



**A  
GUIDE FOR  
NEW YORK  
COUNSELORS  
OF  
INDIVIDUALS  
IN RECOVERY  
FROM  
ALCOHOL  
AND  
DRUG  
DEPENDENCE  
AND  
EX-OFFENDERS**

# **Employment Discrimination**

**and**

# **What to Do About It**

**Legal Action Center  
153 Waverly Place, New York, NY 10014**

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## **Foreword**

This manual was prepared by the Legal Action Center, a public interest law firm with headquarters in New York City, on the basis of many years' experience challenging employment discrimination against people in recovery from alcohol or drug dependence and ex-offenders and persons with HIV/AIDS. It has been nearly a decade since we published the first edition of this manual. Over the years, our efforts at combating this type of discrimination have gone a long way toward making employers aware of their responsibilities and employees and job applicants of their rights as well as their responsibilities. Yet discrimination in employment remains a problem. This manual describes what can be done. Many public and private job opportunities which appear, at first, to be closed to people in recovery or those with criminal histories or HIV/AIDS can be opened, but these individuals need help to achieve this end. This assistance need not come from lawyers and, because of the scarcity of legal resources, very often cannot. In many cases people like you can make the difference between one of these individuals getting the cold shoulder and getting the job.

This manual is designed to serve as a guide for people trying to help individuals in recovery and ex-offenders find and hold on to jobs. If you have any questions or if you need legal assistance in solving a problem involving any of the issues raised in this manual, you should feel free to write or call the Legal Action Center. The Center is also available for consultation in the area of confidentiality of drug or alcohol patient records and HIV-related information.

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# I. Introduction

## Is It Illegal for Employers to Discriminate

### — Against People in Recovery from Alcohol or Drug Dependence?

While the answer is not as simple as the question, the answer is often “yes.”

**Two federal laws directly address the issue of employment discrimination against individuals with past or current alcohol or drug problems. They are the federal Rehabilitation Act of 1973 (Title 29 of the U.S. Code, sections 701 et seq.) and the Americans with Disabilities Act of 1990 (Title 42 of the U.S. Code, Sections 12101 et seq.).**

**The Rehabilitation Act prohibits discrimination against persons with a past or current "disability" (as well as those who are perceived to have a disability) who are otherwise qualified to perform the job they seek or hold.** Under this Act (like the later Americans with Disabilities Act described below), a “disability” is defined as a physical or mental impairment that substantially limits one or more of an individual’s major life activities, including working, learning, performing manual tasks, and caring for one’s self, among others. Both the federal agencies responsible for implementing and enforcing the Act and federal courts in a number of cases, including cases in New York, have ruled that individuals in recovery from alcoholism or drug dependence, including those in methadone treatment, are covered by the law’s definition of individuals with “disabilities,” and that the Act forbids employers from discriminating against job applicants and employees because of their history of or treatment for alcohol or drug dependence, if those individuals are qualified to perform their jobs. Being “qualified” for employment means being able, with or without reasonable accommodations, to perform the essential functions of a job.

In 1990, the Act was amended so that individuals who “**currently** engage in the **illegal use of drugs**” are **not** protected from discrimination by the Act; but individuals in recovery, including those in treatment (both drug-free and methadone treatment) who are no longer illegally using drugs, are protected. The Act continues to protect individuals with current as well as past alcohol problems (as long as they satisfy the definition of disability) who are qualified for the jobs they hold or seek.

The Rehabilitation Act applies to private employers who hold federal government contracts, and to both private and public employers who receive federal grants or aid. The Act also applies to the federal government itself. (The law's nondiscrimination provisions are contained in sections 501 through 505 of the Act, 29 U.S.C. §§ 791-794.)

**The Americans with Disabilities Act (ADA) extends the Rehabilitation Act's prohibition against disability-based discrimination to most employers, private and public.** The ADA prohibits employers from discriminating against a "qualified individual with a disability" and requires, as does the Rehabilitation Act, that employers make "reasonable accommodations" to the known physical or mental limitations of a qualified individual with a disability. The ADA defines a "disability" as a past, current or perceived "mental or physical impairment" that "substantially limits" one or more of an individual's major life activities, such as those as noted above. The federal agencies charged with implementing and enforcing the ADA and a number of federal courts have ruled that alcohol and drug dependence are — or in individual cases can constitute — substantially limiting impairments under this definition; but the law requires this determination to be made on an individualized, case-by-case basis, examining how the condition affects the particular person's functioning. As in the Rehabilitation Act, however, the ADA's definition of an individual with a "disability" does not include an employee or job applicant who currently engages in illegal drug use.

In sum, persons in recovery from drug dependence (including those enrolled in rehabilitation programs), and those erroneously perceived to be drug users, have been and in many if not most cases will be recognized as individuals with a "disability" under the ADA. This is also the case with recovered, current and perceived alcoholics. If these individuals are "qualified" for the job in question — which, like the Rehabilitation Act, means able to perform the essential duties of that job, with or without reasonable accommodation — the ADA protects them from discrimination. The ADA applies to all state and local governments and agencies, as well as to private employers with 15 or more employees.

**New York State has its own fair employment law, the New York State Human Rights Law (Exec. L. §§ 290 et seq.).** The State Human Rights Law offers important protections to people with past, current and perceived alcohol or drug problems in New York, as it reaches more employers and protects a broader range of people affected by drug- or alcohol-related discrimination than the federal laws just described. The State Human Rights Law applies to all public and private employers with four or more employees, as well as occupational licensing agencies, labor organizations and employment agencies, in New

York. It prohibits employment discrimination based on any past or current “disability,” or any condition perceived by others to be a disability. The law defines a disability as “a physical, mental or medical impairment” which does not interfere with the individual’s ability to perform the job requirements “in a reasonable manner.” The state law’s definition of disability is broader than the ADA’s and Rehabilitation Act’s and includes more people, because individuals do not have to prove (as they do, under the federal laws) that their particular health condition substantially limits one or more of their major life activities to be considered a person with a covered disability.

The New York State Division of Human Rights, the agency responsible for enforcing this law, has ruled that alcoholism is a “disability” covered by the Human Rights Law. (Human Rights Division Memorandum of Law #803, September 1978.) Both state and federal courts have also confirmed the Human Rights Law’s coverage of alcoholism, and state courts have recognized its coverage of alcohol abuse, as well. The Division of Human Rights has also ruled that a history of drug addiction, and participation in a methadone maintenance program as a form of treatment for addiction, are “disabilities” under the law. (Division General Counsel’s Opinion in Perez v. State of New York, November 21, 1979.) Thus the Human Rights Law forbids New York employers from discriminating against individuals who have histories of or are in treatment for alcoholism or addiction so long as those individuals can “reasonably perform” the jobs they have or seek.

In addition — and in contrast to both the federal laws and the New York City law noted next — the State Human Rights Law provides legal protections to persons currently using illegal drugs if they can safely perform their job duties. So people who are regarded — rightly, as well as wrongly — as being involved in current illegal drug use (for instance, on the basis of a drug test) are permitted to challenge job discrimination based on such use under this law.

**New York City also has its own Human Rights Law.** This law prohibits job discrimination against individuals on the basis of an actual or perceived “disability,” which is generally defined as a “physical, medical, mental or psychological impairment” or a history or record of such an impairment. The law’s definition of a disability includes “alcoholism, drug addiction or other substance abuse” (or a history or record of these conditions) **if, but only if**, an individual is “recovering or has recovered” and “currently is free of such [alcohol or drug] abuse.” The City Human Rights Law, like the federal laws discussed above, provides no protection for those currently involved in illegal drug use. (Administrative Code of the City of New York, §§ 8-102(16)(c), 8-107(15)(c).)

The remedies available to persons who believe they have been subjected to discrimination in violation of the federal, state and local laws just discussed are described in Chapter V of this manual.

### — Against Ex-Offenders?

There is no federal statute that specifically protects ex-offenders from employment discrimination. But a policy of denying people jobs on the basis of arrests not followed by conviction, and policies that bar anyone who has a criminal record from employment, have been ruled illegal as applied to racial minorities under federal civil rights laws. Since minorities are arrested and convicted at a greater rate than whites, courts have found that such policies have a racially discriminatory effect. So, in some cases, a refusal to hire on the basis of a criminal record may be illegal race discrimination under federal law.

**The New York State Human Rights Law prohibits public and private employers and occupational licensing agencies from denying any individual a job or license (or otherwise discriminating against that person) because of any arrest that did not result in conviction (Exec. L. § 296(16)).** This law also makes it illegal for most employers and occupational licensing agencies to ask job or license applicants to disclose or discuss any arrest that did not lead to conviction (see p. 10). The law does not apply to police or "law enforcement" jobs, though.

**As for arrests that did lead to conviction, New York State has two laws that protect persons with criminal records from discrimination by employers and occupational licensing agencies: Article 23-A of the Correction Law (§§ 750-755) and the New York State Human Rights Law (Exec. L. § 296(15), (16)).**

Although it is legal for employers and licensing agencies to ask individuals about past **convictions** for criminal offenses, Article 23-A of the Correction Law (§§ 750-755) protects ex-offenders from being unfairly denied jobs or occupational licenses because of their convictions. It makes it illegal for an employer to have a policy of not hiring any person with a criminal history: employers must individually consider each person who applies for a job and make a decision about hiring that individual based on his qualifications and other factors, including his conviction history. This law applies to all New York State —

C occupational licensing authorities,

- C public employers (except for positions involving members of law enforcement agencies), and
- C private employers of more than 10 employees.

It makes it illegal to deny any ex-offender a job or license because of his or her past conviction(s) **unless** that person's conviction(s) are "directly related" to the job in question, or hiring or licensing that person would create an "unreasonable risk" to the safety of people or property.

An example is a person who applies for a job as a school bus driver and who has a conviction for driving while intoxicated (DWI). This individual's DWI conviction can be considered to be job-related in this instance, but would not be if he were applying for a job as a stock clerk with no driving duties.

**Employers must consider the following factors when determining whether a person's conviction history is job-related or whether that person would, because of that history, pose an unreasonable risk to the public or to property:**

- (1) New York's public policy to encourage the licensing and employment of ex-offenders;
- (2) The specific duties and responsibilities necessarily related to the license or employment being applied for, and the bearing, if any, that the ex-offender's criminal history will have on his or her fitness to perform these duties and responsibilities;
- (3) The time that has elapsed since the ex-offender's criminal conduct occurred, and the ex-offender's age at the time of its occurrence;
- (4) The seriousness of the individual's offense or offenses;
- (5) The legitimate interest of the employer or licensing agency in protecting property, specific persons, or the general public; and

(6) Any evidence of rehabilitation that an ex-offender presents, including a Certificate of Relief from Disabilities or Certificate of Good Conduct (which are discussed at pp. 38-40).

Whether a particular ex-offender's conviction(s) are, or are not, so "job-related" as to justify a denial of employment or licensure must be determined on a case-by-case basis.

The **New York City Human Rights Law** also protects persons who have had **arrest(s) not followed by conviction**, as well as persons with past **conviction(s)**, from employment discrimination in the same way that the State Human Rights Law and Article 23-A of the Correction Law protect these individuals. (Administrative Code of the City of New York, §§ 8-107(10), (11).)

The remedies available for persons who believe that they have been illegally denied employment or licensure because of their criminal history are discussed in Chapter V.

#### — **Against Persons With HIV/AIDS?**

In addition to protecting persons with alcohol and drug histories from employment discrimination as noted above, **courts have ruled that both the federal Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 (see above) also protect persons with HIV infection or related illnesses, including AIDS, from discrimination in employment.**

The **ADA** prohibits discriminatory hiring and personnel practices by employers against qualified individuals with disabilities, and requires employers to make "reasonable" efforts to accommodate an individual's mental and physical limitations, so long as these accommodations do not impose an undue hardship on the employer.

HIV infection and related illnesses, including AIDS, have been ruled disabilities under the ADA. As with most other mental or physical conditions, the question whether HIV disease constitutes a covered "disability" under the ADA (because it is an impairment that substantially limits one or more of a particular individual's major life activities) must be considered and decided on a case-by-case basis and must, among other factors, take into consideration how the use of medication affects the individual's functioning. Based on such individualized assessments, courts including the U.S. Supreme Court have concluded that HIV is a covered disability even in cases of asymptomatic HIV infection. The Supreme Court, for example, ruled that a woman with HIV infection was covered by the law because

HIV is a health impairment that, in her case, substantially limited the major life activity of reproduction.

Since the ADA protects persons who are regarded (even erroneously) as having a covered disability, as well as those who actually have such disabilities, individuals who are denied or subjected to discriminatory treatment in employment on the basis of an employer's belief or fear that they have HIV/AIDS can claim the ADA's protection. This could include, for example, a person whose injection drug use history is discovered by her employer, and who is then fired because the employer assumes she must have AIDS — even though that assumption is wrong.

In the context of employment, the ADA protects a person with HIV/AIDS from discrimination if he or she, with or without reasonable accommodation, can perform the essential functions of a job. An employer must make its decision on the basis of the individual's capabilities at the time of hiring — not on the basis of speculation that the person may be unable to do the job in the future, or that hiring him or her may result in higher health insurance premiums or worker's compensation costs. This provision obviously is significant for people with HIV disease, whose health may deteriorate in the future, and whose medical needs may well force employers to pay higher insurance premiums.

The **Rehabilitation Act** provides essentially the same protections as the ADA to persons working for or applying for employment with the government or for private employers who receive federal grants or contracts. Although the Act's implementing regulations do not specifically address HIV/AIDS, courts have found that HIV infection and AIDS are covered by the Act.

The **New York State Human Rights Law** and the **New York City Human Rights Law** both prohibit discrimination in employment against persons with HIV disease in the same way that they protect persons with drug or alcohol histories from discrimination. (See pp. 2-4.) Many cases, brought under both the State and the City laws, including cases decided by the state's highest court (the New York State Court of Appeals), have confirmed these laws' protection of individuals with HIV and AIDS who (with or without reasonable accommodations) are able to perform their jobs.

## Illegal Pre-employment Inquiries

### — About an Alcoholism or Drug Dependence History or HIV/AIDS

**The federal Rehabilitation Act, the ADA and the New York State Human Rights Law all limit the kinds of pre-employment inquiries an employer can make about whether or not a job applicant has a current or former disability.** Employers may **not** ask job applicants about whether they have or have had a disability, or about the nature or severity of a disability, before a job offer is made. An employer may only ask questions about whether an applicant can perform the duties of the job prior to making that person an offer of employment.

As discussed above, the **Rehabilitation Act's** and the **ADA's** definition of "disability" includes a history of alcohol or drug dependence and HIV/AIDS (see pp. 1-2, 6-7). Asking job applicants questions such as "Have you ever had an alcohol or drug problem?" or "Are you infected with HIV?" or "Do you have AIDS?" are therefore illegal pre-employment inquiries under these federal laws.

Pre-employment medical examinations are also prohibited by these federal laws. However, after making a job offer to an individual, an employer may make medical inquiries and/or require the individual to undergo a medical examination before beginning work; and the employer may condition the job offer on the satisfactory results of such medical examinations or inquiries. But this information may not be used in a discriminatory manner by the employer. Remedies for violations of the Rehabilitation Act and ADA are discussed in Chapter V of this manual.

Note: the ADA explicitly provides that a **drug test** (such as a urinalysis) is **not** a medical examination for purposes of these provisions. This means that employers **may** require job applicants to undergo pre-employment drug tests and may require employees to submit to drug tests without violating the ADA (although other laws may govern whether and when such testing by employers is permitted). But if a drug test reveals information about an applicant's or employee's disability — for instance, a test may reveal an individual's participation in methadone treatment and, so, his history of heroin addiction — it is illegal for the employer to use this information in a discriminatory manner: to refuse to hire or fire the individual on the basis of this information. On the other hand, a test to detect alcohol use is considered a medical examination under the ADA.

The **New York State Human Rights Law** also limits the kinds of inquiries that employers may legally make about job applicants' "disabilities," which include a history of or treatment for alcoholism or addiction or HIV/AIDS (see pp. 2-3, 7). The law is designed to prevent employers from discriminating against any individual on the basis of any past or present disability that does not prevent that person from reasonably performing the duties of a job.

Thus the New York State Division of Human Rights has ruled that it is illegal in most cases for employers to make general inquiries about whether a job applicant has or ever had a disability, or to ask applicants to list all mental or physical problems that they have or once had. The law allows pre-employment inquiries into disabilities and medical examinations only when an employer shows they are based on a "bona fide occupational qualification" (BFOQ) — a qualification standard that is job-related and material to job performance. Therefore, pre-employment inquiries such as "Have you ever abused drugs or alcohol or been treated for alcoholism or drug addiction?" or "Are you HIV positive?" or "Do you have AIDS?" ordinarily violate the State Human Rights Act. The law also generally prohibits pre-employment medical examinations unless based on a BFOQ. Employers are, however, permitted to ask an applicant whether he has any mental or physical impairments that would prevent the person from performing in a reasonable manner the activities of job being sought. (Exec. L. § 296.1(d); State Division of Human Rights Rulings on Inquiries.)

In contrast to the ADA, **drug and alcohol tests** that are conducted before a job offer is made, including tests done during a pre-employment medical examination, are considered to be pre-employment inquiries under the State Human Rights Law. Such testing therefore violates the state law unless an employer can demonstrate that it is job-related with respect to the particular job in question.

Once the applicant has been accepted for employment, the employer may ask about disabilities. This information, however, must not be used in a discriminatory manner when making promotion or other employment decisions. (State Division of Human Rights Rulings on Inquiries.)

Persons who believe they have been asked, or denied employment because of, illegal pre-employment inquiries about their alcohol or drug problems or treatment or HIV status may file complaints with the federal or state agencies charged with enforcing these anti-discrimination laws or in state or federal court, as discussed at pp. 51-59.

### — About a Criminal History

No federal or state law prohibits employers from asking job applicants if they have ever been **convicted** of an offense; and employers may legally consider an applicant's conviction(s) in making hiring decisions. And, if an applicant is less than truthful about his criminal history when asked about it, either on an application or in person, and the employer discovers the deception, that individual can be fired legally.

The New York State Human Rights Law, however, does make it **illegal** for almost all public and private employers, occupational licensing agencies, employment agencies and labor organizations in New York to make pre-employment inquiries about **arrests** that did not finally result in a conviction. This means that most employers may not legally ask applicants (in job application forms, interviews or otherwise) such questions as "Have you ever been arrested?" or require them to "list all arrests." An exception is made for agencies that are given specific statutory authorization to ask about and consider arrests that did not result in conviction. Few agencies have such statutory authority, but law enforcement agencies are authorized to ask applicants for police and "peace officer" positions about all arrests, whether or not they led to conviction.

Another New York law (Criminal Procedure Law § 160.60) gives individuals the legal right not to answer any question about any arrest that did not finally result in conviction. **If an individual is faced with an illegal application question asking about arrests, he is only required to reveal his convictions. If he has no convictions, only arrests that did not lead to conviction, then he can legally answer "no" to the question.** Again, however, this rule does not apply to law enforcement positions where the employer has statutory authority to ask about such arrests. Individuals who have been asked such questions, or been denied employment on the basis of arrests that did not lead to convictions, may file complaints with the state's Human Rights Division or New York City Human Rights Commission, or may file a lawsuit in state court. (See pp. 60-61.)

## **II. The Importance of Preparation to Prevent Discrimination**

**Once an employer has rejected an applicant, it is much more difficult to reverse the decision than it would have been to prevent it initially.** Thoroughly preparing your client before the hiring process begins can often avert a rejection on the basis of the client's alcoholism or addiction history or criminal record or HIV status. Further, if there is any possibility that an employment decision may be challenged in court, you should establish solid groundwork for a legal challenge from the beginning. This means finding out the facts so that you can build an accurate factual record — before controversy makes that difficult to do. So, before you send your client to apply for employment, you should learn about the job seeker and find out about the prospective job and hiring process.

### **Learn About the Job and the Hiring Process**

Exploring the requirements of the job in advance enables you to anticipate the employer's concerns and to assemble the kind of information and documentation that will address those concerns. Many of the things you should learn about prospective employers are things any good job developer would inquire about as a matter of course. Knowing about the hiring process can reduce the anxiety that everyone feels when applying for a job. In addition, knowing how selections are usually made will enable you to ascertain whether your clients are being treated differently than other applicants. Some questions you should ask include:

- What kinds of jobs are available?
- How many positions are opening?
- What duties does the job entail?

- Is there a standard application form? (The applicant should secure an extra copy whenever possible.)
- Is there an interview? Who conducts it?
- Who makes the final hiring decision?
- How long does the process usually take?
- How are applicants usually notified about hiring decisions?
- Is a medical examination required? Does it involve urine testing or other screening for drug use?
- Are applicants fingerprinted?
- Does the employer run a routine check with law enforcement agencies for applicants' criminal records?
- Does the employer obtain reports on applicants from a consumer credit reporting agency?

## **Learn About the Client**

The importance of having a thorough interview with your client **before** he or she applies for a job cannot be overstated. The goal is, of course, to anticipate potential difficulties in order to help applicants present themselves in the best possible light. You should explore every aspect of a job seeker's past that an employer might want to know about. This may require digging into the person's background beyond the point dictated by considerations of privacy or tact. You should follow up inconsistencies or improbabilities until you are convinced that you have the entire, unvarnished story. It is important to realize that clients may be reluctant to reveal potential problems out of fear that you will somehow disapprove or not assist them. Recognize this fear and confront it in a straightforward way.

The cardinal rule in learning about your client is to think like an employer. Whatever an employer might want to know, you should want to know. However, to avoid surprises later, you should press potential problem points one step further than an employer would. Whatever would make an employer nervous should make you nervous. You-as-counselor should not feel comfortable until you-as-employer feel comfortable.

## **What Questions to Ask: The Pre-application Interview**

### **— History of Drug or Alcohol Problems**

Find out the exact nature and duration of your client's past alcohol or drug problem. Review with your client the treatment your program has provided. Also ask whether she has undergone alcohol or drug treatment at another program. If so, find out where and when, and discuss your client's record in the program. You should confirm the client's treatment history and readiness for employment with the treatment program's medical and counseling staff. If some or all of your client's treatment is or was at a program other than your own, remember that you must obtain your client's written consent before making any contact with that other program.

### **— Arrest and Conviction History**

For each arrest you should determine the date, the exact charges, and the disposition of the charges. (See "Dealing with a Criminal Record," pp. 24-28.) If the arrest resulted in a conviction, you should obtain the name of the court in which the conviction was issued and sentence imposed, and learn how and where the sentence was served. Ask if your client is still on probation or parole and who his supervisor is.

### **— HIV/AIDS**

If your client tells you that he or she has HIV/AIDS, discuss with your client his or her physical and mental ability to perform current or future employment. You may wish to confirm your client's medical treatment and readiness for employment with the client's care provider(s) **if** it seems appropriate **and** your client provides his or her consent. (Note: In New York, people generally may not be required by employers, vocational counselors or

others to disclose their HIV status or to undergo HIV tests without their voluntary, informed consent.)

### — **Employment History**

Find out about all of your client's former jobs. Determine where the client worked, for how long, and what responsibilities the job entailed. Pay special attention to the reason for leaving a position — make sure it is specific and that you know all the circumstances surrounding it. For example, ask if your client resigned instead of being terminated. You should know whether a "personality conflict" was the result, for example, of your non-smoking client's having to work in close quarters with a cigar-smoking boss or the result of haphazard attendance. Ask if your client was ever subject to disciplinary action at work. Find out if the client was ever turned down for unemployment compensation.

### — **Military History**

Find out whether your client was subject to court martial or disciplinary action short of court martial. Ask whether any tours of duty were unexpectedly shortened. Determine the status of the discharge and if possible get a copy of the discharge papers (Form DD-214). Remember that "under honorable conditions" is **not** the same as "honorable." (See "Military Discharges," pp. 41-44.)

### — **Unaccounted-for Gaps of Time**

If there are substantial periods of time not accounted for by employment, the military, incarceration, or the like, inquire about them closely. These periods are often warning flags to an employer.

A pre-application interview should also explore positive traits and accomplishments that can be worked into an interview or can somehow be highlighted on a job application form. The most important traits are those that counterbalance the applicant's weak spots.

## **III. Applying for the Job**

### **The Job Application**

After you have learned about your client's background, the job, and the hiring process, it is crucial to counsel her about how to apply for the job. If you can, ask the job-seeker to bring in the application form so you can assist your client directly in completing it. If that is impossible, be sure your client understands how to answer all questions to her advantage.

In general, job seekers should limit their responses to the scope of the inquiry. For example, if an application form asks a person to list all "convictions" or convictions of all "offenses," the applicant should list both criminal (felony and misdemeanor) and noncriminal (violations) convictions, but should not list any arrest not followed by a conviction (for example, an arrest resulting in acquittal or dismissal). If an application form just asks about "crimes," "convictions of crimes" or "criminal offenses," only misdemeanors and felonies need be listed. If an application asks only about a current alcohol or drug problem, past use should not be mentioned.

When in doubt, however, it is usually more prudent to reveal than to withhold; an employer who discovers anything that the applicant has not disclosed may give it more attention than it deserves, and may even accuse your client of willful misrepresentation. You should advise clients that they are under no obligation to volunteer information about their drug or alcohol histories or criminal records, or about any other troublesome aspect of the past. However, a job seeker should not attempt to evade an ambiguously worded inquiry when the questioner's intent is clear.

One of the most important things many of your clients can do to dramatically increase their chances of getting a job is to deal with their criminal record. Chapter IV, which begins on p. 24, is devoted entirely to that subject.

## Talking About HIV/AIDS

As discussed at the beginning of this manual, employers are prohibited from asking a job applicant about HIV infection or AIDS unless the employer has first made the applicant a conditional offer of employment. After an offer of employment is made but before the applicant begins work, an employer is permitted to ask him or her health-related questions; but the employer may not exclude the individual from work unless the reasons for the exclusion are job-related and justified by business necessity. Thus, even after an offer of employment, the employer should only make inquiries related to the applicant's medical fitness to perform the essential duties of the job.

This means that an employer may ask a person with HIV or AIDS only questions limited to determining if he or she is able, with or without reasonable accommodation, to perform the job. Ordinarily an employer may **not** ask an applicant whether he or she is HIV-positive or has HIV-related illness or AIDS.

## Talking About Alcohol or Drug Dependence or Criminal History

Just as with HIV/AIDS, employers may only ask job-related questions concerning a person's history of alcohol or drug dependence, and only after making a conditional offer of employment. Employers may ask pre-employment questions about criminal **convictions**, but not arrests that did not lead to convictions. When preparing to discuss their alcohol or drug use or criminal history, your clients should bear in mind some common employer prejudices and beliefs about people in recovery or ex-offenders:

- the job seeker continues to abuse alcohol or drugs or is still committing crimes;
- the job seeker will relapse or revert to crime;
- drug dependence, alcoholism or a criminal record stems from a fundamental and irremediable character flaw;
- alcoholism or drug dependence results in lasting physical and/or psychological impairment; and

— all persons with former alcohol or drug problems and ex-offenders are unreliable and irresponsible.

Your client can overcome these prejudices by **minimizing the negative aspects of his record and emphasizing the positive**. Your client can minimize an addiction or alcoholism history by describing it honestly and succinctly. He can put it into perspective by describing briefly any family problems or other circumstances which helped cause or foster the problem. A client can also mention his relative youth at the time he was using, and stress the length of time he has been drug- or alcohol-free, or successfully maintained on methadone.

If some of your clients have a criminal record, they should minimize its negative aspects by attempting to place it in context. Your clients should **not** try to rationalize their behavior after the fact, or assert innocence of crimes for which they have been convicted or dispute the seriousness of any conviction. You should advise clients who are inclined to do this that these tactics are usually counterproductive. The average employer will assume that the job seeker either has difficulty facing reality or thinks the employer can be conned.

Your clients **should** inform the employer of any mitigating circumstances connected with a criminal record. For example, a client can point out the relationship between her convictions for driving while intoxicated and her simultaneous alcoholism; this allows her then to argue persuasively that, having successfully conquered one problem, she has conquered both. Another client might successfully emphasize that his last conviction was ten years ago. A third individual could note that she was only 17 years old when she committed the only serious offense for which she was convicted.

### **Demonstrating Rehabilitation**

Your client can emphasize the positive by demonstrating her rehabilitation. You should make sure your client meets an employer only when ready with a firm statement of her rehabilitation efforts. To help your client stress the positive parts of her background, look carefully at some of the following things:

— Progress in Treatment Program

If your client has decided to reveal her addiction or criminal history, she should consider mentioning her participation in treatment or counseling. If your client has a good record in the program, she will almost certainly want

to inform a potential employer of this. For example, your client might well want to mention that she has participated voluntarily in drug treatment for three years, particularly if periodic testing at the program verifies that she has not reverted to drug or alcohol abuse during that period.

— Previous Employment Record

If your client had been consistently employed during any period, either before or after becoming involved with alcohol, drugs or crime, you should emphasize the fact. You should highlight good performance at and low absenteeism in previous positions, especially if the jobs involved difficult working conditions such as irregular hours or compulsory overtime.

— Educational Achievements

What your client studied may not be nearly as important as the fact that she did study. For example, if a woman's two-year residence in an alcoholism treatment program appears on her resume as a two-year gap between jobs, she can effectively stress her faithful attendance at a community college during the same two years.

— Social and Religious Activities

Your client should stress any such activities. If she has a conviction for larceny or embezzlement, for example, the fact that she handles the cash at a neighborhood fundraising event may be even more impressive.

— Military Achievements

A good military record, especially if it displays commendations, educational achievements or other special accomplishments, can be helpful; it shows an ability to work well in a structured environment.

You should give serious consideration to providing your client with a letter of reference detailing your knowledge of her efforts at rehabilitation. Employers tend to look more favorably on applicants who present such concrete evidence of their abilities. You should remember that, before you can give any recommendation, either orally or in writing, on behalf of a person in recovery to whom you have provided treatment services, federal rules governing confidentiality require that your client first sign a consent form permitting you to make such a recommendation.

The job seeker should also include letters of recommendation from former employers if they are willing to provide them. Your client should send letters of recommendation from clergy, community leaders, or anyone else who might impress an employer. Employers tend to worry about whether applicants will make stable and reliable employees, so letters of recommendation should address that issue as favorably as possible.

Finally, clients with Certificates of Relief from Disabilities or Certificates of Good Conduct for their conviction(s) should always offer employers copies of those Certificates, for they provide additional evidence of rehabilitation which must be considered by employers in making hiring decisions about ex-offenders (see pp. 38-40).

You should also be aware of a federal program that encourages the employment of people in recovery and ex-offenders: the **Work Opportunities Tax Credit Program**. Under the program, employers receive substantial tax credits over two years for each person hired from the target group. To find the specific requirements for the tax credit in your area, contact the New York State Department of Labor Economic Development Services Unit at 1-800-472-8612 or 1-800-HIRE-992.

Educating the employer about such tax advantages could well make the difference in a job decision for a marginal client.

Another federal program helps ex-offenders and individuals in recovery obtain bonding. Employers often require bonding for employees in positions as diverse as messengers, cashiers, or stockbrokers, to name just a few. The **Federal Bonding Program (FBP)** may bond a person who has been offered a job conditioned upon her being bonded, even if she has been denied bonding by a private insurance company. The FBP will insure individuals for up to \$5,000 or \$10,000 (depending on the nature of the job) for a maximum of six months. The FBP is available at no charge to either employer or employee. After the six month period ends, the bond can be renewed through the FBP, but the employer or employee must pay for it. There are a limited number of bonds available each year; therefore, you should contact the New York State Department of Labor Economic Development Services Unit noted above for eligibility and availability information.

## Some Special Problems

### Correcting an Employer's Misinformation

Even if your client both discloses his alcohol or drug or criminal history and presents evidence of rehabilitation to a potential employer, he may still encounter difficulties. Frequently an employer obtains criminal record information or information about a client's alcohol or drug problem from an independent source. In these cases, what the employer knows about an applicant may be more extensive than what the applicant has been asked to reveal.

As stated above, the employer may obtain a rap sheet that contains errors, information that should have been sealed, information about commitments to alcohol or drug treatment programs, or data about alcohol- or drug-related charges that an employer may interpret as evidence of drug or alcohol dependence. This leaves the applicant in an awkward position, since he may not have an opportunity to comment upon information — some of it incorrect — that may well negatively affect the employer's decision.

There is no blanket prescription for handling this problem. Usually, if you know that the employer has obtained damaging misinformation, it is prudent to correct it even if the explanation carries you beyond the scope of the initial inquiry. In less clear-cut situations, what an applicant should do depends upon such factors as:

- whether you can determine what information the employer has obtained;
- whether that information is accurate;
- whether it can be explained effectively;
- whether the explanation is potentially even more damaging than what the employer has already discovered.

Your client should certainly correct any errors that occur on his rap sheet before the employment process begins. If that is not possible, and your client knows that the employer will obtain his rap sheet, it is advisable to provide the potential employer with copies of court records for the items in error even if the employer does not request them. (See pp. 32-

33 about disposition slips.) Doing so at the outset will demonstrate to the employer that your client wishes to be candid about his record and should minimize the damaging effect of any errors on the rap sheet that the employer finally receives.

### Polygraph Tests

The federal **Employee Polygraph Protection Act of 1988** (EPPA) makes it illegal for virtually all private employers to use polygraph or "lie-detector" tests on job applicants, and severely restricts their use on employees.

Employers are generally prohibited from requiring or requesting any employee or job applicant to take a polygraph test and from discharging, disciplining, or discriminating against an employee or prospective employee for refusing to take a polygraph test. Federal, state and local governments are not affected by the law. Government employers may therefore still order polygraph tests.

The EPPA permits polygraph tests to be administered in the private sector to prospective employees of certain companies providing security services (armored cars, alarm systems, or guards), and to certain prospective employees of pharmaceutical manufacturers or distributors. The EPPA also permits private firms to ask an individual employee to take a polygraph test when the employee is reasonably suspected of involvement in a workplace theft that resulted in economic loss to the employer.

Where polygraph tests are permitted, they are subject to numerous strict standards concerning the conduct of the test. People being examined have a number of specific rights, including the right to written notice before testing, the right to review the questions before being hooked up to the polygraph machine, the right to refuse or discontinue the test, and the right not to have the results disclosed to unauthorized persons.

### How to Respond to Illegal Questions

Now that you know how to recognize illegal questions (see the discussion at pp. 8-10), you and your client must confront the real issue: how to respond. If you anticipate the problem far enough in advance, you may be able to get the employer to eliminate an

illegal question. You or an attorney can, without revealing the identity of the client, advise the employer of the illegality of the inquiry and the employer's potential legal liability.

If that approach is unsuccessful, or if time is of the essence, what should an applicant do? He or she can assert the legal right to refuse to answer the question, but the employer's response may be to deny employment for failure to cooperate. You could then elect to challenge the denial by filing a complaint or lawsuit under the laws discussed at pp. 1-7. Or the applicant can simply answer the question, recognizing that doing so helps the employer defeat the very purpose of the law at issue. When deciding which approach to take, consider:

- how badly the applicant needs the job;
- how damaging his answer would be;
- how likely it is that the applicant would prevail in a legal challenge arising from a refusal to answer the question;
- how committed your program is to pursuing the matter to a hopefully-not-bitter end.

### Lying

Everything we have said so far presupposes that the job seeker candidly and fully responds to questions concerning alcohol or drug problems or convictions. (Note that withholding information about any arrest not followed by conviction is not considered lying. See page 10.) A question that frequently comes up is, "Should my client lie about his or her record?" We advise clients to tell the truth. Wholly apart from ethical considerations, a number of factors militate against lying. Where statements on an application or elsewhere are made under oath, knowingly making a material misstatement leaves one open to the risk of criminal prosecution. While it is unlikely that criminal charges would be brought against someone who lies on an employment application, the severity of the possible sanction suggests that it is a gamble not worth taking.

Moreover, from a practical standpoint, lying is often foolhardy. An employer can learn about an applicant's drug or alcohol history or criminal record in a variety of ways. Many employers subject applicants or employees to medical examinations, some of which

include urine tests, that may reveal previous alcohol or drug dependence or maintenance on methadone. In New York, many employers are authorized to obtain copies of applicants' and employers' rap sheets. (See p. 31 for a list of employers who have statutory authority to get a copy of an applicant's rap sheet from DCJS.) Sometimes criminal records also reveal a former drug or alcohol problem, since convictions for alcohol- or drug-related crimes or diversions to treatment by the court may be signals to the employer that the person had such a problem. Employers also have access to consumer credit reports, which may reveal a person's drug or alcohol use history, arrests and/or convictions. If your client applies for bonding, his record will be verified. Large private employers frequently have internal security departments that investigate applicants' criminal and alcohol or drug histories through informal mechanisms.

Thus, even if your client lies about his history, the employer may well learn the truth from an independent source. In these cases, the employer will probably reject your client on the ground that he lied. The chances of successfully reversing such a rejection are almost non-existent.

Even if a client doesn't actually make false statements on an application, failing to answer specific questions may cause an employer to reject the person for omitting material information. These decisions are also difficult to challenge.

Even if your client manages to obtain the job without the employer detecting his record, he may not be able to breathe easily. Some employers do not fingerprint people until after they are hired. Others routinely encounter delays in securing criminal record information, scheduling physical examinations, and verifying statements on the application. If the criminal record or drug or alcohol history subsequently comes to light, the employer may well fire your client for having lied or omitted material information on the application. Even if you suspect that your client's history was the primary factor motivating the employer, the employer will almost certainly win an administrative hearing or lawsuit challenging the dismissal; nearly all administrative agencies and courts consider misrepresentation on an application a legitimate reason for terminating an employee.

## IV. Dealing with a Criminal Record

### Kinds of Offenses

It is important to know what type of offense your client has been convicted of, as employment restrictions are sometimes defined by the class or severity of offense. In addition, your client's record may contain a conviction for a noncriminal offense, which is not the same as conviction of a crime. An "offense" is any disposition for which a fine or imprisonment may be ordered. "Criminal" offenses are limited to misdemeanors and felonies. In New York the following types of offenses are recognized:

— Violation: a noncriminal offense usually disposed of in a local criminal court. The penalty may consist of a fine and/or up to 15 days of imprisonment. Common violations include disorderly conduct, simple trespass, simple harassment, and possession of less than 7/8 ounce of marijuana. Conviction for any of these offenses is **not**, under New York law, conviction of a **crime**, although it does fall under the broader phrase "crime or other offense."

— Misdemeanor: a lesser criminal offense usually dealt with by a local criminal court, but sometimes by a County or Supreme Court. Misdemeanors may result in a fine and/or sentences of a minimum of 15 days to a maximum of one year of imprisonment. Common misdemeanors include prostitution, **petit** larceny, possession of small amounts of controlled substances, a **first** conviction for driving while intoxicated by alcohol or while impaired by drugs, possession of burglar's tools, criminal trespass, and assault in the third degree. Conviction of a misdemeanor offense is considered conviction of a crime.

— Felony: a serious criminal offense punishable by more than one year's imprisonment (although the person may not have served any time in a jail or prison). Felony charges come under the jurisdiction of the Supreme Court or County Court. Some common felony charges are burglary, grand larceny, robbery, arson, possession or sale of controlled substances, and second convictions for driving while intoxicated by alcohol or impaired by drugs.

## Special Dispositions of Charges

Often criminal charges are disposed of by means other than a conviction or acquittal at trial. This can be accomplished by:

- Dismissal, which is the equivalent of an acquittal. All charges are dropped and the accused retains the same status he or she had prior to the arrest.
- Adjournment in Contemplation of Dismissal (ACD). The case is adjourned for a specific period of time, during which the District Attorney has the option of reinstituting a case against the accused. If the case is not reopened within that period, the charges are dismissed as described above.
- Vacating or Setting Aside a Conviction. As a result of a successful appeal or other special factors, a conviction may be "set aside" or "vacated" by the court. In this state, such action has the effect of nullifying a New York conviction.

## Types of Sentences

- Conditional or Unconditional Discharge, which is a conviction although there may be little or no jail sentence imposed. A discharge can be conditional (for example, requiring the person to attend an alcohol or drug treatment program) or unconditional, meaning that the convicted defendant serves no sentence whatsoever.
- Probation, which is a conviction where the court places an individual under the supervision of the Probation Department for a specified period of time. When the court places an individual on probation, it may require him or her to comply with certain conditions such as participating in a drug or alcohol treatment program, making restitution, and the like. If the individual violates the conditions of probation, the court may order him or her to prison for the remainder of the sentence.

## Proceedings Involving Minors

Under New York's Penal Code, "infancy" is a valid defense to most criminal charges. This means that, except in the special situations described below (see discussion of "juvenile offenders"), a person less than sixteen years old is not criminally responsible for his or her conduct. In general, a person between the ages of 7 and 16 who has engaged in conduct which would otherwise subject him or her to criminal charges will be processed in the Family Court, and, if found guilty, will be adjudicated a juvenile delinquent. A person between 16 and 18, on the other hand, **is** considered an adult under the Penal Code, and may be tried and convicted of criminal charges. Among the various adjudications to which a minor may be subject are the following:

— Juvenile Delinquency Adjudications: a set of procedures under New York's Family Court Act in which the court holds "fact-finding hearings" to determine whether a child between the ages of 7 and 16 is a juvenile delinquent. A "juvenile delinquent" is a child who has been shown to have committed an act which would constitute a crime if committed by an adult. Once a showing of delinquency has been made, the court then holds a "dispositional hearing" to determine whether the child requires supervision, treatment or confinement.

— Juvenile Offender Adjudications: a special treatment of children aged 13 to 16 who have committed certain **serious** criminal acts. These children may be prosecuted as **adults** outside of the Family Court, and, if convicted, are considered to have felony convictions. Fourteen and 15 year-olds can be tried in the criminal courts for certain violent felonies, including kidnapping, murder, arson, rape and robbery. Thirteen year-olds may be treated likewise if the charge is murder.

— Youthful Offender Adjudications: a special treatment afforded to some young adults who are charged with having committed a criminal offense. Although persons between the ages of 16 and 18 are considered adults under New York's Penal Code, a court may choose to designate such a person a youthful offender in order to avoid the stigma that often accompanies conviction of a crime. In New York, a youthful offender (Y.O.) adjudication is **not** a conviction and does not disqualify a person for public employment (including the right to hold public office) or licensure. Since a Y.O. is not a

conviction, it need not be disclosed to a prospective employer, unless that employer specifically asks the applicant if he or she has ever been adjudicated a youthful offender.

## **Getting and Cleaning Up Arrest and Conviction Records**

As part of the pre-application process for clients with criminal histories, your client should obtain copies of arrest and conviction records whenever possible. There are several reasons why this is extremely important. First, although there are restrictions on the release of criminal records by the Division of Criminal Justice Services, the agency responsible for keeping the centralized file of such records in New York State (see p. 28), employers often obtain this information from several sources, including local law enforcement agencies, the FBI, and consumer reporting agencies. It is important to ascertain exactly what information the employer will obtain whenever possible so that problem areas can be addressed directly. This is especially crucial if the criminal record reveals a history of alcohol or drug dependence. Some examples might be a criminal record that reveals a conviction for possession of drugs or driving while intoxicated, or shows that an individual was required to enter or remain in a treatment program as a condition of probation or in lieu of some other punishment.

Second, arrest and conviction records often contain errors or information that should not be there. If your client finds this out in time, steps can be taken to correct the records before the employer sees them.

Third, often your client will not know the disposition of certain charges or will have forgotten some arrests. Finding out the details will enable the client to present his criminal record to employers in the most accurate and straightforward way possible. Clients who present inaccurate information to employers are frequently rejected or fired for "lying" during the application process, even though they did not intend to mislead. There is often little anyone can do to help a client in this situation (see pp. 22-23).

You should note that obtaining and cleaning up criminal records often takes a long time — frequently as long as several months. Your client should begin the process as early as possible in the search for employment — perhaps even before beginning the actual job hunt — in order to clean up the record before an employer obtains it.

## How to Get Copies of Arrest and Conviction Records

In New York State, there are several million arrest records ("rap sheets") on file in the computers of the Division of Criminal Justice Services (DCJS). If a person has been arrested and fingerprinted for violating a state or local law in New York, even if she were **never** found guilty of the charges, she has a rap sheet on permanent file at DCJS. **These records cannot be destroyed or "expunged."** A variety of criminal justice agencies (such as police departments, courts, probation offices and prosecutors) as well as certain employers and others have the right under New York State law to see these records.

A DCJS record contains information about arrests, arrest charges, whether the person was convicted or not, and, if so, what he was convicted of, what sentence the person received, and more. Individuals in New York are entitled to see their own DCJS records. There are different ways to do this, depending in part on where your client lives.

Clients **throughout New York State** can obtain their rap sheets at the offices of DCJS in Albany. Clients can file a formal "Request for Record Review" form with DCJS, along with a complete set of fingerprints (which can be obtained from a local law enforcement agency). The client (including those in jail or prison) must pay a \$25 fee. Only U.S. Postal Service, American Express or Traveler's Express money orders will be accepted as payment. The application fee can be waived if the client can demonstrate that he or she suffers a "financial hardship." In most cases, a public assistance benefit card or Medicaid card should be enough to show an inability to pay.

Clients can get the "Request for Record Review" form by calling or writing the DCJS Record Review Unit (see below). The client's completed request form, fingerprints and payment (or proof of "financial hardship") should be sent to:

New York State Division of Criminal Justice Services  
Record Review Unit  
4 Tower Place  
Albany, New York 12203  
(518) 485-7675

The Record Review Unit will then send your client a copy of his or her rap sheet, along with a "Statement of Challenge" form that can be used to ask DCJS to correct any mistakes or problems that are found on the rap sheet (see p. 27). DCJS removes the

individual's name and other identifying information from the copy of the rap sheets it sends to people who want to review their own rap sheets. This is to protect the client's privacy and assure that his or her rap sheet is not misused.

In **New York City**, individuals who want to obtain their rap sheets may go directly to the Police Department at One Police Plaza in Manhattan. There they will be fingerprinted for a \$40.00 charge, and their records will be sent directly to them.

If your client lives in the **Buffalo/Erie County** area, he or she can obtain the forms necessary to review a copy of his or her rap sheet through the Erie County Central Police Services. The first step is to call (716) 858-6760 to arrange an appointment where the person will be given a record review request form and a fingerprint card, which he or she can take to a local police office for fingerprinting.

Clients with a criminal history in more than one state will often need to get a rap sheet from each state in which they were arrested or a copy of their federal rap sheet from the Federal Bureau of Investigation (FBI).

Your clients may obtain a copy of their **FBI rap sheets**, which contain arrest and conviction records from all 50 states plus any federal criminal history information, by requesting them in writing from:

Federal Bureau of Investigation  
Criminal Justice Information Division  
SCU MOD D2  
1000 Custer Hollow Road  
Clarksburg, West Virginia 26306

The letter must specify that the individual is making a request "under the Freedom of Information Act" for his or her FBI record. Included with the request for records should be the applicant's name and current home address, the place and date of birth, and a set of fingerprints. Fingerprints can usually be obtained from a local police department or criminal court. Charges for this service vary and you should call ahead to find out what they will be. A certified check or money order for the \$18.00 processing fee (payable to the U.S. Treasurer) must also be included with the letter. The processing fee can be waived if proof of

indigence is included with the application. A stamped, self-addressed envelope should also be included.

Federal rap sheets contain state arrest and conviction records as well as records of federal offenses. However, it is worthwhile to consider whether the information contained in the federal rap sheet is worth the time and expense involved in obtaining it. Except for banks and federal agencies, most employers will obtain state rap sheets. In addition, FBI records are often more incomplete or inaccurate than state records. As discussed before, it is best to ascertain exactly what information the employer will have and plan accordingly.

Family Court records — records of offenses involving children aged 7 to 16 who have been found to be "juvenile delinquents" (see p. 26) — are not usually available to the public or to the person involved. However, records of youths aged 13 through 15 who have been treated as "juvenile offenders" — which means that they have been tried as adults for certain serious felony charges (see p. 26) — are reported on DCJS rap sheets.

Records of Youthful Offender adjudications (see p. 26) are also treated differently than Family Court records. Records of Y.O. adjudications generally are kept confidential, and DCJS will not include information about Y.O. adjudications on the rap sheets that it sends to employers who are authorized to obtain them (see below). You should be aware, however, that the rap sheets that DCJS shows to individuals who are reviewing their own criminal records do contain information about Y.O. adjudications.

### **Access to, and Limits on Dissemination of, Criminal History Records and Information**

Potential employers may get information about individuals' criminal records in a variety of ways.

First, many public employers and occupational licensing agencies in New York are authorized by statute to obtain copies of applicants' and employees' **criminal history records (rap sheets)** from the Division of Criminal Justice Services (DCJS). If an employer or licensing agency fingerprints an individual during the application process or employment, that usually means that agency does have the necessary statutory authorization to obtain the individual's DCJS rap sheet, and will do so.

Certain private employers are also authorized to obtain criminal history information maintained by DCJS (see below). But DCJS may **not** disseminate rap sheets or other information to the general public or to employers who have no statutory authorization to get such information. Thus, most private employers do not have access to individuals' rap sheets (although they may be able to obtain criminal history information in other ways).

Here is a list of some employers in New York State who are allowed to obtain rap sheets on job applicants:

- Public employers (federal, state and local governmental agencies), including all law enforcement agencies
- Occupational licensing agencies
- Child care agencies
- Hospitals
- Museums
- Home health aide agencies
- Financial institutions, such as banks and brokerage houses
- School bus driving companies

There are limits on the kind of information that may be reported by DCJS in the rap sheets it disseminates to those employers who do have the right to obtain such records.

Adult convictions for misdemeanors and felonies may be and are reported in the DCJS rap sheets such employers obtain. Convictions for violations (noncriminal offenses) will also appear in those rap sheets, unless the violation has been "sealed" (see pp. 24, 36).

Arrests that did **not** result in a conviction may also be sealed so that they will not appear on the rap sheets DCJS disseminates to authorized employers and licensing agencies. Finally, as noted earlier, arrests that resulted in a Youthful Offender adjudication (which is not considered a conviction) are also omitted from such DCJS rap sheets.

Whether or not an employer is entitled to obtain DCJS rap sheets, it can get information about individuals' criminal records in other ways. Often a potential employer will request job applicants to submit **disposition slips** to the employer as part of the application process. This is legal, as long as the employer is inquiring about information related to a

conviction. A disposition slip is an official court record of a criminal case that tells what the individual was arrested for and how the case was finally resolved.

The disposition slip contains the date of arrest, the charge(s) the person was arrested for, the docket number of the case, and the disposition of the case (for example, dismissal or conviction). If the case led to conviction, it will describe the charge(s) the person was finally convicted of (which may be different from the arrest charges), as well as the date of conviction and the sentence. Disposition slips are important when clients need to correct errors on their rap sheets or when employers have obtained inaccurate information about arrests or convictions (see pp. 27-28).

As noted earlier (see p.10 ), most employers are forbidden to ask applicants about any arrest that did not lead to conviction; therefore, they should not ordinarily ask for disposition slips concerning these kinds of arrests. Sometimes, however, an employer will find out about a person's arrest, but will have no information or wrong information about its final outcome. In those cases, it may be useful for your client to give the employer a disposition slip to confirm that the arrest did **not** result in conviction.

To obtain a disposition slip, your client should request it from the clerk of the court to which he or she was brought after being arrested. In New York City, misdemeanors are handled through the Criminal Court(s) and felonies are handled in the Supreme Court(s). In Nassau and Suffolk counties the County Court handles felony prosecutions and the District Court handles misdemeanors. There is usually a fee for disposition slips (\$5.00 per slip is about average). Some courts will provide disposition slips without charge to people who were represented by Legal Aid. It is helpful but not essential to know the date of arrest, the indictment number, or the docket number of each case when asking the court clerk to locate the proper records. Clients should bring identification when they go to obtain records from the court.

Some employers routinely screen prospective employees by obtaining **background investigation reports** from a consumer reporting agency. "**Consumer reporting agencies**" (also known as credit reporting or background investigation agencies) are firms that prepare reports on individuals for employment, credit or insurance purposes. Their reports often contain information about the individual's criminal record, employment history, credit rating, and sometimes past drug or alcohol problems. The agencies gather this information by checking public records (such as court files) and by talking to former employers and others about the person.

Consumer reporting agencies are regulated by the **New York Fair Credit Reporting Act** (N.Y. General Business Law § 380) and a similar, but somewhat less strict, federal law, the **Federal Fair Credit Reporting Act** (15 U.S.C. § 1681). These laws limit the information that can be included in a "consumer report" about an individual's criminal record or substance abuse history.

The New York Fair Credit Reporting Act prohibits consumer reporting agencies from reporting any information about an "arrest or criminal charge unless there has been a criminal conviction for such offense, or unless such charges are still pending." Thus, a consumer report cannot include information about an arrest or charge that ultimately was dismissed or resulted in a conviction of an offense that is not a crime. (An offense classified as a "violation" is not a crime under New York Law. See p. 24.) There is, however, one exception to this rule: reports may contain information about a person's detention by a retail store (e.g., for shoplifting), provided that the individual "has executed an uncoerced admission of wrongdoing."

In addition, the New York Fair Credit Reporting Act sometimes prohibits the reporting of criminal convictions and other adverse information more than seven years old. Consumer reports cannot contain information about "records of conviction of crime which, from date of disposition, release, or parole, antedate the report by more than seven years," information relating to "drug or alcoholic addiction" that ended more than seven years ago, or "any other adverse information" more than seven years old. However, these restrictions on reporting old information do not apply if the employment in question would involve an annual salary of \$25,000 or more.

Like the New York law, the Federal Fair Credit Reporting Act sometimes forbids the reporting of negative information that is more than seven years old. The federal law's restrictions on reporting this information do not apply if the job has a salary of \$20,000 or more.

Finally, both the New York and Federal Fair Credit Reporting Acts contain protections against inaccurate reports. It is a violation of the New York law for a consumer reporting agency to report any information, including information about convictions, which it has reason to know is inaccurate. The federal law similarly requires that agencies "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual . . . ."

Before requesting a report about a job applicant from a consumer reporting agency, an employer must notify the applicant that a report may be requested. If an "investigative consumer report" is to be obtained, the applicant must first sign a written authorization consenting to the preparation of the report. (An "investigative consumer report" is a consumer report for which information is gathered through personal interviews as well as written records.) If an employer does obtain a consumer report, the employer must provide the individual with the consumer reporting agency's name and address upon written request. The person can then contact the consumer reporting agency, which is required to provide the individual with a copy of the report and any other information in the agency's files concerning that individual.

### **How to Clean Up a Criminal Record**

Once your clients have learned about their criminal record, they should try to clean up any mistakes that occur on the rap sheet. Some of the most common mistakes are arrests that have no dispositions, erroneous or incomplete sentencing information, and duplication of entries (which may make one arrest and conviction look like several). Such errors or omissions may make your client's record appear more serious than it is in reality.

If errors are detected in the DCJS records, a request for correction of the records can be made by writing a letter to DCJS' Record Review Unit (see below) or by completing and sending it the "Statement of Challenge" form that is attached to the rap sheet DCJS sends to individuals who wish to review their criminal record (see p. 29). You must send the disposition slip or other documentation showing the correct and final outcome of cases that are mistakenly or incompletely reported in your rap sheet. (You must have **original** disposition slips for this. Photocopies are not acceptable for record correction.) DCJS will investigate the document under dispute and inform the applicant of the result of the investigation. If the accuracy or completeness of the record is still questionable after an investigation, your client may appeal the decision by writing:

New York State Division of Criminal Justice Services  
Record Review Unit  
4 Tower Place  
Albany, New York 12203  
(518) 485-7675

If your clients find errors in their federal (FBI) records, they should contact the agency that reported the information to the FBI (for example, the local police department that reported an arrest in a case where no disposition is shown on the FBI record).

If inaccurate or incomplete information appears in a consumer reporting agency's file concerning a conviction record or other matters (see p.33), the individual should notify the agency. The agency has an obligation under the Fair Credit Reporting Act to promptly reinvestigate and correct any errors. If the agency finds that an item was in error, it must, upon request, notify any employer who was given the information during the previous two years about the correction. If the agency, after reinvestigating, still believes that the information is complete and correct, the individual has the right to file a statement with the consumer reporting agency concerning the dispute. Any future reports made by the agency containing that information must state that the information is disputed and include the person's statement.

### **How to Get Criminal Records Sealed**

If your clients have arrests that were resolved in their favor or resulted in a conviction for a violation, they may be eligible to have the records of those arrests sealed. **Misdemeanor and felony convictions cannot be sealed.** Having a case sealed means that information about the sealed arrest is removed from the version of the rap sheet that will be sent to employers and others. However, **it is important to understand that the record of a sealed arrest is never completely destroyed.** A record of all your arrests will still remain in a confidential file in the DCJS computer. Sealed information can, under very limited circumstances, be released.

The first category of arrests that can be sealed are those that were resolved in the individual's favor: cases that resulted in acquittal, dismissal, or a decision by the police or prosecutor not to prosecute are examples. The law authorizing the sealing of records of arrests not followed by convictions (§ 160.50 of the Criminal Procedure Law) became effective in September 1976 and applies only to arrests in New York State. Records of arrests that were favorably resolved after that date should be automatically sealed.

Arrests that have been sealed under § 160.50 of the Criminal Procedure Law are **fully** sealed. This means that they are deleted from most rap sheets which are sent to employers

and others. Court records concerning the arrest are not available to the public. The law requires police fingerprints and photographs to be either destroyed or returned to the attorney who defended the client in the case. The law gives the police department or criminal justice agency holding the photos or fingerprints the discretion to decide whether to destroy or return them. In practice, though, police may retain these records.

Another law permits the records of cases resulting in conviction for most violations (see p. 24) to be sealed. This law (§ 160.55 of the Criminal Procedure Law) went into effect in September 1980. Records of convictions of violations that occurred after 1980 were supposed to be sealed automatically, but sometimes were not. Administration of the law was haphazard for a number of years, so oversights occurred frequently.

A 1991 law was enacted to fix this problem by simplifying the process by which information about sealable cases is forwarded to DCJS by individual courts. The result has been that dismissed cases and most convictions for violations occurring **after** November 1, 1991 are now sealed automatically by DCJS unless the judge in the case specifically orders the case not to be sealed.

Convictions of violations that have been sealed under § 160.55 are only **partially** sealed. The record of conviction is deleted from most DCJS rap sheets and fingerprints and photographs are required to be destroyed or returned to the client's attorney, but the court records are **not** sealed. Thus, an employer or investigator checking through court files may be able to obtain information about a sealed violation.

The records of arrests that occurred **before** the sealing laws went into effect — cases resolved in an individual's favor before September 1976, and cases ending in conviction for a violation before September 1980 — have not been sealed automatically, and will not be sealed unless a sealing motion is made. In addition, if your client had a "sealable" arrest between the time the sealing laws went into effect and 1994 (when the procedures for dealing with fingerprints and photographs were changed), he should verify with the court that dealt with the case whether his fingerprints and photographs were destroyed or returned to his attorney. Your client must make a sealing motion in those cases, too. Your client's DCJS rap sheet will also show whether or not an arrest has been sealed.

If an individual's arrest was resolved **before** it reached court (because either the police or the prosecutor elected not to prosecute), the client should obtain documentation that the case was not prosecuted and send it to DCJS. DCJS will then seal that arrest event on the

client's rap sheet. Check with the appropriate police precinct or prosecutor's office to obtain the needed documentation.

If your client has arrests that can be but have not yet been sealed, it **may** be necessary to file a formal motion to seal the records of those arrests. Each court is free to set up its own procedures for the sealing of cases. Your client should call the court where his case was heard and ask the court clerk how to apply to have a case sealed in that court. Some courts require written sealing motions; others will seal records on the basis of an oral request. Check with the clerk of the court that dealt with the case to find out the proper procedure. The clerk will know whether the services of an attorney will be needed to file a sealing motion, or whether the clerk can assist the applicant to prepare and file the motion without an attorney. (Clients who want to seal arrests or correct information on their rap sheets can consult How to Get and Clean Up Your New York State Rap Sheet, a manual prepared by the Legal Action Center.)

### **Certificates of Rehabilitation**

Since we know that misdemeanor and felony convictions cannot be sealed in New York State, the question is: is there anything that an ex-offender can do to mitigate the effect of these convictions? **Under the New York State Correction Law, ex-offenders can obtain a Certificate of Rehabilitation that removes many of the civil disabilities they may encounter because of their convictions.** For example, a number of New York statutes bar persons who have been convicted of certain offenses (often felonies) from getting certain jobs or occupational licenses. A Certificate of Rehabilitation will remove these statutory bars to jobs or licenses.

In addition to restoring many rights that are automatically lost because of a conviction, Certificates of Rehabilitation are important to the job seeker because they create a "presumption of rehabilitation." In legal terms this means that a conviction for which a person has a Certificate should not be a bar to employment or licensure in the absence of other evidence indicating that the person is not qualified for that job or license. Without the evidence of rehabilitation that these Certificates provide, ex-offenders are often put in the position of having to satisfy the employer that they will be reliable and trustworthy employees. This can be time-consuming and difficult under the best of circumstances, so clients should obtain Certificates as soon as they are eligible to do so.

Having a Certificate of Rehabilitation does not, however, completely protect an applicant from being denied a job or license because of a past conviction history. An

employer or licensing agency is still permitted, under Article 23-A of the Correction Law, to deny an ex-offender a job or license if his or her convictions can be considered "directly job-related" or would pose an "unreasonable risk" to the safety of people or property, as defined by Article 23-A of the Correction Law (discussed at pp. 4-6).

There are two types of Certificates of Rehabilitation: Certificates of Relief from Disabilities and Certificates of Good Conduct. Any person convicted of two or more felonies must apply for a Certificate of Good Conduct. Other ex-offenders may apply for a Certificate of Relief from Disabilities. Both certificates provide the same benefits to the holder, with one important exception which will be discussed later.

#### Certificate of Relief from Disabilities

A Certificate of Relief From Disabilities is available to any person who has been convicted of no more than a single felony during her lifetime. The number of misdemeanor convictions a person has does not matter; that is, an individual is eligible for a Certificate of Relief if she has no misdemeanors or many misdemeanors, so long as she has no more than one felony conviction. A separate Certificate of Relief must be obtained for each conviction. A temporary Certificate may be obtained even while the individual is on probation or parole. A Certificate is available to an ex-offender regardless of whether the offense occurred in New York State or in another state.

If, following a conviction, your client was incarcerated in a city or county jail or received a suspended sentence, a sentence of probation, or an unconditional or conditional discharge, the sentencing court determines whether to issue the Certificate. The court may issue it at the time of sentencing or any time thereafter.

If your client was incarcerated in a state correctional facility, the state Parole Board issues the Certificate. The Parole Board also handles Certificates for convictions that occurred outside of New York State or in federal courts.

To apply for a Certificate of Relief from Disabilities, request an application from the court that convicted the individual or from:

New York State Division of Parole  
Executive Clemency Bureau  
97 Central Avenue

Albany, New York 12206  
(518) 485-8953

The completed form should be submitted to the clerk of the appropriate court or returned to the Parole Board. Included in the information asked for on the application is the applicant's NYSID number. This refers to the identification number used to track that person's criminal history. It is not necessary to have this number when applying for a Certificate of Relief, but it may take longer to process the application without it. Unfortunately, most ex-offenders have no idea what their NYSID number is. If the applicant has ever been on probation or parole, her probation or parole officer can readily verify the number. Otherwise, leave the question blank and proceed with the application process.

Once the application is filed, the applicant will be investigated by the Parole Board or by the Probation Department connected with the court that is handling the Certificate application. If all goes well (as it usually does), a Certificate will be issued. Even without complications, the process may take several months.

#### Certificate of Good Conduct

If your client has more than one felony conviction, and hence is not eligible for a Certificate of Relief from Disabilities, she may be eligible for a Certificate of Good Conduct. As with the Certificate of Relief, the offenses did not have to occur in New York for an ex-offender to be eligible.

If the applicant has been convicted of an A or B felony, five years of good conduct is required before he will be permitted to apply for the Certificate. If the most serious conviction was for a C, D or E felony, three years of good conduct must be shown. The period of good conduct required for the Certificate begins when the person involved has paid any fines which may have been imposed and has been released from prison or parole, whichever is later.

Applications for a Certificate of Good Conduct can be obtained from:

New York State Division of Parole  
Executive Clemency Bureau  
97 Central Avenue  
Albany, New York 12206  
(518) 485-8953

### **Pardons (Executive Clemency)**

In some states executive clemency or a pardon is a common method of eliminating civil disabilities resulting from convictions. In New York, however, pardons are virtually impossible to get and are issued only after a detailed investigation. If there are unusually good grounds, your client may apply for executive clemency by writing:

New York State Division of Parole  
Executive Clemency Bureau  
97 Central Avenue  
Albany, New York 12206  
(518) 485-8953

Obtaining a pardon is a long and rarely successful process. You are well advised to encourage your clients to concentrate their efforts on obtaining Certificates of Relief from Disabilities or Certificates of Good Conduct rather than pursuing an almost certainly fruitless effort to obtain executive clemency.

### **How to Upgrade a Less Than Honorable Military Discharge**

Employers often request military records, especially when an applicant has little work experience. Frequently employers ask for copies of discharge papers (form DD-214) and inquire into what type of discharge your client received. There are several types of discharges:

- Honorable
- General
  1. Under Honorable Conditions
  2. Administrative
- Undesirable
- Bad Conduct (determined by court martial)
- Dishonorable (determined by court martial)

Most veterans receive honorable discharges, so if your client has a less than honorable (General or Undesirable) discharge it can pose a serious problem. Discharges are frequently upgraded, so encourage your client to apply.

Any person who leaves military service with less than an honorable discharge can file an application to have it upgraded with the appropriate branch of the service. Before applying, however, your client will need copies of his military records. You should request these records from:

Military Personnel Records Center  
9700 Page Avenue  
St. Louis, Missouri 63132  
(314) 263-3901

After an application to upgrade a discharge is made, the client's military records will be sealed; neither the applicant nor his counsel may view them. Having all of the military records is essential for success, so some veterans' groups advise applicants who have not secured copies of their records to withdraw their applications and resubmit them when they have obtained their records.

People whose bad conduct or dishonorable discharges were the result of a **special** court martial, or people who received less than honorable discharges because of disciplinary action short of court martial, should apply to the Discharge Review Board (DRB) of the appropriate branch of service. Ordinarily, one must apply within 15 years of the date of discharge from the service. However, anyone wanting to upgrade a discharge that occurred more than 15 years ago may file a motion with the Board of Correction of Military Records (BCMR) of the appropriate branch of service. Obtaining an upgrade from the BCMR is sometimes difficult because many older veterans' records were lost in a fire in St. Louis some years ago. Veterans' groups frequently encourage older veterans to apply nevertheless.

If your client's discharge was the result of a general court martial, then he must apply to the BCMR for upgrading. There is no time limit on this application. One also applies to the BCMR to correct any errors found in the discharge papers.

After a client applies to upgrade a discharge, the appropriate panel will evaluate the case. If the DRB is handling the case, there will probably be a hearing on the application. Applicants should have some sort of representation from an attorney, legal services agency, or a lay advocate.

If the BCMR is handling the case, there will probably not be a hearing. Rather, the matter is likely to be decided on the basis of the written materials submitted on the applicant's behalf. It is best to seek legal assistance in preparing these materials from a legal services agency or experienced lay advocate.

For information, assistance or appropriate referral regarding discharge upgrading, your client can contact the following:

American Red Cross of Greater New York  
150 Amsterdam Avenue  
New York, New York 10023  
(212) 787-1000  
(or check phone book for office nearest you)

New York State Division of  
Veterans' Affairs  
245 West Houston Street  
New York, New York 10014  
(212) 807-7229

Vietnam era veterans can also call:

Bronx Veterans Center  
226 E. Fordham Road, Room 220  
Bronx, New York 10458  
(718) 367-3500

Manhattan Veterans Center  
120 West 44th Street  
New York, New York 10036  
(212) 944-2917

Queens Veterans Center  
75-10B 91st Avenue  
Woodhaven, New York 11421  
(718) 296-2871

Brooklyn Veterans Center  
25 Chapel Street, Suite 604  
Brooklyn, New York 10021  
(718) 330-2825

Old discharge papers (form DD-214) carry numerical codes called "SPN" or "spin" numbers. The armed forces use these discharge and enlistment codes to identify certain kinds of people — including people with drug or alcohol problems. Since employers are often able to decode the spin numbers, clients should find out what they mean before giving employers military records. Clients can obtain new discharge papers without the spin

number by contacting the Military Personnel Records Center (see p. 42) and requesting copies of their DD-214 with the spin number deleted.

## V. If the Applicant is Rejected

### Informal Resolution

If a potential employer rejects your client when she applies for a job, you should try to determine if the client's alcohol or drug history, criminal history or HIV status affected the decision. When making this determination, you should consider your client's qualifications for the job in question in addition to her preparations for the hiring process. For example, if your client has three years' experience as a grocery store cashier and was denied a job as a restaurant cashier — after revealing a conviction for possession of drugs — ostensibly because she was not qualified, you can be fairly sure that her conviction influenced the decision.

When you feel reasonably convinced that your client's history (or HIV status) affected her rejection, the next step is to get the employer to admit this. Without such an admission, your efforts to resolve the matter informally (without resorting to formal legal proceedings) will probably fail. Moreover, even when formal legal measures are available, pursuing such remedies requires time, energy, and money. You may want to attempt an informal resolution first.

Often if your client politely asks why she was not hired, she will be told that it was because of her alcohol or drug use and/or criminal history and/or her HIV status. If that does not work, it may help for you to become directly involved. In that case, the circumstances surrounding your client's rejection will determine how you should approach the employer to learn the reason for your client's rejection. Sometimes you can simply write a non-threatening letter — something on the order of "I'm anxious to do a better job preparing people for employment and would therefore like to know what it is about Ms. X that made you decide not to hire her." You may want to use a more indirect approach if you suspect the employer may have an absolute ban on hiring ex-offenders or persons in recovery. In these cases you may send a letter stating your interest in placing former offenders or people in recovery in meaningful jobs, and inquiring about possible openings. Another option is asking someone unconnected with your agency to ask the employer about his or her policy toward your client groups.

Under New York Correction Law § 754, persons with criminal records who have been rejected for employment are entitled to request and be given a written statement of the reasons for their rejection from the employer. All employers subject to this law (that is, all employers in New York except law enforcement agencies and those with less than 10 employees) must respond to such requests within 30 days. The employer's response may help show that the person's criminal record was responsible for the decision not to hire.

If the employer is uncooperative or continues to claim that the applicant's history did not affect the decision, you may have to turn to the more formal measures we will discuss later. If, however, the employer admits (or the records show) that your client's record may have influenced the rejection, you should ask for an opportunity to sit down and discuss the matter. You are an excellent mediator for this task. You know your client well, and have researched the duties of the job. Thus you can show the employer how close the match is between your client's abilities and the requirements of the job. Keep in mind the same employer prejudices and concerns that you already prepared the applicant to recognize and meet.

You should proceed on two levels: to educate the employer about rehabilitation programs in general (and HIV disease if that is at issue) and to stress the qualifications and employability of the individual who has been rejected. Explain to the employer how your program operates. Help the employer understand that:

- the program is designed to get at the root of the alcoholism, addiction or criminal problem;
- persons with former problems who are drug- or alcohol-free can remain that way;
- many people with HIV infection are not at all impaired in their ability to work, and many people with symptomatic HIV disease, including AIDS, are fully capable of performing their jobs;
- ex-offenders can stay out of trouble with the law;

- employees maintained on methadone are indistinguishable from their co-workers in every material respect; and
- other comparable employers have knowingly hired individuals in recovery and ex-offenders and have not regretted the decision.

In making a case for a particular client, don't forget to assure the employer that the applicant is in fact sober, drug-free or successfully maintained on methadone; to explain what steps the program has taken to make the person job-ready; and to demonstrate that the applicant is responsible, stable, and respectful of others. How you show this will vary from case to case, but remember that simply asserting that the job seeker possesses these traits is usually insufficient. You should single out activities (for example, consistently arriving punctually for therapy), accomplishments (for example, successfully completing a series of courses), and experiences (for example, getting married) that support your assertions.

Sometimes it is appropriate to make sure the employer realizes its potential legal liability if it persists in denying your client a job. How you do this is extremely important. If you are too heavy-handed, the employer may take offense and refuse even to try to work things out amicably. If, on the other hand, you soft-pedal the issue, mentioning potential liability ostensibly as "a factor that everyone is of course aware of," you may succeed in engaging the employer's full attention. (Remember: you may not communicate with the employer in any way about your client's drug or alcohol treatment or disclose the client's HIV status without first having your client sign a consent form permitting you to do so.)

If the employer is recalcitrant or if your attempt to persuade it to reverse its initial decision proves unsuccessful, you should decide whether it is worth it to the job seeker and to the program to press the matter further. Among the factors you should consider are:

- Is the applicant able to do the job satisfactorily?
- How strong is the applicant's evidence of rehabilitation?
- How badly does the applicant want or need this particular job?
- What other jobs are available?

- Are there other factors that might make this applicant attractive to an employer?
- Have you sent other applicants to the same employer? If so, how have they fared?
- How many potential jobs does this employer realistically represent?
- How much time can you devote to seeing this through if you press on?

## **Administrative Appeals to Public Employers and Occupational Licensing Agencies**

If you are dealing with a governmental or quasi-governmental employer (for example, a state occupational licensing agency, a public hospital, or a regional transportation authority), the applicant may be entitled to challenge an initial decision to deny him the job or license in an administrative appeal to that agency or another one (such as a civil service commission) designated to hear such appeals. An administrative appeal may include a hearing or it may simply be an opportunity to submit whatever documents and written statements the applicant thinks are appropriate. A licensing agency almost always allows an unsuccessful applicant to appeal his license denial at a hearing before an impartial hearing examiner or panel.

These appeals to public agencies are likely to be available both to those who have been denied a job because of their alcoholism or addiction history or HIV/AIDS, and to those denied employment because of past arrests or convictions.

If an administrative appeal is available, encourage your client to pursue it; such appeals are frequently successful. Try to get a lawyer to represent the applicant. If you are unable to do so, however, do not panic. You should request the appeal anyway, making sure your request is on time. Frequently you have as little as 30 days to request an appeal, and

sometimes you have even less time. Once you have requested the appeal, you can return to the question of who should represent the applicant. In most cases the answer is simple: **you** do it. You will already be familiar with the pertinent facts about the applicant. You are already something of an expert on drug or alcohol treatment, HIV/AIDS, and ex-offender issues. You will probably already have a general understanding of the applicable law. In short, you fit the bill.

If there is a hearing, it will probably be informal and legal technicalities (such as the rules of evidence) will not ordinarily apply. You should, of course, identify yourself as a lay advocate, not a lawyer. Hearing examiners are often not lawyers either, so don't be intimidated by them. Even if they are lawyers, they will probably be less interested in discussing the law than in hearing your client's version of the facts.

In general, you should treat the hearing officer as you would a private employer whom you are trying to persuade to reverse an initial decision rejecting an applicant. Educate the officer about drug or alcohol treatment and/or HIV/AIDS (if those are the issues in the appeal). Emphasize the applicant's strengths.

The hearing officer will probably allow you to choose how to present your client's case. You should probably begin by telling the officer what areas or topics you want to cover and in what order. Besides making it easier for the examiner to follow your story, it makes him or her less inclined to cut into your presentation with a line of questions that disturbs your train of thought. This introduction will also give you an opportunity to relax by covering material with which you are relatively familiar.

In presenting the applicant's story, you should figure out what general topics you want to cover and, taking each topic separately, decide what you want to emphasize. You and your client can then prepare a statement covering all the relevant points which your client can read at the hearing. However, you should give serious consideration to drawing out your client's story through questions and answers. For example, if one point you want to stress is that the applicant has been steadily employed since detoxing from heroin, you might ask the following series of questions:

— When did you detoxify from heroin?

- During the five years immediately preceding that date, how many different jobs did you hold?
  
- Were there times during that five years when you held no job at all?
  
- During the five years immediately **after** your detoxification, how many jobs have you held?
  
- Have you held the same job throughout the entire five year period?
  
- For clients with HIV/AIDS who have revealed their diagnosis to the employer, it would be good to practice asking them to explain how their illness does not prevent them from performing the job.

You and your client should practice this question and answer technique in advance, so that you both feel comfortable with it. Don't worry about framing your questions elegantly. The more conversational your questions, the more relaxed both you and the applicant will be. Tell the applicant not to try to memorize the answers; otherwise, he will be too nervous about "blowing a line" to concentrate on answering calmly and with assurance. The advantage of a question and answer form of presentation is that **you** can control what the applicant says and in how much detail. If your client responds to a question less completely than you had hoped, and you feel that the answer is important, you may simply reword the question and ask it again.

Note: Although administrative appeals to public employers or licensing agencies can successfully win your clients the jobs or occupational licenses they were initially denied, you and your client should remember two things about these kinds of remedies. First, though your client may ultimately get the job or license he or she wants, the appeal process may take some time — sometimes months — before it results in a decision. Your client should not bank on a good outcome in the meantime. This means that he or she should keep working or looking for work while the appeal is going forward. Also, you and your client should keep in mind that the other remedies your client may have the right to pursue — like administrative complaints and/or lawsuits under the antidiscrimination laws discussed below — all have time limits of their own. Those time limits are likely to apply, and keep running, even if your client has an administrative appeal pending. If your client does not file a discrimination complaint or lawsuit within those time limits (see below), he or she may lose

the right to challenge the employer's decision under the antidiscrimination laws. So, stay mindful of those time limits even as you and your client also pursue whatever administrative appeal may be available.

Second, successful administrative appeals of this sort may well get your clients the jobs or licenses they want, but they will usually **not** entitle a winning client to other remedies — like back pay or seniority retroactive to the date the client was first denied the job or license. The antidiscrimination laws discussed below do offer winning clients this broader relief.

If the appeal is unsuccessful, your client may be entitled to a further administrative appeal, or to challenge the administrative decision in court, under laws other than (or in addition to) the antidiscrimination laws discussed in this manual. At this point you should get advice from a lawyer on how best to proceed.

## **What to Do Next for Individuals in Recovery from Alcoholism or Drug Dependence and People with HIV/AIDS**

### **— Formal Legal Challenge Under Antidiscrimination Laws**

#### **— Against Public Employers**

The federal and state laws that prohibit discrimination based on non-job-related "disabilities" may offer your client a variety of remedies to choose from in challenging public employers' and agencies' discriminatory actions.

When the discriminating agency is a public employer, one or both of the federal laws that ban disability-based discrimination — the **Rehabilitation Act of 1973** and the **Americans with Disabilities Act of 1990 (ADA)** — is likely to apply, and each of these laws gives your client a choice of remedies. If the public employer receives federal grants or other federal financial assistance (and a significant number do), or is a federal agency, your client can file a lawsuit and/or an administrative complaint against it under section 504 of the Rehabilitation Act. If the employer is a state or local government or governmental unit,

whether or not it receives any federal funds, your client can file an administrative complaint, and lawsuit, against it under the ADA.

Some public employers are covered by only one of these federal laws, but many are covered by both. And, though each law has somewhat different rules for filing lawsuits and administrative complaints, the federal agencies charged with enforcing them are required to coordinate their efforts to ensure that complaints charging a violation of either or both laws are processed by the proper federal agency (or agencies), and that consistent standards are applied in enforcing both laws. So if an administrative complaint charges an employer with violating the Rehabilitation Act and the ADA also applies to that employer, the complaint will be deemed dually and simultaneously filed under both laws and will be processed accordingly; and vice versa. What follows is an overview of the rules and procedures for pursuing the remedies available under each of these laws.

Under section 504 of the **Rehabilitation Act**, clients who are subjected to discrimination based on their alcohol or drug history or treatment or HIV/AIDS by a public employer that receives federal grants or aid have the right to file an administrative complaint or a lawsuit — or both — against the employer. You may be able to find out whether and what federal grants or aid an employer receives by calling its financial, administrative or public relations office.

The time limit for filing a lawsuit under the Rehabilitation Act, which is most effective if done by a lawyer, is three years from the date the discriminatory act occurred. Individuals do not have to pursue an administrative complaint before resorting to a lawsuit under section 504 of the Act (as is also the case with the ADA, if the lawsuit is against a public employer like a government agency).

Administrative complaints alleging violations of the Rehabilitation Act must be filed with the federal agency that provides the federal grants or other funds to the discriminating employer or agency, or with the U.S. Department of Justice in Washington, D.C., which will refer the complaint to the proper federal agency. (Its address is listed on p. 54.) To find out where and when to file such administrative complaints, call the federal funding agency's headquarters in Washington, D.C., or its regional office in this area; or call the Department of Justice's ADA Information Line (202-514-0301). (This can provide information about section 504 of the Rehabilitation Act as well as the ADA.) The Federal Information Center (1-800-688-9889) will know where the various federal funding agencies' regional offices are. Administrative complaints under the Rehabilitation Act must ordinarily be filed with the

federal funding agency (or the U.S. Department of Justice) within 180 days of the discriminatory act complained of.

One advantage of filing an administrative complaint under the Rehabilitation Act is that you do not need a lawyer. The complaint can be submitted in the form of a simple letter to the head of the federal agency that gives grants or aid to the employer. The letter should include:

- a statement that the letter is intended to be a complaint under the Rehabilitation Act of 1973;
- the name, address and telephone number of the person who has been discriminated against;
- a statement that the person has a history of or is in treatment for alcoholism or drug dependence, or is a person with HIV/AIDS;
- the name and address of the employer who is being charged with discrimination;
- a description of exactly how the discrimination occurred, including a description of the job being sought, the qualifications of the person who was discriminated against, and how that person was treated differently from other job candidates;
- a statement of the date(s) the discriminatory act(s) occurred;
- a list of any questions about past or current alcohol or drug use, dependence or treatment, or other health conditions, including HIV/AIDS, that appeared on the employment application or medical questionnaire;
- a description of what happened at any pre-employment medical examinations that may have taken place;
- the name, address and telephone number of the job developer or counselor who may be helping with the complaint;

— the signature of the person who has been discriminated against.

At the top of this letter write "Complaint under Rehabilitation Act of 1973." Write the same thing on the envelope in which you mail the complaint. Once the complaint is filed, the government may ask for additional information, or may request that the complainant fill out some simple forms.

If a federal agency is the discriminating employer, your client can file a complaint under the Rehabilitation Act with the equal employment opportunity (EEO) office of that agency. This must be done within 30 days of the discriminatory act being challenged. The Federal Information Center (1-800-688-9889) can direct you to the proper official. Some agencies may require written complaints; with others, you may be able to state your complaint orally. Check with the agency involved to be sure.

The **Americans with Disabilities Act (ADA)** does not apply to the federal government, but does apply to virtually all other public employers and agencies, including all state and local governments and governmental units, like occupational licensing agencies and vocational rehabilitation and job training programs. Clients claiming disability-based discrimination by one of these public agencies or employers can file an administrative complaint against it under the ADA with the federal Equal Employment Opportunity Commission (EEOC) (or with the U.S. Department of Justice, as described below). They can also file a lawsuit against the agency in court without filing an administrative complaint.

Your clients do not need a lawyer to file an administrative complaint under the ADA. The time limit for filing an ADA complaint with the EEOC is ordinarily 180 days after the discriminatory act occurred, but in New York (and other states that have state or local antidiscrimination laws that parallel the ADA), this time limit is extended to 300 days. Clients can file complaints with the EEOC in person, by phone or by mail. The EEOC will request the same kind of information that is set out above for Rehabilitation Act complaints (see pp. 52-53), so your client should have that information at hand when he or she writes, calls or goes to the EEOC to file a complaint.

ADA complaints should be filed at the nearest EEOC office; if no EEOC office is nearby, clients can call the EEOC at 1-800-669-4000. In New York City, the address is:

New York District Office  
U.S. Equal Employment Opportunity Commission  
7 World Trade Center, 18th Floor  
New York, NY 10048  
(212) 748-8500

The U.S. Department of Justice will also accept complaints charging public (government) employers and agencies with violating the ADA, and will refer them to the EEOC. ADA complaints filed with the Department of Justice may be sent to:

Coordination and Review Section  
P.O. Box 6118  
Civil Rights Division  
U.S. Department of Justice  
Washington, D.C. 20035-6118

Clients with questions about the ADA and its remedies and enforcement procedures can also call the Department of Justice's ADA Information Line at (202) 514-0301.

The New York State Division of Human Rights and New York City Commission on Human Rights (whose addresses and phones are noted on pp. 56-57) have work-sharing agreements with the federal EEOC, and they will also take complaints charging discrimination in violation of the ADA and refer them to the EEOC. So clients have the option of going directly to the Division or Commission and asking those agencies to take and refer their ADA complaints to the EEOC at the same time they file a discrimination complaint with one of those agencies under the state's or New York City's Human Rights Law.

In addition to or in place of a federal Rehabilitation Act or ADA complaint, **your client may pursue the remedies available under the New York State and New York City Human Rights Laws** to victims of discrimination based on non-job-related history of or treatment for alcoholism or addiction, or HIV/AIDS. Since the state's Human Rights Law applies to **all** state and local public employers and occupational licensing agencies in New York, its remedies are available against employers and agencies that may not be subject to the federal Rehabilitation Act (which applies only to recipients of federal funds or contracts). While the ADA now reaches most if not all of these public agencies that are not covered by

the Rehabilitation Act, the state and New York City Human Rights Laws still offer clients some important advantages, including more generous time limits for filing administrative complaints challenging discrimination under both the state's and city's Human Rights Law.

The state's Human Rights Law gives individuals the choice of either filing a lawsuit in state court or filing a complaint with the State Division of Human Rights (but not both). New York City's own Human Rights Law offers individuals the same choice. The time limit for filing a lawsuit is three years from the date of the discriminatory action under both the state and city laws. The deadline for filing a complaint with either the State Division of Human Rights or the New York City Commission on Human Rights is one year from the date of the discriminatory act. If the discrimination occurred within New York City, your client may file a complaint with either the New York City Commission on Human Rights or the State Division of Human Rights, but not both.

To file a complaint with the New York State Division of Human Rights or the New York City Commission on Human Rights, your client does not need a lawyer. (Once the State Division or the City Commission is reasonably convinced that your client has been discriminated against, it will take over and will, in effect, act as your client's lawyer.) Complaint forms can be obtained from the appropriate office. See the list below for the nearest State Division of Human Rights office. The New York City Commission on Human Rights is located at 40 Rector Street, New York, New York 10006, and its telephone number is (212) 306-7500.

Proceedings in both the State Division and the City Commission are relatively informal and normally complainants do not have legal representation. Your client should bring copies of any relevant documents he may have, for example, a letter detailing the reasons for rejection. After a complaint is filed, an investigation of the charges will be made by the agency. If the State Division or the City Commission is reasonably convinced that discrimination has occurred, they will usually attempt to reconcile the matter informally. If the employer is still not cooperative, the agency will hold a hearing. If they find in favor of your client, the agency may issue an order to stop the discrimination and/or remedy the harms it caused. You should be aware that this process is often a slow one, although both the State Division and the City Commission try to fast-track complaints of HIV-based discrimination.

To file a state complaint alleging discrimination based on an alcohol/drug history or treatment, your client should contact the New York State Division of Human Rights at one

of the following offices. Persons charging discrimination based on HIV/AIDS can call the State Division's Office of AIDS Discrimination Issues at 1-800-523-2437 or can contact any of these offices:

Manhattan & The Bronx

Complaints against respondents north of 42nd Street, and the Bronx:

163 W. 125th Street, 4th Floor  
New York, New York 10027  
(212) 961-8650

Complaints against respondents south of 42nd Street:

270 Broadway, Room 922  
New York, New York 10007  
(212) 417-5041

Brooklyn, Staten Island & Queens

55 Hanson Place, Room 304  
Brooklyn, New York 11217  
(718) 722-2856

Nassau

175 Fulton Ave., Room 211  
Hempstead, New York 11550  
(516) 538-1360

Suffolk/Hauppauge

State Office Building  
Veteran's Memorial Bldg.  
Hauppauge, NY 11787  
(631) 952-6434

Albany

Empire State Plaza  
Agency Bldg. # 2, 18<sup>th</sup> Floor  
P.O. Box 2049  
Albany, New York 12220-0049  
(518) 474-2705

Binghamton

44 Hawley Street, 6th Floor  
Binghamton, New York 13901-4465  
(607) 721-8467

White Plains

30 Glenn Street, Room 310  
White Plains, New York 10603  
(914) 949-4394

Buffalo

Walter J. Mahoney State Office Building  
65 Court Street, Suite 506  
Buffalo, New York 14202  
(716) 847-7632

Rochester

259 Monroe Avenue  
1 Monroe Square, 3rd Floor  
Rochester, New York 14607  
(716) 238-8250

Syracuse

New York State Office Building  
333 East Washington St., Room 401  
Syracuse, New York 13202  
(315) 428-4633

**— Against Private Employers**

As is the case with public employers, the federal **Rehabilitation Act** reaches some, and the **Americans with Disabilities Act** reaches many more (but not all), private employers. Again, because some private employers are covered by both of these federal laws, your client may have the option of filing a formal administrative complaint against the discriminating employer under either or both the Rehabilitation Act and the ADA. Once again, though, the different federal agencies charged with enforcing these two laws (see below) are coordinating their enforcement efforts so that complaints against private employers that are filed under either or both laws with any of the federal enforcement agencies will end up being referred to the proper agency for processing.

If the employer is a private company that holds a federal contract or receives federal funds, your client can file a formal administrative complaint against it under the **Rehabilitation Act**. In New York, such complaints must be filed within 180 days from the date the discriminatory action occurred. The form of the complaint can be a letter like that described on pp. 53-54.

In the case of a federal contractor (section 503 of the Rehabilitation Act applies to those who hold federal contracts of \$2,500 or more), the client should file a complaint with the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). Address the complaint to:

U.S. Department of Labor O.F.C.C.P./E.S.A. 201 Varick Street, Room 750 New York, New York 10014 (212) 337-2006	or	U.S. Department of Labor O.F.C.C.P./E.S.A. 6 Fountain Plaza, Suite 300 Buffalo, New York 14202 (716) 551-5065
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To determine whether an employer is a federal contractor, contact the OFCCP at the relevant number listed above.

Individuals claiming discrimination by federal contractors in violation of section 503 of the Rehabilitation Act do not have the right to bring a lawsuit against the employer under section 503. But if the ADA also applies to that employer — and it will in many cases — a lawsuit is permitted (see below).

If the private employer receives federal grants or aid (section 504 of the Rehabilitation Act applies to these employers), your client should complain to the regional office of the federal agency that provides the funds to the employer. Your client can find the regional office of the various federal agencies by calling the Federal Information Center at 1-800-688-9889. If the funding agency does not have a regional office, file the complaint with the agency's national headquarters in Washington, D.C.

Whether or not a private employer is covered by the Rehabilitation Act (because it receives federal contracts or funds), your client can file an administrative complaint against it under the **Americans with Disabilities Act** if it employs at least 15 people. ADA complaints against private employers (like those against public employers) should be filed with the EEOC (see p. 54 for its address). The same time limits and procedures apply to complaints against private as well as to public employers (see p.55). Individuals charging a private employer with violating the ADA can also file a lawsuit against it, but only after first filing a complaint with the EEOC (which will issue a "right-to-sue" letter to the complainant after a certain period of time).

All private employers in New York with four or more employees (as well as employment agencies and labor organizations) are subject to the requirements of the **New York State and New York City Human Rights Laws**. Both prohibit discrimination based on non-job-related disabilities, including an alcoholism or addiction history, or HIV/AIDS. Thus, in addition to or instead of filing a Rehabilitation Act or ADA complaint, clients who have been denied employment by private employers have the choice of either filing a claim

with the State Division of Human Rights (or, in New York City, with the New York City Commission on Human Rights) or filing a lawsuit in state court. Again, your client must choose which Human Rights Law remedy to pursue: if he goes to state court, he cannot go to the Division or Commission, and vice versa. See page 55 on how to file a complaint with the Division or Commission on Human Rights.

Filing an administrative complaint with these federal or state agencies can have a relatively immediate effect, although it often takes some time actually to resolve the legal issues involved. From the employer's point of view, an investigation by a federal or state agency is a nuisance in that the agency may seek the testimony of employees involved in the hiring process; compel the production of corporate books and records; and require the employer to answer a seemingly endless series of questions. Since the prudent employer will retain an attorney to represent it in dealing with these agencies, such an investigation can cost the employer a great deal both in attorneys' fees and in time spent complying with agency requests. Moreover, the employer runs the risk that an agency will, during the course of its inquiry, uncover a pattern and practice of discriminatory activity for which the employer can additionally be held liable. It is therefore often in the employer's interest to settle a claim if it is actively pursued.

## **What to Do Next for Ex-Offenders**

### **— Formal Legal Challenge Under Antidiscrimination Laws**

As was mentioned earlier in this manual, there is no federal law that specifically prohibits employment discrimination against ex-offenders, but discrimination based on an arrest or conviction record may in some cases constitute illegal race discrimination. If your client is African-American or Hispanic and has been rejected by a private or public employer because of a criminal record, he or she may be able to bring a race discrimination claim under Title VII of the 1964 Civil Rights Act. See a lawyer for further details, or contact the New York State Human Rights Division at one of the offices listed on pages 56-57.

The **New York State Human Rights Law** gives a choice of remedies to individuals who believe they have been asked illegal pre-employment inquiries about, or been denied jobs or occupational licenses because of, **arrests** that did not result in conviction (see p. 10).

They may either file a lawsuit in state court, or file a complaint with the State Division of Human Rights (but not both). The procedure for filing complaints with the Division is explained at page 55 of this manual. Individuals must file such complaints within one year of the job denial or other discriminatory action that is the subject of the complaint (Exec. L. §§ 296(16), 297). The time limit for bringing lawsuits is three years from the date of the discriminatory act.

The remedies available to ex-offenders who believe they have been denied employment or licensure because of their past criminal **conviction(s)** in violation of New York State's Correction Law Article 23-A and its Human Rights Law (described at pp. 4-6) depend on whether the discriminatory agency is a public or private one.

If your client has been discriminated against by a **public** agency or employer, he or she may file a lawsuit in state court under Article 23-A of the Correction Law and the State Human Rights Law. This must be done within four months of the job or license denial (Corr. L. § 755; Exec. L. § 296(15)). Ex-offenders who are denied public employment or occupational licenses may also be entitled to administrative appeals (discussed at p. 48); and should consider pursuing such appeals before taking any other action.

If an ex-offender is denied employment by a **private** company, the only remedy available under the State Human Rights Law is to file a complaint with the State Division of Human Rights (see pp. 55-58) within one year of the job denial (Corr. L. § 755; Exec. L. § 296(15)). The New York City Human Rights Law, though, gives ex-offenders a broader range of remedies against private employers, as is discussed next.

Arrest- or conviction-based job discrimination that is illegal under the state laws just noted is also illegal under the **New York City Human Rights Law**. So clients rejected for those reasons by employers in New York City may file complaints of discrimination with the New York City Commission on Human Rights (see pp. 55-56 for its address and rules) or may bring a lawsuit against the employer under the New York City law in addition to or instead of the state law. The rules for filing such lawsuits against **public** employers are the same under both the city and state law, and are described immediately above. However, the City Human Rights Law gives persons who have been rejected by a **private** employer in New York City the right to file a lawsuit against the employer, within three years after the discriminatory act occurred (N.Y.C. Administrative Code, §§ 8-107(10), 8-107(11) and 8-502(d)).

As discussed earlier in this manual (see pp. 33-34), the New York and Federal Fair Credit Reporting Acts restrict the scope of information about arrests, convictions, alcohol or drug history and other matters that may be included in reports that consumer reporting agencies provide to employers. If a consumer reporting agency violates any of the requirements of the New York Fair Credit Reporting Act, the person about whom the report was made can bring an action against the agency in state court. Suit must be brought within two years of the violation. The consumer reporting agency can be sued for any actual damages (such as loss of employment) caused by the violation, plus the costs of bringing the lawsuit, including reasonable attorneys' fees. If the agency's violation of the law was knowing and willful, the agency can also be required to pay punitive damages.

If the agency's actions violated the Federal Fair Credit Reporting Act, the individual also has the option of suing in federal court or filing a complaint with the Federal Trade Commission.

## **When to Consult an Attorney**

An attorney is usually necessary to institute a lawsuit. (If your client wants to act as her own counsel in a suit, she may proceed pro se. Contact the clerk of the court in which the suit is to be filed for information about how to do so.) If lawyers are not easily available to you, try contacting a local law school, the Legal Aid Society, or Bar Association office. You may be able to find a law student, paralegal, or young attorney willing to help you for little or no charge. Sometimes larger law firms will make limited resources available to help agencies as part of their contribution to the community. At the very least, you should be able to enlist the assistance of a local law library (in a law firm, Bar Association, or law school) to help you look up regulations that you may be unsure of.

If you need further help, please call:

Legal Action Center  
153 Waverly Place  
New York, New York 10014  
(212) 243-1313