When Criminal Justice Involvement Affect Civil Legal Needs: Utilizing Reentry Tools and Strategies to Address Employment, Housing and Other "Collateral" Consequences

Thursday, September 15, 2016

Albany Marriott
Albany, NY

CLE Course Materials and NotePad®

Complete course materials distributed in electronic format online in advance of the program.

Sponsored by the

New York State Bar Association and The Committee on Legal Aid

This program is offered for education purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Patricia Spataro, LAP Director

1.800.255.0569

New York State Bar Association

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form-you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees: please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

You MUST turn in this form at the end of the program for your MCLE credit.

When Criminal Convictions affect Legal Needs, Friday, September 16, 2016
New York State Bar Association's Committee on Legal Aid, Albany Marriott, Albany, NY

Name:
(Please print)

I certify that I was present for the entire presentation of this program

Signature: Date:

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NEW YORK STATE BAR ASSOCIATION

Live Program Evaluation (Attending In Person)
Please complete the following program evaluation. We rely on your assessment to strengthen teaching methods and improve the programs we provide. The New York State Bar Association is committed to providing high quality continuing legal education courses and your feedback is important to us.

Program Name: When Criminal Justice Involvement Affect Civil Legal Needs

Program Code: THPIMB2

Program Location: Albany Marriott, Albany - NY

Program Date: September 15, 2016

1. What is your overall evaluation of this program? Please include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional Comments____

____

2. Please rate each Speaker's Presentation based on **CONTENT** and **ABILITY** and include any additional comments.

	CONTENT				ABILITY			
	Excellent	Good	Fair	Poor	Excellent	Good	Fair	Poor
Bill Bryan, Esq.	☐	☐	☐	☐	☐	☐	☐	☐
Paul Curtain, Esq.	☐	☐	☐	☐	☐	☐	☐	☐
Runa Rajagopal	☐	☐	☐	☐	☐	☐	☐	☐
Judith Whiting, Esq.	☐	☐	☐	☐	☐	☐	☐	☐
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(please turn over)

Additional comments (CONTENT)

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Additional comments (ABILITY)

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3. Please rate the program materials and include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional comments

_____

_____

4. Do you think any portions of the program should be **EXPANDED** or **SHORTENED**? Please include any additional comments.
☐ Yes – Expanded ☐ Yes – Shortened ☐ No – Fine as is

Additional comments

_____

_____

5. Please rate the following aspects of the program: **REGISTRATION**; **ORGANIZATION**; **ADMINISTRATION**; **MEETING SITE** (if applicable), and include any additional comments.

	Please rate the following:				
	Excellent	Good	Fair	Poor	N/A
Registration	☐	☐	☐	☐	☐
Organization	☐	☐	☐	☐	☐
Administration	☐	☐	☐	☐	☐
Meeting Site (if applicable)	☐	☐	☐	☐	☐

Additional comments

_____

_____

6. How did you learn about this program?
☐ Ad in legal publication ☐ NYSBA web site ☐ Brochure or Postcard
☐ Social Media (Facebook / Google) ☐ Email ☐ Word of mouth

7. Please give us your suggestions for new programs or topics you would like to see offered

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NEW YORK STATE BAR ASSOCIATION
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NEW YORK STATE BAR ASSOCIATION
2016 PARTNERSHIP CONFERENCE

When Criminal Convictions Affect Civil Legal Needs: Utilizing reentry tools and strategies to address Employment, Housing and other 'Collateral' Consequences

AGENDA

September 15, 2015
11:45- 1:30pm
2 Transitional CLE Credits in Professional Practice.

Panelists:

Bill Bryan,	Supervising Attorney, Civil Justice Practice, Brooklyn Defender Services
Paul Curtin,	Managing Attorney, Legal Aid Bureau of Buffalo
Runa Rajagopal,	Director, Civil Action Practice, The Bronx Defenders
Judith Whiting,	General Counsel, Community Service Society

I. Hypothetical
II. **Intro to criminal court and "collateral" consequences**
   A. Why do we need to know and better understand what happens in criminal court?
   B. Arrest vs. Convictions
   C. Why do people take pleas?
   D. Admissibility of convictions in civil proceedings
III. **TOOLS & STRATEGIES**
   A. Correct Criminal Record Errors
   B. Sealing Laws
   C. Certificates that promote rehabilitation
IV. **How Convictions Impact Housing**
V. **How Convictions Impact Jobs & Employment Licenses**
VI. **Other "collateral" consequences**
VII. **Question/Answer/Discussion**

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When Criminal Justice Involvement Affects Civil Legal Needs:
Utilizing Reentry Tools and Strategies to address Employment, Housing and other 'Collateral' Consequences

I. **Intro and Overview of Criminal Court and Civil Consequences**

a. Introduction

i. Why do we need to know and better understand what happens in criminal court?

ii. Examples of possible Civil Consequences:
   1. Job loss or denial/job License denial, termination or suspension
   2. Eviction/displacement from home or denial for admission to housing
   3. Loss/denial of other income, public assistance, SSI, unemployment insurance
   4. Forfeiture of property
   5. Suspension from school or loss of student loans
   6. Deportation of noncitizens
   7. Civil action filed (personal injury)

iii. Arrest vs. conviction
   1. Being accused of a crime (arrest) leads to a host of civil consequences, person need not be convicted
   2. There are a number of factors why people who have been arrested take pleas- it doesn't necessarily mean the person is "guilty."

iv. Admissibility of convictions in civil proceedings

b. Key Differences between the civil and criminal courts

i. Right to Counsel
   a. Gideon v. Wainwright, 372 U.S. 335 (1963), landmark case where Supreme Court unanimously ruled that state courts are required under the Fourteenth Amendment to the U.S. Constitution to provide counsel in criminal cases to represent defendants who are unable to afford to pay their own attorneys.

ii. Differing burdens of proof
   a. Proof beyond a reasonable doubt.
   b. Preponderance of the evidence.
   c. Preclusive effects of a criminal conviction.

iii. Presumptions
   a. "Innocent until proven guilty"
   b. Guilty until proven innocent

iv. Duration of proceedings
   a. Right to Speedy Trial (but back-logged court systems)
   b. Administrative proceedings-summary proceedings-civil courts

v. Other Constitutional Protections & Issues

a. 5th Amendment/ Self-Incrimination
b. No double jeopardy

PRACTICE TIP: WHAT HAPPENED IN CRIMINAL COURT?

A checklist of questions to *understand* what happened in criminal court if your client is/was involved:

- ✓ Was your client arrested?
- ✓ Is your client's case pending, is there a conviction or was the case dismissed?
- ✓ If it is pending, what is your client accused of and what is happening in the case?
- ✓ If your client took a plea or has a conviction, what is it?
- ✓ What is the sentence?
- ✓ Do you have access to criminal court documents?

The more you know about the criminal charges and proceedings, the better you can prepare to defend your client against the raft of civil consequences they may face.

c. Path of a Criminal Case

i. Arrest
   1. Police observe criminal activity
   2. Police are informed of activity by third party
   3. Court issues arrest warrant

ii. Booking
   1. After being arrested, unless issued a summons (a "ticket") (see below), people are taken to the local precinct and "booked." "Booking" refers to the procedures necessary to process the person and turn his or her arrest into a "case." In New York City, the initial procedures occur at the police station, but people are not officially "booked" until they arrive in Central Booking, located in the basement of the Criminal Courthouse.

iii. Fingerprinting
   1. Once the person has been searched, she will be fingerprinted.
   2. Every set of prints received by the State Division of Criminal Justice Services (DCJS) is assigned a New York State Identification Number (NYSID) number, which, in theory, should stay with that set of prints forever. If the person was previously arrested, fingerprinted, and given a NYSID number, his fingerprints should trigger that same number in the DCJS computer no matter what name, address or date of birth he gave at a previous arrest. This is how the list of aliases used is sometimes included in the person's rap sheet (though "aliases" can also be simple misspellings of individual's name).

iv. Criminal Justice Agency Interview
    1. While the person's fingerprint information is being sent back and forth to Albany, and other papers are being generated for the court, the prosecutor, and defense counsel, the person will be interviewed by a representative of the New York City Criminal Justice Agency (CJA). The CJA representative will fill out a form, the purpose of which is to assess the strength of the person's community ties as a means of determining whether he will come to court when required. The completed form will go to the judge, the ADA and the defense and will include a recommendation as to whether the person should be released or is a flight risk. This might influence the judge's decision regarding bail or release.

v. Summons or Desk Appearance Ticket
    1. Summons: People may be "arrested" for certain quality of life offenses, such as disorderly conduct, public urination, smoking marijuana, riding bikes on sidewalks, etc., which do not actually constitute crimes. Such offenses are generally defined as "violations." If a person is arrested for such an offense, the police will give the person a "summons" which will direct the person to return to a special Summons Appearance Part (SAP) on a future date. The person will not be fingerprinted or even taken to the precinct, unless she has no identification. While the person will not face criminal charges, they should show up for their summons date because failure to do so will end up in a warrant for the person's arrest.
    2. Desk Appearance Ticket (DAT): Depending on the nature of the charge, the police will decide either to give a DAT or hold him for central booking and immediate arraignment before a judge. If the charge is a minor offense, or if the person arrested is disabled or elderly, the police may issue a DAT. If a DAT is given, the arrestee is given a later date to appear in court for arraignment, usually a few months after the date of arrest. The person will then go to court on their own on the day that they are given and will be arraigned at that time.

vi. Arraignment and Bail
    1. The first court appearance is called an "arraignment." It means that the case is formally open. One of two things will happen after the court case is opened – either the person's case will be immediately closed with a plea or a dismissal, or a person will continue to have an open court case after arraignments.
    2. If the case is not immediately disposed of, the court will take arguments on bail. The statutory purpose of bail is New York is <u>solely</u> to ensure the person's return to court. It is not intended to be a means of protective custody or anything else.

vii. Pretrial Procedure

1. Motions, hearings, and adjournments: each is a chance for the defendant to miss an appearance and get a bench warrant.
2. Discovery

viii. Disposition: Plea or Trial

1. Though they may not enter a guilty plea at arraignments, the overwhelming majority of criminal defendants eventually accept a plea offer before trial. If the defendant takes a plea, the court will hold an allocution, during which the defendant makes a sworn statement that she committed the elements of the offense pleaded to. This is extremely problematic for collateral, civil proceedings, as plea allocutions are essentially *res judicata* and are not subject to collateral attack.
2. Bench Trial – Charges of a B Misdemeanor, Violation, or Traffic Infraction automatically result in a Bench Trial. However, defendants may waive their right to jury trial for any charge, and have a bench trial instead.
3. Jury Trial – Required for A Misdemeanors and all Felonies (unless waived).

d. Examples of Charges

i. Drug-Related Charges

1. Divided into Articles 220 and 221 of the Penal Law. Article 221 is for marijuana, and Article 220 covers all remaining controlled substances.
2. PL § 220.03 – (A Misdemeanor) Possession in the Seventh Degree
3. PL § 220.06 – (D Felony) Possession in the fifth degree (intent to sell or exceeding certain very small quantities).
4. PL § 221.05 – (Violation) unlawful possession of marijuana

ii. Violent Conduct

1. PL § 120.00 – (A Misdemeanor) Assault in the third degree
2. PL § 240.26 – (Violation) Harassment in the second degree
3. PL § 240.20 – (Violation) Disorderly Conduct

iii. Theft

1. PL § 165.15 – (A Misdemeanor) Theft of services (including riding public transportation without paying fare)
2. PL § 160.05 – (D Felony) Robbery in the third degree
3. PL 155.25 – (A Misdemeanor) Petit Larceny (shoplifting)

iv. Welfare Fraud

1. Article 158 of the Penal Law.
2. Based on amount of benefits fraudulently received, offenses range from an A Misdemeanor (base charge) to a B Felony (in excess of $1 million). Anything above $1,000.00 is a felony.

e. **Favorable Dispositions and Sealed Records**

i. Adjournment in Contemplation of Dismissal (ACD)

1. No finding of fact, no admission of guilt.

2. Case is adjourned for a later date (6 months or, in the case of a marijuana arrest, one year), at which point it will be dismissed and sealed outright if defendant has not been arrested or charged with any other crime in the interim.

ii. Violations
   1. Non-criminal in nature.
   2. Often seal after conditional discharge, **but not always:** violations involving domestic violence, loitering for the purpose of prostitution, and certain other enumerated offenses generally will not seal.

iii. Sealed Records in Dismissed Cases - Crim. Pro. L. §160.50
   1. Court and police records seal in the event of a disposition "in favor of the accused"
   2. Such dispositions include: dismissal (including after an ACD), acquittal, vacatur of the judgment. A PL § 221.05 conviction will also seal under this provision one year after sentencing.
   3. Very few instances where records can be unsealed.

iv. Effect of sealing – Crim. Pro. L. § 160.60
   1. Arrest and prosecution are "nullities" and the accused "shall be restored" to the legal status she occupied before her arrest.
   2. No formerly accused person may be forced to divulge information related to the arrest and prosecution, except where specifically required by statute.
   3. Arrest and prosecution "shall not operate as a disqualification" to pursue any lawful employment, license, or occupation.
   4. Sealed records **must be removed from the record of other courts** or administrative fora, even if sealing occurs after joinder of issue.
   5. Witnesses cannot rely on any sealed records to testify, but they *may* testify from memory.

v. Sealing of Records of Violations – Crim. Pro. L. § 160.55
   1. Police records, but not those in the court, will seal
   2. Police witnesses must testify from memory

f. Examples of Sentences

i. Conditional Discharge: The defendant is released and the sentence is "discharged," provided that the defendant comply with certain conditions, such as performing community service or abiding by an order of protection

ii. Probation: The defendant will be supervised by the Department of Probation for a number of years and will be required to comply with certain conditions

iii. Fine

iv. Restitution

v. Program: e.g. Substance-abuse counseling, domestic-violence counseling and prevention;

vi. Time served

vii. Imprisonment
viii. Split sentence: incarceration followed by a term of probation

g. Probation or Community Supervision (Parole), with Conditions

i. Violations: are separate proceedings
   1. Probation: have to file VOP in court; filed by Probation, but adjudicated by a judge (preponderance of evidence)
   2. Community supervision: Parole Officer files administrative violation with Board of Parole.

ii. Warrants
   1. Generally, warrants are orders by a court directing law enforcement agents to arrest an individual
   2. Types of warrants
      a. Bench warrants
      b. Arrest warrants

h. **Types of Documents Generated by a Criminal Case**

i. <u>Police Reports</u>
   1. The police fill out several police reports, the two principals of which are the arrest report and the complaint report. In the arrest report or On Line Booking Sheet (OLBS), the arresting officer will take down the person's personal pedigree: name, address, family, employment.
   2. The officer will fill out a hand written or scratch copy of the arrest report, which will then be put on a computer by a PAA (Police Administrative Assistant) and a computer-generated police report will be produced.
   3. If the arrest is relatively contemporaneous with the crime, the arresting officer will also fill out a complaint report (UF-61) on the incident in question with information about the nature of the alleged crime, the names of victims or witnesses, and the name and description of the alleged perpetrator or defendant.

ii. <u>Criminal Complaints</u>
   1. While the person waits in Central Booking and the courthouse cells, the assistant district attorneys review the police reports and speak with the arresting officers in the District Attorney's complaint room.
   2. The arresting officer will meet with an ADA and describe the facts of the case and the circumstances of the arrest. Although the police officer has made an initial charging determination, which will appear on the arrest report and rap sheet, the case is evaluated anew by the ADA screening the case.

3. The police officer will in all likelihood have wanted to charge the person with the highest possible crime. The ADA may agree or may decide to charge a lesser offense after discussion with the police officers. In rare instances, the police officers may bring in a civilian witness to speak with the ADA.
4. It is in the discretion of the screening ADA to determine both the nature and severity of the actual charge.
5. The ADA will then draft the accusatory instrument – the Criminal Court Complaint -- the initial charging document.
6. The function of the complaint is to describe the crime with which the person is charged, the applicable Penal Law sections, the name of the person providing the information to the ADA, whether the charge is based on direct or hearsay information, the date, time and location of the alleged offenses, and a brief narrative description of the offense.
7. The document is then signed and sworn to by the person supplying the information. This document is typed or put into a computer, and the complaint is then forwarded to the clerk's office.

iii. Laboratory Results, Field Tests, Vouchers, Confidential Informant Affidavits

iv. Certificate of Disposition – Official Court document issued by the Clerk's office stating the charges on the docket, as well as the final outcome of the case.

II. **Criminal Records**

A. Types of background checks: rap sheets; commercial background checks

Any person who has been arrested and fingerprinted has an official "Record of Arrest and Prosecution," or *rap sheet*. In New York, police or other arresting authorities transmit fingerprints and arrest data electronically to the New York State Division of Criminal Justice Services (DCJS), which in turn transmits them to the FBI.

Individuals are entitled to receive copies of their rap sheets from both DCJS and the FBI. A helpful guide on how people can go about doing this on their own can be found on the Legal Action Center's website, http://www.lac.org/doc_library/lac/publications/YourRapSheet.pdf

We suggest that, if at all possible, individuals obtain rap sheets by working with programs that specialize in rap sheet review and cleanup. The Community Service Society's Next Door Project (NDP) is one such program (*see, e.g*, http://www.cssny.org/programs/entry/the-next-door-project); others include Youth Represent and the Legal Action Center.

The rap sheets returned to individuals are highly confidential. They contain information about all arrests that resulted in fingerprinting, *no matter what the ultimate conclusion was*. They include sealed records, youthful offender adjudications, Social Security numbers, alleged aliases, unflattering mug-shots, and other information that no one other than the individual or his/her attorney should see. *In no circumstances* should they be provided to a current or prospective employer, to a licensing agency or to a housing provider.

Fingerprint-based rap sheet record information is not available online, nor is it available to private employers or commercial background check companies. Certain government agencies are entitled to request fingerprint-based record information when considering applicants for employment or licensing. Nonprofits regulated or licensed by government agencies whose employees will have substantial unsupervised contact with vulnerable populations are required by law to have those employees pre-cleared; in those instances, the relevant government agencies will review fingerprint-based criminal record information when making clearance decisions (*see, e.g.*, N.Y Exec. Law 845-b).

Even where government agencies are permitted to review fingerprint based criminal record information, they do not obtain or see a full rap sheet. They are only provided with a list of the individual's *criminal convictions* and arrests that have not yet been "disposed of." In other words, they do not see cases that were sealed, youthful offender adjudications, arrests terminated favorably to the accused or noncriminal convictions (such as disorderly conduct).

DCJS can, on request, provide an individual with a "suppressed" version of his or her rap sheet, meaning the version that would be provided to a government agency that is authorized to review fingerprint-based criminal history information for employment clearance or occupational licensing purposes. This "suppressed" edition should not include sealed cases, arrests terminated favorably to the accused, non-criminal convictions, cases in which the applicant was adjudicated a youthful offender, etc. If an individual is planning to apply for State-regulated employment or an occupational license, it may be informative to obtain a "suppressed" rap sheet in advance of doing so, in order to see what the regulator or licensing agency will be given.

Rap sheets are replete with errors. At last count, 35% of the rap sheets NDP reviewed had at least one error. These errors are not the fault of the individual, but instead are the fault of various actors at each step along the path from arrest to conviction. Unfortunately, unless legislation is passed to make systemic change, the burden of correcting rap sheet errors will continue to be borne by the individual. Correcting these

errors is often difficult, and requires the assistance of an advocate and in some cases an attorney. The most common errors are: failure to record any information about a matter other than the initial arrest ("no disposition reported"; "no court-reported information"); failure to seal matters disposed in favor of the individual; failure to seal violation-level convictions; and warrants that appear to be "live" but are not. NDP has undertaken to correct errors for our clients because we have found the task is just too daunting for them to complete.

B. NYS Office of Court Administration (OCA) Records

The NYS OCA maintains records of criminal case dispositions. They are not confidential: anyone willing to pay $65 can obtain these records by searching under an individual's name and date of birth. Here is a link to information about this service: http://www.nycourts.gov/apps/chrs/

OCA records will not include arrests that did not lead to prosecution. OCA also will not release information about non-criminal convictions (i.e. violations) whether or not sealed, or records where the sum total of the record is a single misdemeanor conviction more than 10 years old.

There are issues with OCA records: they include two dates for each case: a "Case Disposition Date" and a "Last Disposition Date" or "Adjourned To" date. The "Case Disposition Date" indicates the date of conviction. The "Last Disposition Date" or "Adjourned To" date, in contrast, indicates the defendant's final or next court appearance, as listed on OCA's CRIMS database. If for example a client applied for a Certificate of Relief from Disabilities or paid a fine/surcharge late, the "Last Disposition Date" will be the date of application or payment. This sows confusion for clients and anyone relying on these records, and makes for errors in commercial background checks that use OCA data.

Commercial background check companies frequently access these records, which means these issues are likely to be transferred to the background check provided to the employer hiring the company.

C. Commercial Background Checks

More than 80% of large employers now screen prospective employees by ordering a background check. They do so, generally, by engaging a commercial background check company (a/k/a "consumer reporting agency"). It is estimated that there are at least 600 commercial background check companies operating in the United States (some may

actually be headquartered overseas). Some are members of the National Association of Professional Background Screeners, a trade association: https://www.napbs.com/ .

Reports generated by commercial background check companies vary in quality. The contents and use of commercial background checks are regulated by the federal and New York State Fair Credit Reporting Acts, 15 U.S.C. §§1681-1681(u) and N.Y. G.B.L. §380-a *et seq*., respectively.

III. Tools & Certificates that Promote Rehabilitation

Certificates of Relief from Disabilities (CRD) and Certificates of Good Conduct (CGC) are issued by New York State and create a presumption or rehabilitation. They lift mandatory bars to occupational licensing eligibility set forth by law, and are among the things an employer or government agency must consider when evaluating an applicant for a job or license. They also restore the right to vote for individuals on parole. Eligibility for these certificates depends on an individual's conviction history. Individuals with no more than one felony and any number of misdemeanors are eligible to apply for CRDs; individuals with two or more felony convictions are eligible to apply for GCGs, though certain waiting periods apply for CGCs. N.Y. Correct. Law Art. 23,§§700-706.

The application process for CRDs differs from that for CGCs.

CRDs are in general issued by the sentencing court, and application must be made to that court, except where the individual served state prison time, or is applying for a CRD concerning an out of state or federal conviction. In these circumstances the individual must apply to DOCCS/Board of Parole. Individuals must apply for separate CRDs for each of their convictions. The process for applying to the court and waiting time for receipt differs by geographic location and local practice. In general, courts mandate that the applicant be interviewed and evaluated by the local Department of Probation (although this is not a legal requirement), and will ask that Probation make a recommendation whether the CRD should be granted. Some local jurisdictions, such as New York City, take the position that there is a presumption a CRD should be approved.

A court may issue a CRD at sentencing. The individual's attorney must specifically ask for this relief. It is, unfortunately, rarely granted, but when it is, the CRD acts not only to relieve the individual of disabilities for also of forfeiture of existing occupational licenses. *See, e.g*, http://www.nytimes.com/2007/10/11/nyregion/11cipriani.html?_r=0 (liquor license not forfeited – restaurant empire saved).

CGCs are issued by DOCCS/Board of Parole. The application process is more complex than for CRDs and involves production of documents and a personal interview;

remember that there are severity-of-conviction-based waiting periods before an individual is eligible to apply. It may take anywhere from nine months to two years for DOCCS to issue a CGC. One CGC will cover all an individual's convictions (in contrast to a CRD). The application form and more information can be found here:

http://www.doccs.ny.gov/pdf/DOCCS-CRD-Application_Instructions.pdf

Note that DOCCS recently revised this form to make it (somewhat) simpler to follow. DOCCS has taken the position that it does not deny CGCs to eligible applicants (though it may find some applicants legally ineligible); instead, it recommends that the applicant reapply after a set period of time.

IV. Employment Consequences of Criminal Convictions and How to Mitigate Them

A. Laws that protect people with conviction histories in the employment arena
Two separate sets of laws exist: those that regulate contents of commercial background checks and their use in employment matters – fair credit reporting acts – and those that protect people with conviction histories from employment discrimination – human rights laws.

Fair Credit Reporting Acts:

1. 15 U.S.C. §§1681-1681(u) – the federal Fair Credit Reporting Act (FCRA). Applies to commercial background reports (a/k/a "consumer reports") and creates responsibilities both for the background check companies that issue them and for employers who use them to make employment decisions.

While FCRA does require that reports be accurate and up to date, there is currently ***no limit*** on reporting criminal convictions (there had been a seven-year limit until 1998; abolished) – reports can go back as far as there are records to support them. 15 U.S.C. §1681c. However, for positions that will pay $75,000 per year or less, reporting information about arrests more than seven years old (considered an "adverse item of information") that did not lead to conviction is prohibited.

Where a background check is used as the sole basis or as one basis for denying employment or other adverse employment action (defined at 15 U.S.C.§1681a(k)(B)(ii)), an employer is required to provide the individual with a copy of the report in advance of making the decision. This gives individuals an opportunity to review the report for errors and to discuss changes they have made in their lives since the conviction took place (i.e. "evidence of rehabilitation"). 15 U.S.C. §1681b(b)(3)(A).

The Federal Trade Commission sued HireRight for FCRA violations and settled for injunctive and monetary relief – information about the suit, settlement and relief can be found here:

http://www.ftc.gov/enforcement/cases-proceedings/102-313/hireright-solutions-inc

Recent class action litigation includes *Long et. Al. v. SEPTA*, 16 cv1991 (E.D.Pa.) – complaint filed in early May, 2016 and can be found here: Long Et Al v. SEPTA Complaint (stamped).pdf.

After investigating them for federal and NYS FCRA violations, in 2015 the NYS Attorney General entered into a settlement with the "big three" consumer reporting agencies, which includes provisions requiring better correction of inaccuracies, and better dispute resolution procedures when mistakes are found. *See* http://www.ag.ny.gov/press-release/ag-schneiderman-announces-groundbreaking-consumer-protection-settlement-three-national.

2. N.Y. G.B.L. §380-a *et seq*. – New York State Fair Credit Reporting Act (NY FCRA). Applies to commercial background reports used in New York State. Does include seven-year limit on reporting criminal convictions, but ***only*** for positions that will pay ***less than $25,000***. N.Y. G.B.L. §380-j. Only allows reporting of ***criminal*** convictions. This means that no commercial background report may contain non-criminal conviction information (i.e. violations).

In 2009 the NYS Attorney General issued an Assurance of Discontinuance against ChoicePoint concerning its violations of FCRA and NY FCRA which can be found here: http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/ChoicePoint%20AOD.pdf.

Human Rights Laws:

1. EEOC Guidance and Title VII of the Civil Rights Act of 1964

   - EEOC Guidance 4/25/12: criminal records discrimination is race discrimination and may violate Title VII of Civil Rights Act of 1964. The Guidance may be found here: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.
   - The Guidance suggests that flat bans on employment for individuals with criminal conviction histories likely violate Title VII.
   - State laws that create flat bans in licensing and employment are preempted.
   - Recent litigation includes *Houser et al. v. Pritzker*, 10cv3105 (FM) (S.D.N.Y.) (class certified 7-1-14) and *Little et al. v. Washington Metropolitan Area Transit Authority et al*. (D.D.C) – complaint filed 7-30-14 and can be found here: http://apps.washingtonpost.com/g/documents/local/class-action-suit-against-wmata/1163/

     Motion to strike class claims denied 4-23-15
     (Note: this case also raises FCRA claims)

2. New York State Correction Law Article 23-A:

Article 23-A of the Correction Law (§§750-755) sets out the employment rights of people with conviction histories, and responsibilities imposed on employers who evaluate them for jobs, promotion, reassignment or retention. It covers both job applicants *and* current employees, applies to public and private employers *and* licensing agencies.

Employers must evaluate applicants *individually* and must not use criminal conviction history as a bar unless hiring the individual would pose a risk to persons or property or the individual's conviction history is directly related to the job sought. N.Y. Correct. Law 752. In order to make this determination, employers must review eight separate factors. N.Y. Correct. Law 753.

3. New York State Human Rights Law

N.Y. Exec. Law 296(15): it is an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based upon his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of Art. 23-A of the Correction Law.

Cases concerning the application of Art. 23-A and NYS Human Rights Law include:

- *Dempsey v. New York City Dept. of Educ*., 25 N.Y.3d 291 (2015)
- *Acosta v. New York City Dept. of Educ*., 16 N.Y.3d 309 (2011)
- *In re Investigation of Eric Schneiderman v. Quest Diagnostics* (Assurance of Discontinuance 2013)

N.Y. Exec. Law 296 (16): employers may not ask about or act adversely upon arrests that did not lead to a criminal conviction; youthful offender adjudications; or sealed violation convictions, except for law enforcement positions.

4. New York City Fair Chance Act

New York City Administrative Code (the "New York City Human Rights Law") § 8-107: prohibits employers (with four or more employees) offering employment in NYC from inquiring about conviction history or running background checks until conditional offer of employment is made; thereafter, conviction history must be evaluated consistent with Art. 23-A; if employer intends to deny applicant, must provide specific notice in form set by the NYC Commission on Human Rights (the Fair Chance Notice) and allow applicant at least three business days to respond. Job ads cannot refer to conviction history and cannot include language such as "must pass background check," "clean records only," etc. There are exceptions for federally regulated industries (e.g. banking) and for industries for which state law imposes criminal records requirements.

Fair Chance Act Guidance is found here:

http://www.nyc.gov/html/cchr/html/coverage/fair-chance-legalguidance.shtml

Fair Chance Notice is found here:

http://www.nyc.gov/html/cchr/downloads/pdf/FairChance_Form23-A_distributed.pdf

5. "Ban the Box" in other localities

Other New York State cities have passed fair chance hiring ("ban the box") ordinances, including the City of Rochester (*see* http://www.cityofrochester.gov/article.aspx?id=8589961788), the City of Buffalo, and the City of Syracuse (*see* http://www.syracuse.com/news/index.ssf/2014/12/syracuse_city_council_passes_ban_the_box_ordinance.html).

The NYS Attorney General investigated Big Lots and Marshalls (two national "big box" stores) for violation of Buffalo's ordinance, and in 2015 obtained a settlement that provides relief statewide. *See* http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlements-two-major-national-retailers-over-violations-.

V. Safeguarding Housing and Effect on Tenancies

A. Housing and Re-entry

The Division of Criminal Justice Services reports that over nine million New Yorkers have a criminal record. [DCJS reported 9,289,000 individual subjects in its criminal history file as of December 31, 2014. *See* Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2014*, Table 1 (December 2015)]. The vast majority are concentrated in poor communities of color that are the traditional consumers of civil legal services including assistance with housing and government benefits. Consequently, seamless access to stable housing and full, uninterrupted government entitlements are critical components of the "re-entry" process.

Unfortunately, the recognition of the link between re-entry, civil consequences, and recidivism too frequently fails to influence daily decisions made by prosecutors, policy makers, judges, defenders, and government agencies. It often falls on civil legal services providers and public defenders and to work collaboratively to advise clients about penalties that are intimately related to criminal charges and potential pleas, and to help clients prepare for successful re-entry. Civil legal practitioners and public defenders should collaborate more frequently to move toward the "person-oriented" society envisioned by Dr. Martin Luther King, thus ensuring clients' housing and benefits needs are being met. This section of the presentation is meant to address these important issues. (Many citations in this presentation are sourced from the "Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys, Civil Legal Services Attorneys and Other Reentry Advocates," by The Bronx Defenders, available on www.reentry.net.)

1. Overview of Subsidized and Private Housing Law in the Re-entry Context.

A. Breaking the cycle: Housing is an essential element to successful Re-entry
   a. Housing is the key to employment, family reunification, educational opportunities, and stability. Stable housing can help break the cycle of criminalization & homelessness.
   b. Any involvement in the criminal justice system – even a simple arrest or a few days in jail – creates a substantial risk of homelessness, shelter use, and job loss. *See*, *e.g.*, Zaire D. Flores, Jeffrey Lin, John Markovic & Nancy Smith, UNDERSTANDING FAMILY HOMELESSNESS IN NEW YORK CITY Section III at 29 (Vera Institute of Justice) (2005) (available at www.nyc.gov/html/dhs/downloads/pdf/vera_Study.pdf).
   c. Homelessness and unemployment, in turn, create a substantial risk of future arrest. *See*, *e.g.*, ; Stephen Metraux and Dennis P. Culhane, "Homeless Shelter Use and Reincarceration Following Prison Release," 3 Criminology & Public Policy 2, 137 (2004).
      i. The experience of The Bronx Defenders has shown that once a person has a criminal record, he or she spends longer in homeless shelters or out of work because of the barriers raised by the convictions.
   d. People with criminal court-involvement are marginalized with respect to housing. They face significant obstacles obtaining safe and stable housing because of criminal records ineligibility. They also risk termination of their lease and eviction if they are arrested during their tenancy.

B. Private Housing

1. Private Housing is usually the most commonly available option in any community. "Affordable Housing", whether nonprofit or privately owned and managed, is typically more affordable than private-market housing, but waiting lists are long and owners may exercise their discretion to exclude people with criminal histories. *See* Katherine Cortes & Shawn Rogers, "Re-entry Housing Options: The Policy Makers' Guide," Council of State Governments Justice Center (2010).

2. Tenant Screening: The Fair Housing Act does not treat individuals with criminal records as members of a protected class. *See* 42 USC § 3604 *et seq.* (1988).

But HUD's recent General Counsel Guidance on the FHA and Criminal Records expressed the opinion that blanket bans on applicants with criminal histories potentially violate the Act. Case-by-case reviews of applicants that "appropriately" consider criminal histories and tailor admissions bans to a legitimate interest may comply with the law. *See* HUD Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real-Estate Transactions, April 4, 2016, (hereinafter "HUD Guidance") *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf.

The FHA is applicable to all housing accommodations *except* a building with four or fewer dwelling units *and* in which the owner actually resides. 42 U.S.C. § 3603(b)(ii).

It may also be possible to establish a case for reasonable accommodation if mental health or substance dependence issues are documented. In such circumstances we may be able to establish claims using the Americans with Disabilities Act. Advocates should be on the lookout for *inconsistent* application of background checks which may indicate unlawful discrimination of a protected class. Partnering with fair housing agencies, such as Housing Opportunities Made Equal, can be crucial.

a. Credit Reports: Landlords can obtain credit reports and use the information found there. The information in a complete credit report can often include details of a person's criminal record. Advocates must verify that the record is correct, and that it does not contain references to sealed records or duplicative reports of arrests and charges.
b. Criminal Convictions. Landlords can look at an applicant's criminal record and can take into account the particulars of an individual's criminal history. As with credit reports, the advocate should try to review the record with the client to verify accuracy and to confirm that no prohibited information (sealed convictions, juvenile convictions, YO's, violations, or acquittals) appears on the report.

3. Convictions/Arrests During Tenancy

a. Illegal Use. RPAPL §711(5) provides for eviction if the property is used as a "bawdy house" i.e. where illegal activity is known to take place. Bawdy House cases are brought against a tenant who is accused of using their home for the purposes of prostitution or for any illegal trade, business, or manufacture.

a. The client's landlord, usually with assistance and insistence of the District Attorney (in New York City, each borough District Attorney has a special Narcotics Eviction Unit), brings a case to evict the client because that tenant used the premises "as a bawdy-house, or house or place of assignation for lewd purposes, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business." RPAPL § 711(5).

b. An isolated illegal act is not sufficient to bring a Bawdy House case; it must appear that the premises were used for illegal purposes with a measure of continuity and permanence. Law enforcement can notify the landlord when they suspect illegal activity. Landlords may be threatened with legal action if they fail to evict the targeted tenants.

c. 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.

d. Police or Neighborhood Complaints. RPAPL §715 allows the police, co-tenants, and neighbors to initiate eviction proceedings in the event the landlord (on notice) fails to take action under §711(5).

e. Staying the Eviction: Generally, the tenant cannot stay the eviction proceeding pending the outcome of the criminal case, however, given the stakes and the requirement that the illegal use be proven, it is worth making every effort to stay the eviction. Given

sympathetic facts, some Housing Court judges will stay proceedings to protect the tenant's Fifth Amendment right against self-incrimination. Fulton St. S. Redev. Co. L.P. v. James, N.Y.L.J., May 2, 2014 (Civ. Ct. Kings Cnty.).

f. 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).

g. Right to Jury Trial: pursuant to RPL § 231(1), where the landlord elects to commence an eviction proceeding under RPAPL § 711(5), the lease void, along with all the clauses therein. In the absence of a jury waiver clause, the common law right to trial by jury attaches.

h. *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.

b. Lease Provisions: Common provisions in leases addressing peaceful enjoyment of the premises may be used against tenants when police have been called to a home. Advocates should pay close attention to situations involving over-charging, over-broad inclusion of persons charged, and instances when all parties are named in complaints arising from instances of domestic violence.

c. Nuisance: Criminal charges can also result in an eviction proceeding based on common-law nuisance. While typically a nuisance theory requires a pattern of objectionable conduct, the courts have not absolutely foreclosed proceeding on a single, egregious incident. Just as with breach-of-lease cases, advocates should be wary of overly broad allegations.

d. Nuisance Abatement Laws in NYC target the buildings where drugs are allegedly being sold.

a. The City of New York may bring an ex parte motion in Civil Supreme Court for a temporary closing order to abate so-called "public nuisances" under New York City Administrative Code § 7-701 *et seq.*, resulting in

immediate eviction without notice, and for a preliminary and permanent injunction.

b. Such laws are brought against the tenants or the property owners of these buildings. Because the law is, in theory, aimed at *buildings* and not *people*, the authorities do not need to convict anyone before declaring a building a nuisance and evicting its tenants. All they need is "compelling evidence," such as arrests and community complaints. In effect, tenants can be evicted without a conviction and with no notice. Nuisance Abatement Laws were originally passed to shut down massage parlors and gambling establishments.

C. Subsidized Housing

Because many poor families rely on government-funded housing or rent subsidies, one family member's arrest on a narcotics charge, for example, can lead to homelessness for the entire family. And inevitably, eviction and residential instability create a cascade of emotional, economic and health problems. Decreased educational achievement, stymied professional development and even an increased risk for suicide are documented results of eviction and chronic homelessness. *See*, Matthew Desmond, Eviction and the Reproduction of Urban Poverty, 118 AM. J. SOC. 88, 91 (2012), *available at* http://www.law.harvard.edu/faculty/faculty-workshops/desmond.faculty.workshop.spring2013.pdf.

1. Public Housing Authorities (PHA) administer most of the federally subsidized housing programs in NY, including public housing and most of the Section 8 voucher program.
   a. PHAs must publish standards for denying eligibility and terminating assistance based on criminal activity and substance abuse.
   b. In NYC, the PHA is the New York City Housing Authority (NYCHA).

2. Tenant Screening
   a. Persons who are otherwise eligible for subsidized housing may denied a lease on the basis of criminal history. 24 CFR §960.205(b) (Public Housing), §982.307(a) (Section 8 vouchers).
   b. The recent HUD General Counsel Guidance on criminal records and the Fair Housing Act states that bright-line rules barring admission to anyone with a criminal record were potentially in violation of the Act due to the disparate impact of criminal proceedings on protected classes. However, rules that

"appropriately" consider the type of crime and its impact on the provider may, on case-by-case basis, be in compliance with the FHA. *See* HUD Guidance.

c. PHAs will run fingerprint background checks on the applicant, everyone the applicant currently lives with, everyone 16 years or older who might live with the applicant, and any biological parent of any children who will be living with the applicant, even if that parent will not live in the public housing unit and is not part of the application.
d. PHAs have the authority to bar eligibility for a reasonable period of time after any criminal activity (42 U.S.C. § 13661(c)). They can institute policies that are more restrictive than federal law and regulations.
e. In NYC, NYCHA fingerprints applicants at the point of the apartment interview, not the point of application, which can be helpful to applicants who can wait out any applicable mandatory ineligibility period while on the wait list. Ineligibility periods range from 3-4 years for a misdemeanor to 5-6 years for a felony, with NYCHA discretion for violations or DWI. NYCHA's policies likely comply with the HUD Guidance, in that they factor in the type of conviction and are otherwise tailored to serve a "substantial, legitimate, nondiscriminatory interest." *See* HUD Guidance.
f. Applicants are entitled to appeal a denial. 24 CFR §982.554. Mitigating factors include age of conviction, nature of the illegal act, evidence of rehabilitation, willingness to participate in counseling programs, etc. 24 CFR §960.205(d).

3. Convictions/Arrests During Tenancy
    a. Tenants can be evicted, and may lose their future rights to subsidized housing, if it is found that they have engaged in certain criminal activity. Specifically, termination can be based on drug-related or violent criminal activity or any criminal activity "that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises." 24 CFR § 982.310(c). Housing Authorities and landlord often attempt to terminate and evict on the basis of arrests. Advocates should make efforts to stay any such proceedings pending the outcome of the

criminal case. Coordination with criminal defense attorneys at this point is critical.

b. Tenant liability is personal but extends also to household members, guests and persons under the tenant's control. Id. Illegal drug use by a household member can be cause for termination. 24 CFR § 982.553(b).
    a. Advocates should be aware that the activity of guests, while it may be cause for eviction, may not be so bad that the voucher subsidy has to be terminated.

c. Termination is possible for drug related activity "on or near the premises by any tenant, household member, or guest, or such activity engaged in on the premises by any other person under the tenant's control." 24 CFR 982.308(f). "Near" will be a case-specific concept that advocates need to scrutinize carefully.
    a. 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).

d. Violent criminal activity is defined as "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 to be reasonably likely to cause, serious bodily injury or property damage." 24 CFR §5.100.

e. NYCHA termination of tenancy is the first step in the eviction process. To evict a tenant, NYCHA must first terminate the tenancy and then go to Housing Court on a licensee theory for a court order to effect an eviction. NYCHA may take a tenant directly to housing court in some cases for non-payment of rent or if the tenant of record moved out or died, but they are generally exceptions to the rule. NYCHA terminates tenancies for any of the following reasons: Non-desirability (drugs, nuisance to neighbors, damage to property, etc.), Breach of rules and regulations, Chronic breach of rules and regulations, Chronic delinquency in payment f rent, Non-verifiable income, Assignment or transfer of possession (of the apartment), and Misrepresentation (about your eligibility for NYCHA

occupancy). If a tenant receives a hearing date and fails to go, he or she will be held in default and almost certainly evicted.

2. Residency Restrictions based on Specific Types of Conviction.

   A. Public Housing: HUD requires that Housing Authorities ban two groups permanently. 24 CFR §960.204, 24 CFR §982.553.

      1. "Individuals found to have manufactured or produced methamphetamine on the premises of federally assisted housing."

      2. "Sex offenders subject to a lifetime registration requirement under a state sex offender registration program."

   B. SORA Restrictions: New York State sex offender law can create serious problems when a client is looking for housing. The regulations governing SORA can be found at http://www.criminaljustice.ny.gov/nsor/claws.htm.

VI. Civil Representation During a Criminal Case – Collaborating (or at least co-existing) With Your Client's Defense Attorney

A. **Holistic representation and cross-organizational collaboration**

1. **Padilla and beyond -** Padilla has opened the door to the idea that a defense attorney may have obligations to inform a client of these consequences even beyond the realm of immigration. The U.S. Supreme Court held in Padilla v. Kentucky that defense counsel must give affirmative, competent advice to clients about the risk of all penalties "enmeshed" with the criminal charges or potential pleas. 599 U.S. 356 (2010). The Court recognized that preserving rights, including but not limited to immigration status, may be more important to the defendant than any jail sentence.

   As a result, it is more important than ever that civil attorneys, whether part of a holistic practice or providing concurrent representation, play a role in advising criminal defendants of their rights, educating defense attorneys, and even affecting the direction a criminal case can take.

2. **Not Just Collateral, but intertwined –** As a civil attorney it might be tempting to consider a client's past or current criminal proceedings to be separate from your work. To view the status or outcome of the criminal case as just another objective fact that you must take into account in developing your own advocacy strategy. It may even be tempting to wait and see how a pending criminal matter shakes out before agreeing to provide civil representation.

In reality, you can take an active role in minimizing the harm the criminal justice involvement can cause. Often merely informing the criminal attorney, or even the criminal court, of the collateral effects of a proposed plea or order can affect the outcome of the case and give the attorney reason to push back on what seems to be a standard plea or give the criminal court justification for creative sentencing or less punitive measures.

Whether this occurs in the same office or through formal or informal partnerships and referral agreements, our clients are better equipped to avoid harsh collateral consequences that have real and documented impact on lives and on recidivism.

3. **Taking concurrent collateral consequence representation beyond holistic practices -**For the two of us working at public defender offices on this panel, our practice areas collaborate directly with defense attorneys so that we can share resources and litigate civil and criminal matters concurrently for our clients.

   This approach has obvious benefits and has gained in popularity, but it should not be seen as the only way to provide effective and zealous civil representation for clients involved with a pending criminal matter.

B. **Working with Criminal Defense Offices as a Civil Legal Service Provider**

1. Getting involved in your client's criminal case – while not necessary in all circumstances in the right situation it can be essential to ensuring the best outcome in both criminal and civil court.
2. Though representation is separate, the concurrent cases can't exist in a vacuum and so we are focusing on collaboration with criminal defense attorneys while understanding the difficulties that can arise with overlapping cases and competing goals and strategies where both attorneys have a duty of zealous advocacy in their respective forums.
3. Even without the ability to collaborate in house, the duties of the criminal defense attorney still require a client be informed of collateral consequences. Without the expertise in these areas criminal defense attorneys need, more than ever, to consult with direct legal service experts.
4. We aim to provide suggestions for direct legal service providers unaffiliated with public defense offices whose clients may have been involved, or are currently involved, in the criminal justice system.

C. **Communication is Key**

1. Communicating with Counsel as early as possible – If a civil client indicates involvement in a criminal matter it is imperative that you obtain permission to speak with their defense attorney and reach out as soon as possible.
   a. Tell your clients to inform their criminal attorney about **you** if you have not already been in contact.

b. If you can't reach them, call the public defender office where your client was arrested. If you are having trouble, the best time to contact the defense attorney is before 9:30 a.m., between 1 and 2, and after 4:00 p.m.

a. When leaving voicemail messages be persistent but be clear you are asking them for help with your civil case. Don't lead with "You are going to get my client evicted!!!." Instead, with your client's consent, provide the defense attorney with information about your client's ongoing civil matter and the services you provide.
    i. There is an exception to every rule…so of course if you hear a harmful plea is being entered in the morning and your client's appearance was waived do whatever you can to get the attorney's attention.

b. Remember the defense attorney works for the client and NOT YOU.

c. Explain the nature of the other legal issues in plain language. Don't assume that the defense attorney knows civil law.

2. <u>Stay in touch and check in before your client's criminal court dates</u>
    a. The goal is to help minimize the types of collateral consequences we have been discussing.
    b. What may seem to the defense attorney as a routine calendar date may be a chance to set the stage to minimize collateral consequences down the road.
        i. Often early routine appearances are the best chance to seek remedies like DA releases to facilitate return of a client's property held by the NYPD, request modification of a full order of protection, seek an access order for necessary medication or personal items.
    c. If a plea is taken before the defense attorney or the client can be fully informed of potential pitfalls it may cause irreversible harm and make your job as a civil attorney that much harder.
        i. A defense attorney may see a client with a past criminal record as someone who will not be affected by another misdemeanor plea. They may not realize their client is currently applying for NYCHA or has succeeded to a parent's rent stabilized apartment where a landlord is looking for any pretense to seek eviction.
    d. Constant communication and collaboration is paramount to ensure neither party is passing a point of no return in their respective forum that might trigger consequences in the other.
        i. <u>Inform the defense attorney before a client testifies about related facts in a civil proceeding</u> - Civil attorneys can expose their client's to just as much harm if they proceed without knowledge of the criminal case. Allowing your client to testify in a NYCHA termination hearing, or housing court, or a forfeiture proceeding may open them up to harmful cross examination or provide ammo for impeachment in their criminal trial.

3. Communicate with your client about the effects of certain pleas – You may have difficulty reaching the defense attorney or finding time to fully discuss the substance of the case. Regardless, you can inform your client of the issues at play and make sure *they* understand what is at stake.
    a. Even though a defense attorney may not thank you if a client begins to push back on their advice to take a given plea, the client must make the decision while fully informed of the long term consequences their criminal disposition might have.
    b. Sadly a client may sometimes have to choose a more punitive outcome in criminal court if it means avoiding exposure to harmful collateral consequences.

    c. Examples:

        - While disorderly conduct pleas, discussed earlier, result in sealed criminal records, these plea offers are often accompanied by 2 year orders of protection prohibiting access to the complaining witnesses' home or work. If this home or work is the client's as well, they may need to risk exposure to a harsher penalty if it means the avoiding the order.
        - An ACD would be seen by every defense attorney as preferable to a disorderly conduct plea. The ACD results in dismissal down the road. It may not, however, result in criminal records being sealed when the plea is entered. As a result, a client with a disorderly conduct and sealed records may fare better at a NYCHA termination hearing than a client who received an ACD. In the former situation no criminal records are available, in the latter, the case is technically open and officers are free to testify and NYCHA is free to present all relevant arrest records.

        - A client with a past criminal record who relies on SSI as their sole source of income. The defense attorney advises them to take a misdemeanor plea if they want to avoid Rikers and get home as quick as possible. The defense attorney does not realize that "home" is their NYCHA apartment and the misdemeanor opens them up to termination of tenancy in a way that fighting for a plea to a violation would not.

4. Educating yourself about criminal records remedies and sealing requirements – These were described previously and touched on in the examples above. This issue is one that is extremely important on a daily basis in a holistic practice. Despite being the direct result of certain criminal pleas sealing laws are often misunderstood or ignored by criminal attorneys but are mandatory knowledge for a civil attorney working with criminal justice involved clients.

5. Understanding the importance of your work – Don't be discouraged by your lack of expertise with related criminal legal issues. Rest assured the criminal attorneys know as little about our fields (and after this training, much less!). We all have a duty to our clients to ensure they are fully informed of the consequences in all forums.

6. Practical Guidelines for collaboration:
   a. Tell your clients to inform their criminal attorney about **you** if you have not already been in contact.
   b. If you can't reach them, call the public defender office where your client was arrested. If you are having trouble, the best time to contact the defense attorney is before 9:30 a.m., between 1 and 2, and after 4:00 p.m.
   c. When leaving voicemail messages say – "You are representing my client. I have some important information about our client's other legal issues that I would like to discuss with you." Leave the best numbers and times at which the attorney can reach you.
   d. With your client's consent, provide the defense attorney with information about your client's ongoing civil matter and the services you provide
   e. Remember the defense attorney works for the client and NOT YOU.
   f. Explain the nature of the other legal issues in plain language. Don't assume that the defense attorney knows civil law.

D. **Things to remember -** In helping to buffer the effect this a criminal case can have on a client and your own representation:

1. A defense attorney prioritizes a client's liberty - Remember a client's criminal attorney, even if they are aware of ongoing housing or other civil legal issues, is prioritizing their client's liberty and the impact a given plea will have on future criminal justice involvement.
   a. They may need reminding that a seemingly benign plea can still affect stable housing, employment, household composition, and property rights.
   b. The goal of avoiding any jail time may lead a defense attorney to make strategic decisions that will atively *harm* your client's civil legal interests.
      - Example: A full order of protection is often issued at arraignments which bars a client from returning home. The defense attorney may not have fought this order because it was seen as a condition of the client being released on bail or ROR'd.

2. Make sure your client understands your role and expertise - ensure a client understands the civil consequences of a potential plea, but make sure they also understand that you are not a criminal expert and not seek to second guess their attorney's legal advice on criminal justice issues.

3. Only step on a few toes – By the same token fostering a collaborative relationship with a defense office requires making sure the defense attorney respects your expertise and hears when a civil consequence is important to your client, but make sure they understand you don't seek to insert yourself into their representation.
    a. It can take time, but advocates must find ways to structure collaborations that bridge the critical gap in services between traditional criminal and civil legal organizations.
    b. Bronx Defenders has been providing holistic representation for more than 15 years. Brooklyn Defender Services Civil Justice Practice is not even 3 years old. The organizations are at different stages of institutional integration of civil legal advice informing decision making in a criminal case. We mention this only to point out that a successful and mutually beneficial working relationship won't happen overnight.

E. **How to Affirmatively Assist Defense Attorneys –** Many prosecutors, judges, and even defenders simply do not believe that so many irrational and draconian punishments exist or that our clients are not truly "innocent until proven guilty" as far as civil forums are concerned. We can assist defense attorneys and our clients by:

1. Helping defense attorneys to develop comfort with these issues - Once defenders have been trained and have worked with civil attorneys on these collateral issues they can be more successful at leveraging these concerns in bail determinations, pleas, and sentencing.
    a. By building connections over time we can demonstrate that our civil knowledge and collaboration can be an asset to their practice and can provide leverage or support for their arguments at every stage of the criminal case.
2. Pointing out cases where collateral consequences exist – We can provide direct testimony or written statements to prosecutors or the court in situations where an expert's explanation of potential consequences can influence a DA to structure a plea a certain way or a sway a judge's order.
    a. Countless times judges and prosecutors have expressed surprise at hearing of collateral issues resulting from a defendant's criminal case.
        i. By the same token, some prosecutors are fully aware and have even admitted on the record that they want a client to suffer collateral consequences to offset what they see as a lenient plea.
        ii. Even these cases, however, can help educate the court and bring these consequences into the calculus used in day to day sentencing.
    b. To be clear, none of these issues occur in every case. We don't recommend inserting yourself into each and every case that comes through arraignments, only with a client's permission and where such involvement is necessary.

3. Civil Assistance in Criminal Court – in addition to technical support and education there may be circumstances where a client's civil issues may be best addressed by direct collaboration in criminal court.
    a. Examples:
        i. Advocacy to modify a full order of protection to allow a client to return home.
        ii. Advocacy for immediate sealing or a lesser plea to avoid mandatory collateral consequences or likely harm if records remain unsealed.
        iii. Educating judges and prosecutors about what remedies are and are not available to a client.
        iv. Criminal judges often make orders "subject to housing court" due to a misguided belief that the housing court can rule on disputes between roommates or family members.
        v. Compelling a DA release of property to assist a client in retrieving a vehicle or personal items.

4. We can help insulate the defense attorney from their judge's ire - The reality is that many criminal attorneys who work in front of the same judges every day may be hesitant to raise some of these considerations for fear of slowing down the process, annoying a judge who might take frustration out on clients etc.
    a. The same attorney who may not wish to ask for a modified order of protection may permit a housing attorney to come explain to the court why housing court does not provide a remedy in a given case.
    b. In our experience, when a civil attorney appears in criminal court to explain these issues the court is more willing to listen and sees it as either extremely important or at least novel that this client's case warrants special intervention.
        i. At the very least if it goes poorly the criminal attorney can blame us, the quirky housing lawyers for insisting.

5. Providing Additional Discovery – Another tangible benefit that civil practitioners can offer a defense attorney is the opportunity for discovery.
    a. Eviction cases, family law proceedings, employment licensing proceedings, DMV suspension hearings, immigration proceedings, school suspension hearings— are all venues where an administrative or lower court judge is likely to have subpoena power.
    b. If defense attorneys know the range of relevant hidden punishments and related ancillary proceedings, they can use them to obtain additional discovery not available in the criminal cases.
        i. For example, NYCHA is rushing termination of tenancy proceedings after recent bad publicity. A civil attorney appearing at a NYCHA hearing may have access to information and documents the prosecutor has not yet turned over.

c. We can invite a defense attorney to second seat a termination hearing and be given the opportunity for a free cross examination on a police officer or other witness in the criminal case.

F. **What other resources can civil legal services provide to criminal defense attorneys?**
   1. Offer Training and Education –Training and education programs or providing written guides and materials to the defense bar can help these attorneys begin to recognize the importance of addressing collateral issues affirmatively at the earliest possible stage.
   2. Client Interview and Initial Assessment – We can encourage defense counsel to make early referrals to civil legal services for issues they cannot personally handle. The initial arraignment interview might be the best chance to catch an eviction or wrongful termination before it is too late.
   3. Investigation or Collaboration – It may be too much to ask a strictly criminal practitioner to personally invest time in a collateral civil issue but where the client is sharing details and asking for help it is imperative that successful referrals to civil legal services be made.
   4. Help them understand their role and obligations as gatekeepers - Experience has shown that families caught in the disruption of pending criminal cases or incarcerations are less likely to seek other needed legal services at a separate office.
      a. A defense attorney needs to understand the obligation to inform a client of referral options when they hear of impending civil legal issues. The days of seeing these as separate spheres are coming to an end.
      b. Without affirmative assistance from the only lawyer they have contact with a client may let the first and second notices from their landlord or welfare agency go unaddressed.
      c. Even if a client does manage to successfully contact a legal service agency, the time lost may mean a lesser chance of success in the civil case and certainly necessitate the expenditure of additional resources.
      d. Defenders, however, are often the first to hear about these problems because of their established relationship with these families. Partnering with a defender office for civil legal services creates a unique opportunity for early intervention. This model leverages existing services for the greatest effectiveness.

G. **Potential conflicts of interest and Competing Priorities** – Even within the same office these problems can arise but certainly are exacerbated when navigating informal or formal collaboration between different offices.
   1. Conflicts of Interest – As these relationships and collaborative efforts grow the likelihood of conflicts will as well. These can be overcome and avoided with planning.
   2. Strategy Disagreements – It may take some work convincing a defender that a client is more concerned with their public housing residency than with avoiding a conviction, but there are times when a slightly worse plea might come with slightly less egregious collateral consequences.

a. For example, a plea to a violation "disorderly conduct" is a conviction, but it is a non-criminal disposition that results in the arrest records being immediately sealed. These records can no longer be used in an ongoing termination of tenancy proceeding.
b. In contrast, a client may be offered an ACD, which will result in no conviction and no record in the long term, but will require their arrest records remain accessible for the next year.
c. Accessible and available to NYCHA or the NYPD or other agencies to use in a civil forum.
    i. While other options exist, such as asking for immediate sealing, the protracted duration of a criminal case may mean there is no time to get the record sealed before NYCHA or the NYPD can push a civil case through.
    ii. We have been told directly by the NYPD that they will withdraw a civil case for a disorderly conduct violation but not for an ACD due to the ability to access arrest records and officer testimony.

VII. <u>Practice Guide – Criminal Court Orders of Protection</u> – One area of direct overlap between criminal and civil representation can be dealing with clients with orders of protection affecting access to their home or job.

A. <u>How Common are Orders of Protection</u> - It is common practice for criminal courts to issue full stay away orders of protection at arraignments without considering the consequences these orders have on defendants. Clients subjected to these orders are regularly displaced from their homes, forced into homelessness and the shelter system, and they often surrender their affordable apartments rather than continue to pay rent on an apartment they are not living in.

An order of protection issued by criminal court judge can indefinitely bar a client from returning to their home or work after arrest with little or no opportunity to contest the order. These orders are rarely explained and a client denied access to their home or work has little recourse or remedy when they find themselves suddenly homeless. There is a lack of understanding on all sides about how these orders affect a tenant's actual tenancy rights (they don't) and this can lead to confusion, illegal lockouts, or eviction when a party assumes the order of protection is the same as an eviction.

- **<u>Example</u>**: D lives in an owner-occupied building, and she and her landlord live on different floors in the building. The landlord alleges that D assaulted him and D is arrested. D is charged with felony assault. At arraignment, D is released on her own recognizance, but the judge issues a full stay away order of protection, ordering D to stay away from the home of the landlord. Since the home of the landlord happens to be the home of D as well, she is effectively barred from returning to her home despite being "innocent until proven guilty."

  Not only does this leave her without a place to live in the short term, but she has to continue paying rent on the apartment or risk being evicted officially. This situation

is common place but can be even more complicated. For example, if D has a 15-year-old disabled son living with her. D now has to choose between terrible options: violate the order of protection and risk being re-arrested, leave her son alone in the apartment and possibly face an ACS investigation, or find some way to move him and his medical equipment into shelter—which would endanger her son's health and wellbeing.

B. Frequency of Issuance - An order of protection is issued at the People's request without any inquiry into the actual danger to the complaining witness or the rights of the defendant.

    1. This practice exists despite the fact that due process dictates that defendants be given a meaningful opportunity to be heard before they are forced out of their homes or a meaningful review of any such order shortly after issuance.
    2. This section aims at providing a little background for civil legal service providers to push back (either directly or by educating defense attorneys) and insist that our clients are entitled to a meaningful opportunity to be heard on these issues before being removed from their homes.
    3. By advocating for modification in these cases and educating the court about the repercussions of these we hope to change the culture from one where the People's request is rubber-stamped to one where judges expect to be challenged on these orders, understand the rights at issue and take the time to tailor their orders so as to protect the rights of our clients.

C. Types of orders and Samples– Example to be added: requires defendant to " _____-
    1. Full orders of protection –
    2. Incidental contact orders or limited orders
    3. Final orders of protection
    4. Rights of the tenant/defendant/cw.
    5. Ongoing landlord/tenant responsibilities.

D. Statutory authority and State of the Law - N.Y. Crim. Proc. Law § 530.12, governs orders of protection in criminal actions between family members, and CPL § 530.13 governs orders of protection between non-family members.
    1. Both statutes give the court power to issue an order of protection in conjunction with any securing order or as a condition of any order of recognizance, bail, or ACD. Neither statute requires courts to consider the property rights of those against whom the orders of protection are levied.
    2. C.P.L. §§ 530.12 and 530.13, provide little guidance as to the standard a criminal court should employ in issuing the orders of protection, and neither addresses the due process rights of those affected by the order.
        i. C.P.L. § 530.13 only requires that "good cause [is] shown" to justify the issuance of an order of protection. In practice, the "good cause" standard is a low one and is found to be met in most situations; demonstrated by the frequency with which these orders are granted by the criminal courts.
        ii. C.P.L. § 530.12 is silent on its face as to the standard by which a court should approach the issuance of temporary orders of protection, and

presumably gives courts a wider latitude in their issuance. See generally, Meggie, 184 Misc.2d at 884; People v. Koertge, 182 Misc.2d 183, 186-187 (Dist. Ct. 1998).

E. Case Law and due process implications - The statutes are silent as to how to address due process rights directly implicated by these orders. But courts have acknowledged a right to a "meaningful opportunity to be heard." The open question is just how meaningful this must be. One major question concerns whether this opportunity to be heard must be provided *before* an order is issued or whether due process in requesting modification is sufficient.

1. People v. Faieta, 109 Misc. 2d 841, 440 N.Y.S.2d 1007 (Dist. Ct., Nassau 1981) recognized a due process right to request a hearing seeking modification of an existing order of protection, holding that a defendant may at any time request a hearing for the purpose of determining the merits of an order despite that such a this not being provided for in the CPL.

   The court conducted a hearing on the issue, and found that the defendant had owned his home for a long time, that the he was disabled, that his home was equipped with grab rails to aid his disability, and that the complaining witness had other places to stay. The court modified the order and directed the defendant to stay away from the home of the complaining witness so long as that home was located somewhere other than the premises owned by the defendant. The court also ordered that the defendant be allowed to re-enter the residence without interference. Faieta at 845.

2. People v. Derisi, 110 Misc. 2d 718, 442 N.Y.S.2d 908 (Dist. Ct., Suffolk 1981) - found that the order of protection can only remain valid if the defendant is given an opportunity to be heard regarding modification of the order "promptly after the deprivation occurs". People v. Derisi, 110 Misc. 2d 718, 442 N.Y.S.2d 908 (Dist. Ct., Nassau 1981) (citing Barry v. Barchi, 443 U.S. 55; Armstrong v. Manzo, 380 U.S. 545 (1965)).

3. People v. Forman, 145 Misc.2d 115, 546 N.Y.S.2d 755 (N.Y. Crim. Ct. 1989) the most successful decision addressing the lack of due process afforded by CPL § 530.12 and § 530.13 acknowledged that due process entitles a criminal defendant, like any other citizen, a meaningful opportunity to be heard before they can be deprived of property unless extraordinary state interests mandate immediate action.
   a. Forman laid out a four-part analysis it deemed necessary to ensure the procedural safeguards passed constitutional muster. Before a temporary order of protection can be issued at arraignment, the court held:
      i. a probable cause determination must be made by a judicial officer, based on a verified complaint containing facts of an evidentiary character providing reasonable cause to believe that a crime has been committed;

ii. the defendant is entitled to a presentation of reasons for the issuance of an order of protection by the prosecution and to be heard in opposition to its issuance;
iii. before issuing the order of protection as a condition of bail or release, the court must be satisfied that there is a danger of injury or intimidation to the complainant; and
iv. The defendant has a right to a prompt evidentiary hearing following the issuance of an order of protection. Forman at 130.

b. Required a prompt hearing to modify the order of protection if the defendant can show "entitlement to the residence … such as the Court would consider sufficiently compelling to modify so much the temporary order of protection as excludes the defendant from the residence," and that "there exist[s] some valid reason why the defendant cannot expeditiously obtain relief in another forum."

4. People v. Carrington, 12 Misc. 3d 1189(A), 2006 WL 2135516 (NY City Crim. Ct. 2006). A defendant must demonstrate that these factors outweigh the "danger of intimidation or injury" to the complaining witness that may accompany modifying the order of protection.

F. How Orders are Issued = Arguments at arraignments - Since Forman one of the major questions has become whether arraignments provides sufficient opportunity to be heard before an order of protection is issued.
1. See e.g., People v. Durst, 42 Misc. 3d 1201(A), 983 N.Y.S.2d 205 (Crim. Ct. 2013) (holding People's request for order of protection and opportunity to be heard at arraignment, absent changed circumstances, satisfied meaningful opportunity to be heard.).
2. Some decisions have directly attacked the ideas put forth in Forman and demonstrate the vitriol some criminal courts seem to have towards requests to consider something they see as outside the criminal justice purview. People v. Carrington, held that an evidentiary hearing is not required at all, would be excessively onerous in most cases, and that an argument at arraignment regarding an order of protection satisfies the "meaningful opportunity to be heard" requirement in most cases. 2006 NY Slip OP 00245 (N.Y. Crim. Ct., Kings County 2006).

G. Availability of remedy in another forum - Carrington held that Forman hearings are discretionary and should rarely be ordered. The court instead encouraged defendants to seek relief in venues other than Criminal Court—e.g. Housing court, Family court, or Supreme Courts —on the grounds that Criminal Court is the forum least able to expeditiously resolve such a claim. Id. The court declared that an order should only be modified "…where there are valid reasons why defendant cannot expeditiously obtain relief in another form." Id.

1. People v. Meggie insisted that courts should be liberal in scheduling Forman hearings. 184 Misc.2d 883, 884 (Dist. Ct., Nassau County 2000).

2. In the Matter of Lopez v. Hon. Fischer, the court held the interests of the defendant in a prompt hearing must be weighed against the interests of the government (the burden placed upon the government in terms of the time and judicial resources required to conduct the Forman hearing, and the government's interest in protecting victims, specifically victims of domestic violence.) NYLJ, 12/15/09, p 26, col. 3, 2009 WL 4737590 (Sup Ct, Nassau County 2009). The Lopez decision, although only persuasive, gives the clearest description of the required calculus behind what type of "hearing" is necessary:

    a. "The form said hearing should take is left to the discretion of the judge conducting it. Clearly, although a full evidentiary hearing is permissible and of course desirable from the petitioner's point of view, is it not mandatory. A more limited form of hearing could also suffice, as could an in camera interview of the complainant by the judge, or some other variation or combination, which would not be unduly onerous to the complainant. What is required is that the judge ascertains the facts necessary to decide whether or not the [order of protection] should be continued, i.e., is there a continuing danger of injury or intimidation to the complainant. Given the very limited scope of the hearing and the minimal drain on the courts' resources which would result, the petitioner/defendant's right to a hearing should prevail."

    b. While it does not mandate any specific procedures, the decision at least recognizes the necessity of protecting a defendant's right to a hearing on these issues and calls for continuing an order of protection only where there is a continuing danger. Id.

H. Case Study - The Local Landscape in Kings County: Both the Supreme and Criminal Courts for Kings County recognize that orders of protection affect a defendant's property rights and therefore implicate due process.
    1. People v. Yan 2010KN021817, at 3 (3/31/2010, J. Kalish) (citing People v. Scott, 195 Misc. 2d 647, 760 N.Y.S.2d 828 (N.Y. Sup. Ct. Kings County 2003)).
        i. Yan noted that when an order of protection excludes a defendant from his residence, the defendant has a due process right to be meaningfully heard when his property rights are compromised.
        ii. It is within a court's discretion to order an evidentiary hearing to be held shortly after arraignment, in order to accurately determine whether it would be appropriate to modify a full stay away order of protection. Yan, citing Carrington; Koertge; Faieta. According to Judge Kalish, a property interest triggers the right to the hearing, and then the judge determines the danger of intimidation or injury.

I. The role of the housing lawyer in criminal court – As touched on above one of the main things we can provide is a clear explanation of a defendant's rights and remedies (or lack thereof) in housing court or other forums.

1. Inform the criminal judge that making a full stay away order "subject to housing court" is not going to provide any solace to the homeless defendant when the order requires him to stay away from the place of business of the buildings live in maintenance worker. There is no landlord tenant relationship between the parties.
2. Point out absurdity of the people's concerns – Judges are often unwilling to order modification but will be happy to push the people to consent. The people, for their part, often consent out of fear of what a modification hearing might end up looking like if granted.

J. Standard for modification, in practice: Case law aside in our practice we usually attempt to show:
    1. Standing, if in dispute, or if CW is claiming to be primary tenant – right to the apartment (lease, bills or ID w/ that address, testimony that he has lived there at least 30 days).
    2. Unavailability of relief in other forum. Examples:
    3. No LL/T relationship – dispute between neighbors means you can't take your neighbor to housing court and the land lord is not involved in the exclusion from the apartment.
    4. Immediate family members can't utilize summary proceeding in housing court; Supreme Court ejectment takes years).
    5. Countering risk of harm/mitigation – Remind the court that the people have not explained *why* the CW is at risk by client's continued residency.
        i. Explain why incidental contact should be sufficient, examples
            1. disability makes it hard to get around,
            2. physical layout of apartment, separate locking entrances etc.
            3. presence of caretakers for the client
            4. Safety measures already in place – in supportive housing, shelters, etc.
            5. Client was off medication and is now compliant.
            6. Practical size/strength of parties – 90 year old tenant "threatening" 6 foot 8 landlord.
    6. Extenuating circumstances – house equipped for his disability, nowhere else to go, risk of homelessness, danger to client's health, reasons loss of home is such a problem, CW has other places to stay, minor children, health safety etc.
        i. Not technically part of Forman or other standard but can be crucial to getting the judge on your side pushing the DA to consent.

K. Making the Request for Modification – A request can be made orally at a scheduled appearance or placed on the calendar by notice of motion or order to show cause. A defense attorney may feel more comfortable raising it at an already scheduled appearance.
    1. Orders to show cause – in Brooklyn we have seen confusion from attorneys and judges about what an order to show cause is actually requesting. All a signature does is place the issue on the calendar for argument. The judge's, however, often seem to think signing the OSC means they are granting our ultimate relief and shifting the burden to the people to rebut our argument. We have seen judge's

multiple times say "I won't sign this I'm just going to put your issue on the calendar for a hearing." …. Ok thanks judge!

2. Motions can affect 30.30 time – Speedy trial laws can be affected if a defendant makes an affirmative motion. Even though the request for modification seeks to affect only this order of protection and not the underlying merits of the case, the motion can alter the likelihood of the defendants case being dismissed on speedy trial grounds. As a result, a defense attorney may often encourage the client to seek alternative living arrangements until their case gets dismissed rather than risk restoring the matter to the calendar.
3. Characteristics of common successful cases:
    i. Separate entrances.
    ii. Disability
    iii. c/w is an employee not a tenant.
4. Possible format for a post-deprivation hearing.
5. Negotiating a limited order with the ADA.
6. Subject to housing court – seeking to limit/modify in another forum.

L. Housing Court and Criminal court orders of protection - Criminal court judges and defense attorneys have many misconceptions about the available remedies in the civil arena. You will hear many things in criminal court meant to justify such a severe order and imply it can be addressed elsewhere, "I'm making it subject to housing court!", "I'm not going to decide who has the better claim to the apartment." "Can't the defendant just evict his roommate c/w? he has a lease!"

1. Why Housing Court is Unavailable – common relationships between defendant and cw
    i. When the c/w is your landlord – If a criminal court order is barring access to your home, the landlord hasn't done anything to warrant a defendant taking the landlord to housing court.
        1. Keep an eye out for illegal lockouts however, intentional or not many landlords assume they are permitted to do so if they find out the tenant is barred from the apartment.
    ii. When the c/w is your tenant – If a dispute is with a tenant or subleasor the client may have grounds for eviction which would permit them to return home. This does not provide the means of getting around a long term lease. In addition, defendant is not going to be able to find free legal services to assist in prosecuting an eviction.
    iii. When the c/w is your roommate – if both parties have a direct tenant relationship with the landlord they have no remedy in housing court against one another.
    iv. When the c/w is immediate family – housing court is likely unavailable and supreme or family court can take much longer. Even if a tenant could seek to evict immediate family, most allegations that would lead to the order of protection will be sufficient to stop a successful attempt and possibly put the defendant at risk of losing housing permanently.

M. Why can't we go to another forum – Even assuming standing in housing court or another forum, judge's in these forums are generally unwilling to issue an order affecting a criminal judge's order.
    1. As a precaution, if you anticipate a related housing court proceeding make sure the criminal court order says "subject to housing court." While not legally necessary it can help calm a housing court judge nervous about stepping on anyone's toes.
    2. Often defense attorneys and judges misunderstand the limitations of summary proceedings. If the defendant "has a lease" they assume the housing court can provide some relief and somehow order the CW to vacate the premises.

N. Access orders – Even if an order remains in place a client may often need access to get important medical items, clothes, identity documents or any number of things.
    1. Access for emergencies.
    2. Access for purposes of packing and moving.
    3. Dealing with police escort logistics – while an access order may grant "9 to 5" on a particular day, it requires the defendant to have a police escort. In practice the precinct may only allow the client 15 minutes to enter the premises.
        i. If you know this will be an issue, if client is packing and moving, you can try to get the judge to explicitly order client needs "a 2 hour window to move".
    4. Housing court access order vs. Criminal order of protection – in some cases the housing court can grant an access order that will temporarily limit the criminal order of protection. This is most common in situations where the landlord is the C/W or ends up illegally locking out the tenant. Once in court the parties can negotiate an access date.

O. Contempt Charges
    1. Violating orders.
    2. Enforcing limited orders.
    3. Serving papers or seeing the c/w in housing court.

P. Collateral Consequences and Orders of protection – These orders can pose problems in a number of unforeseen ways. Even where a criminal case ends favorably a final order of protection may be issued. This can happen even if a client's criminal record is sealed.
    1. The client can end with a non-criminal disposition which has no direct effect on their subsidized housing residency but have a full order of protection which implies to HPD, fore example, that there was some domestic dispute warranting potential termination or bifurcation.
    2. Subsidized Housing – family break up standards for HUD, HPD – orders of protection can be used.
    3. OOP as proof of criminal activity – If criminal records are sealed the order itself should not be seen as evidence of criminal activity.

Q. Remedies if modification is denied – If modification of an order of protection is denied remedies are limited.

1. New Motion – changed circumstances. You are permitted to bring a new motion for modification and sight changed circumstances such as change in living arrangements, compliance with treatment or counseling, new evidence etc.
2. Article 78 proceedings – If a judge refuses to hear argument on modification or their decision can be billed as "arbitrary and capricious" you can appeal the judge's order via article 78 proceeding.
3. Direct appeal not available – you cannot bring a direct interlocutory appeal in criminal court of a denial of a request for modification.
4. Investigate and advocate – You can seek to investigate the CW and whether they truly fear risk of danger or intimidation. If not, you can try to advocate with the DA or the court to get the DA to consent to modification where the CW doesn't even want the order.

VII. CIVIL FORFEITURE

I. What is Civil forfeiture and why does it matter to our clients?

a. Origins of civil forfeiture.
b. Criminal vs. Civil forfeiture.
c. Ongoing criminal case vs. civil forfeiture
d. Why haven't we heard of it?
e. Sample case (horror) study.
f. Effect on client's daily lives.

II. Applicable laws in NY:

i. Federal.
ii. State
iii. Municipal (small survey)
    1. NYC
    2. Nassau
    3. State

III. Why Civil Forfeiture – Where does the money go?

a. Current applications and results
b. NYC budget data
    i. Some anecdotal stats
c. Federal stats, shut down – now restarted.

d. What do cops take?
    i. Cash
    ii. Cars
    iii. Everything else.

IV. Sure, but how do I get my stuff? - How the process works for clients (NYC focus).

a. Arrest and seizure.
b. Categories of property vouchers
    i. Safekeeping.
    ii. Arrest evidence.
    iii. Forfeiture.
    iv. Investigatory.
c. Where is my stuff?
d. The criminal case and dealing with the DA
    i. Criminal forfeiture.
    ii. DA release.
        1. When the DA refuses to release property.
        2. Evidence holds.
    iii. Property as leverage for a plea.
    iv. Guilty plea and its effect on future forfeiture action.
    v. Sealing and its effect on same.

e. The Civil side – Dealing with the NYPD.
    i. Demanding release of property.
    ii. Krimstock hearings.
    iii. Settlements.
    iv. Article 78's.
f. Return of cash
g. Return of vehicles.
h. Supreme Court forfeiture actions.
    i. Legal Standard.
    ii. Case Examples.

V. **Krimstock v. Kelly – Due process and post-deprivation property rights**

a. Krimstock hearing standard.
b. Hearing procedures.
c. Effect of Krimstock decision on ultimate civil forfeiture action.

VI. Outside of NYC (time permitting and/or if we get sufficient materials).

a. Similar outline to above.

VII. Other Jurisdictions/trends. Recent popularity.

a. Examples:
    i. Florida – waiting until conviction to begin process
    ii. Nebraska – done with entirely

iii. Rand Paul's bill introduction calling for reform.

When Criminal Convictions Affect Civil Legal Needs: Utilizing Reentry tools and strategies to address Employment, Housing and other "Collateral" Consequences

Biographies

Panelist Biographies

Bill Bryan

Bill Bryan joined the BDS Civil Justice Practice in July 2014 after 5 years as a staff attorney at the Urban Justice Center where he focused on direct representation and affirmative litigation of public benefits and public housing issues. He is a 2009 Graduate of UC Berkeley School of Law. Originally from Southern California Bill attended UC Santa Cruz where he majored in Philosophy and Legal Studies. He spent 3 years working as a game tester and producer in the video game industry. Desiring a more meaningful career path Bill attended law school where he gained experience with both criminal defense and civil legal services organizations, highlighted by a summer internship at the Federal Defender's Capital Habeas Unit in Philadelphia and two years of work with the East Bay Community Law Center where he focused on criminal record expungement and direct civil legal services.

For the past 5 years Bill has fought for systemic change and the due process rights of his clients in various administrative fora as well as state and federal court. Having been interested in the intersection of the criminal and civil justice systems since law school, Bill jumped at the opportunity to join BDS' Civil Justice Practice and is truly grateful to be able to help some of New York's most vulnerable residents with a range of civil legal issues while also being part of a broader multidisciplinary effort to push back against the stigma caused by contact with the criminal justice system. Every new client is a both a reminder of the shocking extent to which, even while a criminal case is pending, the civil legal world does not care about "innocent until proven guilty", and an important opportunity to help individual clients deal with collateral consequences at the point of origin rather than addressing them only after their full impact is realized.

Paul Curtin

Paul Curtin has worked at the Legal Aid Bureau of Buffalo since 2002. During that time he has been staff attorney in the Civil, Felony Appeals, and Attorneys for Children Units. He is currently Joint Chief Attorney in the Civil Unit, concentrating on matters related to Reentry, Housing, Bankruptcy, financial well-being, Foreclosure defense, and Veterans and Military Families issues. He oversees the Reentry Practicum as an adjunct professor at the University of

Buffalo Law School. Together with other members of the Civil Unit, he has established a Reentry initiative at Legal Aid that cooperates with Federal and State Probation, Federal Reentry Court of the Western District of New York and a range of community organizations and agencies to assist individuals facing barriers related to incarceration or criminal records. The Reentry initiative recently expanded to provide supportive services for a regional Restorative Justice project.

Graham Dumas

Graham Dumas is a Supervising Attorney in the Civil Action Practice at The Bronx Defenders. After joining BXD in 2013, Graham has defended clients against a broad range of consequences arising out of an arrest, including evictions, termination of crucial benefits, suspension of employment, forfeiture of property and police misconduct. In addition to those duties, Graham supervises two attorneys and four non-attorney advocates within the Civil Action Practice. He also provides technical assistance to defense attorneys and civil practitioners alike in identifying the potential civil fallout from entry into the criminal justice system and developing approaches to safeguard clients and promote reintegration and reentry into the community. Prior to joining The Bronx Defenders, Graham was a Staff Attorney for the Housing Project at the New York Legal Assistance Group, where he represented tenants in eviction proceedings in Manhattan, the Bronx, Brooklyn, and Queens. Graham received his J.D. from New York University School of Law, and his B.A. in Russian Studies from Amherst College.

Judith Whiting

Judith Whiting is General Counsel at the Community Service Society of New York (CSS), performing a full range of legal services for this 174-year-old nonprofit organization. She also directs the work of CSS's Legal Department, helping to develop litigation, advocacy and legislative approaches to ending discrimination against people with criminal conviction histories, with a particular emphasis on employment and housing. In addition, she supervises the Legal Department's Next Door Project, whose staff and specially-trained older adult volunteers help hundreds of New Yorkers each year to obtain, understand and fix mistakes in their official criminal conviction histories. Judy represents individual clients in employment, licensing, criminal records-correction and housing matters, and – together with the firm Outten and Golden

and a host of well-respected advocacy organizations – represents plaintiffs in a nationwide Title VII class action against the U.S. Census Bureau challenging discriminatory hiring practices. She and staff of the Legal Department convene the New York Reentry Roundtable, a regular convening of individuals with conviction histories, their friends, family and allies. She also co-directs the Coalition of Reentry Advocates, a statewide organization that works to change laws and policies preventing individuals with criminal conviction histories from full participation in society at large. She is a frequent speaker on reentry, employment and criminal justice matters.

Before coming to CSS, Judy was Senior Staff Attorney at the Legal Action Center, where she worked on anti-discrimination litigation and policy affecting people with criminal records, histories of substance use disorders and/or HIV/AIDS. She previously served as Assistant Attorney General in the Massachusetts Attorney General's Office Consumer Protection and Antitrust Division. She also worked as staff attorney with the Criminal, Civil and Volunteer Divisions of The Legal Aid Society in New York, specializing in representing the elderly and mentally impaired persons charged with crimes. Judy also served as clinical instructor at Hofstra Law School's Housing Law Clinic and as adjunct faculty at Suffolk University Law School.

Judy is a graduate of Barnard College and Cornell Law School, where she received the first Freeman Civil Rights/Civil Liberties Award, and in 2014 received its Exemplary Public Service Award. She is past Chair of the New York City Bar Association's Corrections and Community Reentry Committee, was appointed to and serves on its Mass Incarceration Task Force and House of Delegates, as well as the Association's Criminal Justice Operations Committee. She was formerly a member of the Association's Nominating Committee and Council on Criminal Justice, and in 2008 received the Association's Legal Services Award. Judy is also a member of the New York State Bar Association and both the New York and national chapters of the National Employment Lawyers Association.