I. Is It Illegal for Employers to Discriminate?

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

Protections for People in Recovery from Alcohol or Drug Dependence

Two **federal laws** address directly the issue of employment discrimination against individuals with past or current alcohol or drug problems. They are the federal **Rehabilitation Act** of 1973[1] and the **Americans with Disabilities Act** of 1990.[2] These laws encompass all areas of employment discrimination, including the hiring and firing of employees and terms and conditions of employment.

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 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. Both the federal agencies responsible for implementing and enforcing the Act and federal courts in a number of cases 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 a reasonable accommodation, to perform the essential functions of a job.

In 1990, the Act was amended to exclude individuals who "**currently** engage in the **illegal use of drugs**" from protection. Individuals in recovery, including those in treatment (both drug-free and in methadone treatment) who are no longer illegally using drugs, are protected. The

[1] 29 U.S.C. §§ 701 et seq.
[2] 42 U.S.C. §§ 12101 et seq.

Act continues to protect individuals with current as well as past alcohol problems who satisfy the definition of disability and 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.[3]

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. Title I of the ADA covers private employers and state and local government agencies with more than fifteen employees, whereas Title II of the ADA applies to public employers without regard to the number of employees they have.

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, depending upon the individual's case, substantially limiting impairments. 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.

The ADA protects "qualified individuals with a disability" from discrimination.

In sum, individuals in recovery from drug dependence (including those enrolled in rehabilitation programs), and those erroneously perceived to be drug dependent, 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.

Virginia has its own fair employment law: the **Virginians with Disabilities Act (VDA).**[4] The VDA explicitly excludes individuals with current or perceived drug or alcohol problems from its protection. Consequently, in Virginia, these

[3] The law's nondiscrimination provisions are contained in sections 501 through 504 of the Act, 29 U.S.C. §§ 791-794.
[4] VA. CODE ANN. §§ 51.5 et seq. (Michie 2000).

individuals must rely upon federal law for protection. While the VDA does not expressly mention past alcohol or drug abuse, it seems equally clear that individuals in recovery from alcohol or drug dependence are not covered by the state law.

Two state agencies administer the VDA: (1) the Department for Virginians with Disabilities (DVD); and (2) the Virginia Council on Human Rights (VCHR). The DVD is the state agency that advocates on behalf of individuals with disabilities, representing them in administrative proceedings and in court. The VCHR is the adjudicatory body that mediates and performs hearings on complaints of discrimination under Virginia and federal law. Both of these administrative agencies interpret the VDA to exclude individuals with histories of alcohol or drug abuse problems from the definition of "disabled." Thus, these state laws do not protect such persons from employment discrimination under state law.

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

The federal disability discrimination laws may protect a client like John who has a history of drug dependence and treatment. First evaluate whether he is covered by one of these statutes. For example, if John is currently using illegal substances, the ADA would not protect him from discrimination based upon his current illegal drug use. But if his drug dependence problem affected his ability to function in the past, and he is now in recovery, these laws most likely protect him against discrimination on the basis of disability.

Protections for Ex-Offenders

No federal statute specifically protects ex-offenders from employment discrimination. However, a policy of denying people jobs based on arrests not followed by convictions, and policies that bar those with criminal records from employment, have been ruled illegal as applied to racial minorities under **Title VII of the Civil Rights Act of 1964.** Since minorities are arrested and convicted at a greater rate than their percentage of the population, courts have found that such policies have a racially discriminatory effect absent a business justification. So, in some cases, a refusal to hire on the basis of a criminal record may be illegal race discrimination under federal law.

Virginia's Criminal Procedure Code also provides some protection to persons with criminal records. Occupational licensing authorities are prohibited from denying an individual a license based upon a prior criminal conviction unless the conviction is "directly related" to the license sought. A "directly related" conviction has a bearing on the

individual's suitability for employment in the particular position.[5]

Consider, for example, a job applicant who has a conviction for driving while intoxicated (DWI). This individual's DWI conviction would be considered job-related if he applies for a job as a school bus driver, but not if he were applying for a job as a stock clerk with no driving duties. Whether a conviction is job-related must be determined on a case-by-case basis. Individuals who have convictions that are not job-related may, like other applicants, be denied a license, if found "unfit" or "unsuited" based on other information.[6] Individuals who believe they have been unlawfully denied a license based upon their criminal history may file a complaint with the Director of the Virginia Department of Professional and Occupational Regulation (see pp. 33-35).

The Code also makes it illegal for any public or private employer or educational institution to require any job applicant to disclose information regarding expunged arrests or charges.[7] Denial of a job based upon the refusal to answer this unlawful question is also prohibited. Employers are permitted to ask about arrests and convictions that have not been expunged and to consider such criminal history in making employment decisions. Individuals who are asked unlawful questions, or those who believe they have been denied employment based upon their refusal to provide such information, may file a complaint with any law enforcement agency or the Attorney General's Office.

How can you use Virginia law to assist John in his job search? The first step in preventing ex-offender employment discrimination is to obtain John's rap sheet so you can familiarize yourself with its contents and ensure its accuracy. John's criminal history must be reviewed and considered when making a job referral to determine whether the offense is related to the job or an occupational license he may need. This will enable you to make the most appropriate job referrals.

The first step in preventing ex-offender employment discrimination is to obtain John's rap sheet so you can familiarize yourself with its contents and ensure its accuracy.

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

Illegal Pre-employment Inquiries

The simplest way for a prospective employer to learn about John's criminal record and substance abuse history is to

[5] Va. St. §§ 54.1-204.
[6] Va. St. §§ 54.1-204.
[7] Va. Code Ann. § 19.2-392.4.

ask about it on a job application or during an interview. One of the most serious practical barriers to employment John might face is the bias and stigma associated with his criminal and substance abuse history. Many employers are hesitant to hire applicants like John because of stereotypes unrelated to his ability to perform the job. However, if you and John are familiar with the legal standards that govern what employers may ask about criminal records and substance abuse history, you can prepare John for a successful job search.

Inquiries About an Alcoholism or Drug Dependence History

The federal **Rehabilitation Act** and the **ADA** 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 before 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 (see pp. 1-2). Asking job applicants a question such as "Have you ever had an alcohol or drug problem?" is therefore an illegal pre-employment inquiry under these federal laws. Employers could, however, ask about current illegal drug use because individuals with current problems are not protected against discrimination.

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. In addition, the employer may condition the job offer on the satisfactory results of such medical examinations or inquiries. But the employer may not use this information in a discriminatory manner. 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, if 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 based on this information. On the other hand, a test to detect alcohol use is considered a medical examination under the ADA and, therefore, cannot be performed prior to a conditional offer of employment.

In John's case, as with all applicants, he should be advised that under federal law, an employer may not lawfully ask about his history of drug or alcohol dependence and treatment prior to a conditional offer of employment. An employer may ask on an employment application whether he currently uses drugs illegally.

Because the VDA does not contain any provisions regarding pre-employment inquiries, it does not protect anyone from disability-related questions. Pre-employment **drug and alcohol tests** are permitted under Virginia law, as well.

Federal law is the most definitive means of relief for persons who believe they have been subjected to or denied employment because of illegal pre-employment inquiries about their drug or alcohol histories. If the claim involves an employer covered by Title II (see p. 2), these persons may file complaints with the federal agency charged with enforcing these anti-discrimination laws or in federal court as discussed in Chapter V, "Job Rejection." Claims involving Title I employers, on the other hand, must be filed directly with the administrative agency.

Inquiries About a Criminal History

No federal or state law prohibits employers from asking job applicants if they have ever been **convicted** of an offense. Employers may legally consider an applicant's conviction(s) in making hiring decisions. If an applicant provides false information about his criminal history either on an application or in an interview, and the employer discovers the deception, the employer can deny employment to or fire the individual.

As noted above, **Virginia's Criminal Procedure Code**[8] prohibits pre-employment inquiries regarding expunged records. Individuals who are asked such questions, or who believe they have been denied employment based upon refusal to provide such information, can file complaints with any law enforcement agency or the Attorney General's Office.

In John's case, although he can never have his drug possession conviction expunged, he should be advised that he may apply for expungement of his arrest that did not lead to conviction (see pp. 15-17 for more information on expungement). If the court grants expungement, employers would then be prohibited from asking John questions about or denying him employment based upon his expunged arrest record.

[8] VA. CODE ANN. § 19.2-392.4.

II. Dealing with a Criminal Record

Kinds of Offenses

Being familiar with your client's criminal record will help you make appropriate job referrals for your client. It is, therefore, important to understand the process for obtaining a rap sheet in Virginia, as well as what it contains.

In particular, it is useful to know the type of offense(s) your client has been convicted of, as employment restrictions are sometimes defined by the class or severity of offense. For the sake of this discussion, let us assume that John, in addition to being convicted for drug possession (a felony) two years ago, was arrested, but not convicted, for petit theft (a misdemeanor) five years ago. An "offense" is any disposition for which a fine or imprisonment may be ordered. In Virginia, "criminal" offenses are limited to misdemeanors and felonies. Traffic infractions are violations of public order and are not considered criminal in nature.

Misdemeanor: A lesser criminal offense usually dealt with by a local district court, but sometimes by a circuit court of the Virginia Supreme Court. Misdemeanors may result in a fine and/or sentences of a minimum of fifteen 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 under the influence of alcohol or while impaired by drugs, criminal trespass, and simple assault or assault and battery. Conviction of a misdemeanor offense is considered a conviction of a crime.

Felony: A serious criminal offense punishable by imprisonment for more than one year (although the person may not serve any time in prison or jail). Felony charges fall under the jurisdiction of a circuit court or the Virginia Supreme 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. Conviction of a felony offense is considered a conviction of a crime.

Special Dispositions of Charges

Often criminal charges are disposed of by means other than a conviction or acquittal at trial. In Virginia, these other means include:

Dismissal: The equivalent of an acquittal. All charges are dropped and the accused retains the same status he had prior to the arrest.

Nolle Prosequi: A discontinuance based on the prosecutor's decision (with the court's consent) to not prosecute. It clears the charges against the accused, wiping the slate clean. To reinstate charges against the accused following "nolle prosequi," the prosecutor must seek a new indictment.

Vacating or Setting Aside a Conviction: Because of a successful appeal or other special factors, a conviction may be "set aside" or "vacated" by the court. In this state, such action voids a conviction.

Alternative Sentences

The punishment imposed upon a person in a criminal prosecution, usually in the form of a fine, incarceration, or probation, is called a "sentence." The following is a list of sentences that may appear on an individual's rap sheet:

Conditional or Unconditional Discharge: A conviction for which little or no jail sentence is 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.

Probation: A sentence in which 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 to comply with certain conditions such as participating in a drug or alcohol treatment program or making restitution. If the individual violates the conditions of probation, the court may order him to prison for the remainder of the sentence.

Proceedings Involving Minors

Under Virginia's Penal Code, "infancy" is a valid defense to most criminal charges. Consequently, except situations in which juveniles are tried as adults, a person less than eighteen years of age is not criminally responsible for his conduct. When a person less than eighteen years of age engages in conduct that would otherwise subject him to criminal liability, the juvenile court determines whether the juvenile has committed a delinquent act. If a juvenile is found delinquent, the court issues orders regarding the juvenile's supervision, care, and rehabilitation. Under Virginia law, a finding of juvenile delinquency does not impose any of the civil disabilities a conviction imposes, nor does such a finding disqualify a person from state or local government employment. A juvenile delinquency adjudication probably is not required to be listed on a job application as an arrest or conviction. First, a finding of juvenile

Under Virginia law, a finding of juvenile delinquency does not impose any of the civil disabilities a conviction imposes, nor does such a finding disqualify a person from state or local government employment.

delinquency is an adjudication, not a conviction. In addition, juvenile proceedings are confidential, and thus not a matter of public record.

However, when a juvenile between fourteen and eighteen years of age is charged with an offense that would be a felony if committed by an adult, the juvenile court, at the Commonwealth Attorney's request, may transfer the case to the circuit court for criminal trial. Consequently, if a juvenile is tried and convicted of a crime as an adult, he is obligated to reveal the conviction if asked about it on an employment application.

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 and become familiar with the reported information. This is extremely important for several reasons.

First, although restrictions exist on the release of criminal records by CCRE, employers often obtain this information from several sources, including local law enforcement agencies, the Federal Bureau of Investigation (FBI), and consumer reporting agencies. It is important to ascertain exactly what information the employer will obtain 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 other punishment.

Second, arrest and conviction records can contain errors or information that should not be reported. If your client discovers this 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 or convictions. 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. 30-31).

NOTE: Obtaining and cleaning up criminal records may take a long time. Clients, like John, should begin the process as early as possible in the search for employment — perhaps even before beginning the actual job hunt.

How to Get Copies of Arrest and Conviction Records

Virginia's Central Criminal Records Exchange has more than 1.5 million arrest records ("rap sheets") on file in its computers. If an individual has ever been arrested and fingerprinted for violating a state or local law in Virginia, even if no conviction resulted, that person has a "rap sheet" permanently on file at CCRE. A variety of criminal justice agencies (such as police departments, courts, probation offices and prosecutors) and certain employers and others have the right under Virginia law to view these records.

A CCRE record contains information about arrests, arrest charges, whether the person was convicted, and, if so, the crime and the sentence the person received. Individuals in Virginia are entitled to see their own CCRE records.

Clients **throughout Virginia** can obtain their rap sheets from the offices of CCRE in Richmond. Clients can request their records from CCRE by filing a "Criminal History Record Name Search Request" form accompanied by a complete set of fingerprints (which can be obtained from any law enforcement agency). To receive one's complete criminal history, one must write "Complete Record" across the top of the form. The client must pay a $15 fee. Only certified checks, money orders, or company checks will be accepted as payment. CCRE will not waive the application fee for persons with "financial hardship" or inmates.

CCRE can be contacted by telephone, mail, or the internet. Search request forms can be downloaded at **http://www.vsp.state.va.us/**. To request a copy of a rap sheet, the client must mail a completed and notarized form, fingerprints, and payment to:

Virginia State Police
CCRE
P.O. Box 85076
Richmond, VA 23261-5076
(804) 674-2024

CCRE will then send the individual a copy of his rap sheet within thirty days.

Clients with a criminal history in more than one state must get a rap sheet from each state in which they were arrested or request a copy of their federal rap sheet from the FBI.

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

U.S. Department of Justice
Federal Bureau of Investigation
1000 Custer Hollow Road
Clarksburg, WV 26306

The letter must specify that the individual is making a request "under the Freedom of Information Act" for his 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 be obtained from a local police department or criminal court; charges for this service vary.) Include a certified check or money order for the $18 processing fee (payable to the U.S. Treasurer) 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 and 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 earlier, it is best to ascertain exactly what information the employer will have and plan accordingly.

Juvenile Court records — records of offenses involving juveniles under age eighteen who have been adjudicated "juvenile delinquent" (see pp. 8-9) — are not available to the public. After they are expunged, records of juvenile delinquency proceedings are not even available to the person involved. (For a discussion of expungement, see pp. 15-17.) However, records of youths aged fourteen to eighteen who have been tried as adults for felonies (see p. 9) are reported on CCRE rap sheets.

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.

CCRE Records

Many public employers and occupational licensing agencies in Virginia are authorized by statute to obtain copies of applicants' and employees' criminal history records from CCRE. If an employer or licensing agency fingerprints an individual during the application process or after hiring an applicant, it usually means that agency does have the necessary statutory authorization to obtain the individual's CCRE rap sheet, and will do so.

Certain private employers are also authorized to obtain criminal history information maintained by CCRE (see list on the next page). Yet CCRE 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 can obtain criminal history information in other ways.

Here is a list of some employers in Virginia who are allowed to obtain rap sheets for job applicants:

- Public employers (federal, state, and local governmental agencies), including all law enforcement agencies
- Occupational licensing agencies
- Child care agencies
- Adult care agencies
- Child welfare agencies
- Hospital pharmacies
- Private/parochial elementary or secondary schools

Limits exist on how much information CCRE may report in the rap sheets it distributes to those employers entitled to obtain such records. Adult misdemeanor and felony convictions may be and are reported in CCRE rap sheets provided to employers. In addition, juvenile circuit court felony convictions will appear on these rap sheets. However, neither expunged court records nor juvenile delinquency adjudications may appear on the rap sheets CCRE distributes to authorized employers and licensing agencies. Unless the record of John's arrest is expunged, it will be the type of arrest information that CCRE will report in the rap sheets it distributes to statutorily entitled employers. His felony conviction will, under all circumstances, be listed on his rap sheet.

In Virginia, criminal penalties exist for employers who willfully seek expunged criminal records. The same criminal penalties exist for the wrongful dissemination of expunged records.[9]

Consumer Reports

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 **federal Fair Credit Reporting Act.**[10] This law limits the information about an individual's criminal record history that can be included in a "consumer report." This law also limits the uses of consumer reports. While many states have their own version of the federal law, Virginia does not. Virginia relies entirely upon the federal regulations for consumer protection.

The Fair Credit Reporting Act forbids the reporting of certain negative information that is more than seven years old. For

[9] Va. St. §§ 19.2-392.3, 19.2-392.4.
[10] 15 U.S.C. § 1681.

example, information about arrests not leading to conviction may only be reported if they have occurred within the last seven years or the statute of limitations has not expired. Conviction information can be reported regardless of when it occurred. The federal law's restrictions on reporting this information do not apply if the job has a salary of $75,000 or more.[11]

In addition, the Fair Credit Reporting Act contains protections against inaccurate reports. It is a violation of the federal law for a consumer reporting agency to report any information which it has reason to know is inaccurate. The law requires that agencies "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual. . . ."[12]

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 and written records.) If an employer does obtain a consumer report, the employer must give the individual the consumer reporting agency's name and address upon written request. The person can then contact the consumer reporting agency, which is required to give the individual a copy of the report and any other information in the agency's files concerning that individual.

If inaccurate or incomplete information appears in a consumer reporting agency's file, 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.

It may be wise for John to obtain a copy of his consumer report prior to beginning his job search. First, John can familiarize himself with the contents of his report so that he will be aware of the information prospective employers are receiving. He will also be prepared to dispute any inaccurate information or items with either the consumer reporting agency or the source of the information. Correcting inaccuracies before the potential employer discovers them will alleviate the damage caused by an inaccurate report. If John certifies that he is on welfare or unemployed and planning to seek

[11] 15 U.S.C. § 1681(c)(a).
[12] 15 U.S.C. § 1681e(b).

employment within sixty days, he can receive one free report within a twelve-month period.

How to Corrrect Mistakes on a Criminal Record

Once your client has familiarized himself with his criminal record, he should try to clean up any mistakes that appear on his rap sheet. Some 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 really is.

Sometimes an employer will find out about a person's arrest, but the rap sheet will not have information about its final outcome or will contain incorrect information. In those cases, it may be useful for your client to give the employer a certified copy of a court order to confirm that the arrest did not result in a conviction.

The order contains the arrest charge(s), 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 conviction charge(s) (which may be different from the arrest charges), the date of conviction, and the sentence.

Orders can be used by your client to correct errors on a rap sheet or an employer's inaccurate information about arrests or convictions.

Your client can request an order from the clerk of the court in which he appeared after arrest. In Virginia, misdemeanors are handled in the general district courts or circuit courts, and felonies are disposed of in the circuit courts. The fee for orders is 50 cents per page, and $2 to have the copies certified. Most orders will be two pages long, so the total charge will be $3. To help the clerk locate an individual's records, the client should provide the date of arrest, indictment number, or docket number. The client should have identification when seeking records from the court.

If errors are detected in the CCRE records, a request for correction of the records can be made by contacting the entity which erroneously submitted the record to CCRE, either in person or by mail. CCRE will only accept requests for corrections from the original reporting official or agency (examples include local law-enforcement officers, conservators of the peace, clerks of court, Secretary of the Commonwealth, corrections officials, etc.). Once the agency notifies CCRE of an error, its staff will initiate an audit, and coordinate corrections or modifications directly with the contributing agency. The time necessary to complete this process varies.[13]

[13] VA. CODE ANN. § 19.2-390.

If the error is solely a matter of identity, the process is different. The individual may initiate a "challenge of a record" by reporting this error to a local law enforcement agency and requesting to be fingerprinted to challenge a criminal record. After establishing the individual's identity, the official will take the fingerprints and document the individual's identity and fingerprints on agency letterhead. The letter and the fingerprints must be mailed to the following address:

Manager
Central Criminal Records Exchange
Virginia Department of State Police
P.O. Box 27472
Richmond, VA 23261-7472

Results of the fingerprint search and record of any modification(s) should be received within five business days.

If your client finds errors in his federal (FBI) records, he 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).

How to Get Criminal Records Expunged

Clients with arrests or charges that were resolved in their favor may be eligible to have their police and court records expunged. Having a case expunged means that information about the particular arrest or charge is removed from the version of the rap sheet that will be sent to employers and others. However, it is important to note that the record of an expunged arrest or charge is never completely destroyed. A record of all your arrests, charges, and fingerprints will remain in a CCRE vault.

Misdemeanor and felony convictions cannot be expunged in Virginia. However, Virginia's Criminal Procedure Code[14] sets forth four instances in which criminal records may be expunged:

Acquittals: An individual has been found "not guilty."

Cases otherwise resolved in the individual's favor:

1. indictments for which a **nolle prosequi** is taken (see p. 8);
2. arrests or charges that were **otherwise dismissed**;[15] and
3. dismissals by **accord and satisfaction**.[16]

Absolute pardons: An individual who has been granted an absolute pardon for an unjust conviction may file a petition with the Secretary of the Commonwealth setting forth the relevant facts and

[14] Va. Code Ann. § 19.2-392.2.
[15] For purposes of the expungement statute, the Virginia courts have required a finding of "innocence." The courts will not grant expungement in cases where evidence of guilt exists, such as a guilty plea or a suppressed confession. (Gregg v. Commonwealth, 227 Va. 504, 507, 316 S.E.2d 741, 743 (1984)).
[16] Virginia's Criminal Procedure Code (Va. Code Ann. § 19.2–151) explains "dismissal by accord and satisfaction." In certain cases, if the injured person appears in court and states in writing that the accused has made restitution, the court will dismiss the case. Common charges for which an accord and satisfaction is available are simple assault and battery.

requesting expungement of all police and court records. (See p. 17 for the Secretary's contact information.)

Identification misuse: If a person is arrested or charged while using another individual's identification without consent or authorization, the individual whose identification has been misused may seek expungement. In this case, the individual may seek expungement from the court or CCRE (see pp. 14-15).

Expungement in these circumstances is not automatic. The individual must petition the circuit court of the county or city in which the case was handled. The petition should include the following information: a copy of the warrant or indictment; the date of the arrest; the name of the arresting agency; the specific criminal charge to be expunged; the date of the final disposition of the charge; the individual's date of birth; and the full name at the time of the arrest. If any of this information is unavailable, the individual must state the reason for unavailability in the petition.

A separate statute covers **juvenile record expungement**.[17] Juvenile court records must be expunged automatically once the youth has reached the age of nineteen, and five years have elapsed since the case's disposition. After they are expunged, records of juvenile delinquency proceedings are not available even to the person involved.

However, two exceptions exist to the automatic expungement of juvenile records. First, records are retained until the youth reaches twenty-nine years of age for certain motor vehicle violations. In this case, however, the records are maintained at the Department of Motor Vehicles, not at CCRE. Consequently, unless the offense was so serious that the juvenile was tried as an adult, the motor vehicle violation will not appear on the individual's rap sheet.

The second exception for juvenile records requires that if the offense had been a felony if committed by an adult, and the juvenile is tried as an adult, the adult rules apply and the records are retained indefinitely, unless an independent reason for expungement exists.

Each court is free to establish its own procedures for expunging cases. Your client should call the court in which his case was heard and ask the court clerk how to apply to have a case expunged in that court. The clerk will know whether the services of an attorney will be needed to file an expungement petition, or whether the clerk can help the applicant prepare and file the petition without an attorney. (Clients who want to expunge arrests or charges or make corrections on their rap sheets can consult How to Get and Clean Up Your Virginia Rap Sheet, prepared by the Legal Action Center.)
To assist John, you and he should review his rap sheet to determine if, based on the

[17] VA. CODE ANN. § 16.1-306.

dispositions, any charge on it can be expunged. For instance, John's recent conviction that led to his incarceration would not be eligible for expungement relief because he was convicted of a felony, which can never be expunged. If his previous arrest was resolved in his favor, he would be eligible to file a petition seeking expungement.

Restoration of Civil Rights and Pardons

Since misdemeanor and felony convictions cannot be expunged in Virginia, is there anything an ex-offender can do to mitigate the effects of these convictions? In Virginia, **two types of clemency** exist: Restoration of Civil Rights and Pardons. Both are granted at the Governor's discretion. Neither type of clemency significantly improves employment opportunities. Only one type of pardon (an absolute pardon) entitles individuals to expungement of their criminal records, but this type of pardon is rarely granted. For all other grants of clemency, an individual must still report criminal convictions.

Restoration of Civil Rights

In Virginia, individuals with misdemeanor and felony convictions may apply for pardons. The application process for a pardon (also known as executive clemency) applies similarly to those with a felony conviction, as to those with a misdemeanor conviction. However, an individual with a felony conviction must first apply for Restoration of Civil Rights, to return the rights lost upon conviction, which include the right to vote, hold public office, serve on a jury, and be a notary public. Before an individual with a felony conviction may be considered for a pardon, these rights must be restored. Individuals with misdemeanor convictions may apply directly for a pardon without having their civil rights restored because these individuals do not lose their civil rights upon conviction.

Applications for Restoration of Civil Rights are available from the Secretary of the Commonwealth ((804) 786-2441) and at the website: **www.soc.stat.va.us/clemen.htm**. To be eligible to have one's rights restored, five years must have elapsed since the end of any suspended sentence, probation, or parole. In the case of drug convictions, seven years must have elapsed before being eligible. In addition, all court costs, fines, and restitution must be paid. The applicant must also demonstrate evidence of good, law-abiding character. For instance, participation in community organizations, volunteer work, child care, elder parent care, or membership in religious organizations can be evidence of such character. The process takes several months from the time an application is received.

Restoration of Civil Rights does not protect an individual from being denied a job or license because of a criminal record. This is because the process does **not** erase conviction records. You must still list your convictions on job applications that ask for them. An employer will see your convictions if he asks for your rap sheet when you apply for a job.

Pardons (Executive Clemency)

The application process for a pardon is the same for both those with a felony conviction whose rights have been restored, as well as individuals with a misdemeanor conviction. Petitions for pardons are strictly scrutinized. Three types of pardons exist:

1. An **Absolute Pardon** is based on the belief that the applicant was wrongly convicted and is, in fact, innocent. It is seldom granted and is the only type of pardon that results in expungement of the criminal record.

2. A **Conditional Pardon** is available only to inmates and provides for conditional early release. These are granted only under extraordinary circumstances. For example, an extremely ill individual might be conditionally pardoned if adequate medical care is otherwise unavailable. If the conditions of release are violated, the individual is subject to reincarceration.

3. A **Simple Pardon** removes some of the stigma ex-offenders encounter in obtaining employment and education, but does not allow the recipient to expunge his conviction record. One must demonstrate evidence of good, law-abiding character (see previous page) and receive favorable recommendations from the officials involved in the case and the Virginia Parole Board.

To petition the Governor for a pardon, an individual must send a letter to the Governor with the following information: reasons for the request; date of birth; Social Security Number; current address; conviction(s); date(s) and court(s) of conviction(s); sentence or other disposition of conviction(s); date civil rights were restored (for felony convictions); and location of any incarceration. The letter should be sent to the following address:

Office of the Governor
830 East Main Street, 14th Floor
Richmond, VA 23219

The pardon process can take over a year to complete and will involve a complete investigation by the Virginia Parole Board. While an individual seeking clemency cannot appeal the Governor's decision, he can reapply every two years. If you have additional questions about clemency, you can call the Secretary of the Commonwealth at (804) 786-2441.

Neither Restoration of Civil Rights nor a pardon prevents an individual from being denied a job or license because of a criminal record. Only an absolute pardon provides for expungement of a misdemeanor or felony conviction. Although the Restoration of Civil Rights or the conditional or simple pardon will appear on a rap sheet — informing employers and licensing agencies that an individual has received clemency — an individual must still list convictions (that are not expunged) if asked about them. In addition, as mentioned above (see previous page), neither Restoration of Civil Rights nor any type of pardon removes most statutory bars.

Consequently, clemency does not improve most employment opportunities. However, an employer or licensing agency might consider an individual "rehabilitated" if clemency is granted.

John may not apply for Restoration of Civil Rights because seven years have not yet elapsed since his drug felony conviction. He is also ineligible for all three types of pardons without first having his rights restored. However, John should apply for Restoration of Civil Rights and a pardon after the seven-year waiting period has elapsed. If he is granted an absolute pardon, it will enable him to apply for expungement of his felony drug conviction. On the other hand, even a simple pardon might provide some evidence of rehabilitation.

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 ask about discharge status. Several types of discharges exist:

- 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.

To apply, your client will need copies of his military records, which can be obtained from:

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

To facilitate the request, clients should use a Department of Defense Form 180, "Request Pertaining to Military Records." This form can be obtained by calling the Department of Defense at (703) 697-5737 or picking one up at a veterans organization. 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 for a review of discharge. Your client should use Department of Defense Form 293 (DD-293). These forms are available at local Veterans' Affairs regional offices or by calling the Department of Veterans' Affairs at (800) 827-1000. Ordinarily, one must apply within fifteen years of the date of discharge from the service. However, anyone wanting to upgrade a discharge that occurred more than fifteen years ago may file a motion with the Board of Correction of Military Records (BCMR) of the appropriate branch of service (see address below). Department of Defense Form 149 (DD-149) should be used if the veteran was discharged more than fifteen years ago.

Board for Correction of Military Records
(C-60)
400 7th Street SW
Washington, DC 20590
(202) 366-9335

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 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 based on the written materials submitted on the applicant's behalf. It is best to seek legal assistance in preparing these materials.

For further assistance, contact the following agencies:

Greater Richmond Chapter of the
American Red Cross
420 East Cary Street
Richmond, VA 23219
(804) 780-2250
(or check phone book for the office nearest you)

Virginia Department of Veterans' Affairs
Roanoke Headquarters
270 Franklin Road, SW Room 503
Roanoke, VA 24011-2215
(540) 857-7104

Vietnam-era veterans may also call:

Vietnam Veterans of America
2258 Bayberry Street
Virginia Beach, VA 23451
(757) 498-2541

III. Preparation to Prevent Discrimination

Once an employer has rejected an applicant, it is much harder to get the decision reversed than it would have been to prevent it initially. Preparing your client thoroughly for the hiring process can often avert a rejection based on the client's alcoholism or addiction history or criminal record. So, before your client applies for employment, learn about the job seeker and 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 help your client assemble the information and documentation that will address those concerns. Many things you should learn about prospective employers are things any good job developer would ask 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 the employer makes hiring decisions will enable you to ascertain whether an employer is treating your clients differently than other applicants. Some questions you should ask include:

- What kinds of jobs are available?
- How many positions are open?
- 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? What drugs will be identified?
- 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 applies for a job cannot be overstated. The goal is, of course, to anticipate potential difficulties to help applicants present themselves in the best possible light. 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 explore inconsistencies or improbabilities until you are convinced 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.

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 all treatment services that he has participated in. If he has undergone treatment, find out where and when, and then contact the treatment programs to discuss your client's record in the program. Confirm the client's treatment history and readiness for employment with the treatment program's medical and counseling staff. Remember that you must obtain your client's written consent before making contact with a drug or alcohol treatment program.

Since John received substance abuse treatment while in prison, try to find out what kind of treatment he received and whether he has certification for completing the treatment program. Also, you may want to find out whether he has or is currently receiving community-based treatment or other after-care services and, if so, obtain any available progress reports.

Arrest and Conviction History

For each arrest, determine the date, the exact charges, and the disposition of the charges. (See "Dealing with a Criminal Record," p. 7.) If the arrest resulted in a conviction, obtain the name of the court in which the conviction was issued and sentence imposed, and learn how and where the sentence was served. Determine if your client is still on probation or parole and, if so, identify his parole or probation officer.

Like many clients, John is unclear about the date, disposition, and exact nature of his first arrest. Advise him to get a copy of his official criminal record to determine this information, including whether this charge occurred when he was a juvenile. The criminal record will also refresh John's memory about other criminal charges he may have forgotten.

Employment History

Find out about all of your client's former jobs. Determine where the client worked, for how long, and the job responsibilities. 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. Determine if your client was ever subject to disciplinary action at work. Find out if the client was ever denied unemployment compensation.

Military History

An employer may ask your client if he has served time in the military. If he has performed military service, 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 “How to Upgrade a Less Than Honorable Military Discharge,” p. 19.) 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.

Unexplained Time Gaps in History

If there are substantial periods of time not accounted for by employment, the military, incarceration, or treatment, investigate them thoroughly. 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 be highlighted on a job application form. The most important traits are those that counterbalance the applicant’s weak spots.

IV. Applying for the Job

The Job Application

After you have learned about your client's background, the job, and the hiring process, counseling him about how to apply for the job is crucial. Ask the job-seeker to bring in the application form so you can assist him in completing it. If the employer will not release the application, be sure your client understands how to answer all questions to his 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 (infractions) 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 asks about arrests or "charges," all arrests (that have not been expunged) and convictions must be disclosed. If an application form just asks about "crimes," "convictions of crimes" or "criminal offenses," only misdemeanors and felonies need to be listed. If an application asks only about a current drug problem, past dependence should not be mentioned. It is, therefore, important for you and John to be familiar with his criminal record and his drug history so that you can prepare him to answer these types of questions.

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. 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 their 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 clean up their criminal record. (See Chapter II, "Dealing with a Criminal Record," p. 7.)

Disclosing Alcohol or Drug Dependence or Criminal History

Employers may ask questions concerning a person's history of alcohol or drug dependence after making a conditional offer of employment. Employers may ask pre-employment questions about criminal **convictions**, but not expunged arrests. 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 that helped cause or foster the problem. If relevant, 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 participating in treatment.

If some of your clients have a criminal record, they should reduce 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. Advise clients 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 his convictions for driving while intoxicated and his simultaneous alcoholism; this allows him to argue persuasively that, having successfully conquered one problem, he has conquered both. Another client might successfully emphasize that his last conviction was ten years ago. A third individual could note that he was only seventeen years old when he committed the only serious offense for which he was convicted.

In John's case, he should emphasize the substance abuse treatment, vocational training, and educational courses he successfully completed while incarcerated. If he has continued to participate in community-based substance abuse treatment, he should obtain letters from those providers and inform the employer of that, as well.

Demonstrating Rehabilitation

Your client can emphasize the positive by demonstrating his rehabilitation. Make sure your client meets an employer only when ready with a firm statement of his

rehabilitation efforts. To help your client stress the positive parts of his background, look carefully at some of the following things:

- **Progress in Treatment Program**

If your client has decided to reveal his addiction or criminal history, he should consider mentioning his participation in treatment or counseling. If your client has a good record in the program, he will almost certainly want to inform a potential employer of this. For example, your client might want to mention that he has participated voluntarily in drug treatment for three years, particularly if periodic testing at the program verifies that he has not reverted to drug or alcohol abuse during that time.

- **Previous Employment Record**

If your client had been consistently employed during any period, either before or after becoming involved with alcohol, drugs, or crime, emphasize the fact. Highlight good performance 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 he attended a school or training program. For example, if a client's two-year residence in an alcoholism treatment program appears on his resume as a two-year gap between jobs, he can effectively stress his faithful attendance at a community college during the same two years.

- **Social and Religious Activities**

Your client should stress any such activities. If he has a conviction for larceny or embezzlement, for example, the fact that he handles the cash at a neighborhood fund-raising event will be 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.

The job seeker should also include letters of recommendation from former employers who 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.

You should be aware of a federal program that helps ex-offenders and individuals in recovery obtain bonding. Employers often require bonding for employees in positions 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 his being bonded, even if he 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 the 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. Contact the Virginia Department of Labor and Industry at (804) 371-2327 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 previously, the employer may obtain a rap sheet that contains errors, information that should have been expunged, 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 on information — some of it incorrect — that may adversely affect the employer's decision.

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

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

Your client should certainly correct any errors that appear 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. 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 erroneous information.

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 it 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. However, federal, state, and local governments are **not** affected by the law. Government employers may, therefore, impose 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.

Employers who violate the EPPA are subject to civil penalties of not more than $10,000 and injunctive actions by the Secretary of Labor. Individuals subjected to polygraph examinations in violation of the EPPA may also file civil lawsuits within three years of the violation.

Virginia law generally allows governmental employers to administer pre-employment polygraph tests. However, because the **Virginia Criminal Procedure Code** prohibits these employers from asking job applicants about expunged records, such inquiries would violate the law.[18]

How to Respond to Illegal Questions

Now that you know how to recognize illegal questions (see p. 4), 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 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

[18] VA. CODE ANN. § 19.2-392.4.

complaint or lawsuit under the laws discussed in Chapter V, “Job Rejection.” 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; and
- 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. A question that frequently comes up is, “Should my client lie about his record?” We advise clients to tell the truth. It may be tempting for clients to lie out of hope that the employer might not find out about their criminal record. However, if the applicant lies or omits pertinent information, and the employer learns the truth through a background check or a reference from another source, the employer is legally permitted to discharge the employee. Any protections against discrimination the ex-offender might otherwise have will become moot. 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.

If your client manages to obtain the job without the employer detecting his record, his problems may not be over. 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 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.

V. Job Rejection

Informal Resolution

If a potential employer rejects your client when he applies for a job, try to determine if the client's alcohol, drug, or criminal history affected the decision. When making this determination, consider your client's qualifications for the job. 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, you can be fairly sure that his conviction influenced the decision regardless of the reason given for rejection.

When you feel reasonably certain that your client's history contributed to his 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. Attempt an informal resolution first.

Sometimes, if your client asks politely why he was not hired, he will be told that it was because of his alcohol or drug use and/or criminal history. If asking does not work, it may help for you to become directly involved. The circumstances surrounding your client's rejection will determine how you should approach the employer to learn the reason for your client's rejection. In certain cases, it may be appropriate to refer your client to another employer. If you want to pursue the opportunity with the same employer, you may consider writing a nonthreatening 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 Mr. Doe that made you decide not to hire him." You may want to use a more indirect approach if you suspect the employer may have an absolute ban on hiring ex-offenders. In these cases, you may send a letter stating your interest in placing former offenders in meaningful jobs, and inquiring about possible openings. Another option, to avoid alienating the employer, is to have someone unconnected with your agency (such as a legal services attorney) ask the employer about its policy toward your client groups.

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 discussed later. If, however, the employer admits (or the records show) that your client's record may have influenced the rejection, ask for an opportunity to 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 had prepared the applicant to address.

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;
- 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, assure the employer that the applicant is, in fact, sober, drug-free, or successfully participating in treatment. Explain what the person has done to become job-ready and demonstrate that he is responsible, stable, and respectful of others.

Demonstrating this will vary from case to case, but remember that simply asserting that the job seeker possesses these traits is usually insufficient. Highlight activities (consistently arriving on time for therapy), accomplishments (successfully completing a series of courses), and experiences (getting married) that support your assertions.

Sometimes it is appropriate to remind the employer of potential legal liability if it persists in denying your client a job. Approach this issue carefully. If you are too heavy-handed, the employer may take offense and refuse to try to work things out amicably. If, on the other hand, you soft-pedal the issue by mentioning potential liability as "a factor that everyone must be aware of," you may succeed in engaging the employer's full attention.

If the employer is recalcitrant or if your attempt to persuade it to reverse its initial decision proves unsuccessful, 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 resolving the problem?

Administrative Appeals to Public Employers and Occupational Licensing Agencies

Sometime in the future, John may decide to apply for a tradesman license to make use of his vocational training in plumbing. If he does, he may experience difficulties getting a license because of his criminal record. In Virginia, applicants for a tradesman license are required to disclose misdemeanor and felony convictions that occurred in any jurisdiction. The occupational licensing board may deny licensure to any applicant based upon a conviction directly related to the profession, or when the applicant is found "unfit" or "unsuited" because of additional information.[19] John would, however, be entitled to a hearing before the Department of Professional and Occupational Regulation, the agency responsible for enforcing the laws regarding professional and occupational licensing, if he was denied a license based upon his criminal history.

Department of Professional &
Occupational Regulation
Enforcement Division
3600 West Broad Street
Richmond, VA 23219-4917

On the other hand, if John is denied a job with a governmental or quasi-governmental employer (for example, a public hospital, or a regional transportation authority), he may be entitled to challenge an initial decision to deny him the job in an administrative appeal to that agency or another one, such as the Civil Service Commission, designated to hear such appeals.[20] An administrative appeal may include a hearing or it may simply be an opportunity to submit whatever documents and written statements John thinks are appropriate.

Appeals to public agencies are likely to be available only to those who have been wrongfully denied a license because of their criminal record, or denied a job because of past expunged records. Individuals who have been denied employment based upon their alcoholism or addiction history must rely upon federal law, because administrative agencies do not recognize these individuals as "disabled" under the VDA.

If an administrative appeal is available, encourage John to pursue it; such appeals can be successful. Try to get a lawyer to represent him. If you are unable to do so, have him request the appeal anyway,

[19] VA. ST. § 54.1-204.
[20] VA. ST. ANN. §§ 15.2-721, et seq. (2000).

making sure the request is on time. Frequently, an individual has as little as thirty days to request an appeal, and sometimes even less time. Once John has requested the appeal, you can return to the question of who should represent him. In most cases the answer is simple: **you** do it. You will already be familiar with the pertinent facts about John. You are already something of an expert on drug and alcohol treatment 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 (if it is an issue in the appeal). Emphasize John's strengths and rehabilitation.

The hearing officer will probably allow you to choose how to present John's case. Begin by telling the officer what areas or topics you want to cover and in what order. This will make it easier for the examiner to follow your story and make him 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 John's story, identify the general topics you want to cover and, taking each topic separately, decide what to emphasize. You and John can then prepare a statement covering all the relevant points, which he can read at the hearing. However, you should give serious consideration to drawing out John's story through questions and answers.

You and John 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 John will be. Tell John 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 John says and the level of detail. If he 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: You and John should remember two things about these administrative remedies. First, while John may ultimately get the job or license he wants,

the appeal process takes time — sometimes months — before it results in a decision. John should not bank on a good outcome in the meantime. This means that he should keep working or looking for work while the appeal is going forward. Also, keep in mind that the other remedies John may have the right to pursue — such as 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 John has an administrative appeal pending. If he does not file a discrimination complaint or lawsuit within those time limits (see below), he may lose the right to challenge the employer's decision under the antidiscrimination laws. So, stay mindful of those time limits even as your client pursues whatever state administrative appeal may be available.

Second, successful administrative appeals of this sort may get John the job or license he wants, but he may not be entitled to other remedies — like back pay or seniority retroactive to the date he was first denied the job or license. The antidiscrimination laws discussed below do offer this broader relief.

If the appeal is unsuccessful, John 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. In these circumstances, you should get advice from a lawyer on how best to proceed.

Legal Challenges to Discrimination Against Individuals in Recovery from Alcoholism or Drug Dependence

Formal Legal Challenge Under Anti-Discrimination Laws Against Public Employers

The federal 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 may file a lawsuit 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, your client can file an administrative complaint and lawsuit against it under the ADA, regardless of whether it receives any federal funds.

Some public employers are covered by only one of these federal laws, but many are covered by both. 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 by a public employer that receives federal grants or aid have the right to file an administrative complaint or a lawsuit against the employer. You may be able to find out whether an employer receives federal grants or aid by calling its financial, administrative, or public relations office.

The time limit for filing a lawsuit under the Rehabilitation Act is one year from the date the discriminatory act occurred. Individuals do not have to pursue an administrative complaint before a lawsuit under section 504 of the Act (as is also the case with the ADA, if the lawsuit is against a public employer such as a government agency). However, please be aware that a federal district court in Virginia has held that federal employees must first pursue administrative remedies before proceeding to court under section 504 of the Rehabilitation Act.

Administrative complaints alleging violations of Section 504 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 within 180 days of the discriminatory act. To find out where and when to file such administrative complaints, call the federal funding agency's headquarters in Washington, DC or its regional office in this area. The Federal Information Center at (800) 688-9889 will know where the various federal funding agencies' regional offices are located.

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;

FEDERAL AND STATE REMEDIES FOR EMPLOYMENT DISCRIMINATION BASED ON DISABILITY

Statute	Type of Employer		Where to File Complaint		Deadline for Filing	
FEDERAL ADA	Private	Public (state/local)	Administrative Agency	Court	Agency	Court
Title I	Yes (15 or more permanent employees)	Yes	EEOC or Virginia Council on Human Rights (VCHR)	Following Right to Sue Letter	180 days 300 days if filed PHRA claim first	90 days after Right to Sue Letter
Title II	No	Yes	Not Required	Immediate/no exhaustion	N/A	1 year
Rehabilitation Act						
Sections 501 & 504 (Federal employer)	Federal gov't only	Federal gov't only	Federal Agency	Exhaustion required	Generally 180 days	90 days - if final agency action 180 days - if no final agency action
Section 503	Federal contract	Federal contract	Dept. of Labor OFCCP	No private action	300 days	N/A
Section 504 (Non-federal employer)	Federal assistance	Federal assistance	DOJ or funding agency	Exhaustion may be required	180 days	1 year
Virginia						
Virginians with Disabilities Act (VDA)	Yes	Yes, except those covered by the Rehabilitation Act	VDA	N/A	N/A	N/A

- 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 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; and
- 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 thirty days of the discriminatory act being challenged. The Federal Information Center at (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 all other public employers and agencies, including all state and local governments and governmental units, regardless of the size of the employer. Clients claiming disability-based employment discrimination by one of these 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 a public agency in court under Title II of the ADA without filing an administrative complaint. The time limit for filing a Title II lawsuit in Virginia (under the ADA) is one year from the date the discriminatory act occurred. However, please be advised that your client cannot recover monetary damages in a Title I (and, most likely, a Title II) lawsuit against a state employer because of a United States Supreme Court decision issued in 2001.

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 180 days after the discriminatory act occurred. 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 on the previous page, so your client should have that information at hand when he 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 (800) 669-4000. In Norfolk, the address is:

Norfolk Area Office
U.S. Equal Employment Opportunity Commission
World Trade Center
101 West Main Street, Suite 4300
Norfolk, VA 23510
(757) 441-3470

In Richmond, the address is:

Richmond Area Office
U.S. Equal Employment Opportunity Commission
3600 West Broad Street, Room 229
Richmond, VA 23230
(804) 278-4651

The U.S. Department of Justice will also accept complaints charging state or local 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, DC 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 Virginia Council on Human Rights (VCHR) (see contact information below) has a work-sharing agreement with the federal EEOC, and it will also take ADA complaints and refer them to the EEOC. However, there is little advantage to filing a federal claim with the VCHR because the VDA does not protect individuals with histories of alcohol or drug dependence.

Virginia Council on Human Rights
Washington Building, 12th Floor
1100 Bank Street
Richmond, VA 23219
(804) 225-2292

Formal Legal Challenge Under Anti-Discrimination Laws Against Private Employers

As 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 both federal

laws cover some private employers, 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. The federal agencies charged with enforcing these two laws (see below) are coordinating their enforcement efforts so that complaints against private employers 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, like the employer John applied to, your client can file a formal administrative complaint against it under the Rehabilitation Act. The form of the complaint can be a letter like that described on pp. 36 and 38.

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 must file a complaint with the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) within 300 days of the discriminatory act. Address the complaint to:

U.S. Department of Labor
O.F.C.C.P./E.S.A.
Curtis Center, Suite 750 West
170 S. Independence Mall West
Philadelphia, PA 19106
(215) 861-5763

To determine whether an employer is a federal contractor, contact the OFCCP at the number listed above.

Individuals claiming discrimination by federal contractors in violation of Section 503 of the Rehabilitation Act do not have the right to file a lawsuit in court against the employer. But if the ADA also applies to that employer — and it will if the employer has more than fifteen employees 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 file a complaint with 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 (800) 688-9889. If the funding agency does not have a regional office, file the complaint with the agency's national headquarters in Washington, DC.

Regardless of whether a private employer is covered by the Rehabilitation Act (because it receives federal contracts or funds), your client may file an administrative complaint against the employer under Title I of the Americans with Disabilities Act if it employs fifteen or more people on a permanent basis. The administrative procedures and time limits identified on pp. 38-39 also apply to complaints against private employers. ADA complaints against private employers may be filed with the VCHR or the EEOC (see p. 39 for contact information).

Individuals charging an employer with violating the ADA under Title I must first

file an administrative complaint before filing a lawsuit. The EEOC will then issue a “right-to-sue” letter to the complainant after a certain period of time. If an employer is a public employer, however, individuals may proceed directly to court under Title II of the ADA within one year of the discriminatory act, without first filing a complaint against the EEOC.

Thus, in John’s case, if he believes the employer rejected him for a job he is qualified to perform because of his past drug dependence, he could challenge that decision by filing a complaint with the EEOC alleging a violation of the ADA.

Filing an administrative complaint with these federal or state agencies can have a relatively immediate effect, although it often takes time to resolve the legal issues involved. Employers do not welcome an investigation by a federal or state agency because 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 series of questions.

Since the prudent employer will retain an attorney to represent it in dealing with these agencies, 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.

Legal Challenges to Discrimination Against Ex-Offenders

Federal Law

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 may be able to bring a race discrimination claim under **Title VII of the 1964 Civil Rights Act.**

Title VII prohibits private employers and state and local governments from discriminating in employment based upon race, color, gender, national origin, or religion. The EEOC has ruled that employment policies that exclude individuals based upon their criminal history may violate the Civil Rights Act because such policies disproportionately impact minorities, who are arrested and convicted at a significantly higher rate than their percentage in the population.

According to the EEOC, exclusion based upon a criminal conviction must be justified by a business necessity. To establish business necessity, the employer must show that three factors were taken into consideration in the hiring decision: (1) the nature and gravity of the offense(s); (2) the time that has elapsed since the conviction and/or completion of

the sentence; and (3) the nature of the job held or sought. For example, business necessity exists where the applicant has a fairly recent conviction for a serious offense that is job-related.

Employers are also prohibited from excluding individuals based upon their arrest records absent a business justification. A "business justification" is demonstrated by showing the applicant engaged in the conduct for which he was arrested, and that the conduct is both job-related and fairly recent. The EEOC guidance requires employers to provide applicants a chance to explain their arrest records before they are disqualified from employment.

For further details, you may see a lawyer or contact the EEOC at (800) 669-4000.

State Law

The **Virginia Criminal Procedure Code** prohibits denial of an occupational license based upon a criminal conviction that is not directly related to the license sought, unless the individual is otherwise "unfit" or "unsuited" for such profession. Individuals who believe they have been wrongfully denied licenses based upon their criminal history may file complaints with the Virginia Department of Professional and Occupational Regulation. No time limit exists for filing a complaint.[21]

If John applies for and is denied a tradesman license based upon his felony drug conviction, he could file a complaint with the Department because a drug possession conviction is unrelated to plumbing.

The Code also provides protection to individuals who believe they have been asked illegal pre-employment inquiries about, or been denied jobs or occupational licenses because of expunged records (see p. 6). These adverse employment actions may be reported to any law enforcement agency or the Attorney General (see contact information below), because employers are criminally liable for such practices. The time limit for filing a complaint is within one year of the action.

In John's case, he could also file a complaint based upon an adverse hiring practice that related to his arrest record to the extent it had been expunged.

Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-2071

As discussed previously, the Federal Fair Credit Reporting Act restricts 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 (see pp. 12-14). If the agency's actions violated this law, the individual has the option of suing in federal court or filing a complaint with the Federal Trade Commission. You may contact the Federal Trade Commission toll-free at (877) FTC-HELP.

[21] VA. ST. §§ 54.1-204 and 306.

When to Consult an Attorney

It is important to consult an attorney if clients like John intend to pursue any kind of formal legal action, including filing an administrative complaint and/or a lawsuit. A lawyer can advise your client on the appropriate place to file a claim. Also, since legal standards can change, it is important to have the most current information. Because there is a growing national trend toward expanding access to criminal records, procedures and rules governing this area, in particular, are subject to change.

If John, on the other hand, wants to act as his own counsel in a suit, he may proceed pro se. Some courts have a pro se clerk who provides limited legal assistance. Otherwise, contact the clerk of the court in which the suit is to be filed for information about how to do so. Given the importance and complexity of these actions, a client who proceeds pro se should still consult with an attorney for advice.

If lawyers are not easily available, contact a local law school, a legal services office, or Bar Association office. You may be able to find a law student, paralegal, or attorney willing to help for little or no charge. Sometimes larger law firms will make limited resources available to help agencies as part of their pro bono 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 laws and regulations.

Conclusion

This manual provides guidance in dealing with clients who want to obtain employment. You are now equipped to advise your clients about the kinds of questions employers are permitted to ask about drug and alcohol history, criminal records, and the kind of information they are obligated to divulge. You are also prepared to help your clients become familiar with the contents of their rap sheets so that they know how to correct information and answer pre-employment inquiries directly and completely. This information also helps you make appropriate job referrals. Finally, we hope this manual gives you and all your clients a better understanding of employment rights and the state and federal laws that may protect them against discrimination.

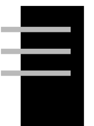
Employment Discrimination

and

What to Do About It

A Guide for Virginia Counselors of Individuals with Criminal Records or in Recovery from Alcohol and Drug Dependence

LEGAL ACTION CENTER



This booklet was made possible through the generous support of the **Charles Stewart Mott Foundation.**

The Legal Action Center would also like to thank **Public/Private Ventures** for its advice and assistance in preparing this manual.

The **Legal Action Center** is the only nonprofit law and policy organization in the United States whose sole mission is to fight discrimination against people with histories of alcohol and drug dependence, HIV/AIDS, or criminal records, and to advocate for sound public policies in these areas.

Legal Action Center

153 Waverly Place, New York, NY 10014
(212) 243-1313 • FAX (212) 675-0286

236 Massachusetts Avenue, NE, Suite 505, Washington, DC 20002
(202) 544-5478 • FAX (202) 544-5712

www.lac.org

Copyright © 2002 • All rights reserved.

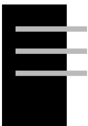


Table of Contents

FOREWORD v

INTRODUCTION vii

I. IS IT ILLEGAL FOR EMPLOYERS TO DISCRIMINATE? 1
Illegal Pre-employment Inquiries 4

II. DEALING WITH A CRIMINAL RECORD 7
Kinds of Offenses 7
Special Dispositions of Charges 7
Getting and Cleaning Up Arrest and Conviction Records 9

III. PREPARATION TO PREVENT DISCRIMINATION 21
Learn About the Job and the Hiring Process 21
Learn About the Client 21
What Questions to Ask: The Pre-application Interview 22

IV. APPLYING FOR THE JOB 25
The Job Application 25
Disclosing Alcohol or Drug Dependence or Criminal History 25
Demonstrating Rehabilitation 26
Some Special Problems 28

V. JOB REJECTION 31
Informal Resolution 31
Administrative Appeals to Public Employers
and Occupational Licensing Agencies 33
Legal Challenges to Discrimination Against Individuals in Recovery from
Alcoholism or Drug Dependence 35
Legal Challenges to Discrimination Against Ex-Offenders 41

WHEN TO CONSULT AN ATTORNEY 43

CONCLUSION 44

Foreword

This manual was prepared by the Legal Action Center, a nonprofit law and policy office whose mission is to fight discrimination against and protect the privacy of people in recovery from drug dependence or alcoholism, individuals living with HIV/AIDS, and people with criminal records. It is based on the Center's experience advocating for policies that help people in recovery from alcohol and drug dependence and ex-offenders get and retain jobs, and assisting those who face employment discrimination because of their background. Over the years, our efforts have gone a long way toward helping employees and job applicants become aware of their rights and responsibilities, while increasing employers' awareness of theirs.

Discrimination in employment remains a problem. This manual describes what can be done to maximize an individual's ability to get employment and challenge discriminatory employment decisions. Many public and private job opportunities which appear, at first, to be closed to people in recovery or those with criminal histories can be opened with the right preparation. This assistance need not come from lawyers. People like you can make the difference between an individual getting the job instead of the cold shoulder. This manual serves as a guide for people who want to help individuals with criminal records and histories of alcoholism and drug dependence find and retain jobs in Virginia.

This manual was made possible through a generous grant from the Charles Stewart Mott Foundation. The Legal Action Center would also like to thank Public/Private Ventures for its advice and assistance in preparing this manual.

Introduction

Those who work with individuals with criminal records and histories of substance abuse know the challenge of helping them find appropriate employment. Often this challenge begins with identifying and understanding the legal standards that apply to the hiring of individuals with criminal records and histories of substance abuse. The following typical scenario will guide you through the applicable legal standards discussed in this manual.

Scenario:

John Doe comes to your office looking for a job. He tells you that he has been turned down for several jobs and he is convinced that it is because he has a drug-related criminal record. You ask him about his criminal history and he tells you that he was arrested four or five years ago but he cannot remember the charge. He also tells you that he was incarcerated for two years for a drug possession conviction and was released four months ago. While in prison, he received substance abuse treatment for heroin dependence. His work history is sporadic and mostly includes food services jobs, although he did get some vocational training in plumbing while he was in prison. He is frustrated and thinks it is unfair that he is being discriminated against based on his criminal record and his past drug dependence. You are familiar with the employer, which is a large government contractor, and you know that the company regularly has positions available that include a generous benefit package.

What should you do?

The starting point for assisting clients like John is to understand the federal and state laws that prohibit discrimination on the basis of disability and criminal justice status.