

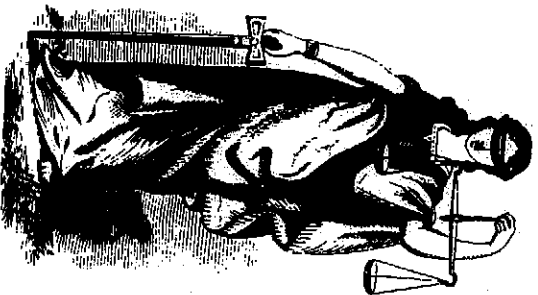
CONTINUING LEGAL EDUCATION

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CIVIL CONSEQUENCES OF AN ARREST: USING HOUSING AND EMPLOYMENT LAW TO GET BETTER RESULTS IN YOUR CRIMINAL CASE

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**CIVIL CONSEQUENCES OF AN ARREST: USING HOUSING & EMPLOYMENT LAW
TO GET BETTER RESULTS IN YOUR CRIMINAL CASE**

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Civil Action Practice

THE BRONX DEFENDERS

January 16, 2014

6-8 pm

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Overview of Civil Consequences of Arrest & Conviction

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- B. Types of Housing Proceedings
 - 1. Housing Court (Evictions)
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 - 3. Administrative Proceedings (Admissions vs. Terminations)
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 - 1. **“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.
 - b. Landlord, at the demand of the District Attorney (in New York City, each borough has a special Narcotics Eviction Unit), must prove 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) **No Stay Available:** Generally, your client cannot stay the eviction proceeding pending the outcome of the criminal case.
 - iii) **Fifth Amendment Bind:** In Housing Court, your client will be faced with a choice between waiving his 5th 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.
 - c. **Prostitution** (RPAPL § 71.5(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.
 - d. **Gambling offenses** (RPAPL § 71.5(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.
- 2. 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.
 - 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.

Provisions Applicable to All Federally-Subsidized Housing

1. Public Housing Authorities (PHA's) administer most of the federally subsidized housing programs in NY, 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.
 - 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 USC § 13661(c).)
 - i) Generally, for each conviction, there is a specific time period of ineligibility after the person's sentence, probation, and payment of fine.
 - ii) Upon application, PHA will fingerprint all members of the household (except those under 16) and run a criminal background check.
 - c. *Termination from Programs*: PHA's and Landlords generally have the authority to terminate or evict residents for any new criminal activity.
 - d. PHA's and Landlords can require the *exclusion* of an offending household member as a condition of admission or continued benefits.
3. **Definitions**
 - 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 USC § 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.

Conventional Public Housing

1. **Admission to Programs** (24 CFR §§ 960.203 & 960.204)
 - a. **Mandatory Denial**: The following categories of applicants **WILL** be found ineligible (subject to the listed mitigation provisions):
 - 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 USC § 1437n(f)): Permanent bar if any family member has ever been convicted of drug-related criminal activity for manufacture or production on 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 family member has been **evicted** from any public, federally-assisted, or Section 8 housing for drug-related criminal activity within the immediate past 3 years from the *determination*, ineligible UNLESS the applicant submits evidence to the PHA's satisfaction:
 - (1) That the affected family member has successfully completed a 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 USC § 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 USC § 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 USC § 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 CFR § 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);
 - 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 CFR § 960.204) that warrant denial.
- 2. Termination or Eviction (42 USC § 1437d(f); 24 CFR § 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*: [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, guest, or any other person under the tenant's control engages in any drug-related criminal activity **on or off** 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, or 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 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; the PHA merely has to determine that the activity occurred.
 - v) *Fleeing Felons*: if the tenant is fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the individual flees, 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.

Public Housing in New York City

1. Admission

a. Bases for Ineligibility:

i) Persons with a Criminal Record (*see Applications Manual, Ex. 2, "Standards for Admission"* (*Chap 1, Sec. VI, Subsec. H(3)(a)*))

(1) For public housing, NYCHA has set ineligibility periods for each level of offense:

Criminal Conviction	Years After Serving Sentence (including completion of probation/parole and payment of fine)
<i>Felonies</i> Class A, B, and C Class D and E	6 years 5 years
<i>Misdemeanors</i> Class A	4 years (5 years if 3+ convictions for A m/d or felonies within last 10 years) 3 years
Class B or unclassified	(4 years if 3+ convictions for m/d or felonies within last 10 years)
<i>Violations or Infractions</i> Violations or DWI	2 years (3 years if 3+ convictions for violations or above within last 10 years)
<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.

(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 copy of the original charges to prove that one of these offenses was the *only basis*.

(a) *Felonies*

- (i) Unlawful use of secret scientific material;
- (ii) Trademark counterfeiting in 1st and 2nd degree;
- (iii) Manufacture of unauthorized recordings in 1st degree;
- (iv) Unauthorized recording of a performance in 1st degree;
- (v) Advertisement or sale of unauthorized recordings in 1st degree;
- (vi) Failure to disclose origin of recording in 1st degree.

(b) *Misdemeanors*

- (i) Subway fare evasion (first or second offense in last 10 years);
- (ii) Self-abortion in 1st and 2nd degree;
- (iii) Consensual sodomy;
- (iv) Fortune telling;
- (v) Trademark counterfeiting in 3rd degree;
- (vi) Unauthorized recording of performance in 2nd degree;
- (vii) Advertisement or sale of unauthorized recordings in 2nd degree;
- (viii) Failure to disclose origin of recording in 2nd degree;
- (ix) Improper labeling of "stereo" or "stereophonic" recordings of sound.

(c) *Violations*

- (i) Hazing in 2nd degree;
- (ii) Unlawfully posting advertisements;
- (iii) Littering on railroad tracks and rights-of-way;
- (iv) First offense for theft of cable television service, for avoiding payment for admission to a theater or a concert hall or a ski lift;
- (v) Misconduct by a juror in 2nd degree;
- (vi) Unlawful prevention of public access to records;
- (vii) Offensive exhibition;
- (viii) NOTE: Disorderly Conduct (PL § 240.20) and Harassment (PL § 240.26) are NOT on this exclusion list.

(d) (See *Applications Manual*, Ex. 2, "Standards for Admission" (Chap 1, Sec. VI, Subsec. H(3)(a)), "*Guidelines for AIO Staff and McNair Hearing Officers When Considering Applicants Found Ineligible Because of Penal Offenses*.")

(4) McNair Hearing (challenging ineligibility for criminal offenses) (See *Guidelines for AIO Staff and McNair Hearing Officers*)

- (a) If a grievant is "otherwise ineligible," she has the right to produce evidence of her rehabilitation to overcome any denial of eligibility. See Management Manual, Chapter I, Section VI, Subsection H.
- (b) Applicant family must 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) See *Guidelines* for factors and proof and for specific crimes that categorically meet this standard.

- (i) Persons who have started fires in their buildings;
 - (ii) Persons who within the last 3 years have behaved violently or have destroyed property;
 - (iii) Persons who within the last 3 years have disturbed neighbors;
 - (iv) Persons with grossly unsanitary or hazardous housekeeping habits;
 - (v) Persons who within the last 3 years have illegally *used* a controlled substance, UNLESS
 - 1. The family provides:
 - a. written verification from a state-licensed drug treatment agency that the offending person has been drug-free for 12 months; and
 - b. a current clean toxicology report; or
 - c. The family provides substantial evidence that the offending person:
 - d. is no longer engaging in the illegal use of a controlled substance, and
 - e. has otherwise been rehabilitated successfully;
 - ii) Persons permanently excluded from a NYCHA apartment (5 years' wait);
 - iii) Persons terminated from NYCHA employment after trial.
- b. General Mitigation Provision**
- i) Evidence of rehabilitation;
 - ii) Evidence of family's participation in or willingness to participate in social service or other appropriate counseling service programs and the availability of such programs.
- c. (See generally *NYCHA Applications Manual, Ex. 2 (Revision to Chap 1, Sec: VI, Subsec. H, "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 household members and guests.
 - b. NYCHA continues to be bound by various consent decrees (especially the *Escalera* decree) that are more protective of tenants than current federal law.
 - i) Probably the most important provisions relevant to criminal conduct are in the *Randolph/Tyson* consent decrees, which state that a tenant cannot be evicted if the offender (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 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 begin administrative termination proceedings soon after the arrest. The hearing generally can be postponed until after the 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 (even for a violation) can be used as a basis for termination because it can be a basis for ineligibility (see above).

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 USC § 1437f; 24 CFR §§ 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 Past for Drug-Related Activity:* [same as for public housing, including specific mitigation provision];
 - 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.
 - 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)(NOTE: Fleeing Felons and Parole Violators are not mentioned in the statutes or regulations concerning Section 8 eligibility, including 42 USC § 1437f and 24 CFR Part 982.)

- viii) **General Mitigation Provision:** (24 CFR § 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 CFR Part 8.
 - (3) *Exclusion of Family Member:* the PHA may require the exclusion of the culpable family member from the household.
- 3. **Termination or Eviction** (42 USC §§ 1437f(d) & 1437f(o)(7)(D))
 - a. **Termination by PHA** (24 CFR §§ 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];
 - ii) **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];
 - (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.
 - b. *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 USC § 1437f and 24 CFR 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.]
 - b. **Termination or Eviction by Owner/Landlord** (24 CFR § 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 are incorporated as lease provisions.

- 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, guest, or any other person under the tenant's control engages in any drug-related criminal activity **on or near 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, guest, or any other person under the tenant's control engages in any violent criminal activity **on or near 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;
 - (d) Other criminal activity that threatens the health, safety, or right to peaceful enjoyment of their 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 CFR § 982.551.
- iii) **General Mitigation Provision:** for all of these grounds, the owner/landlord 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.
- 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 CFR § 982.312(a).)
 - ii) *Absence* means that no member of the family is residing in the unit. (§ 982.312(c).)
 - iii) **Practice Tip:** Watch this provision when a client is incarcerated or entering a residential treatment program.

III. EMPLOYMENT

1. Public Employers

- a. Examples
 - i) Any State, City, Town, or Village employee.
 - ii) MTA or NYCTA
 - iii) Department of Education
- b. **Information Sharing:** DCJS automatically notifies many public employers and licensing agencies about arrests of their employees or licensees. This notification occurs when a public employer has run a criminal records check on your client in the past.
 - 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 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, therefore, 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 5th 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.
 - (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.
- 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. 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 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 termination.

2. Licensing Regimes (over 100 in NYS)

- a. Examples
 - i) Security Guard Registration (through NYS Department of State)
 - ii) NYC Department of Education (including custodial staff)
 - iii) Taxi & Limousine Commission
 - iv) Real Estate Broker's license
 - v) Locksmith
- b. All of the points about public employers also apply to licensing agencies.
- c. The Legal Action Center has an excellent compilation of the licensing regimes and their bars to eligibility. The "Occupational Licensing Survey" is available on Reentry Net/NY (www.reentry.net/ny/).

3. Public Offices

- a. Examples: police officer; firefighter; court officer; law enforcement jobs; notary public; some elective offices.
- b. Should ask the employer or licensing agency whether it's a public office and whether there's a bar for felony or misdemeanor convictions.
 - i) If so, the only way to lift the bar is a Certificate of Good Conduct.

4. Employment Discrimination – Criminal records

- a. **Criminal Record Availability:** New York State does not delete or expunge records – it only seals them. Sealing is automatic for favorable dispositions and convictions for petty offenses after 11/1/91. 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.
- b. **Misdemeanor and felony convictions:** can **never** be sealed, **except** under the Rockefeller Drug Law reform provisions of C.P.L. 160.58.
 - i) They remain on a person's criminal record for life.
 - ii) Address these convictions with certificates that promote rehabilitation (see next section).
- c. **Favorable Dispositions:** CPL § 160.50 seals arrests that resulted in a disposition favorable to the defendant (*e.g.*, acquittal, dismissal, decline prosecution, ACD).
 - 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 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.)

- d. **Violations:** CPL § 160.55 seals arrests that led to a conviction for non-criminal offenses (violations), EXCEPT convictions for DWI and prostitution (loitering).
 - i) **Warning:** until a case is sealed (usually at the end of the sentence, e.g. after a one year conditional discharge), **all** violations will appear on a background check, including all underlying charges! This can severely affect a client applying for jobs.
- e. **Marijuana Violations:** CPL § 160.50(3)(k) seals arrests that led to a **marijuana** violation under P.L. § 221.05 (after 3-year waiting period).
- f. **Youthful Offender Adjudications** (CPL § 720.35)
 - i) YO Adjudications are confidential, but do appear on DCJS rap sheets issued for criminal justice purposes.
 - ii) All official records and papers relating to the case are confidential and may not be made available to any person or public or private agency.
- g. **Conditional Sealing** (CPL § 160.58)
 - i) *Please visit www.communityalternatives.org and 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 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
- h. **Practice Tip – Limitation on Use of Sealed Records**
 - i) No unsealing or use in criminal sentencing (or bail). *Katherine B. v. Cataldo*, 5 N.Y.3d 196 (2005).
 - (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.
 - ii) No unsealing or use in employment disciplinary proceedings. *Matter of Joseph M. v. New York City Board of Education*, 82 N.Y.2d 128, 134 (1993); *In the Matter of Scott D.*, 13 A.D.3d 622 (2d Dept. 2004); *Application of Police Commissioner of the City of New York*, 131 Misc.2d 695 (Sup. Ct. N.Y. Co. 1986).
 - iii) No unsealing or use in eviction proceedings. *People v. Manauri R.*, NYLJ 21, col. 1 (Sup. Ct. Bronx Co. Oct. 22, 2004); *People v. Candies*, 174 Misc.2d 387 (Sup. Ct. Bronx 1997).

- iv) No unsealing or use in property forfeiture proceedings. *Property Clerk v. Bonilla*, NYLJ 20, col. 1 (Sup. Ct. New York Co. Nov. 25, 2002).
- 5. 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 is 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).
 - iv) New EEOC guidance (4/2012)
http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm provides more direction and guidance to employers on best practices. Makes it clear that complete bans on hiring people with convictions violate the law.
 - 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. 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.
 - ii) NY 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.
 - c. ***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 that person—“acting adversely upon”) 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.

d. **Convictions**

i) Provisions: Corr. L. §§ 750-755 (Art. 23-A) and NYS Human Rights Law (Exec. L. § 296(15) & (16)).

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 bill 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 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) 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) 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 factors that must be considered in determining whether a conviction meets the above criteria.

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.

vii) **Negligent Hiring Defense:** 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 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).)

e. **Warning:** these protections generally only apply to job *applicants*, not current employees. Current employees or license-holders are protected from termination only if the conviction preceded their employment or granting of a license and they did not misrepresent their criminal history at application. 2007 N.Y. Laws 284.

f. 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 history on an employment applications. Thus it is crucial that clients understand their criminal record.
- 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, and other deadly weapons;
 - (b) Applications for 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 lead to a “favorable termination” as defined in CPL § 160.50.

g. Enforcement

- i) The HRL permits a private right of action for someone denied employment because of an arrest that led to a favorable termination (dismissal, acquittal, etc.). Exec. L. §§ 296(16); 297.
- ii) However, Corrections Law Art. 23A, which protects those who have criminal convictions, is much more limited. If the employer is a public employer, then an applicant can challenge the action only in an Article 78 proceeding. If the employer is a private employer, then the only recourse is to file a complaint with the State Division of Human Rights or City Commission on Human Rights. Corr. L. § 755. The New York City Human Rights Law provides similar enforcement options. NYC Admin Code §§ 8-107(10) & (11); 8-502(d).

6. 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.¹ 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

¹ Devah Pager, *The Mark of a Criminal Record*, 108 American Journal of Sociology 5, 937-75 (March 2003).

whites *with* criminal records – 17%) and only 5% of African-Americans with criminal records received callbacks.

IV. 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.”
 - 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.

2. Certificate of Relief from Disabilities (CRD) (Corr. L. §§ 701-703)

- 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.
 - (ii) Different probation departments have very different attitudes and 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*. (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 NY with convictions from any other jurisdiction (including federal).
 - (a) **Warning:** *out-of-state residents* who want a NY employment license but have federal or out-of-state convictions may not be eligible!

ii) *Procedure:*

(1) Request an application from DOCCS website or from:

New York State Dept of Corrections and Community Supervision
Certificate Review Unit
97 Central Avenue
Albany, NY 12206
(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 client is still on probation or parole, or has not finished her sentence, talk to her probation/parole officer. They 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 the felony bar to holding public office. (See below for list) Corr. L. § 701(1). (Must obtain Certificate of Good Conduct).

(1) **However**, many sections of New York law were amended during the 2010 legislative session to state that a CRD would relieve a license disability just as well as a CGC—There is therefore some lack of clarity over the “public office” limitation.

iii) Does not trump discretionary considerations in employment and licensing (“good moral character,” etc.).

h. **Forms**

i) CRD Application (Appendix 1): Single page form to apply at sentencing court—otherwise use application to DOCCS (Appendix 2).

ii) Form for judge to sign is different—in general it is prepared by the local probation dept.

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) above); 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.
- 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) Applicant must demonstrate that they have conducted themselves "in a manner warranting such issuance" 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 Division of Parole office listed above.
 - 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, Parole 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. However, I 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.

V. Resources

- A. Defender Toolkit
- B. Ethics Handout
- C. Reentry.net
- D. <http://www.abacollateralconsequences.org/>

VI. Question & Answer

DEFENDER TOOLKIT & PADILLA COMPLIANCE GUIDE: USING KNOWLEDGE OF ENMESHED PENALTIES (OR “COLLATERAL” CONSEQUENCES) TO GET BETTER RESULTS IN THE CRIMINAL CASE*

The U.S. Supreme Court Requires Due Consideration of All Actual Penalties

In March 2010, the U.S. Supreme Court in *Padilla v. Kentucky*, 599 U.S. ___, 130 S.Ct 1473 (2010), ruled that defense counsel *must* give affirmative, competent advice to clients of the risk of all penalties “enmeshed” with criminal charges or potential pleas.

- 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.
- 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 have made ineligibility for these programs and termination of these rights nearly an automatic result for a broad class of people.
- The Court explicitly encouraged creative pleas to avoid these enmeshed penalties. 130 S.Ct. at 1486.

State Law Requires the Same

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.)

Use Padilla and P.L. § 1.05(6) to improve your advocacy skills, from bail arguments to plea negotiations to sentencing.

From the moment of arrest, people are in danger of losing hard-earned jobs, stable housing, basic public benefits, and even their right to live in this country. The steady increase in the scope and severity of the penalties that result from arrests has combined with the nearly universal availability

* Adapted from McGregor Smyth, From “Collateral” to “Integral”: The Seismic Evolution of *Padilla v. Kentucky* and Its Impact on Penalties Beyond Deportation, 54 HOWARD L.J. 1001 (2011) (www.reentry.net/ny/library/item.378736) and *Holistic Is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments As An Advocacy Strategy*, 36 U. Tol. L. Rev. 479 (2005) (www.reentry.net/link.cfm?5373).

of criminal history data to alter drastically the impact of criminal charges on clients – and the practice for lawyers.

As the Supreme Court recognized in *Padilla*, these sanctions, formerly called “collateral consequences,” have become an integral part – and are sometimes the most important part – of the penalty in a criminal case. For many clients, their children, and their families, these consequences are much more severe than any criminal sentence. Because these enmeshed penalties have dramatically raised the stakes of a criminal case, defenders, prosecutors, and judges must incorporate knowledge of them into their daily practice.

The Supreme Court has now endorsed, and in many ways required, a *client-centered, holistic defense practice*. Proper investment in this practice and its strategies will return measurable results.

✦ **The Bronx Defenders’ experience proves that defense counsel can use knowledge of these penalties, or collateral consequences, as a direct advocacy tool to win better dispositions in the criminal case and improved life outcomes for clients.**

I. IMPROVED CRIMINAL DISPOSITIONS

Experience has taught that defenders can obtain more favorable bail, plea, and sentencing results – and even outright dismissals – when they are able to educate prosecutors and judges on the draconian consequences for the clients and their families.

When raising these consequences with prosecutors and judges, keep in mind that they typically respond best to consequences that offend their basic sense of fairness – those that are absurd, disproportionate, or affect innocent family members.

➤ **Be specific.** Focus on the measured risk of *identifiable* penalties for *specific* clients and challenge prosecutors and judges to justify those consequences when they have the power to change them with alternative dispositions. If you know that bail will result in the loss of a stable job for a breadwinner, or that a particular plea or sentence will lead to the loss of permanent, affordable housing or the right to live in this country with your client’s citizen children, ask whether prosecutors and judges are really serving public safety – or achieving just outcomes – by insisting on that disposition. Ask them to consider the unquestioned research which has shown that access to stable housing and employment proves critical to reducing recidivism.

➤ **Pursue creative dispositions.** Remind prosecutors and judges that the U.S. Supreme Court has explicitly encouraged creative dispositions, endorsing “informed consideration” of these enmeshed penalties by the defense, prosecution, and courts during plea bargaining. *Padilla v. Kentucky*, 599 U.S. at ___, 130 S. Ct at 1486.

➤ **Demonstrate true equity, not special treatment.** Assure prosecutors and judges that proper consideration of these penalties for individual clients does not create any special treatment for certain classes of clients. Rather, it embraces the Supreme Court’s recognition that some people charged with the same crimes suffer far greater penalties than others in predictable (but often

hidden) ways. A fair and just process entails a proper and complete consideration of all penalties that cannot be divorced from a particular conviction.

We have found these four categories of penalties most powerful in advocating for alternative dispositions:

- (1) Immigration**
 - Deportability, inadmissibility, or ineligibility for a waiver as the result of a plea
- (2) Housing**
 - Loss of public housing or Section 8 as the result of a plea
- (3) Employment & Military Service**
 - Loss of a job or employment license, particularly for a breadwinner
- (4) Student Loans**
 - Loss of a federal student loan eligibility and educational opportunity

Other serious penalties “intimately related” to criminal charges include sex offense registration and its attendant consequences, loss of voting rights, ineligibility for government benefits, and prohibition on firearms possession.

Improved Dispositions - Using Collateral Consequences in Practice

- Juan R. was charged with a drug crime, and the prosecutor refused any plea below a misdemeanor. Juan, however, was disabled and lived in public housing, and a misdemeanor would result in his eviction. The defense attorney used this knowledge to convince the prosecutor to offer a non-criminal disposition, and Juan kept his home.
- Joanne F. had worked hard to get a steady job as a security guard. In a domestic incident with her boyfriend, she was charged with Assault and Harassment. The initial plea offer would have resulted in the loss of her security guard license and her job. The defense attorney used this knowledge to convince the DA to offer an adjournment in contemplation of dismissal. Joanne kept her job.
- Max S. was 18 years old and charged with possession of a marijuana cigarette. The prosecutor would only offer a plea to a marijuana violation, defined by New York law as a non-criminal offense. Max, however, was enrolled in college and was receiving student loans. Under draconian federal law, even a non-criminal plea to a drug offense would render Max ineligible for student loans and thus unable to attend college. Using her knowledge of this sanction, the defense attorney persuaded the DA to offer an adjournment in contemplation of dismissal. Max remains in college pursuing his degree.

- Defense counsel, however, bears the burden for good reason. Sometimes the appropriate client-centered strategy involves *avoiding* a discussion of certain penalties with prosecutors and judges, when raising these issues would actually increase the risk of those enmeshed penalties. Give clear, specific, individualized advice to the client of these risks and make strategy decisions consistent with the client’s priorities.

II. RISK MANAGEMENT

- Knowledge of enmeshed penalties, or “collateral” consequences, is a key risk management tool for defenders. Clients facing criminal charges will often have to face ancillary civil or administrative proceedings in housing court, in family court, or with employment licensing agencies.
- Clients will often testify or give written statements as part of these ancillary proceedings (they are penalized for invoking their right to remain silent) about the underlying facts, with or without their defense attorney.
- Defense attorneys have to be familiar with the collateral consequences so that they can anticipate these proceedings and properly advise clients of the impact of those proceedings on their criminal case.

III. DISCOVERY

- Proper risk management has another significant benefit: as a result of being prepared for these ancillary proceedings, defense attorneys can use them for additional discovery not available in the criminal case.
- Eviction cases, employment licensing proceedings, DMV hearings, school suspension hearings, Family Court – these are all venues where important witness might testify and where an administrative or lower court judge (or even an attorney) is likely to have subpoena power allowing you to obtain documents otherwise unavailable to you.

IV. CLIENT BENEFITS

- Learning the penalties enmeshed with your client’s criminal case and advising your clients of those consequences helps you build better relationships with your clients.
- It also empowers clients to choose outcomes based their *own* priorities. The collateral damage of being arrested often falls most heavily on family members. When given the option, your clients will often choose the outcome that minimizes the impact on their families.
- Help your client think about these long-term hidden effects of a plea before he accepts it. Give clear, specific, individualized advice about these penalties. Under *Padilla*, silence (the failure to advise a client of these risks) is *per se* ineffective assistance of counsel.

Attorneys who ignore these enmeshed penalties are not only not doing their job, they are *actively doing harm*. These penalties can be disproportionate to the offense and counterproductive, forming substantial barriers to successful reentry. Proper advocacy within the criminal case can mitigate or avoid them entirely and win better case outcomes. By redefining “reentry” as a process that begins at arrest and continues through community reintegration, we highlight the substantial role that

criminal defense attorneys can play. Quite simply, incorporating knowledge of the broad range of enmeshed penalties into your daily defense work will make you a better lawyer.

GENERAL PRACTICE TIPS

- Always advise your clients to attend a relevant treatment program - immediately. Such “evidence of rehabilitation” will prove invaluable for obtaining or keeping a job, housing, or immigration status.
- 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.

ADVOCATE RESOURCES

- ❖ ***Padilla v. Kentucky Compliance Guide & Resource Center*** (www.reentry.net/library/attachment.195385)
- ❖ ***ABA Adult Collateral Consequences Survey*** (every jurisdiction, in progress at <http://isrweb.isr.temple.edu/projects/accp/accproject/>)
- ❖ ***Reentry Net*** (www.reentry.net) & ***Reentry Net/NY*** (www.reentry.net/ny) - comprehensive information clearinghouse on reentry and enmeshed penalties
- ❖ ***Immigrant Defense Project*** (www.immigrantdefenseproject.org; 212-725-6422) - written resources, individual consultations and technical assistance on the immigration consequences of criminal cases
- ❖ ***Defending Immigrants Partnership*** (www.defendingimmigrants.org) - practical resources for public defenders
- ❖ ***Survey of Federal Enmeshed Penalties - Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations*** (The ABA Commission on Effective Criminal Sanctions and the Public Defender Service for the District of Columbia, January 2009) (www.reentry.net/search/item.232200)
- ❖ ***The Center for Holistic Defense at The Bronx Defenders*** (www.holisticdefense.org) - practical resources and technical assistance to support client-centered, interdisciplinary advocacy
- ❖ ***Relief From The Collateral Consequences Of A Criminal Conviction: A State-By-State Resource Guide*** (by Margaret Colgate Love, 2008) (www.reentry.net/library/attachment.114643)
- ❖ For an extensive ***New York practice guide***, see *The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records* (The Bronx Defenders, February 2010) (www.reentry.net/ny/library/attachment.172234)