will file to terminate a parent's rights without ever having filed a neglect petition against them (e.g., filing a TPR case against a father of children who have been in foster care due to some prosecution of their mother, if that father does not take the children out of foster care).
- e. Any respondent in a TPR will be appointed an attorney at intake. (See FCA § 262)
- f. ***Special Notes for Incarcerated Parents***
  - i) An agency is generally required to demonstrate "diligent efforts to encourage and strengthen the parental relationship" before terminating that parent's rights. However, if an incarcerated parent has failed on more than one occasion to cooperate with an authorized agency in its efforts to help that parent plan for the future of the child, the agency may be excused from exercising those efforts.

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- ii) “Diligent efforts” by the foster care agency to encourage the parent-child relationship are still required with incarcerated parents. They may include:
  - (1) Consultation and cooperation with the parents in developing a plan for appropriate services for the child and his family.
  - (2) Making suitable arrangements for visits with the child if “reasonably feasible and in the best interests of the child.” (Soc. Serv. L. §§ 384-b(7)(f)(2)) This can include transportation and rehabilitative services to address the reason why visitation might not be deemed to be in the child’s best interests.
  - (3) Informing the parents at appropriate intervals of the child’s progress, development and health.
  - (4) Providing information which the authorized agency shall obtain from the office of children and family services outlining the legal rights and obligations of a parent who is incarcerated or in a residential substance abuse treatment program and whose child is in custody of an authorized agency, and also providing information regarding social or rehabilitative services available in the community, including family visiting services, to aid in the development of a meaningful relationship between the parent and child. Wherever possible, such information shall include transitional and family support services located in the community to which an incarcerated parent or parent participating in a residential substance abuse treatment program shall return.
- g. ***Special Note for “unwed fathers” (whether or not they are incarcerated)***
  - i) Many fathers unwittingly become “notice-only fathers” (or “notice fathers”), meaning they are only entitled to notice that their parental rights will be terminated. This means that when the child’s parents are both facing TPR cases, the father does not have the right to be heard on the merits, and if deemed a “notice-only father,” his rights will be terminated upon that threshold showing alone. This raises several Due Process and Equal Protection concerns.<sup>114</sup>
    - (1) Fathers wishing to retain their ability to defend themselves against TPR cases must be able to show that they are “consent” fathers, whose consent is required for their children to be adopted.
    - (2) A lack of knowledge of this law is not a defense.
      - (a) At the time fathers are given notice of neglect proceedings involving their children, they are not informed by the court or by CPS of the DRL § 111(1)(d) requirements
      - (b) If the father is not party to an abuse or neglect proceeding, they will not have assigned counsel who can advise them of these requirements.
      - (c) By the time a termination of parental rights proceeding has commenced, it is often too late for an unmarried father to satisfy the requirements
  - ii) Whose consent is required for an adoption to go forward? (Governing Law: Domestic Relations Law § 111)
    - (1) Individuals whose consent *must always* be given before an adoption can go forward
      - (a) The child (if over 14), unless the judge in his discretion dispenses with such consent;
      - (b) The parents of the child if the child was born or conceived in wedlock;

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<sup>114</sup> See Matter of M./B. Children, 7 Misc. 3d 272 (Fam. Ct. Kings County 2004) (finding that the requirement that the father of an out-of-wedlock child must have paid fair and reasonable child support in order for him to block the adoption of the child was unconstitutional, at least as applied to a father who had established a significant relationship with the child.). See also Caban v. Mohammed, 441 U.S. 380 (1979) (finding an earlier version of DRL § 111 was unconstitutional because it treated unmarried parents differently according to their sex); Amanda Sen, Measuring Fatherhood: ‘Consent Fathers’ and Discrimination in Termination of Parental Rights Proceedings, 87 N.Y.U. L. Rev. 1570, 1592 (2012).

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- (c) The mother of the child if that child was born out-of-wedlock (note that it is not necessary that the mother was married to the child's father);
- (d) Any person or authorized agency having lawful custody of the child.
- (2) If the child was born out-of-wedlock, when is the father's consent required?
  - (a) DRL § 111(1)(d): If the child is over six months old when placed with the adoptive parents, the father's consent is needed **ONLY IF** that father *maintained substantial and continuous or repeated contact* with the child, as manifested by:
    - (i) **The Payment** of support towards the child of a fair and reasonable sum,<sup>115</sup> according to the father's means, and either:
    - (ii) **Visiting the child at least monthly** when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child; or
    - (iii) **Maintaining regular communication** with the child or with the person or agency having care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child.
    - (iv) **Note:** These requirements apply to fathers whose children were born out-of-wedlock, including fathers whose names are on their children's birth certificates, those who have signed acknowledgements of paternity and filed them with the putative father registry, and those who have been deemed the legal father in paternity proceedings.
  - (b) *Special note for incarcerated fathers:* The First Department has affirmed the support obligation requirement for fathers who are incarcerated and thus almost always unable to contribute towards the support of their children. In re Jaden Christopher W.-McC., 100 A.D.3d 486 (1st Dep't 2012), leave denied, 20 N.Y.3d 858 (2013). Without the assistance of a friend or family member, it may actually be impossible for an incarcerated father to later establish himself a "consent father."

## **6. Child and Spousal Support**

- a. Child support is a crucial component of any effort to strengthen low-income families.
- b. It is also a critical concern for formerly incarcerated parents struggling to obtain employment, rebuild family ties, and reintegrate into New York communities.
- c. Incarceration is no longer a bar to apply for a downward modification of a child support order. See FCA § 451(2)(a). Law reform in 2010 legislatively overruled the position of New York Courts, which had held since the 1980s that support orders may not be reduced or suspended while a person is incarcerated.<sup>116</sup>
  - i) Incarcerated non-custodial parents with ongoing support obligations are therefore afforded every right to ask the court for downward modification.

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<sup>115</sup> In some jurisdictions, including those in NYC, there is actually no mechanism for the payment of child support to their children's foster care agencies. (In other jurisdictions, unwed fathers' wages are automatically garnished when their children go to foster care, which may help them establish themselves as "consent fathers" down the line if a TPR case is filed.) In fact, many fathers properly advised by counsel find their efforts to pay child support rebuffed by agency workers also ignorant of the law.

<sup>116</sup> See Knights v. Knights, 71 N.Y.2d 865 (1988) (as a policy matter, no modifications allowed because the incarcerated parent's "current financial hardship is solely the result of his wrongful conduct."). See also Furman v. Barnes, 293 A.D.2d 781 (3d Dep't 2002).

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- d. Downward modifications for incarcerated non-custodial parents are not automatic. To obtain a downward modification, the non-custodial parent must affirmatively file a petition with the Family Court that issued the support order. FCA §§ 413, 416, 433, 438, 439, 440, 442-447, 471; Art. 5-B. The effective date of any child support order is the date that the petition was filed, not the date that the order was established in court.
- e. To prevail, the petitioner must show a “substantial change in circumstance[s]” that have occurred since the order was entered into that prevent the parent from paying child support.<sup>117</sup>
- f. If a parent’s yearly income is below the New York State self-support reserve (SSR) (\$15,755 for 2014), his/her child support order may be established at \$50 per month.
  - i) The SSR and the federal poverty level change every year and can be found at: [https://www.childsupport.ny.gov/child\\_support\\_standards.html](https://www.childsupport.ny.gov/child_support_standards.html)
- g. If a parent’s yearly income is below the federal poverty level for one person (\$11,490 for 2013), his/her child support order may be established at \$25 per month and the amount of arrears owed will be limited to \$500.
- h. Support Arrears – Consequences
  - i) **No Bankruptcy:** Child and Spousal Support arrears are non-dischargeable debt in bankruptcy.
  - ii) **Wages Garnished:** If a parent with arrears finds a job, up to 65% of his income may be subject to income execution to recover child support arrears. CPLR § 5242(c)(2)(i), (ii).
  - iii) **Loss of Driver’s and Employment Licenses:** Arrears of more than four months will likely result in the loss of the parent’s driver’s license and any occupational licenses. FCA §§ 458-a, 458-b, 458-c.
  - iv) **Attachment and Seizure of Assets:** If the court converts the arrears to a money judgment, any bank accounts or other assets will be subject to seizure in their entirety. FCA §§ 454, 460; CPLR §§ 5201, 5202, 5203 et. seq.
  - v) **Loss or Denial of Passport:** If a case is being handled by the state child support enforcement agency and the obligated parent is more than \$5,000 in arrears, the parent might not be able to obtain a passport. If the individual already has a passport, the passport may be revoked or limited. 42 U.S.C. §§ 652(k)(1) & 654(31). If more than \$2,500 is in arrears is owed, the passport denial/revocation procedures may be invoked.<sup>118</sup>
  - vi) **Incarceration:** Non-custodial parents may face the statutory penalty of incarceration of up to six months, if adjudicated by a support magistrate to have “willfully” violated an order of support. See FCA § 454(3)(a).

## **7. Family Offense Proceedings (Domestic Violence)**

- a. Family Offense Proceedings are essentially order of protection cases that are filed in Family Court.
- b. Family and criminal courts have concurrent jurisdiction. (CPL § 530.11)
- c. *Collateral Estoppel by Conviction:* If a criminal court case based on the same underlying allegations as a Family Offense case in Family Court results in a plea or a conviction, the defendant is at risk for summary judgment in the Family Court under the doctrine of collateral

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<sup>117</sup> *Rodriguez v. Mendoza-Gonzalez*, 96 A.D.3d 766, 946 N.Y.S.2d 204 (2012) (citing Domestic Relations Law § 236 [B] [9] [b] [1]; *Matter of Sannuto v Sannuto*, 21 AD3d 901 [2005]; *Klapper v Klapper*, 204 AD2d 518 [1994]; *Dowd v Dowd*, 178 AD2d 330 [1991])). The party seeking to modify such child support provisions has the burden of establishing that a modification is warranted. *Id.* (citing *Matter of Mandelowitz v Bodden*, 68 AD3d 871 [2009]; *Matter of Marrale v. Marrale*, 44 AD3d 773 [2007])).

<sup>118</sup> 42 U.S.C. §§ 652(k)(1) & 654(31).

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estoppel. This doctrine applies where the two cases involve the same issues between the parties. Suffolk County Dept. of Social Services on Behalf of Michael V. v. James M., 83 N.Y.2d 178, (1994). A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts in a subsequent civil action. Grayes v. DiStasio, 166 A.D.2d 261 (1<sup>st</sup> Dep't. 1990); Colby v. Crocitto, 207 A.D.2d 764 (2d Dept. 1994). If the opposing party secures a finding of summary judgment as to one or more family offenses, the opposing party's attorney may either ask to go forward to fact-finding with regard to any acts that were not the subject of the concurrent criminal proceeding or seek to move directly to disposition under FCA § 841.

- 8. Foster/Adoptive Parents** (Soc. Serv. L. § 378-a; 18 NYCRR § 443.8)
  - a. Convictions can lead to denial of application as foster parent and/or removal of the child.
  - b. **Mandatory Disqualifications**
    - i) For felony convictions for child abuse or neglect, a crime against a child, or a crime involving violence (includes attempted robbery and attempted criminal possession of a weapon, unless spousal abuse was a factor in causing the prospective parent to commit such a crime)
      - (1) *But see* In re Adoption of Abel, 33 Misc.3d 710 (Fam. Ct., Bronx Co. 2011), finding that under the totality of the circumstances, denying a petition to adopt a child brought by an individual with a mandatory felony disqualification would violate the child's and the prospective father's due process rights, and granting the adoption.
    - ii) For any felony conviction within the past five years for physical assault, battery, or a drug-related offense.
    - iii) **Safety Valve:** Based on welfare of the child.
  - c. **Discretionary Denials**
    - i) If the foster parent, adoptive parent, or any person over 18 residing in the home was ever charged with or convicted of any crime.

**FEDERAL STUDENT LOANS**

1. As a preliminary matter, it should be noted that colleges and universities routinely request criminal history information from applicants, including all information that may be sealed or expunged. This leads to barriers to accessing higher education for many people annually. *See* Center for Community Alternatives, "Boxed Out: Criminal History Screening and College Application Attrition," available at <http://communityalternatives.org/fb/boxed-out.html> (2015).
2. **Automatic suspension of eligibility** (Title IV funds): 20 U.S.C. § 1091(r)(1) suspends eligibility for any grant, loan, or work assistance for students convicted<sup>119</sup> of *any offense* under any Federal or State law involving the possession or sale of a *controlled substance*, but **only for conduct occurring while receiving student aid**.<sup>120</sup>
  - a. *Definition:* the term "controlled substance" is defined in 21 U.S.C. § 802(6), and includes marijuana.

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<sup>119</sup> Note that because Youthful Offender Adjudications are **not convictions**, they do not trigger this statute and do not limit a student's ability to access loans.

<sup>120</sup> On February 8, 2006, this provision was amended to bar student loan eligibility only when the drug conviction was for conduct that occurred during receipt of student loans. *See* Pub. L. No. 109-171, § 8021, 120 Stat 4 (February 8, 2006).

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- b. The federal benefits referenced are those under 20 U.S.C. § 1070 *et seq.* (Higher Education Resources and Student Assistance) and 42 U.S.C. § 2751 *et seq.* (Federal Work Study Programs).
- c. The official FAFSA form (which governs federal student loans) asks a narrow and direct question (#23): “Have you been convicted for the possession or sale of illegal drugs for an offense that occurred while you were receiving federal student aid (grants, loans or work-study)? (Q23)” (See <http://www.fafsa.ed.gov/before012.htm>.)
- d. The period of suspension begins on the date of the conviction and ends after the following intervals:

Type of Offense	Ineligibility Period for 1 <sup>st</sup> Offense	Ineligibility Period for 2d Offense	Ineligibility Period for 3d Offense
Possession of a controlled substance	1 year	2 years	Indefinite
Sale of a controlled substance	2 years	Indefinite	

- e. **Warning:** A conviction for Unlawful Possession of Marijuana, PL 221.05, will make a student ineligible for federal aid if the conduct occurs while the person is then receiving aid. A person is ineligible under Section 1091 because of a conviction for any controlled substance “offense,” not necessarily a “crime.” In New York, PL 221.05 is an offense (a violation), although not a crime, and marijuana is a controlled substance.
- f. **Waiver:** Under § 1091(r)(2), a student may regain eligibility before the above period expires if:
  - i) The student satisfactorily completes a drug rehabilitation program that
    - (1) Complies with criteria set out by the Secretary of Education:
      - (a) Be qualified to receive funds from federal, state, or local government, or from a federally- or state-licensed insurance company; **OR**
      - (b) Be administered or recognized by a federal, state, or local government agency or court, or a federally- or state-licensed hospital, health clinic, or medical doctor
    - AND**
    - (2) Includes two unannounced drug tests.
  - ii) The student passes two unannounced drug tests conducted by a drug rehabilitation program that meets the criteria established by the Secretary of Education (described in (i) above); or
  - iii) The conviction is reversed, set aside, or otherwise rendered nugatory.

**3. Tax credit ineligibility:** Federal law also denies the Hope tax credit to students and their families if the student has a prior Federal or State felony drug conviction. *See* 26 U.S.C. § 25A(b)(2)(D).

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**FORFEITURES (CITY AND STATE LAW)**

- 1. District Attorney forfeitures (CPLR Article 13-A)**
  - a. The District Attorney can seek forfeiture of (1) proceeds of a crime; (2) substituted proceeds of a crime (property obtained by the sale or exchange of proceeds of a crime); or (3) the instrumentality of a crime. The prosecutor can obtain a money judgment.
  - b. Can be “preconviction” (only where underlying felony involves narcotics or marijuana) or “postconviction,” and can be against the criminal defendant or an uncharged property-holder.
    - i) The *postconviction* action requires conviction of any felony (not just drug-related);
    - ii) In the *preconviction* action, the prosecutor only has to prove the occurrence of a drug-related felony by clear and convincing evidence.
      - (1) Therefore, an acquittal or dismissal of the criminal charges does not bar the 13-A proceeding (and neither does a reduction to a misdemeanor).
      - (2) **Practice Tip:** Where there is an acquittal or dismissal of the criminal charges, all official records and papers of the criminal prosecution are sealed pursuant to C.P.L. § 160.50 and cannot be used in the forfeiture proceeding. (See *supra* in “Criminal Records” section, at 12, for more on the consequences of sealing.)
  - c. Filed in the Supreme Court where the criminal acts took place.
- 2. Criminal Forfeiture (Penal Law Article 480)**
  - a. Permits forfeiture of property in a criminal prosecution following defendant’s conviction of a felony controlled substance offense.
- 3. Public Health Law §§ 3387 & 3388 – in rem actions**
  - a. Section 3387: seizure and forfeiture of controlled substances, imitation controlled substances, and official NYS prescription forms.
  - b. Section 3388: seizure and forfeiture of vehicles, vessels, or aircraft unlawfully used to conceal, carry, convey, or transport controlled substances (or used to facilitate these activities).
    - i) The vehicle must be used in conjunction with acts constituting a felony under Pen. Law Article 220 (remember, it’s a civil case, so acquittal, dismissal, and reduction to a misdemeanor are irrelevant except concerning use of sealed records).
    - ii) Action must be commenced within 10 days of formal demand by owner for return of property.
    - iii) Affirmative defense: that the use of the vehicle was not intentional on the part of any owner.
- 4. Seizure of Unlawfully Operated Vehicles (VTL § 511-b)**
  - a. Police must seize and impound a vehicle when the driver has been arrested or issued summons for aggravated unlicensed operation of a motor vehicle in the second or third degree (VTL § 511(2) & (3)).
    - i) VTL § 511(2) is a misdemeanor.
  - b. Notice will be sent to the last registered owner after 30 days; make sure that the owner makes a **formal demand** for the return of the vehicle as soon as possible – failure to demand within 30 days of the notice leads to a forfeiture of the vehicle.
- 5. New York City Property Designations**

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- a. Arrest procedure: Upon arrest, a client is entitled to a property invoice (commonly referred to as a “voucher”) that should detail all property taken from her.<sup>121</sup> A client is entitled to inspect the voucher to ensure that it lists everything taken. The voucher should be given to the person before arraignments.
  - i) If the client does not have a voucher, it can be obtained from the Precinct of Arrest. To get the voucher, client needs: Arrest Date, Arrest number, and Arresting Officer’s name.
- b. The voucher will list property under one of several designations. Understanding the differences between each designation is crucial in determining how clients will be able to retrieve their property, or if they get it back at all.
  - i) **Safekeeping:** Property held temporarily to protect it from theft. Clients can retrieve property held for safekeeping immediately upon their release (or before their release, if they authorize someone else to pick it up). The process for retrieving property is fairly straightforward and should be described on the second or third page of the voucher. They usually must go to the property clerk’s office in the criminal court where they were arraigned with two forms of ID.
    - (1) **Practice Tip: If client does not have two forms of ID or wants someone else to pick up the property**, s/he can authorize another person to go to the precinct or property clerk. That person must have two forms of ID, must have the voucher, and must have a **notarized** letter from the client stating the property that the client wants the person to retrieve, the voucher number and names of both the client and the client’s representative.
    - (2) Property that is marked for safekeeping will be held by the NYPD Property Clerk for 120 days from the date of invoice. After that time it will be destroyed or retained by the police and a client will lose the right to have it returned.
  - ii) **Arrest Evidence:** This is property the DA’s office holds as relevant to an ongoing criminal case.
    - (1) Clients cannot retrieve this property without a release from the DA’s office. DAs are often reluctant to grant DA releases during ongoing cases, though they are supposed to respond to a request for release (granting the release or explaining why they’re not granting it) within 15 days.
    - (2) **Note:** The NYPD seizes vehicles as arrest evidence when arrests are made for:
      - (a) Larceny of a vehicle
      - (b) Unauthorized use of a vehicle
      - (c) Criminal possession of stolen property (vehicle involved)
      - (d) Possession of vehicle with an altered V.I.N.
      - (e) Leaving scene of collision - serious injury and likely or critical injury
      - (f) Assault or homicide - vehicle used as weapon
      - (g) Illegal Registration - Motorist arrested for Operating an Unregistered Vehicle.<sup>122</sup>
  - iii) **Forfeiture:** Property that is seized due to use or possession while committing a crime. Most commonly, money taken during a drug arrest will be confiscated and marked as forfeiture evidence, but other property (e.g., merchandise allegedly sold without a license) can also be taken for forfeiture. See more on forfeiture below.
    - (1) **Note:** Per the NYPD patrol guide, a vehicle may be invoiced as forfeiture when the vehicle was used to transport Controlled Substances, Gambling Records, Untaxed

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<sup>121</sup> See Rules of the City of New York, Title 38, § 12-32 for vouchering procedures. The NYPD Patrol Guide Procedure Number 218-19 also explains this process. As of April 17, 2015, the patrol guide can be accessed here: <http://s3.documentcloud.org/documents/1200523/218-19-invoicing-vehicles-property-as-arrest.pdf>

<sup>122</sup> See NYPD Patrol Guide 218-19, *supra* note 121 at 2.

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Cigarettes, Equipment used in promoting pornography, or Equipment used in unauthorized recording of sound.<sup>123</sup>

- (2) NYPD also usually vouchers vehicles for forfeiture when there are DUI charges.
- (3) A vehicle is subject to two holds: (1) “DA” evidence hold & (2) NYPD Legal Bureau forfeiture hold. Thus, two separate releases are required before the vehicle will be returned. (Sometimes the car will be marked as “arrest evidence,” but a release from the NYPD Legal Bureau is almost always necessary to pick up the car). A client cannot simply go to the police department or auto pound to pick up a vehicle after arrest; the process can take anywhere from 1-5 months and on average at least 3 months.
- iv) **Contraband:** Property that it is illegal to possess. This will likely be held for evidence and ultimately destroyed.
- v) **Investigatory:** This is evidence held by the NYPD for an investigation, usually when no arrest has been made. It will not be released without a sign-off from the Arresting Officer who vouchered it as such.
- c. **Practice Tip:** Clients should make formal demands for the property as soon as possible to force the NYPD to either return the property or bring a forfeiture action.

**6. NYPD Property Clerk Forfeitures** (NYC Admin. Code § 14-140 and Chapter 12 of Title 38 of the RCNY)

- a. If the NYPD decides to move forward with forfeiture, the Property Clerk must prove by a preponderance of the evidence that the subject property was “used as a means of committing crime or employed in aid or in furtherance of crime.” (NYC Admin. Code § 14-140(e)(1).)
  - i) Examples of forfeiture:
    - (1) Forfeiture of vehicles seized in connection with DWI arrests.
    - (2) Forfeiture of vehicles seized in connection with soliciting prostitution.
    - (3) Forfeiture of cash seized in connection with drug possession arrests.
  - b. The NYPD must commence a forfeiture action within 25 days of the owner making a formal demand for return of the property with the Property Clerk. This timeline applies only when the property is not otherwise being held as “arrest evidence” by the District Attorney’s office for use in a criminal case (38 RCNY § 12-36(a)).
    - i) **Practice Tip:** The NYPD does not have to file a formal case if the property is never formally demanded! Make the formal property demand early to expedite the process.
    - ii) Owners of **vehicles** (and only vehicles) have the right to a post-seizure Krimstock hearing<sup>124</sup> before the Office of Administrative Trials and Hearing (OATH) to challenge the validity of the seizure and the NYPD’s need for continued retention of the vehicle, before a final judgment is reached in the forfeiture proceeding.
      - (1) Claimants have the opportunity to settle with the NYPD’s Civil Enforcement Unit before the Krimstock hearing, either to terminate the underlying forfeiture action, or to negotiate a temporary return of the vehicle pending the outcome of the criminal case, usually in exchange for a fee and participation in a treatment program approved by the New York State Office of Alcoholism and Substance Abuse Services.

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<sup>123</sup> *Id.*

<sup>124</sup> These hearings are pursuant to what is known as the “Third Krimstock Order,” Krimstock v. Kelly, 99 Civ. 12041 (SDNY, Oct. 1, 2007) (Baer, J.), *See generally* Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002). The Third Krimstock Order is available here:

[http://www2.law.columbia.edu/vehicleseizure/documents/Krimstock\\_Order\\_10\\_1\\_07.pdf](http://www2.law.columbia.edu/vehicleseizure/documents/Krimstock_Order_10_1_07.pdf)

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- (2) In many cases, a person will be served with papers commencing the forfeiture proceeding at the termination of a Krimstock hearing.
- c. After the owner makes a formal demand for the return of her property, a civil forfeiture action will be initiated in Manhattan Supreme Court. The client will be served with a Summons and Complaint to commence the action, and an Answer must be made within 20 or 30 days depending on the method of service. If no answer is made, a motion for default judgment can be made by the Legal Bureau.
- i) As this is a civil case, it will likely be a lengthy process that can take well over a year. A client should seek representation in this action.
- ii) Plaintiff must establish by the preponderance of the evidence that vehicle was used as an instrumentality of a crime.
- (1) A criminal conviction for DWI is presumptive proof of unlawful use. The NYPD can move for summary judgment.
- d. If the property is being held as **arrest evidence** for use in a criminal case by the District Attorney's office, then a claimant must do two things: 1) make a formal demand with the Property Clerk for return of the property, and 2) provide the Property Clerk with a District Attorney's release. Only upon receiving the District Attorney's release does the 25-day clock run for the Property Clerk to commence a forfeiture action. (38 RCNY § 12-36(a))
- i) However, delays are common in obtaining a District Attorney's release. The District Attorney must respond within 15 days of receiving a request for a release. (38 RCNY § 12-34(e))
- ii) If the District Attorney denies the request for a release, he or she must state that the claimant can request to have the decision reviewed by a Supervising District Attorney. (38 RCNY § 12-34(e))
- iii) A Supervising District Attorney must respond to the request for review within 10 days of receiving it, and provide in writing particularized reasons for denying the request. (38 RCNY § 12-34(e))
- e. Consult Reentry Net/NY at [www.reentry.net/ny](http://www.reentry.net/ny) for additional materials on forfeitures in New York City. An excellent guide to **Krimstock Hearings** is available at <http://www2.law.columbia.edu/vehicleseizure/index.html>

7. **Practice Tip:** a Certificate of Relief from Disabilities (See *supra* at 17) issued at sentencing can relieve *automatic* forfeitures.

8. **Federal Forfeitures in New York City:** In certain<sup>125</sup> drug cases, money will be taken from your client by the NYPD and then transferred to the DEA. The NYPD voucher will usually have some notation that the property has been transferred (e.g., a reference to the U.S. Marshal Service).

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I. <sup>125</sup> On January 16, 2015, Attorney General Eric Holder announced major changes in the Federal Asset Forfeiture program. The changes he announced will drastically reduce the number and types of cases in which federal agencies will intervene in state criminal prosecutions for the purpose of forfeiture. The only categories of state cases that will remain in the federal asset forfeiture program are those stemming from arrests made by joint taskforces of federal and state or local law enforcement. See Office of the Attorney General, "Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies" (Jan. 16, 2015), at [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney\\_general\\_order\\_prohibiting\\_adoptions.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf); see also Robert O'Harrow Jr. and Steven Rich, "Justice Clarifies New Limits on Asset Forfeiture Involving Local, State Police," The Washington Post, Feb. 11, 2015, at [http://www.washingtonpost.com/investigations/attorney-general-holders-curbs-on-seizures-did-not-go-far-enough-critics-say/2015/02/11/19ec34b4-a1c0-11e4-903f-9f2faf7cd9fe\\_story.html](http://www.washingtonpost.com/investigations/attorney-general-holders-curbs-on-seizures-did-not-go-far-enough-critics-say/2015/02/11/19ec34b4-a1c0-11e4-903f-9f2faf7cd9fe_story.html). It is not certain how the Holder order will be enforced after he steps down as Attorney General.

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- a. Once the property has been transferred to the DEA, the DEA will send out a notice to the client (and often to the criminal attorney as well)—usually within 2-3 months of the arrest. The client then has 30 days to make a claim for the return of his/her property. Claims **must be made within 30 days of the date on the notice**. Once that deadline passes, it is nearly impossible to get the money back.
- b. There are two ways to petition for the return of the seized property being held by the DEA: 1) “remission or mitigation of forfeiture”; and 2) contesting the forfeiture in federal District Court.
- c. To contest the forfeiture in District Court, your client must send a claim to the Forfeiture Counsel of the DEA. The case will then be referred to the AUSA in the Southern District. At some point (often several months) later, the AUSA will start a case in District Court.

## HOUSING

### 1. Background

- a. Access to housing is central to the stability of individuals, families, and communities. But for people with criminal records—and their families—even basic shelter is hard to find.
  - i) Incarceration almost invariably leads to loss of stable housing. Then, when a person returns from prison or jail, she usually finds herself homeless, relying on local shelter systems or the generosity of family members or friends.<sup>126</sup>
    - (1) Note: at least one court has found that incarceration was a “reasonable cause” for a tenant’s failure to appear in summary eviction proceedings. See 46 Downing St. LLC. v. Thompson, 44 Misc. 3d 143(A) (1st Dep’t, App. Term 2014).
  - ii) In New York City, over thirty percent of single adults in the shelter system were recently released from local jails (substantially more if prisons are included), and many cycle between shelters and incarceration.<sup>127</sup>
  - iii) Research indicates that homelessness is also directly linked to re-incarceration of people who have served jail or prison sentences.<sup>128</sup>
    - (1) For instance, homeless individuals on parole have been shown to be seven times more likely to abscond after the first month of release than those located in more permanent housing.<sup>129</sup>
      - (a) Involvement with the criminal justice system can ultimately result in the loss of both private and public housing, with public housing residents facing legal bars as the result of certain convictions. These bars often force families to choose between

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<sup>126</sup> JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY, at 120-23 (2003).

<sup>127</sup> See Reentry Policy Council, Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community, Program Statement, at 19 (Council of State Governments 2005), available at <http://csgjusticecenter.org/wp-content/uploads/2013/03/Report-of-the-Reentry-Council.pdf>.

<sup>128</sup> For a recent study documenting the connections between homelessness and recidivism, and the difference that supportive housing can make in a re-entering person’s life, see Angela A. Aidala, et al., “Frequent Users Service Enhancement ‘FUSE’ Initiative, Evaluation Report, available at [http://www.csh.org/wp-content/uploads/2014/01/FUSE-Eval-Report-Final\\_Linked.pdf](http://www.csh.org/wp-content/uploads/2014/01/FUSE-Eval-Report-Final_Linked.pdf) (2014).

<sup>129</sup> Marta Nelson, Perry Deess, & Charlotte Allen, The First Month Out: Post-Incarceration Experiences in New York City (1999), available at <http://www.vera.org/content/first-month-out-post-incarceration-experiences-new-york-city>.

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losing their housing or permanently excluding family members from their homes, creating tremendous barriers to family reunification upon reentry from jail or prison.

- (b) As with other areas, these sanctions are not limited to felony convictions, and are sometimes not limited to receiving any convictions at all—an arrest alone can trigger an eviction.
- (c) They illustrate that the fallout of criminal proceedings occurs in the civil or administrative realm, without the basic constitutional protections afforded at criminal trials, and with much different burdens of proof and evidentiary standards.

**2. “Bawdy House” Evictions (Narcotics Eviction Proceedings/Illegal Use of Residence)**

- a. By operation of 3 statutes: RPL § 231(1), RPAPL § 711(5), RPAPL § 715
  - i) RPL § 231 voids the lease; RPAPL § 711(5) gives Landlord cause of action to evict; RPAPL § 715(1) authorizes other parties to evict and establishes presumptions.<sup>130</sup>
  - ii) These statutes permit eviction from *private* rental housing if it is alleged that the housing is being used in connection with illegal activity, and shift liability to the landlord for failing to do so. However, public housing authorities are also able to (and do) use these laws to evict tenants (see next section on Federally Subsidized Housing).
- b. The client’s landlord, usually with assistance and insistence of the District Attorney (in New York City, each borough District Attorney has a special Narcotics Eviction Unit), brings a case to evict the client because that tenant used the premises “as a bawdy-house, or house or place of assignation for lewd purposes, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business.” RPAPL § 711(5).
  - i) **Elements:** (a) illegal conduct, (b) engaged in a business, (c) on more than one occasion, (d) involving the premises to be recovered, (e) with the participation, knowledge, or passive acquiescence of one or more of the tenants of record.
  - ii) **Staying the Eviction:** Generally, the tenant cannot stay the eviction proceeding pending the outcome of the criminal case, however, given the stakes and the requirement that the illegal use be proven, it is worth making every effort to stay the eviction. Given sympathetic facts, some Housing Court judges will stay proceedings to protect the tenant’s Fifth Amendment right against self-incrimination. Fulton St. S. Redev. Co. L.P. v. James, N.Y.L.J., May 2, 2014, at 38 (Civ. Ct. Kings Cnty.).
  - iii) **Fifth Amendment Bind:** In Housing Court, your client will be faced with a choice between waiving his 5<sup>th</sup> Amendment rights and testifying, or invoking his rights and suffering an adverse inference (permitted in civil cases).
  - iv) **Warning:** You must know every time your client appears in Housing Court for a Drug Eviction proceeding! The proceeding inherently explores the underlying facts of the criminal case, it is on the record, and an Assistant District Attorney will be in Housing Court to follow the case. If your client is unrepresented, the ADA may approach the client and discuss the housing case with them.
- c. **Drugs:** Generally, an eviction will be initiated whenever a search warrant is executed in the apartment and drugs, and/or drug paraphernalia, and/or weapons are found.
  - i) **Practice Tip 1:** If the criminal case arose from a search warrant for drugs, tell your client to be prepared to defend against an eviction proceeding.

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<sup>130</sup> In both the 2013 and 2014 sessions, a bill (A7054/S2365) has been introduced in the New York State legislature that would authorize the District Attorney of the jurisdiction to intervene and appear as of right in illegal use eviction proceedings brought by the property owner. Brindisi sponsored the bill in the Assembly and Klein and Ranzenhofer sponsored the bill in the Senate.

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- ii) **Practice Tip 2:** Sometimes the eviction proceeding will not begin until months after the search warrant is executed.
- d. **Prostitution** (RPAPL § 715(2)): Two or more convictions of any occupant within the period of a year for P.L. §§ 230 (prostitution, m/d); 230.05 (patronizing a prostitute 2, F); 230.20 (promoting prostitution 4, m/d); 230.25 (promoting prostitution 3, F); 230.30 (promoting prostitution 2, F); 230.40 (permitting prostitution, m/d), arising out of conduct engaged in at the subject property, shall be **presumptive evidence** of conduct constituting use of the premises for purposes of prostitution.
- e. **Gambling offenses** (RPAPL § 715(3)): Two or more convictions of any occupant within the period of a year for P.L. §§ 225.00 (definitions); 225.05 (promoting gambling 2, m/d); 225.10 (promoting gambling 1, F); 225.15 (poss. of gambling records 2, m/d); 225.20 (poss. of gambling records 1, F); 225.30 (poss. of gambling device, m/d); 225.32 (poss. of gambling device, defenses); 225.35 (gambling offenses, presumptions); 225.40 (lottery offenses, no defense), arising out of conduct engaged in at the subject property, shall be **presumptive evidence** of unlawful use of the premises and of the owner’s knowledge of the same.
- f. **Practice Tip 1:** ASK your clients to inform you immediately if they are served with eviction papers; otherwise, they may **testify on the record** in Housing Court about the underlying facts of the criminal case without your knowledge.
- g. **Practice Tip 2:** The District Attorneys in the five boroughs of New York City have in the past released sealed records from criminal cases to support these evictions. Increasingly, they also obtain *ex parte* unsealing orders. District Attorneys have sometimes appealed to the exception permitting release of sealed records to a “law enforcement agency” contained in CPL § 160.50(1)(d)(ii) to attempt to unseal the records. **Significant case law indicates that such unsealings are improper.**<sup>131</sup>
  - i) For further resources dealing with this issue, consult Reentry Net/NY at [www.reentry.net/ny](http://www.reentry.net/ny).

### 3. Nuisance Abatement Actions – NYC

- a. The City of New York may bring an *ex parte* motion in Supreme Court for a temporary closing order to abate so-called “public nuisances” under New York City Administrative Code § 7-701 et seq., resulting in immediate eviction without notice, and for a preliminary and permanent injunction.
  - i) Cases often brought 2–6 months after the alleged incident(s).
  - ii) Brought by NYPD Legal Bureau. City is plaintiff. Jurisdiction is *in rem*. Landlord and John and Jane Doe are named additional defendants. Tenants are almost never named.
  - iii) *Two Bites at the Apple*. Even if nuisance abatement action is settled, a “Bawdy House” proceeding (see 2 above) may still be brought based on the same facts.
- b. Nuisance abatement actions brought under § 7-703 are typically for:

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<sup>131</sup> See, e.g., *Albany Cnty. Dist. Attorney's Office ex rel. Barrett Twp. Police v. William T.*, 88 A.D.3d 1133, 1134 (3d Dep’t 2011) (noting that the adverse consequences sealing was intended to prevent “include potentially severe damage to an individual’s reputation and employment prospects and, as such, there are only six narrow, precisely tailored exceptions” to the general restriction against unsealing); *Matter of City of Elmira v. Doe*, 39 A.D.3d 942 (3d Dep’t 2011), *affd.* 11 N.Y.3d 799 (2008); *Katherine B. v. Cataldo*, 5 N.Y.3d 196 (2005); *People v. Manauri R.*, NYLJ, Oct. 22, 2004, at 21, col. 1 (Sup. Ct. Bronx Cnty.); *People v. Canales*, 174 Misc. 2d 387 (Sup. Ct. Bronx Cnty. 1997). *But see Matter of N.Y. State Comm’n on Judicial Conduct v. Rubenstein*, 2014 N.Y. Slip Op. 04118 (Ct. App.) (holding that Commission on Judicial Conduct may properly obtain criminal records sealed under C.P.L. § 160.50 if reasonably related to judicial misconduct inquiry, including for individuals other than the judge).

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- i) Three or more violations of Penal Law Articles 220 (Controlled Substance Offenses), 221 (Offenses Involving Marihuana), or 225 (Gambling Offenses) within a one-year period (subsection (g));  
(1) Often based on execution of a search warrant plus two or more controlled buys.
- ii) Any building used for prostitution-related activities as defined by Penal Law Article 230 (Prostitution Offenses) (subsection (a)). The law creates a presumption that a building is being used for prostitution if there are two or more convictions for “acts of prostitution” within a one-year period; or
- iii) Criminal nuisance as defined by Penal Law Section 240.(subsection (1)).<sup>132</sup>
- c. Temporary Closing Order (Tenants are locked out of their dwelling after an ex parte motion)
  - i) Requires a showing by “clear and convincing evidence” that a public nuisance can be established (as defined in the statute) and is “ongoing.”
  - ii) The statute requires a hearing be held within three (3) days; commonly, court schedules result in delays significantly beyond three days.

#### **4. Private Landlords**

- a. Many criminal offenses can also spark an eviction under the “nuisance” theory or as a violation of a “substantial obligation” of the lease. These are sometimes called “nuisance holdover” proceedings.
- b. **Definition of Nuisance**
  - i) Generally, the offensive conduct must be ongoing and continuous.
  - ii) The tenant is using or permitting the apartment to be used for an immoral or illegal purpose.
  - iii) The tenant is committing or permitting a nuisance, or is maliciously or by reason of gross negligence substantially damaging the housing accommodation; or his conduct is such as to interfere substantially with the comfort and safety of the landlord or of other tenants or occupants of the same or another adjacent building or structure.
  - iv) Landlord must prove that tenant’s conduct “interfered with the use or enjoyment” of the property.

#### **5. Effect of Incarceration—Non-primary Residence Holdovers and Succession Rights Issues in Rent-Regulated Tenancies:**

- a. Incarceration may lead to non-primary residence holdover:
  - i) If tenant is absent from a Rent Stabilized apartment pursuant to a court order involving any term or provision of the lease, or involving any grounds specified in the Real Property Actions and Proceedings Law.<sup>133</sup>
  - ii) If tenant is absent from a Rent Controlled apartment for a long-term prison sentence.<sup>134</sup>

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<sup>132</sup> See also City of New York v. B250 Holding LLC, 32 Misc. 3d 1202(A) (Sup. Ct., N.Y. Cnty. 2011) (finding that City stated cause of action for nuisance abatement under § 7-703(g) after controlled buys of Ziploc baggies); City of New York v. Castro, 160 A.D.2d 651 (1st Dep’t 1990) (holding that the mere existence of the prohibited conduct suffices and that § 7-703(g) does not require criminal prosecution or conviction).

<sup>133</sup> See N.Y. Rent Stabilization Code § 2524.4(c) (providing for non-renewal of lease where tenant does not occupy the premises as his or her primary residence); New York Rent Stabilization Code §2520.6(u) (providing factors to consider in determining what constitutes a “primary residence” including long-term absence of more than half of a year), N.Y. Rent Stabilization Code § 2523.5 (providing exception to long-term absence provision when tenant is not in residence at the housing accommodation pursuant to a court order not involving any term or provision of the lease, and not involving any grounds specified in the Real Property Actions and Proceedings Law)

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- b. Recent incarceration may also interfere if incarcerated person is a family member who wishes to claim succession rights to a regulated apartment and period of incarceration is during the requisite period of residency to establish tenancy.<sup>135</sup>

**6. Housing Discrimination—Rights & Protections**

a. ***Disability & Race*** (Federal and State Fair Housing Acts)

- i) The powerful fair housing provisions that protect people with disabilities against discrimination and require reasonable accommodation also protect recovered substance abusers as persons with disabilities. *See* Exec. L. §§ 290 *et seq.*; 42 U.S.C. 3604(f).
- ii) In addition, a landlord’s policy or practice of uniformly denying housing to persons with conviction records has a disparate impact on African-Americans and Latinos. *See id*; Civ. Rights L. §§ 18-a to 19-b.
- (1) The U.S. Supreme Court has come very close to considering the question of whether the federal Fair Housing Act permits disparate impact claims but, as of July 2014, has not yet done so. In the interim, HUD promulgated a final rule on February 15, 2013 that resolves some of the discrepancies that previously existed between the circuits and provides guidance for stating a disparate impact claim under the federal FHA.<sup>136</sup>

b. ***Federal and State Fair Credit Reporting Acts (FCRA)*** (Employment & Housing)

- i) Most private employers and landlords receive criminal history information from a variety of consumer reporting agencies (CRAs), rather than official sources. A number of national studies have shown that reports from these CRAs are notoriously incorrect or incomplete.<sup>137</sup> FCRA establishes standards of accuracy and procedural rights if a report is the basis for adverse decisions.<sup>138</sup> *See* 15 U.S.C. § 1681 *et seq.*

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<sup>134</sup> *See Emay Properties Corp. v. Norton*, 136 Misc. 2d 127 (1st Dep’t 1987) (taking primary residence to mean “ongoing, substantial, physical nexus with the controlled premises for actual living purposes—which can be demonstrated by objective, empirical evidence” and allowing landlord to proceed against tenant who was incarcerated for a period of fifteen years to life in a rent-controlled apartment).

<sup>135</sup> *See Kelly Mgt. LLC v Soltero*, 27 Misc 3d 984 (Civ. Ct., Bx. Cnty. 2010) “incarceration does not serve to bar the respondent from seeking succession to the rent regulated apartment” *citing Corr v. Westchester Cnty. Dep’t of Soc. Servs.*, 33 N.Y.2d 111 (1973) “Ordinarily, a patient or inmate of an institution does not gain or lose a residence or domicile, but retains the domicile he had when he entered the institution.”

<sup>136</sup> *Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100) (*available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=discriminatoryeffectrule.pdf>). *See also* Michael G. Allen et al., *Assessing HUD’s Disparate Impact Rule: A Practitioner’s Perspective* 49 HARV. C.R.-C.L. L. REV. 155 (2014).

<sup>137</sup> *See, e.g.,* Persis S. Yu and Sharon M. Dietrich, National Consumer Law Center, *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses* (April 2012), *available at* <http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf>. Industry practice of including entries for individuals with similar names or other identifying characteristics in search results contributes greatly to the reporting of inaccurate or misleading information to potential landlords and employers. *See, e.g., Meyer v. National Tenant Network, Inc.*, C-13-03187, 2014 WL 197773 (N.D. Cal. Jan. 17, 2014) (noting that screening company included files for other, similarly-named individuals in Plaintiff’s report, some of which labeled him as a violent sex offender, which caused Plaintiff to be denied both housing and employment).

<sup>138</sup> *See* Consumer Finance Protection Bureau, “List of Consumer Reporting Agencies,” [http://files.consumerfinance.gov/f/201501\\_cfpb\\_list-consumer-reporting-agencies.pdf](http://files.consumerfinance.gov/f/201501_cfpb_list-consumer-reporting-agencies.pdf). Federal Trade Commission, “Background Checks: What Job Applicants and Employees Should Know,” at <http://www.consumer.ftc.gov/articles/pdf-0143-background-checks-what-job-applicants-employees-need-know.pdf>

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- (1) *Tenant Blacklisting*: Up until March, 2012, the New York State Office of Court Administration sold case data from Housing Court – including tenants’ names, the amount in controversy and limited disposition information – to tenant screening companies, which in turn sold this data to potential landlords and other paying customers. While tenants’ names are no longer included, the practice of providing court data to screening companies continues, and screening companies may easily match up names and case numbers using the court public access computers.<sup>139</sup>
  - (2) Landlords across the country frequently refuse to rent to tenants whose reports show even a single Housing Court case.<sup>140</sup>
  - (3) Cases may be reported *on filing*, not just after a judgment has been rendered. Thus, even cases where the landlord has declined to pursue the eviction or which have been filed in error may cause a tenant to be blacklisted.
- ii) N.Y. FCRA prohibits reporting noncriminal convictions, such as violations. See Gen. Bus. L. § 380 et seq. This and other protections of the state (and federal) FCRA can be used to promote fairness in both employment and housing decisions.
- (1) **Warning**: Several CRAs have attempted to avoid liability under the FCRA by including provisions in their customer contracts which state that the reports provided may be neither truthful nor accurate, and some courts have sanctioned this activity.<sup>141</sup>

**FEDERALLY-SUBSIDIZED HOUSING**

**(Public, Federally-Assisted, or Section 8 Housing)**

**Provisions Applicable to All Federally-Subsidized Housing**

1. Public Housing Authorities (PHA’s) administer most of the federally subsidized housing programs in N.Y., including public housing and most of the Section 8 voucher program. In New York City, the PHA is the New York City Housing Authority (NYCHA).
2. Each PHA must *publish standards* for denying eligibility and terminating assistance based on criminal activity and substance abuse.<sup>142</sup>

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<sup>139</sup> New York State Bar Association, *LEGALEase: The Use of Tenant Screening Reports and Tenant Blacklisting* 3-4, (June 2013), available at <http://www.nysba.org/tenantscreening/>.

<sup>140</sup> See, e.g., *Massey v. On-Site Manager, Inc.*, 11 Civ. 2612(BMC), 2011 WL 4356380 (E.D.N.Y. Sept. 16, 2011) (observing that tenant’s rental application was denied because of a single eight-year-old eviction that should not have even been reported under FCRA and NYFCRA). The *Massey* court also addressed the issue of a waiver signed by the tenant as part of her rental application, which purported to release the screening company from any and all liability arising out of its reporting of information, finding that such waiver was void with respect to “intentional or willful violations of the NYFCRA or the FCRA.” 2011 WL 4356380 at \*3.

<sup>141</sup> Yu *supra* note 137 at 30. See also *Taylor v. Tenant Tracker, Inc.*, 710 F.3d 824 (8th Cir. 2013) (noting that Tenant Tracker’s report contained the disclaimer “WARNING: Any service NOT using fingerprint analysis has limited effectiveness and is subject to the uniqueness and truthfulness of the applicant's identification. Subscriber shall use all additional identifying information to confirm accuracy.”); *Fiscella v. Intellus, Inc.*, 2010 WL 2405650 (E.D. Va. 2010) (finding that search results provided by Intellus with accuracy disclaimer did not constitute a “file” on Plaintiff that would be subject to FCRA).

<sup>142</sup> For an excellent overview of the nation-wide policies of public housing authorities to keep out tenants with criminal justice involvement, see Sargent Shriver National Center on Poverty Law, “When Discretion Means

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- a. PHA's can institute policies that are *more restrictive* than the federal law and regulations described below.
- b. *Admission to Programs*: PHA's have the authority to bar eligibility for a reasonable period of time after any criminal activity. (42 U.S.C. § 13661(c).)
  - i) Upon application, a PHA will fingerprint all members of the household (except those under 16) and run a criminal background check.
    - (1) In New York City, NYCHA now fingerprints applicants at the point of the apartment interview, not at the point of the application. (This is a good practice because there may be a waiting list several years long between application and interview, and it allows applicants to wait out any applicable mandatory ineligibility period while on the wait list.)
  - ii) Generally, for each conviction, there is a specific time period of ineligibility after the person's sentence, probation, and payment of fine. See ineligibility time periods at the end of this section.
    - (1) *Termination from Programs*: PHA's and landlords generally have the authority to terminate or evict residents for any new criminal activity.
    - (2) PHA's and landlords can require the *exclusion* of an offending household member *and* probation for the household head as a condition of admission or continued benefits.

**3. Definitions** (24 C.F.R. § 5.100)

- a. *Drug-related Criminal Activity*: the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute, or use the drug.
- b. *Drug*: a controlled substance as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802.
- c. *Violent Criminal Activity*: any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage.
- d. *Guest*: a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant.
- e. *Person Under the Tenant's Control*: a person, although not staying as a guest, on the premises at the time of the activity in question because of an invitation from the tenant or other household member with express or implied authority to consent on behalf of the tenant. Absent evidence to the contrary, a person temporarily and infrequently on the premises solely for legitimate commercial purposes is not under the tenant's control.

**Conventional Public Housing**

**1. Admission to Programs** (24 C.F.R. §§ 960.203 & 960.204)

- a. **Mandatory Denial**: Only two narrow categories of applicants **WILL** be found ineligible:
  - i) *Persons Subject to Lifetime Sex Offender Registration* (42 U.S.C. § 13663(a)): Any household with a member who is subject to a lifetime registration requirement under a state sex offender registration program is ineligible for public, federally assisted, or Section 8 housing.
  - ii) *Persons Convicted of Methamphetamine Production* (42 U.S.C. § 1437n(f)): Permanent bar for any individual who has ever been convicted of drug-related criminal activity for

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Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing," available at <http://povertylaw.org/sites/default/files/images/publications/WDMD-final.pdf> (Feb 2015).

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- manufacture or production of methamphetamine on the premises of federally-assisted housing.
- b. **Presumptive Denial:** The following categories of applicants **WILL** be found ineligible unless the relevant mitigation provisions are satisfied:
- i) *Persons Evicted in Past for Drug-Related Activity:* If a household member has been **evicted** from any public, federally-assisted, or Section 8 housing for drug-related criminal activity within the immediate past 3 years, PHA must deny admission **UNLESS** the applicant submits evidence to the PHA's satisfaction:
    - (1) That the affected household member has successfully completed a supervised rehabilitation program approved by the PHA; **OR**
    - (2) That the circumstances leading to the eviction no longer exist.
  - ii) *Persons Engaging in Illegal Use of a Drug* (42 U.S.C. § 13661): PHA will deny admission if:
    - (1) Any family member is *currently engaging in illegal use* of a controlled substance; or
    - (2) There's reasonable cause to believe that a family member's illegal use or *pattern of illegal use* of a controlled substance *may interfere with* the health, safety, or right to peaceful enjoyment of the premises by other residents.
    - (3) *Mitigation Provision:* **BUT**, in determining whether the applicant **MUST** be found ineligible based on any of the above grounds, the PHA **MAY** consider evidence submitted by the applicant that the affected family member is no longer engaging in the activity and:
      - (a) participates in, or has successfully completed, a supervised rehabilitation program; *or*
      - (b) has otherwise been rehabilitated successfully.
  - iii) *Persons Abusing Alcohol* (42 U.S.C. § 13661)
    - (1) PHA will deny admission if there is reasonable cause to believe that a family member's abuse or pattern of abuse of alcohol may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.
    - (2) *Mitigation Provision:* **BUT**, in determining whether the applicant **MUST** be found ineligible based on any of the above grounds, the PHA **MAY** consider evidence submitted by the applicant that the affected family member is no longer engaging in the activity and:
      - (a) participates in, or has successfully completed, a supervised rehabilitation program; *or*
      - (b) has otherwise been rehabilitated successfully.
- c. **Discretionary Denial**
- i) *Persons Who Engaged in Past Criminal Activity* (42 U.S.C. § 13661)
    - (1) For a reasonable amount of time after the criminal activity, the PHA may deny admission if any member of the household engaged in:
      - (a) Any drug-related criminal activity; or
      - (b) Any violent criminal activity; or
      - (c) Any other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or PHA employees.
  - ii) (NOTE: Fleeing Felons and Parole Violators are not mentioned in the statutes or regulations concerning Public Housing eligibility, but they are subject to termination. See below.)
- d. **General Mitigation Provision** (24 C.F.R. § 960.203): When the PHA receives any unfavorable information about an applicant:
- i) Consideration shall be given to the time, nature, and extent of the applicant's conduct (including the seriousness of the offense);

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- ii) Consideration may be given to factors that might indicate a reasonable probability of “favorable future conduct,” such as:
    - (1) Evidence of rehabilitation, and
    - (2) Evidence of the applicant family’s participation in or willingness to participate in social service or other appropriate counseling service programs and the availability of such programs.
  - iii) However, if rehabilitation is not an element of the eligibility determination (see above), the PHA may choose not to consider whether the person has been rehabilitated.
  - iv) *Exclusion of Family Member*: The PHA may require an applicant to exclude a household member who has participated in or been culpable for criminal, alcohol, or drug-related activity (those in 24 C.F.R. § 960.204) that warrant denial.
  - v) *Continuation of Denial*. The PHA may choose to continue the prohibition of admission past the prescribed period of time for a disqualifying behavior or event. (24 C.F.R. § 960.203(c)(3).)
  - e. **Practice Tip 1**: CRDs and CGCs (*See supra*, Certificates that Promote Rehabilitation, at 16) can be critical mitigation evidence that permits tenants with criminal convictions to obtain stable public housing.
  - f. **Practice Tip 2**: In a June 2011 letter HUD Secretary Shaun Donovan encouraged local PHA’s to consider “all relevant information” in admissions and termination decisions regarding people with criminal justice involvement, including “factors which indicate a reasonable probability of favorable future conduct” and emphasizing that “this is an administration that believes in the importance of second chances.” (Available on Reentry Net/NY: <http://bit.ly/1o4ou3r>).
- 2. Termination or Eviction** (42 U.S.C. § 1437d(l); 24 C.F.R. § 966.4)
- a. **Mandatory Termination**: The following categories of current public housing residents WILL have their subsidies terminated and be evicted from public housing:
    - i) *Persons Subject to Lifetime Sex Offender Registration*: [see above];
    - ii) *Persons Convicted of Methamphetamine Production on the premises of federally assisted housing*: [see above];
  - b. **Discretionary Termination**: The following categories of residents MAY be terminated:
    - i) *Persons Engaging in Illegal Use of a Drug*: [see above, including specific mitigation provision];
    - ii) *Persons Abusing Alcohol*: [see above, including specific mitigation provision];
    - iii) *Persons Furnishing False Information*: Any person who furnished false or misleading information concerning illegal drug use, alcohol abuse, or rehabilitation of illegal drug users or alcohol abusers;
    - iv) *Persons Engaging in Criminal Activity*
      - (1) *Drug Crime On or Off the Premises*: if any tenant, member of the tenant’s household, or guest engages in any drug-related criminal activity **on or off** the premises, or any other person under the tenant’s control engages in any drug-related criminal activity **on** the premises;
        - (a) **Warning**: PHA’s have the authority to evict for drug-related activity even if the tenant did not know, could not foresee, or could not control behavior by other occupants or guests. *Dep’t of Housing & Urban Dev. v. Rucker*, 535 U.S. 125 (2002).
      - (2) *Crimes Entailing Threat to Other Residents*: if a public housing tenant, any member of the tenant's household, a guest, or any other person under the tenant's control engages in any criminal activity threatening the health, safety, or right to peaceful enjoyment of the

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- premises by *other tenants* or by *persons residing in the immediate vicinity* of the premises;
- (3) **Evidence:** Neither an arrest nor a conviction is necessary, and the standard of proof required for a criminal conviction need not be satisfied. However, the PHA must provide some evidence that the criminal activity has occurred.
  - v) **Fleeing Felons:** if the tenant is fleeing to avoid prosecution, or custody or confinement after conviction, for a crime (or attempt to commit a crime) that is a felony under the laws of the place from which the individual flees (or a high misdemeanor in NJ);
  - vi) **Parole Violators:** if the tenant is violating a condition of probation or parole imposed under Federal or State law.
  - vii) **General Mitigation Provision:** for all discretionary terminations, the PHA may consider all relevant circumstances such as:
    - (1) The seriousness of the offending action;
    - (2) The extent of participation by the leaseholder in the offending action;
    - (3) The effects that the eviction would have on family members not involved in the offending activity; and
    - (4) The extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.
  - viii) **Exclusion of Family Member.** The PHA has *discretion* to evict only the wrong-doer, but PHA's can and frequently do evict entire families.
  - ix) **Warning:** Exclusions are usually permanent and PHA's, including NYCHA, will send investigators to the apartment to check for excluded household members. Violations of permanent exclusions will trigger termination proceedings for the entire household.
  - x) **Practice Tip:** CRD's and CGC's (*See supra*, Certificates that Promote Rehabilitation, at 16) can be critical mitigation evidence that can prevent the loss of public housing due to criminal convictions.

### **3. Grievance Procedure** (24 C.F.R. § 966.50-57)

- a. **Notice.** Written notice of lease termination is required within a reasonable period of time, not to exceed 30 days, informing tenant of the grounds for termination, the right to reply to the notice and examine any documents directly relevant to the lease termination, and whether and when the tenant is entitled to request a grievance hearing. (24 C.F.R. § 966.4(1)(3).)
- b. **Grievance Process**
  - i) **Informal Settlement.** First step is to attempt to settle the matter at an informal conference, usually scheduled within ten working days of filing a grievance.
  - ii) **Formal Hearing.** Within five days of receiving the results of the informal hearing, complainant must file a written request for a formal grievance hearing. Within a reasonable time after the formal hearing, usually ten working days, the hearing panel/officer must issue a decision.
- c. **Grievance Hearing Not Required.** If the PHA is terminating the lease by judicial action (*e.g.*, in Housing Court) and HUD has determined that the state's eviction procedure meets HUD's requirements for due process ("due process determination"), the terminations for the following reasons are NOT subject to the administrative grievance procedure:
- d. Any criminal activity entailing a threat to other residents [see above];
  - i) Any violent or drug-related criminal activity [see above]; or
  - ii) Any criminal activity that resulted in a felony conviction of a household member.

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4. **References:** The HUD *Public Housing Occupancy Guidebook*, which apparently was last updated in 2003, is available online at [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/ph/rhiip/phguidebook](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/rhiip/phguidebook).

**Public Housing in New York City**  
*New York City Housing Authority (NYCHA)*

**1. Admission**

- a. Bases for Ineligibility:
- i) Persons with a Criminal Record
    - (1) For public housing, NYCHA has set ineligibility periods for families containing persons within the categories below: (*Applications Manual, Ex. F, “Standards for Admission: Conviction Factors and End of Ineligibility Periods – Public Housing Program” Updated 10/15/13*)

<b>NYCHA Public Housing</b>		
<b>Criminal Conviction</b>		<b>Years After Serving Sentence</b> (date is calculated from the end of a sentence, including release from incarceration but not completion of parole/probation)
Subject to lifetime requirement under a state sex offender registration program		Barred from NYCHA housing until the convicted person is no longer subject to lifetime sex offender registration
Felonies	Class A, B, and C	6 years
	Class D and E	5 years
Misdemeanors	Class A	4 years
	Class B or Unclassified	3 years
Violations or DWI		No automatic ineligibility, but NYCHA may find the family ineligible. Use of a controlled substance, including marijuana, can be grounds for 3 years of ineligibility.
<i>Multiple Convictions</i>		Ineligible for longest applicable period.

- (2) *Pending Charges:* NYCHA will deny or hold an application if any criminal charges are pending, including an ACD before actual dismissal.
  - (a) **Practice Tip:** Judges and prosecutors have agreed to shorten adjournment periods in this situation.
- (3) *Excluded Crimes:* NYCHA does have a short list of offenses that it officially disregards as a basis of ineligibility, including some felonies, misdemeanors, and violations. Applicant must present a copy of the original charges to prove that one of these offenses

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was the *only basis*. (*Applications Manual, Ex. H, "Overlooked Offenses – Public Housing Program."* Updated 10/15/13; *Applications Manual Chapter IX, Section V Subsection B.3.c, at p. 18* (Updated 12/17/09))

(a) *Felonies*

- (i) Unlawful Use of Secret Scientific Material, PL § 165.07
- (ii) Trademark Counterfeiting in 2nd Degree, PL § 165.72
- (iii) Trademark Counterfeiting in 1st Degree, PL § 165.73
- (iv) Commercial Bribing in 1st Degree, PL § 180.03
- (v) Commercial Bribe Receiving in 1st Degree, PL § 180.08
- (vi) Bribing a Labor Official, PL § 180.15
- (vii) Bribe Receiving by Labor Official, PL § 180.25
- (viii) Sports Bribing, PL § 180.40
- (ix) Sports Bribe Receiving, PL § 180.45
- (x) Tampering with Sports Contest in The 1st Degree, PL § 180.51
- (xi) Impairing the Integrity Of a Pari-Mutuel Betting System in The 2nd Degree, PL § 180.52
- (xii) Impairing the Integrity Of a Pari-Mutuel Betting System in the 1st Degree, PL § 180.53
- (xiii) Rent Gouging in the 1st Degree, PL § 180.57
- (xiv) Unlawful Grand Jury Disclosure, PL § 215.70
- (xv) Harassment of a Rent Regulated Tenant, PL § 241.05
- (xvi) Bigamy, PL § 255.15
- (xvii) Non-Support of a Child in the 1st Degree, PL § 260.06
- (xviii) Manufacture of Unauthorized Recordings in 1st Degree, PL § 275.10
- (xix) Manufacture or Sale of an Unauthorized Recording Or Performance in 1st Degree, PL § 275.20
- (xx) Advertisement Or Sale of Unauthorized Recordings in 1st Degree, PL § 275.30
- (xxi) Failure To Disclose Origin of Recording in 1st Degree, PL § 275.40

(b) *Misdemeanors*

- (i) Self-Abortion in 1st Degree, PL § 125.50
- (ii) Self-Abortion in 2nd Degree, PL § 125.55
- (iii) Issuing Abortional Articles, PL § 126.60
- (iv) Criminal Possession of a Taximeter Accelerating Device, PL § 145.70
- (v) Subway Fare Evasion, PL § 165.15(3)
- (vi) Fortune Telling, PL § 165.35
- (vii) Trademark Counterfeiting in 3rd Degree, PL § 165.71
- (viii) Commercial Bribing in 2nd Degree, PL § 180
- (ix) Commercial Bribe Receiving in 2nd Degree, PL § 180.05
- (x) Bribing Labor Official, PL § 180.15
- (xi) Bribe Receiving by a Labor Official, PL § 180.25
- (xii) Tampering with Sports Contest in the 2nd Degree, PL § 180.50
- (xiii) Rent Gouging in the 3rd Degree, PL § 180.55
- (xiv) Rent Gouging in the 2nd Degree, PL § 180.56
- (xv) Criminal Contempt of the Legislature, PL § 215.60
- (xvi) Criminal Contempt of a Temporary State Commission, PL § 215.65
- (xvii) Criminal Contempt of the State Commission on Judicial Conduct, PL § 215.66
- (xviii) Unlawful Disclosure of Indictment, PL § 215.75
- (xix) Unlawful Disposition of Assets Subject to Forfeiture, PL § 215.80

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- (xx) Disseminating a False Register Sex Offender Notice, PL § 240.48
- (xxi) Unlawfully Issuing Dissolution Decree, PL § 255.05
- (xxii) Unlawfully Procuring Marriage License, PL § 255.10
- (xxiii) Adultery, PL § 255.17
- (xxiv) Non-Support Of a Child in The 2nd Degree, PL § 260.05
- (xxv) Manufacture of Unauthorized Recordings in 2nd Degree 275.05
- (xxvi) Manufacture Or Sale of an Unauthorized Recording Or Performance in 2nd Degree, PL § 275.15
- (xxvii) Advertisement Or Sale Of Unauthorized Recordings In 2nd Degree, PL § 275.25
- (xxviii) Failure To Disclose Origin Or Recording in 2nd Degree, PL § 275.35
- (xxix) Violation of Firearm License Regulations, PL § 400
- (4) McNair Hearing (challenging ineligibility for criminal offenses) (*Applications Manual, Chap IX, Sec. V, Subsec. B (2).*)
  - (a) A grievant found “ineligible due to convictions” has the right to produce evidence of her rehabilitation to overcome any denial of eligibility. See Faison v. New York City Housing Authority, 283 A.D.2d 353, 354 (1st Dep’t 2001).
  - (b) Applicant family must show that the only basis for ineligibility is an offense that NYCHA has chosen to overlook, OR present substantial evidence to indicate a reasonable probability that offending person’s future behavior will not adversely affect the physical or financial health, safety, or welfare of other tenants, Authority staff, or an Authority project.
  - (c) **Practice Tip:** CRD’s and CGC’s [*see supra*, Certificates that Promote Rehabilitation, at 16] can be critical mitigation evidence in McNair hearings.
  - (d) See *Guidelines for AIO Staff When Considering Applicants Found Ineligible Due to Convictions, in Applications Manual Chapter IX, Section V Subsection B.3.c, at p. 18 (Updated 12/17/09)*, for factors and proof that categorically meet this standard.
- ii) Persons who committed fraud, bribery, or any other corrupt or criminal act in connection with a government housing program, or persons who misrepresented information affecting eligibility, preferences for admission, citizenship/immigration status, family composition, income, or allowances.
  - (1) **Practice Tip:** clients who are prosecuted for welfare fraud in connection with a public housing program may be deemed ineligible for the underlying conduct, even if the disposition in that prosecution is a violation or dismissal.
- iii) Persons who have been evicted from a governmental housing program, whose tenancy in a government housing program has been terminated, or whose participation in the section 8 housing assistance program has been terminated as a result of failure to meet tenancy obligations
  - (1) Such families are ineligible for five years from the date of eviction or termination of tenancy or subsidy.
- iv) Persons who have been evicted or are about to be evicted from a NYCHA apartment pursuant to a licensee action.
  - (1) Such families are ineligible for five years from the date of the person’s eviction. An eviction is deemed to have occurred if the family is served with the warrant of eviction or a physical eviction by the City Marshall. If the family is still in occupancy of the apartment, the period of ineligibility begins from the date they are declared ineligible.
- v) Persons who have started fires within the last four years (through arson; smoking in bed; abandoned, discarded, or improperly placed material; children over six playing with a heat

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- source; heat source unattended or combustible material placed too close to a heat source; or use of flammable liquid to start a fire);
- vi) Persons who within the last three years have behaved violently or have destroyed property (note that behavior underlying a criminal prosecution which was subsequently dismissed and sealed can be used against an applicant in this instance);
  - vii) Persons who within the last three years have disturbed neighbors;
  - viii) Persons with grossly unsanitary or hazardous housekeeping habits;
  - ix) Persons who within the last three years have illegally used a controlled substance including marijuana,
    - (1) If the Housing Authority has reasonable cause to believe that a member of the applicant family has engaged in the illegal use, or pattern of illegal use, of a controlled substance within the last three years, the family is ineligible until the earliest of:
      - (a) Three years after the date of the ineligibility finding (if the latest date of illegal drug use can be established by objective evidence, the period of ineligibility shall begin from that date instead of from the date the family is declared ineligible)
      - (b) Until the family provides both written verification from a state-licensed drug treatment agency that the offending person has been drug free for 12 months and also submits a current clean toxicology report
      - (c) Until the Housing Authority is convinced, based on all of the information presented, that the offending person is no longer engaging in the illegal use of a controlled substance and has otherwise been rehabilitated successfully so as not to interfere with the health, safety, or right to peaceful enjoyment of the premises by other Housing Authority residents.
    - (2) At eligibility interview, the applicant is asked if any family member has used illegal drugs in the past three years.
  - x) Persons permanently excluded from a NYCHA apartment within the last 5 years;
  - xi) Persons terminated from NYCHA employment within the last three years after a trial for behavior that would constitute a felony, m/d, violation, or intoxication on the job.
  - xii) (See *NYCHA Applications Manual, Ex I, "Standards for Admission: Non-Penal Factors & End of Ineligibility Periods (EIP) – Public Housing Program" Updated 10/15/13*)
- b. **General Mitigation Provision**
- i) Evidence of rehabilitation;
  - ii) Evidence of family's participation in or willingness to participate in social service programs or other appropriate counseling service programs and the availability of such programs.
- c. (See generally *NYCHA Applications Manual, Chap V, Sec. II, Subsec. F, "Standards for Admission."*)

**2. Termination for "Non-desirability"**

- a. NYCHA tenants can have their subsidies terminated (in an administrative hearing, which leads to an eviction in Housing Court) for their conduct or the actions of any person occupying the premises of the tenant which constitutes:
  - i) A danger to the health and safety of neighbors;
  - ii) A sex or morals offense on or near the NYCHA premises;
  - iii) A source of danger or a cause of damage to NYCHA employees or property;
  - iv) A danger to the peaceful occupation of other tenants;
  - v) A common law nuisance.

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- b. *Grievance Procedure*. NYCHA continues to be bound by various consent decrees (especially the Escalera<sup>143</sup> decree) that are more protective of tenants than current federal law. (See MFY Legal Services, What Do I Do If I Disagree with Something NYCHA Does?, available at [http://www.mfy.org/wp-content/uploads/facts/NYCHA\\_HSG-GrievancePr%23D7EC7.doc.pdf](http://www.mfy.org/wp-content/uploads/facts/NYCHA_HSG-GrievancePr%23D7EC7.doc.pdf).)
- i) Probably the most important provisions relevant to criminal conduct are in the Randolph/Tyson<sup>144</sup> consent decrees, which state that a tenant cannot be evicted if the accused person (or “non-desirable”) has been removed from the household by the time of the administrative hearing.
  - ii) In those cases, the tenant can only be placed on probation and the non-desirable person can be permanently excluded from living there.
  - iii) These cases involve the classic “innocent family member” scenario – where a parent or grandparent is the tenant being evicted for the alleged conduct of a child or grandchild.
  - iv) Procedure
    - (1) NYCHA will provide notice of administrative termination proceedings at least 15 days before the hearing is to be held. The hearing generally can be postponed until after a criminal disposition. A favorable termination in the criminal proceeding (dismissal, ACD, acquittal) usually causes NYCHA to withdraw the termination proceeding.
    - (2) But beware, ANY conviction for a misdemeanor or felony can be used as a basis for termination because it can be a basis for ineligibility (see above).
    - (3) After the hearing, the Hearing Officer will provide a written decision and make a disposition with respect to each of the charges.
  - v) **Practice Tip:** CRD’s and CGC’s [see *supra*, Certificates that Promote Rehabilitation, at 16] can be critical mitigation evidence in termination hearings. Other important mitigating factors include:
    - (1) The tenant faces a high probability of homelessness if evicted;<sup>145</sup>
    - (2) The tenant is responsible for the care of children or individuals with disabilities;<sup>146</sup>
    - (3) The incident for which NYCHA seeks termination was an isolated incident, particularly where the tenant has had a long rental history with NYCHA,<sup>147</sup> and

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<sup>143</sup> See Escalera, et al v. New York City Housing Authority, 425 F. 2d 853 (2d Cir. 1970).

<sup>144</sup> See Joseph Tyson Sr. v. New York City Housing Authority and Myrdes Randolph v. New York City Housing Authority, 73 C 859, 74 C 1856, 74 C 2556, 74 C 2617 (S.D.N.Y 1976, Metzner, J.).

<sup>145</sup> See, e.g., Vega v. N.Y.C. Hous. Auth., 950 N.Y.S.2d 494 (Sup. Ct. 2012) (holding that the penalty of eviction “would render petitioner and her children homeless with all of the consequences that homelessness entails,” which “shocks the court’s conscience”); Matter of Holiday v. Franco, 268 A.D.2d 138 (1st Dep’t 2000) (“The forfeiture of public housing accommodations is a drastic penalty because, for many of its residents, it constitutes a tenancy of last resort.”). But see Matter of Perez v. Rhea 87 A.D.3d 476 (1st Dep’t 2013) (upholding termination and finding Holiday language unpersuasive where tenant had work income and did not originally state in her petition that loss of housing would result in homelessness).

<sup>146</sup> See, e.g., Matter of Vazquez v. N.Y.C. Hous. Auth. (Robert Fulton Houses), 57 A.D.3d 360 (1st Dep’t 2008) (observing that tenant was disabled and also cared for her disabled uncle, who lived with her); Matter of Williams v. Franco, 262 A.D.2d 45 (1st Dep’t 1999) (counting as a mitigating factor that tenant’s household included seven children and three people with disabilities).

<sup>147</sup> See, e.g., Matter of Peoples v. New York City Hous. Auth., 723 N.Y.S.2d 6 (1st Dep’t 2001) (tenant with a 24-year history); Matter of Joseph v. Franco 1/27/99 N.Y.L.J. at 27, col. 6 (tenant with 38-year history); Matter of Milton v. Christian, 99 A.D.2d 984 (1st Dep’t 1984) (tenant with 16-year history). But see Matter of Grant v. N.Y.C. Hous. Auth., 116 A.D.3d 531 (1st Dep’t 2014) (reinstating termination for tenant with 23-year otherwise unblemished history).

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- (4) Circumstances, such as mental health issues or a particularly stressful life period, in some way explain the tenant's actions.<sup>148</sup>
- c. (See generally *NYCHA Management Manual – Chapter VII, Sec. III & IV, “Termination of Tenancy,”* and *Appendix B – “Termination of Tenancy – Non-Desirability Actions”*)

**3. Termination for other Prohibited Conduct**

- a. *Misrepresentation*: if the tenant makes a willful misstatement or conceals any material fact relating to eligibility for admission or continued occupancy;
- b. *Breach of Rules and Regulations*: if the tenant or any person occupying the tenant's premises violates a NYCHA rule or regulation;
- c. *Chronic Breach of Rules and Regulations*: if the tenant or any person occupying the tenant's premises repeatedly violates a NYCHA rule or regulation;
- d. *Chronic Delinquency on the Payment of Rent*: if the tenant repeatedly fails or refuses to pay rent within the month due at least three times within a 12-month period;
- e. *Non-Verifiable Income*: if the tenant fails or refuses to submit to a verification of family income;
- f. *Assignment or Transfer of Possession*: if the tenant of record moves from the apartment and the apartment is being occupied by a person without NYCHA permission;
- g. *Squatter/Licensee Occupancy*: if the tenant has moved and admits to having moved and the apartment is being occupied by a person without any legal claim or right to it;
- h. *Loss of Resident Employee Status*: if an employee loses resident status, unless such employee is eligible to become a tenant;
- i. *Non-Payment of Rent*: if the tenant fails to pay rent on the date fixed for payment.
- j. (See *NYCHA Management Manual – Chapter VII, Sec. III & IV, “Termination of Tenancy”*)

**Section 8 Program**

**1. Generally**

- a. The Section 8 Housing Choice Voucher Program subsidizes tenants to rent apartments from private landlords.
- b. The local PHA usually administers each Section 8 program.
- c. The crime-related eligibility and termination standards generally parallel those of Conventional Public Housing.

**2. Admission to Program** (42 U.S.C. § 1437f; 24 C.F.R. §§ 982.552 & 982.553)

- a. **Mandatory Denial**: The following categories of applicants **WILL** be found ineligible:
- i) *Persons Subject to Lifetime Sex Offender Registration*: [same as for public housing]
- ii) *Persons Convicted of Methamphetamine Production*: [same as for public housing]
- b. **Discretionary Denial**: The PHA has the **discretion** to deny the following (subject to the listed mitigation provisions):
- i) *Persons Evicted in the Past for Drug-Related Activity*: [same as for public housing, including specific mitigation provision];

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<sup>148</sup> See, e.g., *Matter of Rock v. Rhea*, 114 A.D.3d 578 (1st Dep't 2014) (observing that the court has found termination for tenant conduct to shock the conscience “where the conduct was isolated or specifically related to circumstances that gave some explanation for the behavior”); *Matter of Winn v. Brown*, 226 A.D.2d at 191 (1st Dep't 1996) (reversing termination because “the two incidents occurred during a time of much stress for this 15-year tenant, when local drug dealers were making her fear for the life of her son and herself and her request for a transfer remained unfulfilled”).

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- ii) *Persons Engaging in Illegal Use of a Drug*: [same as for public housing, including specific mitigation provision];
- iii) *Persons Abusing Alcohol*: [same as for public housing, including specific mitigation provision];
- iv) *Persons Who Engaged in Past Criminal Activity*: if any household member is currently engaged in, or has engaged in during a reasonable time before the admission:
  - (1) Drug-related criminal activity;
  - (2) Violent criminal activity;
  - (3) Other criminal activity that may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity;
  - (4) Other criminal activity that may threaten the health or safety of the owner, property management staff, or persons acting on behalf of the PHA.
  - (5) NOTE: If the PHA previously denied an application due to criminal activity, it may reconsider the applicant if the PHA has sufficient evidence that the members of the household have not engaged in such criminal activity during a reasonable period.
- v) *Persons Who Committed Fraud*: If any member of the family has committed fraud, bribery, or any other corrupt or criminal act in connection with any federal housing program;
- vi) *Persons Who Threaten PHA personnel*: If the family has engaged in or threatened abusive or violent behavior toward PHA personnel;
- vii) *Persons Who Have Been Evicted or Terminated*: If any member of the family has been evicted from federally assisted housing in the last five years, or if a PHA has ever terminated assistance under the program for any member of the family.
- viii) (NOTE: Fleeing Felons and Parole Violators are not mentioned in the statutes or regulations concerning Section 8 eligibility, including 42 U.S.C. § 1437f and 24 C.F.R. Part 982.)
- ix) **General Mitigation Provision**: (24 C.F.R. § 982.552(c)(2))
  - (1) For all discretionary denials, the PHA may consider all relevant circumstances such as:
    - (a) The seriousness of the case;
    - (b) The extent of participation or culpability of individual family members;
    - (c) Mitigating circumstances related to the disability of a family member; and
    - (d) The effects of denial or termination of assistance on other family members who were not involved in the action or failure.
  - (2) *Disability*: If the family includes a person with disabilities, the PHA decision is subject to consideration of reasonable accommodation in accordance with 24 C.F.R. Part 8.
  - (3) *Exclusion of Family Member*: the PHA may require the exclusion of the culpable family member from the household.
- x) **Practice Tip**: CRD's and CGC's [see *supra*, Certificates that Promote Rehabilitation, at 16] can be critical mitigation evidence that permits tenants with criminal convictions to obtain Section 8 vouchers.

**3. Termination or Eviction** (42 U.S.C. §§ 1437f(d) & 1437f(o)(7)(D))

a. **Termination by PHA** (24 C.F.R. §§ 982.551, 982.552, 982.553)

- i) **Mandatory Termination**: The following categories of Section 8 recipients WILL have their subsidies terminated and be evicted:
  - (1) *Persons Subject to Lifetime Sex Offender Registration*: [same as for public housing];
  - (2) *Persons Convicted of Methamphetamine Production*: [same as for public housing];
- i) **Discretionary Termination**: The following categories of residents MAY be terminated:
  - (1) *Persons Engaging in Illegal Use of a Drug*: [same as for public housing, including specific mitigation provision];

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- (2) *Persons Abusing Alcohol*: [same as for public housing, including specific mitigation provision];
  - (3) *Persons Engaging in Criminal Activity*: if any household member has violated his lease obligation not to engage in any:
    - (a) Drug-related criminal activity;
    - (b) Violent criminal activity;
    - (c) **Evidence**: Neither an arrest nor a conviction is necessary [same as for public housing]. (24 C.F.R. § 982.553(c).)
      - (i) NOTE: the criteria for PHA terminations do not include criminal activity that threatens the health or safety of other tenants or PHA workers.
  - (4) *Persons Who Committed Fraud*: [same as for Section 8 Admission];
  - (5) *Persons Who Threaten PHA personnel*: [same as for Section 8 Admission]
  - (6) (NOTE: Fleeing Felons and Parole Violators are not mentioned in the statutes or regulations concerning Section 8 termination by the PHA, including 42 U.S.C. § 1437f and 24 C.F.R. Part 982. BUT, the HUD Guidebook states that PHA's may terminate on those grounds.)
  - (7) **General Mitigation Provision**: [same as for Section 8 Admission].
  - (8) **Practice Tip**: CRD's and CGC's [see *supra*, Certificates that Promote Rehabilitation, at 16] can be critical mitigation evidence that can prevent the loss of Section 8 vouchers due to criminal convictions.
- ii) **Grievance Procedure**: PHA must provide prompt written notice of termination and right to request an informal hearing. The family must be given the opportunity to examine any directly relevant documents prior to the PHA hearing. (24 C.F.R. § 982.555.)
- b. **Termination or Eviction by Owner/Landlord** (24 C.F.R. § 982.310)
- i) The owner or landlord may terminate the tenancy by evicting the household in Housing Court because the relevant tenant obligations of good conduct, incorporated as lease provisions, have been violated.
  - ii) **Discretionary Termination**: The owner/landlord may evict or require the exclusion of the following categories of residents:
    - (1) *Persons Engaging in Illegal Use of a Drug*: [same as for public housing, including specific mitigation provision];
    - (2) *Persons Abusing Alcohol*: [same as for public housing, including specific mitigation provision]
      - (a) NOTE: this ground is not listed in 982.310, but it is still a lease requirement, the violation of which is grounds for eviction;
    - (3) *Persons Engaging in Criminal Activity*
      - (a) *Drug Crime on Or Near the Premises*: if any tenant, member of the tenant's household, or guest engages in any drug-related criminal activity **on or near the premises**, or any person under the tenant's control engages in any drug-related criminal activity **on the premises**;
        - (i) NOTE that this provision is more limited than the PHA's authority.
      - (b) *Violent Criminal Activity*: if any tenant, member of the tenant's household, or guest engages in any violent criminal activity **on or near the premises**, or any other person under the tenant's control engages in such activity **on the premises**;
        - (i) NOTE that this provision is more limited than the PHA's authority.
      - (c) Other criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents;

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- (d) Other criminal activity that threatens the health, safety, or right to peaceful enjoyment of the residences by persons residing in the immediate vicinity;
- (e) **Evidence:** Neither an arrest nor a conviction is necessary [see above].
- (4) *Fleeing Felons*: [same as for public housing];
- (5) *Parole Violators*: [same as for public housing];
- (6) The owner/landlord may also evict for *serious or repeated violation of the terms and conditions of the lease*, including all tenant obligations in 24 C.F.R. § 982.551. The owner/landlord can also evict for “other good cause,” including failure to accept a new lease, a history of disturbance or destruction of property, owner’s desire to use the unit for personal use, sale, renovation, or to lease at a higher rent, or other economic reason.
- (7) *Exclusion of Family Member*. The owner may require a tenant to exclude a culpable household member as a condition of continued tenancy.
- iii) **General Mitigation Provision:** for all of these grounds, when action is not required by law, the owner/landlord may consider all relevant circumstances such as:
  - (1) The seriousness of the offending action;
  - (2) The effect on the community of denial or termination or the failure of the owner to take such action;
  - (3) The extent of participation by the leaseholder in the offending action;
  - (4) The effects that the eviction would have on family members not involved in the offending activity;
  - (5) The demand for assisted housing by families who will adhere to lease responsibilities;
  - (6) The extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action; and
  - (7) The effect of the owner’s action on the integrity of the program.
- c. **Absence from Unit** (24 C.F.R. § 982.312)
  - i) *Absence from unit*: the family may not be absent from the unit for a period of more than 180 consecutive calendar days. (24 C.F.R. § 982.312(a).)
  - ii) *Absence* means that no member of the family is residing in the unit. (§ 982.312(c).)
  - iii) **Practice Tip:** Be careful of this provision when a client is incarcerated or entering a residential treatment program.
- d. **Changes in Household Composition** (24 C.F.R. § 982.551)
  - i) A participant must keep the Section 8 PHA informed of any changes in household composition. Tenants have been terminated for failure to notify Section 8, particularly for additions to the household.
  - ii) Tenants who do not notify Section 8 of additions can also be prosecuted criminally for fraud.

**Section 8 in New York City**  
***NYCHA Section 8***

**1. Generally**

- a. The vast majority of Section 8 vouchers in New York City are administered by NYCHA. The City Department of Housing Preservation and Development (HPD) also administers a significant number for families in limited situations.

**2. Admission to Program**

- a. Note that NYCHA has chosen to overlook a broader range of offenses under Section 8 housing than under Public Housing and has set specific ineligibility periods only for sex offenders subject to a lifetime registration requirement, violent felonies, and controlled substances or alcohol-related offenses. (See *NYCHA Applications Manual, Ex. FF, “Standards for Admission:*

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*Conviction Factors & End of Ineligibility Periods – Section 8 Housing Assistance Program,” Ex. GG, “NYS Penal and Traffic Offenses of Violent Felonies, Controlled Substances And Alcohol Related Offenses – Section 8 Housing Assistance Program” and Ex. HH, “Overlooked Offenses – Section 8 Housing Assistance Program,” (Revised 7/20/09), and NYCHA Applications Manual, Chap VI, Sec. II, Subsec. E (3). (Revised 12/23/09)*

<b>NYCHA Section 8</b>	
<b>Criminal Conviction</b>	<b>Years After Serving Sentence</b> (including conditional discharge or completion of incarceration, but not including probation/parole)
Subject to a lifetime registration requirement under a state sex offender registration program	Until the convicted person is no longer subject to a lifetime registration requirement
<i>Violent Behavior, Controlled Substances or Alcohol Related Offenses</i> Class A, B, and C Class D and E	6 years 5 years
<i>Controlled Substances or Alcohol Related Offenses</i> Class A Misdemeanors  Class B or Unclassified Misdemeanors	4 years  3 years
<i>Controlled Substances or Alcohol Related Offenses</i> Violations or DWI	No automatic ineligibility, but NYCHA may still find the family ineligible. Use of a controlled substance, including marijuana, can be grounds for three years of ineligibility.
<i>Multiple Convictions</i>	Ineligible for longest applicable period.

- b. For a list of specific offenses, see *NYCHA Applications Manual, Exhibit G “Section 8 Program - NYS Penal Code and Traffic Law Sections with respect to Violent Felonies, Controlled Substances and Alcohol-Related Offenses.”*
- c. **McNair hearing** (challenging ineligibility for criminal offenses): Same as for NYCHA public housing. (See *NYCHA Applications Manual, Chap IX, Sec. VIII, Subsec. B(2).*)
- d. **Practice Tip:** CRD’s and CGC’s [see *supra*, Certificates that Promote Rehabilitation, at 16] can be critical mitigation evidence that permits tenants with criminal convictions to obtain Section 8 vouchers.

**3. Termination or Eviction**

- a. These provisions are substantially the same as for the Section 8 program generally, although some special requirements have been instituted by consent decree.

**IMMIGRATION**

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1. Non-citizens involved in the criminal justice system confront immigration consequences that can be very severe. Even for your clients who have lived in the United States for a long time, have strong ties to the U.S., and have family here, guilty pleas and convictions can lead to immediate detention and can start deportation (also called “removal”) proceedings.
  - a. If your client is a noncitizen, *arrest alone* can lead to detention by Immigration and Customs Enforcement (ICE) and the start of deportation proceedings.
  - b. If your client is out of status or undocumented, his fingerprints will be sent to an immigration database upon arrest. ICE may lodge an **immigration “detainer,” or warrant**, at the arraignment. An immigration detainer may also be lodged by ICE officials while your client is in jail, regardless of the type of charges.
  - c. **Warning:** If a client is living in the U.S. with lawful immigration status but has prior criminal convictions, a new arrest may also lead to an immigration detainer.
  
2. **If your client has an immigration detainer:**
  - a. Once the criminal case is over, or if your client posts bail, instead of being released he will be detained by immigration and sent to see an Immigration Judge.
  - b. **NOTE: in New York City, the City Council has passed laws protecting some people against ICE. It is important to talk to a qualified immigration attorney about whether your client may qualify to be released from NYC DOC custody even if they have an immigration detainer.**
  - c. If your client has an ICE detainer, advise his family NOT to pay bail until you have discussed the options with an immigration attorney. Otherwise your client will be transferred to ICE custody upon payment of the bail. **An open criminal case can prevent a client from fighting deportation proceedings or from returning to the U.S. if he is traveling internationally.**
  
3. **The consequences of a criminal conviction for non-citizens**
  - a. If your client is undocumented, criminal convictions may make them ineligible to obtain status in the future (including residency, asylum, work authorization, etc.)
  - b. If your client is in the U.S. as a Lawful Permanent Resident (someone who has his green card), criminal convictions could:
    - i) Make him deportable
    - ii) Make it so he cannot become a U.S. citizen
    - iii) Make it so he cannot renew his green card
    - iv) Make it so he cannot travel internationally
  - c. For a non-citizen, regardless of whether he is a green card holder or is undocumented, even a non-criminal violation can make him deportable or bring about undesirable consequences. **Make sure to ask all clients where they were born.**
  - d. Even low-level, nonviolent, and misdemeanor offenses (such as shop-lifting, drug possession, and turnstile-jumping) can lead to deportation. For instance, two convictions for turnstile jumping can make a lawful permanent resident deportable.
  - e. Even non-criminal violations can lead to deportation, like violations for possession of marijuana.
  
4. Because these consequences are so severe and complex, it is absolutely critical to consult an immigration lawyer before your client takes any plea or conviction. This is especially important if the client has had any previous encounters with the legal system.

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- a. **Practice Tip:** If your client has a valid green card, be sure to advise him NOT to travel outside the country or to apply for a renewal green card or any other immigration benefit until he has consulted with an immigration attorney.
5. **Where to get help: Call the Immigrant Defense Project:** The Immigrant Defense Project runs a hotline for criminal defense attorneys and immigrant clients and families on weekdays from 9-6 at [212-725-6422](tel:212-725-6422). They can advise about the immigration consequences of criminal cases, as well as whether or not your client may be eligible for release from NYC DOC custody despite a detainer. **For more information, go to** <http://immigrantdefenseproject.org/wp-content/uploads/2013/07/IDP.detainer.advisory2013.pdf>
6. **Deportation Proceedings:** Your client may end up in deportation proceedings if he was picked up by ICE from jail at the end of the criminal case. Clients can also get picked up at probation, or upon reentering the country after travel abroad, or upon application for a new green card or application for citizenship or other change of immigrant status.
  - a. A client who is detained by ICE may be granted bond by an Immigration Judge; however, many criminal convictions will make him ineligible for bond. If a client is not eligible for bond, he may be detained during the entire deportation proceedings.
  - b. Your client will not be given a free lawyer in deportation proceedings if he is not detained.
  - c. As of July 2014, if your client is detained and is seeing a Judge at Varick Street Immigration Court, and if he is financially qualified, he will be assigned a free attorney from The Bronx Defenders, the Brooklyn Defenders, or the Legal Aid Society. This new project, the New York Immigrant Family Unity Project, is funded by the New York City Council and is the first-ever public defender system for immigrants facing deportation. If your client needs an attorney he will be screened for eligibility on the morning of the first court date and, if he is eligible, an attorney will represent him on that day.
    - i) Some New York City residents who are in proceedings in New Jersey may also be eligible for representation under the New York Immigrant Family Unity Project.
7. **Vacating former convictions under Padilla:** Since the 2010 Padilla decision, some non-citizens have become eligible to reopen convictions on the basis that they did not receive immigration advice when they pleaded guilty or were otherwise convicted.
  - a. In New York State, the instrument for reopening a case is the 440 motion. A 440 motion is filed in the criminal court in the city where the client was convicted. If the conviction was after March 31, 2010, it may be possible to reopen the case if the client did not receive immigration advice about the consequences of the plea.
  - b. The Padilla decision is **not retroactive** - that means that if the client pleaded guilty before March 2010, even if he did not receive any immigration advice before he did so, he may not be able to vacate the conviction under Padilla. He may, however, be eligible to reopen his case if he received wrong or misleading immigration advice, or if there was some other error in the plea.
8. **Finding Help for Immigration Issues:**
  - a. In New York City, most public defender offices have immigration attorneys on staff who can answer questions about the immigration consequences of criminal prosecutions. Public defenders can also ask the New York City Criminal Justice Coordinator's office to assign an immigration attorney for deportation defense.

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- b. Outside of New York City, you can search for immigration legal services providers by visiting Immigrant Advocate Networks' [National Immigration Legal Services Directory](#) here: <http://www.immigrationadvocates.org/nonprofit/legaldirectory/>. You may also want to reach out to your client's consulate.
- c. **The Immigrant Defense Project:** runs a hotline: (212) 725-6422 Offers advice, but no legal representation. [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org)
- d. **Families for Freedom:** a New York City-based organization working to fight deportation. They provide support, education, and action for both families and communities affected by these issues. Does not offer legal representation. [www.familiesforfreedom.org](http://www.familiesforfreedom.org) (646) 290-5551
- e. **Legal Aid Society:** Offers legal representation for individuals in deportation proceedings in New York City. [www.legal-aid.org](http://www.legal-aid.org) (212) 577-3300. You can also call the Immigration Law Unit Hotline at [212-577-3456](tel:212-577-3456) on Wednesdays and Fridays between 1:00pm and 5:00pm. The Immigration Law Unit accepts collect calls from prisons and detention centers.
- f. **Erie County Bar Association** Offers advice and referrals in Buffalo, NY (716) 847-0662
- g. For additional information on deportation proceedings, there is a community resource [here](#) <http://familiesforfreedom.org/sites/default/files/resources/Deportation101Manual-FINAL%2020100712-small.pdf>. It has detailed information on who can be deported, how ICE interacts with the criminal justice system, and what to do when you or someone you know is facing deportation proceedings. It is up to date as of 2010.
- h. Also refer to the immigration materials available on **Reentry Net/NY:** [www.reentry.net/ny](http://www.reentry.net/ny).

**PUBLIC BENEFITS/WELFARE**

**1. Drug-related Felony Convictions**

- a. 21 U.S.C. § 862a **permanently bars** anyone with a drug-related felony conviction from receiving federal cash assistance and Food Stamps during his or her **lifetime**.
  - i) **Definitions**
    - (1) *Drug-related felony conviction:* any offense that is classified as a felony by the law of the jurisdiction involved and that has as an element the possession, use, or distribution of a controlled substance.
    - (2) Only applies to convictions for conduct after August 22, 1996.
  - ii) **Benefits Covered by the Ban**
    - (1) Temporary Assistance for Needy Families (TANF) (benefits provided under 42 U.S.C. § 601 *et seq.*) (traditional “welfare” benefits; before 1996, was called Aid to Families with Dependent Children (AFDC));
    - (2) Food Stamps (benefits provided under 7 U.S.C. § 2011 *et seq.* or § 2012(h))
  - iii) **Benefits Excluded from the Ban**
    - (1) Emergency medical services under title XIX of the Social Security Act [42 U.S.C. § 1396 *et seq.*];
    - (2) Short-term, noncash, in-kind emergency disaster relief;
    - (3) The following public health benefits:
      - (a) Public health assistance for immunizations;
      - (b) Public health assistance for testing and treatment of communicable diseases if the Secretary of Health and Human Services determines that it is necessary to prevent the spread of such disease.
    - (4) Prenatal care;
    - (5) Job training programs (including Welfare-to-Work funded services such as supportive services, post-employment services, job readiness, or job placement);

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- (6) Drug treatment programs;
- (7) Medicaid;
- (8) Federal disability benefits under Social Security Disability (SSD) or Supplemental Security Income (SSI).

**b. States May Opt Out**

- i) **New York has opted out of this lifetime ban entirely.**
- ii) As of December 2011 (*see* Legal Action Center, *Opting Out of Federal Ban on Food Stamps and TANF*, <http://www.lac.org/toolkits/TANF/TANF.htm>):
  - (1) Twelve states have the full ban in place.

Alabama	Mississippi	South Dakota*
Alaska	Missouri**	Texas
Georgia	Nebraska*	West Virginia
Illinois*	South Carolina	Wyoming**

- \* Applies only to TANF
- \*\* Applies only to SNAP

- (2) Twenty-five states and D.C. have modified the ban by allowing benefits dependent upon drug treatment, denying benefits only for sales convictions, or placing a time limit on the ban.

Arkansas	Iowa	North Dakota
Arizona	Kentucky	Oregon
California	Louisiana	Tennessee
Colorado	Maryland	Utah
Connecticut	Massachusetts	Virginia
Florida	Minnesota	Washington
Hawaii	Montana	Washington, D.C.
Idaho	Nevada	Wisconsin
Indiana	North Carolina	

- (3) Thirteen states and D.C. have completely opted out of the ban for TANF and SNAP (including N.Y.).

Delaware	New Jersey	Pennsylvania
Kansas	New Mexico	Rhode Island
Maine	New York	Vermont
Michigan	Ohio	
New Hampshire	Oklahoma	

- c. **Practice Tip:** you should **always** advise your clients of this ban in case they move to another state.

**2. No Claims for Disability Benefits May Arise from the Commission of a Felony**

- a. In an application for benefits on the basis of disability from the Social Security Administration (SSA), the SSA will not consider any physical or mental impairment, or any increase in the severity (aggravation) of a preexisting impairment, which arises in connection with the commission of a felony after October 19, 1980, if the person was convicted of the crime. 20

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- C.F.R. § 404.1506. For instance, a person shot during a bank robbery may not receive benefits for a disability arising out of the gunshot wound.
- b. A person who has been convicted of a felony is barred from serving as a representative payee for a beneficiary entitled to benefits under Titles II and XVI of the Act. 42 U.S.C. § 1383(a)(2)(B)(ii)(IV). The Commissioner may make an exception by determining that the certification as a representative payee would be appropriate notwithstanding the conviction. 42 U.S.C. § 1383 (a)(2)(B)(iii)(IV).
3. “Past Relevant Work” in a Prison: for purposes of investigating a person’s application for Social Security benefits, work conducted in an prison is not considered, because compensation for prison inmates is based on a relationship created by force and operation of law due to the inmates conviction of a crime, not by mutual consent; no employment relationship exists between the inmate and the prison and therefore inmate services are not covered under Social Security. *See* Social Security Administration, Program Operations Manual System RS 01901.560, Aug. 20, 2008, available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0301901560>.
4. **Fleeing Felons or Parole Violators Ineligible for Most Benefits**
    - a. *Ineligibility:* (42 U.S.C. § 608(a)(9)(A)) States may not provide TANF-funded benefits, SSI, SSDI, old-age and survivor’s benefits, public and federally-assisted housing, or Food Stamps to individuals who are:
      - i) Fleeing felons,<sup>149</sup> or
      - ii) Violating a condition of probation or parole, as found by a judicial or administrative determination.
      - iii) For public assistance and Food Stamps, these categories are defined by state law under Soc. Serv. Law § 131(14); 18 NYCRR § 351.2(k) (public assistance); 18 NYCRR § 387.1(w)(4) (Food Stamps); and 97 ADM-23.
    - b. These persons **remain eligible for Medicaid**.
    - c. *See also* Empire Justice Center, *Fleeing Felons: Articles* <http://www.empirejustice.org/issue-areas/disability-benefits/non-disability-issues/fleeing-felons/fleeing-felons-archives.html> (last visited Feb. 14, 2014).
    - d. In *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005), the Court of Appeals for the Second Circuit held that the federal statute does not permit the Commissioner to conclude simply from the fact that there is an outstanding warrant for a person’s arrest that he is “fleeing to avoid prosecution.”<sup>150</sup> Instead, there must be some evidence that the person knows his apprehension is sought.
    - e. Similarly, in *Clark v. Astrue*, 602 F.3d 140 (2d Cir. 2010), the Second Circuit held that issuance of a warrant alleging a probation or parole violation is not sufficient evidence that a person has actually violated probation or parole.
    - f. For other conviction-related SSD and SSI barriers, *see* SOCIAL SECURITY HANDBOOK, [http://www.ssa.gov/OP\\_Home/handbook/](http://www.ssa.gov/OP_Home/handbook/)

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<sup>149</sup> “Fleeing Felon” is a specific legal term used to identify individuals “fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the person flees, for a crime, or an attempt to commit a crime, which is a felony under the laws of the place from which the person flees, or, in jurisdictions that do not define crimes as felonies, is punishable by death or imprisonment for a term exceeding 1 year regardless of the actual sentence imposed.” *See* 42 U.S.C. § 1382 (e)(4); 42 U.S.C. § 402(x)(1)(A).

<sup>150</sup> 10 U.S.C. § 1382(e)(4)(A).

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- g. **Warning:** because the Fleeing Felon bar applies to TANF and Food Stamps, the Department of Social Services (Human Resources Administration in New York City) will run a national warrant check on **any** client applying for Public Assistance.
- h. **Practice Tip:** for extensive resources on restoring benefits in these situations, consult Reentry Net/NY at [www.reentry.net/ny](http://www.reentry.net/ny).

**5. Fraud/Intentional Program Violations<sup>151</sup>**

- a. Clients can face criminal and/or civil liability for fraud or misrepresentation concerning government benefits.
  - i) Administrative sanctions can be imposed through Intentional Program Violation (IPV) hearings.
- b. **Sanctions:** Soc. Serv. L. § 145-c (for any finding of IPV in federal, state, or administrative venue).
- c. **Penalties:** 18 NYCRR § 359.9
- d. If a client is arrested for drug crimes and money is seized, that client may face administrative **welfare fraud** accusations of concealment of income from illegal sources.
  - i) The local welfare agency's investigators will meet with the client and ask him about the underlying facts of the criminal case.
  - ii) **Practice Tip:** Warn your client about this! Instruct your client to go to the meeting, but to invoke her right to remain silent if the criminal case is still pending. The Welfare agencies use these meetings aggressively to get "confessions."

**6. Practice Tips for Welfare Fraud Charges in General**

- a. These charges are based on complicated areas of the law. You should talk to a legal services lawyer and/or familiarize yourself with the underlying eligibility process.
  - i) To find a local legal services provider, use [www.lawhelp.org/ny](http://www.lawhelp.org/ny).
  - ii) The relevant agencies generate special forms with arcane codes that are hard to interpret.
  - iii) Also, the agencies frequently make mistakes calculating eligibility – this is no different in criminal cases.
    - (1) The income and asset eligibility determinations will be crucial for felony or misdemeanor amounts.
    - (2) Ask a legal services lawyer to be your "expert."
- b. **Discovery**
  - i) You can get court-ordered discovery from the relevant agencies;
  - ii) For some, including all PHA's, you can use FOIA or FOIL with a client release.

**7. Incarceration:** Eligibility for public benefits may be affected during periods of **incarceration**. Tell your client or his family to watch carefully for notices of termination.

- a. **Public Assistance** (TANF, state cash benefits)
  - i) Generally, the New York City Human Resources Administration considers incarcerated persons ineligible to apply, but there is no statutory basis for this position.
- b. **Temporary Absence:** Current recipients are permitted to be temporarily absent for 6 months from the household if they are within the U.S., still in need, and intend to return to the residence. (18 NYCRR § 349.4.)
- c. **Social Security/Supplemental Security Benefits**

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<sup>151</sup> Useful materials on Intentional Program Violations can be found at the New York State Bar Association's website for past Partnership Conferences: <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=51580>

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- i) **SSI**
  - (1) *Applicants*
    - (a) If a client is incarcerated when he *applies* for SSI and is otherwise eligible, he is not eligible for payment of benefits until the first day of the month following the day of his release from incarceration. (20 C.F.R. § 416.211.)
  - (2) *Current Recipients*
    - (a) *Incarceration for an entire calendar month or more*: Recipient is ineligible starting with the first entire calendar month in which she is incarcerated (*i.e.*, incarcerated at beginning of month and throughout the month), and payments are suspended effective with such first full month. (20 C.F.R. §§ 416.211 & 416.1325.)
    - (b) *Incarceration for less than a full calendar month*: accordingly, incarceration for less than a month should have no effect on SSI eligibility.
    - (c) *Incarceration for more than a full calendar month, but less than a year*: SSI benefits are only suspended, and can be reinstated effective the day of release. Benefits will be prorated for that month. (20 C.F.R. §§ 416.211, 416.421, 416.1325.)
    - (d) *Incarceration for more than twelve months*: SSI benefits are terminated following 12 consecutive calendar months of suspension for any reason, including incarceration. (20 C.F.R. § 416.1335.) Client must reapply for benefits when released.
    - (e) *Duty to Report*: there is a duty to report ANY period of incarceration. (20 C.F.R. § 416.708(k).)
      - (i) **Practice Tip**: However, when a client will be incarcerated for *less than a full calendar month*, there are probably no repercussions from a failure to report since that period of incarceration has no effect on eligibility. Moreover, if your client reports the incarceration, the SSA could easily make a mistake and suspend benefits.
- ii) As long as a person is incarcerated, he is not entitled to dependency benefits (20 C.F.R. § 404.468a); there is no exception for children.
- iii) These provisions generally apply to any “public institution,” but there are limited exceptions such as some treatment programs, mental institutions, and “community residences.”
- d. **Other Social Security Benefits**
  - i) For Social Security benefits such as Social Security Disability, however, where an individual is incarcerated upon conviction of a *felony*, he or she is not entitled to benefits for any month or any part thereof during which he or she is incarcerated, regardless of the length of the sentence. 20 C.F.R. § 404.468(a).

**ADDITIONAL CONSEQUENCES**

**1. Suspension of Civil Rights and Civil Death:**

a. **Suspension of Civil Rights:**

- i) New York Civil Rights Law § 79 provides that “a sentence of imprisonment in a state correctional institution” for an indefinite term, or any term less than for life, “forfeits all the public offices, and suspends, *during the term of the sentence*, all the civil rights, and all private trusts, authority, or powers of, or held by, the person sentenced.” (emphasis added)

(1) **Exceptions:**

- (a) § 79(2) allows the individual to file a lawsuit in court;
- (b) § 79-b states that the individual who has been incarcerated does not automatically forfeit any property upon his conviction;

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- (c) § 79-c states that the incarcerated individual does not forfeit his right to bodily integrity and that “any injury to his person, not authorized by law, is punishable in the same manner as if he were not sentenced or convicted.”
- b. **Civil Death:** New York Civil Rights Law § 79-a provides that “a person sentenced to imprisonment for life is thereafter deemed civilly dead.” This results in the loss of certain important civil rights, such as the right to get married, during the period of incarceration.<sup>152</sup>

## 2. Firearms

- a. **New York:** Persons convicted of a felony or a “serious offense” are prohibited from possessing a rifle or shotgun and are ineligible to obtain a firearm license. (P.L. § 400.00(1).)
- i) “Serious offense” is defined as listed offenses in P.L. § 265.00(17).
  - ii) License revocation occurs automatically upon such a conviction. (P.L. § 400.00(11).)
  - iii) The issuance of firearms permits is a matter of some discretion by the licensing agency. Judicial review of permit denials is thus held to an “arbitrary and capricious” standard.<sup>153</sup>
  - iv) Effect of a Certificate of Relief from Disabilities is complex and not automatic.<sup>154</sup>
  - v) **N.Y. Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013:** The New York SAFE Act was enacted by the state legislature on January 15, 2013, in response to the Sandy Hook Elementary School shootings. Most provisions went into effect on January 15, 2014. The Act significantly amended Penal Law § 400.00 to place tighter regulation on the sale and ownership of firearms in New York State. New and amended provisions that are relevant here include:
    - (1) **Recertification requirement:** all license-holders must recertify every five years. Failure to recertify timely results in revocation of the license.
    - (2) **Eligibility requirements:** Eligibility requirements were supplemented to preclude issuing or renewing a firearms license for anyone who:
      - (a) is a “fugitive from justice” (P.L. § 400.00(1)(d));
      - (b) is addicted to or is an “unlawful user” of a “controlled substance” as defined in 21 U.S.C. 802 (P.L. § 400.00(1)(e));
      - (c) is undocumented, or who entered the United States on a nonimmigrant visa (P.L. § 400.00(1)(f));
      - (d) was dishonorably discharged from the U.S. Armed Forces (P.L. § 400.00(1)(g));

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<sup>152</sup> See, People v. Smith, 227 A.D.2d 655 (3d Dep’t 1996); Ferrin v. N. Y. State Dep’t of Corr. Servs., 71 N.Y.2d 42 (1987) (holding marriage void where inmate married three years into sentence of twenty years to life). Note, however, that this section does not void a valid, pre-existing marriage between spouses upon receipt of a life sentence by one spouse. *But see* Matter of Ronell W. v. Nancy G., 121 A.D.3d 912 (2d Dep’t 2014) (because prisoner had been sentenced to death, not life imprisonment, and because he had been sentenced in federal, not state court, declining to extend civil death statute to apply to him).

<sup>153</sup> See Matter of Kaplan v. Bratton, 249 A.D.2d 199 (1st Dep’t 1998) (“The agency’s determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary result.”).

<sup>154</sup> See Caputo v. Kelly, 117 A.D.3d 644 (1st Dep’t 2014) (finding that CRD removes automatic bar to licensing but does not prevent agency from exercising discretion to deny license for good cause or lack of good moral character); People v. Hughes, 22 N.Y.3d 44 (2013) (holding that three-and-a-half year sentence for possessing unlicensed firearm in home does not violate second amendment because “[i]t is beyond dispute that preventing the criminal use of firearms is an important government objective; and keeping guns away from people who have shown they cannot be trusted to obey the law is a means substantially related to that end”); Hecht v. Bivona, 306 A.D.2d 410 (2d Dep’t 2003) (holding that “unrestricted certificate of relief from disabilities” removed automatic bar to application for and issuance of pistol permit for person with felony conviction).

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- (e) renounced U.S. citizenship (P.L. § 400.00(1)(h));
  - (f) has been civilly or voluntarily committed due to mental illness (P.L. § 400.00(1)(j));  
or
  - (g) has had a guardian appointed for him or herself because “he or she lacks the mental capacity to contract or manage his or her own affairs” (P.L. § 400.00(1)(m)).
- (3) **Sale of Ammunition:** The Act requires ammunitions dealers to register with the State Police. Individuals with a felony conviction will not be permitted to register as an ammunitions dealer. The law also requires establishment of a system for conducting background checks on purchasers of ammunition.<sup>155</sup>
- b. **Federal** (18 U.S.C. § 922(g))
- i) It is a **federal crime** to ship, transport, possess, or receive any firearm or ammunition by anyone:
    - (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year (18 U.S.C. § 922(g)(1));
    - (2) who is a fugitive from justice;
    - (3) who is an unlawful user of or addicted to any controlled substance;
    - (4) who has been committed for mental illness or adjudicated “as a mental defective;”
    - (5) who is undocumented or entered on a nonimmigrant visa;
    - (6) who has been discharged from the Armed Forces under dishonorable conditions;
    - (7) who has renounced his or her U.S. citizenship;
    - (8) who has been convicted in any court of a misdemeanor crime of domestic violence; or
    - (9) who is subject to a non-*ex parte* court order of protection in favor of an intimate partner or child.
  - ii) Prior state convictions must have rights restored pursuant to state law.
    - (1) Effect of a Certificate of Relief from Disabilities is complex.
      - (a) Federal law contains an exception to 18 U.S.C. § 922(g)(1): “[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.”<sup>156</sup>
      - (b) At least one New York court has confronted the question of whether a CRD restores civil rights, such that an individual with a federally-disqualifying conviction may come under the § 921(a)(20) exception.<sup>157</sup> Finding that “all core civil rights must be restored in order to obtain the benefit of this exemption,”<sup>158</sup> a Kings County Supreme Court held that a CRD is “not a document restoring civil rights.”<sup>159</sup>

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<sup>155</sup> For more information about planned changes affecting ammunitions sales due to the NY SAFE Act, see *Open Letter from New York State Police Superintendent Joseph A. D’Amico*, N.Y.GOV, <https://www.governor.ny.gov/sites/default/files/documents/nysafeact/OpenLetterfromNewYorkStatePoliceSuperintendent.pdf> (last visited July 16, 2014).

<sup>156</sup> 18 U.S.C. § 921(a)(20). See also *Logan v. United States*, 552 U.S. 23 (2007) (interpreting the language in this exception).

<sup>157</sup> See *People v. Adams*, 193 Misc. 2d 78 (N.Y. Sup. Ct. 2002).

<sup>158</sup> The *Adams* court observed that “federal courts have defined the three core civil rights as the right to vote, the right to serve on a jury and the right to hold public office.” 193 Misc. 2d at 83.

<sup>159</sup> *Id.* at 84 (emphasis in original).

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(2) Federal circuits have split on this issue. The Second Circuit has declined to extend the protections of 921(a)(20) to individuals with felony convictions who never had their civil rights taken away.<sup>160</sup>

**3. Revocation of Probation or Parole**

- a. Misconduct during probation or parole may result in resentencing arising from a new conviction OR even after a dismissal or acquittal (upon satisfaction of an administrative burden of proof).

**4. Drug-Related Bars For Other Federal Benefits (21 U.S.C. § 862)**

- a. **Definition:** “Federal Benefit” here means any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States.
- i) It does **not** include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.
- b. Drug traffickers and drug possessors are **ineligible** for the listed federal benefits for a specified period of time after conviction, depending on whether the individual is facing a first, second, or subsequent offense. *See* 21 U.S.C. § 862 for the periods of ineligibility.
- c. **Waiver:** waivers are available under the statute, usually upon evidence of rehabilitation and attendance at a long-term treatment program.

**5. Military Service**

- a. In most cases, a felony conviction will preclude military service, but each branch has the authority to make exceptions (10 U.S.C. § 504(a); 32 C.F.R. § 96.1 et seq.). Waivers may be approved in consideration of the exact circumstances of the offense, how long ago it occurred, how old the applicant was at the time, and how desperate that military service is for new recruits at that point in time. In reality, however, the military services very rarely grant waivers. This is especially true if the felony involved sale of narcotics, sex crimes, or violence. Additionally, those convicted of “domestic violence” are prohibited by federal law from owning or possessing firearms, which means that the military will not accept such individuals.
- b. **Practice Tip:** Re-enlistees (veterans with prior service) are subject to much higher scrutiny than first-time enlistees. Generally, no branch of military service will accept a person with a pending case or still under any conditional sentence such as a Conditional Discharge for a violation. ACD’s are “pending” until the ultimate dismissal. If your client is in the process of enlisting, prosecutors and judges have been willing to shorten adjournment periods for ACD’s and the length of Conditional Discharges. For violations convictions, also consider executed sentences such as time served.
- i) **Note** that “expunged,” “sealed,” or “pardoned” records have no legal effect for the purposes of military enlistment. These must be disclosed to the recruiter and a waiver and explanation of the underlying facts may be required.
- ii) **Note** also that “adverse disposition” is defined by the military as all violations of the law that are not civil court convictions, but which result in an arrest or citation for criminal

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<sup>160</sup> *See* McGrath v. United States, 60 F.3d 1005 (2d Cir. 1995) (finding that individual convicted of felony, but not incarcerated for it, therefore did not lose civil rights and so could not have such rights restored).

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- misconduct, followed by the formal imposition of penalties or other requirements by any governmental agency or court. Examples of “adverse dispositions” include admission into diversionary programs, being tried as a youthful offender, orders to pay restitution, pay a fine, serve community service, pay court costs, or attend classes; unconditional suspended sentences, and unsupervised unconditional probations (these terms are defined as court-imposed consequences and therefore “adverse”).
- c. *Suitability review.* An applicant with a criminal history (regardless of disposition) or “questionable moral character,” but who does not trigger the waiver requirement because of dismissed charges, plea bargains, or releases without prosecution, must have a “suitability review” for enlistment. This suitability review may be done over the phone, at the discretion of the reviewer. This review determines whether a waiver is required, regardless of how the criminal offense was disposed of by the courts. Suitability reviews (prior to any waiver process) will be triggered by: Five or more minor non-traffic charges, two or more misdemeanor charges, a combination of four or more minor non-traffic or misdemeanor charges, or one serious criminal misconduct charge.
  - d. Alcohol and drug use. For every branch of the military, past or present *dependency* on illegal drugs or alcohol is disqualifying. Any history of drug use is *potentially* disqualifying. At a minimum, applicants will undergo a urinalysis test while applying and again when reporting for basic training. In the Air Force, anyone who admits to smoking marijuana less than 15 times does not require a waiver. More than 15, but less than 25 times requires a “Drug Eligibility Determination” in which a Drug & Alcohol Specialist will investigate the exact circumstances of the use. An approved Drug Eligibility Determination is not the same thing as a ‘waiver’ and will not preclude enlistment in most Air Force jobs. Twenty-five or more uses of marijuana in a lifetime is disqualifying, and requires a waiver to overcome.
  - e. **Army:** Classifies criminal offenses into four categories. Generally, applicants with six or more minor traffic offenses (where the fine was \$100 or more per offense), three or more minor non-traffic offenses, or two or more misdemeanors, or one or more felonies are rejected unless granted a waiver. Those who receive a total of four civil convictions or other adverse dispositions for a combination of minor non-traffic and misdemeanors also require a waiver.
  - f. **Air Force:** Classifies criminal offenses into five categories, with any conviction or adverse adjudication in the highest three (1 to 3) categories resulting in rejection unless a waiver is granted. Category 3 offenses include assault, breaking and entering, drunk and disorderly conduct, and shoplifting. With the exception of simple marijuana possession, drug convictions automatically disqualify applicants. Applicants with two or more convictions or adverse adjudications in the past three years, or three or more convictions or adverse adjudications in a lifetime for a category 4 offense (including disorderly conduct, driving without a valid license, public drinking, and vandalism) are also generally rejected unless a waiver is granted. This also applies to Air Force applicants with six or more convictions or adverse adjudications in any 365-day period within the past three years from a category 5 offense (including many traffic violations).
  - g. **Navy:** Classifies criminal offenses into four categories. Applicants with six or more minor traffic violations, three or more minor non-traffic violations or minor misdemeanors, one or more non-minor misdemeanors, or one or more felonies are usually rejected unless a waiver is granted. Convictions are subject to a waiver process. Generally, only nonviolent crimes, juvenile offenses, and one-time occurrences of past drug use can be waived.
  - h. **Marines:** Rejects anyone with a pending case. Classifies criminal offenses into six categories. Generally, an applicant with five to nine minor traffic offenses, two to five more serious traffic offenses, two or more Class 1 minor non-traffic offenses, two to nine Class 2 minor non-traffic

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offenses, two to five serious offenses, or one felony will be rejected without a waiver. Waivers are never granted for individuals with ten or more minor traffic offenses, six or more serious traffic offenses, ten or more Class 2 minor non-traffic offenses, six or more serious non-traffic offenses, or more than one felony. No drug offenses (including possession) or domestic violence convictions will be waived. The Marine Corps will look at arrest charges to determine whether the applicant pleaded to a lesser charge.

- i. **Coast Guard:** Classifies criminal activity into four categories. Any person convicted of a felony or domestic violence is categorically ineligible for enlistment. Any person with one major misdemeanor in the past year or two major misdemeanors in the past five years is also ineligible for enlistment. Major misdemeanors as defined by the Coast Guard include assault and battery, DWI, petty larceny, resisting arrest, contributing to the delinquency of a minor, and unlawful carrying of firearms. Any person who is charged but not convicted of one or more felonies, one major misdemeanor within the past year, two major misdemeanors within the past five years, two minor non-traffic offenses within the past year, three minor non-traffic offenses within the past five years, or four or more minor traffic offenses within the past two years must have a waiver in order to apply. Any person with a pending formal complaint, investigation, or criminal case is ineligible for enlistment, including any release from charges on the condition the applicant enters the military service. The only exception is for all civil cases: an applicant may enlist if he or she obtains a statement of nonappearance from the court.
- j. **Promotions or Military Police:** A higher standard of conduct is required in order to be promoted to officer or to join the military police. Thus, a person who is able to enlist with a waiver in the army infantry as a soldier may not be able to advance past this position in his career.
- k. **Military Pensions** (38 U.S.C. § 1505)
  - i) Payment of pension during confinement in penal institutions: no military pension will be paid to an incarcerated individual after 60 days in custody pursuant to a felony or misdemeanor conviction.
  - ii) However, when any veteran is disqualified for pension solely because of incarceration as above, then the pension may be paid in full to the spouse and children of that veteran.

## **6. Insurance Coverage**

- a. **Auto Insurance** (Ins. Law § 3425): New York law permits insurance companies to cancel or refuse to renew insurance policies if the driver's license of the named insured – **or** of any other person who customarily operates the automobile that is insured under the policy – is suspended or revoked. (Exception: suspensions of probationary licenses under VTL § 510-b.)
- b. **Bank Financing Agreements for automobiles:** Some financing agreements now include a provision that states that if the car is used for an illegal purpose, the financing company can repossess the car.
- c. **Personal Lines Insurance** (Ins. Law § 3425)
  - i) **Definition:** Insurance for loss of or damage to residential real property of not more than four dwelling units and personal property. Includes tenant's and homeowner's insurance.
  - ii) New York law permits insurance companies to cancel or refuse to renew insurance policies
    - (1) for a conviction of a crime arising out of acts increasing the hazard insured against;
    - (2) for willful or reckless acts or omissions increasing the hazard insured against.
  - iii) Analogous cancellation authority exists for commercial lines insurance under VTL § 3426.

## **7. International Travel**

- a. **Entry to Other Countries:** Persons with criminal records may be denied entry to or visas for foreign countries.

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- i) Canada has been known to stop truck drivers from crossing the border because they have criminal records that appear in a computer search at entry. Truck drivers now have to apply for waivers through an Application for Criminal Rehabilitation from a Canadian Immigration Office. The application costs \$200 or \$1,000, depending on the severity of the crime.
- b. **Passports** (22 U.S.C. § 2714)
  - i) The U.S. State Department will refuse to issue a passport to any person convicted of a felony federal or state drug offense if she used the passport or otherwise crossed an international boundary in committing the offense.
  - ii) An issued passport may be revoked upon conviction of a disqualifying offense. The revocation lasts during any period that the person is imprisoned or on parole or supervised release as a result of the conviction.

**8. Liability in Related Civil Cases**

- a. **Examples** of types of cases
  - i) Assault/Robbery
  - ii) Larceny (especially corporate retail stores)
  - iii) Any intentional torts
  - iv) Personal injury
  - v) Judgment enforcement
- b. **Statutory Provisions**
  - i) **“Son of Sam” Law for Crime Victims** (Exec. L. § 632-a)
    - (1) Permits recovery of *all profits* from a crime;
    - (2) Permits recovery of money damages from all funds and property received from *any source* while the defendant was incarcerated or on conditioned release;
    - (3) Extends Statute of Limitations;
    - (4) Generally, a crime victim has to sue within seven years of the date of the crime. (CPLR § 213-b);
    - (5) Under the Son of Sam law, a crime victim can bring a civil action to recover money damages from a person convicted of the crime within three years of the *discovery* of any profits from the crime, or of funds of the convicted person;
      - (a) If the defendant was convicted of a “specified crime,” the crime victim must sue within three years of the *release* from prison and the *end* of all forms of conditioned release.
      - (b) *Specified Crimes* include violent felonies, B felonies, “1<sup>st</sup> degree” felonies, grand larceny in 2<sup>nd</sup> and 4<sup>th</sup> degrees, and possession of stolen property worth more than \$50,000.
- c. **Other Statutory Provisions**
  - i) Gen. Oblig. Law Art. 11 (Obligations to Make Compensation or Restitution)
    - (1) *E.g.*: Liability for Shoplifting – Gen. Oblig. § 11-105
      - (a) Liable for retail value of damaged goods, up to \$1,500;
      - (b) Liable for additional penalty up to \$500;
      - (c) Establishes Parental liability for minors.
      - (d) **Warning:** Debt-collecting law firms often send letters to clients post-arrest claiming treble damages and the civil penalty, even if no property left the store.
      - (e) **Practice Tip:** Warn clients to contact you if they receive demand letters from debt-collecting law firms. See Reentry Net/NY for sample letters in response.
    - ii) Gen. Oblig. Law Art. 12 (Drug Dealer Liability Act)
- d. **Victims of Gender-Motivated Violence Act** (NYC Admin. Code §§ 8-901 to 8-907)

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- i) New York City only.
  - ii) Any person claiming to be injured by an individual who commits a crime of violence motivated by gender can sue for compensatory and punitive damages, injunctive and declaratory relief, and attorneys' fees and costs. (NYC Admin. Code. § 8-904.)
  - iii) Statute of Limitations: seven years after the crime.
- e. **Legal Considerations**
- f. *Restitution – Confession of Judgment*
- i) Often, the prosecutor requires a confession of judgment to make up the balance of whatever is not covered by restitution in the criminal case. Restitution is enforceable by criminal justice penalties (usually through probation), while a confession of judgment is only enforceable through civil remedies (attachment, income execution, property execution, liens, etc.). CPLR 3218 outlines the process for a "judgment by confession," basically providing that a confession of judgment can be filed as a judgment with the local county clerk without bringing a new civil action. A party has three years to file the confession of judgment in order to get an enforceable civil judgment. Once the money judgment is filed, the beneficiary of the judgment has 20 years to enforce it. CPLR 211(b). In sum, if a client signs a confession of judgment as part of a plea, then it is as if the complaining witness won a civil court judgment against her.
  - ii) The criminal court clerks are supposed to send notification of confessions of judgment in criminal cases to the county clerk to be filed as civil judgments. As a general matter, all civil judgments are reported to the major credit bureaus and will appear on a person's credit report. However, it is unclear how consistently the criminal court clerks actually send this information to the county clerks, and the practice is likely to vary widely by county.
- g. *Collateral Estoppel:*
- i) A criminal conviction or plea may have a preclusive effect in a subsequent civil proceeding and may establish monetary liability for your client.<sup>161</sup>
  - ii) Violations: There is no collateral estoppel effect of a conviction for a violation.<sup>162</sup>
- h. *Evidentiary Impact:* statements made during criminal proceedings or plea allocutions can be used against your client in civil or administrative proceedings as admissions or prior inconsistent statements.
- i. Insurance companies may use convictions, pleas, evidence, or admissions to assert an exclusion from insurance coverage.

## **9. Debtor Protections Are Few**

- a. *Bankruptcy*
- i) Debts arising out of intentional torts to the person or property of another are non-dischargeable in bankruptcy. (11 U.S.C. § 523(a)(6).)
  - ii) Criminal fines and criminal orders of restitution are non-dischargeable in both Chapter 7 and Chapter 13. (11 U.S.C. § 523(a)(7) & (13).)
  - iii) Child support arrears, even those that accrued during incarceration, are non-dischargeable.
  - iv) Debts for causing death or personal injury while driving under the influence of alcohol or drugs are non-dischargeable in both Chapter 7 and Chapter 13. (11 U.S.C. § 523(a)(9).)
- b. Public Assistance benefits and earnings while on public assistance are shielded from levy or judgment. (Soc. Serv. L. § 137 & 137-a.)

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<sup>161</sup> S.T. Grand, Inc. v City of New York, 32 NY2d 300 (1973).

<sup>162</sup> Gilberg v. Barbieri, 53 N.Y.2d 285 (1981) (harassment violation conviction after a bench trial).