

EXPUNGEMENT HANDBOOK

Your Guide to Expungement of Criminal Records

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Disclaimer: This handbook is intended to provide an overview of expungement. No legal advice is provided.

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Introduction and Scope

This handbook is a general overview of the topic of expungement and is not intended to be an exhaustive treatise dealing with all the intricacies of the law in each state. Therefore the focus herein is on understanding what an expungement does and how it may be obtained.

The construction, scope, and effect of statutes providing for relief from civil disabilities which result from conviction are not questions within the scope of this handbook, even though such statutes may be informally referred to as "expungement" statutes.

This handbook does not specifically consider the availability of judicial relief to compel correction or nondisclosure of criminal records in national criminal data banks, such as those maintained by the Federal Bureau of Investigation.

The dissemination of criminal records can be a severe handicap to a person's opportunities in many areas of life. By expunging such records, the person is legally allowed to act as if such records don't exist. Others may be penalized for unauthorized disclosure of expunged information.

Every state has its own statutory and case law on if and when expungement is permitted. There is no uniformity on what records are covered, what offenses are excluded, when a person may be eligible to apply for expungement, and when expunged records may be inspected. The law of your state should be consulted to determine what the requirements are for expunging records in that state.

Definitions

Some of the terms referred to in this handbook are interpreted to have different meanings in various jurisdictions. Some states may refer to sealed records as expunged records, while others distinguish between the sealing of a record and the expungement of a record. Some of the other terms used to refer to expungement of records include vacation, sealing, expunction, voiding, and annulling of records.

The verb "expunge" is defined as "to strike out, obliterate," or "to cause the physical destruction of." Webster's Third New International Dictionary 803 (1968). Although the nominative form of the verb "expunge" is generally taken to be "expunction," it is the practice of many courts in using "expunction" and "expungement" interchangeably.

"Expunction" includes not only the physical destruction of the record, but also includes "sealing" the record or parts thereof, the return of identification data to the accused, or

otherwise making the record inaccessible for ordinary purposes. However, since the focus of this handbook is upon the use of expunction as a device to shield a convicted person's criminal record from police or public scrutiny, cases which merely "vacate," "set aside," or otherwise dispose of a conviction without removing it from criminal data banks or "sealing" the record are not included within the handbook, even though such procedures may be informally described as "expungements."

Other Terms Used

Many states include a statutory definition of the terms used in their expungement statutes, however some states do not. In either case, the defined or undefined terms used may still require the court to examine legislative history and case law to determine their meaning and application.

For purposes of this handbook, the following definitions will apply:

"Conviction" includes any disposition following an initial determination or assumption of guilt, regardless of the subsequent sentencing procedure and the final judgment following probation or other sentence. Therefore, it includes not only stated convictions on the charged offense, but also cases in which guilty pleas were entered, regardless of whether the court ultimately suspended judgment upon discharge of the defendant following probation, permitted withdrawal of the guilty plea, or applied some other form of alternative sentencing. For scope purposes, the term "conviction" is not to be taken to mean an absolutely final judgment of conviction and sentence, although some courts, in some contexts, have regarded such final judgment to be a requisite element.

"Criminal records" include records of the arrest, fingerprints, and photographs taken at the time of booking, records of the trial, conviction records, and rap sheets, regardless of whether the records are in the custody of the judiciary or various law enforcement agencies.

The term "juvenile court" refers to any court, however designated, which has special jurisdiction to deal with problems of minors.

"Law enforcement agency" includes state police, highway patrol, and other agencies which devote a substantial portion of their budget to law enforcement purposes.

About Expungement

Types of relief available

Some states have statutes which govern exactly what may be ordered when an expungement is granted, such as who may be ordered to expunge records under their control, which records may be expunged, and how they are to be expunged.

In granting an order of expungement, a court may provide for (1) complete expungement of local records and recall of copies forwarded elsewhere; (2) amendment of records to show the arrestee's exoneration; (3) sealing the record; (4) limiting or prohibiting dissemination; (5) "sanitizing" the record by obliterating the arrestee's name and other identifying data; (6) return of records; and/or (7) destruction of records.

Courts often retain a copy of the records under seal so that the records may be accessed in limited circumstances, or upon court order for good cause shown. In some states, the records may only be sealed and not destroyed, such as when there is an objection by a law enforcement agency to a petition for expungement of records, even if there were no grounds for denying such petition, or when a release from civil liability regarding the arrest is not signed by the petitioner.

There is no uniformity on who may be subject to an order of expungement by the court. Some statutes provide that orders to expunge may only be directed to the clerk of courts. Others statutes include law enforcement, social welfare, and criminal justice agencies. However, there is disagreement among states regarding whether certain state agencies, such as the motor vehicles department, are included in these categories. Other statutes provide that an order of expungement may be directed to any agency believed to have records related to the expunged offense.

Expungement of certain data, such as DNA records and identifying data such as photographs or fingerprints, are often dealt with under separate statutes from those dealing with expungement of records of adjudications. These separate statutes dealing with expungement of DNA and identification data are sometimes contingent upon first obtaining an order of expungement under a broader criminal expungement statute.

The statutes dealing with expungement of juvenile records often apply to a broader scope of agencies and records.

Why Expunge?

There are significant and valuable advantages to having records of offenses expunged. Opportunities for education, employment, and professional licensing may be restricted or nonexistent as a consequence of an arrest or conviction record. Such records apparently are occasionally used by police in subsequently determining whether to arrest the individual concerned, or whether to exercise their discretion to bring formal charges against a person already arrested.

The effects of having records expunged are:

- 1) You may legally say that you have never been arrested or convicted of a crime.
- 2) If anyone does a background check on you, courts and law enforcement agencies will indicate that "no criminal record exists".

The areas of life and individual rights affected by a criminal record include:

Legal:

Voting
Jury duty
Child custody rights
Holding public office
Credibility as a witness in court
Determination of enhanced penalties in future proceedings
Firearms - Acquisition and Possession
Naturalization rights

Economic:

Bank Loans
Employment
College Applications
Professional Licenses
Insurance premiums

Social:

Social stigma
Military Service
Place of Residence
Clubs and civic organizations

Common Law vs. Statutory Authority to Expunge Records

There are different types of authority for granting expungement of records. When a legislature passes laws allowing expungement of records, the court following that law in ordering expungement is using statutory authority. When the court orders expungement of records without a specific law that allows it to do so, it is acting under its inherent or "common law" authority.

Where legislative authority has been granted through statutes requiring the expungement or restriction of records, results in particular cases often have required a construction (interpretation) of the applicable statutory language.

The trend is to deny the inherent authority of a court to expunge records when statutory authority to expunge records has been granted by the legislature. However, some courts will deny their inherent authority to expunge records even in the absence of statutory authority, under the reasoning that it is the prerogative of the legislature to choose whether or not expungement is available. Conversely, there are courts which retain inherent authority to expunge records despite the existence of statutory authority to do so.

Eligibility and Factors

Eligibility for expungement- Adults

There are numerous circumstances which may qualify someone for an expungement order.

1st offense-Under statutes permitting expunction of criminal records of first offenders, it has been held that a criminal record consisting of two offenses arising out of substantially the same criminal transaction was not eligible for expunction. Whether multiple offenses are consolidated into one “first offense” depends on their interrelatedness and proximity in time.

Lack of probable cause/unlawful arrest- Upon final discharge or exoneration, the order of expungement will include the arrest record and related court records. Police and other law enforcement records may also be included.

Local ordinance- Sometimes an expungement statute will specify that persons arrested or convicted under a municipal ordinance may seek expungement in a municipal court. There are also statutes allowing expungement of certain petty offenses, such as loitering or disorderly conduct.

False identification- When an innocent person is charged due to another person falsely claiming to be that person, they may have records expunged upon proof of misuse of their identifying information.

Drug offenses-Some jurisdictions have enacted statutes providing for expunction of convictions on minor drug-related charges. They often require that the person successfully complete all terms of probation, which may include attending a drug rehabilitation program. It has been held that under a statute permitting such an offense to be set aside following successful completion of probation, the convicted person is entitled to expunction of his criminal record.

Innocence- Persons found not guilty who are eligible to have records expunged usually have the least stringent conditions imposed on granting expungement. In statutes

providing for expungement of records of exonerated persons, expungement is often made automatically upon the final determination of innocence. When a petition for expungement is required, a lengthy waiting period after the finding of innocence is not imposed.

Termination in favor of the accused- Under statutes providing for the expunction of criminal records of a first-time offender where the criminal proceeding is terminated "in favor of" the accused, there is disagreement regarding the meaning of the "favorable termination" requirement. Although it has been held in some jurisdictions that for the purposes of such an expunction statute, a favorable termination may include successful completion of probation following a guilty plea, during which time an adjudication of guilt is withheld, other jurisdictions have held that any disposition other than an acquittal is not a termination in favor of the accused.

Plea bargains- Sometimes the prosecutor may agree to expunge a related charge when a person pleads guilty to another charge. In some cases, a person may seek expungement of the charges dismissed pursuant a plea bargain agreement under the court's inherent authority to expunge.

Executive pardon/clemency- Expungement granted in conjunction with a pardon or clemency by the governor of a state is usually dealt with separately in the statute dealing with the power to pardon or grant clemency. The trend is to deny expungement of pardoned offenses, under the rationale that a pardon intends to forgive, as opposed to an expungement, which intends to forget.

Probation- Under statutes providing for expunction of criminal records of a single conviction upon successful completion of probation or a suspended sentence, under circumstances where there is no subsequent conviction, there is authority that although several charges arise out of the same criminal transaction, they may be treated as a single conviction for the purpose of applying the expunction statute. However, there is authority that expunction is not available where the defendant has been incarcerated, or where there has been more than one conviction. Similarly, there is authority that subsequent convictions for traffic offenses, or convictions in other state or federal forums, may bar expunction. It has been held that in an application for expunction under such a statute, the petitioner is required to enumerate every offense for which he has subsequently been arrested in order to give the court an opportunity to determine the appropriateness of such relief.

Eligibility for expungement- Juveniles

Expungement of arrests and other preliminary records may be made in cases of pending juvenile proceedings to determine whether a minor should be adjudged delinquent, in need of supervision, or tried as an adult.

Such records may prevent, hinder, or delay the consideration of the arrested person for employment, referral by employment agencies, acceptance into colleges and apprenticeship programs, public housing, the Armed Forces, and the obtaining of a license.

The minority position is that if the records requested to be expunged were destroyed, the juvenile court would not have a true picture of the developing pattern of any juvenile and the court would be without the means to properly evaluate the conduct of the juvenile should he or she be back within the juvenile court system.

Although the matter would appear to be of considerable importance, there are few cases dealing directly with the issue of expungement of juvenile court records. The reason for the dearth of cases may be that most states apparently expressly prohibit public access to records of the juvenile court, with the result that interested parties may consider that such protection is sufficient, or that such protection is all that they may receive.

However, in a few cases, expungement of juvenile court records has been sought (usually together with expungement of police department arrest records). Although there appears to be general agreement that a juvenile court has the power to expunge its own records, there appears to be little uniformity among the cases as to whether such relief should be granted, with the cases about evenly divided between those which have granted and those which have denied the requested relief.

A number of courts have recognized that juvenile court records are a source of potential harm to the involved person, and that such potential harm, at least where the juvenile was before the court because of mistake or without evidence connecting him with a crime, justifies the granting of relief in the form of expungement of the record, or obliteration of names from the record, where there is no benefit to society from retention of the record. In this connection, the courts have, in some instances, pointed out that there is no benefit to society in the maintenance of juvenile court records in those cases in which the juvenile was before the court as a result of mistake or where there was no evidence to connect the juvenile with a crime. Thus it would appear that such courts would also recognize that where the facts were such as to connect a juvenile with a crime, but the charges were dropped because of some technical or procedural matter, retention of the records might be of benefit to society.

Some statutes provide that if a charge against a juvenile is dismissed, erasure of record is mandatory and automatic, whereas if delinquency is found but delinquent is "dismissed" then erasure can occur only upon petition of the delinquent. Each case must turn upon its own facts in balancing the interests of the juvenile and the interests of society.

Factors considered in expunging records

Sometimes, in addition to meeting the statutory requirements for eligibility for expungement, a court has discretion to weigh various interests in deciding whether to

grant the order to expunge. Some of the factors that may be weighed in determining whether to grant expungement include:

- Whether the governmental interest in retention of criminal records outweighs the individual's interest in remaining free of the stigma of conviction.
- Whether the person has waived their right to expungement by bringing a suit for wrongful arrest or libel.
- Whether expungement would yield a benefit to individual equal to the burden on the state of issuing, enforcing, and monitoring the expungement order.
- Whether the person has satisfactorily completed all conditions of a diversion agreement or alternative sentence.
- Whether the person has taken satisfactory measures to rehabilitate themselves, such as employment, training/education, community involvement, participation in a 12-step program.

Exclusions and exceptions to expungement

Statutes which provide for expungement often contain exceptions or exclusions. Certain offenses may be ineligible to be expunged. Most often, these are sexual offenses, offenses involving children, murder, homicide, other violent offenses, and DUI-related offenses. Where sex offenses are sometimes allowed to be expunged, records of identification in a sexual offender registry are usually exempt from expunction. Expungement of an offense will not void related protective orders. Some statutes granting expungement to persons found not guilty exclude persons found not guilty by reason of insanity or mental illness.

When granted an expungement, the expunged records may still be available or required to be admitted in certain circumstances. A person may be required to disclose expunged offenses on certain employment applications, usually involving a position in law enforcement, working with children, elderly, or vulnerable adults, and state gambling or wagering agencies. Expunged records may also be required to be disclosed in applications for admission to the state bar association or in certain licensing, such as gun permits.

Expungement statutes may make records available for purposes of enhanced sentencing in later proceedings or determining if the person is a habitual offender. States may retain records for determining whether the one-time statutory relief is available in future petitions for expungement, probation, or other sentencing alternatives. Juvenile records may be available to school authorities for administration of suspensions or expulsions. When the person's name is obliterated, the records may be allowed to be used for statistical purposes. A few states have enacted statutes governing whether it is

permissible for employers to inquire about expunged records on employment applications.

Courts generally have held or recognized that where such records are compiled in the course of a legal arrest, their retention in confidential files for use by police as an investigative tool and for limited display for identification purposes to victims of crime, and the dissemination of such records to other law enforcement agencies for similar purposes, is justified in the interest of promoting effective law enforcement, and such justification has been held valid even against the claim that such retention or dissemination constituted an invasion of privacy.

Procedure

Procedure Generally

Where a petition for expungement is required to be made, notice must be served on all required parties within the statutory time period. This time period allows the parties served with notice an opportunity to respond or object. A hearing may be required, sometimes based upon objections filed. Any hearing held will be within a specified number of days after the filing of the petition.

The burden of proof at the hearing is on the petitioner to show that they have met any statutory requirements for expungement. The judge may be required to grant the order if the statutory conditions are met, or the judge may make a ruling based upon the court's judgment that the person is deserving of expungement and that such relief is in the best interests of justice.

Once expungement is ordered, the records custodians to whom the order is directed may be required to file a notice of compliance with the expungement order within a specified number of days. In some cases, this notice of compliance may be served upon the petitioner as well as the court. However, case law exists holding it to be the petitioner's responsibility to ensure the expungement order was carried out. Many states have imposed statutory liability on people who wrongfully disseminate expunged information.

The state court decisions are split on whether the court may apply expungement retroactively to affect proceedings terminated before the expungement statute was enacted. Expungement orders are uniformly held to be a civil remedy, and civil rules of procedure and jurisdiction of appellate courts apply.

CONSTITUTIONAL RIGHTS

Constitutional challenges to the expungement of criminal records, or denial thereof, have been raised in court. The challenges most often involve the constitutional rights to due process, right to privacy, and protection against double jeopardy.

Due process claims may argue that it is unfair to treat some categories of offenses as expungeable and not others. An agency ordered to expunge records may oppose the order on the grounds that they didn't have an opportunity to attend the expungement hearing and state their objections.

The right to privacy is usually invoked when the person was not found guilty and seeks to limit the dissemination of information about the arrest because of its affect on their reputation. Privacy concerns are an important issue to people today, given the state of technology and the information-gathering society we live in.

Double jeopardy claims have been raised when expungement orders were denied. The person appealing is essentially claiming that the existence of the records is an additional punishment imposed upon the offense they were arrested for.

The contention that a constitutional right to due process affects the dissemination of arrest records and identification data for persons who have been convicted of a criminal offense appears to have been severely undermined by *Paul v Davis* (1976) 424 US 693, 47 L Ed 405, 96 S Ct 1155, reh den 425 US 985, 48 L Ed 811, 96 S Ct 2194, in which the court held that a person who had been arrested for shoplifting and whose name and picture were included in a police flyer of "active shoplifters" could not state a deprivation of a constitutional right under 42 USCS § 1983. The Court stated that reputation alone, apart from some more tangible interest such as employment, was neither "liberty" nor "property" sufficient to invoke the procedural protection of the due process cause. The court also concluded that the action could not be based on an alleged violation of a constitutional right to privacy, since the claim was not based on the state's ability to restrict freedom of action in a sphere contended to be private, but instead was based on the contention that the state could not publicize the record of an official act such as an arrest.

Other cases have pointed out that, at least where the fact of exoneration was a matter of public record (as where the arrestee successfully prosecuted an action for false imprisonment and malicious prosecution, or where the arrestee was acquitted on retrial) any prejudicial effect arising from the retention or dissemination of the criminal identification or arrest record was neutralized, and thus further relief was not warranted. However, several cases have taken the position that the retention or dissemination of an exonerated arrestee's fingerprints, photograph, or other criminal identification or arrest records violated the arrestee's right of privacy, one such case taking the position that such retention or dissemination could be upheld against a claim of invasion of privacy only where the government made a compelling showing as to the necessity of retaining such records.

Claims of double jeopardy by exonerated persons whose petition to expunge records have been denied have not been upheld. The remedy of expungement is seen as a civil remedy, and not being of a criminal nature which could classify its denial as a punishment. The retention of records is justified on administrative grounds, to promote the efficient operations of the agencies' and courts' functions. Furthermore, the granting of expungement is regarded as a privilege, as opposed to an inherent right.

RIPENESS

The term "ripeness" refers to the appropriate timing of seeking the relief of an expungement. At a minimum, a final conclusion in the matter sought to be expunged must have been made. In the case of unfiled or dismissed charges, sometimes the time to prosecute must have expired before expungement may be sought. In convictions and other adjudications, there must be no related cases or appeals pending.

Many statutes require a person to wait a certain time period after the matter sought to be expunged was concluded or the person was discharged before a petition for expungement may be filed. The person usually must have had no further charges brought against them during this period.

In the case of juvenile records, many statutes require the person to reach a certain age before being eligible for expungement.

The Petition

In most cases, there must be a petition filed in the court requesting an order of expungement. Sometimes a court will order records to be expunged without the requirement of filing a petition, but this is usually in cases where the person was arrested by mistake or without probable cause, was found innocent, or completed an agreement with the prosecutor or the court in order to avoid sentencing.

Statutes will require the petition to set forth certain information. Some of the information often required includes the petitioner's criminal background listing dates, type of offense charged, and final dispositions. Sometimes a statement is required giving an explanation of why the person is deserving of expungement, such as the steps they have taken to rehabilitate themselves and the harm that the existence of the records poses. The petition usually must be notarized and be served upon all parties who have an interest in the case or possess records which may be subject to an order of expungement in the case.

A fee may be required at the time of filing the petition. The fee is often waived in the case of persons whose case was terminated in their favor, such as a dismissal of charges,

a nolle prosequi, or finding of not guilty. It may be possible for indigent persons to apply for a waiver of the filing fee.

Parties

The “parties” to a case are the people involved in the case. In the case of expungement, the parties may include the person who is the subject of the records sought to be expunged, the prosecuting or district attorney, the representatives of the agencies who have records which may be ordered to be expunged, and any victims of the offenses sought to be expunged. In the case of expungement of juvenile records, the petition to expunge may be made by the juvenile, and is often allowed to be made by a parent or guardian of a minor as well. Some states provide for expungement of juvenile records to be made on the court’s own motion in the interests of justice.

Agency representatives served with notice of the petition to expunge may be present. However, the presence of the district attorney, as a representative of the state, may prevent an agency’s claim of lack of opportunity to be heard from succeeding in later challenges to an order of expungement. The district attorney or prosecuting attorney is often a necessary party to a hearing on expungement.

When a hearing is held on the expungement petition, victims of the offenses may be allowed to attend and give statements. However, hearings are not always required and sometimes are required only if objections to the petition for expungement have been timely filed after service of notice of the petition.

Venue

The term “venue” refers to where, and in which court, the petition to expunge records may be made. It is usually the court which did or would have tried the person, or a court in the county where the person who is the subject of the records resides. Sometimes a specific court is specified. When seeking to expunge juvenile records, the family court is often the court the petition must be submitted to.

Records

In granting an order of expungement, the court will direct certain custodians of records to expunge the records under their control. Many different types of records may be subject to an order of expungement. The types of records that many be ordered to be expunged include:

Arrest records- Because arrest records have been classified as confidential, some jurisdictions have determined that arrest records are not subject to public inspection. However, despite this classification system, arrest records may be disseminated by the police to virtually anyone at their discretion. Dissemination of FBI records is allowed by federal statute to authorized individuals, but a regulation of the Attorney General sets forth a broad list of authorized recipients, including governmental agencies in general, railroads, police, insurance companies, and most banks. However, there are three serious problems with the use of an arrest record: (1) the record may contain incomplete or incorrect information; (2) the information may fall into the wrong hands or may be used to intimidate or embarrass; and (3) the information may be retained long after it has lost its usefulness and serves only to harass ex-offenders, and its mere existence may diminish an offender's belief in the possibility of redemption.

Rap sheet- The person's criminal history information or "rap sheet" is usually kept in a separate file from the court records, with an agency responsible for compiling criminal record information and disseminating it to other agencies. Although a person may be granted an order to expunge court records, this information may still exist in other databases of state and national law enforcement agencies.

Court records- Court records ordered to be expunged may include the records of the court proceeding and all the index entries made by the clerk of courts. Some courts will order index entries to be deleted and others may require a separate index to be maintained of all cases which have been expunged.

Investigative reports- Investigative reports of attorneys, law enforcement, or social welfare agencies are more likely to be ordered expunged in juvenile record expungements. The majority of states allow such investigatory material to be shared among law enforcement agencies for investigative purposes in future cases where the person granted expungement is a suspect.

Police records- The statutes sometimes allow for police records, such as police blotter entries, to be expunged. Other states hold such records not to be expungable criminal records, and classify them as administrative records necessary to carrying out administrative functions.

DNA records - DNA records which are maintained in a special database are sometimes expungable under a separate statute specifically dealing with such data. If ordered to be expunged, usually the samples will be destroyed and all identifying data will be erased. However, if another charge remains unexpunged and that charge requires DNA records to be maintained, expungement of DNA for the expunged offense may be denied.

Fingerprints and photos- Fingerprints and photos which are ordered expunged are sometimes ordered to be returned to the petitioner. This information is often dealt with in a separate statute providing specifically for expungement of this type of identifying information.

Greater included charges- Sometimes a person who is charged with multiple offenses is ultimately convicted on one or more of the less serious charges and the related and more serious “greater included offense” may be expunged. This may be done automatically as a result of a plea bargain, but sometimes must be done by order of the court after a petition for expungement.

Expungement orders- The order of expungement itself may be included for expungement in the expungement order. In other cases, a separate file or index is maintained on all expunged cases. These records may sometimes be expunged after the time for civil suit based upon the arrest has expired.

Unsealing

When records are not returned or destroyed, the records may remain available for inspection in limited circumstances. Expungement orders may be granted conditionally. In the case of the subject person’s future arrest or offense, the records may be ordered to be unsealed as if the expungement never occurred. This is most often related to expungement of juvenile records. In other cases, the expunged records may be unsealed upon court order for limited purposes or for good cause shown.

Summary

Expungement is a valuable remedy to relieve the limitations on individual rights and future opportunities that often accompany the existence of criminal records. The issue of expungement is complex and involves competing and overlapping interests and entities. Jurisdiction over records and authority to order them expunged is often subject to statutory interpretations. The requirements, exceptions, and exclusions involved vary from state to state. To determine whether a person is eligible for expungement, and how to best obtain it, consultation with a qualified attorney is recommended.