

COLLATERAL CONSEQUENCES OF JUVENILE DELINQUENCY PROCEEDINGS IN CALIFORNIA

A HANDBOOK FOR JUVENILE LAW PROFESSIONALS



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EDITED BY SUE BURRELL AND ROURKE F. STACY

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Pictured: Los Angeles County Deputy Public Defender, Humberto Benitez with Nick H.

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PREFACE

In 2010, some 185,867 youth were arrested in California for “offenses” ranging from curfew violations to murder.¹ Of those, 95,212 youth had formal juvenile court petitions filed against them,² and 54,761 were made wards of the juvenile court.³

The vast majority of youth arrested do not grow up to be adult criminals. Many will have only one contact with the law, and others will have a few contacts and then leave their delinquent career behind.⁴ Youth are much more likely to successfully transition to adulthood if as many doors as possible remain open to them.

While juvenile court was originally designed to provide confidential proceedings that would not follow the youth into adulthood, the “get tough” era in juvenile justice has left its mark in successive changes to the law. Protections against public disclosure have been substantially eroded. The list of charges whose prosecution is open to the public is extensive.⁵ Youth who have petitions sustained for specified offenses may no longer seal their record.⁶ These changes present serious challenges for youth attempting to move ahead in their adult lives.

1 Criminal Justice Statistics Center, Bureau of Criminal Information and Analysis, Division of California Justice Information Services, California Department of Justice, *Juvenile Justice in California 2010 (2011) Table 1, Juvenile Arrests, 2010*, p. 5, Table 15. Of the 2010 arrests, 28% were for felonies, 57.2% were for misdemeanors, and 14.8% were for status offenses. (*Id.*)

2 *Id.* at p. 23, Table 15, Probation Department Dispositions 2010.

3 *Id.* at p. 27, Table 19, Juvenile Court Dispositions 2010.

4 National research indicates that 54% of males and 73% of females who enter the juvenile justice system never return on a new referral. (Snyder & Sickmund, (1999) Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice, *Juvenile Offenders and Victims: 1999 National Report* p. 80; see generally Greenwood et al., Rand Corporation, (1983) *Youth Crime and Juvenile Justice in California: A Report to the Legislature*, p. 20.) While California lacks comprehensive data on recidivism, a survey of 21 California counties found that 54.3% of youth arrested statewide had no new arrests for a law or technical violation over the four-year study period. (Hennigan et al., (2008) University of Southern California Center for Research on Crime, *Juvenile Justice Data Project, Phase 2: Longitudinal Outcome Indicators for Juvenile Justice Systems in California: Findings and Recommendations*, p. 18.) A study of the Orange County juvenile population found that 71% of juveniles studied had no further arrests in three years, 21% had one or two additional referrals in three years, and 8% had three or more referrals. (Kurz & Moore, (1999) Orange County Probation Department, *The 8% Problem Study Findings: Exploratory Research Findings and Implications for Problem Solutions*.)

5 Welf. & Inst. Code, § 676.

6 Welf. & Inst. Code, § 781.

Some of the consequences of juvenile court adjudication are immediately apparent when the court makes its dispositional order. The court must inform the youth of direct results such as maximum confinement time, probation conditions, and restitution. Unfortunately, the required colloquy fails to inform youth and their families about many additional “collateral consequences” that may flow from juvenile court involvement.

“Collateral consequences” of juvenile delinquency cases may be long lasting and life changing. Some consequences may be immediate, such as difficulty re-enrolling in a regular school program. Other consequences may not surface until years later when the person wants to work in a particular profession.

Even contacts with the system that do not result in a sustained petition may insidiously creep into employment interviews, college applications, and immigration proceedings. To make matters worse, even when the law does not require disclosure of juvenile *adjudications* (as opposed to adult court *convictions*), the imprecision in terminology may inadvertently cause disclosure of juvenile court records.

This handbook was written to help juvenile delinquency defense counsel and others who work with young people in the system to better understand the potential impact of juvenile cases on affected children’s future educational, vocational, and financial aspirations. It also provides information designed to help counsel and youth make informed decisions about how to handle specific situations where the need for disclosure of prior juvenile court involvement may arise.⁷

The handbook also serves as a testament that the consequences of juvenile court involvement are not benign. Courts, probation officers, prosecutors, law enforcement officers, school officials, parents, and others who are involved in referring children or processing them through the delinquency court system need to understand the consequences and barriers children may face as a result of juvenile court intervention.

DISCLAIMER

Our goal in writing this handbook was to point the way for counsel and others to understand and advise juvenile clients about potential collateral consequences of juvenile court involvement. We are not and do not claim to be experts in all of the areas covered. While we have made every effort to provide accurate information, nothing in this handbook should be taken as legal advice.

Each of the areas included could be vastly expanded, and we may have omitted relevant authorities in what was included. We may have inadvertently misunderstood certain provisions of law and not grasped the importance of others. The law may have changed since particular chapters were drafted. And finally, there surely are additional collateral consequences that are not included at all.

Accordingly, readers should never use information in the handbook without confirming it through their own research and checking to ensure that it is current. Similarly, each case and situation is different, and readers should exercise independent judgment before using the practice tips included in many sections.

We expect that this version of the handbook is the first of many, and that it will be revised and improved in the coming years. As readers discover errors or additional material that should be included, we hope they will send authorities and suggestions to the Pacific Juvenile Defender Center.

⁷ While some chapters of the handbook describe potential consequences for juveniles tried in adult criminal court, the primary focus is on consequences of juvenile delinquency court involvement.



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In developing the handbook, we learned from and borrowed ideas from earlier work by colleagues in other states. We are especially grateful to the Christie Hedman and George Yeannakis at the Washington Defender Association; Carlos Martinez and Marie Osborne at the Miami-Dade Public Defender's Office; Bob Listenbee at the Defender Association Of Philadelphia; Lisa Thureau at Strategies for Youth, Inc.; and the American Bar Association's Collateral Consequences Project.

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Rourke F. Stacy, synthesized the chapters into a cohesive handbook and then performed substantive legal, grammatical, and style edits. Ms. Stacy was assisted by Los Angeles County Public Defender's Office Law Clerks Tzipora Goodfriend and Maarja Boulous. In addition, Jonathan Laba assisted with the final stages of production, and Lynn Koble of Parasee Design provided design services.

We learned a great deal from producing the handbook. Perhaps the greatest lesson is that the impact of juvenile court proceedings on young people in the system is much greater and more complex than any of us anticipated. We hope this work will be useful in individual cases, and that it will prompt policy makers to limit consequences that unnecessarily interfere with good outcomes for youth. We also hope this will be the first of many Pacific Juvenile Defender Center practice handbooks.

Sue Burrell and Rourke F. Stacy, Editors *(November, 2011)*



CHAPTER 1:

WHAT IS A COLLATERAL CONSEQUENCE?

When a youth admits an offense in juvenile court, or when a petition is sustained by the court following an adjudication hearing, the court sets the case for a disposition hearing – roughly the equivalent of a sentencing hearing in adult criminal court. At the disposition hearing, the court may impose a variety of obligations that could include community service, detention, out of home placement, specific probation conditions, and restitution.⁸ In California, the court must inform the youth of the *direct* consequences of an admission or sustained petition after adjudication.⁹ Such direct consequences include maximum confinement time,¹⁰ eligibility for commitment to the Division of Juvenile Facilities (commonly referred to as “DJJ”),¹¹ restitution,¹² sex offender registration,¹³ and immigration consequences.¹⁴

Collateral consequences are the other results of an arrest or adjudication in juvenile court. Some collateral consequences occur in almost every case, others only occasionally.

Many of the consequences discussed in this handbook are technically *direct* consequences, but we have included them because they often receive inadequate attention in the juvenile court. Also, as the United State Supreme Court has observed, a distinction between direct and collateral consequences is not determinative in assessing the scope of constitutionally “reasonable professional assistance” of counsel.¹⁵ Regardless of whether a consequence is termed direct or collateral, it may have significant life-changing consequences for the youth, requiring counsel to be thoroughly familiar with those consequences and capable of advising his or her client accordingly.

8 See Cal. Rules of Court, rule 5.790; Welf. & Inst. Code, § 727.

9 See *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605; Cal. Rules of Court, rule 5.778(c).

10 See *Bunnell v. Superior Court*, *supra*, 13 Cal.3d at p. 605.

11 See *In re Jimmy M.* (1979) 93 Cal.App.3d 369.

12 See *People v. Robinson* (1988) 205 Cal.App.3d 280, 282.

13 See *People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1481.

14 See Pen. Code, § 1016.5.

15 *Padilla v. Kentucky* (2010) 559 U.S. ____ [130 S.Ct. 1473, 1481, 176 L.Ed.2d 284].

§ 1.1 JUVENILE ADJUDICATIONS ARE NOT CONVICTIONS

The distinction between juvenile court and adult criminal court proceedings is critically important in the context of assessing collateral consequences. California Welfare and Institutions Code section 203 provides:

An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding.

This distinction is important because many of the situations requiring disclosure of past involvement with the justice system are limited to disclosure of adult criminal court convictions. That distinction will be drawn in pertinent sections of this handbook.

Having said this, it is important to understand that many people in mainstream society do not grasp the difference between *juvenile delinquency* and adult *criminal* court proceedings. This means that if a person who is responsible for releasing court records does not understand the difference, records of juvenile adjudications may be improperly supplied in response to a request for *criminal* convictions. Similarly, a prospective employer may believe a youth (who had a juvenile adjudication) was lying, even though the youth truthfully stated that he or she had no *criminal* convictions. Thus, even when disclosure is not legally required, a youth's "record" may surface because of linguistic imprecision and lack of understanding of the law.

What this means is that attorneys or others advising young people about collateral consequences must be able to provide information about the relevant law that relates to requests for juvenile court history, and must also help the youth to anticipate and be prepared for other practical issues that may arise with respect to disclosure.



CHAPTER 2:

CONFIDENTIALITY AND PUBLIC ACCESS

Historically, confidentiality of juvenile court proceedings has been one of the cornerstones of the juvenile justice system.¹⁶ The adverse consequences, stigma, and harm resulting from a lifelong “criminal” label are contrary to the rehabilitative purposes and objectives of the juvenile court.¹⁷ The strong policy of confidentiality is evidenced by a latticework of California laws governing and limiting access to juvenile court proceedings, records, and information.¹⁸ While the underlying policy has been retained, public concern over juvenile crime has resulted in a substantial erosion of some confidentiality protections. Accordingly, access to information about juvenile delinquency cases, particularly for cases involving serious offenses, has expanded. Under certain circumstances members of the general public, including the media, may access juvenile court proceedings and records from those proceedings.

§ 2.1 ACCESS TO JUVENILE COURT PROCEEDINGS

As a general rule, juvenile court proceedings are not open to the public. Welfare and Institutions Code section 676 prohibits the public from attending juvenile court hearings, unless:

- Requested by both the minor and his parent or guardian who is present;
- The proceeding involves one of more than two dozen specified offenses;¹⁹ or
- The court finds that someone has a direct and legitimate interest in the case or the work of the court.²⁰

16 Zierdt, *The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track* (1999) 33 U.S.F. L. Rev. 401, 420.

17 *T.N.G. v. Superior Court* (1971) 4 Cal.3d 767, 778.

18 *The Report of the Governor's Special Study Commission on Juvenile Justice: Recommendations for Changes in California's Juvenile Court Law*, which strongly influenced California's Arnold Kennick Juvenile Court Act, recommended that the general public be excluded from all juvenile proceedings (Recommendation No. 5, Vol. I, p. 23); and that juvenile court petitions be confidential (Recommendation No. 16, Vol. I, p. 34).

19 Welf. & Inst. Code, § 676 (a).

20 It should be noted that individuals with a direct and legitimate interest in the case or the work of the court can be admitted to any juvenile proceeding, regardless of the nature of the offense. (Welf. & Inst. Code, § 676.)

Additionally, up to two family members of a prosecuting witness,²¹ a victim of the offense (subject to exclusion in certain circumstances), and up to two support persons for the victim²² may attend a juvenile court hearing.²³

OPEN JUVENILE COURT PROCEEDINGS FOR SERIOUS OFFENSES

In cases involving one of the specified serious offenses,²⁴ the public may be admitted in the same manner as in adult criminal court trials. Welfare and Institutions Code section 676 requires that the juvenile court post, in a conspicuous place, which is accessible to the general public, a written list of hearings that are open to the public as well as the time and location of the hearings.²⁵ When the petition alleges the commission of certain specified sexual offenses, and the victim was under 16 years old at the time of the offense, the court may close the hearing to the public either upon a motion made by the prosecutor or during the victim’s testimony.²⁶

DISCLOSURE OF OPEN JUVENILE PROCEEDING RECORDS

If the youth is *found to have committed* one of the listed offenses, the youth’s name may be made public unless the court makes a written finding on the record that good cause exists to keep the name confidential.²⁷ “Good cause” may include the protection of the minor, a victim, or a member of the public.²⁸

Also, if the youth is *found to have committed* one of the specified offenses, then certain items in the file must be made available to the public. These documents include the charging petition, the minutes of the proceeding, the orders of adjudication, and the disposition of the court.²⁹ However, the statute specifically provides that it does not authorize access to other documents in the court file,³⁰ which may include police reports, probation reports, pleadings, and psychological evaluations.

The probation officer or any party may petition the juvenile court to prohibit disclosure of the records to the public.³¹ The juvenile court must prohibit the disclosure if it appears that the harm to the youth, victims, witnesses, or public from the public disclosure outweighs the benefit of public knowledge. However, if the court prohibits disclosure for the benefit of the youth, the court must make a written finding that the reason for the prohibition is to protect the safety of the youth.³²

21 *Ibid.*; see also Pen. Code, § 868.5.

22 Welf. & Inst. Code, § 676.5.

23 See also Cal. Rules of Court, rule 5.530, governing access to juvenile court hearings.

24 Welf. & Inst. Code, § 676 (a) currently lists 28 offenses for which the public may be admitted, primarily Welf. & Inst. Code, § 707 (b) offenses.

25 Welf. & Inst. Code, § 676 (g).

26 Welf. & Inst. Code, § 676 (b).

27 Welf. & Inst. Code, § 676 (c).

28 *Ibid.*

29 Welf. & Inst. Code, § 676 (d).

30 *Ibid.*

31 Welf. & Inst. Code, § 676 (e).

32 *Ibid.*



MEDIA ACCESS

Youth have an interest in maintaining confidentiality not only to promote rehabilitation and avoid the lifelong stigma of a criminal label, but also to protect the right to a fair trial or other interests that may be jeopardized by public disclosure and publicity.³³ Nonetheless, California law provides media access for juvenile court proceedings, records, and information that are open to the public pursuant to Section 676.³⁴

Opening a juvenile court proceeding to the media effectively opens the door to publication of information that comes out during the proceedings. Court imposed disclosure limitations on media have been successfully challenged as invalid prior restraints in violation of the First Amendment.³⁵

Reporters may also obtain access to official information about juvenile court cases in other ways. They may, for example, petition the juvenile court under Welfare and Institutions Code section 827 to access juvenile court records, or request information from law enforcement agencies. (See Chapter 4, Juvenile Criminal History Records.)

The media may also obtain unofficial information³⁶ about juvenile delinquency cases through direct contact with the youth and his or her friends and family. Voluntary contact with the media may pose significant risks, particularly in cases where the media does not have access to official juvenile court information and there has been little or no publicity. Media outlets publish print, television, and radio reports on the Internet, which can create a readily accessible and permanent record of the youth's delinquency court involvement. By consenting to media coverage and revealing case information to the public, the youth and his family may have effectively waived any argument regarding restricting media access to a hearing or to juvenile court records.³⁷



PRACTICE TIP

In the digital age, it is critically important to try to keep your client's name and photographic image out of the media to avoid the collateral consequences discussed in this handbook. Once posted on the Internet, information can be stored forever and can easily be retrieved by law enforcement officials, prospective employers, educational institutions, landlords, media reporters, and other individuals. Even unidentified photographs posted on the Internet might be identified using facial recognition software. It is also important to advise your client to avoid creating a permanent record of his/her juvenile court involvement by posting information regarding the case on social networking or other sites on the Internet.³⁸

33 See *Tribune Newspapers West, Inc. v. Superior Court* (1985) 172 Cal.App.3d 443, 451.

34 See *Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 622 [intent of the language of Section 676 (a) is to authorize courts to admit the press].

35 *KGTV Channel 10 v. Superior Court* (1994) 26 Cal.App.4th 1673 [order limiting disclosure of name and likeness of minor in open juvenile proceeding invalid]; *South Coast Newspapers v. Superior Ct.* (2000) 85 Cal.App.4th 866 [order limiting disclosure of photographs invalid].

36 The juvenile or any other party who has access to juvenile court records under Section 827 may not disseminate "official" documents or authorize access to parties who do not have access under Section 827. (See Welf. & Inst. Code, § 827 (a)(4); *In re Tiffany G.* (1994) 29 Cal.App.4th 443; *In re Gina S.* (2005) 133 Cal.App.4th 1074.)

37 *In re Jeffrey and Stephen F.* (First Appellate District, May 29, 2003) 2003 WL 21240208, 2003 Cal. App. Unpub. LEXIS 5265 (Court of Appeal Case Nos. A099206, A099207) [unreported case affirming a juvenile court order opening disposition hearing to the media where the parent and child appeared on several national media outlets to discuss the case].

38 See Rosen, *The Web Means the End of Forgetting*, New York Times (July 21, 2010), citing Viktor Mayer-Schoenberg's book, *Delete: The Virtue of Forgetting in the Digital Age* (2009), notes that the Internet serves as a recording of every human misstep that will forever tether us to all our past actions making it impossible, in practice, to escape our past.

CHAPTER 3:

JUVENILE CRIMINAL HISTORY RECORDS

The original intention of California’s juvenile court law was to protect youth from the stigma and long-term effects of having a criminal record for behavior that occurred prior to their eighteenth birthday. By keeping juvenile records confidential, the system sought to promote the youth’s best interests, facilitate rehabilitation and family reunification, and protect the youth from adverse consequences, stigma, and harm.³⁹ Although California’s juvenile court law still includes many of the original statutory protections for confidentiality, some exceptions have been carved out that require close attention in assessing collateral consequences. This section discusses confidentiality issues that arise regarding access to and disclosure of juvenile records, and sealing and destruction of those records.

§ 3.1 JUVENILE COURT RECORDS

Juvenile court records, like juvenile court proceedings, are ordinarily confidential. Section 827 of the Welfare and Institutions Code governs the disclosure of confidential juvenile court records.⁴⁰ The unlawful distribution of juvenile records may result not only in civil liability,⁴¹ but in certain circumstances, criminal liability as well.⁴²

JUVENILE RECORDS DEFINED

“Juvenile case file,”⁴³ is defined by Welfare and Institutions Code section 827. A “juvenile case file,” means, “a petition filed in any juvenile court proceeding, reports of the probation officer, and all other documents filed in that case or made available to the probation officer in making his or her report, or to the judge, referee, or other hearing officer, and thereafter retained by

39 *T.N.G. v. Superior Court* (1971) 4 Cal.3d 767, 778; *Wescott v. County of Yuba* (1980) 104 Cal.App.3d 103, 106.

40 Welf. & Inst. Code, § 827 expressly covers the release of juvenile court records and is controlling over the California Public Records Act (Gov. Code, § 6251 et seq.) whenever they conflict. (*Wescott v. County of Yuba, supra*, 104 Cal.App.3d at 106.)

41 See, e.g., *Gonzalez v. Spencer* (9th Cir. 2003) 336 F.3d 832 [violation of Section 827 yields basis for damages claim].

42 The criminal sanctions include punishment as a misdemeanor and a fine up to \$500. (See, e.g., Welf. & Inst. Code, § 827 (b) (2) [redisclosure by school personnel]; § 827.7 [redisclosure by law enforcement]; and § 828.1 [redisclosure by school personnel].)

43 See also Cal. Rules of Court, rule 5.552.

the probation officer, judge, referee, or other hearing officer.”⁴⁴ Case law has interpreted the definition broadly to include agency files where no juvenile court proceedings have been instituted and the matter is handled informally;⁴⁵ police records and reports even when no court proceedings were initiated and the youth was only detained;⁴⁶ testimony that amounts to the inspection of a juvenile case file or information relating to the contents of a juvenile case file;⁴⁷ juvenile hall records;⁴⁸ and Division of Juvenile Justice (DJJ)⁴⁹ records containing information that falls within Section 827.⁵⁰ With respect to DJJ records, it should be noted that records that do not contain information subject to Section 827 are accessible by subpoena duces tecum and are not subject to the confidentiality protections of Section 827.⁵¹

PERMITTED ACCESS AND DISCLOSURES OF JUVENILE COURT RECORDS AND INFORMATION

Because of the confidential nature of juvenile proceedings, the juvenile court controls access to and dissemination of juvenile court records.⁵² Certain parties and agencies are entitled to “automatic access” while others must file a petition with the juvenile court pursuant to Welfare and Institutions Code section 827. Counsel should be aware that even if the juvenile court elects to disclose records based upon a request, it may redact or limit access to portions of the file.⁵³ Also, anyone who has access to juvenile court records under Section 827 may not disseminate documents to, or authorize access by parties who do not have automatic access to juvenile court records.⁵⁴

AUTOMATIC ACCESS

Individuals and entities entitled to access juvenile court records without an order of the court include the juvenile; his or her parents or guardian; the district attorney; a city attorney or city prosecutor authorized to prosecute criminal or juvenile cases under state law; the attorneys for the parties, judges, referees, other hearing officers, probation officers and law enforcement officers who are actively participating in criminal or juvenile proceedings involving the youth; the superintendent or designee of the school district where the youth is enrolled or attending

44 Welf. & Inst. Code, § 827 (c).

45 *In re Elijah S.* (2005) 125 Cal.App.4th 1532, 1551.

46 *T.N.G. v. Superior Court*, *supra*, 4 Cal.3d at 781; *Wescott v. County of Yuba*, *supra*, 104 Cal.App.3d at 106; *Lorenza P. v. Superior Court* (1988) 197 Cal.App.3d 607, 610.

47 *People v. Espinoza* (2002) 95 Cal.App.4th 1287.

48 *Foster v. Superior Court* (1980) 107 Cal.App.3d 218. In addition, various regulations govern certain juvenile hall records, including Cal. Code Regs. tit. 15, § 1312 [juvenile criminal history information] and Cal. Code Regs. tit. 15, §§ 1406-1408 [health records].

49 The official name of California’s state juvenile facility system is the Division of Juvenile Facilities. (Welf. & Inst. Code, §§ 1710, 1712.) However, the system is commonly referred to as the Division of Juvenile Justice (DJJ), and that is the name that will be used in this handbook.

50 *Cimarusti v. Superior Court* (2000) 79 Cal.App.4th 799, 807-808. See also Welf. & Inst. Code, § 1764 [DJJ youth criminal court records]; Welf. & Inst. Code, § 1764.1 [DJJ youth committed for Welf. & Inst. Code, § 676 (a) offenses]; Cal. Code .Regs. § 4743 [mental health records].

51 *Cimarusti v. Superior Court*, *supra*, 79 Cal.App.4th at 805.

52 *T.N.G. v. Superior Court*, *supra*, 4 Cal.3d at 778; *In re Gina S.*, *supra*, 133 Cal.App.4th at 1081.

53 Welf. & Inst. Code, § 827 (a)(2)(A).

54 See, e.g., Welf. & Inst. Code, § 827 (a)(4); *In re Tiffany G.* (1994) 29 Cal.App.4th 443 [non-dissemination order barring parents from distributing dependency documents to press valid]; *In re Gina S.*, *supra*, 133 Cal.App.4th 1074 [upholding dependency order requiring a mother to return copies of son’s juvenile case file and prohibiting dissemination of records without court order].



school; and members of children’s multidisciplinary teams, persons, or agencies providing treatment or supervision of the youth.⁵⁵

Parties who have automatic access are prohibited from disseminating the file to other persons or agencies unless the recipients would themselves be entitled to access.⁵⁶ Further, no portion of the file may be used as an attachment to other documents without the court’s permission, unless it is used in connection with and in the course of a criminal investigation or a proceeding brought to declare a youth a dependent or ward of the juvenile court.⁵⁷

Counties vary in their procedures for parties entitled to automatic access. For instance, in Los Angeles County and other counties, one simply fills out a “Declaration to Access Juvenile Records,” while other counties may still require a Section 827 petition to be filed.

PARTIES WITHOUT AUTOMATIC ACCESS

Those without automatic access must file a petition pursuant to Section 827. The Judicial Council of California has a series of forms to assist in petitioning the court.⁵⁸ The youth and other interested parties must be notified of a petition to access juvenile court records and must be given an opportunity to object to the release of the information.⁵⁹ The determination of whether to disclose juvenile court records is discretionary and involves balancing the youth’s interests in confidentiality against the petitioner’s interests and need for disclosure.⁶⁰ Specifically, the juvenile court must “balance the interests of the child and other parties to the juvenile court proceedings, the interests of the petitioner, and the interests of the public” in determining whether to grant access to juvenile court records.⁶¹

LAW ENFORCEMENT AGENCIES

Law enforcement agencies are permitted, under certain circumstances, to disclose specific juvenile records and information including:

- To other law enforcement agencies or any person or other agency that has a legitimate need for the information for purposes of official disposition of a case, records or information gathered by law enforcement agencies relating to the taking of a youth into custody, temporary custody, or detention (the disposition must be included if available);⁶²
- All felony adjudications and dispositions reported by the juvenile court to the sheriff may be disclosed to other law enforcement officials, provided that the release is relevant to the prevention or control of juvenile crime and dissemination is limited to the law enforcement purpose for which it was provided;⁶³

55 Welf. & Inst. Code, § 827 (a)(1); Cal. Rules of Court, rule 5.552(b).

56 Welf. & Inst. Code, § 827 (a)(5).

57 Welf. & Inst. Code, § 827 (a)(4).

58 Judicial Council Juvenile forms, JV-569 through JV-580, available at <http://www.courtinfo.ca.gov/forms/>.

59 Welf. & Inst. Code, § 827 (a)(3)(B); Cal. Rules of Court, rule 5.552.

60 *Cimanusti v. Superior Court*, *supra*, 79 Cal. App.4th at 806.

61 *R.S. v. Superior Court* (2009) 172 Cal.App.4th 1049, 1054; Cal. Rules of Court, rule 5.552 (c).

62 Welf. & Inst. Code, § 828.

63 Welf. & Inst. Code, § 827.2 (a).

- Law enforcement may release to anyone upon request Welfare and Institutions Code section 707, subdivision (b) felony adjudications and dispositions for youth age 14 years and older at the time of the commission of the offense, as long as the court has not found good cause for non-disclosure;⁶⁴
- To anyone, upon request, the name of a youth 14 years or older following arrest for any serious felony;⁶⁵
- To the public, the name, description, and alleged offense of any youth against whom an arrest warrant is outstanding for certain serious violent offenses in order to assist with the apprehension of the youth;⁶⁶ and
- To the public, the name and description of secure detention facility escapees.⁶⁷

In addition, Welfare and Institutions Code section 828 allows a court to take into account the information related to the taking of a youth into custody if the information is not contained in a sealed record, to determine whether adjudications of juvenile crimes warrant a finding of circumstances in aggravation pursuant to Penal Code section 1170, or to deny probation.⁶⁸

Any other persons not authorized by Section 828 who seek disclosure of juvenile law enforcement records must petition the juvenile court using the Judicial Council form “Petition to Obtain Report of Law Enforcement Agency” (JV 575).⁶⁹

SCHOOLS

The superintendent (or designee) of the school district where the youth is enrolled has automatic access to juvenile court records.⁷⁰ Schools have additional access to juvenile court information in limited circumstances.⁷¹ Any teacher, counselor, or administrator with direct supervisory or disciplinary responsibility over a student may be notified that the student has been adjudicated for use, sale, or possession of a controlled substance or certain Welfare and Institutions Code section 707, subdivision (b) offenses.⁷² If an offense was committed against the property, students, or personnel of a school, information about the offense may be exchanged between law enforcement personnel, the school district superintendent, and the public school principal.⁷³

MISCELLANEOUS DISCLOSURE PROVISIONS

The following are additional provisions permitting the disclosure of juvenile court records or information:

64 Welf. & Inst. Code, § 827.2 (c).

65 Welf. & Inst. Code, § 827.5.

66 Welf. & Inst. Code, § 827.6.

67 Welf. & Inst. Code, § 828 (b).

68 Welf. & Inst. Code, § 828 (a).

69 Cal. Rule of Court, rule 5.552(f)(3). Also see California Judicial Council Forms JV 575 (Petition) and JV 580 (Notice). Welf. & Inst. Code, § 827.9, applicable to Los Angeles County but used in many counties, prescribes a process for disclosing juvenile police records that is similar to the process adopted in rule 5.552.

70 Welf. & Inst. Code, § 827 (a)(1)(G).

71 Note that school districts in some counties may also have access to juvenile court records in local computerized interagency databases created pursuant to Welf. & Inst. Code, § 827.1.

72 Welf. & Inst. Code, § 828.1 (b).

73 Welf. & Inst. Code, § 828.3.



- Names of youth 14 years and older with adjudications for certain serious or violent offenses may be disclosed to the public.⁷⁴
- Violation of Vehicle Code section 13202.5, subdivision (d), [certain enumerated offenses involving controlled substances or alcohol] must be reported to the DMV within 10 days.⁷⁵
- The Board of Prison Terms can review unsealed records to evaluate suitability of release.⁷⁶

Multidisciplinary Teams may share and disclose information as follows:

- *Child Abuse*: Members of a multidisciplinary proceeding engaged in the prevention, identification, and treatment of child abuse may disclose and exchange information to and with one another relating to any incidents of child abuse that may be in confidential juvenile court records. All discussions related to the exchange of such information are confidential, and testimony concerning such discussions is inadmissible in any criminal, civil, or juvenile proceeding.⁷⁷
- *Juvenile Justice*: Members of a juvenile justice multidisciplinary team engaged in the prevention of crime, including criminal street gang activity, may disclose and discuss to and with one another *nonprivileged* information and writings.⁷⁸

Team members who receive such information are under the same privacy and confidentiality obligations as the discloser, and subject to the same penalties for violating those obligations.⁷⁹ The information must be maintained in a manner to ensure the protection of confidentiality.⁸⁰ Members of the team may include law enforcement, probation officers, prosecutors, and others.⁸¹



PRACTICE TIP

It is important to carefully label any documents provided to the court or in the court file that may be privileged. One way to ensure that such documents remain confidential is to have them placed in a separate envelope clearly labeled as “confidential,” or request that the court file the documents under seal.

§ 3.2 CALIFORNIA DEPARTMENT OF JUSTICE, JUVENILE CRIMINAL HISTORY RECORDS

The California Department of Justice (hereinafter “DOJ”) maintains a state database of criminal offender record information that identifies and includes for each offender a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, and information relating to sentencing, incarceration, rehabilitation, and release.⁸² The state system was designed for the adult

74 Welf. & Inst. Code, § 204.5.

75 Welf. & Inst. Code, § 783; Vehicle Code, § 1803.

76 Welf. & Inst. Code, § 829.

77 Welf. & Inst. Code, § 830.

78 Welf. & Inst. Code, § 830.1.

79 *Ibid.*

80 *Ibid.*

81 *Ibid.*

82 Pen. Code, §§ 11105 and 13102.

criminal justice system, but has been used regularly to track juvenile court information since the enactment of Proposition 21 in 2000.⁸³ The juvenile court is required to report to the DOJ the complete criminal history of any youth adjudged to be a ward of the court for any felony offense.⁸⁴ The DOJ is required to retain the reported information and make it available in the same manner as adult criminal history information gathered pursuant to section 13100 et seq. of the Penal Code.⁸⁵

Each time an individual in California is arrested and fingerprinted, a permanent record of that arrest and any subsequent court proceeding is sent to the DOJ.⁸⁶ Criminal offender record information, maintained by the DOJ, is not available to the public and may only be released to those persons, entities, and agencies authorized by statute, including the subject of the record, courts, law enforcement, prosecutors, probation, parole, defenders, specified public entities for purposes of fulfilling duties imposed by law, and specified public and private entities for purposes of fulfilling employment, licensing, and certification duties.⁸⁷ If the criminal offender record information is provided for purposes of fulfilling employment, licensing, and certification, Labor Code section 432.7 limits disclosure of arrests solely to arrests resulting in a conviction, provided proceedings are not pending.⁸⁸ However, according to the DOJ, arrest and dispositional information that occurred when the youth was under 18 years of age will not be disclosed to employers and licensing agencies unless the youth was tried as an adult.⁸⁹

CHALLENGING JUVENILE CRIMINAL HISTORY RECORD ACCURACY

Anyone with a juvenile criminal offender record may obtain a copy and challenge any inaccuracies through a process established by the DOJ.⁹⁰ The subject of the record may request a copy of the record by submitting to DOJ a letter, or a completed DOJ form titled “Application to Obtain Copy of State Summary Criminal History Record.”⁹¹ A copy of the record will be returned with an “Alleged Inaccuracy or Incompleteness Form” which may be used to challenge information in the record. If an inaccuracy in the record is not a function of an incorrect entry by the DOJ or the court, then the offending agency must be contacted to verify the inaccuracy and notify the DOJ. For record inquiries, the DOJ may be contacted at:

California Department of Justice
P.O. Box 903417
Sacramento, CA 94203-4170
Attention: Record Review Unit
Telephone: (916) 227-3835

83 *In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1328; Welf. & Inst. Code, § 602.5 [added by Prop. 21, Ch. 19, approved March 7, 2000, effective March 8, 2000].

84 Welf. & Inst. Code, § 602.5.

85 *Ibid.*

86 Pen. Code, § 13150. Local law enforcement agencies also retain the information and are subject to disclosure rules almost identical to the DOJ. (See Pen. Code, § 13300.)

87 Pen. Code, § 11105.

88 Pen. Code, § 11105 (b) and (c). Lab. Code, § 432.7 prohibits disclosure of arrests not resulting in conviction to employers [except law enforcement, certain health care and certain federal employers through preemption] and prohibits employers from even asking about arrests that did not result in conviction. These issues are more fully discussed in Chapter 13, Employment.

89 California Department of Justice letter to Youth Law Center, December 21, 2010.

90 Pen. Code, §§ 11120-11127.

91 Please see <http://ag.ca.gov/fingerprints/security.php>, for more information regarding obtaining a personal copy of a criminal history record. Counsel should advise clients that an application fee and fingerprinting is required.



§ 3.3 FBI CRIMINAL BACKGROUND CHECKS

The Federal Bureau of Investigation (FBI) also collects, stores, and disseminates criminal history record information, including serious and/or significant juvenile offenses, from state and local law enforcement agencies.⁹² The FBI is prohibited from disseminating records concerning proceedings relating to the adjudication of a juvenile as delinquent to noncriminal justice agencies, unless specifically authorized by statute, court order, rule, or court decision, or for certain criminal justice and research purposes.⁹³ Federal laws specifically empower the FBI to exchange criminal history record information for background checks for certain types of employment (including volunteers), licensing, and specified similar non-criminal justice purposes.⁹⁴

An FBI “identification record” contains information taken from fingerprint submissions retained by the FBI in connection with arrests and, in some instances, includes information taken from fingerprints submitted in connection with federal employment, naturalization, or military service.⁹⁵ All arrest data included in an identification record are obtained from fingerprint submissions, disposition reports, and other reports submitted by agencies having criminal justice responsibilities.⁹⁶ In California, local law enforcement agencies and the DOJ may submit juvenile information directly to the FBI.⁹⁷ The subject of an FBI identification record may obtain a copy⁹⁸ or challenge inaccuracies⁹⁹ by submitting a written request to the FBI’s Criminal Justice Information Service Division.

§ 3.4 FINGERPRINTING

There are no statutory provisions that specifically require the fingerprinting of youth when they are taken into custody. Therefore, fingerprinting practices vary across the state, although it appears that most law enforcement agencies book (fingerprint and photograph) youth who are arrested. The only statutory provision pertaining to fingerprinting youth upon arrest provides that youth who are cited (given a notice to appear) for a felony offense and released *may* be fingerprinted and photographed when they appear before the probation officer.¹⁰⁰ Each time any individual in California is arrested and fingerprinted, a permanent record of that arrest and any subsequent court proceeding is sent to the DOJ.¹⁰¹

92 Under 28 C.F.R. § 20.32, the FBI specifically includes “serious and/or significant adult and juvenile offenses,” and “excludes arrests and court actions concerning non-serious offenses, e.g., drunkenness, vagrancy, disturbing the peace, curfew violation, loitering, false fire alarm, non-specific charges of suspicion or investigation, and traffic violations (except data will be included on arrests for vehicular manslaughter, driving under the influence of drugs or liquor, and hit and run) ...” Part 20.32 also observes that the FBI definition of includable offenses may not be the same as state laws governing the maintenance of criminal records by state agencies.

93 28 C.F.R. § 20.21.

94 28 C.F.R. § 50.12. See also 42 U.S.C. § 2169 [nuclear power providers] and § 5119a [child/dependent care providers].

95 An “FBI identification record” includes “... the date of arrest or the date the individual was received by the agency submitting the fingerprints, the arrest charge, and the disposition of the arrest if known to the FBI. All arrest data included in an identification record are obtained from fingerprint submissions, disposition reports, and other reports submitted by agencies having criminal justice responsibilities.” (24 C.F.R. § 16.31.)

96 *Ibid.*

97 Pen. Code, §§ 11105 (c) and 13300 (c)(4) and (c)(7).

98 28 C.F.R. § 16.32.

99 28 C.F.R. § 16.34.

100 Welf. & Inst. Code, § 626 (c). Note, this is the only statutory reference to youth being fingerprinted.

101 Pen. Code, § 13150. Local law enforcement agencies also retain the information and are subject to disclosure rules almost identical to those applicable to the DOJ. (See Pen. Code, § 13300.)

§ 3.5 DNA

In California youth are subject to DNA collection if they have been adjudicated under Section 602 for the following offenses:

- Any felony offense;¹⁰²
- Any sex offense that requires registration pursuant to Penal Code section 290;¹⁰³ or
- Any arson offense that requires registration pursuant to Penal Code section 457.1.¹⁰⁴

Youth on a grant of deferred entry of judgment¹⁰⁵(DEJ) are *not* subject to DNA collection unless or until they fail to successfully complete DEJ and are adjudicated for a qualifying offense.¹⁰⁶ It is unclear whether youth who admit to a felony and receive, and successfully complete non-wardship probation under Welfare and Institutions Code section 725 have to submit DNA samples.¹⁰⁷

DNA samples are stored in the state DNA data bank maintained by the DOJ.¹⁰⁸ California shares DNA database information with the FBI and other federal and state law enforcement agencies.¹⁰⁹ Consequently, juvenile specimens from California’s DNA databank are maintained in the national offender databases as well.

§ 3.6 SEALING JUVENILE COURT RECORDS (INCLUDING DELINQUENCY ARRESTS)

Section 781 of the Welfare and Institutions Code sets forth the procedure for sealing juvenile court records, both for youth who had petitions filed in juvenile court and youth who were taken before an officer of a law enforcement agency but were not subject to a Section 601 or Section 602 petition.¹¹⁰

A person may petition the court to seal records upon reaching the age of 18, or when five years have passed since his or her juvenile probation ended, last arrest occurred, or last case was closed.¹¹¹ A juvenile court record may be sealed unless the youth has suffered a sustained

102 Pen. Code, § 296 (a)(1).

103 Although Pen. Code, § 296 (a)(3), imposes DNA collection on any juvenile “who is required to register under section 290,” it should be noted that the juvenile offenses eligible for registration under Section 290 are actually found in Pen. Code, § 290.008.

104 Pen. Code, § 296 (a)(3).

105 Welf. & Inst. Code, § 790.

106 Under Welf. & Inst. Code, § 791 (a)(3), successful completion of the deferred entry of judgment program results in dismissal of the charges. Further, an admission for purposes of Section 790 “shall not constitute a finding that the petition has been sustained for any purpose, unless judgment is entered pursuant to subdivision (b) of section 793.” Thus, the DNA collection is not triggered unless the youth fails to succeed in the deferred entry of judgment program and judgment is entered.

107 In order to trigger DNA collection, a youth must be “adjudicated under 602” for committing any felony offense. (Pen. Code, § 296 (a)(1).) Admission to a felony offense even if the youth successfully completes non-wardship probation under Welf. & Inst. Code, § 725 (a) is technically an “adjudication” under Section 602. Some counties do not impose DNA collection unless the youth does not successfully complete the Section 725 non-wardship probation, while other counties have been imposing DNA collection even if the youth successfully completes it. There is no definitive case law on this issue. One argument against DNA collection in these cases is that adjudication under Section 602 requires a finding of wardship under Section 602, a finding that, by definition, will never occur with successful completion of Section 725 non-wardship probation.

108 Pen. Code, § 295.

109 Pen. Code, § 299.6.

110 This section deals with youth processed through the juvenile court. Juveniles processed in adult criminal court can have misdemeanor arrests and convictions sealed pursuant to Pen. Code, §§ 851.7 and 1203.45.

111 Welf. & Inst. Code, § 781.



petition for a crime enumerated in Welfare and Institutions Code section 707, subdivision (b), and was fourteen years or older at the time of the offense.¹¹² If the court makes a finding that the youth has had no subsequent criminal convictions for a felony or misdemeanor involving moral turpitude, and that rehabilitation has been attained, then the court *must seal* the records.

If the petition is successful, all court records, as defined above, are sealed; “the proceedings in the case shall be deemed never to have occurred;”¹¹³ and the youth may legally declare that he or she has never been convicted or arrested. The court must send notice of the sealing to each agency named in the petition, ordering it to seal the pertinent records and destroy them on a certain date. Each agency must seal all pertinent records and notify the court that it has done so.¹¹⁴ Unfortunately, this does not ensure non-disclosure of sealed records. While sealed entries should not appear on the record that is distributed to employers as part of background checks, the entries may remain.

Youth may also petition the court for a finding of factual innocence and a sealing order in cases of arrest where no petition is filed.¹¹⁵

ACCESS TO SEALED JUVENILE RECORDS

Even though the juvenile court has sealed the record, the information will still be available if the subject consents to the information being released. It is important to remember that even though the records are sealed, they are not immediately destroyed.¹¹⁶ Sealed records may be accessed in a defamation proceeding.¹¹⁷ In addition, the California Department of Motor Vehicles may access sealed records for the purposes of setting insurance rates.¹¹⁸ Further, law enforcement and certain health care employers may ask applicants to disclose non-conviction criminal history that includes juvenile arrest information,¹¹⁹ and then may follow up with records checks that include sealed records. Once a record is sealed, the youth is entitled to respond that the events in the sealed record never occurred.¹²⁰ However, law enforcement agencies and branches of the military have access to criminal history record information that may contain a record of the arrests, even though the record has been sealed.

In California, each county is charged with the responsibility of storing and managing the hard juvenile court records as well as electronic dockets and electronic case management information.¹²¹ However, as described above, the juvenile court record is not limited to the documents that specifically reside in the delinquency or dependency court file. Therefore, to the extent that the youth’s record is comprised of police, probation, or other agency documents, those records may be stored at the respective agency and each agency should be notified of the sealing order.

112 Welf. & Inst. Code, § 781 (a); Cal. Rules of Court, rule 5.830.

113 Welf. & Inst. Code, § 781 (a).

114 *Ibid.*

115 Welf. & Inst. Code, § 781.5.

116 Welf. & Inst. Code, § 781 (a) and (d).

117 Welf. & Inst. Code, § 781 (b).

118 Welf. & Inst. Code, § 781 (c).

119 Lab. Code, § 432.7.

120 However note that the military and some licensing boards may have questions that require revealing juvenile court information even if sealed.

121 See, e.g., Welf. & Inst. Code, § 827.1.



PRACTICE TIP

Even though the DOJ has stated it does not furnish arrest or disposition information for incidents before youth turn 18 it may be wise for youth to obtain a copy of their DOJ summary criminal history, so they will be apprised of what information is being furnished to authorized employers and agencies.¹²²

§ 3.7 DESTRUCTION OF JUVENILE COURT RECORDS

Probation *may* destroy records five years after the date the court's jurisdiction is terminated.¹²³ The court *must* destroy court records¹²⁴ when the person reaches age 21 in Section 601 proceedings or age 38 in Section 602 proceedings, unless there is good cause.¹²⁵ Records that relate to offenses that resulted in a conviction in criminal court pursuant to Welfare and Institutions Code section 707.1 cannot be sealed under Section 781 (e), and cannot be destroyed.¹²⁶ Moreover, records that relate to a Welfare and Institutions Code section 707, subdivision (b) offense when the youth was 14 or older at the time of the commission cannot be sealed, nor can they be destroyed.¹²⁷

Sealed records *must* be destroyed, unless for good cause the court orders the records retained. Destruction must occur five years after the sealing order if the records are from a Section 601 proceeding, or when the person reaches the age of 38 if the records are from a Section 602 proceeding.¹²⁸ Any person who is the subject of a juvenile court record may petition the court to release the record to his or her custody, or to destroy a juvenile court record.¹²⁹ The proceedings in any case in which the juvenile court record has been destroyed or released pursuant to Section 826 shall be deemed never to have occurred and the person may reply accordingly to any inquiry about the events in the case.¹³⁰ If the juvenile court record has been released or destroyed, the subject of the record may petition the court to order the destruction of any record retained by any other agency.¹³¹

122 See fn. 90 and fn. 91 for information on how to obtain these records.

123 Welf. & Inst. Code, § 826 (a).

124 Such records would include the docket and minute book entries.

125 Welf. & Inst. Code, § 826 (a).

126 Welf. & Inst. Code, § 826 (a).

127 Welf. & Inst. Code, § 781 (d).

128 Welf. & Inst. Code, § 781 (d).

129 Welf. & Inst. Code, § 826 (a).

130 *Ibid.*

131 Welf. & Inst. Code, § 826 (b).

CHAPTER 4:

FUTURE USE OF SUSTAINED JUVENILE PETITIONS

As discussed in Chapter 1, § 1.1, juvenile delinquency proceedings are not considered “criminal” proceedings, and charges sustained in juvenile court are not “convictions.”¹³² Accordingly, juvenile adjudications generally cannot be used as “priors” in adult court. This chapter discusses the exceptions to that general rule.

§ 4.1 USE OF JUVENILE ADJUDICATIONS FOR ENHANCEMENT OF ADULT SENTENCES

Many adult recidivist sentencing statutes include provisions for enhancement of sentence because of “prior convictions.” Juvenile adjudications do not qualify as a “prior” for purposes of those statutes.¹³³ For example, an adult defendant who previously has been convicted of three or more theft-related offenses may be charged with a felony in a subsequent prosecution for petty theft.¹³⁴ However, a juvenile adjudication for petty theft does not qualify as a prior, because the adjudication is not a conviction.¹³⁵ Similarly, juvenile adjudications for driving under the influence (DUI) do not qualify as adult DUI “priors.”¹³⁶ A prior juvenile adjudication for a serious felony¹³⁷ does not qualify as a “five-year prior” under Penal Code section 667, subdivision (a).¹³⁸

This general rule also applies to eligibility for some statutory programs. For example, a previously sustained juvenile petition may not be used to bar eligibility for a drug program under California’s Proposition 36 although parallel adult convictions would preclude eligibility.¹³⁹

132 Welf. & Inst. Code, § 203; *In re Michael S.* (1983) 141 Cal.App.3d 814, 817.

133 *People v. West* (1984) 154 Cal.App.3d 100, 107-108. Although juvenile adjudications are not “priors” for certain statutes, it does not minimize the impact that juvenile adjudications may have on plea bargaining and sentencing. “The juvenile criminal history shall be considered by the district attorney in the charging decision and establishing the district attorney’s position on the appropriate plea and sentence.” (Welf. & Inst. Code, § 506.)

134 Pen. Code, § 666, as amended by Stats. 2010, ch. 219, §15.

135 *In re Anthony R.* (1984) 154 Cal.App.3d 772, 776-777.

136 *People v. Bernard* (1988) 204 Cal.App.3d Supp. 16, 18. But see Chapter 7, Driving Privileges, for instances where juvenile adjudications are treated as convictions for restrictions on driving privileges.

137 See Pen. Code, § 1192.7 [list of serious felony offenses].

138 *People v. West*, *supra*, 154 Cal.App.3d 100, 110.

139 *People v. Westbrook* (2002) 100 Cal.App.4th 378, 384-385.

The most significant exception to the general rule that juvenile adjudications are not to be treated as prior offenses is the Three Strikes Law, which explicitly authorizes the use of juvenile adjudications as prior “strikes” in adult court.¹⁴⁰ Court decisions have held that despite the absence of a right to a jury trial in juvenile court, the Sixth Amendment does not bar the use of juvenile adjudications as strikes.¹⁴¹

While a detailed analysis of the Three Strikes Law is beyond the scope of this chapter, it is important to understand that a prior “strike” may result in a doubled adult felony sentence, and that two or more prior strikes can result in a sentence of 25 years to life for any subsequent felony conviction.¹⁴² Because juvenile priors may qualify as “strikes,” the existence of one or more prior juvenile adjudications for “strike” offenses will have a dramatic impact on an adult client’s sentencing exposure.

A juvenile court adjudication for an offense committed by a youth age 16 years or older qualifies as a “strike” if the youth was made a ward of the court and either of the following factors applies:

- The offense is listed in Welfare and Institutions Code section 707, subdivision (b) and is also a serious¹⁴³ or violent¹⁴⁴ felony; or
- The offense is not listed in Welfare and Institutions Code section 707, subdivision (b), but *is* listed as serious¹⁴⁵ or violent,¹⁴⁶ and the court declared the youth a Section 602 ward with a Welfare and Institutions Code section 707, subdivision (b) offense in the same petition, or in another petition.¹⁴⁷

EXAMPLES

- A youth is charged with a single count of violating Penal Code section 460, subdivision (a) (residential burglary). The petition is sustained and the youth is made a ward of the court. Will this prior qualify as a strike if the client is later charged with a felony in adult court?

Answer: No. Although residential burglary is a serious felony enumerated in Penal Code section 1192.7, subdivision (c), it is not a Welfare and Institutions Code section 707, subdivision (b) offense.¹⁴⁸ Thus, the adjudication does not qualify as a prior strike.

- A youth is charged with a two-count petition alleging violations of Penal Code section 460, subdivision (a) (residential burglary) and Penal Code section 211

140 Pen. Code, §§ 667 (d)(3) and 1170.12 (b)(3); *People v. Davis* (1997) 15 Cal.4th 1096, 1100.

141 *People v. Nguyen* (2009) 46 Cal.4th 1007, 1022.

142 Pen. Code, §§ 667 (e)(1); 667 (e)(2)(A)(ii); 1170.12 (c)(1); 1170.12 (c)(2)(A)(ii).

143 Pen. Code, § 1192.7 (c) [list of serious offenses].

144 Pen. Code, § 667.5 (c) [list of violent offenses].

145 Pen. Code, § 1192.7 (c).

146 Pen. Code, § 667.5 (c).

147 *People v. Garcia* (1999) 21 Cal.4th 1, 13; *People v. Leng* (1999) 71 Cal.App.4th 1, 10.

148 However, some residential burglaries are Section 707 (b) and juvenile strike offenses. For instance, see Welf. & Inst. Code, § 707 (b)(16). This statute refers to Pen. Code, § 1203.09, which includes residential burglary, when the complaining witness is 60 years or older, or is disabled and great bodily injury is inflicted. (Pen. Code, § 1203.09 (a)(5).) In addition, if the youth commits a residential burglary with a person present and it is for the benefit of the gang, that constitutes a Section 707 (b) offense and a juvenile strike. (See Pen. Code, §§ 667.5 (c)(21) and 186.22 (b); Welf. & Inst. Code, § 707 (b)(21).)



(robbery). The youth was 16 years old at the time of the offenses. Both counts are sustained, and the youth is adjudicated a ward of the court. How many strikes does the youth have?

Answer. Two. Robbery is a 707, subdivision (b) offense *and* a violent felony, and thus qualifies as a strike. Because the Section 707 (b) criterion has now been satisfied, each additional serious or violent felony sustained in the petition also qualifies as a strike, even if it is not an enumerated 707 subdivision (b) offense. Thus, because the Penal Code section 460, subdivision (a) charge is a serious felony, it qualifies as a strike as well.

- A youth is charged with a two-count petition alleging violations of Penal Code section 245, subdivision (a)(1), (assault with means likely to produce great bodily injury) and Penal Code section 422 (criminal threats). The youth was 16 years old at the time of the offenses. Both counts are sustained, and the youth is adjudicated a ward of the court. How many strikes does the youth have?

Answer. One. Penal Code section 245, subdivision (a)(1) is on the Section 707 (b) list, but it is *not* a juvenile strike because it is *not* a serious or violent felony. Because the Penal Code section 422 offense is a serious felony, it qualifies as a juvenile strike because the youth was adjudged a ward for both offenses.

In addition to these examples, counsel should be aware that if youth goes to disposition for two different petitions, one containing Section 707 (b) offense and the other petition containing a non-707 (b) offense *but that same offense is a serious or violent felony*, it is entirely possible that even though the petitions are separate the fact that they went to disposition at the same time may create two juvenile strikes.

For example, assume that the youth does not successfully complete Welfare and Institutions Code section 790 (DEJ) for a residential burglary. (Pen. Code, § 460 (a).) While on DEJ, the youth commits a robbery (Pen. Code, § 211). DEJ is revoked and the youth pleads or goes to adjudication on the robbery. If the youth goes to disposition on both the residential burglary and the robbery, it is entirely likely that the youth now has two strikes.¹⁴⁹ Although there is no specific case law on this issue, the best practice (if possible) in this scenario would be to avoid going to disposition on the residential burglary and the robbery offenses at the same time.



PRACTICE TIP

It is essential that defense practitioners be well versed in the Three Strikes Law. Evaluating the potential strike implications of a juvenile client's charges is critical when engaging in pre-adjudication negotiations and advising a client whether to resolve a case or proceed to trial. Reducing or eliminating a client's exposure to "strike" adjudications should be a primary focus of any negotiations with the prosecutor.

¹⁴⁹ Because the language of *Garcia* is "adjudged a ward" (*People v. Garcia, supra*, 21 Cal.4th 1, 13), the act of going to disposition on two separate petitions at the same time could create the same effect (i.e., "adjudicated a ward") as if the two petitions were really one petition containing all the offenses. Therefore, counsel should proceed with caution when going to disposition on separate petitions that could have strike consequences.



PRACTICE TIP

If a case with strike “wobblers” (offenses that may be punished either as misdemeanors or felonies; for example, Penal Code section 245, subdivision (a)), results in a sustained petition, counsel should make a motion for the court to reduce the wobbler to a misdemeanor¹⁵⁰ at the time of disposition to prevent the offense from later qualifying as either a Section 707 (b) offense or juvenile strike.¹⁵¹

§ 4.2 USE OF JUVENILE ADJUDICATIONS FOR OTHER PURPOSES

In addition to using juvenile adjudications as “strikes,” there are additional ways in which juvenile priors may be used in future juvenile or criminal proceedings.

JUVENILE ADJUDICATIONS AS CRITERIA FOR PROBATION, OR AS A FACTOR IN AGGRAVATION OR MITIGATION AT SENTENCING

If a defendant is convicted of a felony in adult criminal court, the court considers certain enumerated criteria when deciding whether to grant probation.¹⁵² The court also considers factors in aggravation and mitigation when determining whether to sentence the defendant to the low, middle, or high term of a determinate sentence to state prison.¹⁵³ When making these determinations, the court is permitted to consider whether or not the defendant suffered a prior sustained petition as a juvenile.¹⁵⁴ The use of prior juvenile adjudications as a circumstance in aggravation in adult court does not violate a defendant’s right to jury trial.¹⁵⁵

DEATH PENALTY

When determining the penalty in a capital case, a jury is statutorily authorized to consider the “presence or absence of any prior felony conviction.”¹⁵⁶ This factor does not permit the jury to consider a prior juvenile adjudication.¹⁵⁷ However, the underlying facts which gave rise to the sustained juvenile petition are admissible under Penal Code section 190.3, subdivision (b), which permits consideration of the presence or absence of criminal activity that involved the use, or attempted use of force or violence or the threat thereof.¹⁵⁸

IMPEACHMENT

Unlike an adult conviction for a felony or for a crime involving moral turpitude, a sustained juvenile petition may not by itself be used to impeach an accused when he or she testifies.

150 Pen. Code, § 17 (b).

151 *People v. Glee* (2000) 82 Cal.App.4th 99, 105-106; *People v. Franklin* (1997) 57 Cal.App.4th 68, 72-73.

152 Cal. Rules of Court, rule 4.414(b) [criteria affecting probation].

153 Cal. Rules of Court, rule 4.420(b) [selection of term of imprisonment], rule 4.421(b) [aggravating factors], rule 4.423(b) [mitigating factors].

154 Cal. Rules of Court, rules 4.414(b); 4.420(b); 4.421(b)(2) and 4.423(b)(1).

155 *People v. Quiles* (2009) 177 Cal.App.4th 612, 620-621.

156 Pen. Code, § 190.3 (c).

157 *People v. Burton* (1989) 48 Cal.3d 843, 861-862.

158 Pen. Code, §190.3 (b); *People v. Burton*, *supra*, 48 Cal.3d at 862.



However, a witness who has previously suffered a sustained juvenile petition may be impeached with the underlying conduct.¹⁵⁹

SEXUALLY VIOLENT PREDATOR (SVP) COMMITMENTS

The Sexually Violent Predator Act provides for indefinite civil commitment of adult offenders who have qualifying prior sexual offenses.¹⁶⁰ As with the Three Strikes Law, a detailed discussion of California’s SVP law is beyond the scope of this chapter. However, juvenile adjudications *may* qualify as prior sexually violent offenses if the youth was 16 or older at the time of the commission of the offense, the adjudication is for an enumerated sexually violent offense, and the youth was committed to the Division of Juvenile Justice for the offense.¹⁶¹

USE OF JUVENILE ADJUDICATIONS IN FEDERAL CRIMINAL PROSECUTIONS

The federal Armed Career Criminal Act (18 U.S.C. § 924(e)) (ACCA) establishes a 15-year mandatory minimum term of imprisonment for defendants who have three prior convictions for violent felonies or serious drug offenses and who are convicted of unlawful possession of a firearm. Federal appellate courts have upheld the use of juvenile adjudications as qualifying priors for this act.¹⁶²

For a juvenile adjudication to count as an ACCA predicate, the underlying crime has to have involved certain elements of violence.¹⁶³ These special elements for juveniles are also subject to the categorical approach, which means that if they’re not elements of the offense or admitted by the youth, the juvenile adjudication may not be an ACCA predicate.¹⁶⁴

159 *People v. Lee* (1994) 28 Cal.App.4th 1724, 1738.

160 Welf. & Inst. Code, §§ 6600 through 6609.3.

161 Welf. & Inst. Code, § 6600 (g).

162 *United States v. Jones* (8th Cir. 2009) 574 F.3d 546, 552-553; *United States v. Salahuddin* (7th Cir. 2007) 509 F.3d 858, 863-864; *United States v. Wilks* (11th Cir. 2006) 464 F.3d 1240, 1243.

163 The term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that (i) has an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. (18 U.S.C. § 924(c)(2)(B).)

164 *Taylor v. United States* (1990) 495 U.S. 575, 602 [110 S. Ct. 2143, 109 L. Ed. 2d 607]: “The only plausible interpretation of § 942(c)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.” See also, *Shepard v. United States* (2005) 544 U.S. 13, 15 [125 S. Ct. 1254, 161 L. Ed. 2d 205]: When presented with the issue of whether the sentencing court also look to police reports or complaint application in addition to *Taylor* documents to determine whether prior offense constituted ‘generic’ burglary, the Court held that “a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit findings of fact by the trial judge to which the defendant assented. However, when the prior is a state juvenile adjudication, the record may be limited to the minute order and petition. (See *In re Jensen* (2001) 92 Cal.App.4th 262.)

CHAPTER 5:

REGISTRATION

Adjudication or admission of certain sexual assault, arson, and gang offenses in juvenile court may result in burdensome and long-lasting registration requirements. Because youth have difficulty grasping long-term consequences, it is imperative that counsel explain any registration requirements in detail to ensure compliance.

§ 5.1 REGISTRATION FOR SEX OFFENSES

Under California law, a sustained petition for certain sex offenses may trigger the requirement for a juvenile to register as a sex offender, but only if the youth is committed to the Division of Juvenile Justice (DJJ) for commission of such an offense.¹⁶⁵ The offenses that trigger registration are enumerated in Penal Code section 290.008, subdivision (c).¹⁶⁶ In the case of out-of-state juvenile adjudications, the youth must register in California if the offense would have been punishable as one of the listed offenses, and the youth was committed to an institution equivalent to DJJ.¹⁶⁷

Registration is a lifelong requirement.¹⁶⁸ The person must register annually within five working days of his or her birthday¹⁶⁹ as well as within five days of a change of address.¹⁷⁰ There is a separate additional duty to register with campus police if one is living at, enrolled at, or employed by a college/university.¹⁷¹

Failure to register based on a sustained misdemeanor petition is a misdemeanor, punishable by up to one year in jail.¹⁷² A second failure to register based on a misdemeanor juvenile adjudication

165 Pen. Code, § 290.008 (a).

166 A checklist of Section 290 registerable juvenile offenses is posted on the Attorney General's Megan's Law web site (<http://www.meganslaw.ca.gov/registration/juvenile.aspx?lang=ENGLISH>). Counsel should always check the most recent statutory and case law authority to verify whether a particular offense requires registration.

167 Pen. Code, § 290.008 (b).

168 Pen. Code, § 290 (b).

169 Pen. Code, § 290.012 (a).

170 Pen. Code, § 290.013.

171 Pen. Code, § 290.009.

172 Pen. Code, § 290.018 (a).

is a felony, punishable by up to three years in prison.¹⁷³ Failure to register based on a sustained felony juvenile petition is also a felony, carrying up to three years in prison.¹⁷⁴

Juvenile registration laws differ from adult requirements in several significant respects. First, certain offenses that would require an adult to register do not require a juvenile to register, and juvenile registration is only triggered upon commitment to the Department of Juvenile Justice.¹⁷⁵ Second, in contrast to adults, the catch-all discretionary provision in Section 290.006, which allows a court to require registration if the court finds that an offense is committed as a result of sexual compulsion or for purposes of sexual gratification, does not apply to juveniles.¹⁷⁶ Third, the Attorney General’s web site states that juveniles may not be placed on Internet registration.¹⁷⁷

§ 5.2 TERMINATION OF DUTY TO REGISTER AS SEX OFFENDER

Under current California law, the only clear procedural vehicle to terminate a juvenile registration requirement is to have the offense sealed pursuant to Welfare and Institutions Code section 781. However, sealing is not available for offenses listed for Welfare and Institutions Code section 707, subsection (b) offenses when committed by a youth age 14 or older, even if the youth was honorably discharged from DJJ.¹⁷⁸ This fact sharply limits the ability of juvenile offenders to be relieved of the registration requirement.

If a youth has sustained petitions for both registerable and non-registerable offenses, the juvenile court can avoid imposing a registration obligation by committing the youth to DJJ only on the non-registerable offense(s).¹⁷⁹ Also, a youth or a defendant who must register for a non-forcible sex offense on a victim under 18 may be relieved of the duty to register pursuant to *People v. Hofsheier* (2006) 37 Cal.App.4th 1185 and *In re J.P.* (2009) 170 Cal.App.4th 1292. *Hofsheier* found a denial of equal protection where registration was required for consensual oral copulation with a minor, since consensual sexual intercourse with a minor does not require registration; the court found no rational justification for the distinction. If a client’s conduct is *Hofsheier* conduct, not only does he or she not have to register, but there could be an argument that commitment to DJJ is improper since unlawful sexual intercourse with a minor is not a DJJ eligible offense under Penal Code section 290.008. If an appeal is not an adequate remedy to obtain *Hofsheier* relief, a youth may file a petition for writ of mandate in the trial court to remove the registration requirement.¹⁸⁰

No published case addresses whether honorable discharge¹⁸¹ from DJJ relieves a youth of the obligation to register. While honorable discharge relieves the person “from all penalties and disabilities resulting from the offense or crime for which he or she was committed,”¹⁸² registration

173 Pen. Code, § 290.018 (b).

174 Pen. Code, § 290.018 (b).

175 Pen. Code, § 290.018 (a).

176 *In re Derrick B.* (2006) 39 Cal.4th 535, 540.

177 Pen. Code, § 290.46 is silent on this point, but the Megan’s Law web site provides: “Juveniles convicted of certain offenses are required to register as sex offenders upon release from the California Youth Authority. Pen. Code, § 290 (d)(1)–(3). However, registrants whose offenses were adjudicated in juvenile court cannot be publicly disclosed on the Internet web site. Local law enforcement agencies may, in their discretion, notify the public about juvenile registrants who are posing a risk to the public. Pen. Code, § 290.45.”

178 Welf. & Inst. Code, §§ 707 (b) and 781 (a); *In re Chong K.* (2006) 145 Cal.App.4th 13, 18.

179 *In re Alex N.* (2005) 132 Cal.App.4th 18, 24; but see *In re G.C.* (2007) 157 Cal.App.4th 405, 410.

180 *People v. Picklesimer* (2010) 48 Cal.4th 330, 340.

181 Honorable discharge is defined in Cal. Code of Regs. tit. 15, §4995.

182 Welf. & Inst. Code, § 1772 (a).



has been held in similar contexts (such as expungement pursuant to Penal Code section 1203.4) to be neither a penalty nor a disability.¹⁸³ Moreover, as previously discussed, sealing under Section 781 is the only statutorily enumerated method of obtaining relief of the registration requirement. This suggests that honorable discharge from DJJ may yield relief only when it is followed by record sealing under Section 781,¹⁸⁴ and that may not be available to many youth.

Nonetheless, a youth may have an equal protection claim to relief from registration in limited circumstances. An adult's registration obligation for certain less serious sex offenses is terminated if the defendant obtains a certificate of rehabilitation, and for all offenses if the defendant obtains a pardon.¹⁸⁵ Because this relief is unavailable for juvenile adjudications, a youth may have a cognizable equal protection claim that he or she should be entitled to relief equivalent to that available to an adult offender.

It is an open question whether the recall of a DJJ commitment pursuant to Welfare and Institutions Code section 779 relieves a youth of the obligation to register. Unless and until this issue is decided adversely, counsel for clients released from DJJ after the successful litigation of a Welfare and Institutions Code section 779 motion should argue that recall of the commitment also requires relief from the sex offender registration requirement.¹⁸⁶

As with an adult conviction, if a youth is able to withdraw his or her plea (such as through a writ of error coram nobis), the plea is deemed never to have occurred, and the youth would no longer need to register.

One final motion that may impact registration requirements is a motion to dismiss under Welfare and Institutions Code section 782. Under the statutory language, this motion must be granted before the youth reaches the age of 21. At present there is no definitive authority stating that dismissal relieves the youth from sex offender registration, but there is an argument that if a case is dismissed in the interest of justice, the direct consequence of sex registration should be removed.

§ 5.3 REGISTRATION PURSUANT TO FEDERAL LAW

Defenders also need to be aware of possible requirements that youth register as a sex offender pursuant to federal law. Title I of the Adam Walsh Child Protection and Safety Act, known as the Sex Offender Registration and Notification Act (SORNA),¹⁸⁷ requires each state to implement registration and notification standards for individuals convicted as an adult or adjudicated as a juvenile for certain sex offenses. California has not adopted SORNA as of this writing (November, 2011).

183 *Doe v. California Department of Justice* (2009) 173 Cal.App.4th 1095, 1109.

184 There are several sex offenses that are DJJ eligible pursuant to Penal Code section 290.008 and also sealable pursuant to Welfare and Institutions Code section 781. At the time of publication, those offenses include: Pen. Code, § 288 (a); Pen. Code, § 288.5; Pen. Code, § 647.6.

185 Pen. Code, § 290.5.

186 As the handbook goes to press, the issue of county recall of wards as part of the realignment of funding and services to the counties may become a bigger issue. Prior legislation permitted recall of youth at DJJ, but only for non-707(b), non-sex offenders. Welf. & Inst. Code, § 731.1(a). Senate Bill 92 (Stats. 2011, Ch. 36, eff. June 30, 2011) amended Welfare and Institutions Code section 731.1 to permit recall without regard to the nature of the offense, but only if certain budget triggers in the legislation are activated. Counties faced with paying substantial sums to maintain wards at DJJ may elect to recall them. If this happens, there may be additional opportunities to challenge registration requirements for recalled wards.

187 42 U.S.C. § 16901 et seq.

Registration applies to juveniles who were 14 years or older at the time of the offense and who committed an offense comparable to or more severe than aggravated sexual assault, as described in section 2241 of Title 18 of the United States Code.¹⁸⁸ Section 2241 prohibits:

- Knowingly caus[ing] another person to engage in a sexual act —
 - by using force against that other person; or
 - by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or
- Engaging in a sexual act with another by rendering unconscious or involuntarily drugging the victim; or
- Engaging in a sexual act with a person under the age of 12.

SORNA requires that youth adjudicated of offenses equivalent to this description register for life.¹⁸⁹ A youth may be removed from the registry after 25 years if he or she does not acquire any new sex offense or felony conviction for 25 years; completes probation without revocation; and completes sex offender treatment.¹⁹⁰

With respect to federal cases, the U.S. Attorney General, exercising delegated authority from Congress, determined that SORNA applies retroactively to all sex offenders convicted of qualifying offenses before its enactment, including juvenile delinquents.¹⁹¹ However, the Ninth Circuit has ruled that retroactive application of SORNA’s juvenile registration provisions to people who were adjudicated delinquent under the Federal Juvenile Delinquency Act (FJDA)¹⁹² prior to SORNA’s enactment was punitive, and thus violated the Ex Post Facto clause.¹⁹³ While this is an encouraging opinion for juvenile defenders, the applicability of this decision is limited, as the Ninth Circuit stressed in a footnote that “we limit our discussion to individuals adjudicated delinquent in the federal system. We do not express any opinion regarding SORNA’s registration requirements vis-à-vis individuals adjudicated delinquent in any particular state juvenile proceeding.”¹⁹⁴ Further limiting the decision, the Ninth Circuit left open the constitutionality of prospective application of the registration requirements to juveniles, and only focused on the retrospective application of SORNA to juvenile adjudications.¹⁹⁵

§ 5.4 REGISTRATION FOR ARSON OFFENSES

Pursuant to Penal Code section 457.1, subdivision (b)(3), youth who commit certain specified arson offenses,¹⁹⁶ and who are committed to DJJ, must register until age 25 or until their

188 42 U.S.C. § 16911 (8). For more information, see U.S. Department of Justice, Office of Justice Programs, “Juvenile Offenders Required to Register Under SORNA: A Fact Sheet,” available at http://www.ojp.usdoj.gov/smart/pdfs/factsheet_sorna_juvenile.pdf.

189 42 U.S.C. § 16915(a).

190 42 U.S.C. § 16915(b).

191 28 C. F. R. § 72.3.

192 18 U.S.C. § 5031 et seq.

193 *United States v. Juvenile Male* (9th Cir. 2009) 590 F.3d 924, 928.

194 *Id.*, at fn. 4.

195 *Id.*, at 930.

196 For purposes of registration, “arson” is defined as any violation of Pen. Code, §§ 451, 451.5, and 453, attempts of those crimes, and the offense specified in § 455. (Pen. Code § 457.1 (a).)



juvenile records are sealed, whichever occurs first.¹⁹⁷ The youth must register with the police (if youth's residence is in a city) or the county sheriff (if there is no city police department or youth's residence is in an unincorporated area) within 14 days of residence,¹⁹⁸ and within 10 days of changing his or her address.¹⁹⁹ Upon termination of the duty to register, the records regarding registration must be destroyed.²⁰⁰

Violation of the arson registration requirements is a misdemeanor punishable by 90 days to 1 year in jail.²⁰¹

§ 5.5 GANG OFFENSE REGISTRATION

Under Penal Code section 186.30, a youth may be subject to gang registration requirements if:

- A petition is sustained for active participation in a criminal street gang pursuant to Penal Code section 186.22, subdivision (a);
- For an enhancement under Penal Code section 186.22, subdivision (b); or
- Where the court determines at the time of disposition that the person committed a gang related offense. "Gang-related" requires evidence that the current crime is gang-related.²⁰²

Registration must be completed within 10 days of release or within 10 days of a change of address.²⁰³ Registration is required for five years.²⁰⁴ The registration process is detailed in Section 186.32. However, contrary to Section 186.32, subdivision (a)(1)(C), police may only ask for identification and vocational information.²⁰⁵ The requirement that the youth give information about fellow gang members violates the privilege against self-incrimination.²⁰⁶

Failure to register as a gang offender for the requisite offenses under Section 186.30, subdivision (b), is a misdemeanor.²⁰⁷ Further, failure to register plus a subsequent conviction for Section 186.30 offenses can be alleged as an enhancement, adding 16 months, 2 or 3 years to a sentence.²⁰⁸

§ 5.6 REGISTRATION FOR DRUG OFFENSES

Adults must register as narcotics offenders for convictions of specified offenses listed in Health and Safety Code section 11590, subdivision (a). Youth with sustained petitions for one of the listed offenses are *not* subject to the registration requirements.²⁰⁹

197 Pen. Code, § 457.1 (b)(3).

198 Pen. Code, § 457.1 (b)(1).

199 Pen. Code, § 457.1 (g).

200 Pen. Code, § 457.1 (d).

201 Pen. Code, § 457.1 (h).

202 Pen. Code, § 186.30 (b)(3); *People v. Martinez* (2004) 116 Cal.App.4th 753, 762; *In re Eduardo C.* (2001) 90 Cal.App.4th 937, 943.

203 Pen. Code, § 186.32 (b).

204 Pen. Code, § 186.32 (c).

205 *In re Jorge G.* (2004) 117 Cal.App.4th, 931, 950.

206 *Ibid.*

207 Pen. Code, § 186.33 (a).

208 Pen. Code, § 186.33 (b)(1).

209 *In re Luisa Z.* (2000) 78 Cal.App.4th 978, 991.

CHAPTER 6:

COURT ORDERED THERAPY & COUNSELING CONSEQUENCES

Youth face potential collateral consequences when required to participate in court-ordered therapy or counseling. In California, when clients have experienced abuse or have been involved in sexual activity that indicates abuse, their disclosures to their therapist during therapy sessions can result in a report to Child Protective Services, unwanted scrutiny, or the filing of additional charges against the youth. Concern about such disclosure may also create difficulties for youth required to participate in therapy while in the Division of Juvenile Facilities (DJJ) or other juvenile facilities.

§ 6.1 MANDATED REPORTING REQUIREMENTS

The Child Abuse and Neglect Reporting Act²¹⁰ provides for mandatory reporting of suspected child abuse and neglect to a “child protective agency,” which includes the police or sheriff, probation, or child welfare departments.²¹¹

Mandatory reporters under Penal Code section 11166 are identified in Penal Code section 11165.7.²¹² Generally speaking, the reporting law imposes a mandatory reporting requirement on individuals whose professions bring them into contact with children, including health practitioners, therapists, child care custodians, teachers and school employees, social workers, probation officers, clergy, and law enforcement officials. They must report child abuse, including physical injury, sexual abuse, willful harming or injuring of a child, unlawful corporal punishment, and neglect.²¹³

There is a duty to report whenever a mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect.²¹⁴

210 Pen. Code, § 11164 et seq.

211 Pen. Code, § 11165.9.

212 Pen. Code, § 11165.7.

213 Pen. Code, § 11165 et seq.

214 Pen. Code, § 11166 (a).

The trained professional may rely on his or her judgment and experience to distinguish between abusive and non-abusive situations.²¹⁵

The reporting laws create a number of potential difficulties for youth involved in delinquency cases. In the course of court-ordered treatment, the client may disclose behavior that comes within the definition of child abuse and neglect, particularly in relation to sexual behavior.

While some of the reportable offenses are for coercive acts, others encompass adolescent behavior that is consensual, albeit underage sexual activity. This is an area in which some California laws are out of step with the realities of sexual activity among adolescents. This means that youth in juvenile justice facilities may experience collateral consequences for disclosure of acts, such as “statutory rape,” that represent fairly mainstream behavior. The consequences could not only impact the youth disclosing the activity, but also the sexual partner, whose identity would be disclosed through the report.

Penal Code section 11165.1 defines “sexual abuse” as including conduct in violation of the following:

- Penal Code section 261 (Rape)
- Penal Code section 261.5, subdivision (d) (Statutory Rape)
- Penal Code section 264.1 (Rape in Concert)
- Penal Code section 285 (Incest)
- Penal Code section 286 (Sodomy)
- Penal Code section 288a (Oral Copulation)
- Penal Code sections 288, subdivision (a), (b), or (c)(1) (Certain Violations of Lewd or Lascivious Acts upon a Child)
- Penal Code section 289 (Sexual Penetration)
- Penal Code section 647.6 (Child Annoying)

Thus, some sexual activity with a person under 18 may need to be reported as child abuse based solely upon the age of the partners:

- Sexual intercourse between a minor under 16 years of age and a partner 21 years of age or older.²¹⁶
- Sexual conduct (lewd and lascivious acts) with a child under 14 and a person of a disparate age, irrespective of consent.²¹⁷

Also, violations of the sodomy and oral copulation sections of the Penal Code are considered sexual abuse, without regard to whether they were coerced and irrespective of the age of the partners.²¹⁸

215 *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 258-259 [leaving the decision whether to report to professional judgment is a fundamental part of the reporting law, which instead of a blanket reporting requirement based on age allows the professional to distinguish sexual abuse from voluntary sexual relations].

216 Pen. Code, § 261.5 (d).

217 Pen. Code, § 288 (a); *People ex rel. Eicheberger v. Stockton Pregnancy Control Medical Clinic, Inc.* (1988) 203 Cal.App.3d 225, 239 [holding that the Child Abuse and Reporting Act does not currently require the reporting of voluntary sexual conduct between minors under age 14, both of whom are of a similar age.] However, the Act requires the reporting of sexual conduct between a youth under age 14 and a person of disparate age, where the conduct is reasonably suspected to constitute a violation of subdivision (a) of section 288. (*Id.* at 240.)

218 Pen. Code, §§ 286, 288 (a), and 11165.1.



More detailed information on child abuse reporting, including a chart describing reporting requirements based on age of partners, may be found on the Teen Health Rights web site.²¹⁹



PRACTICE TIP

Clients who are ordered to participate in court ordered therapy should be advised that the therapist may be required make a child abuse report if the client discloses information indicating that the client is or has been a victim or perpetrator of child abuse, and the meaning of that term should be explained in language the youth can understand. The client should be advised that a child abuse report could lead to the filing of new charges.

§ 6.2 MANDATED REPORTING IN COURT-ORDERED SEX OFFENDER TREATMENT PROGRAMS

Youth may be required to participate in a sex offender treatment program as a condition of probation, placement, or DJJ commitment. These programs often require youth to describe their sexual behavior in some detail during treatment as part of accepting responsibility for their acts. Refusal to disclose additional behavior beyond the commitment offense may be viewed as non-cooperation with treatment and this could result in a probation violation, supplemental petition for program failure, or extended confinement. However, admission of additional sexual behavior may result in the filing of new charges, and disclosures may appear in treatment reports over which the youth has little control.

Furthermore, the psychotherapist-patient privilege does not preclude the youth's therapist from testifying at probation violation hearing concerning the youth's participation and progress in the court-ordered treatment plan.²²⁰ The juvenile court may receive information from the therapist when the youth has been directed to participate and cooperate in a sex offender treatment program in conjunction with a disposition order placing the youth on probation. However, the therapist may not disclose any specific statements the youth made to the therapist, any advice given to the youth by the therapist, or any diagnosis made by the therapist.²²¹

Counsel should determine whether clients may invoke their Fifth Amendment privilege against self-incrimination in refusing to disclose to the therapist certain sexual behavior on the grounds that it may reveal incriminating information that could result in prosecution or revocation proceedings. The answer may depend on the severity of the punishment for not disclosing.²²² If the therapy is court-mandated, the youth may invoke the privilege if the therapist's questions call for answers that would incriminate him in a pending or later criminal proceeding and the questioner expressly or by implication asserts that invocation of the privilege would lead to

219 The Teen Health Rights web site is at http://www.teenhealthrights.org/child_abuse_reporting/.

220 *In re Pedro M.* (2000) 81 Cal.App.4th 550, 554.

221 *Id.* at 554-555; *In re S.A.* (2010) 182 Cal.App.4th 1128, 1139.

222 *U.S. v. Antelope* (9th Cir. 2005) 395 F.3d 1128 [probation condition requiring defendant to give his sexual history without a promise of immunity from new prosecution and consequent revocation based upon refusal to incriminate himself, violated his Fifth Amendment right against compelled self-incrimination]; *U.S. v. Saechao* (9th Cir. 2005) 418 F.3d 1073 [the Fifth Amendment proscribes the use in a separate criminal proceeding of a statement obtained pursuant to a probation condition that requires a probationer to "choose between making incriminating statements and jeopardizing his conditional liberty" by remaining silent].

revocation of probation.²²³ However, if the questions put to the youth are relevant to his probationary status and pose no realistic threat of incrimination in a separate criminal proceeding, the Fifth Amendment privilege is not available.²²⁴

Some programs may use polygraphs in connection with treatment. There is no right to counsel at a post-disposition polygraph²²⁵ examination used in connection with treatment or in therapy sessions.²²⁶ Because of this, it is incumbent upon counsel to maintain contact with the youth while on probation and inform him or her prior to the time the court-ordered therapy program commences that statements made during therapy could possibly be used as a basis for a new criminal charge, a probation violation, or a modification of probation terms. Attorneys may wish to encourage clients to contact them for advice *first* if the youth prior to admitting to uncharged sexual conduct during therapy.



PRACTICE TIP

Counsel should argue for statements made by a youth to counselors in an involuntary court-mandated treatment program at DJJ to be excluded at a subsequent court hearing as a Miranda violation. Other states have held that statements disclosed to counselors while in state custody are not admissible against the youth. “Questioning regarding other sexual misconduct is often considered a necessary part of the juvenile sexual offender program where participants are strongly encouraged to admit additional sexual misconduct. Such questioning and encouraged disclosure amounted to coercion in the course of a custodial interrogation.”²²⁷

The rules are different when a youth has seen a private therapist voluntarily. A youth cannot be required as a condition of probation to sign a waiver of confidentiality so that a *private* therapist can reveal the content of the therapy to a probation officer.²²⁸ The Fifth Amendment privilege against self-incrimination does not apply to private therapy sessions. California cases have held that the mandated reporting laws do not violate the right against self-incrimination since the disclosure requirement does not transform the “reporter” into a police agent.²²⁹

§ 6.3 POLYGRAPH ISSUES IN SEXUAL OR CRIMINAL BEHAVIOR REPORTING

Some specialized treatment programs require the youth to pass a polygraph test as a condition of entry into the program, or to earn home visits or additional privileges. In addition, some youth cannot complete their sex offender treatment without complying with and passing a polygraph exam. The polygraph test may include questions about past criminal or sexual

223 *U.S. v. Antelope* (9th Cir. 2005) 395 F.3d 1128; *U.S. v. Saechao* (9th Cir. 2005) 418 F.3d 1073.

224 “As for Brown’s contention that an order compelling him to submit to periodic polygraph testing violates his right to counsel under the Sixth Amendment, it is without merit, since there is no right to counsel in a probation interview or therapy session.” (*Brown v. Superior Court*, (2002) 101 Cal.App.4th 313, 320; citing *Minnesota v. Murphy* (1984) 465 U.S. 420, 424, Fn. 3.)

225 Additional polygraph issues are discussed at § 6.3.

226 *Brown v. Superior Court*, *supra*, 101 Cal.App.4th at 320.

227 *Welch v. Kentucky* (2004) 149 S.W.3d 407, 410; *State v. Evans* (2001) 760 N.E.2d 909.

228 *In re Reynaldo Corona* (2008) 160 Cal.App.4th 315, 321.

229 *People v. Younghanz* (1984) 156 Cal.App.3d 811. (Note, this mandated reporter was a private therapist whom the defendant had sought out on his own.)



behavior. Youth in such programs may be required to sign an agreement acknowledging that any disclosures may result in new criminal charges or probation violations, and failure to participate in polygraph testing could result in probation violations. In such programs, youth face serious collateral consequences whether or not they submit to the polygraph test, and counsel should advise how best to respond to testing requests.

The use of polygraph testing in the treatment and post-conviction supervision of juvenile sex offenders should be carefully scrutinized. Polygraph testing as a probation condition is not per se invalid and is permissible treatment of sex offenders as a “valid and effective means of dealing with issues of denial common in these offenders” and a deterrent to recidivism.²³⁰ However, a polygraph condition of probation is overbroad unless the court places restrictions on the questions that may be asked by the examiner or otherwise tailors the order to comport with the court’s purpose in imposing the condition.²³¹



PRACTICE TIP

Juvenile sex offender treatment programs may have internal rules about whether disclosures of additional past misconduct will be reported. The California Coalition on Sexual Offending has suggested that, “using a clinical polygraph examination to extract incriminating historical information is only ethical when clients are protected from the legal consequences of their honest self-report about pre-treatment behaviors.” Some jurisdictions provide legal immunity to patients or some programs may avoid potential consequences of honest historical self-report by collecting only information that does not identify particular victims (e.g. victim #1, #2, etc.).²³²

RECORD RETENTION OF JUVENILE SEXUAL BEHAVIOR REPORTING

Reports of suspected child abuse or neglect that are determined not to be “unfounded”²³³ must be filed with the U.S. Department of Justice and maintained in the Child Abuse Central Index (CACI). Thus, “inconclusive” or “unsubstantiated” reports are retained for ten years if no subsequent report concerning the same suspected child abuser is received within that time period.²³⁴ “Substantiated” reports appear to remain permanently in the CACI. As a result, substantiated, as well as inconclusive reports persist well into the future and potentially may prevent youth from obtaining employment, child custody, and other benefits in the future.

230 *Brown v. Superior Court*, *supra*, 101 Cal.App.4th at 319-320.

231 *Id.* at 321.

232 California Coalition on Sexual Offending Position Paper for Clinical Polygraph Examinations in Sex Offender Treatment (revised 1/23/04), copyright by CCOSO.

233 An “unfounded report” means a report that is determined by the investigator who conducted the investigation to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect. (Pen. Code, § 11165.12 (a).)

234 Pen. Code, § 11170 (a)(3).

CHAPTER 7:

DRIVING PRIVILEGES

The ability to drive may impact a youth’s ability to get to and from school, work, social activities, family obligations, and even court-ordered services. Thus, restrictions on driving privileges are a tremendously important collateral consequence of juvenile delinquency proceedings.

Restrictions on driving privileges may occur in a number of ways. A sustained juvenile petition may affect a young person’s eligibility to apply for a California driver’s license.²³⁵ If a license has already been issued, a sustained petition may result in suspension or revocation of the privilege to drive. Some of the consequences affecting ability to drive are mandatory and others are discretionary. Consequences can originate from the court upon a sustained petition, or the California Department of Motor Vehicles (DMV) after court records are transmitted. In some cases, the DMV has discretion to impose sanctions even though the court could not or has elected not to impose the same restrictions.

The most common offenses affecting the privilege to drive are alcohol, drug and driving violations. Many other common juvenile offenses, including vandalism, truancy, and prostitution, also carry consequences. At the end of this chapter is a chart detailing many of the offenses that can result in revocation, suspension, or delay of DMV privileges.

Unlike other collateral consequences, juvenile adjudications *do* count as “convictions” for the purpose of California driving privileges.²³⁶ Throughout this section when the word “convicted” is used it includes sustained juvenile petitions. For example, in the Vehicle Code provisions on suspension and revocation, “convicted” or “conviction” includes a finding by a judge of a juvenile court, a juvenile hearing officer, or referee of a juvenile court that the person has committed an offense, and the term “court” includes a juvenile court

235 Youth under the age of 18 who have completed the requisite driver’s education and behind-the-wheel instruction may be eligible to receive a provisional driver’s license at age 16, permitting them to drive under specified conditions and under the supervision of specified individuals. (Veh. Code, § 12814.6.) Also, junior permits may be issued to permit limited driving beginning at age 14 based on a determination by the DMV that existing transportation is inadequate to assure regular school attendance; that illness of a family member makes the operation of a vehicle necessary; or that driving to and from employment is needed to support the family. (Veh. Code, § 12513.)

236 As discussed in this chapter, juvenile adjudications carry license consequences and count as “convictions” for those purposes, but they do not count as prior convictions that could be used against the youth in future criminal proceedings. (Welf. & Inst. Code, § 203.) For example, a sustained petition for “Driving Under the Influence” (Veh. Code, § 23152) carries licensing ramifications, but cannot be used as a “prior” if the youth picks up additional Section 23152 charges in the future.

unless otherwise specified.²³⁷ However, there are also a number of Vehicle Code provisions specifically directed at suspension or revocation of driving privileges for juveniles or persons under a certain age.²³⁸

The laws on suspension and revocation vary with respect to reporting of violations and agency responsibility for particular parts of the process, and this contributes to variations in practice.²³⁹ It is important for counsel to understand the applicable statutes and how suspension works in the counties where they practice. Even when suspension is required under the law, courts in some jurisdictions do not routinely notify the Department of Motor Vehicles of sustained petitions for offenses that should trigger limitation of driving privileges, either because there is no mechanism in place to provide notice or because of ignorance of the law. In other jurisdictions, the court automatically forwards adjudication records to the DMV, rendering suspension or revocation more certain.

This chapter summarizes many of the suspension and revocation provisions pertinent to juveniles. The law is confusing, with numerous internal statutory cross-references that make it difficult to easily summarize certain provisions. Accordingly, while practitioners can use this discussion as a starting point, independent research is critical to ensure counsel has located the relevant statutes for a particular offense. Also, for many offenses, offenders subject to revocation or suspension have due process rights to challenge or mitigate driving restrictions through court and/or DMV proceedings. While an extended discussion of those rights and strategies is beyond the scope of this handbook, practitioners should make efforts to advise clients of their rights and remedies in DMV administrative proceedings, and when appropriate, connect their clients with specialists in this area of the law.

§ 7.1 MANDATORY SUSPENSION OR REVOCATION

This section summarizes the various Penal, Health and Safety, Business and Professions, and Vehicle Code sections resulting in *mandatory* suspension or revocation²⁴⁰ of one's driver's license, either by the court or by the California Department of Motor Vehicles.²⁴¹ Under state law, suspension by the court requires physical surrender of the license to the court.²⁴²

237 Veh. Code, § 13105.

238 Some of the age-related statutes are directed at people under age 18 (e.g., Veh. Code, § 13352.3), and other are directed at people between the ages of 13 and 21. (e.g., Veh. Code, § 13202.5).

239 For example, Veh. Code, § 13206 calls for the person whose privilege is suspended to surrender his or her license to the court for retention by the court, but a number of more specific statutes (summarized in this chapter) require the court to send the license to the DMV. These slight differences in the statutes help to create a confusing landscape in which courts may or may not send required transmittals to the DMV.

240 "Revocation" means that the person's privilege to drive is terminated, and a new license may be obtained after the period of revocation. (Veh. Code, § 13101.) "Suspension" means that the person's privilege to drive is temporarily withdrawn. (Veh. Code, § 13102.) Most statutes referred to in this chapter involve "suspension," but the term "revocation" will be used when the statute specifies the term.

241 Veh. Code, §§ 13200 et seq. (primarily court action) and §§ 13350 et seq. (DMV action).

242 Veh. Code, § 13206. Except when required by the provisions of Veh. Code, § 13550 to send the license to the DMV, the court must retain the license during the period of suspension and return it to the licensee at the end of the period. (*Ibid.*)





PRACTICE TIP

The court may not suspend a youth's privilege to drive as a condition of probation for a period longer than that specified in the Vehicle Code.²⁴³ The express provisions of the Vehicle Code override the court's broad discretion to impose reasonable conditions of probation.²⁴⁴

DRUG OR ALCOHOL RELATED

The court must order that the DMV revoke the driving privilege of any person convicted of a violation of one of the following offenses when a motor vehicle was involved in, or incidental to, the commission of the offense:²⁴⁵

- Narcotics possession;²⁴⁶
- Possession for sale or purchase of narcotics;²⁴⁷
- Transportation, sale, or furnishing of narcotics;²⁴⁸
- Possession of marijuana;²⁴⁹
- Possession for sale of marijuana;²⁵⁰ or
- Transportation, sale, or furnishing of marijuana.²⁵¹

The period of suspension or period after revocation during which the person may not apply for a license is determined by the court, and may not exceed three years from the date of conviction.²⁵²

DRUG OR ALCOHOL RELATED OFFENSES BY YOUTH 13 TO 21 YEARS OF AGE

In addition to the mandatory suspension and revocation provisions for drug and alcohol offenses applicable to everyone, the Vehicle Code has specific provisions for youth. Pursuant to Vehicle Code section 13202.5, subdivision (e), any suspension, restriction, or delay pursuant to Section 13202.5 is in addition to any driving penalty already imposed upon conviction of an offense specified Section 13202.5, subdivision (d). For youth 13 to 21 years of age at the time of specified drug and alcohol offenses, the court must suspend the youth's driving privilege for one year.²⁵³ The offenses include:

- Violations relating to prescription drugs;²⁵⁴
- Minor in possession of alcohol;²⁵⁵

243 *In re Colleen S.* (2004) 115 Cal.App.4th 471, 475.

244 *Ibid.*

245 Veh. Code, § 13202 (b). (Violation of Health & Saf. Code, § 11353 [inducing juveniles to violate narcotics laws] also requires suspension, but that section applies only to persons over 18 years of age.)

246 Health & Saf. Code, § 11350.

247 Health & Saf. Code, § 11351.

248 Health & Saf. Code, § 11352.

249 Health & Saf. Code, § 11357.

250 Health & Saf. Code, § 11359.

251 Health & Saf. Code, § 11360.

252 Veh. Code, § 13202 (c).

253 Veh. Code, § 13202.5 (a) and (d).

254 Bus. & Prof. Code, § 4110 et seq.

255 Bus. & Prof. Code, § 25662.

- Attempting to buy alcohol or using a false identity to purchase alcohol;²⁵⁶
- Offenses involving controlled substances;²⁵⁷
- Gross vehicular manslaughter while intoxicated;²⁵⁸
- Vehicular manslaughter while driving a boat;²⁵⁹
- Being intoxicated in a public place;²⁶⁰
- Reckless driving, or “wet reckless;”²⁶¹
- Driving under the influence of alcohol by a person under 21;²⁶² and
- Driving under the influence of alcohol and/or any drug.²⁶³

If the person convicted does not yet have the privilege to drive, the court must order the department to delay issuing the privilege to drive for one year subsequent to the time the person becomes legally eligible to drive. That requirement may be modified if there is no further conviction within 12 months.²⁶⁴ Each successive conviction must result in an additional one-year suspension or delay.²⁶⁵ When driving privileges are suspended the person must surrender any license to the court, and within ten days following conviction the court must transmit an abstract of the conviction and any driver’s licenses surrendered to the DMV.²⁶⁶ After a suspension or delay has been ordered, the youth may petition the court for review of the restrictions based on a “critical need to drive.”²⁶⁷

OTHER OFFENSES

VANDALISM BY PERSONS 13 AND OLDER

The court must suspend the person’s driving privilege for vandalism²⁶⁸ when the person was 13 years of age or older at the time of commission of the offense.²⁶⁹ Suspension may be for up to two years, but there is a provision for the court to make an exception if a personal or family hardship exists that requires the person to have a driver’s license for his or her own, or a family member’s employment, school, or medically related purpose.²⁷⁰ If the person convicted does not yet have the privilege to drive, the court must order the DMV to delay issuing the privilege to drive for one to three years subsequent to the time the person is legally eligible to drive, but that may be modified by petition of the youth if there is no further conviction within 12 months. Each successive conviction must result in an additional one-year suspension.²⁷¹ The youth may reduce

256 Bus. & Prof. Code, § 25658 et seq.

257 Health & Saf. Code, § 11000 et seq.

258 Pen. Code, § 191.5. For purposes of the Vehicle Code, violation of Pen. Code, § 191.5 (b) is considered to be a violation of § 23153. (Veh. Code, § 13350.5.)

259 Pen. Code, § 192.5 (a) and (b).

260 Pen. Code, § 647 (f).

261 Veh. Code, §§ 23103 and 23103.5.

262 Veh. Code, § 23140.

263 Veh. Code, § 23152.

264 Veh. Code, § 13202.5 (a).

265 *Ibid.*

266 Veh. Code, § 13202.5 (b).

267 Veh. Code, § 13202.5 (c).

268 Veh. Code, § 13202.6 includes vandalism under Penal Code sections 594, 594.3, and 594.4.

269 Veh. Code, § 13202.6 (a)(1).

270 *Ibid.*

271 *Ibid.*



the period of suspension by performing community service by cleaning up graffiti from any public property, including public transit vehicles.²⁷² Upon the order for suspension, the court must order the youth to surrender his or her license to the court, and must transmit a certified abstract of the conviction and the license to the DMV within 10 days of the conviction.²⁷³

VEHICLE CODE OFFENSES

The DMV must immediately revoke the privilege of a person to drive a motor vehicle for one year²⁷⁴ upon receipt of a court abstract showing that the person has been convicted of any of the following offenses:²⁷⁵

- “Hit and Run” (failing to stop or otherwise comply with Vehicle Code section 20001) in an accident resulting in injury or death;²⁷⁶
- A felony in the commission of which a motor vehicle was used, with certain exceptions;²⁷⁷
- Reckless driving causing bodily injury.²⁷⁸

The revocation for these offenses is for one year, and the person must show proof of financial responsibility to reinstate his or her privilege.²⁷⁹

The DMV must immediately revoke the privilege of a person to drive a motor vehicle for three years²⁸⁰ upon receipt of a court abstract showing that the person has been convicted of any of the following offenses:²⁸¹

- Manslaughter resulting from operation of a motor vehicle (other than Pen. Code § 190.2, subd. (c)(2));²⁸²
- Three or more “hit and run” (failure to stop and give information) violations within twelve months of the first offense;²⁸³
- Gross vehicular manslaughter while intoxicated;²⁸⁴
- Gross vehicular manslaughter while operating a boat;²⁸⁵
- Evading a police officer and causing serious bodily injury or death.²⁸⁶

272 Veh. Code, § 13202.6 (a)(2).

273 Veh. Code, § 13202.6 (b)(1).

274 Veh. Code, § 13350 (a), (c). Also, persons convicted of specified “under the influence” or “vehicular manslaughter” offenses with priors must be designated as habitual traffic offenders. (Veh. Code, § 13350 (b).)

275 Veh. Code, § 13350 (a).

276 Veh. Code, § 13350 (a)(1).

277 Veh. Code, § 13350 (a)(2). Other provisions provide for revocation in vehicular manslaughter and reckless driving cases (Veh. Code, § 13351), driving under the influence cases (Veh. Code, § 13352), and auto theft cases. (Veh. Code, § 13357.)

278 Veh. Code, § 13350 (a)(3).

279 Veh. Code, § 13350 (a), (c).

280 Veh. Code, § 13351 (b).

281 Veh. Code, § 13351 (a).

282 Veh. Code, § 13351 (a)(1).

283 Veh. Code, § 13351 (a)(2).

284 Veh. Code, § 13351 (a)(3); Pen. Code, § 191.5.

285 Veh. Code, § 13351 (a)(3); Pen. Code, § 192.5 (a).

286 Veh. Code, §§ 2800.3, 13351 (a)(3).

In addition, upon receipt of an abstract showing that the court has ordered the suspension of a license for “road rage,”²⁸⁷ the DMV must suspend the driving privileges of the person so convicted in accordance with that suspension, commencing either on the date of conviction or upon the person’s release from confinement.²⁸⁸

VEHICLE CODE PROVISIONS SPECIFIC TO JUVENILES

In addition to the above-mentioned mandatory provisions for Vehicle Code violations applicable to all offenders, there are mandatory provisions directed at juveniles. Upon a finding by a juvenile court judge, juvenile traffic hearing officer or juvenile court referee the court must immediately report its findings to the DMV²⁸⁹ when a youth has been convicted of:

- Driving under the influence of alcohol and/or drugs;²⁹⁰
- Driving under the influence and causing bodily injury to another person;²⁹¹ or
- Speed contests.²⁹²

Upon receipt of an abstract showing a conviction of one of these offenses, the DMV must immediately suspend or revoke the person’s driving privileges.²⁹³ The mandatory period of suspension or revocation ranges from six months to five years depending on the specific offense and the provisions under which the youth was sentenced.²⁹⁴ Irrespective of the period of suspension, youth must also complete an extensive licensed driving-under-the-influence program ranging up to thirty months in length. There are provisions for obtaining a restricted license during the period of suspension based on completing most of the required programming, installing an interlock device on one’s car ignition, paying all fees associated with the suspension, and showing proof of financial responsibility.²⁹⁵

California has separate, more restrictive provisions for persons under the age of 21 with respect to driving under the influence of alcohol, and violation of these provisions carries mandatory revocation consequences. Thus, whereas the “legal” limit for blood alcohol content for adults is 0.08 percent of alcohol, by weight, in one’s blood,²⁹⁶ the limit for persons under 21 is 0.01 percent.²⁹⁷ The DMV is required to suspend for one year the driving privileges of youth who refuse or fail to complete a preliminary screening test.²⁹⁸

Just to confuse matters, there is an additional mandatory suspension provision for youth under 21 who are convicted of violating Vehicle Code section 23140, making it unlawful for a person under the age of 21 years who has 0.05 percent or more, by weight, of alcohol in his or her

287 Veh. Code, § 13210.

288 Veh. Code, § 13351.8. However, any conviction for a felony violation of Penal Code section 245 where a vehicle was the deadly weapon or instrument used to commit the offense mandates lifetime revocation. (Veh. Code, § 13351.5.)

289 Veh. Code, § 13352 (c) differs from other statutes that give the court itself the power to suspend or revoke.

290 Veh. Code, §§ 13352 (a), 23152.

291 Veh. Code, §§ 13352 (a), 23153.

292 Veh. Code, §§ 13352 (a), 23109, 23109.1.

293 Veh. Code, § 13352 (a).

294 Veh. Code, §§ 13352 (a), 13352.1, 13352.3.

295 Veh. Code, §§ 13352 (a), 13352.4, 13352.5.

296 Veh. Code, § 23152 (b).

297 Veh. Code, § 23136.

298 Veh. Code, § 13353.1 (a)(1).



blood to drive a vehicle. That section requires the court to forward an abstract of the findings to the DMV within 10 days.²⁹⁹ The DMV must immediately suspend the person's driving privileges and may not reinstate them until proof of completion of a driving under the influence program and financial responsibility is produced.³⁰⁰

BUSINESS AND PROFESSIONS CODE PROVISIONS

The court must suspend the youth's driving privilege for one year for a violation of: underage alcohol purchase or consumption in a bar,³⁰¹ minor attempting to purchase alcohol,³⁰² using false ID to attempt to purchase alcohol,³⁰³ or possession of alcohol in a public place.³⁰⁴ If the youth convicted does not yet have the privilege to drive, the court must order the department to delay issuing the privilege to drive for one year subsequent to the time the person becomes legally eligible to drive.³⁰⁵

§ 7.2 DISCRETIONARY SUSPENSION OR REVOCATION

A violation of any of the following California code sections *may* result in the revocation or suspension of one's driver's license either by order of the court or as imposed by the California DMV.

EDUCATION CODE PROVISIONS

The court may suspend the driving privileges of anyone between 13 and 18 years of age who is a habitual truant within the meaning of Education Code section 48262 or who is adjudged a ward of the court under the truancy status offender provisions of Welfare and Institutions Code section 601, subdivision (b).³⁰⁶ The court may suspend the youth's driving privilege for one year.³⁰⁷ If the youth does not yet have the privilege to drive, the court may order the department to delay issuing the privilege to drive for one year subsequent to the time he or she becomes legally eligible to drive. The period of delay may be reduced if there is no further truancy, but it may also be increased if there are further findings of habitual truancy.³⁰⁸ Also, in considering suspension or delay of the youth's driving privileges, the court must consider whether a personal or family hardship exists that requires the youth to have a license for his or her own, or a family member's employment or for medically related purposes.³⁰⁹ When licenses are suspended under this statute, the court may require surrender of any licenses, and if it does, the court must submit to the DMV an abstract of the findings, with the licenses, within ten days of the surrender.³¹⁰

299 Veh. Code, § 23140 (c).

300 Veh. Code, § 13352.6 (a).

301 Bus. & Prof. Code, § 25658; Veh. Code, § 13202.5 (a).

302 Bus. & Prof. Code, § 25658.5; Veh. Code, § 13202.5 (a).

303 Bus. & Prof. Code, § 25661; Veh. Code, § 13202.5 (a).

304 Bus. & Prof. Code, § 25662; Veh. Code, § 13202.5 (a).

305 Veh. Code, § 13202.5 (a).

306 Veh. Code, § 13202.7 (a).

307 *Ibid.*

308 *Ibid.*

309 Veh. Code, § 13202.7 (c).

310 Veh. Code, § 13202.7 (b).

HEALTH AND SAFETY CODE PROVISIONS

Discretionary suspension may be imposed for conviction of any violation of any offense where a controlled substance is involved and the use of a motor vehicle is involved in, or incidental to the commission of the crime.³¹¹ The court may suspend or order that the DMV revoke the privilege of driving for a period determined by the court, not to exceed three years from the conviction.³¹²

PENAL CODE PROVISIONS

PROSTITUTION AND RELATED LOITERING

The court may suspend driving privileges for not more than 30 days³¹³ of persons convicted of prostitution³¹⁴ where the violation took place within 1000 feet of a residence and with the use of a vehicle.³¹⁵ The court may also impose a similar suspension for persons convicted of solicitation to engage in a lewd act,³¹⁶ when the officer sees the youth pick up a prostitute or loiterer as defined within Penal Code section 653.22 and engage in a lewd act within 1000 feet of a private residence and with the use of a vehicle.³¹⁷ In lieu of suspension for these offenses, the court may order restriction of driving to travel to and from the person's place of employment or education for not more than six months.³¹⁸

ASSAULT WITH A DEADLY WEAPON WHEN A VEHICLE IS THE WEAPON (ROAD RAGE)

The court may suspend the driving privilege of anyone who commits "road rage" in violation of Penal Code section 245, subdivision (a), on an operator or passenger of another vehicle, a bicyclist or pedestrian on a highway.³¹⁹ The suspension shall be six months for a first offense and one year for a second or subsequent offense, commencing at the court's discretion at the time of the conviction or the time of the person's release from confinement.³²⁰ In addition, the court may order the person to complete a court-approved anger management or "road rage" course.³²¹ Upon receipt of a court record showing that the court has ordered suspension of a driver's license for road rage pursuant to Vehicle Code section 13210, the DMV must suspend the person's driving privilege in accordance with that suspension order commencing either on the date of the person's conviction or upon the person's release from confinement.³²²

However, upon receipt of an abstract showing conviction for a *felony* violation of assault with a deadly weapon (Pen. Code, § 245) when a vehicle was found by the court to constitute the

311 Veh. Code, § 13202 (a).

312 Veh. Code, § 13202 (c).

313 Veh. Code, § 13201.5 (a) for prostitution and (b) for loitering related to prostitution.

314 Pen. Code, § 647 (b).

315 Veh. Code, § 13201.5 (a).

316 Pen. Code, § 647 (a).

317 Veh. Code, § 13201.5 (b).

318 Veh. Code, § 13201.5 (c).

319 Veh. Code, § 13210.

320 *Ibid.*

321 *Ibid.*

322 Veh. Code, § 13351.8.



deadly weapon, the DMV must immediately revoke the driving privileges of the person so convicted.³²³ This is a *lifetime revocation*.³²⁴ The lifetime revocation applies only to felonies.³²⁵

SPECIFIC PENAL CODE PROVISIONS FOR YOUTH

POSSESSION OF A CONCEALABLE FIREARM

The court may suspend driving privileges for five years for conviction by a youth of any offense involving a concealable firearm.³²⁶ If the minor does not yet have the privilege to drive, the court may order the department to delay issuing the privilege to drive for five years subsequent to the time the minor becomes legally eligible to drive.³²⁷ In considering suspension, the court must consider whether a personal or family hardship exists that requires the person to have a license for his or family member's employment, or medically related purposes.³²⁸ Under these provisions, the youth must surrender his or her license to the court upon suspension, and the court must transmit a certified abstract of the conviction to DMV within 10 days.³²⁹ Youth may reduce the period of suspension or delay by performing community service if half the time has expired and the youth has not been the subject of any other criminal conviction during that time.³³⁰

VEHICLE CODE PROVISIONS

The court may suspend driving privileges for conviction of the following offenses:

SPEEDING OR RECKLESS DRIVING³³¹

The court may suspend driving privileges for not more than 30 days upon a first conviction; not more than 60 days upon a second conviction; and not more than six months upon a third or subsequent conviction.³³²

DRIVING IN EXCESS OF ONE HUNDRED MILES PER HOUR

The court may suspend driving privileges for not more than 30 days;³³³ however, in some cases, other provisions may require that the DMV revoke driving privileges upon receipt of a court record showing conviction for violation of this section.³³⁴

323 Veh. Code, § 13351.5 (a).

324 Veh. Code, § 13351.5 (b).

325 Veh. Code, § 13351.5 (c). This 1998 statute overturned *In re Grayhen* (1997) 55 Cal.App.4th 598, which had held that *misdemeanor* violations of Penal Code section 245 result in lifetime revocation as well.

326 Veh. Code, § 13202.4 (a)(1).

327 *Ibid.*

328 Veh. Code, § 13202.4 (c).

329 Veh. Code, § 13202.4 (b)(1).

330 Veh. Code, § 13202.4 (a)(2).

331 For purposes of these provisions, "reckless driving" is the offense described in Veh. Code, § 23103.

332 Veh. Code, § 13200.

333 Veh. Code, § 22348 (b).

334 Veh. Code, § 13200.5.

FAILURE TO STOP OR COMPLY WITH VEHICLE CODE SECTION 20002 (HIT AND RUN)

The court may suspend driving privileges for not more than six months.³³⁵ Where the accident involved injury or death, the DMV must immediately revoke driving privileges upon receipt of court records showing conviction under these provisions.³³⁶

RECKLESS DRIVING WITH BODILY INJURY³³⁷

The court may suspend driving privileges for not more than six months.³³⁸

FAILURE TO STOP AT A RAILROAD CROSSING³³⁹

The court may suspend driving privileges for not more than six months.³⁴⁰

EVADING A PEACE OFFICER³⁴¹

The court may suspend driving privileges for not more than six months.³⁴²

KNOWINGLY CAUSING AN ACCIDENT FOR THE PURPOSE OF DEFRAUDING AN INSURANCE COMPANY

The court *may* suspend driving privileges for not more than six months.³⁴³ In lieu of suspending the person's license, the court may restrict driving to necessary travel to and from the person's place of employment for not more than six months.³⁴⁴

UNLAWFUL DRIVING OR TAKING OF VEHICLE (AUTO THEFT)³⁴⁵

Upon recommendation of the court, the DMV must suspend or revoke the privilege to operate a motor vehicle of any person who has been found guilty of a violation of Vehicle Code section 10851.³⁴⁶

WELFARE AND INSTITUTIONS CODE PROVISIONS

The Vehicle Code allows the court to suspend the driving privileges of truant minors, adjudged to be wards of the court, for a year under the Welfare and Institutions Code section 601,

335 Veh. Code, § 13201 (a).

336 Veh. Code, § 13350 (a)(1).

337 Veh. Code, §§ 2800.1, 2800.2. This suspension may also be imposed for a violation of Veh. Code, § 2800.3, if the person's license was not revoked pursuant to Veh. Code, § 13551 (a)(3). (Veh. Code, § 13201 (d).)

338 Veh. Code, § 13201 (b).

339 Veh. Code, §§ 2800.1, 2800.2. This suspension may also be imposed for a violation of Veh. Code, § 2800.3, if the person's license was not revoked pursuant to Veh. Code, § 13551 (a)(3). (Veh. Code, § 13201 (d).)

340 Veh. Code, § 13201 (c).

341 Veh. Code, §§ 2800.1, 2800.2. This suspension may also be imposed for a violation of Veh. Code, § 2800.3, if the person's license was not revoked pursuant to Veh. Code, § 13551 (a)(3). (Veh. Code, § 13201 (d).)

342 Veh. Code, § 13201 (d).

343 Veh. Code, § 13201 (e)(1).

344 Veh. Code, § 13201 (e)(2).

345 Veh. Code, § 10851.

346 Veh. Code, § 13357.



subdivision (b).³⁴⁷ If the person convicted does not yet have the privilege to drive, the court may order the department to delay issuing the privilege to drive for one year subsequent to the time the person becomes legally eligible to drive.³⁴⁸

§ 7.3 DRIVING RESTRICTIONS CHART

This chart summarizes restrictions of driving privileges by the underlying offense and provides the code sections for the underlying offense and accompanying Vehicle Code driving restriction provisions. In addition, the chart details whether the action is initiated by the Court or DMV, and the length of the revocation or suspension. In some cases, the chart identifies provisions in the law that can be utilized to limit the restrictions (e.g., hardship to family). The term “shall” refers to mandatory provisions and the term “may” refers to discretionary provisions. Note that sometimes court action is discretionary, but if DMV receives notice of it, the DMV is required to suspend or revoke. Practitioners should look through the whole chart and independently research the statutory provisions for particular offenses and age combinations, because clients potentially may be subject to more than one kind of restriction. When you are reading the statutes, remember that juvenile adjudications are treated as convictions for purposes of most driving restrictions. (Veh. Code, § 13105.) In addition, please note that the statutes referred to in the Penalty Provision and Length of Time columns refer to the Vehicle Code unless otherwise noted.

SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Bus. & Prof. Code, §§ 4110 et seq.	Violations relating to prescription drugs for youth aged 13-20.	§§ 13202.5 (a) and (d)(1).	The court shall suspend or order the DMV to delay driving privileges. The court shall order all licenses surrendered to the court, and within 10 days shall transmit to DMV an abstract of the conviction and any licenses surrendered.	One year, in addition to any other penalties imposed upon conviction of a specified offense. For each additional conviction, the court shall suspend or delay the issuing of a license for one additional year pursuant to § 13202.5 (a). After an order suspending or delaying a license, the youth may petition the court to modify the restrictions based on a critical need to drive, pursuant to § 13202.5 (c). The youth may also reduce the delay if no further convictions within 12 months, per § 13202.5 (a).

continued on next page

³⁴⁷ Veh. Code, § 13202.7 (a).

³⁴⁸ *Ibid.*

SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Bus. & Prof. Code §§ 25658, 25658.5, 25661, 25662.	For youth aged 13-20 these offenses include: underage alcohol purchase or consumption in a bar; minor attempting to purchase alcohol; using false identification to attempt to purchase alcohol; possession of alcohol in a public place; minor in possession of alcohol.	§§ 13202.5 (a) and (d)(1)	The court shall suspend or order the DMV to delay driving privileges. The court shall order all licenses surrendered to the court, and within 10 days shall transmit to DMV an abstract of the conviction and any licenses surrendered.	One year, in addition to any other penalties imposed upon conviction of a specified offense. For each additional conviction, the court shall suspend or delay the issuing of a license for one additional year pursuant to § 13202.5 (a). After an order suspending or delaying a license, the youth may petition the court to modify the restrictions based on a critical need to drive, pursuant to § 13202.5 (c). The youth may also reduce the delay if no further convictions within 12 months, per 13202.5 (a).
Ed. Code, § 48262	For youth aged 13-17, habitual truant under the Education Code.	§§ 13202.7 (a) and (b)	The court may suspend or order the DMV to delay issuance. When the court suspends, it may require all licenses to be surrendered; if it does, within 10 days of the surrender the court must transmit an abstract and all licenses to DMV.	One year. If no further truancy for 12 months, the court may modify the order imposing the delay. For each successive finding of habitual truancy the court may suspend or delay for an additional year. In deciding suspension or delay, the court shall consider whether a personal or family hardship exists requiring the minor to have a license for personal or family member's employment or for medically related purpose.
Health & Saf. Code, §§ 11000 et seq. (Most common §§ 11350, 11351, 11351.5, 11352, 11357, 11359, 11360, 11377, 11378, 11379.)	Any offense related to controlled substances pursuant to Health & Saf. Code, §§ 11000 et seq., when use of a motor vehicle was involved in, or incidental to, commission of the offense. For youth aged 13-20, any offense involving controlled substances regardless of a whether motor vehicle was involved.	For offenses committed with the use of a vehicle, § 13202 (a) controls. If an automobile was used in the commission of the offense, for youth between the ages of 13-20, §§ 13202.5 (a) and (d)(2) will add additional restrictions. For youth aged 13-20, § 13202.5 imposes driving restrictions for drug offenders even if an automobile was not involved.	For offenses involving a motor vehicle, the court may suspend or order that DMV revoke upon conviction. For youth aged 13-20, the restrictions under §§ 13202.5 (a) and (d)(2) mandate that the court suspend or order the DMV to delay driving privileges. The court shall order all licenses surrendered to the court, and within 10 days shall transmit to DMV an abstract of the conviction and any licenses surrendered.	For offenses committed with the use of a motor vehicle suspension/revocation is to be determined by the court, but not to exceed 3 years from date of conviction. For youth aged 13-20, § 13202.5 mandates a one year suspension, in addition to any other penalties imposed upon conviction of a specified offense. For each additional conviction, the court shall suspend or delay the issuing of a license for one additional year pursuant to § 13202.5 (a). After an order suspending or delaying a license, the youth may petition the court to modify the restrictions based on a critical need to drive, pursuant to § 13202.5 (c). The youth may also reduce the delay if no further convictions within 12 months, per § 13202.5 (a).



SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Pen. Code, § 191.5 (a)	Gross vehicular manslaughter while intoxicated and with gross negligence.	<p>§§ 13351 (a)(3) and (b).</p> <p>Additional restrictions imposed for youth aged 13-20 pursuant to §§ 13202.5 (a) and (d)(3).</p>	<p>DMV shall immediately revoke upon receipt of certified abstract showing person's conviction.</p> <p>For youth aged 13-20, the restrictions under §§ 13202.5 (a) and (d)(2) mandate that the court suspend or order the DMV to delay driving privileges. The court shall order all licenses surrendered to the court, and within 10 days shall transmit to DMV an abstract of the conviction and any licenses surrendered.</p>	<p>Three years and to reinstate, proof of financial responsibility as required by § 16430 is required.</p> <p>In addition to any penalties imposed by § 13351 (revocation for vehicular manslaughter), for youth aged 13-20, one year suspension/revocation. For each additional conviction court shall suspend or delay the issuing of a license for one additional year.</p> <p>After an order suspending or delaying a license, the youth may petition the court to modify the restrictions based on a critical need to drive, pursuant to § 13202.5 (c). The youth may also reduce the delay if no further convictions within 12 months, per § 13202.5 (a).</p>
Pen. Code §191.5 (b)	Gross vehicular manslaughter while intoxicated and without gross negligence.	<p>Veh. Code § 13350 (b).</p> <p>In addition, for youth aged 13-20, §§ 13202.5 (a) and (d)(3).</p>	<p>The court shall, upon surrender of the license, require person to sign affidavit acknowledging revocation required by Veh. Code § 13352 (a), and designation as habitual traffic offender. Affidavit shall be transmitted to DMV within 10 days.</p> <p>For youth aged 13-20, additional consequences are imposed and the same as those listed for Pen. Code, § 191.5 (a).</p>	<p>Per § 13350 (c), one year and need proof of financial responsibility as required by §§ 16430.</p> <p>For youth aged 13-20 the additional penalties are the same as those listed above for Pen. Code, § 191.5 (a).</p>
Man-slaughter resulting from the operation of a motor vehicle (no specific code sections referenced).	Manslaughter resulting from the operation of a motor vehicle other than when convicted under Pen. Code, § 192 (c)(2).	§ 13351 (a)(1)	DMV shall immediately revoke upon receipt of certified abstract of record of court showing person's conviction.	Three years, and need proof of financial responsibility as required by § 16430.

SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Pen. Code, § 192.5 (a)	Gross vehicular manslaughter while operating a boat.	§ 13351 (a)(3) For youth aged 13-20, §§ 13202.5 (a) and (d).	DMV shall immediately revoke upon receipt of certified abstract of record of court showing person's conviction. For youth aged 13-20, see Pen. Code, § 191.5.	Three years, and need proof of financial responsibility as required by § 16430. For youth aged 13-20, see Pen. Code, § 191.5, for length of time consequences.
Pen. Code, § 245 (a) Misdemeanor	Assault as described under Pen. Code, § 245 (a) occurring on a highway and on an operator or passenger of another motor vehicle, an operator of a bicycle, or a pedestrian and the offense occurs on a highway.	§§ 13210, 13351.8	Under § 13210, the court may suspend and if it does, the suspensions are as specified in the adjacent column. Under § 13351.8, DMV shall suspend upon receipt of certified abstract showing court suspension under § 13210.	Per § 13210, six months for first offense and one year for a second or subsequent offense. Suspension commences, at the discretion of the court, either on the date of the person's conviction, or upon the person's release from confinement. In lieu of or in addition to suspension, court may order the person to complete a court-approved anger management or "road rage" course.
Pen. Code, § 245 Felony	Conviction of a felony for violation of assault with a deadly weapon when a vehicle was found by the court to constitute the deadly weapon or instrument used to commit that offense.	§ 13351.5 (a)	DMV shall immediately revoke upon receipt of certified abstract of record of court showing person's conviction.	§ 13351.5 (b) provides that the revocation is permanent – DMV shall not reinstate driving privileges under any circumstances.
Pen. Code, §§ 594, 594.3, or 594.4	Vandalism by person 13 years or age or older.	§§ 13202.6 (a)(1) and (b)(1)	Court shall suspend or order DMV to delay driving privilege, except in cases of hardship as specified. Court shall require surrender of all licenses and within 10 days of conviction transmit an abstract of the conviction with any licenses surrendered.	Not more than two years, except when license needed for the person or family member for employment, school, or medically related purpose. If person convicted does not yet have privilege to drive, the court shall order DMV to delay issuing the privilege for 1 to 3 years. If no further specified conviction within 12 months, the court may modify the period of delay. For each successive offense the court shall suspend or delay one additional year. The youth may reduce the period of time for suspension or delay by performing community service pursuant to § 13202.6 (a)(2).



SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Pen. Code, § 647 (a)	Soliciting or engaging in lewd conduct, where a peace officer observes the violator picking up a person who is loitering with the intent to commit prostitution (Pen. Code, § 653.22) and the person subsequently engages in lewd conduct with that person within 1000 feet of a residence and with the use of a vehicle.	§ 13201.5 (b)	The court may suspend upon conviction.	Not more than 30 days. Per § 13201.5 (c), in lieu of suspension, court may restrict driving for not more than six months to necessary travel to and from employment or education, or driving necessary in the scope of employment.
Pen. Code, § 647 (f)	Being intoxicated in a public place.	§§ 13202.5 (a) and (d)(3)	The court shall suspend or order the DMV to delay driving privileges. The court shall order all licenses surrendered to the court, and within 10 days shall transmit to DMV an abstract of the conviction and any licenses surrendered.	One year, in addition to any other penalties imposed upon conviction of a specified offense. For each additional conviction, the court shall suspend or delay the issuing of a license for one additional year pursuant to § 13202.5 (a). After an order suspending or delaying a license, the youth may petition the court to modify the restrictions based on a critical need to drive, pursuant to § 13202.5 (c). The youth may also reduce the delay if no further convictions within 12 months, per § 13202.5 (a).
Penal Code Firearms Violations	For youth under 18 years of age, any public offense involving a pistol, revolver, or other firearm capable of being concealed upon the person. (Note: the Vehicle Code does not provide specific Penal Code sections that trigger this restriction.)	§§ 13202.4 (a) and (b)	For each conviction, the court may suspend or order DMV to delay issuing license. Upon suspension, the court shall require all licenses to be surrendered. Within 10 days of conviction, the court shall transmit to DMV the abstract and any licenses surrendered.	Five year suspension or delay in issuing license. One year added for each successive offense. May be reduced through community service as specified in § 13202.4 (a)(2). Pursuant to § 13202.4 (c), in considering suspension, the court shall consider personal or family hardship requiring a license for employment or medically related purposes.

SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Veh. Code, §§ 2800.1, 2800.2 or 2800.3	Evading a peace officer under §§ 2800.1 or 2800.2. Also evading a peace officer under § 2800.3 if the license is not revoked pursuant to § 13351 (a)(3).	§ 13201 (d)	Court may suspend upon conviction.	Not more than 6 months. In lieu of suspension, court may restrict driving to necessary travel or to that necessary for employment for not more than 6 months. Proof of financial responsibility as required by § 16430.
Veh. Code, § 2800.3	Evading a peace officer causing serious bodily injury.	§ 13351 (a)(3)	DMV shall immediately revoke upon receipt of certified abstract of record of court showing person's conviction.	Per Veh. Code § 13351 (c), three year revocation. Proof of financial responsibility required, as defined in § 16430.
Veh. Code, § 10851	Unlawful driving or taking of vehicle (auto theft).	§ 13357	Upon the recommendation of the court, DMV shall suspend or revoke.	Duration of suspension / revocation not specified in § 13357.
Veh. Code, § 20001	"Hit and Run" – failing to stop or otherwise comply with § 20001 in an accident resulting in injury or death.	§ 13350 (a)(1)	DMV shall immediately revoke upon receipt of certified abstract of record of court showing person's conviction.	Per § 13350 (c), one year and need proof of financial responsibility pursuant to § 16430.
Veh. Code, § 20002	"Hit and Run" with property damage.	§ 13201 (a)	Court may suspend upon conviction.	Not more than six months. In lieu of suspension, court may restrict driving to necessary travel or to employment for not more than six months. Proof of financial responsibility pursuant to § 16430 required.
Veh. Code, § 22452	Failure to stop at a railway grade crossing.	§ 13201 (c)	Court may suspend upon conviction.	Not more than six months. In lieu of suspension, court may restrict driving to necessary travel or to employment for not more than six months. Proof of financial responsibility pursuant to § 16430 required.
Veh. Code, § 22348 (b)	Driving at a speed greater than 100 miles per hour.	§ 13200.5	Court may suspend, unless the code requires mandatory DMV revocation.	Not to exceed 30 days.



SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Veh. Code, § 23103	Reckless driving or speeding For youth aged 13-20, if convicted of § 23103 in lieu of § 23103.5 or § 23140 there is an additional driving consequence.	§ 13200 For youth age 13-20, if adjudication for § 23103 is in lieu of alcohol-related driving offense, then §§ 13202.5 (a) and (d)(4).	Court may suspend, unless the violation requires mandatory DMV revocation For youth aged 13-20, if related to § 23103.5 or § 23140, then Court shall suspend or order DMV to delay driving privileges; court shall order all licenses surrendered and transmit to DMV an abstract of the conviction and any licenses surrendered.	First conviction not to exceed 30 days, second conviction not to exceed 60 days, third or subsequent conviction not to exceed 6 months. For youth aged 13-20, if alcohol-related, then suspension and/or delay is for one year, in addition to any other penalties imposed upon conviction of a specified offense. For each additional conviction, the court shall suspend or delay the issuing of a license for one additional year pursuant to § 13202.5 (a). After an order suspending or delaying a license, the youth may petition the court to modify the restrictions based on a critical need to drive, pursuant to § 13202.5 (c). The youth may also reduce the delay if no further convictions within 12 months, per § 13202.5 (a).
Veh. Code, § 23103.5	Alcohol-Related Reckless driving ("Wet Reckless.")	§ 13200 For youth aged 13-20, additional consequences pursuant to § 13202.5 (a) and (d)(4).	Court may suspend, unless the violation requires mandatory DMV revocation For youth aged 13-20, if related to § 23103.5 or § 23140, then court shall suspend or order DMV to delay driving privileges; court shall order all licenses surrendered and transmit to DMV an abstract of the conviction and any licenses surrendered.	Under § 13200, first conviction not to exceed 30 days, second conviction not to exceed 60 days, third or subsequent conviction not to exceed 6 months. For youth aged 13-20, suspension and/or delay is for one year, in addition to any other penalties imposed upon conviction of a specified offense. For each additional conviction, the court shall suspend or delay the issuing of a license for one additional year pursuant to § 13202.5 (a). After an order suspending or delaying a license, the youth may petition the court to modify the restrictions based on a critical need to drive, pursuant to § 13202.5 (c). The youth may also reduce the delay if no further convictions within 12 months, per § 13202.5 (a).
Veh. Code, § 23104 or § 23105	Reckless driving proximately causing bodily injury.	§ 13201 (b)	Court may suspend upon conviction.	Not more than six months. In lieu of suspension, court may restrict driving to necessary travel or to employment for not more than six months. Proof of financial responsibility pursuant to § 16430 required.

SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Veh. Code, §§ 23109, 23109.1	Speed contests	§§ 13352 (a) and (a)(8)	If ordered by the court, DMV shall immediately suspend or revoke upon receipt of certified abstract of record of court showing person's conviction. Per § 13352 (a), the suspension is mandatory; per § 13352 (a) (8), it is within the court's discretion to decide whether to order suspension.	90 days to six months and proof of financial responsibility under § 16430 required.
Any Felony in Which a Vehicle Was Used	A felony in the commission of which a motor vehicle was used, except as provided in Veh. Code, §§ 13351, 13552, or 13357 (which separately address specific vehicle-related felonies)	§ 13350 (a)(2)	DMV shall immediately revoke upon receipt of certified abstract of record of court showing person's conviction.	One year and proof of financial responsibility pursuant to § 16430 required.
Veh. Code, § 23104	Reckless driving causing bodily injury.	§§ 13200, 13201, 13350 (a)(3)	Per § 13350 (a)(3), DMV shall immediately revoke upon receipt of certified abstract of record of court showing person's conviction. However, per § 13201 (b), the court <i>may</i> suspend the driving privilege for not more than six months.	Per § 13350 (a)(3) and (c), one year and proof of financial responsibility pursuant to § 16430 required. Note that § 13201 (b), in contrast, appears to authorize a discretionary suspension for up to six months.
Veh. Code, § 23136	Youth under 21 driving with a blood alcohol content of .01 percent or greater as measured by a Preliminary Alcohol Screening test or other chemical test.	§ 23136		Failure to submit to, or complete a preliminary alcohol screening test or other chemical test as requested will result in the suspension or revocation of the person's privilege to operate a motor vehicle for a period of one year as specified in §§ 13353 (a)(1) and 13353.1 (a)(1).



SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Veh. Code, § 23140	Driver less than 21 years old having 0.05 percent or more, by weight, of alcohol in his or her blood when driving a vehicle	<p>§§ 23502 (c), 13352.6</p> <p>For youth aged 13-20, additional consequences pursuant to §§ 13202.5 (a) and (d)(4)</p>	<p>Court shall order DUI program and surrender of license to the court in accordance with § 13550; DMV shall suspend upon receipt of certified abstract of record of court showing person's conviction.</p> <p>For youth aged 13-20, court shall suspend or order DMV to delay driving privileges; court shall order all licenses surrendered and transmit to DMV an abstract of the conviction and any licenses surrendered.</p>	<p>Proof of completion of a driving-under-the-influence program and financial responsibility is produced</p> <p>For youth aged 13-20, suspension and/or delay is for one year, in addition to any other penalties imposed upon conviction of a specified offense. For each additional conviction, the court shall suspend or delay the issuing of a license for one additional year pursuant to § 13202.5 (a). After an order suspending or delaying a license, the youth may petition the court to modify the restrictions based on a critical need to drive, pursuant to § 13202.5 (c). The youth may also reduce the delay if no further convictions within 12 months, per § 13202.5 (a).</p>
Veh. Code, § 23152	Driving under the influence of alcohol or drugs	<p>§ 13352 (a)</p> <p>For youth aged 13-20, additional consequences pursuant to §§ 13202.5 (a) and (d)(4)</p>	<p>DMV shall immediately suspend or revoke upon receipt of an abstract showing conviction.</p> <p>For youth aged 13-20, court shall suspend or order DMV to delay driving privileges; court shall order all licenses surrendered and transmit to DMV an abstract of the conviction and any licenses surrendered.</p>	<p>Six months, and no reinstatement without proof of financial responsibility and completion of qualified DUI program. For youth aged 13-20, suspension and/or delay is for one year, in addition to any other penalties imposed upon conviction of a specified offense. For each additional conviction, the court shall suspend or delay the issuing of a license for one additional year pursuant to § 13202.5 (a). After an order suspending or delaying a license, the youth may petition the court to modify the restrictions based on a critical need to drive, pursuant to § 13202.5 (c). The youth may also reduce the delay if no further convictions within 12 months, per § 13202.5 (a).</p>
Veh. Code § 23153	Driving under the influence of alcohol or drugs with injury.	<p>§ 13352 (a)</p> <p>For youth aged 13-20, additional consequences pursuant to §§ 13202.5 (a) and (d)(4), as listed for § 23152, above</p>	<p>DMV shall immediately suspend or revoke upon receipt of an abstract showing conviction.</p> <p>For youth aged 13-20, additional consequences as listed for § 23152, above.</p>	<p>Per § 13352 (a)(2), one year, and proof of financial responsibility and completion of a qualified DUI program is required. Subsequent offenses require lengthier periods of suspension.</p> <p>For youth aged 13-20, additional consequences as listed for § 23152, above.</p>

SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Veh. Code § 13201 (e)(1)	Causing or participating in a vehicular accident for the purpose of making a fraudulent insurance claim. (Insurance Fraud.)	§ 13201 (e)	Court may suspend upon conviction.	Not more than 6 months. In lieu of suspension, court may restrict driving to necessary travel or to that necessary for employment for not more than 6 months. Proof of financial responsibility as required by § 16430.
Welf. & Inst. Code, § 601 (b)	Habitual Truant per Ed. Code, § 48262	§§ 13202.7 (a) and (b)	See consequences listed under Ed. Code, § 48262, above	See consequences listed under Ed. Code, § 48262, above



CHAPTER 8:

IMMIGRATION

Noncitizen youth who have contact with the juvenile justice system face significant collateral consequences. For the past few years, immigration authorities have aggressively sought to identify noncitizen youth for deportation and many juvenile justice officials have cooperated with such efforts. This means that any contact with law enforcement, from arrest through disposition, exposes noncitizen youth to grave immigration consequences. Effective representation requires juvenile defense counsel to accurately advise noncitizen clients about relevant immigration consequences and appropriately advocate to prevent or to mitigate adverse immigration consequences. Moreover, effective representation may open the door to immigration relief.

§ 8.1 DUTY OF DEFENSE COUNSEL IN REPRESENTING NONCITIZEN YOUTH

In *Padilla v. Kentucky*, the United States Supreme Court held that, under the Sixth Amendment, defense counsel has the duty to provide accurate advice regarding the clear immigration consequences of a guilty plea³⁴⁹ because deportation is a “penalty,” and not a “collateral consequence,” of a criminal proceeding.³⁵⁰ Accordingly, a failure to accurately advise a client about the clear immigration consequences of a plea constitutes ineffective assistance of counsel.³⁵¹ Moreover, defense counsel’s duty extends not only to investigating and advising of the immigration consequences, but also extends to defending against such consequences, including preserving eligibility for discretionary relief from deportation.³⁵² In California, these duties were recognized before *Padilla*.³⁵³

349 *Padilla v. Kentucky* (2010) 559 U.S. ____ [130 S.Ct. 1473, 1483, 176 L.Ed.2d 284].

350 *Id.* at pp. 1480–1481.

351 *Id.* at p. 1483. See also *U.S. v. Bonilla* (9th Cir. 2011) 637 F.3d 980, 984 [“criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty”]; emphasis in original.

352 *Padilla v. Kentucky*, *supra*, 559 U.S. _____ [130 S.Ct. 1473, 1482–83, 176 L.Ed.2d 284].

353 Pen. Code, § 1016.5 [court’s duty to advise of certain immigration consequences.] See *People v. Soriano* (1987) 194 Cal. App.3d 1470 [ineffective assistance of counsel for failure to investigate the immigration consequences and advise a noncitizen of them prior to plea]; *People v. Barocio* (1989) 216 Cal.App.3d 99 [ineffective assistance for failure to request a non-deportable sentence]; *In re Resendiz* (2001) 25 Cal.4th 230 [ineffective assistance to give affirmative misadvice to a noncitizen concerning the immigration consequences of a plea]; *People v. Bautista* (2004) 115 Cal.App.4th 229 [ineffective assistance of counsel for failure to negotiate a settlement which would mitigate immigration consequence].

§ 8.2 IMMIGRATION CONSEQUENCES OF DELINQUENCY COURT INVOLVEMENT

Although the immigration consequences of juvenile cases are less extensive than those stemming from an adult criminal conviction, they are still significant. Contact with the juvenile system may lead to: identification and arrest by immigration authorities for deportation; secure detention without the possibility of release during removal proceedings; a bar to obtaining legal status in the United States; statutory ineligibility or denial of discretionary immigration relief; deportation; or more than one of these consequences.

Generally, a juvenile admission, adjudication, or disposition will not trigger the criminal-based grounds of deportation or inadmissibility³⁵⁴ for noncitizen youth. Most criminal-based grounds, which trigger deportation³⁵⁵ or inadmissibility,³⁵⁶ require a conviction, and under the federal immigration laws juvenile delinquency adjudications or dispositions are not considered convictions.³⁵⁷ Nonetheless, arrests and juvenile dispositions may have immigration consequences because some immigration penalties do not require a conviction and are triggered by “bad acts” or conduct alone.³⁵⁸

The conduct-based immigration penalties governing admissibility may have severe and significant immigration consequences for noncitizen youth, especially for undocumented youth. These conduct-based grounds may cause undocumented youth to become statutorily ineligible for lawful status, or for other forms of relief. Moreover, youth with lawful status may be subject to the grounds of inadmissibility if they leave the country and then try to re-enter.

Drug trafficking and drug sales conduct are especially problematic and unforgivable in immigration proceedings.³⁵⁹ To illustrate, a sixteen-year-old lawful permanent resident, who is believed to have sold drugs will be rendered inadmissible because of his or her conduct.³⁶⁰ Consequently, such a youth must be advised that even though the United States government cannot deport him or her because of the alleged conduct, it could deny him or her entry and benefits or relief which requires admissibility because the government has “reason to believe” that he or she has engaged in drug trafficking activity. In addition to drug trafficking, conduct-based grounds of inadmissibility include being a drug abuser, addict, or alcoholic, or having a mental disorder that poses a danger to the person or to the person or property of others,³⁶¹ prostitution, terrorist activities, or false claim of citizenship.³⁶²

354 Inadmissibility is a bar to enter the United States, to gain legal access, and to various forms of immigration relief.

355 “Deportable aliens” include certain persons convicted of crimes of moral turpitude, any offense related to a controlled substance (except for small amounts of marijuana), aggravated felonies, domestic violence offenses, firearms offenses, or multiple crimes. (8 U.S.C. § 1227(a)(2).)

356 8 U.S.C. § 1182(a)(2).

357 See *Matter of Devison-Charles*, (BIA 2000) 22 I & N Dec. 1362. Under federal immigration law, the term “conviction means with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where: (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.” (8 U.S.C. § 1101(a)(48)(A).)

358 8 U.S.C. § 1227(a)(2) [conduct-based and non-conduct based grounds for deportation]; 8 U.S.C. § 1182(a)(1) and (a)(2) [conduct-based and conviction based grounds for inadmissibility].

359 See 8 U.S.C. § 1182(a)(2)(C).

360 8 U.S.C. § 1182(a)(2).

361 8 U.S.C. § 1182(a)(1).

362 8 U.S.C. § 1182(a)(2).



Conduct based grounds which render a noncitizen deportable include being a drug abuser or addict; violating a protective order; failing to register as a sex offender; falsifying certain documents; or making a false claim of citizenship.³⁶³

Further, although the disposition of a delinquency case, and even certain bad conduct³⁶⁴ does not per se cause a noncitizen to become deportable or inadmissible, *the fact of a sustained petition, or evidence of the conduct underlying a delinquency case* may still weigh against a noncitizen youth who seeks a *discretionary immigration relief or benefit*. For example, naturalization, among many immigration benefits, requires the noncitizen to have “good moral character.” The fact of a sustained delinquency petition, or evidence of the conduct underlying a delinquency case, may and will weigh against the requisite “good moral character.”

As another example, cancellation of removal is a highly discretionary form of relief. Under that process, a noncitizen youth who is deportable apart from a delinquency case (for example, for want of legal status), may nevertheless be spared deportation and granted status. *However, this same youth with, for example, a sustained petition with gang participation,*³⁶⁵ *will have difficulty persuading an immigration judge that he or she merits the discretionary relief of cancellation of removal.*

A sustained delinquency petition may also lead to detention in a secure facility for youth while they are in deportation proceedings since it is a significant factor in risk assessment by immigration authorities. This may significantly interfere with a youth’s access to due process and immigration relief.



PRACTICE TIP

Defense counsel should be aware that most youth in the juvenile justice system are placed into deportation proceedings for having unlawful status in the United States and not because of delinquency court involvement. The juvenile justice system merely provides the mechanism for targeting this youth population for deportation. Accordingly, counsel should advise clients to not speak to law enforcement or immigration officials and to refuse to sign any documents relating to immigration status without being advised by counsel. If someone wants to question them, youth should ask for an attorney and in the meantime, assert their right to remain silent.³⁶⁶

A juvenile charge or adjudication may also affect youth taken into federal immigration custody because of their undocumented status. Generally, unaccompanied youth in federal custody must be released to a parent, guardian, relative, or other responsible person or entity. Youth who cannot be released are supposed to be placed in a licensed foster care facility, but youth who are dangerous to themselves or others or youth charged with having committed a criminal offense may be housed in secure facilities.³⁶⁷

363 8 U.S.C. § 1227(a)(2).

364 For example, gang conduct pursuant to Penal Code section 186.22, subdivision (a).

365 For instance, Penal Code section 186.22, subdivision (a).

366 The reality is that even this advice may not completely protect youth from scrutiny if the facility decides to furnish information to immigration authorities. Even routine booking information may provide information that can be used to begin inquiries into immigration status. As previously noted in this chapter, release of juvenile case file information to immigration authorities violates Welfare and Institutions Code section 827.

367 See, Stipulated Settlement Agreement *Flores v. Reno*, (C.D. Cal. Jan. 17, 1997) CV 85-4544 (RJK)(Px); 8 U.S.C. § 1232. Counsel should also be aware that youth could be held in juvenile detention facilities because of immigration charges, if the facility has a contract with the federal government. Federal law and the *Flores* Settlement, not state law provisions that apply to delinquents,

§ 8.3 DISPARATE TREATMENT OF NONCITIZEN YOUTH

Noncitizen youth also face the potential for disparate punishment within the juvenile system, vis-à-vis youth who are citizens of the United States. Thus, noncitizen youth who might otherwise be diverted or released to their families after an arrest may be detained because they are suspected of being unlawfully present in the United States. These and other noncitizen youth who are placed in detention are at greater risk of being flagged by immigration authorities for deportation. Youth who are identified by immigration officials usually receive an “ICE hold”³⁶⁸ or “detainer,” which is a request that an agency, such as a juvenile detention facility, notify ICE before releasing a noncitizen so that ICE can assume custody for the purpose of instituting immigration proceedings and ultimately deporting the person.³⁶⁹ An “ICE hold” often causes noncitizen youth to be detained longer than a citizen because it blocks release into the community during the juvenile proceeding. If ordered released, the youth will very likely be taken into the custody of immigration authorities regardless of the status of the juvenile case.

However, there are limitations on ICE holds for youth whose juvenile case has been resolved. Federal regulations provide that the local law enforcement agency with custody of the youth, for whom immigration has a hold, continue to detain the youth no longer than 48 hours past the time when he or she otherwise would have been released, excluding weekends and holidays.³⁷⁰ If an immigration official has not arrived to claim the youth by the end of the 48 hours, then the youth must be released.³⁷¹ Juvenile defenders must challenge violations of the 48-hour rule by contacting the juvenile detention center and informing it of the violation, or by filing a habeas corpus petition with the court.

In addition to being subject to detention more often and for longer duration, noncitizen youth may receive more severe dispositions than similarly situated citizen youth. In many cases, prosecutors are not amenable to alternative plea offers when immigration concerns are at issue. In such cases, defense counsel interpose *Padilla*, in which the U.S. Supreme Court found that “informed consideration” of immigration consequences by both the defense attorney and the prosecutor during plea negotiations may serve the interests of both parties.³⁷² For example, a youth may exchange an admission to an offense, which averts or mitigates immigration consequences, for a more restrictive disposition. Thus, instead of an admission to gang conduct under Penal Code section 186.22, subdivision (a), for probation without detention, a noncitizen youth may negotiate an admission to a non-gang offense, with some detention time in juvenile hall. Although this may result in a more onerous disposition, it may be worth it to the youth if it reduces the prejudice the youth would otherwise suffer in seeking a discretionary immigration benefit or relief.

Finally, noncitizen youth may be denied probation or community service options in lieu of incarceration because of their perceived immigration status. Some courts may even order immigration-related consequences as part of the disposition. Some examples of harsher court

govern release criteria for these youth.

368 “ICE” refers to the Immigration and Customs Enforcement agency.

369 8 C.F.R. § 287.7.

370 8 C.F.R. § 287.7(d) provides for “temporary detention” upon Service request by ICE (former INS): “Upon a determination by the Service to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period of not to exceed 48 hours, excluding Saturday, Sundays and holidays in order to permit assumption of custody by the Service.” Form I-247 indicates that “holidays” means federal holidays.

371 8 C.F.R. § 287.7(d).

372 *Padilla v. Kentucky*, *supra*, 559 U.S. ___ [130 S.Ct. 1473, 1486, 176 L.Ed.2d 284, 298].



dispositions include ordering a youth not to return to the country,³⁷³ or ordering the youth to appear for progress reviews even though the youth will be referred to immigration authorities and transferred outside of the geographic area. Defense counsel may need to inform probation and the court about immigration law and procedure. Often probation and courts erroneously believe that all noncitizen youth will be deported when, in fact, many are eligible to return to the community pending their removal proceedings. Some noncitizen youth may ultimately win relief against deportation. Defense counsel should also scrutinize imposition of any immigration related conditions, as they may be preempted by federal immigration law and may frustrate the immigration legal process.

§ 8.4 EFFECTIVELY REPRESENTING NONCITIZEN YOUTH³⁷⁴

STEP 1: Determine the youth's immigration status

If a youth was not born in the United States and is not otherwise a U.S. citizen,³⁷⁵ the first step is to determine his or her immigration status. The immigration consequences of a juvenile adjudication will depend significantly on whether the noncitizen youth is living in the United States legally³⁷⁶ or whether he or she is living in the United States without legal immigration status.³⁷⁷

NONCITIZEN YOUTH RESIDING IN U.S. LAWFULLY

If a non-citizen youth is legally residing in the United States, a juvenile adjudication in most cases will not automatically trigger removal proceedings as an adult conviction might. Nevertheless, some conduct-based grounds may trigger removal for such youth. For example, one common charged ground of deportability is that the person violated a domestic violence restraining, protective, or no contact order.³⁷⁸ Additionally, for youth who are in the United States legally, but have not obtained permanent legal residence (a green card) or citizenship, immigration authorities can and will consider juvenile adjudications in making the discretionary decision whether to grant their applications. As previously discussed in this chapter, immigration authorities may also consider conduct that falls within the inadmissibility provisions to deny re-entry into the United States.

NONCITIZEN YOUTH RESIDING IN THE U.S. UNLAWFULLY

Youth residing in this country who are undocumented may be put into removal/deportation proceedings at anytime regardless of their delinquent history. Once an undocumented youth is placed into removal proceedings he or she may still be able to remain in the country legally, and in fact, youth have more forms of relief available to them by virtue of their age and circumstances than do adults. For example, youth might be able to obtain Special Immigrant

373 Counsel may be able to challenge some immigration-related dispositional restrictions. For example, in *In re Babak* (1993) 18 Cal.App.4th 1077, a two-year banishment from the country was held invalid as a violation of the youth's constitutional rights to travel, association, and assembly absent a reasonable nexus to future criminality.

374 §§ 8.4, 8.5 and 8.6 were provided by Immigrant Legal Resource Center.

375 Some youth born outside the United States to one or both U.S. citizen parents may be a U.S. citizen, even if the youth does not know it. (See "Diagnostic Questions," § 8.5, *post.*) An attorney with immigration expertise should analyze this type of case.

376 As with youth who are a "Permanent Resident," with a "Green Card;" or with "Temporary Protective Status."

377 As with youth who are undocumented either by entering without inspection or an over-stayed visa.

378 See 8 U.S.C. § 1227(a)(2)(E)(ii).

Juvenile Status,³⁷⁹ Asylum,³⁸⁰ or a U Visa (for having suffered substantial physical or mental abuse as a result of having been a victim of criminal activity).³⁸¹

Again, a juvenile adjudication is not a “conviction” under immigration laws and will not automatically bar youth from obtaining immigration relief, but the underlying conduct could trigger one of the statutory enumerated conduct-based immigration penalties, and may be considered by immigration officials in the exercise of discretion. Accordingly, defense counsel must advise clients of all potential immigration penalties and attempt to minimize penalties attendant to the disposition, the underlying conduct, or both.



PRACTICE TIP

Because youth do not have a right to counsel at government expense in removal proceedings, delinquency defense counsel may be the first and only lawyer a noncitizen youth ever encounters. Thus, it is critically important to refer the youth to a local immigration agency or attorney immediately so that eligibility for immigration relief may be promptly explored. As in other areas of legal services, engaging an attorney or advocate may be a challenge because of funding and staffing constraints, so any assistance counsel can give clients in actually making contact with an attorney is very helpful. (See § 8.7, *post*, for contact information for agencies providing immigration legal assistance or other advice.)

STEP 2: After determining the youth’s immigration status, research and investigate the immigration consequences of his or her case. (See chart at § 8.6, *post*.)

STEP 3: Advise the youth of the specific immigration consequences of his or her case.

STEP 4: If the youth makes immigration a priority in his or her case, defend against those consequences via plea negotiations or taking the case to adjudication and asserting privacy and confidentiality rights and privileges.

As mentioned previously, in *Padilla* the Court endorsed “informed consideration” of deportation consequences by both the defense attorney and the prosecutor during plea-bargaining.³⁸² The Court specifically highlighted the benefits and appropriateness of the defense and the prosecution factoring immigration consequences into plea negotiations in order to craft a conviction and sentence that reduce the likelihood of deportation while promoting the interests of justice.³⁸³

Although not a conviction for immigration purposes, a delinquency adjudication still may impact noncitizen youth.³⁸⁴ Certain grounds of inadmissibility³⁸⁵ and deportability³⁸⁶ do not depend upon conviction. Mere “bad acts” or status can trigger the penalty. A sustained petition

379 8 U.S.C. § 1101(a)(27)(J).

380 8 U.S.C. § 1158.

381 8 U.S.C. § 1101(a)(15)(U)

382 *Padilla v. Kentucky*, *supra*, 559 U.S. ___ [130 S.Ct. 1473, 1486, 176 L.Ed.2d 284, 298].

383 *Ibid*.

384 For instance gang membership, affiliation, and activity, violent offenses, and sex offenses can cause also problems for noncitizen youth including secure detention and denial of immigration applications as a matter of discretion. Go to www.defendingimmigrants.org for more information and resources on immigration consequences of delinquency.

385 Bars to obtaining legal status, physical entry into the United States, and most forms of relief from deportation.

386 Loss of current legal status, and physical expulsion from the United States.



may be used to establish that a noncitizen youth committed the bad acts or that he or she is of a certain status. (See *ante*, § 8.2.)

§ 8.5 DIAGNOSTIC QUESTIONS FOR NONCITIZEN YOUTH TO DETERMINE POTENTIAL AVENUES FOR LEGAL STATUS³⁸⁷

QUESTION 1: Is the youth a U.S. citizen without knowing it?

A. Anyone born in the U.S. or Puerto Rico is a citizen, and if the person was born in Guam, American Samoa, or Swains Island, he or she is a national who cannot be deported.

B. If the youth is born outside the U.S., ask two threshold questions to see if the youth automatically is a U.S. citizen. If the answer to either might be yes, refer for immigration counseling.

- Was there a United States citizen parent or grandparent at the time of birth? Or,
- Before the youth's 18th birthday, did both of these events happen (in either order):
 - a) the youth became a permanent resident; and
 - b) at least one natural or adoptive parent (but not a step-parent) having some form of custody over the child is or becomes a U.S. citizen.

QUESTION 2: Is the youth currently under delinquency court jurisdiction and is it the case that the child (a) *cannot be reunified with one or both parents* because of abuse, neglect, or abandonment or a similar basis under state law, and (b) it would not be in the child's best interest to be returned to the home country? If these conditions are present, the child may qualify for *Special Immigrant Juvenile Status* (SIJS) 8 U.S.C. § 1101(a)(27)(J).



PRACTICE TIP

Contact an immigration attorney with expertise in SIJS to screen your client's case. If the youth appears to qualify for SIJS, defense counsel should have the court sign a JV-224 Order Regarding Eligibility for Special Immigrant Juvenile Status. Without it, the youth cannot apply for this important immigration benefit. Note that the youth should stay under the jurisdiction of the delinquency court until the immigration attorney completes the entire SIJS process for the youth and the federal government grants the youth lawful permanent residency, so watch out for youth aging out of the system. If it is not possible to keep the youth's case open, then ensure that the court explicitly states that termination of jurisdiction is being done based on age.

QUESTION 3: Has the youth been abused by a *U.S. citizen or permanent resident* spouse or parent, including adoptive, natural or stepparent? Has the youth's parent been a victim of domestic violence by his/her U.S. citizen or permanent resident spouse? If so, consider relief under the Violence Against Women Act (VAWA). (8 U.S.C. § 1154(a)(1) (A)(iv), (B)(iii).)

- The youth does not need to be under current court jurisdiction, and may be reunited with the other parent.
- The youth will need to show "good moral character." Violent crimes will be a negative factor, but can be offset if there is a connection between the abuse and the bad conduct. (8 U.S.C. § 1154(a)(1)(C).)

387 8 U.S.C. § 1227(a).

QUESTION 4: Has the youth been a victim of serious crime, or of alien trafficking? Is the youth willing to cooperate with authorities to investigate or prosecute the offense? Consider the *S, T, or U visas*. (8 U.S.C. § 1101(a)(15)(S), (T), (U).)

- This is one of the few forms of relief available to a youth who has a drug trafficking delinquency disposition.

QUESTION 5: Does the youth have a *U.S citizen or permanent resident parent or spouse* who is willing to petition for her? Investigate *family immigration*.

- To immigrate through an adoptive parent the adoption must be completed by the youth’s 16th birthday. (8 U.S.C. § 1101(b)(1)(E).)

QUESTION 6: Does the youth come from a country, which recently has experienced *civil war, natural disaster, or political persecution*? Investigate various forms of relief such as *asylum and temporary protective status*. (8 U.S.C. §§ 1158, 1254a(a)(1).)

§ 8.6 IMMIGRATION CONSEQUENCES OF JUVENILE DELINQUENCY INADMISSIBILITY³⁸⁸ AND DEPORTABILITY³⁸⁹

The following are commonly applied conduct-based grounds and status-based grounds, and the potential immigration consequences.

GROUND	CONSEQUENCES
Prostitution: Probably limited to being the prostitute, not the customer	Inadmissible for engaging in prostitution Waivers often available
Drug Trafficking: Sale, possession for sale, cultivation, manufacture, distribution, delivery, other drug trafficking offenses	Inadmissible where DHS/ICE has “reason to believe” participation in drug trafficking No waiver except for S, T, or U Visa
Drug Abuser or Addict: Repeated drug findings, finding of abuse (more than one time experimentation in last three years), addiction to drugs	Deportable and inadmissible No waivers; except there is a waiver of inadmissibility for SIJS
Mental Condition with Behavior Showing That it Poses a Current or Future Threat to Self or Others: Including suicide attempt, torture, mayhem, repeated sexual offenses against younger children (predator), perhaps repeated alcohol offenses (showing alcoholism)	Inadmissible for mental disability posing threat to self or other Waivers may be available

388 8 U.S.C. § 1227(a).

389 8 U.S.C. § 1227(a).



GROUNDS	CONSEQUENCES
False Claim to U.S. Citizenship: Use of false documents and fraud offenses relating to false claim to U.S. Citizenship	Inadmissible and deportable for false claim to U.S. Citizenship Does not apply to SIJS Waivers may be available, e.g., U Visa
Violations of protective or “no-contact” order: Designed to prevent harassment, credible threats of violence or bodily injury	Deportable where Court finds violation of domestic violence protective order designed to prevent repeated harassment, credible threats of violence or bodily injury Some waivers

§ 8.7 ADDITIONAL JUVENILE IMMIGRATION RESOURCES

Immigration enforcement in the California juvenile justice system is a growing trend. Practitioners should challenge immigration enforcement in this context and advocate for policies that preclude court personnel, including judges and probation/detention officers, from affirmatively inquiring into a juvenile’s citizenship or immigration status and/or reporting information to ICE.

The following resources are available on the Defending Immigrants Partnership website at www.defendingimmigrants.org under **Library/Representing Noncitizen Juveniles**:

- Practice Advisory: Legal Issues Facing Immigrant Youth in the California Juvenile Justice System by Immigrant Legal Resource Center (issued in late summer 2010);
- Fact Sheets: Immigration Options for Undocumented Youth by Immigrant Legal Resource Center;
- Know Your Rights and Responsibilities Guide for Immigrant Youth in English, Spanish, and Korean by Immigrant Legal Resource Center.

In addition, a number of organizations provide legal assistance and advice about the impact of criminal/juvenile justice involvement on immigration. The ones listed here represent only a sampling of available resources:

The Immigrant Legal Resource Center is a national resource center based in San Francisco, California with expertise in various aspects of immigration law including the immigration consequences of delinquency and crime. Website: www.ilrc.org; telephone (415) 255-9499.

Kids In Need of Defense (KIND) <http://www.supportkind.org/about-us/contact-us.aspx> is a national advocacy project that coordinates and elicits legal representation of unaccompanied children through volunteers and non-governmental organizations. Their website lists the contact information for field offices in California.

The Esperanza Immigrants Rights Project <http://www.esperanza-la.org/who-we-are.html> is a project of Catholic Charities of Los Angeles. It offers free assistance to unaccompanied children and a range of other support services for immigrant youth.

The Legal Aid Foundation Los Angeles offers some immigration services and representation, and links to other organizations that may be able to assist in immigration matters. They have offices throughout the greater Los Angeles area, and contact information is provided at <http://lafla.org/contact.php>.

Legal Services for Children <http://www.lsc-sf.org/> assists undocumented youth living apart from their parents to apply for legal residency.

Public Counsel <http://www.publiccounsel.org/services> offers immigration assistance to unaccompanied children, particularly focusing on abandoned, neglected, or abused children, adults in immigration detention, and victims of trafficking and violent crimes. It provides technical assistance to attorneys pursuing SIJS through the juvenile delinquency system.

Finally, the Pacific Juvenile Defender Center has immigration experts who can be consulted on specific immigration issues relating to youth in the justice system. Members can access their contact information through the Expert Corner at www.pjdc.org.

CHAPTER 9:

FINANCIAL OBLIGATIONS (FINES, PENALTIES, RESTITUTION)³⁹⁰

Many of the financial obligations addressed in this section are direct consequences of an adjudication or admission. Nonetheless, they are included in this handbook because they often involve considerations beyond the court case itself. The vast majority of youth involved in juvenile court proceedings are from poor families struggling to make ends meet. The imposition of fines, penalties, and restitution can literally force some families to choose between necessities such as food or medicine, and compliance with court orders. It is critical that counsel challenge monetary penalties that are beyond the financial means of clients and their families, as well as obligations that are not supported by the evidence. Effective representation can help to prevent court orders that set the youth and family up for failure and future punishment.

Three kinds of financial penalties may be imposed upon a youth: fines and penalties, restitution, and restitution fines. In addition, families may be assessed fees related to detention and probation supervision. When a youth is ordered to pay such penalties, a parent or guardian who has joint or sole legal and physical custody of the youth is rebuttably presumed to be jointly and separately liable for the amount ordered, subject to the court's consideration of the parent or guardian's ability to pay.³⁹¹

§ 9.1 FINES AND PENALTIES UNDER WELFARE AND INSTITUTIONS CODE SECTION 730.5

When a youth is adjudged a ward of the court, he or she may be ordered to pay a fine up to the same amount that could be imposed on an adult for the same offense³⁹² *if the court finds that the youth* has the financial ability to pay the fine.³⁹³ In a case where a youth is ordered to make restitution to a victim or victims, or is ordered to pay fines and penalty assessments under any provision of this Code, a parent or guardian who has joint or sole legal and physical custody and control of the youth is *rebuttably presumed* to be jointly and severally liable with the youth

390 See Chapter 10, Parental Responsibility.

391 Welf. & Inst. Code, § 730.7 (a).

392 Pen. Code, § 1464; Welf. & Inst. Code, § 730.5.

393 Welf. & Inst. Code, § 730.5; *In re Steven F.* (1994) 21 Cal.App.4th 1070.

for the amount of restitution for “willful acts of misconduct.”³⁹⁴ In addition, joint and several liability extends to fines and penalty assessments ordered by the court up to the designated limits and subject to the court’s consideration of the parent’s ability to pay.³⁹⁵



PRACTICE TIP

Defense counsel should be alert for opportunities to assert that the court must make separate fact-findings as to whether *the youth* (as opposed to *the parent*) can pay the fine. Also, to the extent that parents may be liable under section 730.7, subdivision (a), it is a rebuttable presumption. There is also a longstanding legal principle that a parent is only liable for a youth’s actions to the extent that the parent had control over the youth, knew that the youth had tendencies which might lead to the conduct at issue, and had reason to know that he or she should exercise control in order to prevent the conduct. To this end, the parent may rebut the presumption of parental liability by producing evidence that he or she had no way of knowing about the youth’s delinquent tendencies and also had no effective control over the youth.³⁹⁶



PRACTICE TIP

Fines pursuant to Welfare and Institutions Code section 730.5 only apply when the youth is made a ward of the court. Therefore, these fines do not apply to non-wardship probation under Welfare and Institutions Code section 725, subdivision (a), informal supervision under Welfare and Institutions Code section 654.2, or deferred entry of judgment under Welfare and Institutions Code sections 790, et seq.

The State of California and the counties also impose penalties on fines, which have the practical effect of substantially increasing the amount of money due. The State imposes a penalty of ten dollars for every ten dollars or every part of ten dollars for each fine imposed, with the exception of fines punishing parking offenses.³⁹⁷ The State also imposes a surcharge of twenty percent of the base fine.³⁹⁸ Each county levies a penalty of seven dollars for every ten dollars of every fine.³⁹⁹



PRACTICE TIP

Don’t forget to advise clients and their families about these penalties and surcharges. These penalties, on top of the fines, result in huge increases to the amount owed. For example, if the court were to impose a \$100 fee on a youth, the youth would have to pay on top of that \$100 fine an additional \$120 to the State and \$70 to the county, thus raising the total amount of financial responsibility to \$290. These penalties and surcharges also demonstrate the critical importance of arguing for a reduced fine, based upon the parents’ or youth’s ability to pay.⁴⁰⁰

394 Civ. Code, §§ 1714.1 and 1714.3

395 Welf. & Inst Code, § 730.7 (a).

396 *Robertson v. Wentz* (1986) 187 Cal.App.3d 1281, 1290.

397 Pen. Code, § 1464 (a).

398 Pen. Code, § 1465.7 (a).

399 Gov. Code, § 76000 (a).

400 Welf. & Inst. Code, § 730.5.



§ 9.2 RESTITUTION FINES UNDER WELFARE AND INSTITUTIONS CODE SECTION 730.6

In addition to the fines discussed above, courts must impose a restitution fine,⁴⁰¹ which is paid to the California Victim Compensation and Government Claims Board,⁴⁰² even if there is no “victim” of the youth’s offense.⁴⁰³ Welfare and Institutions Code section 730.6, subdivision (a) (2)(A) mandates a separate and additional restitution fine in every case in which a youth is “found to be a person described in Section 602” regardless of the youth’s inability to pay.⁴⁰⁴ This restitution fine therefore applies to youth on non-wardship probation under section 725, subdivision (a), but not to those on informal supervision pursuant to Welfare and Institutions Code section 654.2.

The amount of the restitution fine is set at the discretion of the court, and is to be commensurate with the seriousness of the offense. The restitution fine may not exceed one hundred dollars for misdemeanor offenses, and must be between one hundred and one thousand dollars for youth falling under Section 602 by reason of a felony offense.⁴⁰⁵ The restitution fine limits are per case, not per sustained charge.⁴⁰⁶ A separate hearing for the restitution fine is not required,⁴⁰⁷ but presumably may be requested.

In setting the amount of the fine, the court shall consider any relevant factors including, but not limited to, the youth’s ability to pay (even though the imposition of the fine is required in all cases irrespective of ability to pay); the seriousness and gravity of the offense and the circumstances of its commission; any economic gain derived by the youth as a result of the offense; and the extent to which others suffered pecuniary losses to the victim or his or her dependents, as well as intangible losses such as psychological harm caused by the offense.⁴⁰⁸

The youth bears the burden of demonstrating his or her inability to pay, which may include his or her future earning capacity.⁴⁰⁹ The court is not required to make express findings as to the factors bearing on the amount of the fine imposed.⁴¹⁰

The court may waive the restitution fine in a felony case if the court finds on the record that there are compelling and extraordinary reasons to do so.⁴¹¹ If that occurs, the youth must perform community service in lieu of the restitution fine.⁴¹² The mandatory penalties assessed on fines discussed in the preceding section are not assessed on restitution fees, but counties may charge up to 10% in administrative fees for collecting the fine.⁴¹³

401 Welf. & Inst. Code, § 730.6 (b).

402 Welf. & Inst. Code, § 730.6 (c).

403 *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534.

404 Welf. & Inst. Code, § 730.6 (c).

405 Welf. & Inst. Code, § 730.6 (b)(1) and (2).

406 *People v. Schoeb* (2005) 132 Cal.App.4th 861.

407 Welf. & Inst. Code, § 730.6 (b)(1) and (2).

408 Welf. & Inst. Code, § 730.6 (d)(1).

409 Welf. & Inst. Code, § 730.6 (d)(2).

410 Welf. & Inst. Code, § 730.6 (e).

411 Welf. & Inst. Code, § 730.6 (g).

412 Welf. & Inst. Code, § 730.6 (n) and (o).

413 Pen. Code, § 1202.4 (l).



PRACTICE TIP

Defense counsel should request a separate hearing for restitution fines. Counsel may argue for these mandatory fines to be lowered based on mitigating factors, or completely waived if there are compelling and extraordinary reasons. Although the statute does not address whether misdemeanor fines can be waived, counsel may request that misdemeanor fines be set as low as one cent. The court does not have to make express findings as to the factors bearing on the amount of the restitution fine,⁴¹⁴ but must make express findings if waiving the fine in a felony case.⁴¹⁵



PRACTICE TIP

Defense counsel should object to the imposition of any new fines in Section 777 probation violation hearings as unauthorized.⁴¹⁶

RESTITUTION

When there is a victim of the youth’s delinquent behavior, the court must order the youth to make full restitution for the victim’s losses, unless the court finds “compelling and extraordinary reasons” not to do so.⁴¹⁷ Ability to pay is *not* a compelling or extraordinary reason.⁴¹⁸

Victim’s restitution serves a threefold purpose: (1) to rehabilitate the youth; (2) to deter future delinquent behavior; and (3) to make the victim whole by compensating him for his economic loss.⁴¹⁹ Restitution also may be ordered for youth on informal supervision under Section 654.2,⁴²⁰ or on non-wardship probation under Section 725, subdivision (a).⁴²¹ In deferred entry of judgment cases, restitution is discretionary under Section 794, and ability to pay is a factor for the court to consider because restitution can only be enforced during referral period.⁴²²

If there are co-offenders, restitution may be joint and several.⁴²³ The fact that one or more co-offenders may be individually culpable to a lesser degree does not shield them from the responsibility of making restitution for the full amount of the victim’s losses.⁴²⁴

414 Welf. & Inst. Code, § 730.6 (e).

415 Welf. & Inst. Code, § 730.6 (g).

416 See *People v. Chambers* (1998) 65 Cal.App.4th 819, 822-823 [no statutory authority justifying second restitution fine under Penal Code 1202.4 after revocation of probation when the court had already imposed a restitution fine at the time defendant was granted probation, because the first restitution fine remained in force despite the revocation of probation]. Note that the language of Pen. Code, § 1202.4 (b) is substantially similar to the language of Welf. & Inst. Code, § 730.6 (b).

417 Welf. & Inst. Code, § 730.6 (h).

418 *Ibid.* But note that with restitution fines, co-offenders are *not* jointly and severally liable. (*People v. Kuntz* (2004) 122 Cal. App.4th 652, 655-658.)

419 *In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1387.

420 Welf. & Inst. Code, §§ 654, 654.26, 654.3. However, when the amount of restitution owed to the victim exceeds \$1,000, a youth is only eligible for informal supervision under Section 654.2 if the court makes a finding that it is an unusual case and the interests of justice would best be served, and specifies on the record its reasons for the decision. (Welf. & Inst. Code, § 654.3.)

421 Welf. & Inst. Code, § 730.6 (a).

422 *G.C. v. Superior Court* (2010) 183 Cal.App.4th 371, 378.

423 *In re S.S.* (1995) 37 Cal.App.4th 543, 550.

424 *People v. Madrana* (1997) 55 Cal.App.4th 1044, 1048.



The restitution amount must include, but is not limited to:

- The cost of repair or replacement for stolen or damaged property;
- Medical expenses;
- Wages or profits lost due to injury (including wages or profits lost by a victim’s family when caring for the victim); and
- Wages or profits lost due to time spent assisting the prosecutor or the police (including wages or profits lost by a victim’s family).⁴²⁵

Restitution is only available to direct victims of the relevant delinquent conduct.⁴²⁶ The statutory definition of “victim” includes immediate surviving family members of the victim, as well as government agencies responsible for repairing, replacing, or restoring public or privately owned property that has been defaced with graffiti.⁴²⁷



PRACTICE TIP

Counsel should be prepared to respond to assertions that public agencies are “direct victims.” For example, are fire and police departments or other emergency response services “direct victims”? A government entity is a direct victim of a crime when it is the immediate object of the offense, for example if it is a victim of tax evasion or theft of its property. Public agencies are not directly victimized for purposes of restitution merely because they spend money to investigate crimes or apprehend criminals⁴²⁸ or fight fires.⁴²⁹

Despite this general rule, if your client is charged with vandalism (Penal Code sections 594, 594.3, 594.4, 640.5, 640.6, or 640.7), be aware that agencies responsible for cleaning up graffiti are considered victims.⁴³⁰ However, section 742.16 of the Welfare and Institutions Code governs restitution for graffiti offenses for youth determined to be persons described by Section 602. Unlike the general restitution provided for in Welfare and Institutions Code section 730.6, Section 742.16 provides that a court shall order the youth or the youth’s estate to pay restitution for losses incurred as a result of the offense “to the extent the court determines that the minor or the minor’s estate has the ability to do so.”⁴³¹

425 Welf. & Inst. Code, § 730.6, (h)(1)–(4). Pen. Code, § 1202.4, the adult criminal restitution statute, is often used in construing 730.6 and enumerates additional areas for which restitution may be ordered. (*In re M.W.* (2008) 169 Cal.App.4th 1, 4.) In addition, although not specifically mentioned in either the Welfare and Institutions Code or the Penal Code, the court may also impose restitution for loss of “future earnings.” (See *People v. Giordano* (2004) 42 Cal.4th 644.)

426 *People v. Martinez* (2005) 36 Cal.4th 384, 393, Welf. & Inst. Code, § 730.6 (k).

427 Welf. & Inst. Code, § 730.6 (j).

428 *People v. Ozkan* (2004) 124 Cal.App.4th 1072, 1077.

429 *People v. Martinez* (2005) 36 Cal.4th 384, Fn. 2, disapproving *In re Brian N.* (2004) 120 Cal.App.4th 591. While public agencies cannot recover expenses through the restitution system, there are other code sections that give them civil remedies to obtain reimbursement for expenditures attributable to the youth’s conduct. Examples include, but are not limited to: emergency response to a DUI auto accident (Gov. Code, § 53150); fire suppression, rescue, and emergency medical costs from negligent or unlawfully set fires (Health & Saf. Code, § 13009); medical examinations in child abuse/neglect and sexual assault cases (Pen. Code, § 1203.1 (h)); emergency response to a false bomb threat (Pen Code, § 422.1).

430 Welf. & Inst. Code, § 730.6, (j)(2), added by Stats. 2009, c. 454, § 2, effective 2010.

431 Welf. & Inst. Code, § 742.16 (a).

POSSIBLE EXPENSES COVERED BY RESTITUTION

The court has broad authority to order restitution for a range of costs that the victim may claim. The only real limitation is that the basis for the determination is rational; no “arbitrary or capricious” criteria or methods can be used.⁴³² However, the amount of restitution ordered is intended to “make the victim whole, not to give a windfall.”⁴³³ The statutory list of losses and expenses for which a victim can seek restitution from a youth is not exhaustive; the court may also order restitution for other losses it deems fit, and order restitution to “further legislative objectives.”⁴³⁴ In addition, the adult restitution statute is used in construing Welfare and Institutions Code section 730.6 and thus expands the list of losses for which restitution is appropriate to include losses such as:

- Relocation fees in cases of violent offense;
- Legal fees resulting from attempts at execution of a restitution order (but not for legal fees incurred to recover general damages such as pain and suffering);⁴³⁵
- Installation or expansion of security mechanisms such as alarm systems;
- Psychological harm resulting from conduct such as sexual misconduct; and,
- Expenses for making a home accessible when a victim is permanently disabled as a result of the delinquent conduct.⁴³⁶

This list is not exhaustive as the term “economic loss” is accorded “an expansive interpretation”⁴³⁷

A court’s discretion is further broadened by the lack of any requirement that the restitution order be limited to the exact amount of the loss for which the youth is found culpable.⁴³⁸ A court is permitted to use any method factually and reasonably calculated to make the victim whole, so long as it is not arbitrary and capricious,⁴³⁹ and it is for the purposes of rehabilitation of the youth.⁴⁴⁰ This means that a youth involved in delinquent conduct may be ordered to pay restitution for the full spectrum of the conduct, even for conduct for which the youth is not actually culpable, so long as the order is “reasonably related” to the youth’s offense or to future criminality.⁴⁴¹ However, the court may not delegate the task of determining restitution to the probation officer without the youth’s express consent.⁴⁴²

432 *In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1016.

433 *People v. Fortune* (2005) 129 Cal.App.4th 790, 794-795.

434 *In re M.W.* (2009) 169 Cal.App.4th 1, 6-7.

435 *In re Imran Q.* (2008) 158 Cal.App.4th 1316, 1321.

436 Penal Code section 1202.4 (f)(3)(K).

437 *In re Alexander A.* (2011) 192 Cal.App.4th 847, 854, fn. 4; *In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132. For example, burial and cremation expenses are a proper matter for restitution. (*In re A.M.* (2009) 173 Cal.App.4th 668, 673.)

438 *In re Dina V.* (2007) 151 Cal.App.4th 486, 489.

439 *People v. Rubics* (2006) 136 Cal.App.4th 452, 462.

440 *In re Anthony M.*, *supra*, 156 Cal.App.4th at 1017.

441 See *In re I.M.* (2005) 125 Cal.App.4th 1195, 1209 [restitution for the death of a victim was appropriate despite the fact that minor was not responsible for or involved with the death but was merely an accessory after the fact], citing *In re Maxwell C.* (1984) 159 Cal.App.3d 263, 265.

442 *In re Joshua R.* (1992) 6 Cal.App.4th 1252, 1254.



RESTITUTION ORDERS AND INSURANCE

Payments a victim receives from his or her own insurance for damage and/or injuries arising from a youth's conduct are not credited against the restitution order.⁴⁴³ Welfare and Institutions Code section 730.6, subdivision (a) states that a victim who incurs economic losses as a result of the youth's conduct "shall receive restitution directly from that minor." Similarly, if a victim's medical care is paid for by Medi-Cal or Medicare the youth still must pay restitution for the full amount.⁴⁴⁴ However, the appropriate determination of economic loss is the amount the insurers *actually paid*, not the amount billed by medical providers.⁴⁴⁵

Furthermore, a victim is not prohibited from seeking civil enforcement of a restitution order against youth *even if the victim has received payment from an insurer* in exchange for full civil release of claims against the youth.⁴⁴⁶



PRACTICE TIP

Look carefully at the documentation submitted by the victim. Often, the document is the invoice from the medical provider and not the final settlement by the insurance company, which is usually a lesser amount.

REDUCING AND OVERTURNING RESTITUTION ORDERS

The first step in reducing or overturning a restitution order is to ask for a hearing. The failure to ask for a restitution hearing waives the right of appeal if the court's order does not exceed the probation report's recommendation.⁴⁴⁷ However, imposition of a victim restitution order in excess of the recommendation, made without notice or a reasonable opportunity to challenge the order, violates Constitutional rights of due process.⁴⁴⁸ Restitution orders are only overturned on appeal upon a finding of abuse of discretion.⁴⁴⁹

443 *In re Tommy A.* (2005) 131 Cal.App.4th 1580, 1591-1592.

444 *People v. Howe* (1999) 76 Cal.App.4th 1266, 1272. *Howe* notes the "Medi-Cal statute authorizes the department to file a claim against the estate of a beneficiary to recover benefits paid in some circumstances. (Welf. & Inst. Code, § 14009.5.) Thus, any restitution paid by defendant to the victim would be potentially subject to a Medi-Cal reimbursement claim. The department may, of course, proceed against defendant directly under the third party liability statutes. (Welf. & Inst. Code, § 14123.70 et seq.))" (*People v. Howe, supra*, 76 Cal.App.4th. at fn. 5.) See also 42 U.S.C. §§ 1396a(a)(25)(b), (a)(45), 1396k(a)(1)(A); *In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1019 [juvenile restitution order for amount paid by Medi-Cal].

445 *In re Anthony M., supra*, 156 Cal.App.4th at pp. 1018-1019; *People v. Bergin* (2008) 167 Cal.App.4th 1166, 1172; *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, [the amount of tort damages in a civil case is the amount paid by insurance to the hospital, not the amount billed].

446 *In re Michael S.* (2007) 147 Cal.App.4th 1443, 1457.

447 *People v. Foster* (1993) 14 Cal.App.4th 939, 949.

448 *People v. Resendez* (1993) 12 Cal.App.4th 98, 114 and fns. 11 and 12; *People v. Foster, supra*, 14 Cal.App.4th 939, 949.

449 *In re T.C.* (2009) 173 Cal.App.4th 837, 849.



PRACTICE TIP

Do “Harvey Waivers” (which allow the court to order restitution for behavior in dismissed charges, under *People v. Harvey* (1979) 25 Cal.3d 754), apply to juvenile cases? No, the Harvey Rule is inapplicable.⁴⁵⁰ Nonetheless, the juvenile court can order restitution on dismissed counts as well as for uncharged crimes so long as the order is reasonably related to the crime of which the defendant was convicted or to the extent it aids in preventing future criminality. Counsel should argue that there must be substantial evidence to connect the minor with the crimes for which restitution is sought.⁴⁵¹ The juvenile court can order restitution on dismissed counts if there is evidence in the record to rationally conclude that the youth was responsible for other losses.⁴⁵²



PRACTICE TIP

At a restitution hearing, a youth may dispute the estimated costs presented by the victim and probation department. The economic losses must be the “result of the minor’s conduct for which the minor was found to be a person described in Section 602,”⁴⁵³ and can be challenged if there is no nexus between the loss and the minor’s conduct. A restitution order must “identify the losses to which it pertains”⁴⁵⁴ and thus can be challenged for vagueness. The burden is on the youth to prove that the victim’s losses are less than what is claimed,⁴⁵⁵ but a victim may not create this burden simply by claiming that a certain amount is owed to her.⁴⁵⁶ There must be direct evidence indicating a cost incurred by the victim. If a victim is claiming a cost of repair or replacement that seems unreasonably high, get alternate estimates prior to the hearing to present to the court, or ask the court to order the victim to get more than one estimate. A youth does not have an automatic right to confront or cross-examine witnesses at a restitution hearing.⁴⁵⁷

After a restitution order is entered, if a youth discovers evidence that the victim is exaggerating or is mistaken about the amount, the youth may file a motion to modify the order on the grounds of such new evidence (which may include alternate estimates of the cost of repairing or replacing property).⁴⁵⁸ A victim must be notified at least 10 days before a proceeding to modify restitution.⁴⁵⁹

If all else fails, because the purpose of the restitution statute is to make the victim whole and to rehabilitate the offender, arguments that the restitution order accomplishes neither goal may be

450 *Id.*, at p. 842.

451 Following the analysis of *People v. Carbajal* (1995) 10 Cal.4th 1114, *In re T.C.*, *supra*, 173 Cal.App.4th 837 and *In re I.M.*, *supra*, 125 Cal.App.4th 1195, courts have held that restitution conditions of probation for uncharged crimes as well as those which have been dismissed are permissible, so long as the order is reasonably related to the crime of which the defendant was convicted or to the extent it aids in preventing future criminality. However, note that in both cases the minor participated to some extent in the events in which the victim was harmed. At a minimum there must be substantial evidence that the minor’s unlawful conduct was a substantial factor in the loss. (See *In re A.M.* (2009) 173 Cal.App.4th 668, 673-674.) Accordingly, counsel should argue that for the order to be valid, there must be substantial evidence to connect the minor with the crimes for which restitution is sought.

452 *In re Maxwell C.* (1984) 159 Cal. App.3d 263, 266.

453 Welf. & Inst. Code, § 730.6 (h).

454 Welf. & Inst. Code, § 730.6 (i).

455 *People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542-1543.

456 *In re K.F.* (2009) 173 Cal.App.4th 655, 665. (But cf. *People v. Tabb* (2009) 170 Cal.App.4th 1142.)

457 *People v. Cain* (2000) 82 Cal.App.4th 81, 86-88.

458 Welf. & Inst. Code, § 742.16 (d) and (k).

459 Pen. Code, § 1202.4 (f)(1).



effective. If the loss claimed by the victim is too attenuated from the actual conduct of the youth this could eliminate any rehabilitative value.⁴⁶⁰

The court may direct that any funds taken from the youth at the time of arrest, except for illegal drug funds confiscated pursuant to Health and Safety Code section 11469, be applied to satisfying the restitution order.⁴⁶¹

The court has “limited discretion” in “unusual situations specific to a particular crime, defendant, or other circumstance,”⁴⁶² to award less than full restitution, if it states on the record “compelling and extraordinary reasons” for a reduced award.⁴⁶³ If the court does not order full restitution, the court must order community service as a probation condition.⁴⁶⁴

Filing for bankruptcy, either under Chapter 7 (11 U.S.C. §§ 701 et seq.) or Chapter 13 (11 U.S.C. §§ 1301 et seq.), will not discharge a restitution debt.⁴⁶⁵ The Bankruptcy Code does not apply to restitution orders,⁴⁶⁶ nor do the automatic stay provisions in Bankruptcy Court.⁴⁶⁷



PRACTICE TIP

Civil law concepts such as proximate cause, causation, and contributory negligence may be useful when arguing for a reduction of an order. This is especially useful in complicated cases. Also, counsel should check the correctness of any mathematical calculations proffered, and always have the basis for the calculation made on the record.⁴⁶⁸

A juvenile court’s subsequent termination of probation and dismissal of case should not affect a timely appeal of a restitution order.⁴⁶⁹

RESTITUTION AS A CONDITION OF PROBATION

A juvenile court is required to make a restitution order a condition of probation,⁴⁷⁰ and a youth may not be denied formal or informal probation solely because of his inability to pay restitution.⁴⁷¹ Restitution orders do not have to be based solely on conduct for which a youth is adjudged a ward of the court.⁴⁷² Thus, even absent a direct connection between

460 *People v. Bernal* (2002) 101 Cal.App.4th 155, 162.

461 Pen. Code, § 1202.4 (f).

462 *People v. Giordano, supra*, 42 Cal.4th 644, 662.

463 *People v. Brown* (2007) 147 Cal.App.4th 1213, 1229; Cal. Cons., art. I, § 28 (b).

464 Welf. & Inst. Code, § 730.6 (n).

465 *Kelly v. Robinson* (1986) 479 U.S. 36, 50-53; *Warfel v. City of Saratoga (In re Warfel)* (B.A.P. 9th Cir. 2001) 268 B.R. 205, 209-213; 11 U.S.C. § 523(a)(7); 11 U.S.C. § 1328(a)(3).

466 *People v. Washburn* (1979) 97 Cal.App.3d 621.

467 *In re Gruntz* (9th Cir. 2000) 202 F.3d 1074, 1084-1087.

468 *People v. High* (2004) 119 Cal.App.4th 1192, 1200 [“Although we recognize that a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts.”]

469 This is so because Welfare and Institutions Code section 730 (l) provides that the restitution order “shall continue to be enforceable by a victim ... until the obligation is satisfied in full.”

470 Welf. & Inst. Code, §§ 730 (b) and 730.6 (a)(2)(B).

471 *Charles S. v. Superior Court* (1982) 32 Cal.3d 741, 751.

472 *In re T.C., supra*, 173 Cal.App.4th at p. 843; *In re A.M., supra*, 173 Cal.App.4th 668, 673.

the behavior for which a youth was adjudged a person described by Section 602 and the restitution sought, a court may order restitution as a condition of probation.

For example, *In re T.C.* was a case in which the court dismissed one charge of car theft, but then ordered the youth to pay restitution for damage that took place as a result of that theft because he had a history of car theft. The appellate court held that the court did not exceed its authority under Welfare and Institutions Code section 730, subdivision (b), although the charge was not sustained, since the order was reasonably related to deterring future delinquency.⁴⁷³ And *In re A.M.*, the court ordered the youth to pay cremation expenses of a pedestrian she hit and killed, although she was charged only with driving without a license. The Court of Appeal held that this was proper under Welfare and Institutions Code section 730, subdivision (b), as her conduct was a substantial factor in the man's death and the order served a deterrent and rehabilitative purpose.⁴⁷⁴

Probation may be revoked for failure to pay restitution only if the court determines that the person has “willfully failed to pay or to make sufficient bona fide efforts to legally acquire the resources to pay.”⁴⁷⁵



PRACTICE TIP

Can probation be extended until the youth completes payment of restitution? Yes. While probation may not be revoked for non-willful failure to pay, it can be extended until the maximum period of jurisdiction, which may be age 21 or 25.⁴⁷⁶ Alternatively, the court may enter an Order for Restitution and Abstract of Judgment (Judicial Council Form JV-790), which is enforceable as a civil judgment.⁴⁷⁷ The court can only enter this order while the court has jurisdiction.⁴⁷⁸ This could have potential consequences on the youth's ability to obtain credit in the future.

Generally speaking, a youth may not have her juvenile record sealed until she has paid the restitution amount in full.⁴⁷⁹ However, the juvenile court has discretion to determine whether “rehabilitation has been attained to the satisfaction of the court.”⁴⁸⁰

DEFERRED ENTRY OF JUDGMENT AND RESTITUTION

There is currently no definitive authority as to whether Deferred Entry of Judgment (DEJ) under Welfare and Institutions Code sections 790 et seq. may be revoked for failure to make restitution. Since restitution orders are permitted and commonly imposed as a condition of probation, counsel may wish to emphasize the differences in DEJ in opposing the lifting of DEJ status for failure to pay.

473 *In re T.C.*, *supra*, 173 Cal.App.4th at p. 843.

474 *In re A.M.* (2009) 173 Cal.App.4th 668, 673.

475 Welf. & Inst. Code, § 730.6 (m).

476 *People v. Cookson* (1991) 54 Cal.3d 1091, 1100; See also Pen. Code, § 1203.3 (b)(4).

477 Welf & Inst. Code, § 730.6 (i) & (r).

478 “If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court at any time *during the term of the commitment or probation.*” (Welf & Inst. Code, § 730.6 (h), emphasis added.)

479 *People v. Covington* (2000) 82 Cal.App.4th 1263, 1271; Welf. & Inst. Code, § 781.

480 Welf. & Inst. Code, § 781 (a).



DEJ statutes are inconsistent with respect to the mechanism for determination of program failure. Welfare & Institutions Code section 793, subdivision (a) states that “[i]f it appears to the prosecuting attorney, the court, or the probation department that the minor is not performing satisfactorily ... the court shall lift the deferred entry of judgment and schedule a dispositional hearing.” This ostensibly gives unilateral authority to the probation officer or prosecutor to determine if the youth has successfully performed and to force a judgment in the case.

However, Welfare and Institutions Code section 791 subdivision (a)(4) requires a youth to be given notice that failure to comply is determined by a motion to the court for entry of judgment. Under that section, the probation officer and prosecutor merely have the authority to file a motion on the issue of program failure, which a judge has the authority to grant or deny, and counsel may have the opportunity to challenge factual assertions and argue this issue to the court.⁴⁸¹ In any event, there is nothing to limit the use of the failure to pay restitution in determining that a youth has performed the conditions of his or her probation satisfactorily, whether or not deferred entry of judgment will be lifted and a judgment entered.



PRACTICE TIP

Charles S. held that unequal treatment due to wealth (a suspect classification) is a denial of equal treatment under the law. In that case, it was impermissible to deny the youth informal probation because he was unable to pay restitution. Since Section 790 DEJ is similar to informal probation in many respects, a similar argument could be made.⁴⁸²

§ 9.3 ADMINISTRATIVE FEES AND OTHER FINANCIAL OBLIGATIONS

DRUG TESTING FEES

If the youth is found to come within the description of Section 602 because of the commission of a drug offense,⁴⁸³ and the juvenile court imposes a drug-testing requirement, the juvenile court shall order the youth to pay a reasonable fee, which shall not exceed the actual cost of the testing.⁴⁸⁴ This fee is subject to the youth and family’s financial ability to pay all or part of the costs associated with the testing.⁴⁸⁵

DNA COLLECTION FEES

Any youth who is adjudicated for any felony offense is required to provide a DNA sample.⁴⁸⁶ The juvenile court may order the youth to pay a “reasonable portion of the cost” of obtaining these DNA samples.⁴⁸⁷

481 Welf. & Inst. Code, §§ 791 (a)(4) and 793 (a).

482 *Charles S. v. Superior Court* (1982) 32 Cal.3d 741, 750.

483 Drug offenses are defined by Division 10 of the Health & Safety Code, commencing with Section 11053.

484 Welf. & Inst. Code, § 729.9.

485 *Ibid.*

486 Pen. Code, § 296 (a)(1); *In re Calvin S.* (2007) 150 Cal.App.4th 443, 449.

487 Pen. Code, § 295 (j).

OTHER COSTS ASSOCIATED WITH JUVENILE DELINQUENCY PROCEEDINGS

In addition to the other fines, fees, and restitution, youth and their families may be assessed for the costs of a range of other services associated with the juvenile court process and dispositional orders. Thus, the county may require that the father, mother, spouse, or other person liable for the support of a youth, the estate of that person, and the estate of the youth pay the county for the cost of probation supervision.⁴⁸⁸ This may include the costs of probation supervision, home supervision, and electronic monitoring.⁴⁸⁹ Also, the father, mother, spouse, or other person liable for the support of a youth, the estate of that person, and the estate of the youth, has joint and several liability for the cost to the county or the court for the expenses of legal services rendered to the youth by an attorney.⁴⁹⁰ Further, parents, guardians, and other persons liable for the support of a youth may be charged fees for support of the youth while he or she is “placed, or detained in, or committed to” any institution or placement.⁴⁹¹ These costs are more fully discussed in Chapter 10, Parental Responsibility, and Chapter 16, Public Benefits.

488 Welf. & Inst. Code, §§ 903.2 and 904.

489 Welf. & Inst. Code, § 903.2.

490 Welf. & Inst. Code, § 903.1 (a).

491 Welf. & Inst. Code, § 903.



CHAPTER 10:

PARENTAL RESPONSIBILITY

In addition to the ways that parents or guardians may be involved with paying fines, penalties and restitution imposed on youth,⁴⁹² there may be separate parental financial responsibilities for a series of costs related to juvenile delinquency proceedings. Also, parents may be held civilly liable for the acts of youth in certain circumstances.

In this chapter, the term parent may mean the mother, father, spouse, or any other person liable for the support of the youth, or the estate of such a person.⁴⁹³ If there is more than one such person, all may be held jointly and severally liable.

§ 10.1 COSTS FOR WHICH THE PARENT MAY BE RESPONSIBLE

California law provides for parental liability for a number of case related costs, including the costs of support for youth, legal services to youth, separate registration fee for legal counsel, probation supervision, home supervision or electronic surveillance, detention and other confinement costs, and record sealing.⁴⁹⁴ Notice must be provided to parents with the filing of the petition.⁴⁹⁵

§ 10.2 PROCESS FOR DETERMINING ABILITY OF PARENT TO PAY COSTS

The county board of supervisors may designate a Financial Evaluation Officer (FEO) to determine ability of parent to pay reimbursable costs described below.⁴⁹⁶ If the county has designated a FEO, then after the close of the disposition hearing, the county FEO must determine the parent's ability to pay all or part of the costs assessed, taking into account the

492 These are discussed in Chapter 9, Restitution.

493 Pursuant to Welf. & Inst. Code, § 903 (a) and other more specific statutes on liability, the estate of the youth may also be held liable for the costs discussed in this chapter. Welf. & Inst. Code, § 903 (e), clarifies that fathers, mothers, spouses, or other persons liable for the support of the youth, are not liable for the costs of support if the youth is found to have committed a crime against that person.

494 Welf. & Inst. Code, §§ 903, 903.1, 903.15, 903.2, 903.25, and 903.3.

495 Welf. & Inst. Code, § 656 (h), (j), and (k).

496 Welf. & Inst. Code, § 903.45.

family's income, dependents, and other obligations.⁴⁹⁷ If the parent disagrees with the FEO's determination, he or she has the right to dispute it in juvenile court, and the court will determine the amount to be reimbursed and issue an order for the parent to pay that amount.⁴⁹⁸

If a parent, after having received proper notice of a hearing before the FEO, fails to appear before the FEO, state law provides that the FEO shall recommend that the parent pay the full amount of the costs.⁴⁹⁹ Execution of the order to pay may be issued in the same manner as on a judgment in a civil action.⁵⁰⁰ If the parent's financial circumstances change prior to repayment of the judgment, he or she may petition the court to modify or vacate the judgment.⁵⁰¹

§ 10.3 THE COST OF LEGAL REPRESENTATION IN JUVENILE COURT

When a youth is brought before delinquency court, he or she has a right to legal representation.⁵⁰² However, the youth's parents may be required to pay for some or all of the cost of legal services provided.⁵⁰³ The policy of holding parents responsible for the cost of the youth's legal representation is within the discretion of the board of supervisors of each county, and thus varies by county.⁵⁰⁴ For those counties that do hold parents responsible, the following discussion sets forth the relevant legal provisions.

Under the parental responsibility provisions, the parent of the youth *shall* be liable to the county or the court for legal services rendered to the youth by an attorney pursuant to an order of the juvenile court.⁵⁰⁵ When counsel is first appointed, or when the public defender begins representing the youth, the parent *shall* be assessed a registration fee of no more than twenty-five dollars,⁵⁰⁶ which goes toward credit for the total cost of legal services for which the parent is responsible.⁵⁰⁷ Welfare and Institutions Code section 903.15, subdivision (a) provides, nonetheless, that if the parent cannot afford the fee, it shall not be required of him or her. Section 903.15, subdivision (c), further provides that no youth may be denied the assistance of appointed counsel due solely to the parent's failure to pay the registration fee. The method of determining whether this initial fee will be assessed is the parents' own self report of whether or not he can afford to pay it.⁵⁰⁸ However, even when a parent is not required to pay the initial registration fee, he or she may still be required to pay for the youth's legal costs at a later time if it is determined by the county that the parent is able to pay.⁵⁰⁹

497 Welf. & Inst. Code, § 903.45 (b).

498 *Ibid.*

499 *Ibid.*

500 Welf. & Inst. Code, § 903.45 (d).

501 Welf. & Inst. Code, § 903.45 (c).

502 Welf. & Inst. Code, §§ 633, 634, 634.6, and Cal. Rules of Court, rule 5.663(c).

503 Welf. & Inst. Code, §§ 903.1, 903.15.

504 Welf. & Inst. Code, §§ 903.15 (e) and 903.47 (b).

505 Welf. & Inst. Code, § 903.1 (a).

506 Welf. & Inst. Code, § 903.15 (a).

507 Welf. & Inst. Code, § 903.15 (d).

508 Welf. & Inst. Code, § 903.15 (b).

509 Welf. & Inst. Code, §§ 903.15 (d) and 903.45 (b).



With the consent of the county, the court may designate a FEO who, after the dispositional hearing, will determine the parent's liability for the cost of counsel appointed for the youth, who will then follow the procedure for assessing liability described above.⁵¹⁰ If the parent is delinquent in payment of the amount ordered, a third party collection agency may be enlisted and/or the parent may be charged additional costs associated with the collection of payments.⁵¹¹

§ 10.4 THE COST OF MAINTENANCE WHEN THE YOUTH IS DETAINED

The duty of a parent to support and maintain a youth continues, subject to the financial ability of the parent to pay, during any period in which the youth has been declared a ward of the court and removed from the custody of the parent.⁵¹² Thus, the parent may be held liable for the reasonable costs of support and maintenance of the youth while he or she is detained pursuant to an order of the juvenile court.⁵¹³

The costs of support and maintenance include the actual costs incurred by the county for food and food preparation, clothing, personal supplies, and medical expenses, not to exceed thirty dollars per day.⁵¹⁴ The county must first exhaust any private or Medi-Cal coverage that the child may have before charging the parent for medical costs.⁵¹⁵ The costs of support specifically exclude any costs of incarceration, treatment, or supervision while the youth is detained.⁵¹⁶

If the parent receives notice that the youth is scheduled for release from custody and the parent fails to take delivery of the youth, the parent may be held liable for additional daily costs of housing. These costs may be levied when it is reasonably possible to take delivery of the youth within twelve hours of notice and the parent states a refusal to take delivery of the youth or fails to make reasonable efforts to do so.⁵¹⁷ The liability for failure to take delivery of the youth may not exceed one hundred dollars, which includes liability for support and maintenance, for each 24-hour period.⁵¹⁸ The parent's ability to pay may be taken into account in determining the amount to be imposed.⁵¹⁹

Also, if a youth who has been placed or detained by the juvenile court is subject to a child support order, there are special mandatory provisions. Agencies incurring costs on behalf of a youth subject to a child support order who has been detained or placed pursuant to a court order *must* report these costs to the local child support agency.⁵²⁰ The child support agency may petition the superior court to issue an order to show cause (OSC) why an order should not be entered for continuing maintenance and support, and the hearing may result in an order for the

510 Welf. & Inst. Code, § 903.47 (b).

511 Welf. & Inst. Code, § 903.47 (a).

512 Welf. & Inst. Code, § 202 (c).

513 Welf. & Inst. Code, § 903 (a).

514 Welf. & Inst. Code, § 903 (c).

515 Welf. & Inst. Code, § 903 (c)(2).

516 Welf. & Inst. Code, § 903 (b).

517 Welf. & Inst. Code, § 903.25 (a).

518 Welf. & Inst. Code, § 903.25 (b).

519 Welf. & Inst. Code, § 903.25 (c).

520 Welf. & Inst. Code, § 903.4 (b).

parent to pay child support.⁵²¹ The parent has the right to seek legal representation, and the right to appear personally and present evidence.⁵²² If the parent does not attend the OSC hearing, a judgment may still be entered against him or her.⁵²³ Any order entered could result in the garnishment of the parent’s wages, taking of the parent’s money or property to enforce the order, or the parent being held in contempt of court.⁵²⁴



PRACTICE TIP

The county may not levy fees for detention unless the petition is sustained or the youth agrees to supervision under Section 654.⁵²⁵ If the petition is dismissed or found not true at trial, be sure the family has a copy of the court orders to avoid liability for the cost of detention.

§ 10.5 THE COST OF SUPERVISION

When a youth is under the supervision of the probation department, pursuant to an order of the juvenile court, the court may require that the parent be liable for costs associated with the supervision.⁵²⁶ These costs may include probation supervision, home supervision, or electronic surveillance by the probation officer.⁵²⁷ Also, if an electronic monitor is damaged or discarded while in the possession of the youth, the cost of replacement may be ordered.⁵²⁸ These costs may only be imposed on “the father, mother, spouse, or other person liable for the support of a minor, the estate of that person, and the estate of the minor,” which can be jointly and severally liable. Liability for these costs may only be imposed by the juvenile court if the person has the financial ability to pay.⁵²⁹

§ 10.6 THE COST OF SEALING JUVENILE RECORDS

After a period of five or more years, the youth may petition the court to seal his juvenile arrest and court records.⁵³⁰ If the youth is still a minor when this occurs, California law provides that the parent *shall*, unless indigent, be held liable to the county and court for the cost of any investigation related to the sealing and the cost of sealing any juvenile court or arrest records.⁵³¹ Even if the petition to seal the records is not granted, the parent may be liable to the county for actual costs of services rendered, not to exceed one hundred and fifty dollars.⁵³² Unlike other parental responsibility provisions, there is no requirement that the parent have the ability to pay.⁵³³

521 Welf. & Inst. Code, § 903.4 (c)(1).

522 Welf. & Inst. Code, § 903.4 (c)(2).

523 Welf. & Inst. Code, § 903.4 (e).

524 Welf. & Inst. Code, § 903.4 (c).

525 Welf. & Inst. Code, § 903 (a).

526 Welf. & Inst. Code, § 903.2 (a).

527 *Ibid.*

528 Welf. & Inst. Code, § 871 (d).

529 Welf. & Inst. Code, § 903.2 (b).

530 Welf. & Inst. Code, § 781 (a).

531 Welf. & Inst. Code, § 903.3 (a).

532 Welf. & Inst. Code, § 903.3 (b).

533 *Ibid.*

§ 10.7 COURT-ORDERED PROGRAMS AND ACTIVITIES

Parents may be held responsible for the cost of additional services in certain circumstances.

COUNSELING, EDUCATION, AND TREATMENT PROGRAMS

Parents who retain custody of a youth adjudged a ward of the court under Section 601 or 602,⁵³⁴ may be required to participate in counseling or education programs including, but not limited to, parent education and parenting programs operated by community colleges, school districts, or other appropriate agencies designated by the court.⁵³⁵ The participation of the youth or the parents in counseling may be a condition of continued parental custody of a youth who is a ward of the juvenile court.⁵³⁶

Also, the court may require the parent to pay for or participate in programs related to the specific behavior of the youth. For example, when a youth has been found to have committed a gang related offense, the court may order the parent to attend parenting classes,⁵³⁷ and the parent may be held liable for the cost of the classes if he or she is able to pay.⁵³⁸ Similarly, when a youth has been found to have committed an offense involving a controlled substance or alcohol, the youth may be required to participate in, and successfully complete, an alcohol and drug education program, or both, as designated by the court, with the expense of attendance paid by the youth's parent if he or she is able to pay.⁵³⁹ Further, when the youth is found to have committed an assault or battery at a school or a park, California law calls for the court to order, in addition to any other fine sentence, or as a condition of probation, that the youth attend counseling at the expense of the parent, subject to consideration of ability to pay.⁵⁴⁰

When the parent consents to a six month program of informal supervision pursuant to Welfare and Institutions Code section 654, the parent may be required to participate in counseling or education programs including, but not limited to, parent education and parenting programs operated by community colleges, school districts, or other appropriate agencies designated by the court.⁵⁴¹ The parent of a youth under Section 654 supervision by the probation department may also be required to reimburse the agency for all or part of the cost of supervision, subject to the parent's ability to pay.⁵⁴²

MAINTENANCE OF PUBLIC SPACE

Parents may also be required to provide financial support for public maintenance in certain kinds of cases. When a youth has been adjudged a ward of the court because of a crime committed on a public transit vehicle, and the court does not remove the youth from the

534 Welf. & Inst. Code, §§ 727 and 729.2.

535 Welf. & Inst. Code, §§ 727 (b) and 729.2 (b).

536 Welf. & Inst. Code, §§ 731 (a) and 727 (b) and 727 (c).

537 Welf. & Inst. Code, § 727.7 (a).

538 Welf. & Inst. Code, § 727.7 (d).

539 Welf. & Inst. Code, § 729.10.

540 Welf. & Inst. Code, § 729.6.

541 Welf. & Inst. Code, § 654.

542 Welf. & Inst. Code, § 654.6.

custody of the parents, the parent may be required, as a condition of the youth's probation, to keep a specified property in the community free of graffiti for 90 days.⁵⁴³



PRACTICE TIP

With only a few exceptions (for example, record sealing), the parental responsibility provisions of California law require proper notice to the parent, and give parents the rights to legal counsel and a determination of ability to pay. Counsel and advocates should advise parents to challenge any cost assessments that do not comply with notice requirements, and to take full advantage of the opportunity to present their financial situation and other equities to the financial evaluation officer for the county.

§ 10.8 CIVIL LIABILITY OF PARENTS

Under California law, any act of willful misconduct of a youth that results in injury or death to another person or in any injury to the property of another may be imputed to the parent or guardian having custody and control of the youth for all purposes of civil damages, and the parent or guardian having custody and control shall be jointly and severally liable with the youth for any damages resulting from the willful misconduct.⁵⁴⁴

State law provides, further, that the joint and several liability of a parent may not exceed twenty-five thousand dollars (\$25,000) for each tort of the youth, and in the case of injury to a person, imputed liability is further limited to medical, dental, and hospital expenses, not to exceed twenty-five thousand dollars (\$25,000).⁵⁴⁵

There are also laws governing parental liability for specific kinds of behavior. Thus, any act of willful misconduct of a youth that results in the defacement of property of another with paint or a similar substance may be imputed to the parent or guardian having custody and control of the youth for all purposes of civil damages, including court costs, and attorney's fees, to the prevailing party, and the parent or guardian having custody and control may be jointly and severally liable with the youth for any damages resulting from the willful misconduct, not to exceed twenty-five thousand dollars (\$25,000).⁵⁴⁶

Civil liability for any injury to the person or property of another proximately caused by the discharge of a firearm by a youth under the age of 18 years may be imputed to a parent having custody and control of the youth for all purposes of civil damages, and such parent may be jointly and severally liable with such youth for any damages resulting from such act, if such parent either permitted the youth to have the firearm or left the firearm in a place accessible to the youth.⁵⁴⁷ However, liability under this section may not exceed thirty thousand dollars (\$30,000) for injury to or death of one person as a result of any one occurrence, and may not exceed sixty thousand dollars (\$60,000) for injury to or death of more than one person in any one occurrence.⁵⁴⁸ Moreover, this liability is in addition to any other liability imposed by law.⁵⁴⁹

543 Welf. & Inst. Code, § 729.1 (a) and (b).

544 Civ. Code, § 1714.1 (a).

545 *Ibid.*

546 Civ. Code, § 1714.1 (b).

547 Civ. Code, § 1714.3.

548 *Ibid.*

549 *Ibid.*

CHAPTER 11:

EDUCATIONAL CONSEQUENCES

When youth are arrested, detained, or have a sustained petition, there may be immediate consequences that affect schooling and others that reverberate throughout the youth's educational career. Counsel must be aware of those consequences in order to properly advise the client, minimize interruptions in schooling, and assure appropriate educational placement. Education is an essential part of good rehabilitative outcomes, and practitioners must assist clients in navigating the complicated maze of educational law to assure access to school and needed services.⁵⁵⁰

This chapter discusses the educational consequences associated with juvenile court involvement and practical issues that arise when youth are in the juvenile delinquency system.

§ 11.1 INFORMATION SHARING AND NOTIFICATION OF ARREST/COURT PROCEEDINGS

One immediate consequence of juvenile court involvement is that the youth's school may find out about the juvenile court proceeding. This may happen upon the filing of court papers for certain offenses before the youth is adjudicated "guilty" of any crime. This contributes to negative perceptions about the youth that may impact a range of school-related issues. Even if the school is not aware of the youth's juvenile court case prior to adjudication, for certain offenses notification to the school follows adjudication, further contributing to the stigma associated with court involvement.

PERMISSIVE NOTIFICATION AFTER PETITION FILED

When a juvenile court petition is filed or a complaint is filed in any court alleging that a youth of compulsory school age or currently enrolled pupil "(a) has used, sold, or possessed narcotics or other hallucinogenic drugs or substances; (b) has inhaled or breathed the fumes of, or

550 The juvenile court has long recognized that best practices must account for meaningful access to appropriate education (See California Standards of Judicial Administration section 5.40(g-h).) In 2008, the Judicial Council promulgated California Rule of Court, rule 5.651 which mandates that court probation officers provide information sufficient for the court to ensure each youth before the court is receiving the education to which he or she is entitled.

ingested any poison classified as such in section 4160 of the Business and Professions Code; or (c) has committed felonious assault, homicide, or rape the district attorney *may*, within 48 hours, provide written notice to the superintendent of the school district ...”⁵⁵¹

MANDATORY NOTIFICATION BEFORE AND AFTER ADJUDICATION

BEFORE ADJUDICATION

Schools are mandated to report to law enforcement any conduct that may rise to a violation of section 245 of the Penal Code, possession or sale of narcotics or weapons, and any suspensions or expulsions related to violation of conduct in subdivisions (c) or (d) of Education Code section 48900.⁵⁵²

For those students that have an Individualized Education Program (IEP) the school must comply with the Individuals with Disabilities Education Act, (IDEA),⁵⁵³ when reporting the conduct to law enforcement. The 1997 amendments to IDEA added language addressing the reporting of crimes allegedly committed by students with disabilities. Specifically, these amendments qualified that upon reporting a crime, the schools *must* transmit the youth’s IEP to the agency that took the report.⁵⁵⁴

A 2002 amendment to California Education Code, consistent with the IDEA amendment, provides:

The principal of a school or the principal’s designee reporting a criminal act committed by a school age individual with exceptional needs ... shall ensure that copies of the special education and disciplinary records of the pupil are transmitted, as described in paragraph (9) of subsection (k) of Section 1415 of Title 20 of the United States Code, for consideration by the appropriate authorities to whom he or she reports the criminal act. Any copies of the pupil’s special education and disciplinary records may be transmitted only to the extent permissible under the federal Family Educational Rights and Privacy Act of 1974.⁵⁵⁵

The mandated disclosure of special education and disciplinary records is also codified in the Family Educational Rights and Privacy Act of 1974 (FERPA) and refers to the release of education records which must be according to written parental consent *except* “when the allowed reporting or disclosure concerns the juvenile justice system and such system’s ability to effectively serve, prior to adjudication, the student whose records are released.”⁵⁵⁶

551 Ed. Code, § 48909.

552 Ed. Code, § 48902.

553 20 U.S.C. § 1400 et seq.

554 20 U.S.C. § 1415(k)(6)(B); Significantly, the legislative history of the 1997 behavior and disciplinary amendments cautions that schools may not report crimes to even appropriate authorities where doing so would circumvent the school’s obligations to the student under IDEA. (See statement of Sen. Harkin, one of the legislation’s co-sponsors, at Cong. Rec. May 14, 1997, at S4403, stating, “The bill also authorizes ... proper referrals to police and appropriate authorities when disabled children commit crimes, so long as the referrals, do not circumvent the school’s responsibilities under IDEA.”)

555 Ed. Code, § 48902 (f).

556 See 20 U.S.C. § 1232(g)(b)(1)(E)(ii)(I)-(II) which states “and the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under the State law without the prior written consent of the parent of the student.” See also, 34 C.F.R. § 99.31 and § 99.38.



AFTER ADJUDICATION

The juvenile court *must* provide:

[W]ritten notice that a minor enrolled in a public school ... has been found by a court of competent jurisdiction to have committed any felony or any misdemeanor involving curfew, gambling, alcohol, drugs, tobacco products, carrying of weapons, a sex offense listed in section 290 of the Penal Code, assault or battery, larceny, vandalism, or graffiti ... within seven days to the superintendent of the school district of attendance.

(Welf. & Inst. Code, § 827 (b)(2))

The notice “shall include only the offense found to have been committed by the minor and the disposition of the minor’s case.”⁵⁵⁷

State law requires the expeditious transmission of notification by the district superintendent to the principal at the school of attendance, to counselors directly supervising or reporting on the behavior or progress of the youth, and “to any teacher or administrator directly supervising or reporting on the behavior or progress of the youth whom the principal believes needs the information to work with the pupil in an appropriate fashion, to avoid being needlessly vulnerable or to protect other persons from needless vulnerability.”⁵⁵⁸ Information received by a teacher, counselor, or administrator is to be received in confidence for the limited purpose of rehabilitating the minor and protecting students and staff, and shall not be further disseminated by the teacher, counselor, or administrator, except insofar as communication with the juvenile, his or her parents or guardians, law enforcement personnel, and the juvenile’s probation officer is necessary to effectuate the youth’s rehabilitation or to protect students and staff.⁵⁵⁹ Moreover, intentional violation of the confidentiality provisions is a misdemeanor punishable by a \$500 fine.⁵⁶⁰

If a youth is removed from public school as a result of the court’s finding, the superintendent must maintain the information in a confidential file and defer transmittal until the youth is returned to public school.⁵⁶¹ If the youth returns to a different school district, the probation or parole officer must transmit the information to the superintendent in the last district of attendance, who must transmit the notice to the superintendent in the new district.⁵⁶²

Any information received from the court must be kept in a separate confidential file at the school of attendance and must be transferred to the youth’s subsequent schools of attendance and maintained until the youth graduates from high school, is released from juvenile court jurisdiction, or reaches the age of 18 years, whichever occurs first. After that time, the confidential record must be destroyed.⁵⁶³ The youth or his parent or guardian may make a written request to review the youth’s school records to ensure that they have been destroyed, and the principal must

557 *Ibid.*

558 *Ibid.*

559 Welf. & Inst. Code, § 827 (b)(2).

560 *Ibid.*

561 Welf. & Inst. Code, § 827 (b)(3).

562 *Ibid.*

563 Welf. & Inst. Code, § 827 (d).

respond within 30 days confirming that the records have been destroyed, or explaining why destruction has not yet occurred.⁵⁶⁴

COMPUTERIZED DATA SYSTEM ACCESS FOR SCHOOL DISTRICTS

Under the Welfare and Institutions Code section 827.1, subdivision (a) cities and counties *may* establish computerized data base systems that include probation, law enforcement, and school related information about minors. School districts are among the entities that may access this information. However, all records in the system must be non-privileged and release must be authorized under state or federal law or regulation, regarding youth under the jurisdiction of the juvenile court pursuant to Section 602, or for whom a program of supervision has been undertaken where a petition could otherwise be filed pursuant to Section 602.

In addition, each agency and school district is required to maintain access logs and develop security procedures to preclude unauthorized access and disclosure of information.⁵⁶⁵

§ 11.2 SUSPENSION OR EXPULSION

Because petitions involving school related behavior may also result in school disciplinary action for the underlying behavior, it is important for counsel to be aware of suspension and expulsion issues.

Students are entitled to due process protections prior to any suspension or expulsion from school. California’s disciplinary code, set forth in Education Code sections 48900 through 48927 is quite detailed. The requirements that school districts must follow for suspensions begin at Education Code section 48911, and the requirements for expulsions begin at Education Code section 48918. Apart from statutory law, school boards must establish rules and regulations governing the procedures for expulsion hearings and these rules are often posted on a school district’s website.⁵⁶⁶

There are specific notice, timing, and hearing requirements governing expulsions, and it is not uncommon for expulsions to be overturned because school districts fail to follow the requirements set forth in the Education Code. Students may be represented by legal counsel at expulsion hearings⁵⁶⁷ and are entitled to at least one postponement of an expulsion hearing for a period of no more than 30 calendar days. Any additional postponement may be granted at the discretion of a school board.⁵⁶⁸

Technical rules of evidence do not apply in expulsion hearings.⁵⁶⁹ Hearsay evidence is allowable, but the expulsion recommendation may not be based on hearsay alone.⁵⁷⁰ Also, the panel may consider redacted (anonymous) statements if they find good cause to withhold the individual’s

⁵⁶⁴ *Ibid.*

⁵⁶⁵ Ed. Code, § 49076 (c).

⁵⁶⁶ Ed. Code, § 48918.

⁵⁶⁷ Ed. Code, § 48918 (b)(5).

⁵⁶⁸ Ed. Code, § 48918 (a).

⁵⁶⁹ “... relevant evidence may be admitted and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs,” and a decision to expel must be based on “substantial evidence relevant to the charges adduced” at the hearing. (Ed. Code, § 48918 (h).)

⁵⁷⁰ Ed. Code, § 48918 (f).



identity, such psychological or physical harm.⁵⁷¹ Redacted sworn testimony is allowable even if a subpoena was issued for the witness.⁵⁷² However, there are limits to this, and courts have struck down the use of declarations where no significant and specific risk or harm was shown.⁵⁷³

GROUNDS FOR SUSPENSION OR EXPULSION

California students *may* be suspended or recommended for expulsion from school by a superintendent or principal if they determine that a student has committed one of a long list of enumerated acts specified in the Education Code.⁵⁷⁴ The act must be related to school activity or school attendance, including but not limited to acts committed (1) while on school grounds; (2) while coming or going from school; (3) during the lunch hour whether on or off of school grounds; or (4) during or while coming or going to a school sponsored activity.⁵⁷⁵ The list of acts includes both criminal offenses that would form the basis of juvenile court petitions and other misconduct that would not otherwise be criminal. Notably, the statutory language does not require proof of an adjudication of wardship for the offense, only proof that the youth committed the act. The following acts by a pupil are included (subdivisions are given in the order they appear in Education Code section 48900):

- (a)(1) Caused, attempted to cause, or threatened to cause physical injury to another person;
- (a)(2) Willfully used force or violence upon the person of another, except in self-defense;⁵⁷⁶
- (b) Possessed, sold, or otherwise furnished a firearm, knife, explosive, or other dangerous object, without written permission from a certificated school employee;
- (c) Unlawfully possessed, used, sold, or otherwise furnished, or been under the influence of a controlled substance listed in Health and Safety Code § 11053 et seq., an alcoholic beverage, or an intoxicant of any kind;
- (d) Unlawfully offered, arranged, or negotiated to sell a controlled substance listed in Health and Safety Code section 11053 et seq., an alcoholic beverage, or an intoxicant of any kind, and either sold, delivered, or otherwise furnished to a person another liquid, substance, or material and represented it as a controlled substance, alcoholic beverage, or intoxicant;
- (e) Committed or attempted to commit robbery or extortion;
- (f) Caused or attempted to cause damage to school property or private property;⁵⁷⁷
- (g) Stole or attempted to steal school property or private property;
- (h) Possessed or used tobacco, or products containing tobacco or nicotine products,

571 *Ibid.*

572 Ed. Code, § 48918 (h)(i)(3).

573 In *John A. v. San Bernardino City Unified School District* (1982) 33 Cal.3d 301, 308, the court struck down the use of declarations in expulsion hearings except in very limited circumstances: “We do not preclude the board from relying upon statements and reports where it finds that disclosure of identity and producing the witnesses would subject the informant to significant and specific risk of harm ... While the risk of retaliation may be substantial in some cases, it does not warrant board reliance on reports in all cases or in the instant case where there is no showing or finding of a significant and specific risk of harm.”

574 Ed. Code, § 48900 (a) – (r).

575 Ed. Code, § 48900 (s).

576 Education Code section § 48900, subdivision (t), provides that a pupil who has been adjudged by a juvenile court to have committed, as an aider and abettor, a crime of physical violence in which the victim suffered great bodily injury or serious bodily harm shall be subject to discipline pursuant to Education Code section 48900, subdivision (a). However, a pupil who aids or abets, as defined in Section 31 of the Penal Code, the infliction or attempted infliction of physical injury to another person, may be subject to suspension, but not expulsion.

577 The student’s parents may also be held liable as specified for injury or damage caused by a student’s willful misconduct. (Ed. Code, § 48904 (a).) Grades, diplomas and transcripts may also be withheld for damages to school property until such damages are paid. However, in such cases, a pupil must be afforded due process and if they are unable to pay for the damages, the school must provide for a program of voluntary work for the minor in lieu of monetary damages. (Ed. Code, § 48904 (b).)

including, but not limited to, cigarettes, cigars, miniature cigars, clove cigarettes, smokeless tobacco, snuff, chew packets, and betel...[Does not include use of pupil's own prescription products];

- (i) Committed an obscene act or engaged in habitual profanity or vulgarity;
- (j) Unlawfully possessed or unlawfully offered, arranged, or negotiated to sell drug paraphernalia, as defined in section 11014.5 of the Health and Safety Code;
- (k) Disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties;
- (l) Knowingly received stolen school property or private property;
- (m) Possessed an imitation firearm ... meaning a replica that is so substantially similar in physical properties to an existing firearm as to lead a reasonable person to conclude that the replica is a firearm;
- (n) Committed or attempted to commit a sexual assault as defined in sections 261, 266c, 286, 288, 288a, or 289 of the Penal Code or committed a sexual battery as defined in section 243.4 of the Penal Code;
- (o) Harassed, threatened, or intimidated a pupil who is a complaining witness or a witness in a school disciplinary proceeding for the purpose of either preventing that pupil from being a witness or retaliating against that pupil for being a witness, or both;
- (p) Unlawfully offered, arranged to sell, negotiated to sell, or sold the prescription drug Soma;
- (q) Engaged in, or attempted to engage in, hazing, [defined as a method of initiation or pre-initiation into a pupil organization or body, whether or not the organization or body is officially recognized by an educational institution], which is likely to cause serious bodily injury or personal degradation or disgrace resulting in physical or mental harm to a former, current, or prospective pupil. "Hazing" does not include athletic events or school-sanctioned events;
- (r) Engaged in an act of bullying, including, but not limited to, bullying committed by means of an electronic act, as defined in Education Code section 32261, subdivisions (f) and (g),⁵⁷⁸ directed specifically toward a pupil or school personnel.

Additional statutory grounds for suspension or expulsion recommendations include commission of the following acts:

- Committed sexual harassment as defined in Education Code section 212.5;⁵⁷⁹
- Caused, attempted to cause, threatened to cause, or participated in an act of, hate violence, as defined in Education Code section 233, subdivision (e), which refers to any act punishable under section 422.6, 422.7, or 422.75 of the Penal Code;⁵⁸⁰
- Intentionally engaged in harassment, threats, or intimidation, directed against school district personnel or pupils that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting class work, creating substantial disorder, and invading the rights of either school personnel or pupils by creating an intimidating or hostile educational environment;⁵⁸¹ or

578 An "electronic act" is "the transmission of a communication, including, but not limited to, a message, text, sound, or image by means of an electronic device, including, but not limited to, a telephone, wireless telephone or other wireless communication device, computer, or pager." (Ed. Code, § 32261 (g).)

579 Ed. Code, § 48900.2.

580 Ed. Code, § 48900.3.

581 Ed. Code, § 48900.4.



- Has made terroristic threats against school officials or school property, or both, as defined.⁵⁸²

MANDATORY GROUNDS FOR EXPULSION

Under Education Code section 48915, subdivision (c), the principal or superintendent of schools *must immediately suspend, and must recommend expulsion* of a pupil that he or she determines has committed any of the following acts at school or at a school activity off school grounds:

- Possessing, selling, or otherwise furnishing a firearm without prior written permission as specified;
- Brandishing a knife⁵⁸³ at another person;
- Unlawfully selling a controlled substance listed in Health & Safety Code section 11053 et seq.;
- Committing or attempting to commit a sexual assault or committing a sexual battery as defined in subdivision (n) of section 48900;
- Possession of an explosive.⁵⁸⁴

Upon a finding that the pupil has committed one of the acts in Section 48915, subdivision (c), the governing board *must* expel the pupil and refer them to a school program prepared to accommodate pupils with discipline problems, which is neither a comprehensive school, nor the school site previously attended by the pupil.⁵⁸⁵

QUASI-MANDATORY GROUNDS FOR EXPULSION

Under Education Code section 48915, subdivision (a), a superintendent or principal *must* recommend expulsion for the following acts, “*unless the principal or superintendent finds that expulsion is inappropriate, due to the particular circumstance*”:

- Causing serious physical injury to another person, except in self-defense;
- Possession of any knife or other dangerous object of no reasonable use to the pupil;
- Unlawful possession of any controlled substance listed in ... [Health and Safety Code section 11053 et seq.] ... except for the first offense for the possession of not more than an ounce of marijuana other than concentrated cannabis;
- Robbery or extortion;
- Assault or battery, as defined in sections 240 and 242 of the Penal Code, upon any school employee.⁵⁸⁶

582 Ed. Code, § 48900.7.

583 “Knife” is defined as “any dirk, dagger, or other weapon with a fixed, sharpened blade fitted primarily for stabbing, a weapon with a blade fitted primarily for stabbing, a weapon with a blade longer than 3 ½ inches, a folding knife with a blade that locks into place, or a razor with an unguarded blade.” (Ed. Code, § 48915 (g).)

584 The Federal Gun-Free Schools Act of 2002 requires school districts across the United States to pass what have become known as “zero tolerance” policies for firearms in order to remain eligible for funds. The Act requires one calendar year of expulsion for any student bringing a firearm to school and referral of the student to law enforcement. The California Legislature amended Ed. Code, § 48915 (c) to fulfill the federal mandate.

585 Ed. Code, § 48915 (d).

586 Ed. Code, § 48915 (a). The provisions of Section 48915 (a) can be confusing to some school administrators who mistakenly believe that they have no discretion other than to recommend expulsion. For a good discussion concerning a school district’s obligation to exercise its discretion for offenses listed under Section 48915 (a) see 80 Ops.Cal.Atty.Gen. 348 (1997).

Further, under Education Code section 48915, subdivision (b), the governing board *may* order expulsion upon finding that the pupil committed one of the acts listed in section 48915, subdivision (a), or section 48900, subdivisions (a) through (e), *if* there is also a finding that (1) other means of correction are not feasible or have repeatedly failed to bring about proper conduct; and/or (2) due to the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others.⁵⁸⁷

And, under Education Code section 48915, subdivision (e), the governing board *may* order expulsion upon finding that the pupil committed an act listed in section 48900, subdivision (f) through (m) or section 48900.2, 48900.3, or 48900.4 while on school grounds or at a school activity off grounds, *if* there is also a finding that (1) other means of correction are not feasible or have repeatedly failed to bring about proper conduct; and/or (2) due to the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others.

DISCRETION TO IMPOSE ALTERNATIVES TO EXPULSION OR SUSPENSION

Throughout the Education Code there are provisions that allow for the use of alternatives to suspension, expulsion, or exclusion. These provisions may be useful to counsel when there is a need to show that the school system has appropriate mechanisms for handling a particular youth’s needs without keeping the youth out of school or without resorting to punitive measures through the juvenile court system. The alternatives include the following:

- A superintendent or principal has the discretion to use alternatives to suspension or expulsion, including “counseling and an anger management program” for pupils subject to discipline under section 48900;⁵⁸⁸
- “As part of or instead of disciplinary action prescribed by this article,” a pupil may be required to perform “community service,” which includes work performed in non-school hours in the community or on school grounds in the areas of outdoor beautification, community or campus betterment, and teacher, peer, or youth assistance programs;⁵⁸⁹
- A governing board may suspend the enforcement of an expulsion order and may, as a condition of the suspension of enforcement, assign the pupil to a school, class, or program that is deemed appropriate for the rehabilitation of the pupil. During the period of the suspension of the order, the pupil is deemed to be on probationary status;⁵⁹⁰
- A pupil suspended may be assigned to a supervised suspension classroom for the entire period of the suspension.⁵⁹¹

SUSPENSION OR EXPULSION OF YOUTH WITH DISABILITIES

Youth with disabilities may also be suspended or expelled; however the school must afford due process protections in accordance with federal law.⁵⁹² The due process protections are designed

587 Each of the referenced sections has internal references to lists of offenses in other sections. Defenders and advocates need to carefully comb through each of the sections to understand which offenses are subject to consideration for expulsion.

588 Ed. Code, § 48900 (v).

589 Ed. Code, § 48900.6.

590 Ed. Code, § 48917.

591 Ed. Code, § 48911.1 (a).

592 Ed. Code, § 48915.5



to minimize disruption of their educational program, and to prevent punishment that is related to a disability.

A youth with a disability may be suspended for up to ten consecutive school days, and for not more than ten consecutive school days in that school year for separate incidents of misconduct.⁵⁹³ Removal of a youth with a disability for more than ten days is considered a change in placement,⁵⁹⁴ and youth must receive a “manifestation determination” to ascertain whether the youth’s behavior was a manifestation of his or her disability.⁵⁹⁵ If the behavior is a manifestation of the youth’s disability, the youth’s IEP team must conduct a functional behavioral assessment and implement a behavior intervention plan that includes services designed to address the behavior so it does not recur.⁵⁹⁶

If the behavior is not a manifestation of the youth’s disability, regular disciplinary action may be taken. However, even then, the IEP team may be tremendously useful in developing a service plan that provides meaningful services and less onerous removal provisions than might be the case for youth who do not have a disability.

If the youth is removed for more than ten days, the school must provide services to the youth that enable the youth to participate in the general educational curriculum and to progress in meeting the goals of the youth’s IEP.⁵⁹⁷

Also, despite restrictions on discipline of students with disabilities, a pupil, including an individual with exceptional needs, as defined in Education Code section 56026, may be suspended for any of the reasons enumerated in Section 48900 upon a first offense, if the principal or superintendent of schools determines that the pupil violated subdivision (a), (b), (c), (d), or (e) of Section 48900 or that the pupil’s presence causes a danger to persons or property, or threatens to disrupt the instructional process.⁵⁹⁸

§ 11.3 DIRECTIVES TO ATTEND “ALTERNATIVE” SCHOOLS OR PROGRAMS

Another consequence of juvenile court involvement is that youth may be required to attend alternative educational programs rather than a regular comprehensive middle school or high school program. This may happen through probation officer directives because of commitment to an institution, as a consequence of school discipline for the same misconduct involved in the juvenile court proceedings, or simply because schools are reluctant to reenroll youth who have been involved in the juvenile system.

This is a vitally important issue that requires advocacy and attention to the full array of components of education needed to produce good outcomes. Regular school programs provide full academic curricula, plus access to athletic programs, extracurricular, and social activities

593 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).

594 20 U.S.C. § 1415(k)(1)(B).

595 20 U.S.C. § 1415(k)(1)(E)(i); Ed. Code, § 48915.5.

596 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(d)(1)(ii). However, pursuant to Cal. Code Regs. tit. 5, § 3052, and Ed. Code, §§ 56520–56525, the IEP team is mandated to conduct a functional analysis assessment (FAA), and behavior interventions.

597 20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(b)(2).

598 Ed. Code, § 48900.5. And see Ed. Code, § 48915.5, on suspension and expulsion of pupils with exceptional needs.

that contribute to healthy adolescent development. Attending regular school also gives youth the opportunity to build a resume that can help them in applying for college and employment.⁵⁹⁹ While successful alternative programs do exist, all too many of them, even those that are designed to help youth with educational gaps or deficits, fall short of the mark in academic offerings. A Legislative Analyst's Office report on California alternative schools revealed a system bereft of performance measures or accountability, thus allowing some districts to purposely use alternative programs to avoid responsibility for low-achieving students.⁶⁰⁰ Youth attending alternative school programs often report that they are treated like "losers."⁶⁰¹ To make things worse, alternative schools enroll a disproportionate number of Black and Latino youth, thus contributing further to educational gaps for those youth.⁶⁰²

Unless there is a specific reason that an alternative program would be the better choice for a particular client, counsel should advocate for placement in the public comprehensive school setting.⁶⁰³ If the youth will be placed in a foster home, group home, or relative placement there is a specific law to support this advocacy. Pursuant to Education Code section 48853, probation supervised youth, who are placed in group homes or foster care, are entitled to "in all instances, educational and school placement decisions ... based on the best interests of the child."⁶⁰⁴ In addition, placement in a regular public school must be considered first before placement in any alternative educational program.⁶⁰⁵ Educational placement decisions must promote educational stability and ensure a meaningful opportunity to meet state academic achievement standards, placement in the least restrictive educational programs, and access to the academic resources, services, and extracurricular and enrichment activities available to all pupils.⁶⁰⁶ In addition, the placement decision *must* include the education rights holder, which in most cases is the parent.



PRACTICE TIP

Counsel should determine whether the parent is actively participating in the youth's education or requires advocacy since the person who holds education rights, also holds consent power for access to education entitlements. This is especially important for foster youth who may have no active education representation. California Rule of Court, rules 5.650 and 5.651 mandate that the court and counsel to ensure active education representation for youth in juvenile court.

599 See, e.g., Nellis and Wayman, Youth Reentry Task Force, Juvenile Justice and Delinquency Prevention Coalition, *Back on Track: Supporting Youth Reentry from Out-of-Home Placement to the Community* (2009), pp. 18-19, 40, available at http://www.sentencingproject.org/doc/publications/CC_youthreentryfall09report.pdf.

600 Legislative Analyst's Office, *Improving Alternative Education in California* (February 2007), p. 3, available at http://www.lao.ca.gov/2007/alternative_educ/alt_ed_020707.pdf.

601 See Burrell, Getting Out of the Red Zone: Youth from the Juvenile Justice and Child Welfare Systems Speak Out About the Obstacles to Completing Their Education, and What Could Help, Youth Law Center (2003), available at <http://www.ylc.org/pdfs/GettingOutOftheRedZone.pdf>.

602 Enrollment data for alternative schools in California can be found at DATAQUEST <http://data1.cde.ca.gov/dataquest/> by linking to "other choices" under "Level" and "enrollment" under "subject".

603 For example, there may be situations where the youth needs a certain amount of credits to graduate and only a comprehensive school may offer the courses needed for those credits.

604 Ed. Code, § 48853 (g). See also Ed. Code § 48850 (a); Welf. & Inst. Code, § 361 (a).

605 Ed. Code, § 48853 (a) and (b). In addition, Welf. & Inst. Code, § 361 (a)(5) provides that: "All educational and school placement decisions shall seek to ensure that the child is in the least restrictive educational programs and has access to the academic resources, services, and extracurricular and enrichment activities that are available to all pupils. In all instances, educational and school placement decisions shall be based on the best interests of the child."

606 Ed. Code, §§ 48850 (a) and 48853 (g).



Apart from general advocacy for placement in a regular program, counsel or advocates working with youth may be able to use the due process provisions associated with specific alternative programs to object to a particular placement. A number of the alternative programs are supposed to be “voluntary” or give youth the opportunity to object to placement. When a particular alternative program is proposed, counsel or advocates should assist the youth in raising objection to placements that are not in their best interest. Some of the pertinent provisions are included in the alternative program descriptions at the end of this section.

As noted in earlier sections of this chapter, placement in an alternative school program may also be governed by a school district’s expulsion process. For youth who have also been subject to an expulsion order, counsel should be aware of the school district’s procedures for readmission once the term of order has run its course. At the time of the expulsion, a school board must recommend a plan of rehabilitation for the youth, which may include “periodic review as well as assessment at the time of review for readmission.”⁶⁰⁷ Governing Boards must also adopt rules and regulations establishing a procedure for requests for the filing, processing and review of requests for readmission. A Governing Board “shall readmit the pupil, unless the governing board makes a finding that the pupil has not met the conditions of the rehabilitation plan or continues to pose a danger to campus safety or to other pupils or employees of the school district.”⁶⁰⁸ Counsel should assure that youth are excluded from school no longer than is permitted by these provisions either through direct advocacy or by facilitating advocacy by educational experts.

If efforts with respect to educational placement are unsuccessful and the youth is placed in an unwanted alternative school program or excluded from school, counsel should stay engaged after the dispositional phase to make sure the youth is receiving services contemplated by the court and the Education Code. If the youth is not receiving required services, counsel should move for a modification of the placement (under Welfare and Institution Code section 778) and/or join the educational agency in the proceedings (under Welfare and Institution Code section 727 and California Rule of Court, rule 5.575) so that the court may inquire about the failure to provide statutorily required services.⁶⁰⁹

All too often, probation staff or the court defer to the representations made by school administrators concerning enrollment requirements for a regular placement versus an alternative one. Knowledge of the relevant Education Code provisions concerning alternative schools may help persuade probation and the court as to why such a particular educational placement is not appropriate. The following are some of the categories of alternative schools to which youth in the juvenile court system are relegated.

607 Ed. Code, § 48916 (b).

608 Ed. Code, § 48916 (c). If readmission is denied, a governing board must make a determination “either to continue the placement of the pupil in the alternative educational program initially selected for the pupil during the period of the expulsion order or to place the pupil in another program that may include, but need not be limited to, serving expelled pupils, including placement in a county community school.” (Ed. Code, § 48916 (d).) The board must also provide the pupil and parents written notice “describing the reasons for denying the pupil readmittance into the regular school district program.” (Ed. Code, § 48916 (e).)

609 See also Cal. Rules of Court, Standard 5.40(h)(4).

COMMUNITY SCHOOLS⁶¹⁰

Community schools are operated by County Offices of Education (COE's). Enrollment is limited to students expelled from a regular school district for reasons other than those specified in Education Code section 48915, subdivision (a) or (c), unless the student is on probation or parole, not attending school, and referred by probation pursuant to sections 300, 601, 602, and 654 of the Welfare and Institutions Code. Enrollment is also permissible for students referred by a school attendance review board or at the request of the pupil's parent or guardian if approved by school district of attendance.⁶¹¹

Pupils are supposed to receive an IEP based on an educational assessment, and are to be assigned to classes most appropriate for reinforcing or reestablishing educational development, which may include basic educational skill development, on-the-job-training, tutorial assistance, independent study, and individual guidance.⁶¹² The County Board of Education must set academic requirements and "shall enable each pupil to continue academic work leading to the completion of a regular high school program,"⁶¹³ but it is fair to say that community schools are not geared to state's high school graduation curriculum. Be aware that COE's also run most juvenile court schools found in juvenile detention facilities and other secure locations. Too often, youth released from a juvenile detention facility are automatically placed in the COE's community school for no specific reason other than the fact that the youth was previously enrolled in its juvenile court school.⁶¹⁴ COE's collect American's With Disabilities Act funding and other categorical funding for every youth enrolled in one of their respective alternative schools. It is often in the COE's financial interest to enroll a youth in one of its schools for as long as possible, so that its enrollment numbers can be maintained at a certain level. Because of this, COE's may pressure parents to consent even if the youth does not meet enrollment requirements. However, that consent can be rescinded at any time, thereby forcing the school district to place an otherwise eligible student back in a comprehensive school setting.

COMMUNITY DAY SCHOOLS⁶¹⁵

Community day schools are usually established by regular school districts and a school district's governing board must adopt policies that provide procedures for the involuntary transfer of pupils to such a school. Students may be involuntarily transferred to a community day school *only* if they are (1) expelled for any reason; (2) are referred by probation pursuant to Welfare and Institutions Code section 300 or 602; or (3) are referred by a school attendance review board.⁶¹⁶ The minimum school day in community day schools is 360 minutes of classroom instruction and independent study may not be counted as part of the minimum instructional hours; the academic program is supposed to be similar to that available to pupils of a similar age in the school district.⁶¹⁷ The governing statutes state that the program is intended to include the school district's cooperation with COE's, law enforcement, probation and human services

610 Ed. Code, § 1980 et seq.

611 Ed. Code, § 1981.

612 Ed. Code, § 1983 (b) and (c).

613 Ed. Code, § 1983 (d).

614 COE's that operate county community schools must develop plans for providing educational services to expelled students. (Ed. Code, § 48926.) These plans are often posted on COE's website.

615 Ed. Code, § 48660 et seq.

616 Ed. Code, § 48662.

617 Ed. Code, § 48663.

agencies who work with at-risk youth; low pupil-teacher ratio; individualized instruction and assessment; and maximum collaboration with district support services including counselors, psychologists, and pupil discipline personnel.⁶¹⁸

JUVENILE COURT SCHOOLS⁶¹⁹

Juvenile court schools are established by COE's and operated in juvenile halls, camps, ranches, and group homes housing more than 25 youth.⁶²⁰ The law states that the minimum school day for juvenile court schools is 240 minutes; that they must operate year round with specified exceptions, and that they are subject to curricula requirements.⁶²¹ In most instances youth will not have a choice about whether or not to attend these schools because they are detained in the institution in which the school is operated.⁶²² If students graduate during their time at a juvenile court school, California law allows them to receive a diploma issued from the school last attended before incarceration or from the county superintendent.⁶²³ It important to note that school districts and COE's must accept for full or partial credit coursework satisfactorily completed by a pupil while attending a juvenile court school.⁶²⁴

NONPUBLIC, NONSECTARIAN SCHOOLS (INCLUDING GROUP HOME SCHOOLS)⁶²⁵

“Nonpublic school” is a term used by California to identify private schools that have been certified by the Department of Education to provide special education and related services to youth identified through their IEP as an individual with exceptional needs.⁶²⁶ A range of nonpublic, nonsectarian schools contract with local districts, special education local plan areas, or COE's to provide special educational facilities, special education, designated instruction and services needed by students with disabilities when no appropriate public education program is available. The contract must include agreements to provide special education and designated instruction and services, transportation, procedures for documentation, and maintenance of records to assure that proper credit is received. The contract must also include an individual services agreement for each pupil, an evaluation process, and a method for evaluating progress. However, responsibility for legally required reviews under the IDEA remains with the district, special educational local plan area, or county office. Changes to individual service agreements may only be made through the IEP process. A licensed children's institution (including group homes) may not require, as a condition of placement, that the student attend a nonpublic, nonsectarian school operated by the institution.⁶²⁷

Significantly, youth may not be required to attend nonpublic schools operated by residential placements, and a placement may not require that youth have an IEP as a condition of

618 Ed. Code, § 48660.1.

619 Ed. Code, § 48645 et seq.

620 Ed. Code, § 48645.

621 Ed. Code, § 48645.3.

622 However, youth in group homes may have more opportunity to demand placement in a comprehensive high school. (Ed. Code, § 48853.)

623 Ed. Code, § 48645.5.

624 Ed. Code, § 48645.5.

625 Ed. Code, §§ 56365, 56366, 56366.9, and 56383.

626 Ed. Code, § 56034

627 Ed. Code, § 56366.9.

admission.⁶²⁸ These legal protections are circumvented when COE's establish juvenile court schools or community schools on the same grounds or across the hallway from the nonpublic school associated with a particular group home. Youth from the group home with no IEP, especially those from out of county, may be forced to attend the alternative school maintained by the COE's. This practice effectively circumvents their rights under Education Code section 48853.

CONTINUATION SCHOOLS⁶²⁹

Continuation schools are designed for students 16 and older who are at risk of not completing their education. Students may be involuntarily transferred to continuation school for truancy or commission of an offense for which they could be suspended or expelled under section 48900 *only* if other means have failed to bring about pupil improvement. However, a pupil may be involuntarily transferred for a first offense under section 48900 if the pupil's presence causes a danger to others or threatens to disrupt the educational process.⁶³⁰ Decisions to transfer must be in writing and notice must be given to parents informing them of the opportunity to request a meeting with the district prior to the transfer.⁶³¹

Students must be provided with four 60-minute classes per week or 15 hours per week if they are not regularly employed⁶³² and an opportunity to complete academic courses for high school graduation.⁶³³ Continuation schools must also provide programs emphasizing occupational orientation or work-study, and intensive guidance services. Individualized programs include independent study, regional occupational programs, work-study, career counseling, and job placement, as a supplement to classroom instruction.⁶³⁴ State law provides that no involuntary transfer to a continuation school shall extend beyond the end of the semester during which the acts leading directly to the involuntary transfer occurred unless the local governing board adopts a procedure for yearly review of the involuntary transfer conducted pursuant to this section at the request of the pupil or the pupil's parent of guardian.⁶³⁵

INDEPENDENT STUDY

The alternative education program with the least structure, academic requirements, and access to mainstream activities is "independent study." In independent study, the youth works on his or her own and periodically checks in with a teacher.⁶³⁶ While there may occasionally be situations in which independent study makes sense, the almost complete lack of supervision and loose accountability measures are problematic for the many youth in the juvenile justice system who have already experienced academic failure. Many such youth have a learning style

628 Ed. Code, § 56155.7.

629 Ed. Code, §§ 48400, 48402, 48410, 48430, and 48432.5.

630 Ed. Code, § 48432.5.

631 *Ibid.* The parents must also be given the opportunity to inspect all documents relied upon, question any evidence and witness presented, and present evidence on the pupil's behalf.

632 Ed. Code, §§ 48402

633 Ed. Code, §§ 48400, 48402, and 48430.

634 Ed. Code, § 48430.

635 Ed. Code, § 48432.5.

636 Ed. Code, §§ 51745, 51747.



that requires interaction and direct instruction, or simply need more supervision to get their work done and to stay off the streets. Others may have unidentified disabilities that will continue to elude detection.

Students may be placed in “independent study” in lieu of attending a school program only on a voluntary basis,⁶³⁷ but the reality is that some students are pushed out of other programs for a variety of reasons. Before independent study may be given, the student must be offered the opportunity of participating in alternative classroom instruction⁶³⁸ and an agreement to participate in independent study is valid only for a semester or half-year on a year round calendar.⁶³⁹ Youth with disabilities (“children with exceptional needs” in California) may not be in independent study unless their IEP provides for such participation.⁶⁴⁰ Students in independent study must be given “access to all existing services and resources in which the pupil is enrolled ... as is available to all other pupils in the school.”⁶⁴¹ The school district must have policies governing independent study and the agreement in individual cases must specify process for submitting assignments, a process for evaluating the pupil’s work, timelines for completion of work and provisions for missed assignments, beginning and ending dates for independent study, and a statement of the credits that will be earned upon completion of the work.⁶⁴²



PRACTICE TIP

Be wary of situations in which pupil or parental “consent” to independent study is actually coerced. Youth released from a juvenile detention facility may be told that there is no room or opening for them in an appropriate educational placement, so the only option is to be placed on independent study until an opening occurs. Such exclusionary practices should be vigorously challenged.

§ 11.4 ADDITIONAL RESOURCES

California has many educational experts who can provide free advocacy and advice to defenders, youth and their families on school discipline, suspension, and expulsion. A good place to start in identifying such experts is the Pacific Juvenile Defender Center Experts’ Corner (<http://www.pjdc.org>). In addition to the Expert’s Corner, the following resources may assist you:

SUSPENSION/EXPULSION

Legal Services for Children, *Suspension-Expulsion Manual* (July 2005), available on the Pacific Juvenile Defender Center Resource Bank and at:

http://02f45b1.netsolhost.com/WordPress/wp-content/uploads/2008/12/suspension_expulsion_manual.pdf

637 Ed. Code, § 51747 (c)(7).

638 *Ibid.*

639 Ed. Code, § 51747 (c)(5).

640 Ed. Code, § 51745 (c).

641 Ed. Code, § 51746; Cal. Code Regs. tit. 5, § 11701.5.

642 Ed. Code, § 51747 (c)(1)–(6); Cal. Code Regs. tit. 5, § 11700 (e)–(l).

The ACLU of Northern California, *School Discipline - A Guide for Students & Parents*, available in English and Spanish at [http://www.aclunc.org/youth/publications/school_discipline_-_a_guide_for_students_parents_\(english\).shtml](http://www.aclunc.org/youth/publications/school_discipline_-_a_guide_for_students_parents_(english).shtml)

Disability Rights California <http://www.disabilityrightsca.org> has several publications on suspension or expulsion of youth with disabilities available on line. One particularly useful manual is *Special Education Rights and Responsibilities*, Chapter 8, “Discipline of Students with Disabilities,” Community Alliance for Special Education (CASE), and Protection and Advocacy, Inc. (now Disability Rights California), 9th Ed. (2005).

ZERO TOLERANCE

A great deal has been written about the impact of “zero tolerance” policies and the interplay between exclusion from school and penetration into the juvenile justice system. These materials may be useful in formulating arguments in individual cases or in policy advocacy. The Advancement Project site has excellent materials on zero tolerance: *Test, Punish and Push Out: How Zero Tolerance and High Stakes Testing Funnel Youth Into the School to Prison Pipeline* (2010); *Derailed: The School House to Jailhouse Track* (2003); *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies* (2000); available on line at: <http://www.advancementproject.org/digital-library/publications>

SchooltoPrison.org (<http://www.schooltoprison.org/>) is another useful resource that provides a password-protected forum for impact litigators, direct services attorneys, and other legal advocates across the nation to share ideas and strategies to challenge the push-out of youth from schools and into the juvenile and criminal justice systems.

The American Bar Association Juvenile Justice Section adopted a policy on Zero Tolerance in February 2001. The ABA discusses the reasons it opposes zero tolerance policies and suggests alternative away to address misbehavior without suspension or expulsion. It is available at http://www.americanbar.org/groups/child_law/policy/schools.html.

The California Department of Education web site has a helpful page on alternatives to suspension or expulsion, available at <http://www.cde.ca.gov/ls/ss/se/zerotolerance.asp#1>.

INDEPENDENT STUDY

The California Department of Education web site has a helpful page on independent study (<http://www.cde.ca.gov/sp/eo/is/>) which also has a link to excerpts from its very useful Independent Study Operations Manual (<http://www.cde.ca.gov/sp/eo/is/excerpts.asp>).



CHAPTER 12:

COLLEGE APPLICATIONS AND FINANCIAL AID

§ 12.1 COLLEGE AND UNIVERSITY ADMISSIONS

At the present time neither the University of California⁶⁴³ nor the California State University⁶⁴⁴ systems asks questions about juvenile or criminal history in its admissions process. Similarly, a spot check of applications for California Community Colleges did not yield any requirements for disclosure of juvenile or criminal history.⁶⁴⁵

In contrast, private colleges in California vary in the way they handle juvenile and criminal history. For instance, Stanford University and Chapman University use the “Common Application.”⁶⁴⁶ The “Common Application” is used by 275 private colleges around the country. It asks about school discipline and criminal history:

- Have you ever been found responsible for a disciplinary violation at any educational institution you have attended from 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct, that resulted in your probation, suspension, removal, dismissal, or expulsion from the institution?
- Have you ever been *convicted*⁶⁴⁷ of a misdemeanor, felony, or other crime?
- If you answered yes to either or both questions, please attach a separate sheet of paper that gives the approximate date of each incident, explains the circumstances, and reflects on what you learned from the experience.

643 Applications for the University of California, are available on-line during the application period. See, <http://www.universityofcalifornia.edu/admissions/how-to-apply/apply-online/index.html>.

644 The California State University, Application for Undergraduate Admission is available at <http://www.csumentor.edu/AdmissionApp/>.

645 Review of applications in the following Community College Districts by Kelly Hoehn, Youth Law Center (June 2010): Los Rios Community College District, Los Angeles Community College District, San Diego Community College District, West Kern Community College District, Peralta Community College District, San Jose–Evergreen Community College District, available at <http://californiacommunitycolleges.cccco.edu/maps/districts.asp>.

646 The Common Application, Inc., First-Year Application, available at <https://www.commonapp.org/CommonApp/default.aspx>.

647 Emphasis added.

Therefore, a youth with only juvenile arrests or adjudications may truthfully answer that he or she has not been *convicted* of a crime.⁶⁴⁸

Other private colleges in California have their own applications with a variety of background questions. For example, the University of Southern California asks the following questions:

- Beginning in 9th grade, have you ever been judged responsible for academic or behavioral misconduct that led to disciplinary action against you, and/or your suspension, removal or expulsion from any educational institution? If Yes, please explain on a separate sheet.
- Have you ever been convicted of a misdemeanor, felony, or other crime? Have you been arrested on a felony charge? If you responded “yes” to either question, please explain on a separate sheet.⁶⁴⁹

Thus, juvenile court history is not generally solicited in college applications, but careful review of applications at specific schools is needed to understand exactly what information may be requested.

In advising juvenile clients, it is important to recognize that even when an application does not specifically elicit juvenile arrests or juvenile court adjudications, the fact of juvenile court involvement may still emerge in the application process. For example, the “Common Application” asks for detailed information about schools attended. If the youth graduated from a juvenile facility school, the diploma (even when it is a generic diploma from the county superintendent) may provide clues as to its origin. Also, applications often require teacher evaluations, references, and other school reports that may disclose conviction/adjudication information. Further, gaps in personal history may lead to interview questions about the period in which a youth was in a placement or institution as a result of juvenile court involvement.⁶⁵⁰ Finally, the school may learn about adult convictions for drug offenses through the federal FAFSA financial aid application if a copy is sent to the school financial aid office.⁶⁵¹

This is also a tricky area because people in the educational world may not grasp the difference between juvenile adjudications and criminal convictions, or between arrest and adjudication, and may wrongly believe that the youth was lying or attempting to mislead school officials. The situation presents a whole range of insidious collateral consequences for youth who may have thought that their juvenile record would never surface. In advising youth who are applying to college, counsel should find out as much as possible about the application process to help the youth to assess the likelihood that juvenile history will come out, and then help the youth weigh the equities in disclosure versus non-disclosure of the information. In some situations it may be more advantageous to disclose and then have the ability to minimize the effect of the juvenile court history by demonstrating rehabilitation and lessons learned since the time the problems were experienced.

648 Welf. & Inst. Code, § 203.

649 See, for example, University of Southern California, Undergraduate Application (2010), Questions 21 and 22, respectively.

650 Neither University of California nor the California State University systems currently requires interviews for admission, so this is primarily a consideration when applying to private institutions or when interviews arise in the context of scholarships or grants.

651 This is discussed further at §§ 12.3 and 12.4.



§ 12.2 CLINICAL OR PRE-PROFESSIONAL PRACTICE PROGRAMS

Even if there are no restrictions on admission, students in certain fields may face limitations on participation in clinical programs or other pre-professional programs in certain fields. For example, applicants to nursing programs must disclose prior misdemeanor and felony convictions and obtain Live Scan⁶⁵² fingerprints to receive clearance for clinical programs.⁶⁵³ Similarly, applicants to certain social work programs must provide Live Scan fingerprints and may not be placed in required field internships if they have a “criminal record.”⁶⁵⁴ Career planning for youth involved in the juvenile justice system should include advice about these kinds of educational program limitations.

§ 12.3 FEDERAL STUDENT AID

For many youth in the juvenile justice system, access to financial aid is a prerequisite for pursuing higher education. Most are from poor or economically struggling families, so their chances of qualifying based on economic need are often good, but they need to be found acceptable on the other criteria for selection.

The Free Application for Federal Student Aid (FAFSA) is used for a range of federal financial aid, including Pell Grants, Federal Supplemental Educational Opportunity Grants, Academic Competitiveness Grants, TEACH Grants, Stafford Loans, PLUS loans, Federal Work Study, and Perkins Loans.⁶⁵⁵ The application does not limit federal financial aid for youth with juvenile court arrests or adjudications. It impacts only youth tried as adults in that it asks about convictions for the possession or sale of illegal drugs for an offense that occurred while the student was receiving federal student aid (grants, loans or work-study).⁶⁵⁶ And even for those youth, the period of restricted eligibility may be shortened if the student completes a drug rehabilitation program that includes specified drug testing, or the conviction is reversed or set aside.⁶⁵⁷ No other class of offense, including felonies, sex offenses, strikes, or alcohol related offenses results in the automatic denial of federal financial aid eligibility.

Also, federal aid is not available while the student is incarcerated, but may be received while the student is in a halfway house or is on probation.⁶⁵⁸

652 Youth should be advised that Live Scan will reveal juvenile history that has not been sealed.

653 The applicant must explain the circumstances of the conviction and provide documentation of rehabilitation. The Department of Health Services considers the nature and severity of the offense, subsequent acts, recency of acts or crimes, compliance with court sanctions, and evidence of rehabilitation in determining eligibility for certification. Some convictions permanently disqualify individuals from certification. See, e.g., California State University, Los Angeles, School of Nursing, Entry-Level Master Nursing Student Handbook (2008), pages 17-18:
http://www.calstatela.edu/academic/hhs/nursing/PDF/ELMN_Handbook.pdf

654 See, for example, California State University East Bay, Master of Social Work Program, Application for Field Placement, http://class.csueastbay.edu/socialwork/Field_Placement_Application_Form_04-19-07.pdf

655 U.S. Department of Education, Student Aid on the Web, <http://studentaid.ed.gov/>.

656 20 U.S.C. § 1091(r)(1) provides that “[a] student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance . . . shall not be eligible to receive any grant, loan, or work assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42 from the date of that conviction for the period of time specified . . .” A table included in Section 1091(r) specifies intervals of one year, two years, or indefinite, depending on whether the offense involved possession or sales and whether this was a first, second or third offense.

657 20 U.S.C. § 1091(r)(2).

658 U.S. Department of Education, FAQ’s About Federal Student Aid for Incarcerated Individuals, <http://studentaid.ed.gov/students/attachments/siteresources/incarc%20FAQ%20final%2011.17.08.pdf>

20 U.S.C. § 1070a provides in (b)(6), “No Federal Pell Grant shall be awarded under this subpart to any individual who is incarcerated in any Federal or State penal institution . . .”



PRACTICE TIP

All information provided on the FAFSA is supplied to schools that the student designates on the FAFSA form.⁶⁵⁹ This means that even if the college or university application does not ask about criminal history, the school may receive it by virtue of receiving the FAFSA information. Clients should be aware of this in deciding what and how much to disclose and must recognize that juvenile history may come to the attention of the school through references, personal essays, and other clues in the FAFSA application, as well as the college application itself.

§ 12.4 CALIFORNIA FINANCIAL AID

The California Cal Grant program requires students to apply by using the federal FAFSA application. Apart from the information that may surface through that application (see discussion in §12.3, ante), there is no mention of criminal or juvenile adjudications in the list of qualifying factors for Cal Grants.⁶⁶⁰

⁶⁵⁹ June 14, 2010 E-mail from E-Mail Unit, Federal Student Aid, U.S. Department of Education to Youth Law Center.

⁶⁶⁰ See <http://www.calgrants.org/index.cfm?navId=22&>.



CHAPTER 13:

EMPLOYMENT

§ 13.1 STATE EMPLOYMENT AND LICENSING

With some exceptions, employers may not ask about or utilize the following as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program, or any other training program leading to employment:

- Arrests or detentions which did not result in conviction;⁶⁶¹
- Any conviction for which the record has been judicially ordered sealed, expunged, or statutorily eradicated; or
- Any arrest for which a pretrial diversion program has been successfully completed pursuant to Penal Code sections 1000.5 and 1001.5.⁶⁶²

Again, under Welfare and Institutions Code section 203, a juvenile court adjudication does not constitute a conviction. Thus, in general, employers may not think to ask applicants about juvenile adjudications, and youth are not obligated to disclose such adjudications.

EMPLOYERS WHO CAN INQUIRE ABOUT ARRESTS

- Law enforcement:⁶⁶³ arrest and detention information may be released concerning an arrest or detention of a peace officer or applicant for a position as a peace officer,⁶⁶⁴ which did not result in conviction, and for which the person did not complete a post-arrest diversion program, to a government agency employer of that peace officer or applicant, within five years of the arrest.⁶⁶⁵
- Financial institutions:⁶⁶⁶ “Any person who has been convicted of any criminal

661 Lab. Code, § 432.7 (a).

662 Cal. Code Regs. tit. 2, § 7287.4 (d)(1)(C).

663 Lab. Code, § 432.7 (b) (“The information contained in an arrest report may be used as the starting point for an independent, internal investigation of a peace officer ...”)

664 “Peace officer” is defined in Penal Code section 830.

665 Pen. Code, § 13203 (a).

666 12 U.S.C. § 1829(a)(1)(A).

offense involving dishonesty or a breach of trust or money laundering, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense.”⁶⁶⁷

- Health care facilities:⁶⁶⁸ Employees with regular access to patients may be asked to disclose an arrest under any section specified in Penal Code section 290. Employees who will have access to drugs and medication may be asked to disclose an arrest under section 11590 of the Health and Safety Code.⁶⁶⁹

EMPLOYERS WHO CAN ACCESS AN EMPLOYEE'S CRIMINAL HISTORY

Some employers are permitted to access an employee's criminal history information. This is defined as the “master record of information compiled by the Attorney General pertaining to the identification and criminal history of any person, such as name, date of birth, physical description, fingerprints, photographs, dates of arrests, arresting agencies and booking numbers, charges, dispositions, and similar data about the person.”⁶⁷⁰

Employers who can access criminal history information include:

- Public utility that operates a nuclear energy facility⁶⁷¹
- Cable corporations⁶⁷²
- Positions involving supervision or disciplinary power over minors or any person under his or her care⁶⁷³
- Security organizations⁶⁷⁴
- Financial institutions⁶⁷⁵
- Child day care facilities⁶⁷⁶
- Private schools⁶⁷⁷
- Local, state, and federal government agencies like police and fire departments, California Dept. of Corrections, local boards of education, and the United States Postal Service.⁶⁷⁸

In general, the criminal history that can be accessed is limited to convictions and arrests for offenses for which the person is awaiting trial.⁶⁷⁹ Additionally, there are limitations on disclosing convictions that are over 10 years old, with some exceptions.⁶⁸⁰ According to the California Department of Justice (DOJ), the state summary criminal information that is provided to

⁶⁶⁷ *Ibid.*

⁶⁶⁸ Lab. Code, § 432.7 (f).

⁶⁶⁹ *Ibid.*

⁶⁷⁰ Pen. Code, § 11105 (a)(2)(A).

⁶⁷¹ Pen. Code, §§ 11105 (c)(1) and 13300 (c)(1).

⁶⁷² Pen. Code, § 11105 (c)(10)(A).

⁶⁷³ Pen. Code, § 11105.3 (a).

⁶⁷⁴ Pen. Code, § 11105.4 (a).

⁶⁷⁵ Fin. Code, § 550.

⁶⁷⁶ Health & Saf. Code, § 1596.871.

⁶⁷⁷ Ed. Code, § 44237.

⁶⁷⁸ Pen. Code, §§ 11105 and 13300; Ed. Code, § 44332.6.

⁶⁷⁹ Pen. Code, §§ 11105 (c)(10)(A), (n)(1), (p)(2)(A) and (p)(2)(B).

⁶⁸⁰ Pen. Code, § 11105 (n)(2)(A).

authorized employers does not include arrest or dispositional information which occurred when the youth was under 18 years of age, unless the juvenile was tried as an adult.⁶⁸¹

There are some limited circumstances under which the Department of justice can send an arrest history to an employer. However, when that is permitted it is explicitly noted in the relevant statutes⁶⁸² and usually the DOJ is first charged with making a genuine effort to determine the disposition of the arrest.⁶⁸³ And depending on who is seeking the arrest record, the DOJ may release the arrest record whether or not a disposition is available.⁶⁸⁴

Note to reader: There is a cross-over regarding what “arrest” information an employer may receive. The previous section discussed circumstances under which an employer may *inquire* about arrests. This section discusses circumstances under which an employer may *receive* “arrest” information from the DOJ during a criminal history information request.

Only those authorized by statute to receive criminal history information may obtain it.⁶⁸⁵ Furnishing a record to someone not authorized to receive it is a misdemeanor; buying, receiving, or possessing a record that one is not authorized to have is a misdemeanor.⁶⁸⁶



PRACTICE TIP

All sealable juvenile records should be sealed as soon as the law permits.⁶⁸⁷ Sealing should prevent the juvenile court history from being included in the criminal history information that is sent to potential employers.⁶⁸⁸ Nonetheless, juvenile defense attorneys have found out from clients that, despite sealing, employers have been provided with juvenile court information. Counsel should alert clients that this could happen, and advise them about how to handle the situation. For example, the client could be advised to let employers know that under the law, the offense is to be treated as having not occurred, and that there was no intention to mislead the employer. Counsel should also advise the client to contact him or her if the situation arises. If this occurs, counsel should calendar the matter in the court that granted the order for sealing and raise this issue. The court will have to determine whether the respective agencies implemented the sealing order.



PRACTICE TIP

Although the DOJ does not provide juvenile delinquency arrest or disposition information to certain employers, counsel should advise the youth that many employers employ private firms to complete “background checks” on prospective employees. These firms employ a range of tactics to gain information and this may include access to juvenile court history. Also once this information is obtained, it is often stored in databases and passed on to employers without verifying if the information is still accurate. If a youth is not hired due to his or her “criminal history” this may be the result of a private firm conducting background checks, not the DOJ releasing prohibited information.

681 California Department of Justice letter to Youth Law Center, December 21, 2010.

682 E.g., Pen. Code, § 11105 (m)(2)(C), (k) and (l).

683 Ibid.; Pen. Code, § 13203 (c)(1)–(3).

684 See Pen. Code, § 11105 (k); cf. Pen. Code, § 11105 (l).

685 Pen. Code, § 11140 (b).

686 Pen. Code, §§ 11142 and 11143.

687 See Welf. & Inst. Code, §§ 781 and 781.5 for the provisions on when a youth may petition for sealing.

688 But see Pen. Code, § 13203 creating a likely exception for Peace Officer employment.

In general, the DOJ is supposed to send criminal history information only to those who are authorized to receive it. This information is generally limited to convictions or arrests for pending cases. When arrest information can be sent to an employer, the DOJ usually must make an effort to determine how the case was resolved. It is difficult to see how juvenile arrests and juvenile dispositions can ever be sent to employers given the limitations placed on dissemination by the DOJ. And, the only time that a juvenile's records should be sent would be under the circumstances permitting disclosure regarding arrests. However, as discussed in Chapter 3, Juvenile Criminal History Records, there is a good deal of imprecision in language and understanding of juvenile court adjudications, so it is best never to take for granted that the rules will be followed.

LICENSING

Many professions in California require a state or municipal license in order to practice.⁶⁸⁹ As part of their licensing duty, the professions may obtain criminal history information.⁶⁹⁰ This list of agencies in Business and Professions Code section 144 covers a majority of Department of Consumer Affairs agencies. However, licensing requirements exist outside the Department of Consumer Affairs, for professions in other areas including law, alcoholic beverages, gambling and real estate (Business and Professions Code), insurance (Insurance Code), day care (Health and Safety Code), and teaching (Education Code).

Clients may ask “Will this affect my future career opportunities?” The answer depends on whether the client needs a license to work. If the client chooses a career in neurology, car sales, teaching, plumbing, cosmetology, pest control, or truck driving, among many others, he or she will need a license. If the client is an entrepreneur, he or she will face licensing requirements in fields as diverse as construction, child care, moving and storage, selling estate jewelry, and security alarm services. If the client is a chef who simply wants to open a little café, a license will still be needed to serve alcoholic beverages.

⁶⁸⁹ Bus. & Prof. Code, § 144.

⁶⁹⁰ Bus. & Prof. Code, § 144 (a) applies to the following:

- (1) California Board of Accountancy.
- (2) State Athletic Commission.
- (3) Board of Behavioral Sciences.
- (4) Court Reporters Board of California.
- (5) State Board of Guide Dogs for the Blind.
- (6) California State Board of Pharmacy.
- (7) Board of Registered Nursing.
- (8) Veterinary Medical Board.
- (9) Registered Veterinary Technician Committee.
- (10) Board of Vocational Nursing and Psychiatric Technicians.
- (11) Respiratory Care Board of California.
- (12) Hearing Aid Dispensers Advisory Commission.
- (13) Physical Therapy Board of California.
- (14) Physician Assistant Committee of the Medical Board of California.
- (15) Speech-Language Pathology and Audiology Board.
- (16) Medical Board of California.
- (17) State Board of Optometry.
- (18) Acupuncture Board.
- (19) Cemetery and Funeral Bureau.
- (20) Bureau of Security and Investigative Services.
- (21) Division of Investigation.
- (22) Board of Psychology.
- (23) The California Board of Occupational Therapy.
- (24) Structural Pest Control Board.
- (25) Contractors' State License Board.
- (26) Bureau of Naturopathic Medicine.
- (27) The Professional Fiduciaries Bureau.



Licenses may be denied on numerous grounds including the presence of a conviction for a crime, or the commission of an act involving dishonesty, fraud, or deceit.⁶⁹¹ There is a requirement that for a conviction to be a bar to a license it must be substantially related to the qualifications, functions, or duties of the business or profession for which the application is made.⁶⁹² Even where the “substantial relationship” requirement is inapplicable, there is a constitutional requirement for a nexus between the conviction and the occupation. The U.S. Supreme Court has found, for example, that qualifications for bar membership “must have a rational connection with the applicant’s fitness or capacity to practice law.”⁶⁹³ The California Supreme Court has followed a similar path, holding that “a statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to his or her fitness or competence to practice that profession.”⁶⁹⁴

Each licensing board is charged with developing its own criteria to decide whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession.⁶⁹⁵ A licensee cannot be required to reveal a record of arrest that did not result in a conviction or no contest plea.⁶⁹⁶ Except in the case of specific Vehicle Code exceptions, a conviction for an infraction is not a ground for the suspension, revocation, or denial of any license. (See Penal Code section 19.8.)

The criminal history information that professional licensing agencies are permitted to access takes us back to the previous discussion on employers. Like employers, the professional licensing agencies are permitted to request criminal history information from the DOJ. And as was previously discussed, the DOJ may only send information about convictions and information about arrests for which a person is awaiting trial. In short, the DOJ appears to be able to provide the same information to the professional licensing agencies as they are able to provide for employers.⁶⁹⁷

Licensing agencies may receive the same type of information that employers may receive. Like employers, licensing agencies may request criminal history information. It should also be noted that some licensing entities, such as the State Bar of California, have additional procedures that call for information about past juvenile history under the guise of moral character.⁶⁹⁸

691 Bus. & Prof. Code, § 475.

692 Bus. & Prof. Code, § 480 (a)(3)(B).

693 *Schwartz v. Board of Bar Exam of State of N.M.* (1957) 353 U.S. 232, 238-239 [77 S. Ct. 752, 1 L. Ed. 2d 796].

694 *Hughes v. Bd. of Architectural Examiners* (1998) 17 Cal. 4th 763, 788; see also *Morrison v. State Board of Education* (1969) 1 Cal. 3d 214; *Griffiths v. Super. Court* (2002) 96 Cal. App. 4th 757.

695 Bus. & Prof. Code, § 481.

696 Bus. & Prof. Code, § 461.

697 According to the DOJ, state summary criminal history can be disclosed to authorized agencies for licensing and certification purposes pursuant to Penal Code section 11105, subdivisions (k) – (p). However arrest and disposition information for youth would not be disclosed unless the youth was tried as an adult. (California Department of Justice letter to Youth Law Center, December 21, 2010) However, anecdotal information from attorneys practicing in the field of licensing seems to indicate that in some cases licensing boards are receiving “Rap Sheets,” that reveal complete criminal history and not the “summary criminal history.”

698 Applicants to the State Bar of California must submit fingerprints that disclose whether the person has a criminal record in California or elsewhere (Rules of the State Bar of California, title 4, rule 4.5(C)). In addition, the State Bar requires that persons admitted to the Bar have good moral character. (Bus. & Prof. Code, § 6060 (b).) Accordingly, each applicant to the Bar must submit an Application for Determination of Moral Character (Rules of the State Bar of California, title 4, rules 4.16, 4.41.) The instructions for applicants with respect to moral character require “... [d]etails of any arrests, convictions, administrative proceedings, complaints, scholastic discipline.” No distinction is made between adult and juvenile history. (http://www.calbarxap.com/applications/CalBar/PDFs/mc_important_info.pdf) The State Bar statement on moral character determinations provides that “... in determining whether past criminal activity is presently disqualifying, the Committee will consider the nature of the activity; whether there were aggravating or mitigating circumstances; whether restitution has been made, if appropriate; the age and education of the applicant at the time of the activity; the age and education of the applicant at the present time; whether all terms of the sentence, including parole/probation, have been served; the informed opinions of others as to the applicant’s present moral character; and the nature and extent of the voluntary rehabilitative activities, including career, civic, and family activities in which the applicant has been involved since the criminal activity in question.” (See <http://admissions.calbar.ca.gov/MoralCharacter/Factors.aspx>, emphasis added.)

§ 13.2 FEDERAL EMPLOYMENT

In general, only a conviction in adult court will disqualify a person from federal employment. Thus, prior juvenile adjudicated offenses appear extremely unlikely to bar a person from securing a federal job.

The federal statutes that define the bars to federal employment generally use the term “conviction.” As has been previously noted, under Welfare and Institutions Code section 203, if a youth is adjudged to be a ward of the court, that finding does not constitute a conviction.⁶⁹⁹

Thus, “misdemeanors, juvenile adjudications, or convictions in foreign jurisdictions or tribal courts” and not bars to federal employment.⁷⁰⁰ Whenever there is an exception to this general rule, it is explicitly noted in the relevant federal statutes.⁷⁰¹

In conclusion, because juveniles are not “convicted” it appears very unlikely that prior juvenile delinquency history would prevent the youth from securing federal employment.

However, as previously discussed, even if the law does not permit or require disclosure of juvenile court history, it may come out in interviews or through references, so it is best to anticipate and advise the client accordingly. And as noted earlier in this section, all sealable offenses⁷⁰² and all sealable arrests⁷⁰³ should be sealed as soon as the law permits.

699 Although juvenile adjudications do not appear to impact federal employment, there are myriad of federal jobs that are impacted by *convictions*. It is best to consult with an employment attorney if you have a client that is concerned about how a *conviction* will impact potential federal employment.

700 The American Bar Association Commission on Effective Criminal Sanctions & The Public Defender Service for the District of Columbia, *Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations* (2009) pp. 10, 16-17, 19-20. (Herein Internal Exile.)
<http://www.abanet.org/cecs/internalexile.pdf>

701 But see 42 U.S.C. § 16911(8) [defining “convicted” when used with respect to a sex offense, to include juvenile adjudications, but only if the offender is 14 years of age or older at the time of the offense]; 23 U.S.C. § 159(c)(3) [defining “convicted” when used with respect to revocation or suspension of a driver’s license for a drug offense to include juvenile adjudications proceedings].

702 Welf. & Inst. Code, § 781.

703 Welf. & Inst. Code, § 781.5.



§ 14.1 ACCESS TO JUVENILE RECORDS

The existence of a juvenile court record is almost certain to surface if a youth attempts to join the military. Even juvenile court charges that do not result in an adjudication (sustained petition)⁷⁰⁵ are subject to scrutiny and may require a waiver for enlistment.⁷⁰⁶ Routine military background checks generally include contacting the Department of Justice in the state where the applicant has resided for a specified period. If the applicant wants to enter a field that involves a security clearance, the review will be even more intensive and may involve an investigator performing interviews and checking court records to glean further information. Military investigators have access to actual court documents, including access to sealed documents in more intensive investigations. Security clearances may be denied (or revoked for active duty members) if investigators find records that were not disclosed on security clearance applications forms. Most entry level reviews and security clearance investigations will find arrest records and any prior convictions, including those which have been sealed by the court.

Accordingly, clients should fully disclose (and explain) any arrests and/or convictions, including juvenile adjudications. A conviction may not, in itself, be disqualifying, but any misdemeanor or felony conviction will require a waiver. For security clearances, failure to disclose even traffic infractions may have more dire consequences than the “conviction” itself. Trustworthiness and attention to detail are required in any job involving national security. A perception that the person has failed to be forthcoming may result in the person not being allowed to work in the desired field and, potentially, in prosecution for withholding the information on the applications. Additionally, for example, the Marines will deny enlistment, with no waivers, if an applicant has “ever been psychologically or physically dependent upon any drug or alcohol,” or has

704 Much of the information and advice included in this section was provided by Judith Litzenberger, a military law attorney and retired Naval Officer.

705 For example, petitions that result in resolution via Welfare and Institution Code sections 654, 725 or 790 still may result in consequences for the youth even though the youth was never made a Section 602 ward and even if successful completion results in dismissal and sealing.

706 See, for example, Army Regulation 601-210, Chapter 4, *Waiver and Nonwaiver Disqualifications* (June 2007) (available at http://armypubs.army.mil/epubs/pdf/R601_210.PDF).

This regulation treats juvenile adjudications the same as adult convictions (“applicants with a criminal history (regardless of disposition),” Army Reg. 601-210, ch. 4-2(e)(1)), and even considers status offenses (Army Reg. 601-210, Ch. 4-9(p).)

“ever trafficked, sold, or traded in illegal drugs.”⁷⁰⁷ Army recruitment standards state that waivers may not be obtained for applicants who have a history of “antisocial behavior,” have abused alcohol or used illegal drugs, have received certain mental health diagnoses, or have chronic sexually transmitted diseases.⁷⁰⁸

§ 14.2 RECRUITING ISSUES

Recruiting people to join the military is more of an art than a science, and the eligibility rules change with the fluctuating needs of the military. Because these needs change with political, economic, or operational needs, there are no permanent rules for what convictions are disqualifying and what might end in granted waivers. Those decisions vary widely and depend on timing of the applications. When recruiting goals are being met without waivers, waivers are more likely to be denied. However, in six months (or in another recruiting district) things may change, goals may be harder to meet, and the same applicant may be able to obtain a waiver. For example, the Army regulations on recruitment say that if a request for a waiver is denied, a new request can be made six months later.⁷⁰⁹ That said, felony convictions⁷¹⁰ will disqualify clients from joining the military except in times of very dire recruiting needs.⁷¹¹ Waivers can be more easily obtained for misdemeanors, but usually only if the client scores exceptionally high on their entrance tests or is willing to do a job that the military really needs at that time. Also, being on any supervised or unsupervised active probation or parole is a showstopper for anyone wanting to join the military.⁷¹²

The rules on what convictions require waivers to join vary by recruiting district and such rules are disseminated in emails, bulletins, and official messages as they emerge. If an attorney or advocate wants to assist a youth in researching current waiver rules, one good way is to use the Internet and enter “military criminal history waivers” or “Navy criminal history waivers” (or other military service branch) into a search engine. Counsel may also wish to call the local recruiting station or submit a Freedom of Information Act request to obtain current information.⁷¹³

707 Marines: Military Personnel Procurement Manual, Vol. 2, No. MCO-P110, 72C 3-95-3-105 (2004), Chapter 3, Question 4.

708 Army Regulation 601-210, *supra*, at pp. 44-45.

709 *Id.*, at p. 47-48.

710 The Coast Guard, for example, has a categorical non-waivable prohibition on any person who has committed a felony or domestic violence. See http://www.uscg.mil/d13/dirax/docs/ps/table_of_waiverable_offenses.pdf

711 10 U.S.C. § 504(a) explicitly prohibits the enlistment in the armed forces of a person convicted of a felony unless the Secretary of Defense makes an exception.

712 Army Regulation 601-210, *supra*, p. 47.

713 At the time this handbook is being produced (November, 2011), the following regulations provided information on waivers in the respective armed services:

Air Force Instruction 36-2002 (April 7, 1999), Chapter 1, Enlistment in the Regular Air Force and Attachment 3, Applicants with a Conviction or Adverse Adjudication of an Offense

<http://www.e-publishing.af.mil/shared/media/epubs/AFI36-2002.pdf>;

Army Regulation 601-210, *supra*, Chapter 4, Waiver and Nonwaiver Enlistment Criteria (June 2007)

http://armypubs.army.mil/epubs/pdf/r601_210.pdf;

Coast Guard: Table of Waiverable Offenses, Appendix 2

http://www.uscg.mil/d13/dirax/docs/ps/table_of_waiverable_offenses.pdf;

Marines: Military Personnel Procurement Manual, *supra*, Vol. 2, No. MCO-P110, 72C 3-95-3-105 (2004), Chapter 3

<http://www.marines.mil/news/publications/Documents/MCO%20P1100.72C%20W%20ERRATUM.pdf>;

Navy Recruiting Manual-Enlisted, COMNAVCRUITCOMINST 1130.8F (Unclassified) (2002), Vol. II, chapter 2 (*available at* <http://www.cnrc.navy.mil/publications/1130.8H.htm>).

It is also important for the youth to understand that, irrespective of the rules, the individual recruiter may influence the decision to accept the youth into the military. This, in turn, may be affected by the needs of the recruiter at the time of the application. It will help a lot if the recruiter really wants to enlist the youth because such a recruiter is much more motivated to help get the application through the waiver process. Also, some recruiters will hang onto potential enlistee names and contact information and call them when they are having difficulty recruiting enough people, so while they might not be willing to fight for a waiver in June, they would be willing to do so in December. As a practical matter, most people join the military in the summer, so it is often easier to get into the military in the winter.⁷¹⁴

If your client is already speaking to a recruiter, or has a date certain to go to boot camp, a letter from you explaining the facts of the case and any mitigating circumstances can be included in the waiver packet, and this may sometimes help your client get into the military. Since investigators will surely have uncovered information from the case file, your statement of the facts should include the unpleasant details as well as the points in your client's favor to avoid any appearance of hiding the facts that could undermine the credibility of your assertions. At the same time, when supported by the facts, it may be helpful to point out that the offense represents aberrant behavior that has little chance of being repeated, along with the basis for your opinion. If the admission was a *West/Alford* plea,⁷¹⁵ counsel should explain to the recruiter why some clients make the decision to enter such a plea and why that is a rational decision in some situations. Such a letter from counsel is likely to be viewed as an asset in the consideration of the youth's application. If you give detailed facts, they will be considered and this may help your client to obtain the waiver he or she needs to get into the military, provided that the timing and need for military personnel are also in your client's favor.



PRACTICE TIP

Even though juvenile arrests and adjudications are destined to come to light in the recruitment process, it is worth the effort to try for plea agreements that mitigate the situation. For example, admissions that result in dismissal in the interest of justice under Welfare and Institutions Code section 782; non-wardship probation under Section 725, subdivision (a); informal supervision under Section 654; deferred entry of judgment under Section 790; reduction of the offense to a misdemeanor under Penal Code section 17, subdivision (b), or even admission to a lesser offense than that originally alleged, may create room for making helpful arguments on behalf of the youth in the waiver process. If the prosecutor and the court felt that the allegations were less serious than originally thought, it may help the military to decide to accept the youth.

714 *Ibid.* There is a surprising dearth of information on this subject on the Internet, but one excellent source of information is a series of articles on military enlistment, recruiting and criminal history waivers by Rod Powers on About.Com, including "US Military Enlistment Standards," <http://usmilitary.about.com/od/joiningthemilitary/a/enstandards.htm>; "Military Criminal History (Oral) Waivers," <http://usmilitary.about.com/od/joiningthemilitary/a/enlcriminal.htm>; and "Army Criminal History Waivers," <http://usmilitary.about.com/od/armyjoin/a/criminal.-u59.htm>.

715 An "Alford plea," stemming from *North Carolina v. Alford* (1970) 400 U.S. 25 [91 S. Ct. 160, 27 L. Ed. 2d 162], is one in which the youth enters a plea of guilty or no contest and submits to punishment even though he maintains his innocence. A "West plea" or "No Contest plea," stemming from *People v. West* (1970) 3 Cal.3d 595, is considered by some to be the California version of an Alford plea. Defendants sometimes make such pleas even if they believe themselves to be factually innocent or not guilty of the charges in order to take advantage of a plea bargain (to a lesser or related charge) rather than risk more serious consequences that can arise by pursuing adjudication. Such pleas are entered to reduce the amount of punishment, exposure to prosecution, or for other tactical reasons. In some cases, youth may make such a plea because they cannot endure the time and expense (including lost wages, childcare problems, interference with education) of going through the adjudication process.

CHAPTER 15:

PUBLIC HOUSING

Involvement in the juvenile justice system may result in the youth and his or her family losing housing or eligibility for housing assistance. State landlord-tenant laws and federal laws governing federally subsidized housing programs have eligibility limitations and termination provisions related to an applicant's or tenant's involvement in "criminal activity." While a few of the eligibility limitations and termination provisions require evidence of a conviction, most of the provisions require a lesser standard that does not require evidence of arrest or court disposition. Although confidentiality is a cornerstone of juvenile court proceedings, housing providers frequently obtain, through proper and improper methods, information regarding tenant's involvement in the juvenile justice system. Further, landlords and housing programs, often inaccurately, equate involvement in the juvenile justice system with involvement in "criminal activity" leading to the loss of housing.

§ 15.1 STATE LANDLORD-TENANT LAWS

Landlords sometimes conduct credit checks, including background checks, with tenant reporting agencies that collect eviction and other tenant information, before renting to prospective tenants.⁷¹⁶ The information maintained by tenant reporting agencies may contain the names of juvenile tenants and information about a youth's involvement in the juvenile justice system that was contained in eviction records or reported by landlords. Landlords in California may start eviction proceedings against a tenant after serving a three-day notice when the tenant has violated any provision of the lease agreement⁷¹⁷ or engaged in certain activities including: using the premises for unlawful purposes; substantially interfering with the other tenants quiet enjoyment of the premises; creating a nuisance; engaging in drug dealing or using, cultivating, importing, or manufacturing illegal drugs; committing domestic violence, sexual assault, or stalking another tenant on the premises; or engaging in unlawful conduct involving weapons or ammunition.⁷¹⁸ In California cities that have not adopted

716 Tenant screening and reporting agencies are subject to consumer credit reporting laws that require landlords to inform prospective tenants if their application is denied because of adverse information from the agency and of their right to obtain a free copy of the report from the agency. (See Civ. Code, §§ 1785.1-1785.36 and 1786-1786.60.)

717 Code Civ. Proc., § 1161 (3).

718 Code Civ. Proc., § 1161 (4); Civ. Code, § 3485.

rent-control or other tenant protections, a private landlord may end a month-to-month tenancy without cause by giving the required advanced notice, 30 or 60 days depending on the length of the tenancy.⁷¹⁹

§ 15.2 FEDERALLY SUBSIDIZED HOUSING

The federal government provides housing and housing assistance for low-income individuals and families. There are several types of government housing programs including: federal public housing, subsidized private housing, and portable housing vouchers (commonly known as “Section 8”) that pay a portion of the tenant’s rent.⁷²⁰ Public Housing Authorities (PHA) are responsible for administering federal housing programs on the local level. The rules for eligibility and admission as well as termination and eviction are similar across all federally subsidized housing programs.⁷²¹

Public Housing Authorities conduct criminal background checks on prospective adult tenants and require tenants to certify annually that no one in the tenant’s household has engaged in criminal activity. Accordingly, the Public Housing Authority is charged with establishing and adopting written admission and selection policies⁷²²for tenants that may consider:

- An applicant’s past performance in meeting financial obligations including rent;
- A record of disturbance of neighbors, destruction of property, or living or housekeeping habits at prior residences which may adversely affect health, safety, or welfare of other tenants; or
- A history of criminal activity involving crimes of physical violence to person or property and other criminal acts which would adversely affect the health, safety, or welfare of other tenants.⁷²³

MANDATORY EXCLUSIONS (FOR FEDERAL HOUSING)

Some housing exclusions for federal housing programs are mandatory, including:

- Persons subject to a lifetime sex offender registration requirement under a state sex offender registration program.⁷²⁴
- Persons convicted of the manufacture or production of methamphetamine on the premises of federally assisted housing.⁷²⁵

Prior to any adverse action, the public housing agency must provide the tenant or applicant with notice and an opportunity to dispute the accuracy and relevance of the information.⁷²⁶

719 Civ. Code, §§ 1946 and 1946.1.

720 42 U.S.C. § 1437 et seq.

721 24 C.F.R. § 5.850.

722 See, e.g., 24 C.F.R. §§ 5.850 et seq. [subsidized housing]; 906.15 [home ownership programs]; 982.307-982.308 [Section 8]; and 960.201-960.204 [public housing].

723 See, e.g., 24 C.F.R. § 960.203(c)(1)–(3) for public housing tenants.

724 42 U.S.C. § 13663. Juveniles subject to Pen. Code, § 290.008 registration fall under the mandatory exclusion provisions.

725 42 U.S.C. § 1437n(f).

726 42 U.S.C. § 1437d(q)(2).



PRACTICE TIP

Sex offender registry information is not confidential and is available to the public.⁷²⁷ However, a juvenile may be relieved of Penal Code section 290 registration requirements by sealing their record pursuant to Welfare and Institutions Code section 781 after release from DJJ if they are not adjudicated for an offense which is listed in Welfare and Institutions Code section 707, subdivision (b). There are some offenses listed in Penal Code section 290.008 that are not Welfare and Institutions Code section 707, subdivision (b) offenses.

DISCRETIONARY EXCLUSIONS (FOR FEDERAL HOUSING)

The following activities *may* result in exclusion from federal housing programs:

- Drug related activity, meaning that: (1) the applicant has previously been evicted from federal housing for drug related criminal activity; (2) the household member is currently engaging in illegal use of a drug, or (3) there is reasonable cause to believe that a household member's illegal use or a pattern of illegal use of a drug may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.⁷²⁸
- Violent criminal activity⁷²⁹;
- Other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.⁷³⁰

WHEN EVICTIONS ARE PERMITTED

Residents may be evicted from federal housing programs under the following circumstances:

- The resident engages in any criminal activity threatening the health, safety, or right to peaceful enjoyment of the premises or any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control;
- If there is evidence of fleeing to avoid prosecution, or custody or confinement after conviction, for a crime that is a felony or violating a condition of probation or parole. This doctrine is known as the "*fleeing felon doctrine*." It is applicable to other public benefits as well: SSDI, TANF, and food stamps, and programs administered by the Department of Veterans Affairs. The doctrine does not appear to apply to juvenile adjudications and is more fully discussed in Chapter 16, Public Benefits.

California law, with the exception of lifetime sex offender registrants, does not permit criminal history information of juveniles to be provided to Public Housing Authorities.⁷³¹ California's juvenile court and confidentiality laws are critical here because federal housing law recognizes the non-criminal nature of juvenile court, acknowledges that juveniles are treated differently

727 PHA's can do background checks against sex offender registries and state/local law enforcement is authorized to disclose to PHA pursuant to 42 U.S.C § 13663. Juvenile sex offender information in California is not confidential under state law.

728 42 U.S.C. § 13661; See also 24 C.F.R. §§ 5.854 and 982.553.

729 42 U.S.C. § 13661; See also 24 C.F.R. §§ 5.855 and 982.553(a)(2)(ii)(2)

730 42 U.S.C. § 13661; See also 24 C.F.R. §§ 5.855, 5.859 and 982.553(a)(2)(ii)(3). However, there are pilot projects that may allow individuals with previously excludable convictions to qualify for public housing. See <http://www.healthycal.org/archives/5645>.

731 See Pen. Code, § 11105.03 (b)(3). "Local law enforcement agencies shall not release any information concerning any offense committed by a person who was under 18 years of age at the time he or she committed the offense."

than adults, and defers to State law in the law enforcement criminal background check process. For example, under 42 United States Code section 1437d, Public Housing Authorities are authorized to seek and law enforcement agencies are authorized to provide the criminal conviction records of “adult” applicants or tenants and may only include juvenile criminal conviction information to the extent that the release of such information is authorized under the law of the applicable State, tribe, or locality.⁷³²

One law review author noted the different ways in which juvenile records have been accessed to deny eligibility or to enforce eviction.⁷³³ Methods included blanket orders granting housing authorities access to juvenile records for eviction proceedings⁷³⁴ or by the housing authority obtaining confidential juvenile records and attaching them to eviction proceedings.⁷³⁵



PRACTICE TIP

Legal Services programs are available to assist families with housing cases, but Legal Services attorneys are often unfamiliar with the juvenile court law. Juvenile defenders can contest Welfare and Institutions Code section 827 motions to access juvenile court records for purposes of eviction, collaborate with housing advocates to contest the adoption of local court rules or standing juvenile court orders that allow law enforcement agencies to freely share juvenile police record information with the PHA, advise clients how to protect against improper disclosure of juvenile court records, refer clients when juvenile court information is improperly disclosed, and respond to requests by clients to consult with their housing attorneys when a housing collateral consequence arises during the course of the delinquency representation. Check local listings for the office nearest your client’s family.⁷³⁶

In conclusion, a family’s admission to or retention of federally subsidized housing can be impacted when a juvenile has engaged in “criminal” behaviors, whether or not those acts have been prosecuted in court. Advocates should challenge any attempt by the Public Housing Authority to use anything but lawfully obtained, accurate, and factual information that fits within legal provisions. If the Housing Authority attempts to prove criminal behaviors based on improperly obtained criminal history or juvenile court record information, advocates should seek to exclude the use of the information and hold law enforcement and the Public Housing Authority accountable for violating federal and state law. As discussed in this section, juvenile court involvement can lawfully be used only in extremely limited circumstances. Further, in order to secure a juvenile’s records through the Welfare and Institutions Code section 827 petition process, the Housing Authority must persuade the court to order the records released. The Housing Authority would have to win the balancing test employed by the court by demonstrating that the need to obtain the information for eviction or termination of housing assistance outweighs the public policy purpose of confidentiality (i.e., to promote the best interests of the youth, facilitate

732 42 U.S.C. § 1437d(q)(1)(C).

733 Henning, *Eroding Confidentiality in Delinquency Proceedings: Should School and Public Housing Authorities be Notified?* (2004) 79 NYU L. Rev. 520, 566-567.

734 *Id.* at p. 567; *Hous. Auth. v. Valverde* (Central Valley Mun. Ct., April 5, 1996) (No. C96300004-9), unpublished case, Fresno, California.

735 *Id.* at p. 566, citing news article on ACLU lawsuit against San Francisco Housing Authority.

736 Contact information for California Legal Services programs is available on the Legal Services Corporation web site: http://www.lsc.gov/map/state_T32_R6.php.



rehabilitation or family reunification, and protect the youth from adverse consequences, stigma, and harm).⁷³⁷

A California juvenile adjudication should rarely disqualify an individual from receiving public benefits, but juvenile court proceedings and dispositions may affect eligibility for, or receipt of benefits in specific circumstances. Thus, if eligibility rules use language that does not require *conviction* or does not distinguish between adults and juveniles, juvenile adjudications could arguably affect eligibility.⁷³⁸ However, generally speaking, provisions of law that prohibit or limit benefits for individuals convicted of a crime should not be applied to juveniles who are adjudicated delinquent in California juvenile courts. This chapter will explain the rules governing eligibility for specific federal benefits.



PRACTICE TIP

This area of law is complicated. The law itself is not always precise with respect to juvenile court proceedings, and even when it is, eligibility workers sometimes make mistakes in applying the law. In either case, advocates who have questions or encounter apparently illegal denials of benefits based upon a juvenile court adjudication or criminal conviction should contact a public benefits expert. Many of the issues discussed in this chapter may be subject to challenge through administrative hearings, appeal, or affirmative litigation.⁷³⁹

737 There are no reported housing authority cases on Section 827 access, but see, e.g., *Cimarusti v. Superior Court* (2000) 79 Cal. App.4th 799, 806; *R.S. v. Superior Court* (2009) 172 Cal.App.4th 1049, 1054; Cal. Rules of Court, rule 5.552(b)(1)(E).

738 See, for example, the language on exclusion from federal benefits for fraud in obtaining public assistance in 42 U.S.C. § 608(a)(8), as contrasted with the language in 7 U.S.C. § 2015(b), dealing with a similar exclusion, but not requiring a “conviction.”

739 The Pacific Juvenile Defender Center Expert Corner lists experts that may be able to assist you with Public Benefits issues.

CHAPTER 16:

PUBLIC BENEFITS

§ 16.1 SOCIAL SECURITY ADMINISTRATION PROGRAMS⁷⁴⁰

The Social Security Administration (SSA) administers two programs that are sometimes confused with each other: Old Age, Survivor, and Disability Insurance (OASDI), which is based on the insured person's work history, and Supplemental Security Income (SSI), which is based on need. Both programs are authorized by the Social Security Act and are sometimes referred to by the Title of the Act that governs them.

OLD AGE, SURVIVOR, AND DISABILITY INSURANCE (OASDI) — TITLE II⁷⁴¹

Old Age, Survivor, and Disability Insurance (OASDI), authorized by Title II of the Social Security Act, provides a monthly cash benefit⁷⁴² to individuals who are insured⁷⁴³ and their qualifying dependents. The insured worker is eligible for benefits if he or she reaches retirement age⁷⁴⁴ or meets the SSA definition of disability. Family members who meet the SSA definition of dependents are eligible for benefits when an insured worker retires, becomes disabled, or dies.⁷⁴⁵

SUPPLEMENTAL SECURITY INCOME (SSI) — TITLE XVI⁷⁴⁶

Supplemental Security Income (SSI), authorized by Title XVI of the Social Security Act, provides

740 See the SSA website for consumer friendly materials on these programs (<http://www.ssa.gov>).

741 42 U.S.C. § 402 et seq.; 20 C.F.R. § 404.1 et seq.

742 The amount of the benefit varies with the insured's work history and, for retirement benefits, the age at the time benefits begin. See 20 C.F.R. § 404.304.

743 SSA determines insured status based on quarters of work and contributions made through Federal Insurance Contributions Act (FICA) payroll deductions. See 20 C.F.R. §§ 404.110 through 404.146.

744 Retirement age is sixty two (for early retirement) or 65 for individuals born before 1938, increasing based on date of birth to 67 for people born after 1959. 42 U.S.C. § 416(l).

745 Qualifying dependents may include spouses, children, step-children, and grandchildren, as well as adult children who have disabilities that began before the adult child's 22nd birthday. (See generally 42 U.S.C. §§ 402 and 416; 20 C.F.R. §§ 404.354 through 404.379.)

746 42 U.S.C. § 1381 et seq.; 20 C.F.R. § 416.101 et seq.

a monthly cash benefit⁷⁴⁷ and Medi-Cal eligibility⁷⁴⁸ for low income individuals with disabilities (including youth) and low income individuals over 65. To qualify, an applicant must (1) be 65 or older *or* have a condition that meets the SSA definition of disability; (2) have income and resources within SSI eligibility limits; and (3) meet SSI requirements for citizenship or immigration status.⁷⁴⁹

§ 16.2 CONFINEMENT AND INCARCERATION

OLD AGE, SURVIVOR, AND DISABILITY INSURANCE (OASDI) — PRISONERS

An individual may not receive Title II (OASDI) benefits while imprisoned for conviction of a felony or because of a finding that he or she is not guilty of such an offense by reason of insanity or is incompetent to stand trial for such an offense.⁷⁵⁰ Given that California juvenile adjudications are not felony convictions,⁷⁵¹ this rule should not affect youth adjudicated delinquent in California juvenile courts. The prohibition applies only to the prisoner, not dependents who are receiving benefits based on a prisoner's history,⁷⁵² and does not apply to prisoners participating in approved vocational rehabilitation programs.⁷⁵³

SSI — INMATE OF A PUBLIC INSTITUTION

An individual is not eligible for Supplemental Security Income (SSI) while he or she is an inmate of a public institution.⁷⁵⁴ Federal law specifically defines “inmate of a public institution.” Not all public facilities are included in the definition. For example, a juvenile placed in a publically operated community residence that serves no more than 16 residents is not an inmate of a public institution and is eligible for SSI benefits.⁷⁵⁵

When an individual is ineligible to receive SSI because he or she is an inmate of a public institution SSI benefits can be suspended,⁷⁵⁶ but if the individual is in the institution for more than one year he or she will have to reapply for benefits.⁷⁵⁷ SSA has implemented a procedure that allows inmates to apply for SSI while incarcerated and receive a determination of potential eligibility based on circumstances anticipated when the individual is released. The individual may file an application for SSI if he or she could potentially be released with 30 days of notification of potential eligibility⁷⁵⁸ but will not be eligible to receive benefits until the first day of the month after he or she is released.⁷⁵⁹

747 Current benefit levels are available on the Social Security Administration website. See Social Security Administration, Supplemental Security Income (SSI) in California, <http://www.socialsecurity.gov/pubs/11125.html>.

748 42 U.S.C. § 1396a(a)(10)(A)(i)(II); 42 C.F.R. § 435.120; Cal. Code Regs, tit. 22, §§ 50201(a)(2) and 50227(a)(2).

749 20 C.F.R. § 416.202.

750 42 U.S.C. § 402(x); 20 C.F.R. § 404.468.

751 Welf. & Inst. Code, § 203.

752 20 C.F.R. § 404.468(a).

753 20 C.F.R. § 404.468(d).

754 42 U.S.C. § 1382(e)(1); 20 C.F.R. § 416.211.

755 42 U.S.C. § 1382(e)(1)(C); 20 C.F.R. § 416.211(c).

756 20 C.F.R. §§ 416.1320 and 416.1325.

757 20 C.F.R. § 416.1335.

758 42 U.S.C. § 1383(m); POMS SI 00520.900 Prerelease Procedure – Institutionalization. <https://secure.ssa.gov/apps10/poms.nsf/lnx/0500520900>.

759 20 C.F.R. § 416.211(a).

§ 16.3 DISABILITY DETERMINATIONS

DISABILITY ARISING FROM A FELONY

In determining disability, SSA will not consider impairments that arise from or increase in severity as a result of an individual's commission of, or imprisonment for a felony of which the individual is convicted.⁷⁶⁰ Criminal convictions of youth in adult court fall under this rule, but California juvenile adjudications, which are not felony convictions, should not be considered.

ALCOHOLISM OR DRUG ADDICTION AS A MATERIAL FACTOR

An individual will be found not to meet the SSA definition of disability if alcoholism or drug addiction is a material contributing factor to the individual's disability.⁷⁶¹ Although medical evidence is necessary to support any disability determination, an adjudication or conviction for an offense that involves drugs or alcohol, or evidence of alcohol or drug addiction that comes to light during a juvenile or criminal proceeding, may have an impact on a disability determination.

§ 16.4 THE “FLEEING FELON” RULE — OASDI AND SSI

Individuals are ineligible for OASDI and SSI if they are (1) fleeing to avoid prosecution, or custody or confinement after conviction, for a crime, or an attempt to commit a crime,⁷⁶² which is a felony under the laws of the place from which the person flees, or (2) violating a condition of probation or parole imposed under federal or state law.⁷⁶³ Notwithstanding this rule, SSA may pay benefits to certain individuals for good cause based on mitigating circumstances.⁷⁶⁴

Whether the Fleeing Felon Rule prohibits a juvenile from receiving OASDI or SSI benefits depends on the law in the state where the juvenile was adjudicated.

FLEEING TO AVOID PROSECUTION, CUSTODY, OR CONFINEMENT

Because California juvenile court adjudications are not criminal convictions, individuals adjudicated delinquent in California juvenile courts should not be denied benefits under this provision. Advocates should be aware that SSA may take a different position, and to date, this issue has not been resolved.

Even if the fleeing felon rule is applied to juveniles adjudicated delinquent, it will have a limited effect on these youth and youth convicted of a felony in adult court. Settlement of a federal court class action requires SSA to limit application of the “fleeing felon” rule to three categories of National Crime Information Center (NCIC) Uniform Offense Classification Codes for crimes

⁷⁶⁰ 20 C.F.R. § 404.1506.

⁷⁶¹ 42 U.S.C. §§ 423(d)(2)(C) and 1382c(a)(3)(J).

⁷⁶² In jurisdictions that do not define crimes as felonies the rule applies to crimes punishable by death or imprisonment for a term exceeding one year, regardless of the actual sentence imposed.

⁷⁶³ 42 U.S.C. §§ 402(x)(1)(A)(iv)&(v) and 1382(e)(4).

⁷⁶⁴ See POMS, GN 02613.025 Good Cause Provisions <https://secure.ssa.gov/apps10/poms.nsf/lnx/0202613025>; SI 00530.015 Good Cause Provision <https://secure.ssa.gov/apps10/poms.nsf/lnx/0500530015> SI 00530.015 Good Cause Provision <http://policy.ssa.gov/poms.nsf/links/0500530015>.

related to flight to avoid prosecution and escape from custody: (1) Escape (4901); (2) Flight to avoid (prosecution, confinement, etc.) (4902); and (3) Flight-Escape (4999).⁷⁶⁵

VIOLATING A CONDITION OF PROBATION OR PAROLE

Federal law does not limit disqualification on the basis of a violation of probation or parole to criminal proceedings, and SSA policy appears to include juveniles.⁷⁶⁶ However, the authority of SSA to disqualify individuals under this provision is limited. The United States Court of Appeals for the Second Circuit held that SSA's practice of treating an alleged violation of probation or parole as sufficient and irrebuttable evidence that a violation has occurred is inconsistent with federal law.⁷⁶⁷ The Court of Appeals remanded the case to the District Court for further proceedings.



PRACTICE TIP

For more information about the “Fleeing Felon” Rule in Social Security Administration programs, contact the National Senior Citizens Law Center, <http://www.nslc.org>.

§ 16.5 VETERANS' BENEFITS⁷⁶⁸

The Department of Veterans Affairs (VA) administers various programs to assist veterans with income, disability, education, employment, healthcare, and housing needs. The main cash programs are “wartime disability compensation”⁷⁶⁹ and “pension.”⁷⁷⁰ The disability program entitles a veteran who was injured in the line of duty, or the surviving family, to monthly payments, calculated according to the severity of the disability, not financial need.⁷⁷¹ The pension program is need-based and pays monthly benefits to those who served during a war period⁷⁷² and are now disabled due to a medical condition or age, or to their surviving family.⁷⁷³

The health care programs are available to veterans and their dependents who meet eligibility requirements.⁷⁷⁴ VA health care programs⁷⁷⁵ primarily cover low income veterans or veterans with certain service-related injuries. VA prescription drug coverage is available only to veterans, not their dependents.

765 *Martinez v. Astrue*, Case No. 08-CV-4735 CW (N.D. Cal.) Stipulation of Settlement (August 11, 2009). The settlement and SSA announcement is available on the SSA website. (<http://www.ssa.gov/martinezsettlement>); information on the case is also available on the website of the National Senior Citizens Law Center <http://www.nslc.org>

766 See, e.g., POMS, GN 02613.010 Title II Fugitive Suspension Provisions, <http://policy.ssa.gov/poms.nsf/links/0202613010>.

767 *Clark v. Astrue* (2nd. Cir. 2010) 602 F.3d 140, 152.

768 See the VA website for information on the various Veterans Programs: <http://www.va.gov/>.

769 38 U.S.C. § 1110 et seq.

770 38 U.S.C. § 1521.

771 38 C.F.R. §§ 4.1 through 4.150.

772 “War time” periods relevant today are: WWII: Dec. 7, 1941–Dec 31, 1946; Korean conflict: June 27, 1950– Jan. 31, 1955; Vietnam era: Feb. 28, 1961–May 7, 1975 (or, if the veteran did not serve in Vietnam, the period of Aug. 5, 1964– May 7, 1975); and the Gulf War Aug. 1, 1990– present. See <http://www.vba.va.gov/bln/21/pension/wartime.htm>.

773 38 U.S.C. §§ 1521(a) through (c).

774 See 38 U.S.C. § 1700 et seq.

775 See Department of Veterans Affairs Health Care Overview, <http://www4.va.gov/healtheligibility/Library/pubs/HealthCareOverview/#Eligibility>.

Because limitations on Veteran's benefits are based on conviction of a felony or misdemeanor, juvenile adjudications should not affect eligibility, but convictions of youth in adult court may have an impact in specified circumstances.

CONFINEMENT AND INCARCERATION⁷⁷⁶

The VA may not pay any pension to or for an individual incarcerated in a penal institution after a conviction of a felony or misdemeanor, beginning 61 days after incarceration begins and ending when the veteran is released.⁷⁷⁷ During this period, the Secretary may pay the pension to the veteran's spouse or children.⁷⁷⁸ When an individual receiving disability compensation is incarcerated, payments are limited depending on whether the disability was rated more or less than 20% disabling.⁷⁷⁹ If more than 20% disabling, payments cannot exceed those listed for 10% disability.⁷⁸⁰ If less than 20% disabling, payments cannot exceed one half of the amount listed for 10% disability. The limitations do not apply to veterans residing in a half-way house.⁷⁸¹

FUGITIVE FELON⁷⁸²

The VA is prohibited from providing health care and services to veterans and beneficiaries identified as fugitive felons.⁷⁸³ A fugitive felon is defined as a person who is (1) fleeing to avoid prosecution, or custody or confinement after conviction, for an offense, or an attempt to commit an offense, which is a felony under the laws of the place from which the person flees, or (2) violating a condition of probation or parole imposed for commission of a felony.⁷⁸⁴



PRACTICE TIP

Note that the VA rule is different from fugitive felon rule for other programs in that the violation of a condition of probation or parole is relevant only when the individual has committed a felony.

When the VA identifies a fugitive felon, it mails a letter to the veteran stating that all VA health care benefits will be terminated. The VA then transitions the veteran's health care to alternative programs not paid for by the VA. The VA will also bill the veteran or other beneficiaries for all VA provided care received while a fugitive felon, often creating a large debt, which the veteran must repay. If the veteran believes a mistake was made, or there

776 See, Department of Veterans Affairs, Incarcerated Veterans Fact Sheet, available at <http://www.vba.va.gov/VBA/benefits/factsheets/index.asp>.

777 38 U.S.C. § 1505(a), 38 C.F.R. § 3.665.

778 38 U.S.C. § 1505(b).

779 38 U.S.C. § 5313(a)(1).

780 See table of payable rates at 38 U.S.C. § 1114.

781 38 U.S.C. § 5313(a)(2).

782 See Department of Veterans Affairs Fact Sheet, available at <http://www.vba.va.gov/VBA/benefits/factsheets/index.asp>.

783 38 U.S.C. § 5313B(a).

784 38 U.S.C. § 5313B(b).

are other reasons to cancel the warrant, he or she must contact the Originating Agency that issued the warrant.⁷⁸⁵

§ 16.6 MEDICAID⁷⁸⁶ AND MEDI-CAL⁷⁸⁷

Medicaid is a co-operative federal-state medical assistance program for low-income individuals. Medi-Cal is California’s Medicaid program. The federal government provides federal financial participation (FFP)⁷⁸⁸ for expenditures made by the states for medical assistance to eligible beneficiaries in accordance with federal law.

While important for all beneficiaries, Medicaid coverage may be particularly significant for children and youth because of the Early and Periodic Screening Diagnosis and Treatment (EPSDT) program. EPSDT is a comprehensive child health program that requires states to provide screening, preventive services, and medically necessary treatment for children and youth up to age 21 even if those services are not provided to adult Medicaid beneficiaries.

INMATE PAYMENT EXCLUSION

Federal Medicaid law prohibits payment of FFP for services provided to an individual who is an inmate of a public institution.⁷⁸⁹ However, this rule does not apply to all youth involved in the juvenile justice system, including many living in public facilities.

DEFINITION OF INMATE OF A PUBLIC INSTITUTION

Federal law specifically defines “inmate of a public institution,”⁷⁹⁰ and the definition does not apply to youth in many juvenile placements. For example, Medicaid services are available for youth in facilities funded by Title IV-E foster care funds, youth in community settings for fewer than 16 residents, and youth in a juvenile hall who are awaiting placement on a general placement order.⁷⁹¹

SUSPENSION OF COVERAGE VS. TERMINATION OF ELIGIBILITY

Federal law and policy provide that the inmate payment exclusion affects payment for

785 See Department of Veteran’s Affairs, Health Care Fact Sheet 164-9: Fugitive Felon Program. (June 2010). <http://www4.va.gov/healtheligibility/Library/pubs/FFP/FFP.pdf>; Jim Strickland, *Fugitive Felons and Veterans’ Benefits*, The Veterans Voice (May 18, 2009), <http://www.theveteransvoice.com/JimStrickland/2009/Strickland-2009-05-18.html>.

786 42 U.S.C. § 1396 et seq.

787 Welf. & Inst. Code, § 14000 et seq.

788 The amount of FFP varies by state. Federal Medical Assistance Percentages (FMAP) are available on the Centers for Medicare and Medicaid Services (CMS) website. <http://aspe.hhs.gov/health/fmap.htm>.

789 42 U.S.C. § 1396d(29)(A); 42 C.F.R. § 435.1009.

790 42 C.F.R. § 435.1010. (For further information, see Burrell and Bussiere, *The “Inmate Exception” and Its Impact on Health Care Services for Children in Out of Home Care in California*, Youth Law Center, commissioned by the California Endowment (November 2002), <http://www.ylc.org/viewDetails.php?id=79>; Bussiere and Burrell, *Improving Access to Medi-Cal for Youth in the Juvenile Justice System*, Youth Law Center (November 2006) <http://www.ylc.org/pdfs/ImprovingAccessstoMediCal2.pdf>.)

791 See Cal.Code Regs, tit. 22, § 50273; Medi-Cal Eligibility Procedures Manual Article 6. <http://www.dhcs.ca.gov/services/medi-cal/eligibility/Documents/Article6-InstitutionalStatus.pdf>.

services *not* Medicaid eligibility.⁷⁹² This can be important because an individual will have to reapply for Medicaid upon release if his or her Medicaid eligibility is terminated. Suspension allows states to reinstate coverage as soon as the individual is released or no longer considered an inmate. California law provides for suspension of coverage when a youth becomes an inmate and reinstatement as soon as the youth is no longer considered an inmate.⁷⁹³

EVIDENCE OF COVERAGE UPON RELEASE

The California Department of Health Care Services (DHCS) has also implemented provisions to help Medi-Cal eligible youth who are not enrolled before they become an “inmate of a public institution.” For post-disposition youth who are ordered to a county juvenile hall, camp, or ranch for 30 days or more, the county welfare department and the juvenile facility must work together to file an application for Medi-Cal benefits (unless the youth or the youth’s parents do not want Medi-Cal) and ensure that eligible youth have evidence of Medi-Cal coverage upon release.⁷⁹⁴ Youth who are not eligible for Medi-Cal are referred to the Healthy Families Program. DHCS developed a similar process for youth in state juvenile justice facilities.⁷⁹⁵

IN-PATIENT PSYCHIATRIC AND HOSPITAL CARE

Federal law allows Medicaid coverage for in-patient psychiatric services for individuals under 21.⁷⁹⁶ In 2010 San Francisco and Santa Clara Counties obtained a writ of mandate prohibiting the California Department of Health Care Services from denying Medi-Cal coverage for in-patient psychiatric services to youth under age 21 on the basis that the youth is in the custody of, or detained by a city, county, or state.⁷⁹⁷ Guidance from the federal Centers for Medicare and Medicaid Services (CMS) and its predecessor the Health Care Financing Administration (HCFA) indicate that Medicaid funding is also available when a youth is transferred from a juvenile correctional facility to a hospital in the community.⁷⁹⁸

792 Centers for Medicare and Medicaid Services (CMS), Medicaid Directors Letter re: Ending Chronic Homelessness (May 25, 2004.), <http://aspe.hhs.gov/homeless/smd052504.pdf>

793 Welf. & Inst. Code, § 14011.10; Department of Health Care Services (DHCS), All County Welfare Directors Letter (ACWDL) 07-34, *Medi-Cal Pre-Release Application Process For Wards in County Juvenile Facilities*, RE: Senate Bill (SB) 1469, Chapter 657, Statutes of 2006 Welfare & Institutions (W&I) Code Section 14029.5 (January 2, 2008), available at <http://www.dhcs.ca.gov/services/medi-cal/eligibility/Documents/c07-34.pdf>; DHCS, ACWDL 10-06, *Suspension of Medi-Cal Benefits for Incarcerated Juveniles* (March 23, 2010), available at <http://www.dhcs.ca.gov/services/medi-cal/eligibility/Documents/c10-06.pdf>

794 Welf. & Inst. Code, § 14029.5; DHCS, ACWDL 07-34 (January 2, 2008).

795 DHCS, ACWDL 09-16, *Memorandum of Understanding Between the California Department of Corrections and Rehabilitation (CDCR) and the California Department of Health Care Services (DHCS) Regarding the Pre-Parole Process for Securing Medi-Cal Entitlements* (April 1, 2009), <http://www.dhcs.ca.gov/services/medi-cal/eligibility/Documents/c09-16.pdf>

796 42 U.S.C. § 1396d(a)(16) and (h).

797 *City and County of San Francisco and County of Santa Clara v. State of California Department of Health Care Services.*, San Francisco Superior Court, Case No. 468-241, Order Granting in Part and Denying in Part Petitioners’ Motion for Peremptory Writ (February 25, 2010). Note as of October, 2011, AB 396 was signed into law by Governor Brown, and will provide Medi-Cal coverage for inpatient hospital services under some circumstances. Since this area of the law is in flux and subject to the Department of Health Care Services implementation, it is best to check with a Public Benefits expert if you think your client needs these provisions.

798 Health Care Financing Administration (HCFA), Regional Administrators Letter, *Re: Clarification of Medicaid Coverage Policy for Inmates of a Public Institution*, pages 2-3 (December 12, 1997); CMS Region VII, Letter from Richard C. Allen Associate, Regional Administrator Division of Medicaid & Children’s Health Operations to Joan Henneberry, Executive Director Colorado Department of Health Care Policy and Financing, *Re: Suspension of Medicaid Eligibility for Incarcerated Persons*, pages 1-2 (December 2, 2008). <http://www.colorado.gov/cs/Satellite?c=Page&cid=1247146939485&pagename=HCPF%2FHCPFLayout>

TRANSITIONAL MEDI-CAL FOR FORMER FOSTER CARE YOUTH

Federal law allows states to provide Medicaid up to age 21, regardless of income and resources, for youth who emancipate from foster care,⁷⁹⁹ and California has picked up this option.⁸⁰⁰ In order to qualify for this extended coverage, the youth must be in foster care on his or her 18th birthday.⁸⁰¹ Foster care may include probation-supervised placements, such as group homes, foster family agencies, foster, and relative placements, but does not include secure correctional facilities, such as juvenile hall.⁸⁰²



PRACTICE TIP

It is important to ensure that youth eligible for foster care are moved out of a correctional setting into an appropriate placement before their 18th birthday. The practice of letting older youth run out their time in a juvenile detention facility will deprive youth of Medi-Cal benefits for which they might otherwise be eligible.

§ 16.7 INCOME AND FOOD AID

TEMPORARY ASSISTANCE TO NEEDY FAMILIES (TANF),⁸⁰³ CALIFORNIA WORK OPPORTUNITY AND RESPONSIBILITY FOR KIDS (CALWORKS)⁸⁰⁴

The Temporary Assistance to Needy Families (TANF) program provides block grants to states to assist poor families with children and pregnant women. The California Work Opportunity and Responsibility for Kids program (CalWORKs) is California's TANF program. Recipients receive cash assistance⁸⁰⁵ and, for those in the work program, supportive services, such as childcare as related to their assignments.

SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP), FOOD STAMP PROGRAM⁸⁰⁶

The Supplemental Nutrition Assistance Program (SNAP) (formerly the Food Stamp Program) is a federal program that provides food assistance to low-income households. California now calls its Food Stamp program CalFresh. Eligibility and amount of assistance is based on households, which may include unrelated individuals who live and prepare food together.

799 42 U.S.C. §§ 1396a(a)(10)(A)(ii)(XVII) and 1396d(w).

800 Welf. & Inst. Code, § 14005.28, California Department of Social Services, All County Welfare Directors Letter (ACWDL) 00-41 (August 14, 2000), <http://www.dhcs.ca.gov/services/medi-cal/eligibility/Documents/00-41.pdf>; ACWDL 00-61 (November 22, 2000), <http://www.dhcs.ca.gov/services/medi-cal/eligibility/Documents/00-61.pdf>

801 42 U.S.C. § 1396d(w)(1)(B).

802 See 42 U.S.C. § 672(c), Welf. & Inst. Code, § 727.1 et seq.

803 42 United States Code section 601 et seq.

804 Welf. & Inst. Code, § 11000 et seq.

805 Benefits are based on family size, county of residence, and other available income. The California Department of Social Services (CDSS) issues All County Letters (ACLs) with current benefits levels. See, e.g., ACL 09-20, *California Work Opportunity and Responsibility to Kids (CalWORKs): Grant Reduction; Suspension of the Cost of Living Adjustment (COLA) to the Maximum Aid Payment (MAP) Levels; Cola Increase to the Minimum Basic Standard of Adequate Care (MBSAC) Levels* (April 8, 2009), available at <http://www.dss.cahwnet.gov/lettersnotices/entres/getinfo/acl/2009/09-20.pdf>.

806 7 U.S.C. § 2011 et seq.; Welf. & Inst. Code, § 18900 et seq.

Benefits are provided through electronic benefits transfer cards that look like an ATM card, but can only be used to purchase food.

THE FLEEING FELON RULE

Federal law prohibits use of TANF funds and SNAP eligibility for individuals who are (1) fleeing to avoid prosecution, or custody or confinement after conviction, for a crime or attempt to commit a crime which is a felony under the laws of the place from which the person flees,⁸⁰⁷ or (2) violating a condition of probation or parole.⁸⁰⁸ California has implemented these mandates in state law governing the CalWORKS⁸⁰⁹ and Food Stamp programs.⁸¹⁰

As described above, disqualification because of flight to avoid prosecution or confinement for a felony conviction should not apply to juvenile adjudications.⁸¹¹ With respect to violations of probation or parole, Congress has instructed the United States Department of Agriculture (USDA) to develop criteria so that states will apply these provisions consistently to disqualify individuals whom law enforcement authorities are actively seeking for the purpose of holding criminal proceedings against the individual.⁸¹² In 2000 the California Department of Social Services issued a manual provision recommending that eligibility workers limit verification to those violations that have been investigated and established by the appropriate authorities.⁸¹³ California, however, will not provide further clarification until additional federal guidance is issued.⁸¹⁴

FELONY DRUG CONVICTIONS

Federal law prohibits individuals convicted of a felony that has as an element of possession, use, or distribution of a controlled substance⁸¹⁵ from receiving TANF⁸¹⁶ or SNAP⁸¹⁷ benefits unless the state affirmatively opts out of the ban or limits its duration.⁸¹⁸ This prohibition does not apply to conduct that occurred before August 22, 1996, regardless of date of conviction.⁸¹⁹

In the CalWORKs program California imposes the ban on recipients and requires counties to issue benefits to the remaining family members through vouchers or vendor payments,

807 In New Jersey the rule applies to high misdemeanors.

808 42 USC § 608(a)(9); 7 USC § 2015(k), 7 CFR part 273.11(n). In New Jersey the rule applies to high misdemeanors.

809 Welf. & Inst. Code, § 11486.5.

810 Welf. & Inst. Code, § 18901; Cal. Dept. Social Services, Manual of Policies & Proc., §§63-102(f)(4) and (p)(2) and 63-402.224 (hereinafter MPP).

811 See earlier discussion in this Chapter on the Fleeing Felon Doctrine and other limitations related to criminal history.

812 7 U.S.C. § 2015(k)(2). In 2001, USDA issued a regional letter suggesting agencies verify that an individual has knowledge of an outstanding warrant before imposing the sanction. U.S. Dept. of Agr., Regional Directors Letter (November 9, 2001), available at <http://www.fns.usda.gov/snap/rules/Memo/2001/Fleeingfelons.htm>.

Also available as Regional Letter 02-03, available at http://reentry.mplp.org/reentry/images/c/e8/USDA_fleeingfelon_advisory.pdf

813 Cal. Dept. Social Services, MPP, §§ 63-402.224(b).

814 On August 19, 2011 the Food and Nutrition Service (FNS) issued proposed rules for comment on Clarification of Eligibility of Feeling Felons. 76 Fed. Reg. 51907 -51914 (August 19, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-08-19/pdf/2011-21194.pdf>. FNS should issue the final rule sometime after October 18, 2011 when the comment period closes.

815 As defined in the Fed. Controlled Substances Act, 21 U.S.C. § 802(6).

816 21 U.S.C. § 862a(a)(1).

817 21 U.S.C. § 862a(a)(2), 7 C.F.R. § 273.1(b)(7)(vii) and 273.11(m). See also Cal. Dept. Social Services, MPP §§ 63-402.229, 503.441.

818 21 U.S.C. § 862a(d)(1).

819 21 U.S.C. § 862a(d)(2).

at least for rent and utilities.⁸²⁰ The ban is absolute, and there are no exceptions. Individuals banned in the CalWORKs program are not permitted to receive General Assistance in order to support themselves, as long as they are part of an otherwise eligible CalWORKs family group.⁸²¹

In the Food Stamp Program California has opted out of the ban for individuals who are convicted of possession and meet specified rehabilitation criteria.⁸²² To meet these criteria the individuals must demonstrate they have completed, are enrolled in, or are on a waiting list for a government recognized drug treatment program⁸²³ or that illegal use of controlled substances has ceased.⁸²⁴ Evidence that illegal use has stopped may be in the form of an affidavit by the individual.⁸²⁵

Given that California court adjudications are not criminal convictions, youth adjudicated delinquent in California juvenile courts should not be denied benefits under these provisions.⁸²⁶ In addition, the bar does not apply during a period when the court defers entry of judgment for drug treatment or diversion or if a felony conviction is reduced to a misdemeanor or is expunged from the individual's record.⁸²⁷ Youth who are convicted of a designated felony in adult court and live outside California are subject to the restrictions imposed by the state in which they seek benefits.

§ 16.8 GENERAL ASSISTANCE AND GENERAL RELIEF PROGRAMS

All California counties operate a general assistance or general relief program to provide support for poor residents.⁸²⁸ Counties have flexibility to develop their own programs within broad state requirements.

THE FLEEING FELON RULE

General assistance is not available for individuals who are (1) fleeing to avoid prosecution, or custody or confinement after conviction, for a crime or attempt to commit a crime which is a felony under the laws of the place from which the person flees,⁸²⁹ or (2) violating a condition

820 Welf. & Inst. Code, § 11251.3

821 See General Assistance § 16.8, for more information.

822 Welf. & Inst. Code, § 18901.3; Cal. Dept. Social Services, MPP §§ 63-402.229.

823 A government recognized treatment programs is one that is licensed, certified, or funded by a government entity, a program in which a government entity or court has directed the individual to participate, or Sober Living Environment (SLE) group living facilities emphasizing “Clean and Sober” living. Cal. Dept. Social Services All County Letter (ACL) 04-59, Assembly Bill (AB) 1796 – Drug Felony Bill – Effective January 1, 2005, page 2 (December 29, 2004).

824 Welf. & Inst. Code, § 18901.3, ACIN I-03-05, Questions and Answers — Drug Felony Bill (January 21, 2005); ACIN I-17-05. www.cdss.ca.gov/lettersnotices/PG920.htm.

825 ACL 04-59, page 2; ACIN I-03-05, Question 7. Participation in a SLE facility program is also evidence that illegal drug use has ceased. (ACL 04-59, page 2.)

826 Welf. & Inst. Code, § 203; Cal. Dept. of Soc. Services, All-County Information Notice (ACIN) I-17-05 Questions and Answers — Food Stamps for Drug Felons, Question 6 (April 5, 2005); ACIN-I-71-99, Drug Felon Questions and Answers, Question 7 (September 23, 1999).

827 ACIN I-71-99, pages 1 & 3. (Questions 1 & 5)

828 Welf. & Inst. Code, § 17000 et seq.

829 In New Jersey the rule applies to high misdemeanors.

of probation or parole imposed under federal law or the law of any state.⁸³⁰ This language is the same as the fleeing felon language used for federal programs in the Social Security Act. Please refer to the earlier discussion in this chapter for a discussion of the effect of juvenile adjudications in those circumstances.

FELONY DRUG CONVICTIONS

Generally counties may not deny general assistance benefits to individuals on the basis of a conviction involving controlled substances,⁸³¹ but individuals who are ineligible for CalWORKs because of a drug felony are ineligible for general assistance other than health benefits as long as they remain part of a CalWORKs family group.⁸³² Most counties require persons with suspected substance abuse issues to participate in substance abuse programs, with violations of the rules of these programs (for example, missing appointments) leading to sanctions including 180-day suspension of last resort aid. Although these requirements should not generally be imposed based on a past conviction alone, in practice they often are.

REPORTING

Counties are required to include in quarterly reports information they have about drug felony convictions and individuals who are fleeing prosecution or custody or confinement, or violating a condition of probation or parole as defined in the CalWORKs fleeing felons rule.⁸³³

§ 16.9 PARENTAL LOSS OF BENEFITS OR CHILD SUPPORT

The preceding sections focus on the impact of juvenile court adjudications on the youth. However, there may also be an impact on parents of the youth. For example, parents may lose some or all of their public assistance benefits when their child is in a detention or treatment facility. Under state law, when a youth who is part of a family receiving CalWORKs benefits is detained for a period of at least 30 consecutive days, the county welfare department shall be notified prior to the first day of the month following receipt of notification by the state.⁸³⁴ Whenever a county welfare department is informed that a youth who is incarcerated is also a member of a family receiving benefits pursuant to Welfare and Institutions Code section 11450, the county welfare department shall seek reimbursement of any overpayments.⁸³⁵

Similarly, when a custodial parent receives child support from a non-custodial parent through a child support agency, the support for that child must be diverted to the agency where the youth is detained.⁸³⁶

830 Welf. & Inst. Code, § 17016.

831 *Arenas v. San Diego County Board of Supervisors* (2001) 93 Cal. App. 4th 210, 217. So, for example, if the youth moves to another household, and the individual with the drug felony is living by herself, she can receive General Assistance if meeting the other requirements, such as income and resources.

832 Welf. & Inst. Code, § 17012.5.

833 Welf. & Inst. Code, § 11265.3 (a)(2) and (3).

834 Welf. & Inst. Code, § 11450.10.

835 Welf. & Inst. Code, § 11450.11.

836 Welf. & Inst. Code, § 903.4.

CHAPTER 17:

FIREARM POSSESSION

§ 17.1 CONSEQUENCES FROM SUSTAINED PETITIONS

A sustained petition for certain enumerated offenses limits a youth's ability to possess a firearm until well into adulthood. Penal Code section 12021⁸³⁷ provides that a person may not possess a firearm until age 30 if he or she has sustained a juvenile adjudication and been adjudged a ward of the court for any of the following:⁸³⁸

- Any offense listed in Welfare and Institutions Code section 707, subdivision (b);
- Any offense described in Penal Code section 1203.073, subdivision (b), which lists various drug sales, transportation, and manufacturing offenses;
- Any offense listed in Penal Code section 12021, subdivision (c)(1),⁸³⁹ which lists misdemeanor offenses that result in a 10-year gun ban if committed by an adult;⁸⁴⁰ or
- Any offense listed in Penal Code sections 12025, subdivision (a)⁸⁴¹ [carrying a concealed weapon], 12031, subdivision (a)⁸⁴² [carrying a loaded weapon], or 12034, subdivision (a)⁸⁴³ [knowingly permitting another to bring a gun into a vehicle that one owns or is driving].

A violation of Penal Code section 12021, subdivision (e) is a “wobbler,” punishable either as a misdemeanor (county jail up to one year), as a felony with a maximum of three years in prison, by a fine of up to \$1000, or by both imprisonment and a fine.⁸⁴⁴

837 Effective January 1, 2012, Pen. Code, § 12021 will be renumbered to Pen. Code, §§ 29800–29875.

838 Pen. Code, § 12021 (e). After January 1, 2012, this specific language will be found in Pen. Code, § 29820 (a)–(b).

839 After January 1, 2012, Pen. Code, § 12021 (c)(1) will be renumbered to Pen. Code, § 29805.

840 Note that *all* assault and battery offenses disqualify a person from gun ownership, even if the specific assault or battery charge is not enumerated in Penal Code section 12021 (c)(1). For example, in *In re David S.* (2005) 133 Cal.App.4th 1160, the Court of Appeal held that a violation of Pen. Code, § 243.6 (battery on a school employee) precluded later gun ownership, even though § 243.6 is not listed in Section 12021 (c), because the inclusion of *simple* assault and battery (Pen. Code, §§ 240 and 242) in Section 12021 (c)(1) reflect a legislative intent that *all* assault and battery offenses come within the gun preclusion ambit of § 12021 (c)(1). (*In re David S.*, *supra*, 133 Cal.App.4th at 1166–1167.)

841 Effective January 1, 2012, Pen. Code, § 12025 (a) will become Pen. Code, § 25400 (a).

842 Effective January 1, 2012, Pen. Code, § 12031 (a) will become Pen. Code, § 25850 (a).

843 Effective January 1, 2012, Pen. Code, § 12034 (a) will become Pen. Code, § 26100.

844 Pen. Code, § 12021 (e). After January 1, 2012, this section will be renumbered to Pen. Code, § 29820 (c).

The parallel federal felon-in-possession statute criminalizes gun possession for any person who has been convicted in any court of a crime punishable by more than one year.⁸⁴⁵ The Armed Career Criminal Act (18 U.S.C. § 924(e)) (ACCA) (which establishes a 15 year mandatory minimum term of imprisonment for defendants who have three prior convictions for violent felonies or serious drug offenses and who are convicted of unlawful possession of a firearm) explicitly references certain juvenile adjudications as priors, which may disqualify gun ownership under federal law.⁸⁴⁶ In prosecutions under the ACCA, other Circuit Courts of Appeal have upheld the use of juvenile adjudications for qualifying convictions.⁸⁴⁷



PRACTICE TIP

A prohibition on gun possession may prevent the youth from being eligible for entry into the military.⁸⁴⁸ It may also prevent the youth from serving in law enforcement or security positions that would require possession of a firearm. This factor should be considered when negotiating a disposition.

§ 17.2 MENTALLY ILL YOUTH

Another way that involvement in the juvenile delinquency court may limit a youth's right to a firearm is when the youth is mentally unstable and reveals a threat to a mental health professional, is placed on a mental health hold, or is placed under conservatorship for being "gravely disabled." The corresponding provisions applicable to these unique situations are found in Welfare and Institutions Code sections 8100–8108.

845 18 U.S.C. § 922(g)(1).

846 See, e.g., 18 U.S.C. § 924(e)(2)(B) (defining the term "violent felony" as including certain specified juvenile delinquency adjudications); 18 U.S.C. § 924(e)(2)(C) (defining "conviction" for purposes of § 924(e) as including a finding that a person has committed an act of juvenile delinquency involving a violent felony). Under 18 U.S.C. § 924, a person unlawfully in possession of a firearm with three or more priors for a "violent felony" faces a minimum sentence of 15 years in prison. (18 U.S.C. § 924(e)(1).)

847 *United States v. Jones* (8th Cir. 2009) 574 F.3d 546, 552–553; *United States v. Salahuddin* (7th Cir. 2007) 509 F.3d 858, 863–864; *United States v. Wilks* (11th Cir. 2006) 464 F.3d 1240, 1243.

848 See Chapter 15, Military Service.

CHAPTER 18:

VOTING & JURY SERVICE

Two of the most important opportunities for citizen participation in our government are voting and jury service. Unlike many of the issues covered in other chapters, there are no collateral consequences flowing from juvenile delinquency court involvement; however, there may be consequences for juveniles tried in the adult criminal system.

§ 18.1 VOTING

Sustained juvenile petitions are not *convictions*⁸⁴⁹ and therefore do not cause a loss of voting rights in California.⁸⁵⁰ The only state constitutional voting limitations are for those who are “imprisoned or on parole for the conviction of a felony.” Similarly, the Elections Code limits registration as follows: “People who are in prison or on parole for a felony conviction . . . are not eligible to vote in California.”⁸⁵¹ Thus, while juvenile court cases do not limit voting rights, juveniles tried as adults and convicted of a felony are ineligible to vote if they are incarcerated in prison or are on parole.⁸⁵²

§ 18.2 JURY SERVICE

A juvenile sustained petition is not a *conviction*⁸⁵³ and thus does not disqualify a person from serving as a juror or grand juror in the state of California.⁸⁵⁴ However, juveniles tried as adults and convicted of a felony face the same restrictions as adult convicted felons.⁸⁵⁵

849 Welf. & Inst. Code, § 203.

850 Cal. Const. art. II, § 4. Also, Elec. Code, § 2101 limits eligibility to vote for persons “not in prison or on parole for the conviction of a felony.” Also, the U.S. Const., 15th Amend., § 1 provides that the right to vote may not be abridged because of a previous condition of servitude.

851 Elec. Code, § 2101. There is also an Attorney General’s Opinion construing the law to prohibit voting by persons incarcerated in a local detention facility, such as a county jail, for the conviction of a felony. (5 Ops.Cal.Atty.Gen. 306 (2005).)

852 Cal. Const., art. II, § 4; Elec. Code, § 2101.

853 Welf. & Inst. Code, § 203.

854 Code Civ. Proc., § 203 (a)(5) [limits jury service by excluding “[p]ersons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored”]. In addition, Pen. Code, § 893 (b)(3) similarly restricts grand jury service if the person has been convicted of malfeasance in office or any felony or other high crime.

855 Code Civ. Proc., § 203 (a)(5)

CHAPTER 19:

TRAVEL RESTRICTIONS

Juvenile adjudications may have the consequence of limiting the youth's right to travel. Sometimes, the restrictions are imposed directly, as probation or parole conditions, but they are discussed here because they may have consequences that extend beyond typical probation or parole conditions. Also, discussed in this chapter are travel restrictions that surface more remotely in the context of visa rules for travel to other countries. This chapter also discusses a special category of travel restrictions for youth perceived to be gang involved.

§ 19.1 TRAVEL TO FOREIGN COUNTRIES

PROBATION OR PAROLE CONDITIONS

There are some limitations on what a court may order with respect to travel restrictions. A prohibition on travel to certain areas of the United States (for example, a neighborhood, city, county, or out of state) or between the United States and another country is invalid unless it is related to the offense or future criminality.⁸⁵⁶

Such restrictions have also been quashed with respect to international travel. For example, a travel ban to Mexico was found invalid because it was not related to the crime of theft or to future criminality.⁸⁵⁷ In that case, the Court of Appeal modified the condition, allowing the youth to travel to Mexico accompanied by his parents, with the permission of a probation officer.⁸⁵⁸

In another case, the youth had attempted to drive a stolen vehicle into the United States.⁸⁵⁹ Upon inspection, officers discovered undocumented persons in the vehicle, and the youth admitted receiving a stolen vehicle. The court placed him on probation and stayed a camp commitment on the condition that he return to his residence with his grandparents in Tijuana, Mexico and not return to the United States while on probation. However, the youth was a

⁸⁵⁶ Thus, restrictions on a parolee that are overbroad may amount to an unconstitutional infringement of liberty. (*Cordell v. Tilton* (S.D. Cal. 2007) 515 F.Supp.2d 1114, 1123.)

⁸⁵⁷ *In re Daniel R.* (2006) 144 Cal.App.4th 1, 7-9.

⁸⁵⁸ *Ibid.*

⁸⁵⁹ *In re James C.* (2008) 165 Cal.App.4th 1198, 1201.

citizen of the United States, and his grandparents were his legal guardians. The Court of Appeal reversed the probation condition prohibiting him from entering the United States, finding that the probation condition banishing him from the United States was unreasonable and violated his constitutional rights of freedom of travel, assembly and association.⁸⁶⁰

In yet another case, the youth was a United States citizen who resided with his mother in Mexico.⁸⁶¹ He admitted smuggling marijuana into the United States and as a condition of probation he was ordered not to enter the United States except to attend school, work, or visit his family. The appellate court reversed the limitations on entry to the United States finding that they effectively banished him from the country. However, the court found that a requirement that the youth provide notice of entry into the United States was reasonable to prevent further smuggling.⁸⁶²

VISA RULES

In addition to specific conditions of probation or parole limiting a youth's right to travel out of the country, a youth's ability to travel outside of the United States may be impacted by the other country's policies on permitting visitors with a juvenile record to enter. Most countries appear to focus on the existence of adult criminal records when determining whether to allow the United States citizen to enter the country, *but we have not performed an exhaustive search as to the treatment of juvenile adjudications in every foreign country*. However, the requirements for a few of the countries most likely to be visited by California youth in the juvenile justice system are presented with the information available as of October, 2011:⁸⁶³

CANADA

Canada has very strict rules with respect to allowing foreigners with criminal histories to visit the country. Problematic criminal offenses include both minor and serious offenses, such as theft, assault, manslaughter, dangerous driving and driving while under the influence of drugs or alcohol. These requirements may create problems for people who are in the country even for brief periods of time. For example, it may apply to passengers on a cruise ship traveling from Seattle to Alaska that makes a stop in Canada, or a passenger making a flight connection in Vancouver or Toronto from the United States to a third country (or Alaska).⁸⁶⁴ The Canadian Border Services Agency runs the names of all visitors to the country (including people in transit who are not staying in Canada) through a database linked to the FBI criminal database, thus minimizing the probability that someone with a criminal history could enter the country undetected.⁸⁶⁵

860 *Id.*, at pp. 1204-1205.

861 *In re Alex O.* (2009) 174 Cal.App.4th 1176, 1178.

862 *Ibid.*

863 The individual web links change frequently, but country specific information is available through the United States Department of State, Bureau of Consular Affairs, available at <http://travel.state.gov>.

864 Travel websites and message boards are filled with accounts of people running into problems in these situations even with long-ago convictions, especially for "driving under the influence." See, for example, <http://www.wordtravels.com/forum/comments.php?DiscussionID=1386>; <http://boards.cruisecritics.com>; see also C.W. Nevius, *Going to Canada? Check Your Past*, San Francisco Chronicle, Feb. 23, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/02/23/MNGCAO9NSB1.DTL>. (Herein referenced as "Going to Canada?")

865 *Going to Canada?*, *supra*. For example, due to the Canadian agencies' access to and use of the FBI database, peace activists who were invited to address the Canadian Parliament by Members of Parliament were turned away at the United States-Canada border because their anti-war protest arrests were on the FBI database. Associated Press, *U.S. Peace Activist Barred Again From Entering Canada*, Oct. 6, 2007; <http://www.cbc.ca/news/world/story/2007/10/24/peace-activists.html>.

For the most part, the rules do not restrict travel for juveniles. According to the Canadian Department of Citizenship and Immigration, “If you were convicted of a crime when you were under the age of 18, you can probably still enter Canada.”⁸⁶⁶ However, if a juvenile was tried and sentenced as an adult, he or she cannot be admitted into Canada without a finding of criminal rehabilitation by the Canadian government.⁸⁶⁷ Individuals may file an application for criminal rehabilitation if more than five years have elapsed since the end of the sentence (including since the end of probation), and if there are “urgent and compelling reasons” the government will grant a temporary permit to visit if it has been less than five years.⁸⁶⁸ It can take up to a year for the application to be processed and the person to be found rehabilitated and thus able to enter the country. Individuals who have a pending trial, or are on probation or parole, are not permitted to enter the country. Each application is considered individually and factors that are considered are whether there were multiple offenses, the age of the individual at the time of the offense, the length of the sentence for the offense under Canadian law, and all evidence that the individual has been living a lawful life.⁸⁶⁹



PRACTICE TIP

Although the Canadian rules are directed at adults or juveniles as adults, if there is any reason to believe that a client's juvenile history could be in the FBI database, contact the nearest Canadian consulate for guidance on the individual case.

GUATEMALA

A valid United States passport is required for all United States citizens, regardless of age, to enter Guatemala and to depart Guatemala for return to the United States.⁸⁷⁰ There appear to be no restrictions on travel based on criminal convictions or juvenile adjudications, and Guatemalan authorities currently do not check the FBI database in the same manner as the Canadian government. Even if dual nationals are permitted to enter Guatemala on a second nationality passport, United States citizens returning to the United States from Guatemala are not allowed to board their flights without a valid United States passport.⁸⁷¹ Youth under 18 years traveling with a valid United States passport do not need special permission from their parents to enter or leave Guatemala. United States citizens do not need a visa for a stay of 90 days or less, and the application for a visa for stays of more than 90 days does not ask about criminal history.⁸⁷²

866 Available at <http://www.cic.gc.ca/english/information/applications/guides/5312E.asp>.

867 *Ibid.*

868 Available at <http://www.cic.gc.ca/english/visit/conviction.asp#permit>. The application for rehabilitation and other required forms are available at <http://www.cic.gc.ca/english/information/applications/rehabil.asp>. Please note that there are application fees, detailed on the website.

869 *Ibid.*

870 U.S. Dept. of State, Bur. of Consular Affairs, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1129.html#entry_requirements, or find link through <http://travel.state.gov>.

U.S. Dept. of State, Bur. of Consular Affairs, at <http://travel.state.gov>.

871 *Ibid.*

872 *Ibid.* and see form at http://www.minex.gob.gt/ADMINPORTAL/Data/DOC/20100520141626359Formulario_visa.doc.

EL SALVADOR

To enter El Salvador, United States citizens must present a current United States passport and either a Salvadoran visa, or a one-entry tourist card.⁸⁷³ The tourist card may be obtained from immigration officials for a ten-dollar fee upon arrival in country. The visa allows multiple entries into the country. The visa application does not ask about any criminal convictions or juvenile adjudications, just about income sources and itinerary while in El Salvador. Even if dual nationals are permitted to enter El Salvador on a second nationality passport, United States citizens returning to the United States from El Salvador are not allowed to board their flights without a valid United States passport.⁸⁷⁴

MEXICO

As of March 1, 2010, all United States citizens - including youth - must present a valid passport, book or card, for travel beyond the “border zone” into the interior of Mexico.⁸⁷⁵ Entry by any means, for example by plane or car, is included in this requirement. The “border zone” is generally defined as an area between 20 to 30 kilometers of the border with the United States, depending on the location. Stays of less than 72 hours within the border zone do not require a visa or tourist card. Otherwise, an individual must obtain a tourist card or visa.⁸⁷⁶ U.S. citizens do not need to obtain visas for tourist or family visits of less than 180 days, and only need a tourist card.⁸⁷⁷ The form to apply for the Mexican tourist card or visa does not ask for information regarding criminal history.⁸⁷⁸



PRACTICE TIP

While Mexico historically has not checked criminal histories via United States databases the way Canada does, and does not require police clearance as part of a visa application, Mexico is now part of a Western Hemisphere Travel Initiative organized by the U.S. Department of Homeland Security, which is designed to ensure greater information sharing by law enforcement agencies to fight terrorism and prevent terrorists from entering the U.S.⁸⁷⁹ While the focus is on individuals entering the United States, some travel websites reviewed for this publication expressed concern that Mexican border officials may soon have the same access to FBI databases that the Canadian government already has.

PHILIPPINES

United States citizens may enter the Philippines without a visa for tourism purposes upon presentation of their United States passport, valid for at least six months after the date of entry into the Philippines, and a return ticket to the United States or an onward ticket to another

873 See http://travel.state.gov/travel/cis_pa_tw/cis/cis_1109.html#entry_requirements.

874 *Ibid.*

875 United States Department of State, Bureau of Consular Affairs, <http://travel.state.gov>.

876 *Ibid.*; see also http://mexico.usembassy.gov/eng/eacs_sheet.html.

877 See http://travel.state.gov/travel/cis_pa_tw/cis/cis_970.html#entry_requirements
<http://www.inami.gob.mx/index.php/page/Tramites>.

878 See <http://www.mexonline.com/visamex.htm>; <http://www.mexonline.com/business/images/tourvisa.jpg>.

879 See http://www.getyouhome.gov/html/lang_eng/index.html.



country.⁸⁸⁰ If any part of the visit is for non-tourism purposes, or if the visitor plans to stay for more than six months, then a visa is required. The application for a United States citizen to visit the Philippines requires submission of a police clearance certificate or letter from the jurisdiction in which the applicant resides.⁸⁸¹



PRACTICE TIP

Do not simply rely upon the information listed here, as situations and rules are very fluid. Rules change regularly and the country's consulate should be contacted for the latest information on the client's ability to obtain visas, enter the country and return to the United States. The procedures are country-specific, and must be individually researched. Again, a good place to start is the United States State Department, Bureau of Consular Affairs' website featuring International Travel page with country specific information and contact information for consulates.⁸⁸²

§ 19.2 RE-ENTRY INTO THE UNITED STATES

In addition, recently implemented programs by the U.S. Department of Homeland Security review not only non-United States citizens visiting the United States but also United States citizens returning from foreign countries. The new program will identify individuals who have any arrest warrants outstanding against them, so advise your client that in order to avoid being taken into custody by Homeland Security, he or she needs to make sure there are no active warrants before the he or she travels to a foreign country.⁸⁸³

§ 19.3 DOMESTIC TRAVEL

GANG RESTRICTIONS

Restrictions on “travel” may also arise in the context of probation conditions or civil injunctions prohibiting a youth from being in specified areas of a county or city. This kind of travel restriction is regularly employed in cases involving gang related activity. While the United States Supreme Court has recognized the right of gang members to move freely as “an attribute of personal liberty protected by the Constitution,”⁸⁸⁴ as discussed below, California cases have been less charitable.

PROBATION CONDITIONS

Many courts impose probation conditions ordering that a youth not be present in certain neighborhoods or designated geographic areas. While courts do have broad discretion to

880 United States Department of State, Bureau of Consular Affairs, <http://travel.state.gov>.

881 See <http://www.philippineembassy-usa.org/index.php?page=consular-services-dc/faq-dc/#non-immigrant>.

882 See http://travel.state.gov/travel/cis_pa_tw/cis/cis_4965.html.

883 U.S. Department of Homeland Security, *Privacy Impact Assessment for the Western Hemisphere Travel Initiative*, Aug. 11, 2006, page 2, available at <http://foia.cbp.gov/streamingWord.asp?i=47>. According to the United States Customs and Border Protection you can be detained for unpaid traffic tickets if a warrant has issued! See https://help.cbp.gov/app/answers/detail/a_id/754/kw/detain%20warrant%20border/related/1.

884 *Chicago v. Morales* (1999) 527 U.S. 41, 53; quoting *Williams v. Fears* (1900) 179 U.S. 270, 274. In *Morales*, the Court struck down as unconstitutionally vague a “Gang Congregation Ordinance” which prohibited “criminal street gang members” from “loitering” with one another or with other persons in any public place.

impose conditions limiting the youth's right to travel, that discretion is not unlimited. Any prohibition on travel must be reasonably related to the delinquent act or to future criminality.⁸⁸⁵



PRACTICE TIP

Counsel should oppose probation conditions that impact a client's ability to be present in his or her own neighborhood or locations the client needs to access to go to school, church or perform other activities of daily life. Counsel should argue that other kinds of probation conditions (e.g., conditions that the youth go home after school, or be out in the company of parents after a certain hour) can adequately protect against future criminality without impinging on the youth's constitutionally protected rights.

GANG INJUNCTIONS

As a collateral consequence of involvement in gang related offenses, youth may be prohibited from being present in certain places through civil gang injunctions. Gang injunctions have been upheld against challenges based on overbreadth, vagueness and violations of First Amendment rights of free speech and association.⁸⁸⁶ Thus counsel for youth in cases involving alleged gang activity should advise clients about the potential for being named in a gang injunction limiting travel.

When a court issues a gang injunction, there is a list of prohibited conduct in an area called the "Safety Zone." Before the underlying injunction may be granted, the prosecutor or city attorney seeking the injunction will have to demonstrate to the court the particular area for the injunction to be enforced. This includes a legal description of the area and a map. The injunction enjoins otherwise lawful activities in the "Safety Zone." For instance youth may not be able to travel in the "Safety Zone" during specified hours, or with other individuals. If your client is served with a gang injunction or has a sustained petition for violation of the gang injunction (Pen. Code, § 166, subdivision (a)(4)) his or her travel may be severely limited by the terms of the injunction. It is important for counsel to advise the client of the travel limits to prevent future arrests for violating the injunction.

At the same time, counsel should advise clients that there may be viable legal challenges to the gang injunctions in which they are named. Legal scholars have been critical of the decisions upholding the injunctions. For example, the California Supreme Court case, *People ex rel. Gallo v. Acuna*, *supra*, 14 Cal.4th 1090, has been widely criticized for both ignoring and misinterpreting the constitutional overbreadth and vagueness doctrines.⁸⁸⁷ They suggest that important constitutional questions involving due process and the First Amendment remain.

885 *In re Daniel R.*, *supra*, 144 Cal.App.4th at pp. 7-9.

886 See *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090; *People v. Englebrecht* (2001) 88 Cal.App.4th 1236.

887 See Werdegar, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 Stan. L. Rev. 409, 422 (1999); Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 Hastings Const. L.Q. 717 (2000); McClellan, *People ex. rel Gallo v. Acuna: Pulling in the Nets on Criminal Street Gangs*, 35 San Diego L.Rev. 343 (1998); Allen, *People ex rel. Gallo v. Acuna: (Ab)using California's Nuisance Law to Control Gangs*, 25 W. St. U.L. Rev. 257 (1998).

This view is bolstered by the fact that there have been some successes in challenging gang injunctions in California on the grounds of overbreadth, failure to provide adequate notice, or improper targeting of particular individuals.⁸⁸⁸ For example, one injunction was successfully challenged on notice grounds because it was not served on a person of sufficient character and rank so as to make it reasonably certain that the “unincorporated association” would be apprised of the case.⁸⁸⁹ Counsel advising youth named in such injunctions should be sure to evaluate the need for such challenges and/or connect them with advocates knowledgeable on these issues.⁸⁹⁰

888 *People ex rel. Gallo v. Acuna* (2010) 182 Cal.App.4th 866; *People ex rel. Totten v. Colonia Chiques* (2007) 156 Cal.App.4th 31.

889 *People ex rel. Reisig v. Broderick Boys* (2007) 149 Cal.App.4th 1506 [assuming that the gang is an unincorporated association, service upon a member of unknown rank within the Broderick Boys who promptly disavowed any intention of appearing did not meet the federal due process “notice” requirement articulated in *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306].

890 The Pacific Juvenile Defender Center Expert Corner has experts who can assist with gang-related issues.

CHAPTER 20:

BECOMING A FOSTER CARE OR ADOPTIVE PARENT

§ 20.1 EFFECT OF JUVENILE RECORDS

Past juvenile court records may later interpose a barrier to becoming a foster parent, or adoptive parent. Prospective foster parents, adoptive parents, relative/kinship caregivers, and their household members are subject to criminal background checks that may reveal unsealed juvenile delinquency records. The licensing agency (or placing agency in approving kinship placements) is required to deny a license or approval for foster caregivers and household members that have a “conviction” for anything other than a minor traffic offense unless the individual receives a “criminal record exemption”.⁸⁹¹ Some convictions may be non-exemptible or may only be exempted after receiving a Certificate of Rehabilitation.⁸⁹²

Because California juvenile court adjudications are not deemed criminal convictions,⁸⁹³ individuals adjudicated in California juvenile courts are not subject to the mandatory bars to foster care licensing, approvals, and employment. However, the licensing agency has the discretion to deny licensure or approval to a prospective caregiver if the caregiver or an employee or non-client resident in a foster care placement has engaged in conduct that is inimical to the health, morals, welfare or safety of either an individual or the people of the state.⁸⁹⁴ Thus the juvenile delinquency record may form the basis for investigating “inimical conduct” that may result in a discretionary bar.

Applicants and other adults in the home must submit to a DOJ check (for in-state offenses) and a Federal Bureau of Investigations (FBI) check (for offenses that occurred outside California).⁸⁹⁵ The DOJ report will contain information about:

- Every conviction of an offense;
- Every arrest for which trial is pending;

891 Health & Saf. Code, § 1522(a)(4)(A); Welf. & Inst. Code, § 361.4.

892 Health & Saf. Code, § 1522 (g); Welf. & Inst. Code, § 361.4 (d).

893 Welf. & Inst. Code, § 203.

894 Health & Saf. Code, § 1558 (a)(2).

895 Health & Saf. Code, § 1522 (a); Cal. Code .Regs. tit. 22, § 89219. In the case of approvals of kinship placements, placing agencies may use an initial criminal check through the California Law Enforcement Telecommunications System (CLETS). See Welf. & Inst. Code, § 361.4 (b).

- Every arrest for which one would have to register as a sex offender if convicted;
- Every arrest for assault with a deadly weapon or with force likely to cause great bodily injury;
- Every arrest for willful infliction of corporal injury on a spouse; and
- Every arrest for willfully causing or allowing to be caused the unjustifiable pain or suffering of a child.

The DOJ report must not include information about any arrest subsequently deemed a detention or any arrest for which a diversion program was successfully completed or that resulted in exoneration.⁸⁹⁶ In addition, according to the DOJ, arrest and disposition information regarding juvenile conduct will not be disclosed unless the youth was prosecuted in adult court.⁸⁹⁷

Applicants must disclose convictions even when they have been pardoned, or the record sealed or expunged.⁸⁹⁸ While an arrest record alone (absent a conviction) is not grounds to deny an application, it does provide a point for further investigation of the applicant’s suitability, which may involve ordering police and court records for the incident.⁸⁹⁹ The licensing agency has the discretion to deny an individual to be licensed, or approved as a foster care giver or be employed or reside in a foster care placement if the individual has engaged in conduct that is inimical to the health, morals, welfare or safety of either an individual or the people of the State.⁹⁰⁰ Thus the juvenile delinquency record, including arrests, adjudications and dispositions, may form the basis for investigating “inimical conduct” that may result in a discretionary bar. However, the licensing or approval agency may not deny licensure or approval based solely on an arrest record not resulting in a conviction revealed in the criminal background check, but may investigate and secure other evidence demonstrating the conduct underlying the arrest record.⁹⁰¹

Although the guidelines regarding criminal clearances and child placement are enumerated in the law regarding licensing foster homes and other community care facilities, the same standard applies for relative placements and non-related extended family member placements.⁹⁰² The standards have also been adopted as placement requirements in agency, independent, and inter-country adoptions.⁹⁰³

§ 20.2 APPLICANT’S CHILDREN AND OTHER CHILDREN IN THE HOME

The law is not clear whether the delinquency records of children living in the home of an applicant are subject to investigation. The licensing statutes are clearly geared to investigating

896 Pen. Code, § 11105 (m)(3).

897 California Department of Justice letter to Youth Law Center, December 21, 2010. However as mentioned previously in the employment chapter, attorneys experienced in licensing issues have encountered cases where rap sheets detailing entire criminal histories were provided to the licensing agency.

898 Cal. Code Regs. tit. 22, § 80019(d)(1)(A).

899 Health & Saf. Code, § 1522 (e).

900 Health & Saf. Code, § 1558 (a)(2).

901 Health & Saf. Code, § 1522 (e).

902 Welf. & Inst. Code, §§ 309 (d)(2) and (d)(4); 361.4 (d)(4), and 362.7.

903 Fam. Code, §§ 8712, 8811 and 8908.

“criminal” backgrounds and excluding individuals based on “criminal convictions.” The California Department of Social Services (CDSS) has access to juvenile court records pursuant to Welfare and Institutions Code section 827 for purposes of monitoring children in foster care and licensing foster care placements.⁹⁰⁴ The Community Care Licensing Division of CDSS, however, interprets the licensing statute to require that only non-client adults residing in a foster care placement be fingerprinted and therefore does not fingerprint youth under the age of 18 residing in the home of an applicant or licensee.⁹⁰⁵

Although the approval process for kinship placements should be equivalent to the licensing process, placing agencies that approve relative or kinship caregivers are specifically authorized to conduct “criminal records” checks on children over the age of 14 living in a home if they have reason to believe the child has a “criminal record.”⁹⁰⁶ While the plain meaning of “criminal record” would seem to exclude juvenile delinquency records, some counties have used this statutory authorization to adopt their own policies for screening youth in placements that the county is responsible for approving. For example, Los Angeles County policy requires that, prior to any placement in the home of a relative, non-related extended family member, prospective legal guardian, or prospective adoptive parent, a Juvenile Automated Index (JAI) clearance is required of any youth age 14 to 17 to be placed and any youth age 14 to 17 who lives in the prospective placement home.⁹⁰⁷ The JAI printout will show any juvenile court activity for the youth in Los Angeles County Superior Court, which will factor into the assessment of the home.⁹⁰⁸



PRACTICE TIP

A licensing or placing agency's denial of approval of a foster or adoptive placement based on a juvenile delinquency record should be challenged. The criminal record provisions of the licensing statutes are clearly limited to criminal court records and focus on excluding individuals who have been convicted of crimes. While licensing and placing agencies have the discretion to deny approvals to or exclude individuals from foster or adoptive placements who may pose a risk to the health or safety of foster children, placing agencies may not base a denial or exclusion decision solely on the existence of a juvenile court record.

904 Welf. & Inst. Code, § 827 (a)(1)(I & J).

905 CDSS “Evaluator Manual” section 7-1100 (rev. 11/09) (provides that Health & Saf. Code, § 1522 (b) requires adults, other than clients, who reside in a facility to be fingerprinted and that non-client youth must be fingerprinted within 30 days after their 18th birthday).

906 “A criminal records check may be conducted pursuant to this section on any person over 14 years of age living in the home who the county social worker believes may have a criminal record.” (Welf. & Inst. Code, § 361.4 (b).)

907 Los Angeles County Department of Children and Family Services, Procedural Guide No. 0070-563.10: Juvenile Automated Index (JAI) Clearance (Mar. 26, 2007).

908 *Ibid.*

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