Overcoming Obstacles to Succeed: Notifying Youth of Their Juvenile Record Expungement Rights and Eligibility

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OVERCOMING OBSTACLES TO SUCCESS:
NOTIFYING YOUTH OF THEIR JUVENILE RECORD
EXPUNGEMENT RIGHTS AND ELIGIBILITY

by Riya Saha Shah and Lourdes M. Rosado

Abstract

Records of juvenile offenses are to be kept confidential in order to give youth a meaningful chance at rehabilitation. But such records can follow an individual into adulthood, thus creating barriers to success. Many youth are unaware that juvenile records carry long-term consequences and that expungement or sealing mechanisms, when available, are typically not automatic. Consequently, youth must be advised that their records can affect their futures and that they should seek expungement. Meaningful notification includes notifying the youth about the procedure at a time when he or she can start the process. The majority of states do not have a mechanism for notifying youth of their sealing or expungement rights. In order for youth to fully benefit from notification, notice must include the availability of expungement, the process for obtaining expungement, and the youth’s individual eligibility for expungement. While this information is most often shared at the time of case closure, it is most helpful to the youth at the time he is eligible to apply for expungement. This article provides an overview of American Bar Association standards and existing laws regarding juvenile record expungement and notification of these rights and eligibility, as well as policy recommendations and model legislation.

Introduction and Overview

A central tenet of the American juvenile justice system is that youth should be spared the stigma of being branded as criminals. Records of juvenile offenses are to be kept confidential in order to give youth a meaningful chance at rehabilitation. But today, records of juvenile court involvement can follow an individual into adulthood, thus creating barriers to success. Since the 1990s, a growing number of states have eliminated earlier practices designed to protect confidentiality, such as limiting access to juvenile records and closing juvenile court hearings to the public. This is an alarming...
development given that juvenile arrests and court records can be just as damaging to an individual as records of adult criminal justice system involvement. As The New York Times editorial board recently pointed out, “because some juvenile court records remain open to the public when they should have been sealed or expunged, these young people can be denied jobs, housing and even admission to college.”

While public access to juvenile delinquency records and proceedings has increased, a countervailing trend is to provide for the sealing or expungement of such records once the youth’s case is discharged. The 1960s and 1970s saw “virtually nationwide enactment of expungement statutes.” Indeed, the juvenile court’s central goal of rehabilitation provided the framework for these expungement statutes. Policymakers recognized that absent special protections, a juvenile record would “act like a symbolic millstone around a youngster’s neck.” They created avenues for expungement to enable children to “enter adulthood without the stigma of a criminal conviction.”

Brain 199, 208 (Michael Freeman & Oliver R. Goodenough, eds., 2009).

7 See generally Robert Shepherd, Collateral Consequences of Juvenile Proceedings: Part II, 15 Crim. Just. no. 3, at 41 (2000); see also ABA Resolution on Reducing Collateral Consequences of Juvenile Delinquency Adjudications, ABA H.D. Res. 102A (adopted Feb. 8-9, 2010) (demonstrating that The American Bar Association has urged employers and educational institutions not to consider juvenile adjudications on applications).


9 In this article, the terms “seal” and “sealing” mean to close the records from public view so that they cannot be examined by any individual, except by court order. The terms “expunge” and “expungement” mean to physically destroy the records, and in the case of electronic records, to delete them; the legal effect of which is that the record never existed.


12 Snow, supra note 10 at 18.

13 Snow, supra note 10 at 16.


15 See Shah et al., supra note 1 at 44–45.
2010, the American Bar Association adopted a policy addressing the collateral consequences facing individuals adjudicated delinquent:

Laws, rules, regulations and policies that require disclosure of juvenile adjudications can lead to numerous individuals being denied opportunities as an adult based upon a mistake[s] made when they were a child. The ABA recognizes the language used by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551, that children are different than adults because “[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions.

16 See ABA Standing Comm. on Legal Aid & Indigent Defendants et al., Am. Bar Ass’n, Report to the House of Delegates, (2010) [hereinafter Report to ABA] available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102a.authcheckdam.pdf. This policy is consistent with the ABA’s former efforts to keep juvenile records confidential and offer more opportunities for juvenile record expungement. Several years before this policy was adopted, the ABA adopted juvenile justice standards that provided, in part, that “[a]ccess to and the use of juvenile records should be strictly controlled to limit the risk that disclosure will result in the misuse or misinterpretation of information, the unnecessary denial of opportunities and benefits to juveniles, or an interference with the purposes of official intervention.” IJA-ABA Joint Comm’n on Juvenile Justice Standards, Standards Relating to Juvenile Records and Information Services, 15.1-15.8 (1980) [hereinafter Records Standards]. See also infra Part I. Moreover, acknowledging the barriers a juvenile or criminal record creates to employment, cities and counties in twenty-five states have implemented “ban-the-box” initiatives prohibiting employers from asking about an adjudication or conviction prior to the candidate demonstrating his or her qualifications for the job. See Nat’l Emp’l’r Law Project, Ban the Box Resource Guide (2015), http://www.nelp.org/page/~SCLP/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf?nodoc=1. And the Equal Employment Opportunity Coalition (EEOC) has issued guidance on the limited use of records in assessing candidates and several states have followed suit by enacting laws that prevent employers from considering juvenile records.

and decisions.” Therefore, the ABA is recommending that the collateral consequences of committing a crime as a youth be severely reduced by reducing barriers to education and vocational opportunities because of a juvenile incident. Furthermore there should be limited exceptions that only exist when the incident is directly relevant to the position sought or a concern of a school. 17

As discussed in Part I infra, the American Bar Association has long supported efforts to protect the confidentiality of juvenile records so that young offenders can rebuild their lives. Similarly, The New York Times editorial board asserts that “[t]he fact that most juvenile offenders never presented a threat to public safety and have no further contact with the law after they become adults argues strongly for sealing or expunging records so that young offenders are not permanently impaired by their youthful transgressions.” 18

The mere existence of sealing and expungement statutes is not enough. For sealing and expungement statutes to be optimally effective, youth must be informed about their rights to keep their records out of the public eye. However, as described in Part II infra, majority of state laws do not require that an individual or entity timely notify the youth when they are eligible for record sealing or expungement, or provide detailed explanations of the process. This article sets forth in Part III infra general principles and a model statutory language requiring notification of rights and eligibility. Adoption of such requirements will empower more youth to protect the confidentiality of their juvenile records and, therefore, eliminate obstacles to their successful transition to adulthood.

I. Current American Bar Association Policy on Juvenile Records

In 1979-80, the American Bar Asso-

17 Report to ABA, supra note 16.
18 Editorial, supra note 8.
ciation (ABA) adopted comprehensive standards for the administration of juvenile justice. The standards, which were jointly developed by the ABA and the Institute of Judicial Administration (IJA), include a volume on juvenile records. The IJA-ABA Standards Relating to Juvenile Records and Information Systems ("IJA-ABA JR-IS") direct each state to enact laws that, inter alia,

- protect juveniles from the adverse consequences of disclosure of juvenile records;
- establish safeguards to protect against the misuse, misinterpretation, and improper dissemination of juvenile records;
- limit the collection and retention of juvenile records so that unnecessary and improper information is not collected or retained;
- restrict the information and juvenile records that may be disseminated to and used by third persons;
- afford juveniles and their parents with maximum access to juvenile records pertaining to them; and
- provide for the timely destruction of juvenile records.

The standards further provide that “[p]ublic and private employers, licensing authorities, credit companies, insurance companies, banks, and educational institutions should be prohibited from inquiring, directly or indirectly, and from seeking any information relating to whether a person has been arrested as a juvenile, charged with committing a delinquent act, adjudicated delinquent, or sentenced to a juvenile institution . . . .”

Pursuant to IJA-ABA standards, courts, probation offices and law enforcement agencies are to keep juvenile court and law enforcement records confidential. Such records are not open to public inspection, and only enumerated individuals and agencies are allowed to access the records. The IJA-ABA standards also call for the “expungement” of juvenile records. The terms “expunge” and “expungement” mean to physically destroy the records and are distinct from the terms “seal” and “sealing,” which mean to close the record from public viewing so that it cannot be examined by any individual except by court order.

In all cases that were terminated prior to an adjudication of delinquency, juvenile court records, including probation records, must be automatically destroyed immediately after the discharge of the case. This would include records related to dismissed cases, diverted cases, cases in which the juvenile was ruled not involved, and cases where charges were not substantiated. Moreover, in misdemeanor cases that resulted in adjudication, juvenile records are to be automatically destroyed two

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19 See Records Standards, supra note 16.
20 Id.
21 Under the standards, the term “juvenile records” covers juvenile delinquency court records, which include the “case file” (formal documents such as the complaint or petition, summonses, warrants, motions, legal memoranda, judicial orders or decrees), “summary records” (the equivalent of the docket maintained by most juvenile courts), and “probation records” (which includes social histories). Records Standards, supra note 16 at 22-24. The term also includes “law enforcement records.” Id. at 31-32.
22 Id. at 21-22.
23 Id. at 30. The only exception is that a state agency or department responsible for juvenile justice may be authorized to inquire and seek such information pertaining to persons being considered for positions requiring ex-offenders.
24 See Records Standards, supra note 16, at 25-27, 34. These individuals and agencies include the juvenile and his/her attorney; the juvenile’s parents; the juvenile court and probation officers; the prosecutor; an agency having custody or control of the juvenile; a criminal court before whom a proceeding involving the juvenile is pending; and researchers.
25 Id. at 28. (noting that “[i]t should be the policy of juvenile courts to destroy all unnecessary information contained in records that identify the juvenile who is the subject of a juvenile record so that a juvenile is protected from the possible adverse consequences that may result from disclosure of his or her record to third persons”).
26 Id. at 127 (distinguishing between expungement and sealing).
27 Id. at 28 (cases terminating prior to adjudication of delinquency).
YOUTH MUST BE INFORMED ABOUT THEIR RIGHTS TO KEEP THEIR
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years after courts discharge the cases, as long
as no subsequent delinquency or juvenile pro-
ceeding is pending against the juvenile.28 The
youth is not required to take any action be-
cause destruction is automatic. Similarly, law
enforcement agencies must automatically de-
stroy all records of arrested or detained youth
who are not referred to juvenile court and must
destroy any other records upon receipt of a
court order.29 Although the existing standards
do not explicitly call for notification of expu-
genent rights, a proposal to include such is
consistent with the spirit of the standards.30

II. Current Notification Practices

Although nearly every state provides for some
mechanism where youth can limit the exposure
of their juvenile records, through sealing or ex-
pungement, few statutorily provide guidance on
how youth can access information about the

28 Id. at 28-29. Upon expungement, the court shall
inform all agencies in possession of the juvenile's records and
direct such agencies to destroy the records. Id. at 17.5.
29 See Records Standards, supra note 16, at 35 (law
enforcement records). However, if the chief law enforcement
officer of the agency, or his or her designee, certifies in writing
that certain information is needed for a pending investigation
involving the commission of a felony, that information, and
information identifying the juvenile, may be retained in an
intelligence file until the investigation is terminated or for one
additional year, whichever is sooner. Id.
30 For example, the IJA-ABA standards direct juvenile
courts and law enforcement agencies to create processes by
which juveniles and their attorneys can challenge the accuracy
of records, and provide notice about the available procedure.
Id. at 8, 28, and 35. Moreover, juvenile courts are to provide a
copy of any records to be destroyed to the juvenile who is the
subject of the records prior to expungement. Id. at 29.
require that the court or another agency must advise juvenile offenders of their "right to expungement" at some stage of the proceedings.

Only seven states require detailed notification of the steps required to seal or expunge a juvenile record. In Nebraska, the prosecuting attorneys are statutorily required to inform a juvenile in written, plain language about the record sealing process and what sealing means. In Vermont, although the statute does not provide for notification of the process, it is the only state that statutorily requires the court to assist a juvenile in filing for an expungement.

Finally, eight states require notification of the eligibility requirements to obtain sealing or expungement. California requires each juvenile court and probation department to provide youth with information regarding eligibility and the procedures for obtaining sealing or expungement.

Illinois has a robust notification requirement. The clerk of the circuit court shall send a "Notification of a Possible Right to Expungement" postcard to young persons at their last known address when they turn 17 or 21 for cases where eligibility is at age 17 or 21, respectively. Moreover, the expungement statute requires the Office of the Appellate Defender to create an information packet for juveniles seeking expungement, which must include, at a minimum, an explanation of the State's juvenile expungement process, the circumstances under which expungement may occur, the eligible offenses, the steps necessary to initiate and complete the expungement process, and contact information for the State Appellate Defender. The information packet may also include a pre-printed expungement petition with instructions on how to complete the application and a pamphlet containing information that will assist individuals through the expungement process.

Texas, which has automatic expungement in some instances, provides for a detailed notice to the child, including advising that: 1) the child probably has a juvenile record as a result of the delinquent conduct; 2) the juvenile record is a permanent record that is not destroyed or erased unless the record is eligible for sealing and the child hires a lawyer and files a petition in court to have the record sealed; 3) the child's juvenile record can be accessed by criminal justice officials in Texas and elsewhere; 4) the record can be accessed by employment and educational organizations; 5) if the record is placed on restricted access when the child turns seventeen, access will be denied to employers, educational institutions, and others except for criminal justice agencies; and 6) restricting access is automatic and

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does not require any action by the child.\(^6\) This comprehensive notification ensures that the juvenile is made aware of the consequences of his record being retained and the process and opportunities for restricting its access.

Several states also provide information online about expungement or sealing, as well as sample motions and other useful information that can be downloaded.\(^6\) However, these online resources are often developed and posted at the local or county level, rather than by the State.\(^6\) California provides a model: the statute requires the development of a sealing petition that the child can easily fill out that must be given to all juveniles at the time court supervision is terminated or when their cases are dismissed.\(^6\)

Finally, some states require notification that the expungement has been effectuated, alerting youth that they no longer have to disclose their juvenile court involvement or records. In New Mexico, the court must notify the child that the department’s records have been sealed and that the court, the children’s court attorney, the child’s attorney and the referring law enforcement agency have been notified that the child’s records are subject to sealing.\(^6\) In Indiana, the law enforcement agency must collect all the records and either present them to the individual petitioning for expungement or destroy them.\(^6\)


B. Timing of Notification

In order for notification to be meaningful, it must be timely. A number of states provide youth with notification of their expungement or sealing rights at the adjudication or disposition hearing. 46 Unfortunately, in most jurisdictions, this is long before the youth will become eligible for sealing or expungement and heightens the risk that the juvenile will forget about the opportunity once he or she becomes eligible. For example, at the end of every juvenile hearing in Ohio, "the court shall advise the child of the child’s right to record expungement..." 47 However, no further notice is required. Seven states and the District of Columbia provide for notification at the time the child is discharged from probation, 48 which is often the last time a court has contact with the child. In Alabama, for example, youth must be notified of their sealing and destruction rights at final discharge from placement or probation. 49 Arizona requires that notice be given when the juvenile is discharged from court supervision. 50 Some states also provide for notice of expungement rights at the initial hearings and again upon discharge from court supervision. In the District of Columbia, youth shall be notified of their rights to have their records sealed at the time a dispositional order is entered and again at the time of final discharge from supervision, treatment, or custody. 51 While these notification provisions are helpful, they should be followed up at the time of eligibility with information and practical instructions.

Several states provide for automatic expungement of juvenile records. These states typically do not require notification of expungement eligibility because expungement is done administratively. Some of these states, however, go further and require notice to the juvenile at disposition that the record will be automatically expunged or require notice to the juvenile once the record has been expunged. In New Mexico, the juvenile must be notified in writing when he or she turns eighteen or at the expiration of legal custody and supervision, whichever occurs later, that the department’s records have been sealed and that the court, the children’s court attorney, the child’s attorney, and the referring law enforcement agency have been notified that the child’s records are subject to sealing. 52 In Nevada, the juvenile must receive notice at the time of eligibility that his or her record will be automatically expunged. 53

III. Notification is Key to Timely and Effective Expungement of Juvenile Records

A. Recommended Principles for Effective

Notification Statutes

In order to provide effective and meaningful notification to youth, state statutes should require notification:

- by the child’s attorney throughout the course of the representation;
- by the Court at the final hearing (e.g., at the time of dismissal of the case, at disposition, or at discharge from supervision);
- by the juvenile probation department or its equivalent when juvenile court supervision is discharged;
- by the child’s attorney and the court at the time the child is eligible to apply for expungement; and
- by the Clerk of Court or its equivalent via mail (or email or text message) when the expungement has been completed.

Specifically, notification should include:

- The consequences of being adjudicated delinquent;
- Information about the child’s expungement rights;
- The difference between a sealed and expunged record; and
- The timeline for automatic expungement or expungement upon application.

B. Proposed language for Model Act on Notification of Sealing and Expungement Rights

This article proposes that states amend their sealing and expungement statutes to include the following model language:

(a) Notification by Juvenile’s Attorney. It shall be the duty of the juvenile’s attorney to inform the juvenile of the consequences of being adjudicated delinquent, the difference between a sealed and expunged record, and the timeline for sealing and expungement that is automatic and that which is available upon application.

(b) Notification at Discharge from Supervision. It shall be the duty of the probation department when the juvenile case is discharged from court supervision to notify and explain to the juvenile, where applicable, that the department’s records have been sealed and that the court, the prosecutor, the juvenile’s attorney, and the referring law enforcement agency have been notified that the juvenile’s records are sealed.

(c) Notification by Court at Dismissal or Disposition.

a. At the time of dismissal or disposition of the case, the judge shall inform the juvenile of his or her expungement rights. The court shall provide an expungement information packet to the juvenile, written in plain language, that contains the following:

i. information about the rights and procedures described in Section VI;

ii. instructions to the juvenile that once the case is expunged, it shall be treated as if it never occurred and the juvenile shall not be required to disclose that he or she had a juvenile record;

iii. a sample petition for ex-
pungement; and

iv. a list of resources for expungement assistance.

b. The failure of the judge to inform the juvenile of the right to petition for expungement as provided by law does not create a substantive right, nor is it does that failure constitute grounds for a reversal of an adjudication of delinquency, a new trial, or an appeal.

d) Notification by clerk of court. The clerk of the juvenile shall send a “Notification of a Possible Right to Expungement” by United States Postal Service and electronic mail to the juvenile at the address and email address last received by the clerk of the juvenile court on the date that the juvenile’s case is discharged from court supervision. This message will include the same information provided by the court at the time of dismissal or disposition of the case as described in subsection (c).

c) Notification upon Expungement. Once a juvenile’s records have been expunged by the court, the clerk of the juvenile court shall send by United States Postal Service to the juvenile at the address last received by the clerk of the juvenile court a statement verifying that the records have been expunged.

About the AUTHORS

Riya Saha Shah joined Juvenile Law Center in September 2005 as the fourth Sol and Helen Zubrow Fellow in Children’s Law. While at Juvenile Law Center, Riya has represented youth in dependency court, written amicus briefs, and conducted trainings for child-serving professionals and youth. Riya also leads Juvenile Law Center’s efforts on juvenile record expungement and has written extensively on record expungement. Riya also works with others in the office employing legislative and litigation strategies to combat the criminalization of consensual teen technology use and works with Pennsylvania legislators to implement juvenile justice systems reform. During the Fall term, Riya co-teaches a Juvenile Justice Seminar at University of Pennsylvania Law School with her colleague, Jessica Feierman. Prior to being awarded the Zubrow fellowship, Riya graduated cum laude from Loyola University Chicago School of Law where she was a Civitas ChildLaw Fellow and Editor-in-Chief of The Children’s Legal Rights Journal, a legal journal published with the ABA Center on Children and the Law and the National Association of Counsel for Children.
Riya is a graduate of University of Michigan Ann Arbor, where she earned her B.A. in Psychology and American Culture. Before going to law school, Riya was a Teach for America Corps member in Jersey City, New Jersey where she taught second grade, and also a bilingual third grade teacher in Detroit, Michigan.

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