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Risks and Rewards

Is Record Clearing Right for Your Noncitizen Client?

BY SETH P. LYONS

Criminal records create barriers to employment, housing, and other basic needs and services. For immigrant clients, a criminal record may be even more damaging because it can lead to immigration detention, mandatory deportation, and permanent lifetime banishment from the United States. However, advocates must be prepared to grapple with the many complexities of clearing criminal records for immigrant clients. Filing record-clearing petitions can, at times, pose potential immigration risks while yielding limited benefits. At the same time, certain types of record-clearing mechanisms can actually help clients obtain crucial immigration relief. With the Trump administration's recent changes in immigration enforcement priorities, now more than ever advocates must understand the risks and rewards of record clearing.¹

Clearing Criminal Records for Immigrant Clients

On January 25, 2017, Pres. Donald Trump signed an executive order entitled "Enhancing Public Safety in the Interior of the United States."² Among its other effects, this executive order significantly expanded immigration enforcement priorities and called for a dramatic increase in the

1 Immigration experts often disagree about the level of risk involved in filing record-clearing petitions on behalf of noncitizens. Much of the disagreement likely stems from how record-clearing mechanisms differ from state to state and how immigration law is often jurisdiction-specific. My aim here is not to discourage advocates from filing record-clearing petitions for immigrant clients but to encourage advocates to think critically about issues that they may not have considered.

2 Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

number of U.S. Immigration and Customs Enforcement officers.³ Whereas criminal record-related enforcement priorities under the Obama administration mostly focused on noncitizens with felony or "significant misdemeanor" convictions, the Trump

these enforcement priorities do not alter the grounds of removability—the statutorily defined rules that dictate which crimes will render immigrants deportable and bar noncitizens from obtaining certain immigration relief—the changes drastically increase the

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administration's new priorities include people who have "been convicted of any criminal offense," people charged with but not yet convicted of any crime, and anyone who has "committed acts that constitute a chargeable criminal offense."⁴ Although

risks for immigrants with criminal records.⁵

With the heightened emphasis on criminal records in immigration enforcement, advocates should be aware of how record-clearing laws and processes interact with immigration law. Advocates may see more immigrant clients interested in clearing their records because the clients believe it will help them obtain immigration relief, such as green cards, citizenship, or protection from deportation, while other clients may be more hesitant to go forward with expungement because of increased fear around official legal proceedings. Even if the goal of expungement is to remove

3 The executive order requests an additional 10,000 immigration officers, which would triple the current level ([National Immigration Law Center, Understanding Trump's Executive Order Affecting Deportations and "Sanctuary" Cities](#) (Feb. 24, 2017)).

4 Exec. Order No. 13,768, *supra* note 2. While the portions of this executive order relating to the defunding of sanctuary cities have been challenged in federal court, the immigration enforcement priorities section has not been challenged thus far (see [City and County of San Francisco v. Trump](#), No. 3:17-cv-00485 (N.D. Cal. 2017)). Thus, unlike President Trump's immigration order banning immigration from certain Muslim-majority countries, this order has not been enjoined by any court (see [Alexander Burns, 2 Federal Judges Rule Against Trump's Latest Travel Ban](#), *NEW YORK TIMES* (March 15, 2017)).

5 See [8 U.S.C. §§ 1182\(a\)\(2\), 1227\(a\)\(2\)](#) (2015).

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more traditional collateral consequences, such as housing and employment barriers, advocates must consider whether filing expungement petitions can put their immigrant clients at risk, be prepared to explain any risk to their clients, and take additional steps to protect them.⁶

In general, the risks and benefits of expungement may hinge on whether the client is a U.S. citizen, an undocumented immigrant (sometimes referred to as an unauthorized or illegal immigrant), or a documented immigrant (including lawful permanent residents (“green card” holders), asylees, refugees, and other visa-holders), as well as whether the expungement is intended to address collateral consequences (such as employment barriers) or immigration issues (see table below).

Here I give a basic overview of the issues for advocates to consider when deciding whether expungement is appropriate for an individual client. Because immigration enforcement tactics are constantly changing, advocates should continue to consult with local immigration experts even after doing a risk/reward assessment.

The Benefits of Record Clearing for Noncitizen Clients

An estimated 70 million people in the United States have a criminal record.⁷ Many noncitizens suffer serious consequences of having a criminal record, notwithstanding that immigrants commit crimes at lower rates than the rest of the population.⁸ Old, minor convictions or arrests not resulting in conviction can make finding a job or housing difficult, regardless of immigration status.⁹ Perhaps more important, noncitizens may face immigration-related problems, including deportation, because of their

criminal records. Record clearing through expungement, sealing, vacatur, habeas petitions, or other mechanisms can be highly effective in relieving some of these barriers, although there are limitations to their efficacy in the immigration context.

The benefits of clearing an immigrant client’s record largely depend on the client’s immigration status and the type of record-clearing mechanism available. Evaluating such benefits is helped by breaking them into two categories: (1) immigration issues and (2) other collateral consequences, such as barriers to employment, housing, or education.

Record Clearing for Immigration Purposes. Two broad categories of record-clearing tools are available for cleaning up records for immigrant clients: (1) standard expungements that erase or seal records and (2) other record-clearing mechanisms that actually attack an underlying conviction. The former do not generally help with immigration issues, while the latter often do.

Standard Expungements. Standard expungement procedures merely remove an arrest or conviction record from the system without altering the legal legitimacy of a conviction. They are, in essence, a policy tool to shield an individual’s record from society. However, they rarely help with immigration-related issues, such as reentering the United States or applying for citizenship, naturalization, green cards, or other visas.

In most states, record-clearing petitions simply erase criminal record information—often relating to nonconvictions—or seal it from public view. These standard record-clearing tools rarely offer any benefit for immigration purposes because Immigration and Customs Enforcement maintains its own records that are unaffected by state-level expungement

STATUS	U.S. CITIZEN	DOCUMENTED	UNDOCUMENTED
RISKS	Low to none	Low to high	Medium to high
BENEFITS FOR COLLATERAL CONSEQUENCES	High	High	Low to none
BENEFITS FOR IMMIGRATION ISSUES	n/a	Low to high	Low to high

6 I use “expungement” here as a general term to refer to standard record-clearing petitions that do not attack the validity of a criminal conviction but simply erase or seal the criminal record information. Different states use different terms for these procedures—including sealing, expunction, erasure, and shielding—and each remedy may function somewhat differently (see [Restoration of Rights Project, 50-State Comparison: Judicial Expungement, Sealing, and Set-aside](#) (June 2017)).

7 [Half in Ten & Sentencing Project, Americans with Criminal Records](#) [Nov. 2015].

8 [Richard Pérez-Peña, Contrary to Trump’s Claims, Immigrants Are Less Likely to Commit Crimes](#), *NEW YORK TIMES* (Jan. 26, 2017).

9 See [Margaret \(Peggy\) Stevenson, Expungement: A Gateway to Work](#), *CLEARINGHOUSE* (April 2015).

A sealed or expunged conviction generally still counts as a conviction for immigration purposes.

mechanisms. Whenever anyone is arrested and fingerprinted in the United States, the arrestee's information is automatically sent to Immigration and Customs Enforcement via the Federal Bureau of Investigation.¹⁰ Immigration and Customs Enforcement receives this information from all local, state, and federal law enforcement agencies, regardless of the arrestee's citizenship or immigration status.¹¹ This is important because it means that, even where law enforcement agencies have made a policy decision not to share information affirmatively with immigration authorities, Immigration and Customs Enforcement is still able to maintain a separate database of automatically generated arrest information. These records will remain available for use in immigration proceedings and for establishing enforcement priorities, even if the record is erased from a state or local database.

Moreover, sealing or even expunging a conviction does not generally eliminate the immigration consequences associated with that conviction because sealing or expunging does not usually alter the individual's culpability but merely affects whether the record is accessible. As a result, a sealed or expunged conviction generally still counts as a conviction for immigration purposes.¹²

The main exception to this rule is with applicants for Deferred Action for Childhood Arrival, or DACA, for whom expunging certain convictions—even without attacking

the validity of that conviction—may remove criminal record-based bars to eligibility and offer some discretionary benefit.¹³

Attacking the Underlying Conviction.

Another class of tools attacks the underlying record, altering the very fact of conviction on certain charges. By actually attacking and not just hiding the underlying conviction, these tools can effectuate crucial immigration relief.

Pardons are likely the most ubiquitous form of postconviction relief that can touch on immigration issues. The Immigration and Nationality Act includes a specific provision exempting pardoned convictions from counting as certain removable offenses.¹⁴ Some states also have record-clearing mechanisms that allow the petitioner to challenge the underlying validity of a conviction or modify its sentence. Common examples include habeas petitions, vacatur, and other state statutes that allow courts to overturn convictions for specifically enumerated reasons.¹⁵

A few states have also enacted creative laws that help remedy specific immigration problems. For certain criminal grounds of removability under the Immigration

and Nationality Act, the length and type of sentence imposed can mean the difference between removal and being permitted to remain in the United States. For example, some “aggravated felony” grounds of removability apply only if the imposed sentence included jail or prison time of one year or more.¹⁶ Under two separate California laws, Penal Code Section 17(b) and Proposition 47, petitioners can request that the court reclassify certain felony convictions as misdemeanor charges carrying a maximum sentence of 364 days or less, and thereby petitioners can avoid deportation under this ground.¹⁷ In other words, this type of postconviction relief can actually eliminate immigration consequences for convictions that previously triggered removability.

Record Clearing to Relieve Other Collateral Consequences. Criminal records can create obstacles to various aspects of everyday life, including employment, housing, child custody, education, and travel.¹⁸ For immigrant clients, the stigma of a criminal record may be especially damaging since immigrants are already subjected to harmful crime-related stereotypes.

Depending in part on the client's immigration status, record clearing may offer relief from these collateral consequences. For most documented immigrants, including lawful permanent residents, asylees, refugees, people with special immigrant juvenile status, or anyone else with a work permit, the employment-related benefits of

13 *Kathy Brady & Rose Cahn, Helping Immigrant Clients with Proposition 47 and Other Post-Conviction Legal Options* 36 [2016]. In addition, standard expungements of first-time drug possession convictions that occurred before July 14, 2011, in every state within the 9th Circuit can eliminate the conviction for immigration purposes (*id.* at 11).

14 See 8 U.S.C. § 1227(a)(2)(A)(vi).

15 E.g., New York's 440 motions allow courts to vacate a conviction based on nine distinct grounds, including constitutional violations or newly discovered evidence that may have resulted in a “more favorable” verdict for the defendant (N.Y. CRIM. PROC. LAW § 440.10 (2017)). Rule 30 motions in Massachusetts provide a similar statutory remedy for convictions obtained “in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts” (MASS. R. CRIM. P. 30(a)).

16 *Brady & Cahn, supra* note 13, at 14. Another section of the Immigration and Nationality Act subjects documented immigrants, such as lawful permanent residents, refugees, and asylees, to deportation if they have been convicted of a “crime involving moral turpitude” within five years of entering the country. However, this ground of deportability applies only if the *potential* sentence was for one year or more (*id.* at 11).

17 *Id.* See CAL. PENAL CODE § 17(b) (2017); California Department of Corrections and Rehabilitation, *What You Need to Know About Proposition 47* (n.d.).

18 See *Stevenson, supra* note 9.

10 U.S. Immigration and Customs Enforcement, *Criminal Alien Program: Key Initiatives* (n.d.).

11 *Id.*

12 See *In re Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (if “court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains ‘convicted’ for immigration purposes”).

Expunging someone's criminal record may complicate immigration proceedings by eliminating documentation that is required for certain immigration applications.

expungement are basically the same as for citizen clients: eliminating or reducing the length of a criminal history also reduces or eliminates these collateral consequences.

In contrast, expungements do not necessarily benefit undocumented workers, whose immigration status may prevent them from working in jobs that conduct criminal background checks anyway. There are some exceptions—for example, occupational licensing agencies in California cannot consider immigration status but can evaluate criminal records in licensing decisions—but the immigration risks of filing a standard expungement petition often outweigh the benefits for undocumented clients.¹⁹

In general, advocates should think critically about the effect of expunging criminal records for noncitizen clients—without assuming that all clients will benefit in the same way—and clearly explain the benefits, limitations, and risks of expungement in a particular case. This will allow clients to make informed decisions about whether filing an expungement petition is worthwhile.

The Risks of Filing Expungement Petitions on Behalf of Noncitizen Clients

Filing standard expungement petitions on behalf of immigrant clients presents two main concerns. First, expunging someone's criminal record may complicate immigration proceedings by eliminating documentation that is required for certain immigration

applications. Second, advocates should at least consider whether filing a petition or bringing a client to court will risk contact with immigration authorities.

As a preliminary note, anyone who works with immigrant clients must understand how criminal records can put those clients at serious risk of immigration problems. Any arrest or contact with the criminal justice system, even without a conviction, can lead to removal of undocumented immigrants. Criminal records can also make documented immigrants (such as lawful permanent residents) deportable, even for old and minor convictions. For example, any “aggravated felony” conviction can subject noncitizens to removal and bar them from certain kinds of immigration relief, such as cancellation of removal, voluntary departure, and asylum.²⁰ Vaguely defined “crimes of moral turpitude,” certain domestic violence offenses, drug convictions, firearms offenses, and even some nonconviction records can also put noncitizens at risk.²¹ The crimes that make someone removable are defined by federal statutes or case law and do not necessarily depend on how states classify these offenses. Because removable offenses differ from state to state, consulting with

a local expert on criminal immigration law when issues arise is essential.

At first blush, clearing an immigrant's criminal record may seem to reduce the risk of deportation or other adverse immigration consequences, but expungement can actually create barriers to immigration relief. In some jurisdictions, if an expungement petition is granted, the client's criminal record will be completely destroyed, meaning that the client, law enforcement, the courts, and federal immigration authorities will no longer have access to any information about that record or the underlying criminal case.²² However, as discussed above, immigration authorities will still have a record of the initial arrest because Immigration and Customs Enforcement maintains its own database of criminal records. This can cause two problems. First, although some state laws explicitly allow people not to report expunged criminal record information on employment applications or other official documents, applicants for immigration relief are generally required to report all arrests and convictions, including expunged records. If they fail to report this information, applicants may be denied relief, regardless of what the state expungement statute says.

Second, when applying for immigration benefits, including citizenship, immigrant clients often have the burden of proving what happened in their criminal case, and expungement may hinder the client's ability to obtain necessary documentation. This risk is likely mitigated by obtaining certified copies of the underlying criminal file so long as these copies show the charges and their final disposition.²³ Before the record is cleared, the client or

²⁰ See [American Immigration Council, Aggravated Felonies: An Overview](#) (Dec. 16, 2016). Note that aggravated felonies are defined by federal law and need not be classified as a felony under state law. In fact, some “misdemeanor offenses can be aggravated felonies even if no sentence was imposed. For example, conviction of ‘sexual abuse of a minor;’ any crime involving deceit or fraud (e.g., welfare fraud, credit card fraud, passing bad checks, forgery), where the loss to the victim exceeds \$10,000; or failure to appear to face certain felony charges, regardless of how the charge was resolved could all be considered an aggravated felony regardless of the sentence” (Brady & Cahn, *supra* note 13, at 42).

²¹ 8 U.S.C. §§ 1182(a)(2), 1227(a)(2).

²² See, e.g., [18 PA. CONS. STAT. § 9122](#) [2017].

²³ Although what proof U.S. Citizenship and Immigration Services will require is difficult to predict with certainty, these types of documents have generally been sufficient, according to immigration lawyers.

¹⁹ See [S.B. 1159](#), 2013–2014 Leg. (Cal. 2014). See also [Educators for Fair Consideration, Career License Opportunities for ALL!](#) (n.d.).

Some record-clearing mechanisms can keep clients from being deported, while others could put them at risk of removal or block them from obtaining immigration benefits.

advocate must obtain certified copies of the criminal record and store them in a safe place. Without a certified copy, the client may not be able to prove to immigration authorities that an arrest did not result in conviction for a removable offense, and the client's application for immigration relief could be delayed or denied.

While many advocates fear that simply filing a petition on behalf of an immigrant client could somehow alert Immigration and Customs Enforcement to that client's presence, to date there have been no verified incidents of removal proceedings being triggered by the filing of an expungement petition. Nonetheless, expungement petitions are public records, and, before filing, the advocate should at least investigate if and how the local court collaborates with immigration authorities. In some jurisdictions, courts may have policies against sharing immigration status information with Immigration and Customs Enforcement, while in other areas such information sharing may be common practice.

The risks of expungement are especially important to consider when filing on behalf of undocumented clients, who can be deported simply for being in the United States without authorization.²⁴ As discussed above, expungements rarely benefit undocumented workers in the same way that they benefit other immigrant workers, and filing a petition on behalf of an undocumented client may not be worth the risk unless the client and advocate have identified a specific benefit.

Before filing a petition, advocates should screen for certain factors that increase the risk of filing for immigrant clients. Advocates should first consult with an immigration attorney before moving forward with expungement if the client has been convicted of a crime, is undocumented, or has any of the following red flags for immigration problems.

Does your client have an active bench warrant?

If so, filing a petition or bringing your client to court could result in the client's arrest and could trigger removal proceedings. Have your client consult with a criminal defense and immigration attorney regarding how to deal with the bench warrant.

Has your client been previously removed?

Reentering the United States after being deported not only can bar someone from certain types of immigration relief but also can lead to criminal prosecution and imprisonment.²⁵ If your client was removed previously, consult with an immigration attorney before filing a petition.

Has your client ever had to abide by a protection-from-abuse order?

Criminal convictions are not the only legal proceedings that can make someone removable. Violations of protective orders can also lead to deportation.²⁶ If your client has violated a protective order, bringing the client to court may carry increased risk.

²⁵ *Id.* § 1326.

²⁶ 8 U.S.C. § 1227(a)(2)(E).

Strategies for Protecting Immigrant Clients in Expungement Proceedings

If a noncitizen client decides to go forward with expungement after evaluating the risks and benefits described above, advocates can use certain strategies to help protect the client.

First, if local rules permit, advocates should consider using their organization's address on the expungement petition instead of their client's. If Immigration and Customs Enforcement is monitoring court filings, using a "care of" address instead of a client's home address could avoid leading federal immigration authorities to a client's home.

Second, before the expungement petition is granted, advocates should make sure the client has obtained certified copies of the criminal file. In some states the criminal record is destroyed almost immediately after the petition is granted, and so advocates may not have time to request a certified copy after the hearing. If a state allows petitions to be filed on paper only, advocates should obtain certified copies shortly after sending the paperwork to the court. Advocates should also emphasize to the client that the client will still have to report the expunged record when applying for immigration relief and explain to the client the potential consequences of failing to disclose this information.

Third, if possible, advocates should consider advising noncitizen clients not to come to the expungement hearing. Bringing an immigrant client to court, especially criminal court, always carries some risk. In Philadelphia, for example, an expungement petition is first reviewed by a trial commissioner and is granted if the district attorney's office does not object. Because

²⁴ See 8 U.S.C. § 1227(a)(1).

the client has no opportunity to testify at this stage, there is no reason to risk bringing the client to court. Even if the client can testify, advocates should make sure to re-evaluate the issues described above at the time of the hearing to determine whether the benefits of bringing the client to court outweigh the potential immigration risks.

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Navigating the complexities of representing immigrant clients in the record-clearing context can often be difficult and time-consuming. Some record-clearing mechanisms can keep clients from being deported, while others could put them at risk of removal or block them from obtaining immigration benefits. Thoroughly evaluating the risks and benefits of expungement in these cases has never been more important, and advocates must do their best to guide their clients through this tricky analysis.

SETH P. LYONS

Staff Attorney—Employment Unit

Community Legal Services
1424 Chestnut St.
Philadelphia, PA 19102

215.981.3790
slyons@clsphila.org



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