



WORKSHOP AD.

Moving Towards Civil Gideon

*2014 Legal Assistance
Partnership Conference*

Hosted by:

The New York State Bar Association
and The Committee on Legal Aid



**Copyright © 2014
All Rights Reserved
New York State Bar Association**

NEW YORK STATE BAR ASSOCIATION 2014 PARTNERSHIP CONFERENCE

AD. CRIMINAL LAW FOR THE CIVIL PRACTITIONER: BRIDGING THE GAP BETWEEN ARREST AND REENTRY TO WORK TOWARDS HOLISTIC AND TRANSFORMATIVE DELIVERY OF DIRECT LEGAL SERVICES

AGENDA

September 12, 2014
9:00 a.m. – 12:15 p.m.

3.0 Transitional CLE Credits in Professional Practice.

*Under New York's MCLE rule, this program has been approved for all attorneys,
including newly admitted.*

Panelists:

Paul B. Curtin, Esq., Managing Attorney, Civil Legal Services Unit, The Legal Aid Bureau of Buffalo,
Inc.

Christa Douaihy, Esq., Attorney & Team Leader, Civil Action Practice, The Bronx Defenders
Runa Rajagopal, Esq., Team Leader & Supervising Attorney, Civil Action Practice, The Bronx
Defenders

Shary Enid Sanchez, Esq., Staff Attorney, Legal Services of the Hudson Valley
Judy Whiting, Esq., General Counsel, Community Service Society of New York

- | | | |
|-------------|--------------------------------------------------------------|---------------------------|
| I. | Intro and Overview of Criminal Law | 9:00 am – 9:30 am |
| II. | Criminal Records | 9:30 am – 9:45 am |
| III. | Tools & Certificates that Promote Rehabilitation | 9:40 am – 9:55 am |
| IV. | Preserving Job Licenses & Employment Consequences | 9:55 am – 10:10 am |

FIFTEEN MINUTE BREAK

- | | | |
|------------|------------------------------------------------------------------------------------------------------|----------------------------|
| V. | Safeguarding Housing and Effect on Tenancies (Upstate and NYC) | 10:25 am – 11:05 am |
| VI. | Government Benefits and The Ways in Which Criminal Court
Involvement Affects Entitlements | 11:05 am – 11:20 am |

VII. Child Support & Impact on Families

11:20 am – 11:40 am

VIII. Collaboration and Connection

11:40 am – 12:00 pm

- a. How can civil legal service attorneys connect with criminal defense practitioners to increase dialogue and defend against civil consequences?

IX. Question & Answer

12:00 pm – 12:15 pm

Table of Contents

Substantive Outline	1
Appendices	33
Appendix 1: Consideration of Collateral Consequences of Rulemaking.....	35
Appendix 2: US HUD Memo	38
Appendix 3: 24 C.F.R. § 982.310.....	41
Appendix 4: The Very Basics of Visitation in New York.....	46
Certificates that Promote Rehabilitation: Why They are So Important and How to Help Clients Get Them	48
Biographies	54

Substantive Outline

**AD. CRIMINAL LAW FOR THE CIVIL PRACTITIONER: BRIDGING THE GAP
BETWEEN ARREST AND REENTRY TO WORK TOWARDS HOLISTIC AND
TRANSFORMATIVE DELIVERY OF DIRECT LEGAL SERVICES**

OUTLINE

I. INTRO AND OVERVIEW OF CRIMINAL LAW

A. Introduction

1. Why do we need to know and better understand what happens in criminal court?
 - a. Examples of possible Civil Consequences:
 - i. Job loss or denial
 - ii. Job License denial, termination or suspension
 - iii. Eviction/displacement from home or denial for admission to housing
 - iv. Loss/denial of other income, public assistance, SSI, unemployment insurance
 - v. Forfeiture of property
 - vi. Suspension from school or loss of student loans
 - vii. Deportation of noncitizens
 - viii. Civil action filed (personal injury)
 - b. Admissibility of convictions in civil proceedings

B. Key Differences between the civil and criminal courts

1. Right to Counsel
 - a. [*Gideon v. Wainright, 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.
2. Differing burdens of proof
 - a. Proof beyond a reasonable doubt
 - b. Preponderance of the evidence
3. Presumptions
 - a. “Innocent until proven guilty”
 - b. Guilty until proven innocent
4. Duration of proceedings
 - a. Right to Speedy Trial (but clogged court systems)
 - b. Administrative proceedings-summary proceedings-civil courts
5. Other Constitutional Protections & Issues
 - a. 5th Amendment/ Self-Incrimination
 - b. No Double Jeopardy

C. Basic Intro to the Criminal Justice System

1. Types of Charges/offenses
 - a. Felonies

- i. over a year in prison; no max (life imprisonment), Parole (class A-E)
 - ii. Generally, arrested, then indicted.
- b. Misdemeanor
 - i. up to a year in jail, probation for 3 years max (A, B, Unclassified)
- c. Violations
 - i. not a crime; 15 days or less in prison

D. Path of a Criminal Case –

1. Arrest

a. **“You’re under arrest!”** When the person hears those words in the City of New York, the police believes he has committed a crime, either a felony, a misdemeanor, or a violation. Usually people are arrested without a warrant on the street by a police officer who either claims to have seen the person commit a crime or has been told that the person committed a crime or been told by another person that the person committed a crime. In the case of a warrant, state or federal, the person can be arrested anywhere -- on the street, in their home, in their place of employment.

2. Booking

a. After being arrested, no matter what the charge, 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.” 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.

b. Fingerprinting:

Once the person has been searched, she will be fingerprinted. The police take three sets of fingerprints. One set is retained by the New York City Police, one set is sent to Albany, and the third is sent to the FBI in Washington. The person’s fingerprints are sent by way of computer to Albany, which is the headquarters of the New York State Division of Criminal Justice Services (DCJS). Every set of prints received by Albany 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 sometimes included in the person’s rap sheet is generated.

c. Criminal Justice Agency Interview (CJA):

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). This person 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

OUTLINE:
Criminal Law for the Civil Practitioner

as to whether the person should be released or is a flight risk. This might influence the judge's decision regarding bail or release.

3. **Desk Appearance Tickets or Summons**

a. Summons

Sometimes, an individual is not even charged with a crime when they leave the police station. 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.

b. Desk Appearance Tickets

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 – for example, smoking marijuana in the park, jumping a turnstile, getting drunk on the subway, or committing what the police call a "quality of life" crime – then the person might receive 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.

4. **Arraignment & Bail**

a. 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. When the case is closed with a guilty plea, it is called a "disposition." At an arraignment where the court case stays open, the prosecution speaks first and gives what are called "notices." These include notice of whether the person is alleged to have made a statement, and whether there was an identification made. Then the judge hears both parties on bail.

b. Bail - **crucial factor in whether client pleads

The purpose of bail in New York is *solely* to ensure the person's return to court. It is not intended to be a means of protective custody or anything else.

C.P.L. Sec. 510.30(2)(a)(i) through (viii) lists the factors that the court must take into account when determining bail:

- i. the defendant's character, reputation, habits and mental condition;
- ii. her employment and financial resources;
- iii. her family ties and length of residence in the community;

- iv. her record of juvenile delinquency adjudication as retained pursuant to section 354.2 of the family court act or of pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender adjudication, if any;
- v. her previous record, if any, in responding to required court appearances, or any evidence showing a desire to flee the jurisdiction;
- vi. the weight of the evidence against the defendant, or any other factor indicating the probability or improbability of conviction; and,
- vii. the sentence which may be imposed.

5. **Pretrial/Pending Case**

- a. motions, hearings; constant appearances – chance for warrant every time
- b. Discovery

6. **Trial & Dispositions**

- a. Pleas
- b. Acquittal
- c. Dismissal
- d. Adjournment Contemplating Dismissal (ACDs):

This means that if the person stays out of trouble for six months (or one year on a marijuana charge), the case is automatically dismissed. This is of course an ideal outcome in many cases because an ACD is a delayed dismissal. It is not a plea and does not involve any admission of guilt. The applicability of an ACD is governed by C.P.L. Sec. 170.56 for marijuana cases and C.P.L. Sec. 170.55 for all others cases.

e. Violations:

Only the prosecution can reduce charges, so only the prosecution can offer the person the chance to plead down from a misdemeanor to a violation. A violation is not a crime, and most violations should not appear on the person’s rap sheet after one year.¹ The maximum jail sentence for a violation is 15 days, but that is rarely imposed unless the person repeatedly fails to complete a conditional discharge sentence of, for example, community service. The most common violations are disorderly conduct, harassment, marijuana and trespass

f. Misdemeanors:

The New York Penal Law classifies misdemeanors into two categories: A and B misdemeanors. The usual pleas to misdemeanors can be to jail time, probation and conditional discharges, with the condition being, for example, a number of days of community service, a fine, or a treatment plan like anger management, a batterer’s program, or drug treatment. The maximum jail time for A misdemeanors is one year and for B misdemeanors ninety days. Probation

¹ There are two main exceptions: a harassment violation between family members or former intimate partners when the prosecution asked for it not to seal, and a prostitution violation. These still do not count as convictions, but they are never sealed like the other violations.

OUTLINE:
Criminal Law for the Civil Practitioner

sentences are three years for A misdemeanors (6 years in sex cases) and one year for B misdemeanors. *See* P.L. Sec. 70.15.

g. Felony:

Felonies are the highest level of offense in New York. There are A-1, A-2, B, C, D and E felonies, with A-1 being the most serious. Each of those levels also could be violent or non-violent. A person will never leave arraignments having pled guilty to a felony, but a person may decide to plead guilty very early on in the case if they decide it make strategic sense to do so. New York has a complicated sentencing scheme for felonies, and depending on exactly what someone pleads guilty to, the sentence could range from time in an upstate prison facility to probation to a program.

h. Youth Offender Status:

If the person was eighteen years old or younger at the time the offense was committed then she may be eligible for Youthful Offender (“YO”) treatment. *See* C.P.L. Article 720. If the person is adjudicated a youthful offender she will not have a criminal record, and she will be sentenced under more lenient sentencing guidelines.

i. If someone’s first conviction is for a misdemeanor, it is mandatory that a judge vacate the conviction and replace it with a youthful offender adjudication if the person is eligible age-wise.

ii. YO treatment is never mandatory for a felony, but may be granted even after someone receives YO for a misdemeanor. The person cannot receive YO treatment for A felony convictions, but can for B felonies and below. The person also will not be eligible for YO if she had a designated felony in family court. A list of designated felonies can be found in the Family Court Act.

7. Sentence

- a. Conditional Discharge: The defendant is released under certain conditions
- b. Probation: The defendant will be supervised by the Department of Probation for a number of years and may be required to comply with certain conditions
- c. Fine
- d. Restitution
- e. Program
- f. Time Served
- g. Community Service
- h. Orders of Protection
- i. Imprisonment

8. Incarceration & Serving Time

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

- a. Violations: are separate proceedings
 - i. Probation: have to file VOP in court; filed by Probation, but adjudicated by a judge (preponderance of evidence)

- ii. Community Supervision: Parole Officer files administrative violation with Board of Parole.
- b. Warrants
 - i. Generally, warrants are orders by a court directing law enforcement agents to arrest an individual
 - ii. Types of warrants
 - a) Bench warrants
 - b) Arrest warrants

E. Types of Documents Generated From a Criminal Case

1. Police Reports

a. 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. 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. 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.

2. Criminal Complaints

a. 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. 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. 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. It is in the discretion of the screening ADA to determine both the nature and severity of the actual charge.

b. The ADA will then draft the accusatory instrument – the Criminal Court Complaint -- the initial charging document. 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. 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.

3. Other documents:
 - a. Omniform Complaints,
 - b. Ballistics Reports,
 - c. Laboratory Reports,
 - d. Field Tests,
 - e. Property Clerk Invoices,
 - f. CJA Report,
 - g. Search Warrant,
 - h. Search Warrant Affidavits,
 - i. Confidential Informant Affidavits
 - j. Certificate of Disposition: When & How did the case end?

F. Sealings

1. Sealing Laws
 - a. Favorable Dispositions Should Be Sealed!
 - i. *See* The Bronx Defenders’ “Sealing Criminal Records” How to Review a RAP Sheet for Errors on www.Reentry.net
2. Criminal Procedure Law Sealing Statutes
 - a. §160.50: DCJS, police, prosecutor and court records are sealed. This includes dismissals, acquittals, ACDs, decline prosecution, decline to file an accusatory instrument, order setting aside verdict, order vacating a judgment, habeas appeal.
 - i. ****Use with § 160.60:** “Upon the termination of a criminal action or proceeding against a person in favor of such person...the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution. The arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession, or calling. Except where specifically required or permitted by statute or upon specific authorization of a superior court, no such person shall be required to divulge information pertaining to the arrest or prosecution.”
 - b. §160.55: DCJS, police and prosecutor records are sealed but not court records (This includes violations (trespass, harassment, disorderly conduct, loitering, criminal solicitation, etc.) and traffic infractions.

II. CRIMINAL RECORDS

A. Types of background checks: Rap sheets; Commercial background checks

1. 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.

2. 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
3. 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; others include Youth Represent and the Legal Action Center.
4. 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.
5. 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).
6. 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).
7. **Rap sheets are replete with errors.** At last count, 30% 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 seal matters disposed in favor of the individual; failure to seal violation-level convictions; failure to record any information about a matter other than the initial arrest; warrants that appear to be "live" but are not.

B. NYS Office of Court Administration (OCA) Records

1. 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/>

2. OCA records will not include arrests that did not lead to prosecution. OCA also will not release information about non-criminal convictions whether or not sealed, or records where the sum total of the record is a single misdemeanor conviction more than 10 years old. Commercial background check companies frequently access these records.

C. Commercial Background Checks

1. 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. 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.

2. 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

A. Certificates of Relief from Disabilities (CRD) and Certificates of Good Conduct (CGC)

1. Certificates of Relief from Disabilities (CRD) and Certificates of Good Conduct (CGC) are issued by New York State and create a presumption of 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 CGCs, though certain waiting periods apply for CGCs. N.Y. Correct. Law Art. 23, §§700-706.

2. The application process for CRDs differs from that for CGCs.

a. 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 this circumstance the individual must apply 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 require that the applicant be interviewed and evaluated by the local Department of Probation, and will ask that Probation make a recommendation whether the CRD should be granted.

- i. 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.
- b. 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. It may take anywhere from nine months to two years 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:
 - i. <https://www.parole.ny.gov/pdf/parolecert.pdf>

IV. EMPLOYMENT CONSEQUENCES OF CRIMINAL CONVICTIONS AND HOW TO MITIGATE THEM

A. Laws that protect people with conviction histories in the employment arena

- 1. 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.

B. Fair Credit Reporting Acts

- 1. 15 U.S.C. §§1681-1681(u) – the federal Fair Credit Reporting Act (“FCRA”). Applies to commercial background reports and creates responsibilities in those employers who use them to make employment decisions.
 - a. 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.
 - b. 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).
 - c. 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>
- 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).

- a. 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

C. Human Rights Laws

1. EEOC Guidance and Title VII of the Civil Rights Act of 1964
 - a. 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.
 - b. The Guidance suggests that flat bans on employment for individuals with criminal conviction histories likely violate Title VII.
 - c. State laws that create flat bans in licensing and employment are preempted.
 - d. Recent litigation includes *Houser et al. v. Pritzker*, 10cv3105(FM) (SDNY) (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/>²
2. New York State Correction Law Article 23-A:
 - a. Article 23-A of the Correction Law (§§750-755) sets out the employment rights and responsibilities of people with conviction histories, and 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.
 - b. 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
 - a. **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.

² Note: This case also raises FCRA claims

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

a) *Bonacorsa v. Van Lindt*, 71 N.Y.2d 605 (1988)

b) *Acosta v. New York City Dept. of Educ.*, 16 N.Y.3d 309 (2011)

c) *In re Investigation of Eric Schneiderman v. Quest Diagnostics* (Assurance of Discontinuance 2013)

b. **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; sealed violation convictions, except for law enforcement positions.

V. SAFEGUARDING HOUSING AND EFFECT ON TENANCIES (UPSTATE AND NYC)

“We must rapidly begin the shift from a "thing-oriented" society to a "person-oriented" society. When machines and computers, profit motives and property rights are considered more important than people, the giant triplets of racism, materialism, and militarism are incapable of being conquered.” – *Dr. Martin Luther King, Jr.*

A. Housing and Reentry

1. The Division of Criminal Justice Services reports that over seven million New Yorkers have a criminal record. [DCJS reported 7,049,600 individual subjects in its criminal history file as of December 31, 2008. See Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2008, Table 2 (October 2009)]. 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.
2. 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.)
3. Overview of Subsidized and Private Housing Law in the Reentry Context.
 - a. Breaking the cycle: Housing is an essential element to successful Re-entry
 - i. Housing is the key to employment, family reunification, educational opportunities, and stability. Stable housing can help break the cycle of criminalization & homelessness.

OUTLINE:
Criminal Law for the Civil Practitioner

- ii. 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).
- iii. Homelessness and unemployment, in turn, create a substantial risk of future arrest. *See, e.g.,* Stephen Mettraux and Dennis P. Culhane, “Homeless Shelter Use and Reincarceration Following Prison Release,” 3 *Criminology & Public Policy* 2, 137 (2004).
 - a) 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.
- iv. 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 it may 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.
 - 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. If the

building has four or more units the landlord cannot have a blanket policy that bars all persons with convictions from renting. *See* Fair Housing Act, 42 U.S.C. §§ 3601 et seq.

3. Convictions/Arrests During Tenancy

a. Illegal Use. NYS Real Property Actions and Proceedings Law (“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.

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

c. 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.

i. Elements: (a) illegal conduct, (b) engaged in a business, (c) on more than one occasion, (d) involving the premises to be recovered, (e) with the participation, knowledge, or passive acquiescence of one or more of the tenants of record.

ii. 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).

iii. 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.).

iv. 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).

***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.*

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

- 1. 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. 88-133, at 91 (2012), available at <http://www.law.harvard.edu/faculty/faculty-workshops/desmond.faculty.workshop.spring2013.pdf>.
- 2. 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).
- 3. Tenant Screening
 - a. Persons who are otherwise eligible for subsidized housing may be denied a lease on the basis of criminal history. 24 CFR §960.205(b) (Public Housing), §982.307(a) (Section 8 vouchers).
 - b. 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.
 - c. 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.
 - d. 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.
 - e. Applicants are entitled to appeal a denial. 24 CFR §982.554. Mitigating factors such as age of conviction, nature of the illegal act, evidence of rehabilitation, willingness to participate in counseling programs, etc. 24 CFR §960.205(d).
- 4. 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 landlords 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).
 - i. 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.

from prison as a means of combatting recidivism. Directors are encouraged to use their discretion to work with individuals attempting to return home and are asked to carefully consider applicants who can demonstrate progress in rehabilitation. The call to consider applicants who have previously been evicted for drug-related offenses is especially important. This letter should accompany every application for reconsideration of denial of tenancy. It should also be part of any appeals process involving tenant counsels as it counterbalances decades of rigid policy that have become dogma at many administrative levels.

ii. Attorney General Memo, dated August 12, 2013: (*See* appendix). Although not directly aimed at the housing community, this letter is a general statement of support for an approach to dealing with the consequences of criminal convictions in a way that leads to better results for those reentering their community. This letter can be used when appealing to probation officers and judges to mitigate or remove barriers to public and private housing.

iii. NYCHA Re-entry Pilot Project. As above, HUD has urged PHAs to enact programs that will help formerly incarcerated individuals to gain stability and reunite with family living in public housing. NYCHA and DHS have accordingly enacted the Family Re-entry Pilot Program which will reunite a pilot group of 150 persons leaving prison or jail with their families who live in NYCHA public housing. They will be given 2-year temporary permission to reside in the household while they are enrolled in the program; upon successful completion of the program's requirements, they may apply to be added to the NYCHA household permanently. Eligibility requirements and a list of disqualifying criminal histories, as well as a list of the service providers through which individuals can apply to participate in the pilot program, are available at the NYCHA website: (<http://www.nyc.gov/html/nycha/html/residents/re-entry-program.shtml>).

b. Approaches to Advocacy

i. Employ a “holistic” advocacy approach to housing and benefits work.

a) The Bronx Defenders model includes a cross-practice approach to justice work. Civil attorneys work hand-in-hand with criminal defense attorneys, social workers, family court attorneys, investigators and non-attorney advocates to address the root cause of individual problems. Our holistic approach includes: delivery of high-impact civil legal services to help individuals and families achieve and maintain essentials of life; affirmative efforts to effect systemic change; and actively expanding our connection to the Bronx community. Influenced by criminal defense and family defense narratives, these civil justice methods inform and complement each other.

OUTLINE:
Criminal Law for the Civil Practitioner

b) Talk directly to housing providers. When so many people without criminal records are also without affordable housing, it can be difficult to gather political or popular support to help address the housing needs of the formerly incarcerated. However, successful service *providers* of supportive re-entry housing have used a two-pronged strategy of collaborating with the community with transparency and respect, and simultaneously remaining firm about their mission to provide housing to formerly incarcerated persons. Specific tips include: hiring a PR consultant to be completely transparent, accountable, and immediately communicative about community members' concerns, reaching out to elected officials, identifying community stakeholders, hiring a community liaison, one-on-one relationship building by the organization's leaders with the community leaders, balancing client needs with giving voice to community concerns, taking the heat and making concessions without jeopardizing essential client needs, being a 'good neighbor' and responding promptly to community concerns, building trust in the agency, restoring or making the building itself beautiful and a point of pride for the community, creating a community advisory board with key leaders from the community, perseverance in relationship building, and learning from mistakes. See "In Our Backyard: Overcoming Community Resistance to Re-entry Housing (A NIMBY Toolkit)," John Jay College of Criminal Justice & The Fortune Society (2010) (available at: http://www.jjay.cuny.edu/TOOL_KIT_1-NIMBY_FINAL.pdf).

c) Engage with tenant councils. Tenant councils often feel constrained by the spirit of earlier regulations and will generally take a cautious approach to allowing persons with criminal histories the opportunity to become tenants. It can be helpful to present an overview of the new federal policy, especially with regard to family reunification. As with employment applications, careful preparation with the client prior to any meeting with a tenant council can have an enormous positive effect on the process.

d) Develop meaningful alliances in the best interests of our clients. Connect with and make use of individuals such as probation officers, mentors, and community leaders when they express support.

1) Having a P.O. or other independent character witness at a tenant hearing or obtaining a letter from such authorities can overcome the fears of a nervous council.

VI. GOVERNMENT BENEFITS AND RE-ENTRY

Income maintenance is an indispensable factor of successful re-entry. The current economic downturn has only increased our reliance on safety net supports, and involvement with the criminal justice system presents even more barriers to accessing these bureaucratic systems. For example, when an arrest leads to employment termination but the criminal case is later dismissed, our clients are entitled to Unemployment Insurance, but few will go through the appeals process as there is no right to counsel and limited access to attorneys. Families of clients in jail and prison need help navigating complex temporary absence rules for public assistance budgets. Clients returning home from prison encounter waiting periods for enrollment in Medicaid and other crucial programs. Civil legal services attorneys, working in concert with public defenders, are crucial in ensuring access to entitlements for our court-involved clients.

A. **Public assistance – temporary absence, welfare fraud**

1. 21 U.S.C. § 862a permanently bars anyone with a drug-related felony conviction from receiving federal cash assistance and Food Stamps during his or her lifetime. However New York has opted out of this ban completely. Therefore NY State residents can apply for and receive government benefits like SNAP, Medicaid, TANF, and cash assistance. They may apply for and receive these benefits no matter how many convictions they have. *See* Legal Action Center, Opting Out of Federal Ban on Food Stamps and TANF, <http://www.lac.org/toolkits/TANF/TANF.htm>
2. Arrest and incarceration can temporarily affect the receipt of these government benefits.
 - a. Temporary Absence: If a person is incarcerated for less than six months, then they may claim a temporary absence to continue receiving benefits. Temporary absence policies permit families to continue receiving public assistance to pay rent or utilities when a household member is temporarily absent due to “illness or other good cause” (18 NYCRR § 349.4(a)(2)(i) (2014) as long as they do not leave the U.S., evidence intent to establish residence elsewhere, and complies with other requirements of the law (18 NYCRR § 349.4(a)(1). However, this allowance only extends to an upper limit of six months.
 - b. If a person is incarcerated for more than six months and he or she misses an appointment with HRA because they are in jail, then HRA will send a “notice of intent” to terminate public assistance. This is the same thing that happens if a person misses a work assignment or any other requirement. The person can challenge the termination in a Fair Hearing. An incarcerated person may argue improper mailing (that HRA knew they were incarcerated but sent the notice to a different address) and/or inadequacy of notice (that HRA cannot show you missed your appointment or assignment “wilfully” and “without good cause;” rather, you could not go because you were incarcerated). (Re-entry.net: http://www.re-entry.net/ny/help/item.2914-Public_Benefits_Re-entry).
 - c. Welfare Fraud: Clients can face criminal and/or civil liability for fraud or misrepresentation concerning government benefits. Administrative sanctions can be imposed through Intentional Program Violation (IPV) hearings. Sanctions are

OUTLINE:
Criminal Law for the Civil Practitioner

covered by SSL § 145-c (for any finding of IPV in federal, state, or administrative venue) and penalties are covered by 18 NYCRR § 359.9. If client is arrested for drug crimes and money is seized, client may face administrative welfare fraud accusations of concealment of income from illegal sources. The local welfare agency's investigators will meet with the client and ask him about the underlying facts of the criminal case. The client may invoke their right to remain silent if the criminal case is still pending. This is not a time to make "confessions." Periods of ineligibility for public assistance will vary according to the program and the person's history of prior sanctions for welfare fraud.

B. SSDI/I Consequences to Incarceration & the "Fleeing Felon" Bar

1. Increasingly, large numbers of persons with mental illness, cognitive disabilities and/or physical disabilities are coming into contact with the adult correctional system. *See* National Disability Rights Network, available at: <http://www.ndrn.org/issues/criminal-justice.html>. It is estimated that as many as 50 percent of prisoners have a mental illness or other type of disability. *Id.* By collaborating with public defenders, civil legal practitioners stand in the best position to remedy injustices worked upon disabled clients and ensure income maintenance upon re-entry.
 - a. Incarceration must be reported to the Social Security Administration. Benefits are affected differently depending on how long one is incarcerated.
 - i. Less than one month: No effect. More than one month but less than one year: SSI benefits are suspended but will be reinstated effective the day of release. The prorated check will cover only the days after one is released. Incarceration for more than one year: SSI benefits will be terminated, and one must re-apply for benefits when released or while still incarcerated. If eligible, one will receive benefits starting the first day of the first month after release. As long as person is incarcerated, he is not entitled to dependency benefits (20 CFR § 404.468a); there is no exception for children. These provisions generally apply to any "public institution," but there are limited exceptions such as some treatment programs, mental institutions, and "community residences."
 - ii. One cannot receive benefits for any month or any part of a month during which one is incarcerated. 20 C.F.R. § 404.468(a).
 - b. 42 U.S.C. § 608(a)(9)(A) States may not provide TANF-funded benefits, SSI, SSDI, old-age and survivor's benefits, public and federally-assisted housing, or Food Stamps to individuals who are:
 - i. Fleeing felons ("Fleeing Felon" is a specific legal term used to identify individuals "fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the person flees, for a crime, or an attempt to commit a crime, which is a felony under the laws of the place from which the person flees, or, in jurisdictions that do not define crimes as felonies, is punishable by death or imprisonment for a

term exceeding 1 year regardless of the actual sentence imposed.” See 42 U.S.C. § 1382 (e)(4); 42 U.S.C. § 402(x)(1)(A)), or

ii. Violating a condition of probation or parole, as found by a judicial or administrative determination.

iii. For public assistance and Food Stamps, these categories are defined by state law under Soc. Serv. Law § 131(14); 18 NYCRR § 351.2(k) (public assistance); 18 NYCRR § 387.1(w)(4) (Food Stamps); and 97 ADM-23.

c. In *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005), the Court of Appeals for the Second Circuit held that the federal statute does not permit the Commissioner to conclude simply from the fact that there is an outstanding warrant for a person’s arrest that he is “fleeing to avoid prosecution.” (10 U.S.C. § 1382(e)(4)(A)). Instead, there must be some evidence that the person knows his apprehension is sought.

d. Similarly, in *Clark v. Astrue*, 602 F.3d 140 (2d Cir. 2010), the Second Circuit held that issuance of a warrant alleging a probation or parole violation is not sufficient evidence that a person has actually violated probation or parole.

e. See also Empire Justice Center, *Fleeing Felons: Articles*

<http://www.empirejustice.org/issue-areas/disability-benefits/non-disability-issues/fleeing-felons/fleeing-felons-archives.html> (last visited Feb. 14, 2014).

Warning: Because the Fleeing Felon bar applies to TANF and Food Stamps, the Department of Social Services (Human Resources Administration in New York City) will run a national warrant check on **any** client applying for Public Assistance.

C. Veteran’s benefits

1. Disability: VA disability compensation payments are reduced if a Veteran is convicted of a felony and imprisoned for more than 60 days. Veterans rated 20 percent or more are limited to the 10 percent disability rate. For a Veteran whose disability rating is 10 percent, the payment is reduced by one-half. Once a Veteran is released from prison, compensation payments may be reinstated based upon the severity of the service connected disability(ies) at that time. Payments are not reduced for recipients participating in work release programs, residing in halfway houses (also known as “residential re-entry centers”), or under community control. The amount of any increased compensation awarded to an incarcerated Veteran that results from other than a statutory rate increase may be subject to reduction due to incarceration.

2. Pension: Veterans in receipt of VA pension will have payments terminated effective the 61st day after imprisonment in a Federal, State, or local penal institution for conviction of a felony or misdemeanor. Payments may be resumed upon release from prison if the Veteran meets VA eligibility requirements. Failure to notify VA of a Veteran’s incarceration could result in the loss of all financial benefits until the overpayment is recovered.

OUTLINE:
Criminal Law for the Civil Practitioner

3. Apportionment to Spouse or Children: All or part of the compensation not paid to an incarcerated Veteran may be apportioned to the Veteran's spouse, child or children, and dependent parents on the basis of individual need. In determining individual need, consideration shall be given to such factors as the claimant's income and living expenses, the amount of compensation available to be apportioned, the needs and living expenses of other claimants as well as any special needs, if any, of all claimants. VA will inform a Veteran whose benefits are subject to reduction of the right of the Veteran's dependents to an apportionment while the Veteran is incarcerated, and the conditions under which payments to the Veteran may be resumed upon release from incarceration. VA will also notify the dependents of their right to an apportionment if the VA is aware of their existence and can obtain their addresses. No apportionment may be made to or on behalf of any person who is incarcerated in a Federal, State, or local penal institution for conviction of a felony. An apportionment of an incarcerated Veteran's VA benefits is not granted automatically to the Veteran's dependents. The dependent(s) must file a claim for an apportionment.

4. Education benefits: Beneficiaries incarcerated for other than a felony can receive full monthly benefits, if otherwise entitled. Convicted felons residing in halfway houses (also known as "residential re-entry centers"), or participating in work-release programs also can receive full monthly benefits.

5. Claimants incarcerated for a felony conviction can be paid only the costs of tuition, fees, and necessary books, equipment, and supplies. VA cannot make payments for tuition, fees, books, equipment, or supplies if another Federal State or local program pays these costs in full. If another government program pays only a part of the cost of tuition, fees, books, equipment, or supplies, VA can authorize the incarcerated claimant payment for the remaining part of the costs.

6. Resumption of Veterans' Benefits: Veterans may inform VA to have benefits resumed within 30 days or less of their release date based on evidence from a parole board or other official prison source. Benefits will be resumed the date of release from incarceration if the VA receives notice of release within one year following release. Depending on the type of disability, the VA may schedule a medical examination to determine if the disability has improved. The local VA regional office will facilitate this. "Release from incarceration" includes those who are paroled or participating in a work release or halfway housing program

- a. Sources: (The VA: <http://www.benefits.va.gov/persona/veteran-incarcerated.asp> & <http://benefits.va.gov/BENEFITS/factsheets/misc/incarcerated.pdf>)

VII. CHILD SUPPORT & IMPACT ON FAMILIES

A. The Very Basics of Child support in New York

1. Where to find the law - NY Family Court Act, ("FCA") Article 4
2. Why?

- a. Child Support was established so that children would be provided for equally by both parents, making both parents liable for the health and wellbeing of their children.
3. Who?
 - a. Child support is paid to the custodial parent by the non-custodial parent is such payments shall continue until the child reaches the age of 21. FCA 413.
4. Where?
 - a. Family court has exclusive original jurisdiction over child support matters. A child support proceeding may be initiated in the county in which one of the parties resides or is domiciled at the time of the filing of the petition. FAC 421. The action is initiated by the filing of a Petition which is then served on the potential obligor, who is called the Respondent.
5. Who can petition?
 - a. A husband, wife child or relative in need of public assistance or care, a social service official, parent, guardian or any person in loco parentis may originate a support proceeding. FCA 422.
6. Any requirements before a petition is filed?
 - a. There is no requirement (as a condition precedent) that the petitioners make prior demand for support.
7. How can the Petitioner get support quickly?
 - a. The Family Court requires that the Court shall make an order for temporary child support pending a final determination, in an amount sufficient to meet the needs of the child. Without a showing of immediate or emergency need. FCA 434
8. How does the Family court decide how much the obligor must pay?
 - a. The Family Court Act requires compulsory financial disclosure by both parties of their respective financial states. Parties are required to disclose all income. FCA 424-A
9. What is considered income for purposes of Child Support?
 - a. Income includes not only gross income (as reported on tax returns) but also workers compensation benefits, disability benefits, unemployment insurance benefits , social security benefits, pension and retirement benefits, fellowship stipends and annuity payments.
 - b. The Court can, in its discretion impute income from goods, services and financial gifts provided to the Respondent by another person. FCA 413 (1) (b)(5) (vii)
10. What if the Respondent fails to disclose his/her income?
 - a. If a respondent fails, without good cause to file sworn statement of net worth, a current or representative paystub and the most recently files tax returns, the Court, on its on motion or upon application, shall grant the relief demanded in the petition. The Court may also order that, for purposes of the proceeding,

OUTLINE:
Criminal Law for the Civil Practitioner

Respondent is precluded from offering evidence of Respondent's financial ability to pay support. FCA424-a(b)

11. What if Respondent is poor?
 - a. The law provides that a parent cannot be ordered to pay an amount of child support that would place him or her below the "self-support reserve. The self-support reserve is 135% of the federal poverty income. FCA 413 (b)(6)
12. How is child support calculated?
 - a. Child support is calculated at a percentage which is determined by the number of children being supported. FCA 413 (3) Child support includes more than monthly payments- it includes medical insurance/health care, and day care. (This section requires great attention to the statute and should be thoroughly reviewed)
13. Is the obligor required to provide any other support than money?
 - a. The court may include in its order providing for necessary food clothing, medical expenses, health insurance, expenses of confinement, expense of education and other proper and reasonable expenses. The court may also order a party to purchase and maintain life insurance. Outlines the elements of support and provision for accident, life and health insurance benefits.
14. Can parties agree to a child support order?
 - a. If an agreement for support of the petitioner is brought about, it must be reduced to writing and presented to the family court or support magistrate. If the court approves it, it will be reduced to an order and is binding on the parties. FCA 425
15. How long does an obligor pay child support?
 - a. An obligor is required to pay child support until the child reaches the age of 21 or is found to be emancipated. FCA 413
16. What if the child is in receipt of public assistance or in an institution?
 - a. The duty to support one's child extends beyond the household. The parent of a recipient of public assistance or care of a person needing an institution is responsible for the support of that child. The court, in its discretion, may order the parents to contribute a fair and reasonable amount of support. FCA 415
17. When does the order of support become effective?
 - a. Any order of child support shall be effective as of the date of filing the petition. FCA 449
18. What if an obligor stops paying or otherwise violates the child support order? What can the Court do? FCA 454
 - a. Enter a Money Judgment - Upon a finding that Respondent has failed to comply with any lawful order of support, the court shall enter a money judgment.
 - b. Income Withholding - Upon a finding that Respondent has failed to comply with any lawful order of support, the court may make an income deduction

- c. Making the Obligated Parent Post a Bond - Upon a finding that Respondent has failed to comply with any lawful order of support, the court can order the obligated parent to deposit a sum of money, or bond.
- d. License Suspension - Upon a finding that Respondent has failed to comply with any lawful order of support, the court may suspend Respondent's driving privileges
- e. The Court may also suspend the Respondent's state professional license, business license or recreational license.
- f. Participation in work or rehabilitative program - Upon a finding that Respondent has failed to comply with any lawful order of support, the court may require Respondent to participate in work fare programs as defined by the Social Services law or require Respondent to attend rehabilitative programs, including substance abuse programs.
- g. Place Respondent on probation - Upon a finding that Respondent has failed to comply with any lawful order of support, the court may place Respondent under probation under such conditions as the Court deems necessary.
- h. Incarceration - Upon a finding that Respondent has failed to comply with any lawful order of support, the court may place Respondent in jail for a term not to exceed 6 months.

B. The Very Basics of Custody Proceedings in New York

1. Where to find the law - NY Domestic Relations Law Section 70, *Matter of Ebert v. Ebert*, 38 N.Y.2d 700, 702; *Neuman v. Neuman*, 796 N.Y.S. 2d 403; *Bennett v. Jeffries*, 387 N.Y. S. 2d 821; *Tropea v. Tropea*, 642 N.Y.S.2d 575, *Braiman v. Braiman* 44 NY2d 584
2. What is it?
 - a. A person's relationship to a child
3. Who has it?
 - a. There is a presumption that married persons have shared custody as of right.
4. What is the process to obtain custody?
 - a. A custody action is commenced in Family Court by filing and serving a Petition. After service, and the return date the court will hold a preliminary proceeding which may provide for the assignment of counsel to indigent parties. The matter is then conferenced in an attempt to reach an agreement. Should no agreement be reached, the matter is set for a hearing. Parties testify at hearing, along with other witnesses as the matter requires. Rules of evidence apply.
5. What is physical custody?
 - a. The rights of a person to have the child reside in their household
6. What is legal custody?
 - a. The right of a person to make decisions regarding the child, including issues regarding education, physical and mental health, religion, discipline religious, etc.
7. What is joint custody?

OUTLINE:
Criminal Law for the Civil Practitioner

- a. In New York, there is no statutory presumption of “joint custody”. Courts will generally only order “joint custody” as a result of an agreement between the parties. Joint custody is comprised of two components- legal custody and physical custody. Joint legal custody means that the parties share decision making. Joint Physical custody concerns where the child lives on a daily basis. Joint Custody is not precluded pursuant to DRL 240
8. If there is a fight regarding custody, who wins?
- a. When one party seeks custody in Family Court or in Supreme Court, in the context of divorce, the standard for being awarded custody is the “best interest of the child”. Any court considering custody must make every effort to determine what will promote child’s welfare and happiness. DRL70.
9. What does best interest of the child mean?
- a. There is no list of factors that are equivalent to “best interests” but rather, there are policies that guide the court in determining what is in the best interest of the child. Factors to be considered include the quality of the home and the parental guidance the parent provides for the child, the parenting skills of each parent, mental and physical health of the parents, whether there has been domestic violence in the family, work schedules of the parents, child’s relationship with siblings, parent’s ability to cooperate with each other and the child’s preference (depending upon child’s age)
10. What if a non-parent, third party wants custody of the child?
- a. Case law has held that for a non-parent to gain custody of a child, he or she must prove “extraordinary circumstances”. An example of extraordinary circumstances would be that a grandparent, other relative or unrelated third party seeks custody when parents are not fit to raise the children- for instance the parents have abandoned, neglected or abused the child.
11. Can custody orders be changed?
- a. The Court may change custody upon appropriate grounds such as stability, health of custodial parent, substance abuse, abuse and neglect. The overriding consideration remains, “best interest of the child”. Previously, the party seeking the modification had to prove “substantial or extraordinary” change in circumstances.
12. What if the custodial parent wants to relocate out of state or to a faraway location?
- a. The” best interest of the child” standard applies. All factors regarding the proposed move must be considered and weighed as to how these effect the “best interest of the child”

C. The Very Basics of Paternity Proceedings in New York

1. What is a Putative Father?
- a. A father of a child born out of wedlock
2. What is a paternity proceeding?
- a. A proceeding held in Family court to determine the father of a child. A determination of paternity bestows upon the putative father legally enforceable

rights and responsibilities to the child. When a child is born to parents who are not married to each other, the biological father is not considered the father unless he signed an “acknowledgement of paternity”.

3. Why is this important?
 - a. A man who is not legally married to the mother of the child has no legal right to custody or visitation, nor does he have an obligation to pay child support.
4. How is this proceeding commenced?
 - a. Paternity proceedings are commenced by the filing of a petition in Family court and it must be served upon the respondent.
5. Who can file?
 - a. The petition may only be filed by the mother of the child, the man seeking to be named the father of the child, the child’s guardian or the Department of Social Services of the child is receiving public assistance.
6. Statute of Limitations?
 - a. Proceeding can be brought during the mother’s pregnancy or after birth of child up to the age of 21
7. What happens at the paternity proceeding?
 - a. If the parties were not married at the time the child was conceived or born, the parties can agree that the respondent s is the father. At that point, the Judge enters an order of filiation. If the respondent does not agree that he is the father, the court will order blood or DNA tests to determine paternity. If the test results prove that it is probable that the Respondent as the father and the Respondent now admits paternity, the Court will issue an order of filiation. If the parties don’t agree, the matter is set for a hearing.

VIII. COLLABORATION AND CONNECTION: BRINGING CRIMINAL DEFENSE & CIVIL LEGAL SERVICE ATTORNEYS TOGETHER TO INCREASE DIALOGUE AND DECREASE COLLATERAL CONSEQUENCES

A. Overview

1. Collaboration with public defenders has the power to yield positive outcomes for clients in both civil justice and criminal justice arenas. Why? Because public interest law offices serve the very same population that the criminal justice system targets; our clients’ legal issues are often interconnected. As elaborated in a noted Legal Services NYC report on legal needs of New Yorkers, there is no meaningful line between the population requiring “traditional” civil legal services and the population served by public defenders, as criminal justice and family court involvement are both symptoms and causes of poverty. *See, New Yorkers In Crisis, A Report by Legal Services NYC (January 2009).* Available at http://www.legalservicesnyc.org/storage/lsny/PDFs/new_yorkers_in_crisis.pdf. Despite this overlap, public defender organizations and civil legal services organizations operate in silos. For a plethora of reasons, public defenders and civil attorneys run parallel and hardly talk to each other.

OUTLINE:
Criminal Law for the Civil Practitioner

2. The purpose of this section is to explore opportunities for collaboration with public defenders with an aim to 1) expand cross-practice communication, 2) influence best practices in criminal court to avoid enmeshed penalties of conviction, and 3) obtain better life outcomes through concerted advocacy that prioritizes successful reentry.
- B. Strategies for Cross-Practice Communication**
1. Engage in targeted outreach to criminal defense attorneys and create spaces for interaction
 - a. New York State has many defender offices we can outreach to. There are approximately 120 indigent defense offices (full and part time) throughout the state. This includes: Public Defender Offices, Legal Aid Societies, Assigned Counsel Plans and other Public Defender offices. There is also the New York State Defenders Association, a not-for-profit membership organization providing support to public defenders throughout the state since 1967.
 - b. There exists unlimited potential for connection and information sharing with our criminal defense counterparts. We can create spaces for interaction through: Site visits, In-service trainings, law school panels, CLES, Bar Association events and social events.
 2. Create best practices for holistic advocacy in criminal court.
 - a. We have the opportunity to influence criminal court systems to recognize and mitigate collateral consequences of arrest and conviction. With extensive proficiency in civil legal areas of employment, housing, and government benefits, we have expertise in collateral consequences and can train others. We can create best practices for client-centered advocacy in criminal court by doing the following: (1) Share your knowledge of enmeshed penalties, (2) Instruct on methods to prove rehabilitation, (3) help clients obtain CRDs/CGC, (4) Protect clients 5th Amendment rights by monitoring testimony in concurrent civil proceedings. We can solidify alliances in the best interests of our clients by engaging public defenders at roundtable client meetings (where possible) and co-counseling cases in criminal and civil fora, where feasible.
 3. Benefits to the criminal case
 - a. We have the ability to create for better outcomes for our clients in criminal court. Cross-practice training on civil consequences of conviction best equips defenders to advise clients in the following ways:
 - i. Knowledge about civil consequences may help criminal defense attorneys persuade prosecutors and judges to alter their bail, plea, or sentencing decisions. For example, we can encourage our defender counterparts to invoke Penal Law § 1.05(6). This amendment to New York's Penal Law marks a significant shift by the legislature in sentencing policy. The new law will require every judge presiding at sentencing in a criminal case to consider carefully the extent to which any given sentence will help to promote the convicted person's reintegration into society. Under the amended law a new and increased significance is placed on

breaking the cycle of recidivism by imposing sentences of a length and type that will promote successful reintegration and increase public safety.

- ii. A more informed public defender is a more informed client! There can only be meaningful decision-making when clients have advance knowledge of the consequences of their conviction.
- iii. Ancillary civil proceedings can be discovery vehicles.

**OUTLINE:
Criminal Law for the Civil Practitioner**

This is a list of most of the public defender offices in the state. Explore ways to connect about issues that affect all of our clients: enmeshed penalties, tools for advocacy and strategies for mitigating adversity on reentry.

[Albany County Public Defender](#)
[Assigned Counsel Plan, First Department](#)
[Assigned Counsel Plan, Second Department](#)
[Allegany County Public Defender](#)
[Bronx Defenders](#)
[Brooklyn Defender Services](#)
[Broome County Public Defender](#)
[Cattaraugus County Public Defender](#)
[Cayuga County Assigned Counsel Program](#)
[Cortland County Public Defender](#)
[Chemung County Public Advocate](#)
[Chemung County Public Defender](#)
[Chenango County Public Defender](#)
[Columbia County \(Public Defender and Conflict Defender\)](#)
[Erie County Bar Association Aid to Indigent Prisoners Society](#)
[Federal Public Defender: Northern District of New York](#)
[Federal Public Defender: Western District of New York](#)
[Frank H. Hiscock Legal Aid Society \(Onondaga County\)](#)
[Genesee County Public Defender](#)
[Jefferson County Public Defender](#)
[Legal Aid Society of Nassau County](#)
[Legal Aid Society of New York \(NYC\)](#)
[Monroe County Public Defender](#)
[Neighborhood Defender Service of Harlem](#)
[New York County Defender Services](#)
[Office of the Appellate Defender \(1st Dept\)](#)
[Oneida County Public Defender](#)
[Orleans County Public Defender](#)
[Schuyler County Public Defender](#)
[St. Lawrence County Public Defender](#)
[Steuben County Public Defender](#)
[Suffolk County Assigned Counsel Defender Plan](#)
[Tioga County Public Defender](#)
[Ulster County Public Defender](#)

Appendices

Appendices Table of Contents

Appendix 1: Consideration of Collateral Consequences of Rulemaking
Appendix 2: US HUD Memo
Appendix 3: 24 C.F.R. § 982.310
Appendix 4: The Very Basics of Visitation in New York

Appendix 1

Office of the Attorney General
Washington, DC 20530

MEMORANDUM TO HEADS OF DEPARTMENT OF JUSTICE
COMPONENTS AND UNITED STATES
ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: Consideration of Collateral Consequences in Rulemaking

This Administration has made it a priority to promote effective policies to aid former prisoners in reentering society. Lack of or ineffective re-entry policies impose high social and economic costs, including increased crime, increased victimization, increased family distress, and increased pressure on already-strained federal, state and municipal budgets. By assisting individuals being released from prisons and jails to become productive citizens, we can protect public safety and save taxpayer dollars by lowering the direct and collateral costs of incarceration. In January 2011, I established the Federal Interagency Re-entry Council (Re-entry Council) which includes 20 federal agencies that span the Administration. A chief goal of the Re-entry Council is to remove barriers to successful re-entry, so that individuals who have served their time and paid their debt to society are able to compete for a job, attain stable housing, support their children and their families and contribute to their communities.

Multiple Department components have played a significant role in advancing this goal. To mention a few, the Department's Office of Justice Programs leads the Re-entry Council's Staff-Level Working Group, oversees the Second Chance Act grants, and has funded a comprehensive national study by the American Bar Association's Criminal Justice Section on the collateral consequences of criminal convictions. The Civil Rights Division leads the Collateral Consequences Working Group of the Re-entry Council. The Access to Justice Initiative has worked with federal grant-making agencies to emphasize the importance of connecting the reentering population with legal services necessary to surmount barriers to re-entry. The Office of Community Oriented Policing Services has published tools for law enforcement aimed at enhancing public safety by improving re-entry outcomes. The Executive Office for United States Attorneys has identified tools and resources for United States Attorneys to provide leadership in advancing re-entry activities. U.S. Attorney's Offices are involved in re-entry programs, such as re-entry courts, ex-offender call-in programs and re-entry outreach events with potential employers for ex-offenders, across the country. And the Bureau of Prisons works to improve re-entry outcomes for federal prisoners through a variety of treatment programs and services.

But there is more work to be done. With the support of this Department, the American Bar Association is creating an online catalog of what is likely to be 40,000 federal and state statutes and regulations that impose collateral consequences on people convicted of crimes. Collateral consequence statutes and policies impose additional barriers on

people who have served their sentences, including denial of employment and housing opportunities, without increasing public safety in essential ways. Some of those restrictions serve meaningful public safety goals. However, others can be more narrowly tailored. Research reveals that gainful employment and stable housing are key factors that enable people with criminal convictions to avoid future arrests and incarceration.

Over the past two and a half years, I have reached out to the leadership of other federal agencies and to state attorneys general, urging them to evaluate the collateral consequences imposed by laws, regulations and policies under their supervision. I urged them to tailor laws and policies to address genuine public safety risks while reducing or eliminating those that impede successful re-entry without significant community benefit. For example, one consideration could be time limits on certain collateral consequences imposed by statutes so that formerly incarcerated individuals are not subjected to lifelong penalties after they have completed their term of incarceration. Other Re-entry Council agencies have proposed regulatory changes and some states answered this call with proposed regulatory and legislative changes. In this Department, we reviewed regulations creating collateral consequences of criminal convictions and clarified policy to help eliminate unnecessary barriers to re-entry.

These efforts are first steps toward a broader goal of institutionalizing consideration of collateral consequences in future regulatory development. This Department can and should take the lead in this process. You should insure that, in proposing new and revising or updating existing regulations or policy guidance, your component considers whether the regulation or guidance could impose a barrier to successful re-entry after a criminal conviction and/or incarceration. If so, your component also should consider whether the regulation or guidance can be more narrowly tailored, without impeding public safety or other legitimate government interests, to avoid imposing an unnecessary burden on individuals reentering society. Finally, the Office of Legal Policy (OLP), in its review of regulations proposed by a DOJ component, will look to see whether the collateral consequences the proposed regulation impose on the reentering population have been narrowly tailored to reasonably eliminate or mitigate such consequences without impeding public safety or other legitimate government interests. To further that review, a component submitting a regulation to OLP for Department clearance should expressly state that it has undertaken the collateral consequences analysis. Further guidance on implementing this review will follow this memorandum.

Appendix 2

**U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON D.C. 204100001**

THE SECRETARY

June 17, 2011

Dear PHA Executive Director:

Each year, more than half million people are released from prisons in the United States, and an additional seven million are released from jails. Research shows that ex-offenders who do not find stable housing in the community are more likely to recidivate than those who do, yet people returning to their communities from prison often face significant barriers to obtaining housing. Studies have also found that the majority of people released from prison intend to return to their families, many of whom live in public or other subsidized housing.

The Department is engaged in several initiatives that seek a balance between allowing ex-offenders to reunite with families that live in HUD subsidized housing, and ensuring the safety of all residents of its programs. To that end, we would like to remind you of the discretion given to public housing agencies (PHAs) when considering housing people leaving the criminal justice system. The Department encourages you to allow ex-offenders to rejoin their families in the Public Housing or Housing Choice Voucher programs, when appropriate.

Within HUD statute and regulations, there are only two explicit bans on occupancy based on criminal activity. PHAs must establish a lifetime ban on admission to the Public Housing and Housing Choice Voucher programs for:

- I. Individuals found to have manufactured or produced methamphetamine on the premises of federally assisted housing (24 CFR 960.204, 24 CFR 982.553);
- and 2. Sex offenders subject to a lifetime registration requirement under a State sex offender registration program (24 CFR 960.204, 24 CFR 982.553).

Additionally, PHAs must establish standards that prohibit admission if the PHA determines that any household member is currently engaged in illegal use of a drug, or the PHA has reasonable cause to believe that a household member's illegal drug use, alcohol use, or pattern of drug or alcohol abuse may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents. PHAs must also prohibit admission of an applicant for 3 years from the date of eviction if a household member has been evicted from federally assisted housing for drug-related criminal activity. In this case, however, PHAs retain discretion to consider the circumstances and may admit households if the PHA determines that the evicted household member who engaged in drug-related criminal activity has successfully completed a supervised drug rehabilitation program, including those supervised by drug courts, or that the circumstances leading to eviction no longer exist (24 CFR 960.204, 24 CFR 966.4, 24 CFR 982.553).

Beyond these restrictions, PHAs have broad discretion to set admission and termination policies for the Public Housing and Housing Choice Voucher programs. When screening family behavior and suitability for tenancy, PHAs may consider all relevant information, including factors which indicate a reasonable probability of favorable future conduct. For example, evidence of rehabilitation and evidence of the applicant family's participation in or willingness to participate in social services such as counseling programs should be taken into consideration by the PHA.

As President Obama recently made clear, this is an Administration that believes in the importance of second chances — that people who have paid their debt to society deserve the opportunity to become productive citizens and caring parents, to set the past aside and embrace the future. Part of that support means helping ex-offenders gain access to one of the most fundamental building blocks of a stable life — a place to live.

We are grateful that you will join us in welcoming these deserving citizens back to their communities.

Shaun Donovan
Secretary

Sandra B. Henriquez
Assistant Secretary for Public
and Indian Housing

Appendix 3

24 C.F.R. § 982.310 Owner termination of tenancy.

(a) *Grounds.* During the term of the lease, the owner may not terminate the tenancy except on the following grounds:

(1) Serious violation (including but not limited to failure to pay rent or other amounts due under the lease) or repeated violation of the terms and conditions of the lease;

(2) Violation of federal, State, or local law that imposes obligations on the tenant in connection with the occupancy or use of the premises; or

(3) Other good cause.

(b) *Nonpayment by PHA: Not grounds for termination of tenancy.* (1) The family is not responsible for payment of the portion of the rent to owner covered by the housing assistance payment under the HAP contract between the owner and the PHA.

(2) The PHA failure to pay the housing assistance payment to the owner is not a violation of the lease between the tenant and the owner. During the term of the lease the owner may not terminate the tenancy of the family for nonpayment of the PHA housing assistance payment.

(c) *Criminal activity—* (1) *Evicting drug criminals due to drug crime on or near the premises.* The lease must provide that drug-related criminal activity engaged in, 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, is grounds for the owner to terminate tenancy. In addition, the lease must provide that the owner may evict a family when the owner determines that a household member is illegally using a drug or when the owner determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(2) *Evicting other criminals.* (i) *Threat to other residents.* The lease must provide that the owner may terminate tenancy for any of the following types of criminal activity by a covered person:

(A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises);

(B) 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; or

(C) Any violent criminal activity on or near the premises by a tenant, household member, or guest, or any such activity on the premises by any other person under the tenant's control.

(ii) *Fugitive felon or parole violator.* The lease must provide that the owner may terminate the tenancy if a tenant is:

(A) Fleeing to avoid prosecution, or custody or confinement after conviction, for a crime, or attempt to commit a crime, that is a felony under the laws of the place from which the individual flees, or that, in the case of the State of New Jersey, is a high misdemeanor; or

(B) Violating a condition of probation or parole imposed under Federal or State law.

(3) *Evidence of criminal activity.* The owner may terminate tenancy and evict by judicial action a family for criminal activity by a covered person in accordance with this section if the owner determines that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction. (See part 5, subpart J, of this title for provisions concerning access to criminal records.)

(d) *Other good cause.* (1) "Other good cause" for termination of tenancy by the owner may include, but is not limited to, any of the following examples:

(i) Failure by the family to accept the offer of a new lease or revision;

(ii) A family history of disturbance of neighbors or destruction of property, or of living or housekeeping habits resulting in damage to the unit or premises;

(iii) The owner's desire to use the unit for personal or family use, or for a purpose other than as a residential rental unit; or

(iv) A business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, or desire to lease the unit at a higher rental).

(2) During the initial lease term, the owner may not terminate the tenancy for "other good cause", unless the owner is terminating the

tenancy because of something the family did or failed to do. For example, during this period, the owner may not terminate the tenancy for "other good cause" based on any of the following grounds: failure by the family to accept the offer of a new lease or revision; the owner's desire to use the unit for personal or family use, or for a purpose other than as a residential rental unit; or a business or economic reason for termination of the tenancy (see paragraph **(d)(1)(iv)** of this section).

(e) *Owner notice*— (1) *Notice of grounds.* (i) The owner must give the tenant a written notice that specifies the grounds for termination of tenancy during the term of the lease. The tenancy does not terminate before the owner has given this notice, and the notice must be given at or before commencement of the eviction action.

(ii) The notice of grounds may be included in, or may be combined with, any owner eviction notice to the tenant.

(2) *Eviction notice.* (i) Owner eviction notice means a notice to vacate, or a complaint or other initial pleading used under State or local law to commence an eviction action.

(ii) The owner must give the PHA a copy of any owner eviction notice to the tenant.

(f) *Eviction by court action.* The owner may only evict the tenant from the unit by instituting a court action.

(g) *Regulations not applicable.* **24 CFR part 247** (concerning evictions from certain subsidized and HUD-owned projects) does not apply to a tenancy assisted under this part 982.

(h) *Termination of tenancy decisions.*— (1) *General.* If the law and regulation permit the owner to take an action but do not require action to be taken, the owner may take or not take the action in accordance with the owner's standards for eviction. The owner may consider all of the circumstances relevant to a particular eviction case, such as:

(i) The seriousness of the offending action;

(ii) The effect on the community of denial or termination or the failure of the owner to take such action;

(iii) The extent of participation by the leaseholder in the offending action;

(iv) The effect of denial of admission or termination of tenancy on

household members not involved in the offending activity;

(v) The demand for assisted housing by families who will adhere to lease responsibilities;

(vi) The extent to which the leaseholder has shown personal responsibility and taken all reasonable steps to prevent or mitigate the offending action;

(vii) The effect of the owner's action on the integrity of the program.

(2) *Exclusion of culpable household member.* The owner may require a tenant to exclude a household member in order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.

(3) *Consideration of rehabilitation.* In determining whether to terminate tenancy for illegal use of drugs or alcohol abuse by a household member who is no longer engaged in such behavior, the owner may consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated successfully (**42 U.S.C. 13661**). For this purpose, the owner may require the tenant to submit evidence of the household member's current participation in, or successful completion of, a supervised drug or alcohol rehabilitation program or evidence of otherwise having been rehabilitated successfully.

(4) *Nondiscrimination limitation and protection for victims of domestic violence, dating violence, or stalking.* The owner's termination of tenancy actions must be consistent with fair housing and equal opportunity provisions of **24 CFR 5.105**, and with the provisions for protection of victims of domestic violence, dating violence, or stalking in **24 CFR part 5**, subpart L.

(Approved by the Office of Management and Budget under control number 2577-0169)

[60 FR 34695, July 3, 1995, as amended at 60 FR 45661, Sept. 1, 1995; 64 FR 26645, May 14, 1999; 64 FR 43613, Aug. 11, 1999; 64 FR 56911, Oct. 21, 1999; 64 FR 56913, Oct. 21, 1999; 66 FR 28804, May 24, 2001; 73 FR 72344, Nov. 28, 2008; 75 FR 66263, Oct. 27, 2010]

Appendix 4

THE VERY BASICS OF VISITATION IN NEW YORK

- **Case law?**
 - *Strahl v. Strahl*, 414 NYS2d 184;
 - *Murphy v. Murphy* 600 NYS2d 373;
 - *Jennifer Diane D. v. Arnold D.* 589 NYS2d 554;
 - *Comm. of Social Services NYC v. Nina G* 594 NYS2d305;
 - *Janusek v. Janusek* 485 NYS2d 305
- **What is it?**
 - Visitation is the joint right of the noncustodial parent and of the child.
- **Why?**
 - Courts have determined that it is in the best interest of the child to have the love and guidance of the non-custodial parent.
- **What does it mean?**
 - It means that the non-custodial parent have reasonable and meaningful access to the children. Case law has interpreted “meaningful” to mean “frequent and regular”
- **What Type?**
 - Visitation can be unsupervised, supervised or therapeutic
- **Can a child compel a parent to exercise visitation rights?**
 - Courts have stated that a non-custodial parent cannot be compelled to exercise his/her visitation rights.
- **Can a parent be denied visitation or can it be suspended or terminated?**
 - Suspension or denial of visitation rights must be justified by “exceptional or extraordinary” circumstances. The visitation is so dire as to put the child’s welfare at stake.
- **What about grandparents?**
 - The United States Supreme Court has held that there is no provision in the Constitution to grant the right of visitation to grandparents. However, NY State allows grandparent’s to petition to gain the right of visitation if the child does not have two parents in an intact marriage fit to raise children. Grandparent must show a substantial relationship with the child and demonstrate the visitation to be in the “best interest” of the child. (Grandparents can also seek visitation in NY pursuant to Article 10 of the Family court Act, Child Protective Proceedings, - visitation of minors in foster care FCA 1081.)

Certificates that Promote Rehabilitation: Why They are So Important and How to Help Clients Get Them

CERTIFICATES THAT PROMOTE REHABILITATION: WHY THEY ARE SO IMPORTANT AND HOW TO HELP CLIENTS GET THEM

Why are these Certificates so Important?

- They can prevent evictions and preserve employment.
 - They remove statutory collateral bars imposed because of convictions.
 - They appear on a person's rap sheet beside relevant convictions.
-

Overview of Certificates of Rehabilitation

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

Eligible Persons: Granted to people with only one felony and/or any number of misdemeanor convictions.

- i) One must get a certificate for each conviction.
- ii) Includes out-of-state and federal convictions.

Effect: Relieves most automatic forfeitures and disabilities, including felony disenfranchisement and most state employment and license bars, automatically imposed by law as a result of the conviction.

Issued by: Court of sentencing. Application often includes probation interview. Process takes from 4 weeks to several months (varies widely by county). If person served sentence in a NY State prison or if the conviction was from a federal court or other state, apply through Department of Corrections and Community Supervision.

Limitations:

- i) Generally, a CRD does not affect driver's license suspensions.
- ii) Does not lift the felony bar to holding public office. (Area of law in flux)
- iii) Does not trump discretionary considerations in employment and licensing ("good moral character," etc.).

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

Eligible Persons: Granted to those with multiple felony convictions.

Effect: Relieves same automatic forfeitures and disabilities as CRD. The CGC, however, is the only certificate that lifts felony or misdemeanor bars to "public office." If client is applying for a "public office," she can apply for this certificate even if she has only one felony conviction or only misdemeanor convictions.

Issued by: Department of Corrections and Community Supervision (DOCCS). Can take many months but may be sped up if applicant writes a letter expressing urgent need.

Waiting period (based on most serious conviction):

Time since last conviction, payment of fine, or release from prison or parole, whichever is later:

- i) A & B felonies, 5 years from completion of sentence;
 - ii) C, D, E, 3 years;
 - i) Misdemeanors only, 1 year.
-

CERTIFICATES OF REHABILITATION

1. In General

- a. These certificates are critical tools for avoiding the fallout of convictions.
- b. They remove statutory bars imposed because of convictions, and provide a rebuttable “presumption of rehabilitation.”
 - i) While they generally will **not avoid deportability or inadmissibility** for non-citizens, they **may** have a positive effect on some forms of discretionary relief in immigration proceedings.
- c. They (ought to) appear on a person’s rap sheet beside relevant convictions.

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

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

- (b) **Practice Tip:** It is always recommended to help a client submit **Evidence of Rehabilitation** along with their post-sentencing application. Help them write a personal statement that explains the context of the conviction and expresses remorse. Have the client collect letters of recommendation from jobs or clergy or other references. Any certificates of completion of drug treatment or other programs will be viewed favorably by probation and the deciding court.
- (c) CRD after sentencing can only grant relief from disabilities, not forfeitures.
- iii) **Temporary Certificates:** If the court has imposed a revocable sentence (e.g. probation or Conditional Discharge), the CRD will be temporary until the court's authority to revoke the sentence has expired.
 - (1) The court *may* revoke the temporary certificate for violations of conditions of the sentence, and *must* revoke it if the defendant is remanded to a *state* correctional institution. (e.g. Violation of Probation)
 - (a) Revocation shall be upon notice and after the defendant has an opportunity to be heard.
 - (2) If the certificate is not revoked, it automatically becomes permanent at the expiration of the probation or CD.
 - (3) At the **very least**, ask the court to grant a CRD relieving Housing, Employment, and Voting disabilities.
 - (4) **Priorities:** Judges have proven resistant to large-scale grants of CRD's, particularly at arraignments. If you must make a reasoned choice of when to request CRD's at sentencing, the *top priority* should be those clients who have *no prior record*. (A client with multiple convictions must apply for a CRD for each offense.)
 - iv) **Myth:** Some judges believe that they cannot issue CRDs for violations. In fact, CRDs are often **most** useful for violations convictions, and Corr. L. § 701(1) explicitly authorizes issuance of CRDs for any crime or "offense." It can be helpful to provide the court with a copy of the statute.
 - v) **Myth:** Some judges and prosecutors oppose CRDs because they think criminal records will be sealed as a result. In fact, CRDs have nothing to do with sealing, and they do not restrict access in any way to the records of criminal convictions.
- e. **Issuance by Department of Corrections and Community Supervision** (Corr. L. § 702)
 - i) **Eligible Persons** (only one felony conviction permitted)
 - (1) Persons who have been incarcerated in a state correctional facility, and have been released;
 - (2) Persons who reside in NY with convictions from any other jurisdiction (including federal).
 - (a) **Warning:** *out-of-state residents* who want a NY employment license but have federal or out-of-state convictions may not be eligible!
 - ii) **Procedure:**
 - (1) Request an application from DOCCS website or from:
New York State Dep't of Corrections and Community Supervision
Certificate Review Unit
97 Central Avenue
Albany, NY 12206
(518) 485-8953
 - (2) Applicant will be investigated by DOCCS. The process usually takes several months. Wait times of up to a year are normal. Recommend keeping in contact with DOCCS.
 - (3) The CRD can be issued at the time of release from the NYS institution or any time thereafter.

- iii) *Temporary Certificates*: If issued while person is still on parole or supervised release, the CRD is temporary until discharge and can be revoked by DOCCS for violation of the conditions of parole or release.
 - f. **Practice Tip**: If client is still on probation or parole, or has not finished her sentence, talk to her probation/parole officer. They can start the application process and have a temporary certificate issued.
 - g. **Limitations**
 - i) Generally, does not affect driver's license suspensions—absent “compelling circumstances.” Corr. L. § 701(2).
 - ii) Does not lift the felony bar to holding public office. (See below for list) Corr. L. § 701(1). (Must obtain Certificate of Good Conduct).
 - (1) **However**, many sections of New York law were amended during the 2010 legislative session to state that a CRD would relieve a license disability just as well as a CGC— There is therefore some lack of clarity over the “public office” limitation.
 - iii) Does not trump discretionary considerations in employment and licensing (“good moral character,” etc.).
 - h. **Forms**
 - i) CRD Application (Appendix 1): Single page form to apply at sentencing court—otherwise use application to DOCCS (Appendix 2).
 - ii) Form for judge to sign is different—in general it is prepared by the local probation dep't.
- 3. Certificate of Good Conduct** (Corr. L. §§ 703-a & 703-b)
- a. *Eligible Persons*
 - i) Any person “previously convicted of a crime in this state.” Corr. L. § 703-b(1).
 - ii) Any person “previously convicted of a crime in any other jurisdiction.” Corr. L. § 703-(b)(2).
 - (1) Persons convicted of a crime in another jurisdiction must have “specific facts and circumstances and specific sections of New York state law that have an adverse impact on the applicant and warrant the application for relief to be made in New York.” (*Id.*)
 - iii) Therefore, this Certificate can be granted for any “crime,” but not for non-criminal offenses such as violations.
 - b. *Effect*: The CGC has the same effect as the CRD, except that it is the only certificate that lifts felony or misdemeanor bars to “public offices.”
 - i) Public Offices: Examples: police officer; firefighter; court officer; law enforcement jobs; notary public (but see 2(g)(ii) above); some elective offices.
 - (a) Should ask the employer or licensing agency whether it's a public office and whether there's a bar for felony or misdemeanor convictions. If so, the only way to lift the bar is (probably) a Certificate of Good Conduct.
 - ii) If person is applying for a “public office”, she can apply for this certificate even if she has only one felony conviction or only misdemeanor convictions.
 - c. *Waiting period* (based on most serious conviction): Must wait an amount of time after last conviction, payment of fine, or release from prison or parole, whichever is later:
 - i) A & B felonies, 5 years from completion of sentence;
 - ii) C, D, E, 3 years;
 - iii) Misdemeanors only, 1 year.
 - iv) Applicant must demonstrate that they have conducted themselves “in a manner warranting such issuance” for the waiting period.
 - d. Temporary certificates are available, per statute, but given the waiting period requirements they are very rare.
 - e. *Process*: Apply to the same NYS Division of Parole office listed above.
 - i) Process takes at least 6 months, but may be faster if the applicant or his attorney attaches a letter explaining need for expediting (*e.g.*, when a job or occupational license is at stake).
 - ii) In 2006, Parole issued approximately 250 Certificates of Good Conduct.

**CERTIFICATES THAT PROMOTE REHABILITATION:
WHY THEY ARE SO IMPORTANT AND HOW TO HOW TO HELP CLIENTS GET THEM**

- iii) **Practice Tip:** Here even more than with the CRD application, clients should be encouraged to submit **Evidence of Rehabilitation** along with their application. The DOCCS application specifically asks for evidence of paying taxes—1040s *and* W-2s. Obviously these are not available in all cases. However, I encourage applicants to show how they are supporting themselves in order to head off inquiries about unlawful means of earning a living.
- iv) **Practice Tip:** As a matter of policy, DOCCS issues all Certificates with two explicit exemptions from relief: (a) firearms, and (b) holding public office. Therefore, a person must specifically ask for relief from these disqualifications in her Certificate application.

Biographies

Paul Curtin has been with the Legal Aid Bureau of Buffalo for 13 years. During that time he has been staff attorney in the Civil, Felony Appeals, and Attorneys for Children Units. He is currently a managing attorney in the Civil Unit, concentrating on matters related to Reentry, Housing, Bankruptcy and financial well-being, Foreclosure defense, and Veterans and Military Families issues. 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, the University of Buffalo Reentry Practicum, 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.

Christa Douaihy is a Team Leader and attorney in the Civil Action Practice with The Bronx Defenders. In her current position, Christa leads one of the office's interdisciplinary teams and works collaboratively with criminal defense and family defense attorneys, advocates and social workers to assess clients' civil legal needs and provides representation in courts, administrative tribunals and appellate fora.

Before The Bronx Defenders Christa was a staff attorney with the Disability Rights Unit at Legal Services of the Hudson Valley in Westchester County, NY. During her tenure at Legal Services of the Hudson Valley, she served on the Tri-County Steering Committee of Ryan White Comprehensive AIDS Resources Emergency (CARE) Act, responsible for intra-regional administration of Congressionally appropriated funds for Westchester, Rockland, and Putnam counties. She is a certified mediator and an accredited representative with the US Department of Veteran's Affairs. Recently, Christa became Secretary of the New York City Bar Association's Special Committee on AIDS. She also serves as the Legal Expert at Thebody.com -- the complete HIV/AIDS resource. Christa is admitted to practice law in New York Courts and the Southern District of New York, U.S. District Court. She received her Bachelor of Arts at The University of Pittsburgh and her Juris Doctorate at The City University of New York School of Law.

Shary Enid Sanchez is a Staff Attorney in the White Plains, New York office of Legal Services of the Hudson Valley. She represents the indigent in the following areas of law: Family law, Social Security Disability appeals (Supplemental Security Income), Landlord/Tenant law, Consumer Debt Collection, Public Benefits, HIV/AIDS discrimination and breaches of HIV/AIDS confidentiality.

Prior to joining Legal Services of the Hudson Valley, Ms. Sanchez worked at The HIV Law Project representing people living with HIV/AIDS in a number of practice areas throughout the Bronx and Manhattan. She graduated from The Ohio State University Moritz College of Law in 2009.

Runa Rajagopal, an experienced litigator and social justice advocate for over 9 years, is currently a Team Leader and Supervising Attorney in the Civil Action Practice at The Bronx Defenders. Runa supervises and supports over twenty-five attorneys and advocates defending against the full range of consequences that arise out of an arrest, including evictions, termination of crucial benefits, suspension of employment, forfeiture of property and police misconduct. Runa trains and 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 strategies to safeguard clients and promote reintegration and reentry into the community. Prior to joining The Bronx Defenders, Runa was a Senior Staff Attorney for the Mental Health Law Project at MFY Legal Services, Inc., where she represented mental health consumers in the areas of fair and affordable housing, income preservation, consumer defense, family law and disability rights. Runa received her J.D. from the Washington College of Law, American University and her B.A. in Sociology and Communication from the State University of New York at Geneseo.

Judy Whiting is General Counsel at the Community Service Society of New York (CSS), performing a full range of legal services for this 170-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 New Yorkers obtain, understand and fix mistakes in their official criminal conviction histories.

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 and currently serves on the New York City Bar Association's Corrections and Community Reentry Committee, was formerly a member of its 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.