

**SETTING
THE RECORD
STRAIGHT**



*to know About the
Civil Consequences of Client
Criminal Records*

Legal Action Center

SETTING THE RECORD STRAIGHT

What Defense Attorneys Need to Know About the Civil Consequences of Client Criminal Records

Who Is This Pamphlet for?

This pamphlet is intended for New York State defense attorneys. It focuses on the importance of rap sheet accuracy and the process for correcting errors. It also addresses some of the most frequently asked questions about the collateral consequences of a criminal conviction. A defendant who is considering a plea should be advised beforehand of the potential civil consequences of a conviction.

Why Should a Defense Attorney Be Concerned About Rap Sheet Accuracy?

As a defense lawyer, you know that rap sheets can have serious consequences, both within and without the criminal justice system.

Within the criminal justice system, the information in a rap sheet can affect bail, plea offers, sentencing, and even parole or work release. Outside the criminal justice system, rap sheet information can affect an ex-offender's ability to find work, secure housing or obtain public benefits.

It is therefore extremely important to ensure that information on a rap sheet is as complete and accurate as possible.

Defense lawyers can play an important role in ensuring rap sheet accuracy by:

- Helping clients review their rap sheet for accuracy and completeness, and
- Helping them correct errors.

How Can a Defense Attorney Obtain a Copy of the Client's Criminal History Record?

The Division of Criminal Justice Services (DCJS) is the repository of New York State criminal records. When an arrest is reported, DCJS will send copies of the arrested's rap sheet, if any, to the arresting agency, which will distribute copies to the prosecutor and court. N.Y. CRIM. PROC. LAW § 160.40(1). The court is responsible for furnishing one of these copies to the defendant's attorney or to the defendant, if he or she is not represented by counsel. N.Y. CRIM. PROC. LAW § 160.40(2). A defense attorney is entitled to and should always be provided a copy of a client's criminal history record.

Sometimes the court will provide the defendant's rap sheet only to the district attorney or otherwise fail to furnish the defense lawyer with a copy of the rap sheet. If you have trouble getting a copy of a client's rap sheet, please contact:

New York State Defenders' Association, Inc.
Public Defense Backup Center
194 Washington Avenue
Suite 500
Albany, NY 12210
(518) 465-3524 Telephone
(518) 465-3249 Fax

Record Reviews

If a former client asks to see a copy of a record that you do not have in your possession, you can advise him that individuals can obtain copies of their rap sheet from DCJS by requesting a "record review." Conducting a record review helps a client confirm that the disposition of his most recent arrest was properly recorded and that mistakes have been corrected. It also gives the client an opportunity to see the full extent of his rap sheet, since the record review rap sheet may include more information than appears on the criminal history record available to you and the court.

Warning: If you believe that there may be an active warrant for your client's arrest, you should try to dispose of it before advising the client to request a record review. Otherwise, DCJS will be obligated to notify the police of the whereabouts of your client.

To receive a copy of his rap sheet, your client must obtain a Request for Record Review form from DCJS (see address below). After filling in the requested information, the client should return this form to DCJS along with a full set of fingerprints (which can be taken at a local police station) and a \$25 money order.

The fee will be waived if the client can submit "proof of financial hardship." Financial hardship can be shown by a public assistance card, a Medicaid card, or a notarized letter indicating that the client is a resident at an alcohol or drug treatment program.

Record Reviews by Incarcerated Persons

Persons who are incarcerated in a New York State prison can write to DCJS and request that a copy of the rap sheet be sent to them at their facility. They must provide their date of birth and their Department of Corrections "Department Identification Number" (DIN). Persons held in a local jail may also request a rap sheet. DCJS will send the detainee a form asking if he or she will be detained for 45

days or more. If so, the client will be sent a rap sheet. If not, he or she will have to make a record review request after his or her release. Persons who are incarcerated are not subject to the \$25 fee.

Request for Record Review forms can be obtained from:

NYS Division of Criminal Justice Services
 Record Review Unit
 4 Tower Place
 Albany, NY 12203-3764
 (518) 485-7675

Clients with a criminal history in more than one state must get a rap sheet from each state in which they were arrested, or, alternatively, a copy of their federal rap sheet from the FBI. To obtain a copy of an FBI rap sheet, write to:

U.S. Department of Justice
 Federal Bureau of Investigation
 1000 Custer Hollow Road
 Clarksburg, WV 26306

The client should state that he or she is making the request under the Freedom of Information Act and should include his or her name, address, date and place of birth and a full set of fingerprints. The FBI charges an \$18 fee, which may be waived if the request letter is accompanied by a notarized statement claiming indigence.

The Legal Action Center can assist your clients with record review requests and fingerprinting. Interested clients can write or call the Center at the address and phone number listed at the end of this pamphlet. Clients are seen by appointment only.

What Kinds of Inaccuracies Occur on Rap Sheets?

DCJS maintains over four million rap sheets dating from 1890. The information contained on these rap sheets is based on reports from the hundreds of police departments and courts around the state. Because of the variety of sources on which its records are based, and the sheer volume of arrests that take place in New York State, it is not uncommon for DCJS's records to contain errors or misinformation.

You can play an important role in helping improve the accuracy of rap sheets. One of the first things to do after obtaining a copy of your client's rap sheet is to review the entire rap sheet, not just the parts that contain missing information, since even complete arrest events can contain inaccuracies. As a defense attorney, you know that these errors can have a direct bearing on your client's case, since mistaken information can affect the way your client is viewed within the criminal justice system.

This most commonly occurs during arraignment, where incomplete information from a prior arrest can prevent your client from being released on his or her own recognizance or having an appropriate level of bail set. An unrecorded disposition in a case could result in the judge assuming that the client never returned to court in the previous case.

The most common errors on rap sheets include:

- **Incomplete Entries**

Rap sheets often report arrests without indicating the outcome of the case. This implies that the case remains unresolved, but in many instances the court simply never informed DCJS of the actual outcome. In most cases, the rap sheet entry will be headed, “NO DISPOSITION REPORTED.” Even if a rap sheet entry contains extensive information, the final disposition at the end of the entry may be missing, especially if the case has been transferred between courts.

- **Open Bench Warrants**

Rap sheets will often report that a bench warrant is outstanding, when, in fact, the warrant has been vacated or the subject has returned. This omission often occurs in conjunction with an unreported disposition, when the court neglects to inform DCJS of the outcome and other developments in the case.

- **Erroneous Entries**

While extremely rare, rap sheets can report data that is incorrect. For example, one Legal Action Center client had his petit larceny conviction (N.Y. PENAL LAW § 155.25) reported as murder (N.Y. PENAL LAW § 125.25). Rap sheets can also mistakenly attribute arrest events to the wrong subject. If your client disputes the accuracy of a recorded disposition, you or your client should check with the court that reported the disposition to verify your client’s claims.

- **Split Entries**

Corrections and parole/probation data can sometimes be split from their corresponding arrest event, causing the rap sheet to appear as if there is a separate conviction for which no arrest information, charges or disposition data have been reported. This obviously makes the client’s record seem longer and more serious than it actually is.

- **Unsealed Arrest Events**

Occasionally, an arrest that should have been sealed will be included on a rap sheet. This may happen with older arrests in particular. Naturally, this can have a prejudi-

cial effect on a subsequent case or even a client's ability to secure parole. One Legal Action Center client was denied parole because three "sealed" cases appeared on his rap sheet. The cases were over twenty years old and had been ordered sealed pursuant to N.Y. CRIM. PROC. LAW. § 160.50, but the court had failed to forward any of the sealing orders to DCJS. As a result, DCJS never removed the information from the client's rap sheet. The Board of Parole denied the individual parole because of his "pattern of criminal activity."

It is critical that you check to make sure that these and other types of mistakes do not appear on your clients' records and do not adversely affect their cases.

How Can These Mistakes Be Fixed?

Correcting inaccurate rap sheet data is usually a straightforward process. DCJS will correct sheet inaccuracies if it is informed of the mistake and is provided proof of the correct information.

Depending on the error, it may be vital to your client's representation to correct the error on her rap sheet as soon as you identify it. However, in situations where you are not in a position to correct the rap sheet yourself, you and your client should know that correcting a rap sheet does not require representation by an attorney, and it can even be done by persons who are incarcerated. However, you can play a valuable role by explaining to your client what he or she needs to do. The procedure is as follows:

1. Obtain a Disposition Slip

DCJS will only correct a rap sheet error if it is given documented proof of the outcome of the case. A certified disposition slip from the court that heard the case should provide the correct information, and DCJS will amend the rap sheet based upon it.

Disposition slips can be obtained from the court clerk's office. The clerk should be told the docket or index number for the case in question and the date of disposition, if this information is available. There is usually a fee to obtain a disposition slip, but in some jurisdictions this fee may be waived if the client is on public assistance.

For inaccurately recorded cases that were never arraigned in court, the documentation may have to be obtained from the District Attorney's office or the police station in which the client was booked.

2. Send DCJS a Statement of Challenge

Once the disposition slip is obtained, you or your client must write a letter that clearly explains what part of the record is wrong and how it should be corrected, or file a statement of challenge form with DCJS. (A Statement of Challenge is an official

DCJS form. It is usually enclosed with any rap sheet DCJS sends to a client in response to a record review). The challenge must be documented by attaching an *original certified disposition slip* that verifies the change being requested. Photocopied disposition slips will not be accepted.

Send statement of challenge forms to:

NYS Division of Criminal Justice Services
Record Review Unit
4 Tower Place
Albany, NY 12203-3764

The record should be corrected within a few weeks. DCJS will notify the client when his or her record has been amended. To ensure that this has occurred, the client should review the record again and check to see if the correction was made.

DCJS will also notify the FBI, which will amend its own rap sheet to reflect the change. It is a good idea to request a copy of the FBI rap sheet as well to make sure the change has been made.

What Else Can I Do to Help My Client Clean Up His or Her Rap Sheet?

Apart from correcting inaccuracies, there are other important steps you or your clients can take to mitigate the effects of their criminal histories.

Sealing

New York State does not delete, erase or expunge criminal history information. State law does allow DCJS and the courts to seal arrests that did not lead to a criminal conviction. These include:

- Arrests that resulted in a disposition favorable to the defendant, such as acquittal, dismissal, or decline prosecution. N.Y. CRIM. PROC. LAW § 160.50;
- Arrests that led to a violation conviction for marijuana under N.Y. PENAL LAW § 221.05;
- Arrests that led to a conviction for other non-criminal offenses, except convictions for Driving While Impaired and Prostitution. N.Y. CRIM. PROC. LAW § 160.55.

When a case is sealed, information about the sealed arrest is not disseminated by DCJS except in very limited circumstances. As part of the sealing process, DCJS will destroy or return all fingerprints and photographs on file. N.Y. CRIM. PROC. LAW § 160.50(1)(a). The court will seal its records as well if the arrest resulted in a favorable disposition. N.Y. CRIM. PROC. LAW § 160.50(1).

Getting a case sealed does not require the assistance of an attorney. The process for sealing a case depends on the date the case was disposed.

Cases decided after November 1, 1991: As of November 1, 1991, DCJS will automatically seal an arrest event when it is notified by the court that the case has resulted in a sealable disposition (listed above) unless DCJS receives an order from the court **not** to seal the case. Therefore, all that needs to be done to have such a case sealed is to forward an original certified disposition slip to DCJS along with a letter of explanation or a statement of challenge.

Cases decided prior to November 1, 1991: If the case was decided prior to November 1, 1991, the process is more complicated. You or the client should contact the court and ask it to send a sealing order to DCJS. Each court's procedures for obtaining a sealing order may vary. In some courts the client may be required to appear before a judge and make an oral request to have the case sealed, others may require formal legal papers. You can refer your clients to the Legal Action Center for step-by-step advice.

Certificates to Demonstrate Rehabilitation

Clients are often disappointed to learn that criminal convictions (felonies and misdemeanors) cannot be sealed. While criminal conviction information cannot be suppressed on the rap sheet, a person with a felony or misdemeanor can still take steps to mitigate the effects of a criminal conviction.

One important step is to apply for a Certificate of Relief from Disabilities or a Certificate of Good Conduct. Generally, these certificates can remove statutory bars imposed on a person convicted of a crime (such as bars against eligibility for certain jobs and licenses). A certificate also provides a rebuttable "presumption of rehabilitation," which prevents an employer or licensing board from denying an applicant a job due to his or her conviction, unless the conviction is directly job-related or indicates that the applicant poses a risk to people or property.

Certificates of Relief from Disabilities are granted to persons with one felony and/or any number of misdemeanor convictions. N.Y. CORRECT. LAW §§ 701-703. The certificate only applies to the conviction for which it was granted, and a separate certificate must be obtained for each conviction. The Certificate of Relief does not lift the felony bar to holding public office.

There is no waiting period for a Certificate of Relief from Disabilities. This certificate may be granted by the court at the time of sentencing or anytime afterward. If it is not granted at that time, persons who were convicted of misdemeanors, or who were convicted of a felony for which they did not serve time in a state prison, should apply to the court in which they were convicted for their certificate. Persons who

were incarcerated in a state facility should apply to the New York State Division of Parole, Certificate Review Unit (see below).

Certificates of Good Conduct are granted to persons with multiple felony convictions. N.Y. CORRECT. LAW §§ 703-a and 703-b. There is a waiting period before the client is eligible to apply for a Certificate of Good Conduct. If the client's most recent felony was an "A" or "B" class felony, he or she must wait five years from the completion of his or her sentence. If the offense was a "C," "D," or "E" class felony, he or she must wait three years. Completion of sentence means payment of fine or restitution or release from prison or parole, whichever is later. If the client was sentenced to probation, the waiting period begins at the time of sentencing.

The Certificate of Good Conduct applies to the entire conviction history, including misdemeanor convictions. Persons interested in obtaining a Certificate of Good Conduct should apply to:

Certificate Review Unit
New York State Division of Parole
97 Central Avenue
Albany, NY 12206
(518) 485-8953

What Are the Collateral Consequences of a Conviction?

A criminal conviction can have many consequences beyond the penalties of fines, incarceration or supervision that a judge may impose. A criminal conviction can mean the loss of important rights and opportunities.

It is important to keep these consequences in mind when advising your clients. Before a client accepts a plea agreement, he or she may need to be advised of the ramifications of a criminal conviction, especially with regard to current or future employment, housing, public benefits, immigration status and student loans. The following is a brief summary of the primary collateral consequences of criminal convictions in New York State.

Employment

A criminal conviction can result in the imposition of certain statutory bars to jobs and occupational licenses. For example, a convicted felon cannot apply for a real estate broker's license or be employed as a security guard; a misdemeanor conviction for possession of burglar's tools bars licensure as a locksmith. Of course, certificates of good conduct and certificates of relief from disabilities can lift bars to these and other jobs and licenses. To inquire about conviction bars for particular jobs or licenses, contact the appropriate licensing board or agency.

In addition, certain jobs might not be available to an ex-offender because of the very nature of the offense for which he or she was convicted. While Article 23-A of the N.Y. CORRECT. LAW, §§ 750-755, and the New York State Human Rights Law, N.Y. EXEC. LAW § 296(15), (16), prohibit employers from establishing hiring policies that exclude “all felons” or “all ex-offenders,” the employer or occupational licensing agency may deny an ex-offender a job or license due to a conviction if:

- the conviction is directly job-related; or
- hiring the ex-offender would create a threat to people or property.

For example, a person’s DWI conviction could be cited as a reason to refuse him or her a job as a school bus driver. However, his or her conviction could not be used as a reason to deny him or her a job as a bank teller, since that job does not involve driving, and that conviction was not for an offense involving dishonesty.

Employers must consider a number of factors in deciding whether an applicant’s conviction history is job-related or poses a risk to the public or property, such as the ex-offender’s age at the time of conviction, the length of time that has passed since the offense, the seriousness of the individual’s record and any evidence of rehabilitation that the applicant presents.

Public Benefits

The Personal Responsibility and Work Opportunity Reconciliation Act, enacted on August 22, 1996, permanently bars anyone with a drug-related felony conviction from receiving federal cash assistance (Temporary Assistance for Needy Families or “TANF”) and food stamps during the individual’s lifetime. Drug-related felonies are considered to be those involving the use, possession or distribution of illegal substances. The ban applies to conduct that occurred after August 22, 1996, the effective date of the federal welfare law. 21 U.S.C. § 862a. The drug felon ban does not apply to Medicaid or to non-federal assistance that a state may provide through its own general assistance program.

Under federal law, states are given an opportunity to opt-out or modify the drug felon bar. New York is among those states that has chosen to fully opt out of the lifetime bar on the receipt of public assistance for individuals with drug felony convictions. In New York, persons with drug felony convictions remain fully eligible for Family Assistance and Safety Net Assistance. Keep in mind, however, if your client moves to a state that has adopted the drug felon ban and he or she has a drug felony conviction, he or she will not be eligible for federal cash assistance and food stamps, regardless of the circumstances.

The federal welfare law also prohibits states from providing TANF, Supplemental

Security Income (SSI), public and federally-assisted housing, and Food Stamps to individuals who are fleeing felons or “violating a condition of probation or parole.” 42 U.S.C. § 608 (a)(9)(A)(ii). Under New York’s welfare law, a person is considered in violation of a condition of probation or parole and, thus, ineligible for these benefits if: (1) he or she is currently fleeing probation or parole supervision and a warrant is outstanding or (2) he or she has been found by judicial determination to have violated probation or by administrative adjudication by the Division of Parole to have violated parole. N.Y. SOC. SERV. LAW § 131(14). Thus, in New York, an individual should not be sanctioned until a warrant is outstanding or a court or administrative hearing has determined he or she has violated the terms of probation or parole. The ban ends as soon as the violator returns to compliance.

Immigration

Grounds for deportation of non-citizens from the United States include convictions for:

- one crime of moral turpitude committed within five years of entry and for which a sentence of one year or more may be imposed;
- two or more crimes of moral turpitude committed any time after entry;
- aggravated felonies (murder, sex offenses, drug trafficking, firearms trafficking, money laundering, and serious crimes of violence);
- felony or misdemeanor crimes relating to controlled substances, except for a single offense of possession of 30g or less of marijuana;
- felony or misdemeanor crimes related to a firearm or destructive device; and
- domestic violence crimes, stalking, crimes against children, and violations of protective orders.

Public Housing

Federal law and state laws bar individuals with certain criminal records from public, federally assisted and/or Section 8 housing. Under federal law, individuals who have been **evicted** from public, federally assisted or Section 8 housing because of drug-related criminal activity are ineligible for such housing for three years, beginning on the date of the eviction. The period of exclusion may be shortened if the evicted tenant successfully completes a rehabilitation program approved by the public housing agency or if the circumstances that led to the eviction no longer exist. 42 U.S.C. § 13661(a). In addition, 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. 42 U.S.C. § 13663(a).

Individuals who have engaged in any drug-related criminal activity, violent criminal activity or other criminal activity that would adversely affect the health, safety or right to peaceful enjoyment **may** also be excluded from public, federally assisted or Section 8 housing, if such criminal activity occurred within a reasonable time prior to their seeking admission to the housing. 42 U.S.C. § 13661(c). Housing entities have discretion in setting time frames for ineligibility.

Finally, federal law requires public housing providers to include a lease provision that calls for the termination of tenancy of any individual who engages in (1) criminal activity that threatens the health, safety or right to peaceful enjoyment of other tenants or (2) drug related criminal activity on or off the premises engaged in by the tenant, a member of the household or any guest or other person under the control of the tenant. 42 U.S.C. § 1437d(1)(6).

The New York City Housing Authority (NYCHA) exercises its discretion to deny housing to applicants who have been convicted of *any* criminal offense, including a violation. In general, people with criminal convictions must complete their sentences (including probation and/or parole and the payment of any fines) and are thereafter ineligible for public housing for two to six years, depending on the severity of their crimes. Violent felonies as well as any felonies, misdemeanors, violations, and infractions related to drugs or alcohol are taken extremely seriously by NYCHA. In general, class A, B, or C violent *felonies* or *felonies* involving drugs or alcohol mandate a six-year period of ineligibility. Class D or E offenses of the same caliber result in a five-year period of ineligibility. People convicted of class A drug or alcohol *misdemeanors* are ineligible for four or five years, whereas those with class B or unclassified drug or alcohol *misdemeanors* are ineligible for three to four years. Finally, a drug or alcohol *violation* or *infraction* triggers a two- to three-year period of ineligibility. NYCHA may alter the period of ineligibility if it believes the applicant does not pose any immediate danger to other tenants or to the Housing Authority project.

Foster/Adoptive Care

New York State's implementation of the Adoption and Safe Families Act of 1997, P.L. 105-89, restricts the right of individuals with certain convictions to become foster or adoptive parents. N.Y. SOC. SERV. LAW § 378-a and 18 N.Y.C.R.R. § 444.7. Current and prospective foster and adoptive parents (as well as adults who live in the parent's home) who have ever had a felony conviction involving child abuse or neglect, spousal abuse, a crime against a child, or other crime of violence including rape, sexual assault, or homicide (other than physical assault or battery) will be denied approval or renewal unless the prospective parent can demonstrate that: (1) denial will

create an unreasonable risk of harm to the physical or mental health of the child; and (2) approval will not place the child's safety in jeopardy and will be in the best interests of the child.

Current and prospective foster and adoptive parents who have had a felony conviction within the past five (5) years for physical assault, battery, or a drug-related offense will be denied approval or renewal unless the prospective parent can satisfy the above criteria. These restrictions also apply if an adult residing in the home of the applicant parent has one of the applicable felony convictions.

For all other convictions, current and prospective foster and adoptive parents may be denied approval if the prospective parent has been charged or convicted of a crime or if a person over the age of eighteen who resides in the home has been charged or convicted of any crime.

Federal Student Loans

The Higher Education Act of 1998, 20 U.S.C. § 1901(r), suspends eligibility for any grant, loan or work assistance for students convicted of drug-related offenses. The period of suspension begins on the date of conviction. Persons who have been convicted of possession of a controlled substance lose eligibility for one year for the first offense, two years for the second and indefinitely for a third or subsequent offense. The penalty for a sales conviction is stiffer: a two-year ineligibility for the first offense and indefinite suspension for any subsequent convictions. Students who complete a drug rehabilitation program that complies with standards established by the Secretary of Education may be permitted to resume eligibility before the proscribed period.

Military Service

In most cases, a felony conviction will preclude military service in all branches of the armed forces. Federal law states: "no person . . . who has been convicted of a felony, may be enlisted in any armed force." However, exceptions may be allowed in meritorious cases. 10 U.S.C. § 504.

Individual service branches may also have recruiting policies that forbid the enlistment of persons with specific offenses, such as drug-related misdemeanors and violations.

Voting

Persons with New York State, out-of-state and federal felony convictions who are incarcerated or are under parole supervision are ineligible to vote in New York. This restriction may be lifted by a governor's pardon. Once a convicted felon is released

from incarceration or parole, however, he or she may register to vote. N.Y. ELEC. LAW §§ 5-106(2)-(5).

Voting eligibility is not affected by a misdemeanor conviction.

Jury Service

Persons convicted of a felony may not serve on a jury in New York State. N.Y. JUD. LAW § 510(3).

Driver's Licenses

In certain cases, an individual's driver's license will be revoked as a result of being convicted. Commercial driver's licenses will be revoked for at least one year following any drug felony conviction involving manufacturing, distributing, or dispensing a drug, or possession of any such drug with intent to manufacture, distribute, or dispense such drug in which a commercial motor vehicle was used. N.Y. VEH. & TRAF. LAW § 510-a(1)-(2). In addition, DWI convictions will result in driver's license revocation for periods of six-months to one year. N.Y. VEH. & TRAF. LAW § 1193.1.

Where Can My Client Go for Help?

If you or your clients have any questions regarding the topics addressed in this pamphlet, please contact the Legal Action Center.

The Legal Action Center is a not-for-profit law and policy organization that specializes in issues relating to criminal justice, alcoholism and substance abuse, and HIV/AIDS. We have advised and helped thousands of people correct their rap sheets. We also provide workshops on the collateral consequences of criminal convictions for staff of criminal justice agencies. For more information, you may contact us at:

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