

By Beth Johnson

Helping Clients with **Criminal Records**

It's More Than Expungement



A cry for legal help with a criminal record usually begins with a loss: the loss of a job opportunity, the loss of an affordable or subsidized apartment, or the loss of an opportunity for educational growth. These losses are referred to as the “collateral consequences” of a criminal record. And it’s these collateral consequences that lead clients to seek help from a lawyer, typically asking for “expungement.”

Expungement has a long history in Illinois and is the most well-known remedy. But expungement is only one of many ways to remove the collateral consequences clients face after an encounter with the

criminal justice system, and in many ways is a very limited option. With an estimated 3.9 million men and women living in Illinois with a criminal record, lawyers should be aware of the multiple barriers records create and remedies that are available to help people with records become productive members of society.

Take, for example, Lorraine. She had an eight-year-old felony conviction that was properly sealed. But when Lorraine applied for a promotion at her bus company, where she had worked for five years, she was denied due to the sealed felony conviction. With assistance from Cabrini Green Legal Aid, Lorraine applied for and

received a Certificate of Good Conduct, which allowed the Secretary of State to issue her license to drive a school bus and the company to promote her. Because the certificate provided relief from the collateral consequence of her record, Lorraine was able to advance in her company and receive higher compensation to support herself and her family.

This article provides an overview of the collateral consequences of an encounter with the criminal justice system and the remedies that are available to overcome them, including how the relevant laws have changed over time.

It's More Than Employment

Although employment is the number one reason people seek legal help with criminal records, many other consequences can result from a criminal record. Public housing can be jeopardized or denied because of criminal activity by the lease holder, a household member or even a guest. "Criminal activity" that can result in the loss of affordable housing includes not only convictions but also mere arrests, including cases where a person was released from police custody without being charged or where a case was dismissed from court. Private landlords have no restrictions on the types of criminal records they can use when deciding whether to rent. Certain convictions can also make a person ineligible for government cash assistance programs for life. Drug convictions result in the denial of food stamps for two years. A person could be denied guardianship of a family member because of a conviction. A person convicted of a felony cannot act as an administrator of a parent's estate. Any felony conviction results in the denial of state retirement benefits. Certain convictions can result in severe immigration consequences and removal from the country. These far-reaching policies not only impact the person who was convicted, but also an entire family.

Lawyers need to be aware of the collateral consequences of convictions because those consequences can be dire. The consequences are more than employment. And the answer is more than expungement.

Inventoring the Collateral Consequences

The collateral consequences of a criminal conviction are buried throughout state and federal laws, administrative rules, regulations and policies. The American Bar Association has identified over 38,000 collateral consequences nation-wide, making it difficult for lawyers and non-lawyers alike to identify and understand them. This complexity has led to two recent inventories, one national and one in Illinois, which have made the picture a little clearer.

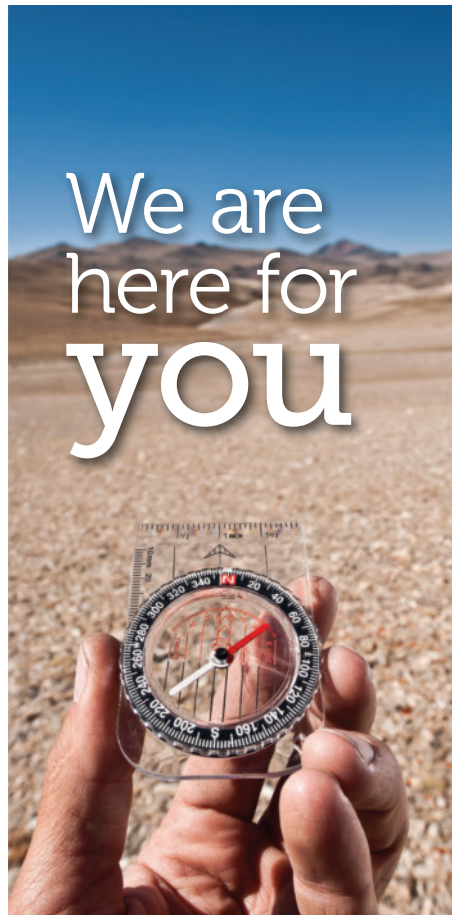
In 2009, after being directed by Congress to collect and study all collateral consequences in the United States, the National Institute of Justice selected the ABA's Criminal Justice Section to undertake this endeavor, resulting in the National Inventory of the Collateral Consequences of Conviction (available at www.abacollateralconsequences.org). Through this interactive web site users can search by state (currently 23 states, including Illinois, and federal law) and either by the category of consequence (e.g. employment, education, civic participation, housing) or by a specific offense. The site also provides a citation to the relevant law or regulation, the type of offense that triggers the consequence, whether it is a mandatory or discretionary bar and how long the bar is in place.

In 2009, Illinois also undertook an inventory to catalogue restrictions relating to employment by creating the Task Force on Inventoring Employment Restrictions. The Task Force was charged with reviewing statutes, administrative rules, policies and practices that restrict employment or occupational licenses required for state employment and with recommending a "less restrictive approach" that "both furthers public safety and preserves employment opportunities." In June 2013, the Task Force released its final report (available at www.icjia.org/IERTF2013), which is another good starting point to identify collateral consequences of a criminal record in Illinois.

The Limitations of Expungement and Sealing

Expungement is the ultimate remedy available, as it results in the destruction of the police records. However, it is only available for certain types of records in a very limited number of circumstances. People with a conviction, of any kind and at any point in their lives, are not able to petition the court to expunge their records.

Yet convictions are the main reason people face collateral consequences. Prior



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Through the Association of Pro Bono Counsel's IMPACT Chicago Project, many of Chicago's large law firms have come together to launch a special project focused on providing alternative forms of relief to individuals with criminal records. Partnering with Cabrini Green Legal Aid and with assistance from The Chicago Bar Foundation and others, the IMPACT Project is expanding the legal services available to people with criminal records and increasing access to employment, housing and educational opportunities.

More attorneys are needed to help people with criminal records. Visit www.cgla.net to learn more about upcoming training programs and the complete spectrum of available volunteer opportunities.



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to 2003, the only available remedy for a conviction was a pardon from the Governor of the State of Illinois. It didn't matter how old or minor the conviction was. A person with a 1973 misdemeanor conviction for disorderly conduct and a person with a 2003 felony conviction for robbery were both required to file a clemency petition. A pardon from the Governor authorizing expungement was the only way to remove a record from public view.

Realizing the inefficiency in the clemency process for such minor offenses, and responding to strong advocacy by community organizations, the Illinois General Assembly passed the first version of the sealing law in 2003, allowing the sealing of convictions for a limited number of offenses. Sealed records, unlike expunged records, are still accessible by law enforcement and the courts. However, sealing allows a person to lawfully answer "no" to the question, "have you ever been convicted." When records are sealed, background checks come back as "no record," and the Illinois Human Rights Act prohibits employment discrimination based on expunged or sealed records (775 ILCS 5/2-103).

While sealing created a new path for thousands of people to petition the court for relief from their records, the list of felony convictions eligible to be sealed was and remains extremely limited. In Illinois, 1,143 distinct felony offenses exist, but the 2003 law made only four of them eligible for sealing: Class 4 Prostitution, Class 4 Possession of Cannabis, Class 4 Possession of Controlled Substance, and Class 4 Possession of Methamphetamine Precursors.

For 10 years, the sealing law provided relief for some, but not for tens of thousands of individuals, many of whom were convicted of low level felony offenses such as retail theft of an item valued at \$151. Fortunately for these individuals, the list of felony offenses that are eligible to be sealed will expand effective January 1, 2014, thanks to Public Act 98-0142. This amendment to the sealing law adds six more low

level felony offenses to the eligibility list: Class 3 and 4 Theft, Retail Theft, Deceptive Practice, Forgery, Possession of Burglary Tools and Possession with Intent to Deliver. In addition, certain other single Class 3 and 4 felony offenses will be eligible to be sealed through a new remedy called the Certificate of Eligibility for Sealing under Public Act 97-1120. The Prisoner Review Board will administer the Certificate of Eligibility for Sealing process and will likely hear the first petitions in April 2014.

While many people will benefit from sealing under these expanded laws, there are serious limitations to the sealing of records, especially the sealing of felony convictions. Sealed records remain entirely available to law enforcement. And even more important, clients need to know that certain employers, those who are governed by state or federal law that requires background checks, can still access sealed felony conviction records through the Illinois State Police. These include common employers and agencies such as schools, parks, health care, public transportation and child welfare agencies. For clients seeking work or pursuing an education to enter one of these fields, the sealing of a felony record will not be enough. Lawyers should advise clients that their sealed felony records will still be available to many employers and agencies.

Alternative Relief from Collateral Consequences

What should we do when someone has a criminal conviction that is not eligible for expungement or sealing and collateral consequences bar them from becoming productive members of society?

Waivers and certificates allow individuals to obtain specific employment or licensure despite their convictions. Certain statutes have waiver processes, such as the Health Care Worker Background Check Act. 225 ILCS 46. Although many offenses bar a person from working in unlicensed positions in health care, this waiver process makes employment possible. The Illinois

GET INVOLVED

Fortunately for men and women in Chicago, the pro bono community has stepped up to this challenge, and you can help. Cabrini Green Legal Aid (CGLA) operates a Help Desk in the Daley Center four days a week and a Help Desk in Markham one day a week. Both provide opportunities for attorneys to research clients' criminal records, advise on eligibility for expungement and sealing and when not eligible, provide advice and referrals for alternative forms of relief. Experienced volunteers are also provided the opportunity to represent clients before the court on contested petitions to expunge and seal. For more information, please contact CGLA's Legal Services Coordinator for upcoming trainings at 312/738-2452 (ext. 414).

Department of Public Health maintains a Health Care Worker Registry, through which a person can submit an application that will explain the conviction and provide proof of rehabilitation. If the application is granted, the person is no longer barred by the Act from working in health care. Other similar waiver provisions exist for certain agencies, such as the Illinois Department of Children and Family Services (DCFS). However, not every conviction is eligible for a waiver. For example, Section 385, Appendix A of Title 89 of the Administrative Code lists "serious criminal offenses" that are not eligible for a waiver.

Another way to seek relief from employment barriers are Certificates of Good Conduct. Relief from discretionary licensing barriers is available through Certificates of Relief from Disability. Certificates of Good Conduct (CGC) waive any employment barrier and provide employers immunity from negligent hiring. 730 ILCS 5/5-5.5-25(a). This ability to waive any employment barrier has opened doors at institutions that were barred by law from hiring people with certain convictions. Like waivers, certificates do not require

employers to hire individuals who have obtained them, instead these individuals are just not barred by law from employment. The Certificates law opened up employment for qualified individuals at the Chicago Public Schools and the Chicago Transit Authority, and allowed individuals to obtain teacher certification through the Illinois State Board of Education and to be licensed as school bus drivers through the Secretary of State.

Finally, many barriers are not absolute in nature. If a client provides mitigating evidence, discretionary barriers can be removed. For example, the Illinois Department of Professional Regulation oversees 175 professions, and very few of them contain absolute bars. Although a client seeking licensure in these professions must disclose a criminal record, the Department will provide an opportunity for the client to explain the conviction and provide evidence of rehabilitation in writing and at a hearing. However, all too often, clients give up and don't follow through with the hearing, not realizing they still have a chance to be licensed, despite the existence of a criminal record. ■

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If your office receives an inquiry about a legal issue you simply do not handle or your client has a special need beyond your practice area, don't fret! Simply refer the caller or client to the CBA's Lawyer Referral Service (LRS).

LRS programs are important because they bridge the gap between attorneys and the public, and by providing such a valuable service, enhance the public's perception of the organized bar.

To learn more about the LRS, contact Brenda Ott, Director of the Lawyer Referral Service, at 312/554-2071 or bott@chicagobar.org, or visit www.chicagobar.org and click on Services, Lawyer Referral Service.



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