EMPLOYMENT ADVOCACY FOR CLIENTS WITH CRIMINAL RECORDS

NLADA Litigation and Advocacy Directors Conference

Sarah Crowley
Clean Slate Practice
EBCLC’s Holistic Practice

East Bay Community Law Center Practice Areas

Fair & Stable Housing
- Eviction Defense
- Housing Discrimination
- Housing Rights

Economic Security & Opportunity
- Re-entry – Reentry/Licensing (Clean Slate)
- Consumer/Debt Defense
- Green Collar Communities Clinic (GC3)

Youth Education & Justice

Health & Welfare

Immigration & Integration
- Legal Residency/Naturalization Petitions
- Deportation Defense

Health & Welfare
- Public Benefits
- Welfare to Work Benefits
- Wrap Homeless Legal Services
- Medical Legal Partnership
- HIV

Youth Education & Defense
- School-based Legal Services
- Special Ed
- School Discipline
- Juvenile Defense
BUILDING ECONOMIC SECURITY AND OPPORTUNITY

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ECONOMIC SECURITY AND OPPORTUNITY AT EBCLC

- CONSUMER JUSTICE
- COMMUNITY ECONOMIC JUSTICE
- HOMELESSNESS
- CLEAN SLATE
ATTORNEYS, SUPPORT STAFF, LAW STUDENTS
COMMUNITY PARTNERS
HOLISTIC REPRESENTATION

LIMITED-SCOPE ASSISTANCE

COMMUNITY LEGAL EDUCATION & OUTREACH

BROADEST REACH

Self-help & counseling = more time, fewer people

Full representation, cross-referred = much more time, fewest #s, greatest gains

INFORMED BY DIRECT SERVICES, CLIENTS, COMMUNITY PARTNERS

POLICY ADVOCACY & LITIGATION

MULTIMODAL SERVICES
Employment Is Key to Successful Reentry

Employment significantly reduces recidivism

- The research: Among individuals employed during the first year following release from incarceration, the rate of recidivism was just 8%, compared to a statewide average rate of 54%. (American Correctional Association, 135th Congress of Correction, Presentation by Dr. Art Lurigio (Loyola University) Safer Foundation Recidivism Study, August 8, 2005.)

After time has passed, criminal record is not a reliable predictor of future criminality

- The research: Using two different cohorts, the authors concluded that a person who committed an offense six or seven years ago is no more likely to re-offend than someone who has never committed an offense. This was true even for violent offenders. (Megan C. Kurlychek, Robert Brame, & Shawn D. Bushway, Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?, 5 Criminology & Public Policy 3, 483-504 (2006) and Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement, 53 Crime & Delinquency, 64-83 (2007) via Nelp.org).

People with records make better employees

- Employees with criminal records were 1.5% more productive. http://www.businessinsider.com/a-criminal-record-might-increase-productivity-2012-12

But people with criminal records have a hard time finding jobs.
REENTRY LEGAL SERVICES = EMPLOYMENT

After working with Clean Slate Reentry Legal Services (Criminal Court Based Remedies + Civil Advocacy):

• 80% of previously unemployed clients found jobs

• Clients who had jobs saw their annual earnings increase by an average of between $4,100 to $6,200

• 83% of clients say that Clean Slate services increased their confidence in the job market

Source: Clean Slate client outcomes survey; see also Selbin et al., Unmarked? Criminal Record Clearing and Employment, DRAFT published in NLADA program materials
OLD REENTRY ASSUMPTION

Criminal Record Remedies “EXPUNGEMENT”

Job Application

=

Job

East Bay Community Law Center
Criminal Court-Based Advocacy

- Alameda County Public Defender Collaboration
- EBCLC
- Pro Bono Partnerships
BENEFITS OF COLLABORATION

• Maximize scarce county and non-profit resources
• Increase capacity (more clients served)
• Informs work upstream in Public Defender’s Office
• Helps identify issues for impact litigation
• Better client outcomes in civil and criminal matters
CRIMINAL RECORD REMEDIES
(SOME) CALIFORNIA CRIMINAL RECORD REMEDIES

- PC § 17(b) (felony reduction)
- PC § 17(d) (misdemeanor reduction)
- PC § 1203.3 (early termination of probation)
- PC § 1203.4 (set aside & dismissal AKA “expungement” – probation imposed)
- PC § 1203.4a (set aside & dismissal AKA “expungement” – no probation imposed)
- PC § 1203.41 (set aside & dismissal AKA “expungement” – PC § 1170(h) sentence)
- PC § 1203.43 (withdraw guilty plea of DEJ) NEW 01/01/2016
- PC § 1203.45 (sealing misdemeanor adult conviction by minor)
- Certificate of Rehabilitation & Pardon
- Direct Pardon
- PC § 1170.9 (restoration remedy for veterans) PC § 851.6 (certificate describing arrest as detention)
- PC § 851.7 (record sealing - juvenile misdemeanor arrest)
- PC § 851.8 (record sealing & destruction following arrest – factual innocence)
- PC § 851.85 (record sealing following acquittal – factual innocence)
- PC § 851.86 (record sealing following conviction – factual innocence)
- PC § 851.87 (record sealing following non-drug DEJ) PC §§ 530.6/530.7 (record sealing & registration following identity theft)
- PC § 851.90 (record sealing following drug diversion)
- Juvenile Record Sealing & Other Juvenile Record Remedies (W & I Code §§ 781, 1772, 1179, PC §§ 851.7, 1203.47;
- HS § 11361.5 (automatic destruction of some marij. arrests/convictions)
- PC § 1170.18 (Prop 47 – reclassification of felonies to misdemeanors)
- PC § 1203.49 (special 1203.4 relief for sex trafficking victims) New as of 1/2015
FEDERAL CRIMINAL RECORD REMEDIES

• No federal expungement remedy by statute
• Creative remedies from Federal Judges
  – Judge Gleeson, EDNY
    • *US v. Jane Doe I*: expungement of conviction pursuant to court’s “ancillary jurisdiction”
    • *US v. Jane Doe II*: “federal certificate of rehabilitation”
  – Judge Block, EDNY
    • *US v. Nesbeth*: non-incarceratory sentence on drug smuggling conviction, expressly to avoid employment and other consequences of felony conviction
ADVOCACY WITH EMPLOYERS AND BACKGROUND CHECK PROVIDERS
Title VII

- Prohibits employment discrimination based on race, color, religion, sex and national origin.

EEOC guidance on Title VII
- An employer is liable under Title VII where the employer’s criminal record screening policy or practice disproportionately screens out a Title VII-protected group and the employer does not demonstrate that the criminal record exclusion is job-related and consistent with business necessity.
- Employer screening policy will generally meet these criteria if (1) Employer employed an individualized assessment AND (2) considered:
  - The nature and gravity of the offense or offenses;
  - The time that has passed since the conviction and/or completion of sentence; and
  - The nature of the job held or sought.
**Ban the Box Laws**

- Promote fair chance hiring by prohibiting employers from asking about criminal records in the initial stage of job application.
- Laws differ in scope and categories of employers covered.
SOURCE OF CRIMINAL RECORDS USED IN EMPLOYMENT

• *Private background check companies ➔* Private employers
• *FBI ➔* Federal government employers
• *California DOJ ➔* California state and local government employers
  ▪ Applicant fingerprinted
  ▪ Employer will get background check (CORI) from Cal. Dept. of Justice
• *California DMV ➔* Public and private employers
THE FAIR CREDIT REPORTING ACT (FCRA)

An employer that relies on a background check prepared by a consumer reporting agency in taking an adverse action must provide:

- Pre-adverse action notice, including a copy of the report and consumer’s rights. 15 U.S.C. § 1681b(b)(3).
- Adverse action notice, including contact information for the consumer reporting agency and a notice of the consumer’s rights. 15 U.S.C. § 1681m.
A **consumer reporting agency** that provides a background check for employment purposes must give a consumer:

- Notice of consumer’s rights under FCRA
- Opportunity to request a copy of background check
- Opportunity to request correction of reporting errors
- Access to any information it maintains regarding the consumer
FBI Records

FBI is authorized to disclose RAP sheets to government agencies that conduct background investigations for employment and licensing purposes

- Public Law No. 92-544, 86 Stat. 1115 (Oct. 25, 1972)
COMMON FBI REPORTING PROBLEMS

- 50% error rate
- Missing dispositions
- Frequent reporting of juvenile adjudications and other criminal record information not reported by Cal. DOJ

ADVICE FOR ALL

- Always request a copy of every background check that is run on you, private or public employers. That’s your right.
- Report job postings you see that rule out anyone with any criminal conviction
- Report job postings that require a 10-year driving record
- Don’t assume your criminal record will be a barrier to your career goals
- Don’t start a new career path without talking to a reentry advocate

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CLIENT EXAMPLE: DAVID

• License suspension following arrest for “excessive blood alcohol” reported in DMV section of background check, despite no resulting conviction
• David denied job as a result
• EBCLC advocated with background check company and employer; David hired
• EBCLC sued DMV for violations of state law restricting reporting of criminal records
CLIENT EXAMPLE: STANLEY

• Removed from staffing agency placement after background check erroneously reported his misdemeanor conviction as a felony

• Staffing agency advertises policy of refusing to place anyone with a non-dismissed felony conviction

• EBCLC got report corrected; Stanley placed in lower paying position

• EBCLC negotiating with employer regarding blanket felony ban (Title VII) and pre-adverse action notice failures (FCRA)
OCCUPATIONAL LICENSING ADVOCACY
Licensing Process – The Straightforward Route

Education/Training

Application for licensure

Licensure

Job
LICENSING PROCESS – FOR PEOPLE WITH CRIMINAL CONVICTIONS

Clean Slate remedies

Education /Training

Application for licensure

Administrative Hearing

Appeal of denial of licensure

Denial of Licensure

Proposed decision of Administrative Law Judge

Issuance of licensure /negotiated settlement

Job

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CLIENT EXAMPLE: JOHN

• Obtained MA in Counseling Psychology, wants to counsel youth aging out of foster care
• California Board of Behavioral Sciences denied intern registration based on 14 year-old dismissed DUI, arrest resulting in successful diversion, and drunk in public arrest
• Board proposed punitive and onerous probationary terms
• EBCLC is appealing denial
CLIENT EXAMPLE: JANELLE

• Offered job at a retirement home
• State law requires criminal record clearance through California Department of Social Services
• DSS received report of a domestic violence arrest that did not result in conviction; conducted 3-month investigation into arrest
• Employer hired another applicant to fill the position
• EBCLC sued DSS for denying work clearance based on arrest only
STATE OF CALIFORNIA HEALTH AND HUMAN SERVICES AGENCY

DEPARTMENT OF SOCIAL SERVICES
Caregiver Background Check Bureau
744 P Street, MS 9-15-62, Sacramento, CA 95814

IMMEDIATE ACTION REQUIRED
Criminal Record Exemption Needed

This is to notify you that we have received criminal record information concerning you. It contains criminal conviction information, and may also contain arrest information. A similar notice was sent to the licensee of the above named facility informing him/her that in order for you to work or be present in the facility, you must obtain a criminal record exemption. If you intend to work or reside in the above named facility you may request an exemption in coordination with the licensee. If you are no longer employed by or no longer reside in the facility, you may request an exemption on your own.

To request a criminal record exemption, either in coordination with the licensee or on your own, you must submit the items listed below, within forty five (45) days of the date of this notice to the address above. If you request an exemption, it may take at least seventy five (75) days to process after a complete exemption request is received by our office. You cannot work or be present in any licensed facility until an exemption has been granted.
FIGHTING DRIVERS’ LICENSE SUSPENSIONS FOR INABILITY TO PAY
**Traffic Court Debt ➔ Criminalization of Poor People**

4.6 million people in California have suspended licenses because they can't afford to pay their tickets. **THAT'S 1 IN 7 DRIVERS.**

- Traffic fines and fees have skyrocketed
  - $100 ticket initially = $490 with automatic charges, penalties and surcharges
  - Civil Assessment of $300 automatically imposed for Failure to Appear or Failure to Pay
- Cannot get back into court until pay the full amount owed – “bail requirement”
- Courts suspend licenses as a means to collect traffic debt
  - But no license = no job = no money to pay the debt

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SUSPENDED LICENSES:
ANOTHER BARRIER TO LIBERTY AND ECONOMIC SECURITY

• Suspended licenses ➔ FTAs ➔ misdemeanor convictions for VC §§ 14601.1 & 12500 ➔ probation & loss of 4th Amendment Rights ➔ barriers to employment ➔ more debt ➔ more convictions

• Racial justice implications
In California, people can vote

– While on probation
– While in jail (most cases)
– After release from prison and parole supervision. After completion of parole, just re-register to vote. No further steps (i.e., COR, pardon) required.
JURY SERVICE & CONVICTION HISTORY
BE AN ENFRANCHISER!

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WE NEED YOU!

East Bay Community Law Center
Why & How?

• The need is great!
• Legal Services Corporation (LSC) allows this work
  – See LSC Program Letter 15-5
• Funding is available
  – Department of Labor
  – Employment Opportunity Legal Corps
    (Americorps/Equal Justice Works)
THANK YOU

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