PACIFIC JUVENILE DEFENDER CENTER

PJDC

Collateral Consequences of Juvenile Delinquency Proceedings in California:

A Handbook for Juvenile Law Professionals

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PREFACE

In 2011, PJDC published the first edition of this manual. In the decade since then, we have seen a sea change in the juvenile justice landscape in California. While many of these changes are positive, including updates to our record sealing and competency statutes, increased *Miranda* protections for all youth, the end of transfer to adult court for 14 and 15 year old youth, and in 2023, the closure of the Department of Juvenile Justice, the fact remains that thousands of California youth are wards of the court and subject to grave and long lasting collateral consequences of a juvenile court adjudication.

As Sue Burrell and Rourke Stacy, the Editors of the 2011 edition noted, "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.

This handbook was written, and now has been updated, 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.[1]

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.

As this is our second version of this handbook, we anticipate future versions as the law and our practice evolves. 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.

A NOTE ABOUT LANGUAGE

As advocates of all stripes well know, words matter, especially when talking to, or about, young people. Over the past several decades, certain terms commonly used in the context of the juvenile legal system unfortunately have developed certain connotations which now serve primarily to stereotype and stigmatize young people who happen to find themselves under juvenile court jurisdiction. In recognition of this phenomenon, this manual consciously avoids the use of certain words and phrases, namely "juvenile," "minor," "delinquents" and "wards," unless being used as, or part of, a specific term of art (e.g., "the minor has a right to contest the allegations in the petition filed against them") and/or in conventionally used phrases (e.g., "juvenile delinquency court"). The animus behind this usage is an attempt to de-stigmatize system involvement by consciously refraining from differentiating between system-involved young people and those not under juvenile court jurisdiction.

Additionally, whenever practicable, this manual uses person-first and gender-inclusive language, again to counter unfair stereotypes about young people involved with the juvenile legal system, and also to promote

1 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.

gender equity. Thus, instead of using identity-first language (e.g., disabled person), this manual uses person-first language (e.g., person with a disability). Similarly, again whenever practicable, this manual tries to avoid any preference for feminine pronouns over masculine pronouns (or vice-versa) and to use language applicable to both binary and non-binary people (e.g., they/them/theirs).

ABOUT PJDC

PJDC provides support to juvenile trial lawyers, appellate counsel, law school clinical programs and nonprofit law centers to ensure quality representation for young people throughout California. Our mission is to promote justice for all young people by ensuring excellence in juvenile defense and advocating for systemic reforms.

At PJDC, we believe that young people in the juvenile justice system must be treated with dignity, respect and fairness; that young people must have timely access to competent, properly resourced and specially trained counsel; and that young people are fully capable of transformational character changes and true rehabilitation — irrespective of the decisions they may or may not have made during adolescence. We further believe that no young person should be prosecuted as an adult; that youth advocates must play an important role in transforming the juvenile justice system; that juvenile defense is a highly-specialized area of the law; and that indigent defense organizations should cultivate and promote the critical role of the juvenile defender.

Brooke Harris
Executive Director
Pacific Juvenile Defender Center

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Editor:
Eileen Manning-Villar
Pacific Juvenile Defender Center

Design and Typesetting:
Amanda Butler
Boost Consulting

Contributing Authors:
Raul Arroyo-Mendoza
Contra Costa County Public Defender's Office

Kathy Brady
Immigration Legal Resource Center

Tony Cheng
University of California, Hastings College of Law

Virginia Corrigan
Youth Law Center

Meredith Desautels
Youth Law Center

Greg Feldman
San Francisco Public Defender's Office

Brooke Harris
Pacific Juvenile Defender Center

Christiane Hipps

Sidney Hollar
San Francisco Bar Association Conflicts Panel

Colleen Kauth
Bay Area Legal Aid

Jonathan Laba
Contra Costa County Public Defender's Office

Sabyl Landrum
East Bay Community Law Center

Patti Lee
San Francisco Public Defender's Office

Rebecca Marcus
San Francisco Public Defender's Office

Eleanor Miller
Center for Juvenile Law and Policy, Loyola Law School

H. Marissa Montes
Loyola Law School

Jocelyn Neudauer

Rachel Prandini
Immigration Legal Resource Center

Patricia Soung

Law Students and Interns:
Sara Nicole Antoun
Former Clinical Law Student, Loyola Law School

Verna Chan
Intern, Rutgers Law

Claire Kennedy
Former Certified Law Student, Center for Juvenile Law and Policy, Loyola Law School

Michelle Elena Polanco
Former Clinical Law Student, Loyola Law School

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.[2] In California, the court must inform the youth of the *direct* consequences of an admission or sustained petition after adjudication.[3] Such direct consequences include maximum confinement time,[4] eligibility for commitment in a local juvenile facility, including in some cases a secure youth treatment facility (SYTF),[5] restitution,[6] registration pursuant to Penal Code 290.008,[7] and immigration consequences.[8]

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 States 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.[9] Regardless of whether a consequence is termed direct or collateral, it may have significant life-changing consequences for the child, requiring counsel to be thoroughly familiar with those consequences and capable of advising their client accordingly.

§ 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 states:

> 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

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

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

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

5 Secure Youth Treatment Facilities (SYTF's) are the county-run institutions that house youths, who prior to July 1, 2021. would have been committed to DJJ. In 2020 the California Legislature passed "juvenile justice realignment" through Senate Bill No. 823 (2019–2020 Reg. Sess.) (Stats. 2020, ch. 337), which announced the closure of Division of Juvenile Facilities (commonly referred to as Division of Juvenile Justice or "DJJ"), and began the shift of responsibility for youth adjudicated for section 707(b) to the county level. (Welf. & Inst. Code, § 736.5, subd. (a).) On May 14, 2021, the Governor signed into law Senate Bill 92 (2021–2022 Reg. Sess.) (Stats. 2021, ch. 18), adding Welfare and Institutions Code section 875 et seq., which governs commitment to local "secure youth treatment facilities" in lieu of a DJJ commitment. (See Welf. & Inst. Code, § 875, subd. (c)(1).)

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

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

8 See Pen. Code, § 1016.5.

9 *Padilla v. Kentucky* (2010) 559 U.S. 356, 365.

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.[10] The adverse consequences, stigma, and harm resulting from a lifelong "criminal" label are contrary to the rehabilitative purposes and objectives of the juvenile court.[11] The strong policy of confidentiality is evidenced by a latticework of California laws governing and limiting access to juvenile court proceedings, records, and information.[12] 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 youth and any parent or guardian who is present;[13]
- the proceeding involves one of more than two dozen specified offenses;[14] or
- the court finds that someone has a direct and legitimate interest in the case or the work of the court.[15]

Additionally, up to two family members of a prosecuting witness,[16] a victim of the offense (subject to exclusion in certain circumstances), and up to two support persons for the victim[17] may attend a juvenile court hearing.[18]

Open Juvenile Court Proceedings for Serious Offenses

In cases involving one of the specified serious offenses,[19] 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.[20] 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.[21]

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.[22] "Good cause" may include the protection of the youth, a victim, or a member of the public.[23]

10 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.

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

12 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).

13 Welf. & Inst. Code, § 676, subd. (a).

14 *Ibid.*

15 *Ibid.* 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. (*Ibid.*)

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

17 Welf. & Inst. Code, § 676.5.

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

19 Welfare and Institutions Code section 676, subdivision (a) currently lists 28 offenses for which the public may be admitted, primarily section 707 (b) offenses.

20 Welf. & Inst. Code, § 676, subd. (g).

21 Welf. & Inst. Code, § 676, subd. (b).

22 Welf. & Inst. Code, § 676, subd. (c).

23 *Ibid.*

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.[24] However, the statute specifically provides that it does not authorize access to other documents in the court file,[25] which may include police reports, probation reports, pleadings, and evaluations.

The probation officer or any party may petition the juvenile court to prohibit disclosure of the records to the public.[26] 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.[27]

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.[28] Nonetheless, California law provides media access for juvenile court proceedings, records, and information that are open to the public pursuant to section 676.[29] 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.[30]

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 3, *Juvenile Criminal History Records*.)

The media may also obtain unofficial information[31] about juvenile delinquency cases through direct contact with the youth and the youth's 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.[32]

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.[33]

24 Welf. & Inst. Code, § 676, subd. (d).

25 *Ibid.*

26 Welf. & Inst. Code, § 676, subd. (e).

27 *Ibid.*

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

29 See *Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 622-623 [intent of the language of section 676, subdivision (a) is to authorize courts to admit the press].

30 *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 Court* (2000) 85 Cal.App.4th 866 [order limiting disclosure of photographs invalid].

31 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, subd. (a)(4); *In re Tiffany G.* (1994) 29 Cal.App.4th 443; In re Gina S. (2005) 133 Cal.App.4th 1074.)

32 *In re Jeffrey F.* (Cal.App.1 Dist. May 29, 2003) 2003 WL 21240208 (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].

33 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). The article 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.[34] 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.[35] Juvenile court records "may not be disclosed or disseminated except by order of the juvenile court. The juvenile court has exclusive authority to determine the extent to which juvenile court records may be disclosed."[36] The unlawful distribution of juvenile records may result not only in civil liability,[37] but in certain circumstances criminal liability as well.[38]

Juvenile Records Defined

"Juvenile case file,"[39] is defined by Welfare and Institutions Code section 827. A "juvenile case file," means, "a petition filed in a 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 the probation officer's report, or to the judge, referee, or other hearing officer, and thereafter retained by the probation officer, judge, referee, or other hearing officer."[40]

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;[41] police records and reports even when no court proceedings were initiated and the youth was only detained;[42] testimony that amounts to the inspection of a juvenile case file or information relating to the contents of a juvenile case file;[43] juvenile hall records;[44] and Division of Juvenile Justice (DJJ)[45] records[46] containing information that falls within section 827. DJJ records that do not contain information subject to Section 827 are accessible by subpoena duces tecum and are not subject to the

34 See *T.N.G. v. Superior Court, supra*, 4 Cal.3d at pp. 777-778; *Wescott v. County of Yuba* (1980) 104 Cal.App.3d 103, 106-107.

35 Welfare and Institutions Code section 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 p. 106.)

36 *T.N.G. v. Superior Court, supra*, 4 Cal.3d at p. 778.

37 See, e.g., *Gonzalez v. Spencer* (9th Cir. 2003) 336 F.3d 832, 835, abrogated on other grounds by *Filarsky v. Delia* (2012) 566 U.S. 377 [violation of section 827 yields basis for damages claim].

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

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

40 Welf. & Inst. Code, § 827, subd. (e).

41 *In re Elijah S.* (2005) 125 Cal.App.4th 1532, 1551 [juvenile court has exclusive authority to order disclosure of juvenile records pertaining to deceased child who came within the jurisdiction of the court pursuant to Welfare and Institutions Code section 300 regardless of whether juvenile dependency petition had been filed].

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

43 *People v. Espinoza* (2002) 95 Cal.App.4th 1287 [foster parent's testimony about complaining witness did not amount to the inspection of a juvenile dependency case file or information relating to the contents of that file because the foster parent did not have access to the case file and there was no indication that her testimony would be based on information related to that file].

44 *Foster v. Superior Court* (1980) 107 Cal.App.3d 218. In addition, various regulations govern certain juvenile hall records, including California Code of Regulations, title 15, section 1312 [juvenile criminal history information] and sections 1406 through 1408 [health records].

45 DJJ is officially known as the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF). (*In re N.C.* (2019) 39 Cal.App.5th 81, 85, fn. 3.) While "DJJ" and "DJF" are used interchangeably in case law (*ibid.*), for the purposes of this publication, this entity will be referred to using the term more commonly utilized by practitioners: DJJ.

46 *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., tit. 9, § 30657 [mental health records].

confidentiality protections of Section 827.[47] As of August 2022, it is not clear whether Secure Youth Treatment Facility[48] (SYTF) records will be treated like their counterparts at DJJ or at juvenile hall.

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.[49] 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.[50] 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.[51]

Automatic Access

Individuals and entities entitled to access juvenile court records without an order of the court include the youth; the youth's parent 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 school; and members of children's multidisciplinary teams, persons, or agencies providing treatment or supervision of the youth.[52]

Parties who have automatic access are prohibited from disseminating the file to other persons or agencies unless the recipients would also be entitled to access themselves.[53] 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.[54]

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 some 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.[55] 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.[56] 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.[57] 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.[58]

Law Enforcement Agencies

If the juvenile court finds that a youth has committed any felony, the court must provide written notice within seven days to the county sheriff of where the

47 *Cimarusti v. Superior Court, supra*, 79 Cal.App.4th at p. 805 [document such as a dormitory roster does not on its face come within the ambit of Welfare and Institutions Code section 827].

48 Secure Youth Treatment Facilities (SYTF's) are the county-run institutions that house youths, who prior to July 1, 2021. would have been committed to DJJ.

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

50 Welf. & Inst. Code, § 827, subd. (a)(2).

51 See, e.g., Welf. & Inst. Code, § 827, subd. (a)(4); *In re Tiffany G., supra*, 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].

52 Welf. & Inst. Code, § 827, subd. (a)(1); Cal. Rules of Court, rule 5.552(b). Senate Bill 1071 (Umberg), if signed into law by the Governor, will add attorneys in certain types of administrative hearings involving the youth to the list of those eligible to automatically access juvenile records pursuant to section 827, subdivision (a)(1). (Sen. Bill No. 1071 (2021-2022 Reg. Sess.) §§ 1, 1.5.)

53 Welf. & Inst. Code, § 827, subd. (a)(5).

54 Welf. & Inst. Code, § 827, subd. (a)(4).

55 Judicial Council Juvenile forms, JV-569 through JV-580; https://www.courts.ca.gov/formnumber.htm.

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

57 *Cimarusti v. Superior Court, supra*, 79 Cal. App.4th at p. 806.

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

offense occurred. This written notice must only include information regarding the felony offense found to have been committed and the disposition of the youth's case.[59]

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

- Records gathered by a law enforcement agency that relate to the taking of a youth into custody, temporary custody, or detention, may be disclosed to other law enforcement agencies, including school district police, or any other person who has a legitimate need for the information for purposes of official disposition of a case;[60]
- All felony adjudications and dispositions reported by the juvenile court to the sheriff may be disclosed to other law enforcement officials upon request, 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;[61]
- Records of an adjudication for an offense under Welfare and Institutions Code section 707, subdivision (b) (a "707(b) offense") may be released to the public or any interested person if the youth is 14 years old or older. However, the law enforcement agency may not release this information if the court has found good cause for its non-disclosure;[62]
- The name of a youth who is 14 years old or older, to anyone, upon request, following arrest for any serious felony;[63]
- The name, description, and alleged offense of any youth who has an outstanding warrant and is alleged to have committed a violent offense in order to assist with the apprehension of the youth;[64] and
- The name and description of a youth may be disclosed to the public in order to secure detention facility escapees.[65]

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.[66]

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).[67]

Schools

The superintendent (or designee) of the school district where the youth is enrolled has automatic access to juvenile court records.[68] Schools have additional access to juvenile court information in limited circumstances.[69] Any teacher, counselor, or administrator with direct supervisorial 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 section 707(b) offenses.[70] 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.[71]

Miscellaneous Disclosure Provisions

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

59 Welf. & Inst. Code, § 827.2, subd. (a).

60 Welf. & Inst. Code, § 828; Welf. & Inst. Code, § 827.9.

61 Welf. & Inst. Code, § 827.7, subd. (a).

62 Welf. & Inst. Code, § 827.2, subd. (c).

63 Welf. & Inst. Code, § 827.5.

64 Welf. & Inst. Code, § 827.6.

65 Welf. & Inst. Code, § 828, subd. (b).

66 Welf. & Inst. Code, § 828, subd. (a).

67 Cal. Rule of Court, rule 5.552(e). Also see California Judicial Council Forms JV-575 (Petition) and JV-580 (Notice). Welfare and Institutions Code section 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.

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

69 Note that school districts in some counties may also have access to juvenile court records in local computerized interagency databases created pursuant to Welfare and Institutions Code section 827.1.

70 Welf. & Inst. Code, § 828.1, subd. (b).

71 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.[72]
- Violation of Vehicle Code section 13202.5, subdivision (d), [certain enumerated offenses involving controlled substances or alcohol] must be reported to the Department of Motor Vehicles (DMV) within 10 days.[73]
- The Board of Prison Terms can review unsealed records to evaluate suitability of release.[74]

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.[75]
- ***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.[76]

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.[77] The information must be maintained in a manner to ensure the protection of confidentiality.[78] Members of the team may include law enforcement, probation officers, prosecutors, and others.[79]

72 Welf. & Inst. Code, § 204.5.

73 Welf. & Inst. Code, § 783; Veh. Code, § 1803.

74 Welf. & Inst. Code, § 829.

75 Welf. & Inst. Code, § 830.

76 Welf. & Inst. Code, § 830.1.

77 *Ibid.*

78 *Ibid.*

79 *Ibid.*

PRACTICE TIP: It is important to label carefully 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.[80] The state system was designed for the adult criminal justice system, but has been used regularly to track juvenile court information since the enactment of Proposition 21 in 2000.[81] 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.[82] 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.[83]

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.[84] 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

80 Pen. Code, §§ 11105 and 13102.

81 *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).

82 Welf. & Inst. Code, § 602.5.

83 *Ibid.*

84 Pen. Code, §§ 13150, 13151. Local law enforcement agencies also retain the information and are subject to disclosure rules almost identical to the DOJ. (See Pen. Code, § 13300.)

duties.[85] 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.[86] 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.[87]

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.[88] 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."[89] 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 inquires, the DOJ Record Review Unit may be contacted at recordreview@doj.ca.gov.[90]

§ 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.[91] 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.[92] 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.[93]

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.[94] 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.[95] In California, local law enforcement agencies and the DOJ may submit juvenile information directly to the FBI.[96] The subject of an FBI identification record may obtain a copy[97] or challenge inaccuracies[98] by submitting a written request to the FBI's Criminal Justice Information Service Division.

§ 3.4 FINGERPRINTING UPON ARREST

85 Pen. Code, § 11105.

86 Pen. Code, § 11105, subds. (b) & (c). Labor Code section 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*.

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

88 Pen. Code, §§ 11120-11127.

89 Please see https://oag.ca.gov/fingerprints/record-review, 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.

90 Please see the DOJ Record Review Unit's website at https://oag.ca.gov/fingerprints/record-review for specific instructions on how to request one's own criminal records. The process varies depending upon whether the requestor is a California resident or not.

91 Under 28 Code of Federal Regulations part 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.

92 28 C.F.R. § 20.21(d).

93 28 C.F.R. § 50.12. See also 42 U.S.C. § 2169 [nuclear power providers] and 34 U.S.C. § 40102 [child/dependent care providers].

94 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." (28 C.F.R. § 16.31.)

95 *Ibid.*

96 Pen. Code, §§ 11105, subd. (c), 13300, subds. (c)(4) & (c)(7).

97 28 C.F.R. § 16.32.

98 28 C.F.R. § 16.34.

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.[99] 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.[100]

§ 3.5 DNA AND FINGERPRINTING AFTER ADJUDICATION

In California, a juvenile is subject to DNA collection and fingerprinting if she pleads guilty or no contest or if she has been adjudicated under section 602 for the following offenses:

- Any felony offense;[101]
- Any sex offense that requires registration pursuant to Penal Code section 290;[102] or
- Any arson offense that requires registration pursuant to Penal Code section 457.1.[103]

If the youth pleads guilty or is adjudicated for the above offenses, the youth shall provide buccal swab samples, right thumbprints, and a full palm print impression of each hand for law enforcement identification.[104]

Youth on a grant of deferred entry of judgment[105] (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)[110]

Generally speaking, there are two ways to pursue the sealing of juvenile court records—"automatically" under Welfare and Institutions Code sections 786 and/or 786.5 or "discretionarily" under Welfare and Institutions Code sections 781 and/or 782. Since the enactment of "automatic" record sealing in 2015, the vast majority of petitions eligible to be sealed should now be sealed by operation of law. As a result, cases with record sealing issues tend to be those involving findings from before 2015. Of these older cases, record sealing should be relatively straightforward if probation was completed successfully, as the "automatic" sealing provisions of sections 786 and/or 786.5 should apply. Record sealing can become much more complicated,

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

100 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, § 13150.)

101 Pen. Code, § 296, subd. (a)(1).

102 Although Penal Code section 296, subdivision (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 Penal Code section 290.008.

103 Pen. Code, § 296, subd. (a)(3).

104 Pen. Code, § 296, subd. (a)

105 Welf. & Inst. Code, § 790.

106 Under Welfare and Institutions Code section 791, subdivision (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, subd. (a)(1).) The language of Welfare and Institutions section 725 states that "if a court has found that a minor is a person described by Section 601 or 602 . . . it may, without adjudging the minor a ward of the court, place the minor on probation." 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 725, a finding of wardship, by definition, will never occur with successful completion of section 725 non-wardship probation. 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.

108 Pen. Code, § 295.

109 Pen. Code, § 299.6.

110 Please see also Pacific Juvenile Defender Center's other publications covering juvenile record sealing: "California Juvenile Record Sealing Toolkit" and "California Post-Dispositional Representation" (Chapter 15).

however, when probation was not completed successfully and/or a 707(b) offense is involved. In these situations, record sealing must be sought through the "discretionary" provisions of sections 781 and/or 782.

"Automatic" Record Sealing Under Section 786

Under Welfare and Institutions Code section 786, a youth who has been alleged or found to be a ward of the juvenile court is eligible to have a petition dismissed and the records pertaining to that petition sealed immediately upon a court finding that they "satisfactorily completed": (1) informal probation pursuant to Welfare and Institutions Code section 654.2 (pre-adjudication 6-month probation); (2) non-wardship probation under Welfare and Institutions Code section 725 (6-month probation without wardship); or (3) a term of probation for any offense not listed in section 707(b).[111] Sealing under this section also applies to a petition that is dismissed without an adjudication or one that results in an acquittal after a hearing.[112]

"Satisfactory completion" of a term of probation shall be deemed to have occurred if two criteria are met: (1) "if the person has no new findings of wardship or conviction for a felony offense or a misdemeanor involving moral turpitude during the period of supervision or probation"; and (2) "if the person has not failed to substantially comply with the reasonable orders of supervision or probation that are within their capacity to perform."[113] Consistent with the purpose of section 786–to provide a clean slate for young people under delinquency court jurisdiction–only "substantial" (vs. perfect) compliance need be achieved.[114]

An unfulfilled condition of restitution–including restitution fines and orders to pay restitution to the victim–cannot constitute "unsatisfactory" completion of supervision or probation under section 786.[115] This section does not relieve a youth from the obligation to pay victim restitution, restitution fines and/or court-ordered fines and fees merely because their juvenile court records have been sealed.[116] In addition, the court may still enforce a civil judgment for unfulfilled restitution, even after sealing.[117]

Any youth who has "satisfactorily completed" probation is eligible to have their juvenile records sealed under section 786, regardless of whether their juvenile probation was terminated before or after January 1, 2015 (the effective date of section 786).[118] If a person filed a petition to seal under section 781 before January 1, 2015, but that petition was still pending after section 786 went into effect, the juvenile court properly should consider the sealing request under section 786 as well.[119]

A juvenile record sealing order under section 786 applies to "all records pertaining to the dismissed petition in the custody of the juvenile court, and in the custody of law enforcement agencies, the probation department or the Department of Justice."[120] Additional juvenile records may also be sealed upon request: "[a]n individual who has a record that is eligible to be sealed under this section may ask the court to order the sealing of a record pertaining to the case that is in the custody of a public agency other than a law enforcement agency, the probation department, or the Department of Justice, and the court may grant the request and order that the public agency record be sealed if the court determines that sealing the additional record will promote *the successful reentry and rehabilitation of the individual*."[121] Section 786 also allows the juvenile court to dismiss prior petition(s) and order the sealing of records related to the petition(s) where these documents "appear to the satisfaction of the court to meet the sealing and dismissal criteria otherwise described in this section."[122]

"Upon the court's order of dismissal of the petition, the arrest and other proceedings in this case shall be *deemed not to have occurred* and the person who was the subject of the petition may reply accordingly to an inquiry by employers, educational institutions, or other persons and entities regarding the arrest and proceedings in the case."[123] The juvenile court provides notice to

111 Welf. & Inst. Code, § 786, subd. (a); *In re K.W.* (2020) 54 Cal.App.5th 467 [juvenile court erred in reducing youth's robbery adjudication to the lesser included offense of grand theft because the statutes the juvenile court cited — Welfare and Institutions Code sections 775 and 786 — did not authorize the court to reduce adjudication.]

112 Welf. & Inst. Code, § 786, subd. (e).

113 Welf. & Inst. Code, § 786, subd. (c)(1).

114 See *In re A.V.* (2017) 11 Cal.App.5th 697, 708-709.

115 Welf. & Inst. Code, § 786, subd. (c)(2).

116 Welf. & Inst. Code, § 786, subd. (h).

117 *Ibid.*

118 *In re I.F.* (2017) 13 Cal.App.5th 679, 691 [a "petition to seal should [be] governed by the version of section 786 in effect *at the time of the juvenile court's adjudication of it*"] (emphasis added).)

119 *Ibid.*

120 Welf. & Inst. Code, § 786, subd. (a).

121 Welf. & Inst. Code, § 786, subd. (f)(2) (emphasis added).

122 Welf. & Inst. Code, § 786, subd. (f)(1).

123 Welf. & Inst. Code, § 786, subd. (b) (emphasis added).

the person and his or her attorney once the person's records have been sealed. That notice must include an advisement of this right to non-disclosure.[124]

"Automatic" Record Sealing Under Section 786.5

Welfare and Institutions Code section 786.5 applies to a youth who was arrested for a crime as a juvenile but then was referred by the probation officer or the prosecutor to a program of diversion or supervision in lieu of filing a wardship petition. This includes a program of informal supervision pursuant to section 654.[125] To be eligible for record sealing, the program participant must have satisfactorily completed the program of diversion or supervision. The determination of "satisfactory completion" under section 786.5 is made by the probation department.[126]

"Satisfactory completion of the program of supervision or diversion shall be defined for purposes of . . . section [786.5] as substantial compliance by the participant with the reasonable terms of program participation that are within the capacity of the participant to perform."[127] The probation department shall make this determination within 60 days of the juvenile's completion of the program.[128]

If the probation department has sealed a youth's records based on a determination of "satisfactory completion" of diversion or supervision, it must notify the youth in writing.[129] If the probation department has declined to seal the youth's records under this section, it must *also* notify the youth in writing and explain the reasons for not sealing the record.[130] The youth may petition the court for independent review of any adverse decision.[131] At the hearing, the youth must demonstrate that they "satisfactorily completed" the diversion or supervision program for the court to order sealing.[132]

Section 786.5 requires the probation department to "seal the arrest and other records in its custody relating to the juvenile's arrest or referral and participation in the diversion or supervision program . . . ."[133] In addition, probation must notify any public or private agency operating any diversion or supervision program to which a youth was referred and direct the agency to seal records in the program operator's custody relating to the youth's arrest, referral and participation in the program.[134] The program operator must promptly seal those records.[135]

"Upon the sealing of records under this section, the arrest . . . giving rise to the person's participation in the program shall be *deemed not to have occurred* and the individual may respond accordingly to any inquiry, application, or process in which disclosure of this information is requested or sought."[136]

"Discretionary" Record Sealing Under Section 781

If a youth is ineligible for "automatic" record sealing under sections 786 or 786.5, or if they were denied "automatic" sealing on some or all of their petitions, the youth may choose to petition the juvenile court for "discretionary" record sealing pursuant to section 781. There are two forms of sealing covered by section 781: (1) a more protective form available to those arrested for a crime as a juvenile and/or alleged or found to be a ward of the juvenile court, *but* have no sustained findings for 707(b) offenses committed after reaching age 14 on their record;[137] and (2) a more limited form available to an individual with a sustained finding for a 707(b) offense who is unable to get the offense dismissed or reduced.[138] The latter type is explained below under the heading: "'Limited'" Record Sealing Under Section 781."

In general terms, the more protective form of discretionary sealing requires:

- The youth to wait to until they are *at least* 18 years old or *at least* five years or more have passed since either juvenile court jurisdiction was terminated or since the youth was cited to appear before a probation officer or a law enforcement agency, if a petition was never filed;[139]

124 Welf. & Inst. Code, § 786, subds. (a), (e).

125 Welf. & Inst. Code, § 786.5, subd. (a).

126 *Ibid.*

127 Welf. & Inst. Code, § 786.5, subd. (e).

128 *Ibid.*

129 Welf. & Inst. Code, § 786.5, subd. (b).

130 *Ibid.*

131 Welf. & Inst. Code, § 786.5, subd. (d)(2).

132 *Ibid.*

133 Welf. & Inst. Code, § 786.5, subd. (a).

134 Welf. & Inst. Code, § 786.5, subd. (b).

135 *Ibid.*

136 Welf. & Inst. Code, § 786.5, subd. (c) (emphasis added).

137 Welf. & Inst. Code, § 781, subd. (a)(1)(A).

138 Welf. & Inst. Code, § 781, subd. (a)(1)(D).

139 Welf. & Inst. Code, § 781, subd. (a)(1)(A).

» The juvenile court to find, after hearing and since the termination of jurisdiction, to grant the petition to seal records: (1) the individual has not been convicted of a felony or of any misdemeanor involving moral turpitude; and (2) that rehabilitation has been attained to the satisfaction of the juvenile court.[140]

A finding of "rehabilitation" is based upon a showing that the "criminal behavior is in the past and will not be repeated." Because the inquiry should be made based upon the "totality of the circumstances" presented, "individual factors will inevitably vary."[141]

At the appropriate time, a person may petition the court for the sealing of his or her records, including arrest records, relating to the person's case in the custody of the juvenile court, the probation officer, and any other agencies (e.g., law enforcement agencies), and public officials alleged to have custody of the records.[142] The juvenile court then notifies the county district attorney, the county probation officer and any other person having relevant evidence, so that they may have an opportunity to appear at the hearing on the petition.[143] At the conclusion of the hearing on the petition, the court must determine whether the petitioner has met the standard for record sealing, as set forth above.[144]

If the standard has been met, the court orders the sealing of all records, papers and exhibits in the person's case in the custody of the juvenile court, and any other records relating to the case in the custody of other agencies, entities and officials as named in the order.[145] If the person was required to register under Penal Code section 290, the court also orders that the person is relieved of the duty to register and orders destruction of the registration information in the custody of the Department of Justice and other agencies, entities and officials.[146] The court then sends a copy of this record sealing order to each agency, entity and official named in the order, directing the agency, entity or official to seal the designated records. After the agency, entity of official complies by sealing the records in its custody, it must notify the juvenile court.[147]

As with the automatic sealing statutes described above: "[o]nce the court has ordered the person's records sealed, the proceedings in the case shall be deemed never to have occurred, and the person may properly reply accordingly to any inquiry about the events, the records of which are sealed."[148]

"Limited" Record Sealing Under Section 781

A youth with a sustained finding for a (b) offense who is unable to get the offense dismissed or reduced, may nevertheless be eligible for a more limited form of record sealing under Welfare and Institutions Code section 781, subdivision (a)(1)(D).[149] Effective January 1, 2018, such a person is eligible for the more limited form of record sealing when: (1) they are at least 18 years old, if the 707(b) offense did *not* result in a DJJ commitment; *or* (2) they are at least 21 years old, if the 707(b) offense *did* result in a commitment to DJJ; *and* (3) they have completed any period of supervision associated with the 707(b) finding and/or the DJJ commitment.[150]

The more limited form of record sealing for non-reduced and/or non-dismissed 707(b) offenses allows the 707(b) records to be accessed, inspected and utilized in ways that full section 781 record sealing does not. The distinction between full section 781 sealing and limited section 781 sealing is discussed in further detail *infra*.

An unfulfilled order of restitution that has been converted into a civil judgment shall not be a bar to sealing a record under section 781.[151] On the other hand, the court may still enforce a civil judgment for unfulfilled restitution, even after record sealing.[152] In addition, a person is not relieved from the obligation to pay victim restitution, restitution fines and/or court-ordered fines and fees merely because his or her juvenile court records have been sealed.[153]

Please note that California law does not allow the sealing of a juvenile record for a 707(b) offense

140 *Ibid.*

141 In re J.W. (2015) 236 Cal.App.4th 663, 671-672.

142 Welf. & Inst. Code, § 781, subd. (a)(1)(A).

143 *Ibid.*

144 *Ibid.*

145 *Ibid.*

146 Welf. & Inst. Code, § 781, subd. (a)(1)(C).

147 Welf. & Inst. Code, § 781, subd. (a)(1)(B).

148 Welf. & Inst. Code, § 781, subd. (a)(1)(A).

149 Note that records related to a 707(b) offense committed after age 14 that resulted in sex offense registration pursuant to Penal Code section 290.008 are specifically not eligible for record sealing under section 781. (Welf. & Inst. Code, § 781, subd. (a)(1)(F).)

150 Welf. & Inst. Code, § 781, subds. (a)(1)(D)(i)(I)-(a)(1)(D)(i)(II).

151 Welf. & Inst. Code, § 781, subd. (a)(2).

152 Welf. & Inst. Code, § 781, subd. (g).

153 *Ibid.*

committed after the youth turned 14 years old, and which required them to register for certain sex offenses pursuant to Penal Code section 290.008.[154] And as with sections 786 and 786.5, the record sealing provisions for Vehicle Code violations does not apply to the DMV if the DMV already maintains a public record of such a conviction.[155]

Starting on January 1, 2020, a court or a probation department may not charge an applicant a fee to file a petition to seal a juvenile record under Welfare and Institutions Code section 781.[156] The California Legislature also repealed Welfare and Institutions Code section 903.3, which had allowed a court or county to charge applicants age 26 or older for investigation costs related to the filing of a section 781 record sealing petition.[157]

Dismissal in the Interests of Justice Under Section 782

Welfare and Institutions Code section 782 allows a juvenile court in which a petition was filed to dismiss the petition, or set aside the findings and dismiss the petition, if the court finds that the interests of justice and the welfare of the person who is the subject of the petition require that dismissal, or if it finds that he or she is not in need of treatment.[158]

Section 782 can be an extremely valuable tool in post-disposition representation. For example, in the appropriate case, a dismissal under section 782 can eliminate "juvenile strike" offenses[159] and/or prior 707(b) adjudications[160], where it can be shown that the "interests of justice and the welfare of the person who is the subject of the petition require that dismissal. . . ."[161] If a sustained 707(b) offense committed after a person was 14 years old is dismissed under section 782, the person may then apply for "full" record sealing under section 781.[162] In addition, prior to the enactment of tiered registration, a 782 dismissal was the only way to be relieved from the lifetime sex offender registration requirement for a 707(b) offense committed after age 14.[163]

Section 782 can also be a valuable tool for eliminating offenses which would otherwise disqualify one from joining the military or obtaining employment in law enforcement. If a petition is dismissed pursuant to section 782, it becomes eligible for immediate record sealing under section 786, thereby dispensing with the need to comply with the various procedural requirements of a record sealing petition under section 781.

Any person who was arrested for a crime as a juvenile and subsequently found to be a ward of the juvenile court may seek a section 782 dismissal. There are no restrictions on age, status with the court, or type of charge that can be set aside or dismissed. Similarly, the person who is the subject of the petition and the charges need not be under the jurisdiction of the juvenile court, a ward or a dependent child at the time of the dismissal.

The impact of section 782 dismissal is far-reaching and distinct from the termination of jurisdiction at the end of the juvenile case.[164] "[W]hen a juvenile court sets aside findings and dismisses a petition under [S]ection 782, the court's action operates 'as a matter of law to erase the prior [sustained petition] as if the [minor] had never suffered [it] in the initial instance."[165] "Such a dismissal in intended to erase a prior adjudication -- not merely reduce or mitigate it -- and to thereby protect the person from any and all future adverse consequences based on that adjudication."[166]

Accessing Sealed Juvenile Records

It is important to remember that even though the records are sealed, they are not immediately destroyed.[167] Juvenile records sealed pursuant to

154 Welf. & Inst. Code, § 781, subd. (a)(1)(F).

155 Welf. & Inst. Code, § 781, subds. (c)(1) & (c)(3).

156 Welf. & Inst. Code, § 781.1.

157 See Assem. Bill No. 1394 (2019-2020 Reg. Sess.)

158 See also R. of Ct., rule 5.790, subd. (a)(2).

159 *People v. Haro* (2013) 221 Cal.App.4th 718.

160 *In re David T., supra,* 13 Cal.App.5th 866.

161 Welf. & Inst. Code § 782. Please note that as of August 2022, Assembly Bill 2629 (Santiago), has been enacted by the legislature and is awaiting the Governor's signature. If signed, AB 2629 will require a court, at the time it terminates jurisdiction or any time thereafter, to consider and afford great weight to evidence offered by the person to prove that specified mitigating circumstances are present unless the person seeking relief has been convicted of a serious or violent felony. It would also provide that proof of the presence of one or more specified mitigating circumstances weighs greatly in favor of dismissing a petition under section 782. Dismissal under this provision would not prohibit a court from enforcing a civil judgment for an unfulfilled order of restitution.

162 See *ibid.*

163 See Chapter 5, *Registration.*

164 See *In re Greg F.* (2012) 55 Cal. 4th 393, 419.

165 See *In re David T.*, 13 Cal.App.5th at p. 875.

166 *Id.* at p. 877.

167 Welf. & Inst. Code, § 781, subd. (a) & (d).

Welfare and Institutions Code sections 781, 786 and 786.5 are subject to multiple exceptions that allow access to these records by prosecutors, probation departments, courts and other agencies. What follows is a description of the more common exceptions at the time this publication was completed. For a complete, detailed list of access exceptions refer sections 781, 786 and 786.5 themselves.

A record that has been sealed pursuant to Welfare and Institutions Code section 786 is subject to multiple exceptions that allow access to these records by prosecutors, probation departments, courts and other entities under certain circumstances. These include access to the sealed record by a prosecuting attorney or probation department in order to determine whether the youth is eligible for deferred entry of judgment under Welfare and Institutions Code section 790 or for an informal program of supervision under section 654.[168] If a new petition is filed against the youth, the probation department will still be able to access a record sealed under section 786 in order to review the youth's previous court-ordered programs and placements only for the purpose of identifying suitability for remedial programs and services.[169] The probation department's access to these records should not be used to support the imposition of penalties, detention or other sanctions.[170] Records sealed pursuant section 786 are also subject to many of the same types of exceptions applicable to records sealed under section 781, including the exceptions for determining appropriate dispositions,[171] deciding whether to transfer the youth to adult court,[172] fulfilling "*Brady*" obligations,[173] and enforcing restitution orders, fines and fees.[174]

Further, for records sealed under provision, law enforcement and certain health care employers may ask applicants to disclose non-conviction criminal history that includes juvenile arrest information,[175] 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.[176] 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.[177]

Shortly before this publication went to press, the United States Congress passed the "Safer Communities Act," which among other things, establishes an enhanced review process for those under age 21."[178] The process involves an initial three day investigative period whereby the National Instant Criminal Background Check System (NICS) reviews juvenile and mental health records, including checks with state databases and local law enforcement, for buyers under 21 years of age.[179] If that search reveals a possible disqualifying record, NICS will have an extended window of no more than ten business days total to complete the investigation.[180]

Welfare and Institutions Code section 786.5 lists only *two* circumstances under which a record that has been sealed under this provision may be accessed: (1) the probation department of a county responsible for the supervision of a youth may access a record sealed under section 786.5 for the sole purpose of determining initial eligibility for informal diversion under section 654 and/or informal probation under section 654.2;[181] and (2) a prosecuting attorney may access a record to fulfill "*Brady*" obligations.[182]

A record that has been sealed pursuant to Welfare and Institutions Code section 781, which does not include one or more 707(b) offenses committed after reaching age 14, may only be accessed by a court, probation department and/or prosecuting attorney in very limited circumstances. In general, a juvenile court may access records sealed under section 781 *only* to verify the prior jurisdictional status of a former ward petitioning the court to resume dependency or transition jurisdiction *or* to the extent necessary to enforce a previously imposed

168 Welf. & Inst. Code, § 786, subd. (g)(1)(A).

169 Welf. & Inst. Code, § 786, subd. (g)(1)(C).

170 *Ibid.*

171 Welf. & Inst. Code, § 786, subds. (g)(1)(D).

172 Welf. & Inst. Code, § 786, subds. (g)(1)(E).

173 Welf. & Inst. Code, § 786, subd. (g)(1)(K)(i).

174 Welf. & Inst. Code, § 786, subd. (h).

175 Lab. Code, § 432.7.

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

177 See 32 C.F.R. §§ 66.3, 66.6; Dep't of the Army, Reg. 601-210, Regular Army & Reserve Components Enlistment Program 14 (Aug. 31, 2016) (providing examples of how the military views sealed or expunged cases). A person convicted of a felony may not enlist in any branch of the military without a waiver from the U.S. Secretary of Defense. (10 U.S.C. § 504(a).)

178 Bipartisan Safer Communities Act, 117 P.L. 159; 18 USCS § 922(t)(1)(C).

179 18 USCS § 922(t)(1)(C)(ii)

180 18 USCS § 922(t)(1)(C)(ii)

181 Welf. & Inst. Code, 786.5, subd. (f)(1).

182 Welf. & Inst. Code, 786.5, subd. (f)(2).

restitution order and/or civil judgment.[183] Similarly, a civil court *may* allow sealed records to be admitted into evidence in a subsequent civil matter involving defamation.[184] The person who is the subject of the juvenile court records themself is entitled to inspect their own juvenile court records, even if they have been ordered sealed.[185] Further, not only is the Department of Motor Vehicles (DMV) *not* required to seal records of any juvenile vehicle code violations, but it may also *disclose* these records to insurers for the purpose of determining eligibility for auto insurance and/or auto insurance rates.[186]

A record that has been sealed pursuant to the more limited form of sealing under section 781 (i.e. where the record contains one or more 707(b) offenses committed after reaching age 14)[187] may be accessed in a subsequent proceeding by the prosecuting attorney in order to make charging decisions in an adult criminal court, or by the prosecutor or court to determine sentencing.[188] A prosecutor or court can also access this type of sealed juvenile record in a subsequent juvenile proceeding in order to determine whether transfer to adult criminal court is appropriate or what juvenile disposition would be most appropriate.[189] A prosecutor or criminal court can access this type of record to prove a prior serious felony conviction for sentencing pursuant to Penal Code section 667.[190] Additionally, a prosecuting attorney can access a record sealed pursuant to section 781 to meet a statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case in which the prosecuting attorney has reason to believe that access to the record is necessary to meet the disclosure obligation.[191] This so-called "*Brady*"[192] exception requires notice and opportunity to be heard for the person with the sealed record.[193]

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.[194] 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.

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.

§ 3.7 DESTRUCTION OF JUVENILE COURT RECORDS

Whether and when sealed juvenile records are to be destroyed depends upon the section of Welfare and Institutions Code was utilized to seal the records in the first place.

Destruction Under Section 786

To facilitate the destruction process of a record sealed under section 786 the juvenile court sends a copy of the sealing order to each named agency or official, directing the agency or official to seal the records and specifying a date by which the sealed records shall be destroyed with one caveat: if the record contains a sustained finding rendering the person ineligible to own a firearm until age 30 under Penal Code section 29820, that sealed record may not be destroyed until the person turns age 33.[195] Otherwise, California Rule of Court, rule 5.840(d) gives the court discretion within these timeframes: (1) for court records it is no earlier than youth's 21st birthday and no later than they turn age 38; and (2) for other agency records it is no earlier than the youth's 18th birthday and no later than five years after sealing.[196]

183 Welf. & Inst. Code, § 781, subds. (e), (g)(2).

184 Welf. & Inst. Code, § 781, subd. (b).

185 Welf. & Inst. Code, § 781, subd. (a)(4).

186 Welf. & Inst. Code, § 781, subds. (c)(1) & (c)(2).

187 Following the enactment of the auto-sealing provisions of Welfare and Institution Code section 786, virtually all records sealed pursuant to section 781 will fall into this category. (See Welf. & Inst. Code, § 786, subd. (d).)

188 Welf. & Inst. Code, § 781, subd. (a)(1)(D)(ii)(I).

189 Welf. & Inst. Code, § 781, subds. (a)(1)(D)(ii)(II) & (a)(1)(D)(ii)(III). The probation department may also access this type of section 781 sealed record to help determine an appropriate disposition. (Welf. & Inst. Code, § 781, subd. (a)(1)(D)(ii)(III).)

190 Welf. & Inst. Code, § 781, subd. (a)(1)(D)(ii)(IV).

191 Welf. & Inst. Code, § 781, subd. (a)(1)(D)(iii)(I).

192 *Brady v. Maryland* (1963) 373 U.S. 83.

193 Welf. & Inst. Code, § 781, subd. (a)(1)(D)(iii)(I).

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

195 Welf. & Inst. Code, § 786, subds. (a), (e).

196 California Rules of Court, rule 5.840(d); Welf. & Inst. Code, § 781, subd. (d).

Destruction Under Section 786.5

Unlike section 786, section 786.5 does not contain any specific provisions related to the ultimate destruction of sealed records.[197] However, Welfare and Institutions Code section 826 mandates the destruction of a youth's section 602 records "when the person reaches the age of 38 years . . . unless for good cause the court determines that the juvenile record shall be retained . . . ."[198]

Destruction Under Section 781

Unless the court determines for cause that the person's sealed juvenile records shall be retained, it *shall* order destruction of the records as follows: (1) when the person was alleged or adjudged to be a person described by section 602, because of their commission of a *non-707(b) offense*, sealed juvenile court records should be destroyed when the person reaches age 38; (2) when the person was alleged or adjudged to be a person described by section 602 because of the commission of a 707(b) offense when they were 14 years or older, sealed juvenile court records shall *not* be destroyed; and (3) any other agency in possession of sealed records may destroy the records five years after they were ordered sealed.[199]

Please note that section 826 provides that in the case of non-707(b) offenders, the probation officer *may destroy* all records and papers in the proceedings concerning the youth five years after the juvenile court's jurisdiction over the youth has terminated.[200] Section 826.5 appears to go further by providing that the juvenile court or probation officer may destroy all papers, the juvenile court record, minute book entries and judgment documents at any time before a person reaches the age which requires her records to be destroyed.[201]

Any person who is the subject of a juvenile court record may petition the court to release the record to their custody, or to destroy a juvenile court record.[202] 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.[203]

The proceedings in any case in which the juvenile court record has been destroyed or released pursuant to sections 781 and 826 shall be deemed never to have occurred and the person may reply accordingly to any inquiry about the events in the case.[204]

197 Welf. & Inst. Code, § 786.5.

198 See Welf. & Inst. Code, § 826, subd. (a).

199 Welf. & Inst. Code, § 781, subd. (d).

200 Welf. & Inst. Code, § 826, subd. (a).

201 Welf. & Inst. Code, §§ 826, subd. (a), 826.5, subd. (a).

202 Welf. & Inst. Code, § 826, subd. (a).

203 Welf. & Inst. Code, § 826, subd. (b).

204 *Ibid.*

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."[205] 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.[206] For example, an adult defendant who previously has been convicted of one or more theft-related offenses, and who has a prior conviction for a "super strike" or is required to register as a youth who committed sex offenses, may be charged with a felony in a subsequent prosecution for petty theft regardless of the value of the item taken.[207] However, a juvenile adjudication for petty theft does not qualify as a prior, because the adjudication is not a conviction.[208] Similarly, juvenile adjudications for driving under the influence (DUI) do not qualify as adult DUI "priors."[209] A prior juvenile adjudication for a serious felony[210] does not qualify as a "five-year prior" under Penal Code section 667, subdivision (a).[211]

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.[212]

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.[213] 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.[214]

While a detailed description 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 a subsequent conviction for a serious or violent felony[215] as well as in certain other circumstances. Because juvenile priors may qualify as "strikes," the existence of one or more prior juvenile adjudications for "strike" offenses will have a dramatic effect 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 serious[216] or violent[217] felony; or
- The offense is not listed in Welfare and Institutions Code section 707, subdivision (b), but *is* listed as serious[218] or violent,[219] and the court declared the youth a Section 602 ward

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

206 *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.)

207 Pen. Code, § 666, subds. (a)-(b); § 667 (e)(2)(C)(iv) [list of "super strike" offenses].

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

209 *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.

210 See Pen. Code, § 1192.7, subd. (c) [list of serious felony offenses].

211 *People v. West, supra*, 154 Cal.App.3d at p. 110.

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

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

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

215 Pen. Code, §§ 667, subds. (e)(1), (e)(2)(A)(ii), & (e)(2)(C); 1170.12, subds. (c)(1), (c)(2)(A)(ii), & (c)(2)(C).

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

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

218 Pen. Code, § 1192.7, subd. (c).

219 Pen. Code, § 667.5, subd. (c).

with a 707(b) offense in the same petition, or in another petition. [220]

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 707(b) offense.[221] 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 (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(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(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)(4) (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)(4) 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 a youth goes to disposition for two different petitions, one containing a 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, subd. (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.[222] Although there is no specific caselaw on this issue, the best practice in this scenario, if possible 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 prosecution.

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

221 However, some residential burglaries are section 707(b) and juvenile strike offenses. For instance, see Welfare and Institutions Code section 707, subdivision (b)(16). This statute refers to Penal Code section 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, subd. (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, subd. (c)(21) & 186.22, subd. (b); Welf. & Inst. Code, § 707, subd. (b)(21).)

222 Because the language of *Garcia* is "adjudged a ward" (see *People v. Garcia, supra*, 21 Cal.4th at p. 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, such as 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 misdemeanor[223] at the time of disposition to prevent the offense from later qualifying as a juvenile strike.[224]

§ 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.[225] 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.[226] When making these determinations, the court is permitted to consider whether or not the defendant suffered a prior sustained petition as a juvenile.[227] The use of prior juvenile adjudications as a circumstance in aggravation in adult court does not violate a defendant's right to jury trial.[228]

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."[229] This factor does not permit the jury to consider a prior juvenile adjudication.[230] 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.[231]

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. However, a witness who has previously suffered a sustained juvenile petition may be impeached with the underlying conduct.[232]

Sexually Violent Predator (SVP) Commitments

The Sexually Violent Predator Act provides for indefinite civil commitment of adult offenders who have qualifying prior sexual offenses.[233] 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.[234]

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.[235]

223 Pen. Code, § 17, subd. (b).

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

225 Cal. Rules of Court, rule 4.413 [criteria affecting grant of probation when defendant is presumptively ineligible], rule 4.414(b) [criteria affecting probation].

226 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].

227 Cal. Rules of Court, rules 4.414(b)(1), & 4.421(b)(2).

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

229 Pen. Code, § 190.3, subd. (c).

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

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

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

233 Welf. & Inst. Code, §§ 6600- 6609.3.

234 Welf. & Inst. Code, § 6600, subd. (g).

235 *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.

For a juvenile adjudication to count as an ACCA predicate, the underlying crime has to have involved certain elements of violence.[236] These special elements for juveniles are also subject to the categorical approach, which means that if they are not elements of the offense or admitted by the youth, the juvenile adjudication may not be used as an ACCA predicate.[237]

236 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(e)(2)(B).)

237 *United States v. Taylor* (1990) 495 U.S. 575, 602: "[T]he only plausible interpretation of § 942(e)(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, 16: 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 factual findings 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, 268.)

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 COMPREHENSIVE REFORM FOR REGISTRATION FOR SEX OFFENSES

Starting on January 1, 2021, California put into effect a two-tiered system of law governing registration pursuant to Penal Code 290.008 (sex offenses) to replace the prior system that generally required lifetime registration even for youth. The new system provides individuals subject to registration for offenses committed as a juvenile with an avenue to seek relief from requirements after completing an initial minimum term of registration of either five or 10 years.[238]

For a juvenile offense, registration will only be triggered if the youth is committed to DJJ for commission or attempted commission of one of the sex offenses enumerated in the statute.[239] The offenses that trigger registration are listed in Penal Code section 290.008, subdivision (c). 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).[240] In the case of out-of-state juvenile adjudications, a person must register in California if the offense would have been punishable as one of the listed offenses, and the youth was committed for that offense to an institution equivalent to DJJ.[241] Youth are informed of their duty to register prior to discharge from DJJ.[242]

If registration is triggered by a juvenile offense, the registration tier will be determined by the type of offense.[243] Tier One applies to any offense listed under Penal Code section 290.008(c) that is ***not*** a "serious or violent felony," as described in Penal Code sections 667.5(c) or 1192.7(c).[244] Tier Two applies to any offense listed under Penal Code section 290.008(c) that is ***also*** a serious or violent felony, as described in sections 667.5(c) or 1192.7(c).[245] The registration lengths are as follows:

- Tier One: Minimum of 5 years
- Tier Two: Minimum of 10 years

Note that for juvenile offenses, there are only two tiers, whereas for adult offenses, there are three tiers (with the third tier requiring lifetime registration).[246] ***Under the new law, juvenile adjudications no longer automatically result in lifetime registration.***[247]

The term of the registration begins to run upon discharge from DJJ custody, and will be tolled during any subsequent periods of incarceration.[248] The term will also be extended upon a conviction for failing to register for the following periods: extension of one year for a misdemeanor conviction, and extension of three years for a felony conviction.[249]

The obligations imposed as a result of registration are set out in § 5.5 below.

§ 5.2 TERMINATION OF DUTY TO REGISTER AS A YOUTH WHO HAS COMMITTED SEX OFFENSES

Under the laws that went into effect in 2021, a person who is required to register for a juvenile sex offense may file a petition for termination from the registry following the expiration of the mandated minimum registration period.[250] The petition may be filed in juvenile court in the county in which the petitioner is registered, on or after the registrant's birthday following

238 The California Department of Justice published a factsheet summarizing the new laws. "Frequently Asked Questions California Tiered Sex Offender Registration (Senate Bill 384) For Registrants," California Department of Justice, California Justice Information Services, Sex Offender Registry, Last Updated 2/2021, *available at*: https://oag.ca.gov/sites/all/files/agweb/pdfs/csor/registrant-faqs.pdf.

239 Pen. Code, § 290.008, subd. (a); see also, Welf. & Inst. Code §§ 731, 733.

240 *See In re Alex N.* (2005) 132 Cal.App.4th 18, 24; *Ruelas v. Superior* Court (2015) 235 Cal. App. 4th 374, 383 but see *In re G.C.* (2007) 157 Cal.App.4th 405, 410.

241 Pen. Code, § 290.008, subd. (b).

242 Pen. Code, § 290.008, subd. (e).

243 Pen. Code, § 290.008, subd. (d).

244 Pen. Code, § 290.008, subd. (d)(1).

245 Pen. Code, § 290.008, subd. (d)(2).

246 Compare Pen. Code, § 290, subd. (d) and 290.008, subd. (d).

247 See Pen. Code § 290, subd. (f).

248 Pen. Code, §§ 290, subd. (e), 290.008, subd. (a).

249 *Ibid.*

250 Pen. Code §§ 290.008, subd. (d)(3), 290.5, subd. (a)(1).

the expiration of the registration period.[251] The petition shall include proof of current registration.[252]

A petition to terminate registration must be served on the registering law enforcement agency and the district attorney in the county where the petition is filed ***and*** the county where the offense was adjudicated (*if different*).[253] The registering law enforcement agency must file a report with the juvenile court within 60 days regarding whether the requirements for termination have been met pursuant to Penal Code section 290, subdivision (e).[254]

The district attorney may request a hearing if the petitioner has not met the requirements under Penal Code section 290, subdivision (e), or if "community safety would be significantly enhanced by continued registration."[255] If no hearing is requested, the court shall grant the petition for termination upon finding that the requirements have been met, that there are no pending charges that could extend the time to complete registration or change the tier status, and that the person is not in custody or on parole, probation, or supervised release.[256]

If a hearing is requested, the court will determine whether to order continued registration.[257] If termination from registry is denied, the court shall set a time period after which the person can re-petition for termination, which must be at least one year from denial, but no more than five years.[258] The court shall notify the Department of Justice when a petition for termination is granted or denied.[259]

§ 5.3 ADDITIONAL ROUTES TO RELIEF FROM THE DUTY TO REGISTER AS A YOUTH WHO HAS COMMITTED SEX OFFENSES

The methods discussed in the paragraphs below for seeking relief from the duty to register will likely continue to be available even though the new registration laws have already gone into effect. As such, attorneys should review the options below in addition to the registration termination process discussed above.

Under the former statutory scheme, 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.[260] However, sealing is not available for offenses listed for Welfare and Institutions Code section 707, subsection (b), when committed by a youth age 14 or older, even if the youth was honorably discharged from DJJ.[261] This fact sharply limits the ability of juvenile offenders to be relieved of the registration requirement. However, there are several sex offenses that are DJJ-eligible, pursuant to Welfare and Institutions Code section 733 and Penal Code section 290.008, but that are not listed under section 707(b), and therefore are eligible for sealing and relief from registration under section 781.[262]

Additionally, it may be possible to seek relief pursuant to the dismissal and sealing statute, Welfare and Institutions Code section 786. Under section 786, a court cannot dismiss and seal a petition if the offense is listed in section 707(b) and was committed at the age of 14 or above, unless the offense is reduced to a misdemeanor or another lesser offense not listed in section 707(b).[263] One strategy for removing the duty to register is to file a motion in the juvenile court to reduce the offense to a misdemeanor under Penal Code section 17, subsection (b), or to modify the offense to one not listed under Welfare and Institutions Code section 707(b), in order to open the door for record sealing under section 786 or 781.

Another motion that may relieve registration requirements is a motion to dismiss under Welfare and Institutions Code section 782. A motion to dismiss a petition may be granted regardless of whether the petitioner is a current ward or dependent child of the court at the time that the petition is filed.[264] The court may grant the petition upon a finding that "the interests of justice and the welfare of the person who is the subject of the petition require that dismissal" or that the petitioner "is not in need of treatment or

251 *Ibid.*

252 Pen. Code § 290.5, subd. (a)(1).

253 Pen. Code § 290.5, subd. (a)(2).

254 *Ibid.*

255 *Ibid.*

256 *Ibid.*

257 Pen. Code § 290.5, subd. (a)(3).

258 Pen. Code § 209.5, subd. (a)(4).

259 Pen. Code § 290.5, subd. (a)(5).

260 See Welf. & Inst. Code, § 781, subd. (a)(1)(C); *In re J.C.* (2017) 13 Cal. App. 5th 1201, 1207.

261 Welf. & Inst. Code, §§ 707, subd. (b) and 781, subd. (a)(1)(F); *In re Chong K.* (2006) 145 Cal.App.4th 13, 18.

262 At the time of publication, those offenses include: Pen. Code, § 288, subd. (a); Pen. Code, § 288.5; Pen. Code, § 647.6.

263 Welf. & Inst. Code, § 786, subd. (d).

264 Welf. & Inst. Code, § 782.

rehabilitation."[265] At present there is no definitive authority stating that dismissal relieves the youth from registration pursuant to Penal Code 290.008, but there is an argument that if a case is dismissed in the interest of justice, the direct consequence of registration pursuant to Penal Code 290.008 should be removed.[266]

In 2015, the California Supreme Court decided *Johnson v. Department of Justice*, and overruled a line of cases that had provided relief from registration for non-forcible sex offenses on a minor under 18.[267] Prior to *Johnson*, the Court had held in *People v. Hofsheier*[268] that it was a denial of equal protection to require registration for consensual oral copulation with a minor, since registration is not required for consensual sexual intercourse with a minor. The Court of Appeal, in *In re J.P.*, applied *Hofsheier*'s reasoning to juvenile offenses.[269] However, with *Johnson* the Supreme Court expressly overruled *Hofsheier* and disapproved of cases relying on it, including *In re J.P.*[270] *Johnson* left unclear whether individuals who were previously relieved of registration under *Hofsheier* were now obligated to register.[271]

In response to *Johnson*, the California legislature enacted Senate Bill 145 in 2020. SB-145 exempts a person convicted of non-forcible sodomy with a minor,[272] oral copulation with a minor,[273] or sexual penetration with a minor[274] from having to automatically register pursuant to Penal Code section 290 if the person was not more than 10 years older than the minor at the time of the offense, and the conviction is the only one requiring the person to register.

In 2018, a new "honorable discharge" process went into effect for youth committed to the DJJ.[275] While honorable discharge relieves the person "from all penalties and disabilities resulting from the offense or crime for which he or she was committed," the law explicitly states that honorable discharge does not relieve the duty to register for a sex offense.[276]

It is an open question whether the recall of a DJJ commitment pursuant to Welfare and Institutions Code sections 731.1 or 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 duty to register for a sex offense.

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.

§ 5.4 REGISTRATION REQUIREMENTS UNDER CALIFORNIA LAW

A person who is required to register must register annually within five working days of his or her birthday,[277] as well as within five days of a change of address.[278] Any person who is homeless and subject to registration must update his/her registration at least every 30 days.[279] There is a separate additional duty to register with campus police if one is living at, enrolled at, or employed by a college/university.[280]

A willful failure to register based on a sustained misdemeanor petition is a misdemeanor, punishable by up to one year in jail.[281] A second willful failure to register based on a misdemeanor juvenile adjudication is a felony, punishable by up to three years in prison.[282] A willful failure to register based on a sustained felony juvenile petition is also a felony, carrying up to three years in prison.[283]

Juvenile registration laws differ from adult requirements in several significant respects. First, as set out in the sections above, certain offenses that would require an adult to register do not require a juvenile to register,

265 *Ibid.* For further discussion on section 782 dismissals see the discussion on record sealing in § 3.6 of Chapter 3.

266 *See People v. Haro* (2013) 221 Cal.App.4th 718, 721-724 (holding that a dismissed juvenile petition cannot not be used as a strike under the Three Strikes law in a subsequent criminal proceeding).

267 *Johnson v. Dept. of Corrections* (2015) 60 Cal.4th 871, 875.

268 *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1206-07.

269 *In re J.P.* (2009) 170 Cal.App.4th 1292.

270 *Johnson v. Dept. of Justice, supra*, 60 Cal.4th at p. 879.

271 *Johnson v. Dept. of Justice* (2015) 60 Cal.4th 871, 895-896 (dissenting opinion of Werdegar, J.),

272 Pen. Code, § 286, subd. (b),

273 Pen. Code, § 287, subd. (b),

274 Pen. Code, § 289, subd. (h) & (j),

275 Welf. & Inst. Code § 1177 et seq.

276 Welf. & Inst. Code § 1179.

277 Pen. Code, §290.012, subd. (a)

278 Pen. Code, §290.013

279 Pen. Code, §§ 290.011, 290.012, subd. (c).

280 Pen. Code, §§ 290, subd. (b), 290.009

281 Pen. Code, § 290.018, subd. (a)

282 Pen. Code, § 290.018, subd. (b)

283 *Ibid*

and juvenile registration is only triggered upon commitment to the Department of Juvenile Justice.[284] 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.[285] Third, the Attorney General's web site states that juveniles may not be placed on Internet registration.[286] Note that in 2017, the Court of Appeal for the Third District held that the public disclosure aspects of juvenile registration pursuant to Penal Code 290.008 do not render the registration "punishment" opinion, the Court of Appeal noted that the Attorney General does not publish juveniles on the Megan's Law website.[287] The appellate court also raised a question—for purposes of the Eighth Amendment.[288] In its without deciding—whether the public disclosure provisions under Penal Code sections 290.45 (disclosure by law enforcement) and 290.46 (disclosure on the internet) even apply to juvenile offenses at all.[289]

§ 5.5 REGISTRATION PURSUANT TO FEDERAL LAW

Defenders also need to be aware of possible requirements that youth register, pursuant to federal law, as a person that has committed sex offenses. Title I of the Adam Walsh Child Protection and Safety Act, known as the Sex Offender Registration and Notification Act (SORNA),[290] 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 formally adopted SORNA, and in 2016 was found by the U.S. Department of Justice to have not yet substantially implemented its requirements.[291]

Registration under federal law 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 (or committed an attempt or conspiracy to commit such an offense).[292] 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.[293]

SORNA requires that youth adjudicated of offenses equivalent to this description register for life.[294] Supplemental Guidelines issued in 2011 gave states discretion as to whether or not it to publish juvenile offenses on their public registry websites.[295]

284 See Pen. Code, § 290.008, subd. (a)

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

286 "Risk Assessment," California Megan's Law Website, State of California, Department of Justice, Office of the Attorney General, *available at*: https://www.meganslaw.ca.gov/SexOffenders_RiskAssessment.aspx. ("The JSORRAT-II is used in California to assess youth who have committed sex offenses. The JSORRAT-II was developed using an actuarial approach in an attempt to bring greater accuracy and utility to risk assessments for male juveniles who have offended sexually, recognizing the potential for accurate risk assessment to inform a range of decisions, including placement, programming, supervision, and other resource allocation decisions. By law, juveniles are not displayed on the Megan's Law website, so their risk scores are known only to law enforcement and treatment professionals.").

287 *Id.* at p. 1213.

288 *In re J.C., supra,* 13 Cal. App. 5th at p. 1214.

289 *Ibid.*

290 34 U.S. Code § 20901 et seq. (transferred from previous section, 42 U.S.C. § 16901 et seq.)

291 "SORNA Substantial Implementation Review, State of California," U.S. Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), Jan. 2016, *available at*: https://www.smart.gov/pdfs/sorna/california-hny.pdf.

As of publication of this document, the website for the U.S. Department of Justice, Office of Justice Programs, SMART office indicates that California has not implemented SORNA, available at https://smart.ojp.gov/sorna/sorna-implementation-status.

292 34 U.S.C. § 20911 (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.

293 Note that guidelines published in the Federal Register clarify that a state will be in compliance with SORNA if registration requirements minimally apply to the first two categories. 73 Fed. Reg. 128 (2008). In other words, SORNA does not require states to register for juvenile offenses on the basis that the victim was under 12 years of age. *See* "Significant Changes to SORNA Guidelines," U.S. Department of Justice, Office of Justice Programs (2008), *available at*: https://ccoso.org/sites/default/files/import/sorna_significant_changes.pdf.

294 34 U.S.C. § 20911(4); 34 U.S.C. § 20915(a)(3).

295 *See* "Sex Offender Registration and Notification In the United States: Current Case Law and Issues — Registration of Juvenile

Registration must be made in the jurisdiction of the adjudication and in the jurisdiction of residence, employment, and education (if a student).[296] Initial registration shall be done before completing the sentence of imprisonment for the offense, and within three business days of any change of name, residence, employment, or student status.[297] The registration must be verified in person every three months.[298]

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 behavioral therapy.[299]

With respect to federal cases, the U.S. Attorney General, exercising delegated authority from Congress, determined that SORNA applies retroactively to all persons convicted of qualifying offenses before its enactment, including juveniles.[300] A 2009 decision by the Ninth Circuit, holding that retroactive application of SORNA's juvenile registration provisions to people who were adjudicated delinquent under the Federal Juvenile Delinquency Act (FJDA)[301] prior to SORNA's enactment violated the Ex Post Facto clause, was vacated by the U.S. Supreme Court in 2010.[302] The Supreme Court's ruling was based on mootness, and did not address the question of the constitutionality of the retroactive application of SORNA's requirement that certain adjudicated juveniles register as youth who have committed sex offenses.[303]

§ 5.6 REGISTRATION FOR ARSON OFFENSES

Pursuant to Penal Code section 457.1, subdivision (b)(3), youth who commit certain specified arson offenses,[304] and who are committed to DJJ, must register until age 25 or until their juvenile records are sealed, whichever occurs first.[305] 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,[306] and within 10 days of changing his or her address.[307] Upon termination of the duty to register, the records regarding registration must be destroyed.[308]

Violation of the arson registration requirements is a misdemeanor punishable by 90 days to 1 year in jail.[309]

§ 5.7 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

Offenders," U.S. Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), March 2019, *available at:* https://www.smart.gov/caselaw/3-Juveniles.pdf.

296 34 U.S. C. § 20913(a).

297 34 U.S. C. § 20913(b).

298 34 U.S.C. § 20918.

299 34 U.S.C. § 20915(b).

300 28 C. F. R. § 72.3.

301 18 U.S.C.A. § 5031 et seq.

302 In 2010, the U.S. Supreme Court granted certiorari in a case where the Ninth Circuit had held that the juvenile registration provisions of SORNA were unconstitutional when applied retroactively. *United States v. Juvenile Male*, 581 F.3d 977 (2009), *vacated and remanded,* 131 S. Ct. 2860 (2011), *appeal dismissed as moot*, 653 F.3d 1081 (9th Cir. 2011). In its decision, however, the Supreme Court did not address at all the question of the constitutionality of the retroactive application of SORNA's requirement that certain adjudicated juveniles register as a person who has committed sex offenses.

303 See "Sex Offender Registration and Notification In the United States: Current Case Law and Issues — Registration of Juvenile Offenders," U.S. Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), March 2019, *available at:* https://www.smart.gov/caselaw/3-Juveniles.pdf.

304 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, subd. (a).)

305 Pen. Code, § 457.1, subd. (b)(3).

306 Pen. Code, § 457.1, subd. (b)(1).

307 Pen. Code, § 457.1, subd. (g).

308 Pen. Code, § 457.1, subd. (d).

309 Pen. Code, § 457.1, subd. (h).

evidence that the current crime is gang-related.[310]

Registration must be completed within 10 days of release or within 10 days of a change of address.[311] Registration is required for five years.[312] 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.[313] The requirement that the youth give information about fellow gang members violates the privilege against self-incrimination.[314]

Failure to register as a gang offender for the requisite offenses under Section 186.30, subdivision (b), is a misdemeanor.[315] 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.[316]

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

311 Pen. Code, § 186.32, subd. (b).

312 Pen. Code, § 186.32, subd. (c).

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

314 *Ibid.*

315 Pen. Code, § 186.33, subd. (a).

316 Pen. Code, § 186.33 (b)(1).

CHAPTER 6 COURT-ORDERED THERAPY AND COUNSELING CONSEQUENCES

Youth face potential collateral consequences when required to participate in court-ordered therapy or counseling. In California, cases where 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 committed to DJJ, a secure youth treatment facility or other types of juvenile facilities.

§ 6.1 MANDATED REPORTING REQUIREMENTS

The Child Abuse and Neglect Reporting Act[317] (CANRA)provides for mandatory reporting of suspected child abuse and neglect. The statutory language is very broad, providing that "In any investigation of suspected child abuse or neglect, all persons participating in the investigation of the case shall consider the needs of the child victim and shall do whatever is necessary to prevent psychological harm to the child victim."[318] "Child" is defined as a person under the age of 18 years.[319]

Reports of child abuse or neglect shall be made to an agency designated by the county to receive mandated reports, including the police or sheriff, probation, or child welfare departments.[320]

Mandatory reporters are identified in Penal Code section 11165.7. 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.[321] Mandatory reporters must report child abuse, including physical injury, sexual abuse, willful harming or injuring of a child, unlawful corporal punishment, and neglect.[322]

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.[323] The trained professional may rely on his or her judgment and experience to distinguish between abusive and non-abusive situations.[324]

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 who are justice-involved and ordered to participate in programming where they run the risk of disclosing reportable conduct, may experience collateral consequences for disclosure of acts, such as "statutory rape" or "sexting" 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 "sexual assault," "sexual exploitation," and "commercial sexual exploitation."[325]

Sexual assault includes conduct in violation of the following:

317 Pen. Code, § 11164 et seq.

318 Pen. Code, § 11164.

319 Pen. Code, § 11165.

320 Pen. Code, § 11165.9.

321 Pen. Code, § 11165.7.

322 Pen. Code, §§ 11165.1–11165.6.

323 Pen. Code, § 11166, subd. (a).

324 *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].

325 Pen. Code, § 11165.1.

- 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 287 or former section 288a (Oral Copulation)
- Penal Code section 288, subdivisions (a), (b), or (c)(1) (Lewd or Lascivious Acts upon a Child)
- Penal Code section 289 (Sexual Penetration)
- Penal Code section 647.6 (Child Molestation)[326]

Section 11165.1, exempts voluntary conduct in violation of Penal Code sections 286 (sodomy), 287 (oral copulation), or 289 (sexual penetration), or former section 288a (oral copulation), where "there are no indicators of abuse, unless the conduct is between a person 21 years of age or older and a minor who is under 16 years of age."

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

- Sexual intercourse between a minor under 16 years of age and a partner 21 years of age or older.[327]
- Sexual conduct (lewd and lascivious acts) with a child under 14 and a person of a disparate age, irrespective of consent.[328]

People ex rel. Eichenberger v. Stockton Pregnancy Control Medical Clinic[329] provides an overview on the issue of when sexual activity with a person under 18 must be reported based solely on the age of the partners:

- Voluntary sexual conduct between minors under age 14, both of whom are of similar age is not subject to reporting.[330]
- Sexual conduct between a minor under 14 and a person of disparate age, where the conduct is reasonably suspected to constitute a violation of Penal Code section 288, subdivision (a) must be reported.[331]

Additionally, the statute's definition of "sexual exploitation" includes conduct that might be likely to be disclosed during the course of court-mandated treatment.[332] For example, sexual exploitation includes when a person "knowingly develops, duplicates, prints, downloads, streams, accesses through any electronic or digital media, or exchanges, a film, photograph, videotape, video recording, negative, or slide in which a child is engaged in an act of obscene sexual conduct . . . ."[333]

The question is open under what circumstances a therapists' CANRA reporting duties override a patient's right to privacy under the California constitution. In *Mathews v. Becerra*,[334] therapists who were mandated reporters (including certified alcohol and drug counselor and licensed therapists), filed suit alleging that CANRA violates their patients' constitutional right to privacy.[335] They alleged that statements by their sexual disorder patients during treatment about downloading and viewing child pornography are confidential, that maintaining confidentiality is essential to treatment, and that the patients pose no serious danger of engaging in "hands-on" sexual abuse or exploitation.[336] The therapists alleged that requiring them to report their patients for possessing or viewing child pornography fails to further CANRA's purpose of identifying and protecting abused children and disincentivizes patients with sexual disorders or addictions from seeking treatment.[337]

The California Supreme Court held that the state constitutional right to privacy might override the therapists' CANRA reporting duties in the limited circumstances of this case. While not making a final determination regarding CANRA's constitutionality,

326 Pen. Code, § 11165.1, subds. (a)-(b).

327 Pen. Code, § 261.5, subd. (d).

328 Pen. Code, § 288, subd. (a); *People ex rel. Eichenberger v. Stockton Pregnancy Control Medical Clinic, Inc.* (1988) 203 Cal.App.3d 225, 239.

329 *People ex rel. Eichenberger v. Stockton Pregnancy Control Medical Clinic, supra*, 203 Cal. App. 3d 225.

330 *Id.* at p. 239.

331 *Ibid.*

332 Pen. Code, § 11165.1, subd. (c).

333 Pen. Code, § 11165.1, subd. (c)(3).

334 *Mathews v. Becerra* (2019) 8 Cal.5th 756.

335 *Id.* at pp. 760-761.

336 *Id.* at p. 764.

337 *Ibid.*

the Court held that the therapists' complaint survived the demurrers under the framework in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, because (1) the therapists asserted a cognizable privacy interest regarding their patients' disclosures during voluntary psychotherapy about downloading and electronically viewing child pornography, where the therapists had determined that their patients do not present a serious risk of sexual contact with children or active distribution of child pornography; (2) the patients have a reasonable expectation of privacy regarding communications to therapists about possessing or viewing child pornography; and (3) the reporting requirement is a serious invasion of privacy due to the scope and potential impact of disclosing some of the most intimate aspects of human thought to various agencies, which necessarily triggers further investigations and possible criminal prosecution and sex offender registration.[338] The Court remanded the case for proceedings as "to determine whether the statute's purpose of protecting children is actually advanced by mandatory reporting of psychotherapy patients who admit to possessing or viewing child pornography."[339]

Although this decision did not definitively decide CANRA's constitutionality, it does give some indication that the state's current high court sees that a patient's right to privacy might well override CANRA's mandated reporting requirements even where the viewing of child pornography is involved.

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 BEHAVIORAL TREATMENT PROGRAMS

Youth may be required to participate in a sex behavioral 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.

As a general rule, the psychotherapist-patient privilege protects confidential communications between a minor patient and a psychotherapist, including such communications made during the course of court-ordered treatment.[340] However, the psychotherapist-patient privilege does not preclude the youth's therapist from testifying at a probation violation hearing concerning "general nonintrustive information," such as the youth's participation and progress in the court-ordered treatment plan.[341] The juvenile court may receive information from the therapist when the youth has been directed to participate and cooperate in a sex behavioral 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.[342]

When a youth is interviewed by a therapist during an intake into custody, however, a psychotherapist-patient privilege as well as other measures to protect privacy, rights against self-incrimination, and attorney-client privilege may not apply. [343] In *Y.C. v. Superior Court*, a youth invoked his right to silence during his intake into juvenile hall, but was questioned afterwards by

338 *Id.* at pp. 770, 773, 779.

339 *Id.* at p. 772.

340 *People v. Gonzales* (2013) 56 Cal.4th 353, 372 [The California Supreme Court held in *Gonzales* that the psychotherapist-patient privilege, codified in Evidence Code section 1014, did not include an exception to the privilege for disclosure over the patient's objection or without the patient's permission to a third party (such as the district attorney), where the basis of the disclosure was to serve the public safety or rehabilitative purpose of the therapy. (*People v. Gonzales, supra*, at p. 374.) In so ruling, the Court explicitly overruled the holding of *In re Pedro M.* (2000) 81 Cal. App. 4th 550 insofar as In re *Pedro M.* held that the language of section 1012 created an exception to the psychotherapist-patient privilege. (*People v. Gonzales, supra*, at p. 375, fn. 6.)].

341 See *People v. Gonzales, supra*, 56 Cal. 4th at pp. 375-376 [citing with approval the part of *In re Pedro M., supra*, 81 Cal.App.4th at pp. 554-555, allowing "circumscribed" testimony by the minor's therapist].

342 *Ibid.*

343 *Y.C. v. Superior Court* (2021) 72 Cal.App.5th 241, 250.

county mental health worker.[344] A summary of the interview was shared with the probation department and the juvenile court.[345] The court of appeal held that this communication was not private or privileged, nor was it confidential under HIPAA or the state's medical privacy laws. Further, there was not Fifth Amendment violation because the information was not used against him in court.[346]

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. In *People v. Garcia*,[347] the California Supreme Court considered a challenge to Penal Code section 1203.067, subdivision (b)(3), which requires probationers to waive any privilege against self-incrimination as part of a polygraph program.[348] The Court affirmed that probationers are protected under the Fifth Amendment from waiving the privilege against self-incrimination as a condition of probation.[349] However, the Court went on to uphold the challenged Penal Code section, interpreting the statute as compelling the probationer to answer potentially incriminating questions, but prohibiting the use of such statements in a subsequent criminal prosecution.[350] Under *Garcia*, whether a client must disclose past sexual behavior, notwithstanding the Fifth Amendment, will likely be determined in part by the scope of the disclosure being required and the advisement given to the client regarding his or her statements.[351]

The answer may also depend on the severity of the punishment for not disclosing.[352] 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 revocation of probation.[353] 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.[354]

Some programs may use polygraphs in connection with treatment. There is no right to counsel at a post-disposition polygraph[355] examination used in connection with treatment or in therapy sessions.[356] 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*, prior to admitting to uncharged sexual conduct during therapy.

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344 *Id.* at pp. 246-247.

345 *Id.* at pp. 247-250.

346 *Id.* at pp. 253-250.

347 *People v. Garcia* (2017) 2 Cal. 5th 792.

348 *Id.* at pp. 802-808.

349 *Id.* at p. 803.

350 *Id*. at pp. 806-807.

351 For example, in *Garcia*, the Court held explicitly that "probationers have immunity against the direct and derivative use of any compelled statements" that are obtained pursuant to Penal Code section 1203.067, subdivision (b)(3). (*People v. Garcia, supra*, 2 Cal. 5th at pp. 807-808.) The Court further held that a probationer must be advised, before treatment begins, that no statement may be used against him or her in a future criminal prosecution. (*Id.* at p. 808; see also, *In re U.V.* (Oct. 4, 2018, A152570) 2018 WL 4794167, at *7 [nonpublished opinion upholding juvenile probation conditions requiring release of confidential information against an overbreadth challenge, but modifying one condition to be drawn more narrowly].)

352 *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].

353 *U.S. v. Antelope, supra*, 395 F.3d 1128; *U.S. v. Saechao, supra*, 418 F.3d 1073; *U.S. v. Bahr* (9th Cir. 2013) 730 F.3d 963, 967; *Lacy v. Butts* (7th Cir. 2019) 922 F.3d 371, 377; but see, *U.S. v. Hulen* (9th Cir. 2018) 879 F.3d 1015, 1020–1021, *cert. denied,* (2018) 139 S. Ct. 251 (holding that because incriminating statements were used to revoke supervised release, not in a "new" criminal prosecution, the Fifth Amendment right against self-incrimination was not implicated).

354 *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 320.

355 Additional polygraph issues are discussed at § 6.3.

356 *Brown v. Superior Court, supra*, 101 Cal.App.4th at p. 320, citing Minnesota v. Murphy (1984) 465 U.S. 420, 424, fn. 3 ["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."].)

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."[357]

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.[358] 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.[359]

§ 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, earning home visits, or additional privileges. In addition, some youth cannot complete their sex behavioral therapy without complying with and passing a polygraph exam. The polygraph test may include questions about past criminal or sexual 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 youth who have committed sex offenses should be carefully scrutinized. Polygraph testing as a probation condition is not per se invalid and has been upheld as permissible treatment within sex behavioral therapy as a method for addressing issues of denial and as a deterrent to recidivism.[360] 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.[361]

PRACTICE TIP: Juvenile sex behavioral 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.). [362]

In 2019, the California Sex Offender Management Board (CSOMB) issued its "Juvenile Recommendations" to the Legislature.[363] This report included a recommendation that polygraphs should not be used with juveniles under age 16, and that polygraphs should be used "provisionally" to avoid overreliance on their results.[364] This report could potentially be used to advocate against polygraph testing for your client. Additionally, there is potential that the CSOMB's recommendations could be implemented via legislation, so counsel should always research any new law developments on this front.

357 *Welch v. Kentucky* (2004) 149 S.W.3d 407, 410; *State v. Evans* (2001) 760 N.E.2d 909; *In re Lineberry* (2002) 572 S.E.2d 229, 237 (2002); *Com. v. Brown* (2011) 26 A.3d 485, 510.

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

359 *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.); see also *In re Corona, supra*, 160 Cal. App. 4th at p. 322.

360 *People v. Garcia, supra*, 2 Cal. 5th at pp. 808-809; *Brown v. Superior Court, supra*, 101 Cal.App.4th at pp. 319-320 (citing *Cassamassima v. State* (1995) 657 So.2d 906, 909-911).

361 *People v. Garcia, supra*, 2 Cal. 5th at p. 809; *Brown v. Superior Court, supra*, 101 Cal.App.4th at p. 321.

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

363 California Sex Offender Management Board, "Juvenile Recommendations," January 2019, available at: http://casomb.org/pdf/CASOMB_Juvenile_Recommendations_January_2019.pdf.

364 *Id.* at pp. 13-18.

Record Retention of Juvenile Sexual Behavior Reporting

The California Department of Justice (DOJ) maintains the Child Abuse Central Index (CACI), which contains information regarding reported incidents of child abuse or neglect. The statutes regulating this information are codified in Penal Code sections 11164 through 11174.31.

Following law changes in 2011 and 2012, the Attorney General's office issued two bulletins modifying the information that is reported in the CACI. Pursuant to Bulletin No. 11-10-BCIA, the DOJ will receive and enter into the CACI "**only substantiated reports of child abuse or severe neglect submitted by a child welfare agency or county probation department.**"[365] Accordingly, the DOJ no longer retains reports identified as "inconclusive," or reports received from police or sheriff departments.[366]

Pursuant to Bulletin No. 12-06-BCIA, the DOJ will remove any person listed in the CACI repository prior to reaching 18 years of age after 10 years from the date of the incident, if no subsequent report about that person is received during the 10-year period.[367]

Thus, only substantiated reports will be retained in the CACI.[368] Furthermore, reports regarding minors will be removed after 10 years if there are no other reported incidents.[369] Substantiated reports that are not removed after 10 years appear to remain permanently in the CACI.[370] As a result, such reports could persist well into the future and potentially may prevent youth from obtaining employment, child custody, and other benefits down the line.

365 "Child Abuse Central Index (CACI) Modifications," California Department of Justice, California Justice Information Services Division, Bulletin No. 11-10-BCIA, Dec. 7, 2011, *available at:* https://oag.ca.gov/sites/all/files/agweb/pdfs/childabuse/bcia11-10.pdf.

366 *Id.*

367 "Child Abuse Central Index (CACI) Modification," California Department of Justice, California Justice Information Services Division, Bulletin No. 12-06-BCIA, Dec. 19, 2012, *available at:* https://oag.ca.gov/sites/all/files/agweb/pdfs/childabuse/12-06-bcia.pdf.

368 Pen. Code, § 11170, subds. (a)(1), (a)(3). A "substantiated report" is one that is determined by the investigator to constitute abuse or neglect, based on evidence that makes it more likely than not that child abuse or neglect occurred. (Pen. Code, § 11165.12, subd. (b).)

369 Pen. Code, § 11170, subd. (a)(3).

370 See Pen. Code, § 11169.

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 youth's eligibility to apply for a California driver's license.[371] 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. 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.[372] 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 unless otherwise specified.[373] 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.[374]

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.[375] 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

371 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.)

372 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.

373 Veh. Code, § 13105.

374 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).

375 For example, Vehicle Code section 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.

This section summarizes the various Vehicle and Penal, Code sections resulting in *mandatory* suspension or revocation[376] of one's driver's license, either by the court or by the California Department of Motor Vehicles:[377] Under state law, suspension by the court requires physical surrender of the license to the court.[378]

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.[379] The express provisions of the Vehicle Code override the court's broad discretion to impose reasonable conditions of probation. [380]

Certain Drug or Alcohol Related Offenses Committed by Youth 13 to 21 Years of Age

The Vehicle Code has specific provisions setting forth mandatory license suspension and revocation for certain drug and alcohol-related offenses applicable to 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.[381] The offenses include:

- Gross vehicular manslaughter while intoxicated;[382]
- Vehicular manslaughter while driving a boat under the influence of a substance;[383]
- Reckless driving, or "wet reckless;"[384]
- Driving under the influence of alcohol by a person under 21;[385] and
- Driving under the influence of alcohol and/or any drug.[386]

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.[387] Each successive conviction must result in an additional one-year suspension or delay.[388] 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.[389] 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."[390]

General Vehicle Code Offenses

The DMV must immediately revoke the privilege of a person to drive a motor vehicle for one year[391] upon receipt of a court abstract showing that the person has been convicted of any of the following offenses:[392]

376 "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.

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

378 Veh. Code, § 13206. Except when required by the provisions of Vehicle Code section 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.*)

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

380 *Ibid.*

381 Veh. Code, § 13202.5, subds. (a) and (d).

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

383 Pen. Code, § 192.5, subds. (a) and (b).

384 Veh. Code, §§ 23103 and 23103.5.

385 Veh. Code, § 23140.

386 Veh. Code, § 23152.

387 Veh. Code, § 13202.5, subd. (a).

388 *Ibid.*

389 Veh. Code, § 13202.5, subd. (b).

390 Veh. Code, § 13202.5, subd. (c).

391 Veh. Code, § 13350, subds. (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).)

392 Veh. Code, § 13350, subd. (a).

- "Hit and Run" (failing to stop or otherwise comply with Vehicle Code section 20001) in an accident resulting in injury or death;[393]
- A felony in the commission of which a motor vehicle was used, with certain exceptions;[394]
- Reckless driving causing bodily injury.[395]

The revocation for these offenses is for one year, and the person must show proof of financial responsibility to reinstate his or her privilege.[396]

The DMV must immediately revoke the privilege of a person to drive a motor vehicle for three years[397] upon receipt of a court abstract showing that the person has been convicted of any of the following offenses:[398]

- Manslaughter resulting from operation of a motor vehicle (other than Penal Code section 192, subdivision (c)(2));[399]
- Three or more "hit and run" (failure to stop and give information) violations within twelve months of the first offense;[400]
- Gross vehicular manslaughter while intoxicated;[401]
- Gross vehicular manslaughter while operating a boat;[402]
- Evading a police officer and causing serious bodily injury or death.[403]

In addition, upon receipt of an abstract showing that the court has ordered the suspension of a license for "road rage,"[404] 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.[405]

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 DMV[406] when a youth has been convicted of:

- Driving under the influence of alcohol and/or drugs;[407]
- Driving under the influence and causing bodily injury to another person;[408] or
- Speed contests.[409]

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.[410] 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.[411] 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.[412]

393 Veh. Code, § 13350, subd. (a)(1).

394 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).

395 Veh. Code, § 13350, subd. (a)(3).

396 Veh. Code, § 13350, subd. (a), (c).

397 Veh. Code, § 13351, subd. (b).

398 Veh. Code, § 13351, subd. (a).

399 Veh. Code, § 13351, subd. (a)(1).

400 Veh. Code, § 13351, subd. (a)(2).

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

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

403 Veh. Code, §§ 2800.3, 13351, subd. (a)(3)

404 Veh. Code, § 13210.

405 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 office mandates lifetime revocation. (Veh. Code, § 13351.5.)

406 Vehicle Code section 13352, subdivision (c) differs from other statutes that give the court itself the power to suspend or revoke.

407 Veh. Code, §§ 13352, subd. (a), 23152.

408 Veh. Code, §§ 13352, subd. (a), 23153.

409 Veh. Code, §§ 13352, subd. (a), 23109, 23109.1.

410 Veh. Code, § 13352, subd. (a).

411 Veh. Code, §§ 13352, subd. (a), 13352.1, 13352.3.

412 Veh. Code, §§ 13352, subd. (a), 13352.4, 13552.5.

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 in one's blood,[413] the limit for persons under 21 is 0.01 percent.[414] The DMV is required to suspend for one year the driving privileges of youth who refuse or fail to complete a preliminary screening test.[415]

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 blood to drive a vehicle. That section requires the court to forward an abstract of the findings to the DMV within 10 days.[416] 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.[417]

§ 7.2 DISCRETIONARY SUSPENSION OR REVOCATION

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

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.[418] 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.[419] In addition, the court may order the person to complete a court-approved anger management or "road rage" course.[420] 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.[421]

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 deadly weapon, the DMV must immediately revoke the driving privileges of the person so convicted.[422] This is a *lifetime revocation*.[423] The lifetime revocation applies only to felonies.[424]

Vehicle Code Provisions

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

Speeding or Reckless Driving[425]

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.[426]

Driving in Excess of One Hundred Miles Per Hour

The court may suspend driving privileges for not more than 30 days;[427] 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.[428]

413 Veh. Code, § 23152, subd. (b)

414 Veh. Code, § 23136.

415 Veh. Code, § 13353.1, subd. (a)(1).

416 Veh. Code, § 23140, subd. (c).

417 Veh. Code, § 13352.6, subd. (a).

418 Veh. Code, § 13210.

419 *Ibid.*

420 *Ibid.*

421 Veh. Code, § 13351.8.

422 Veh. Code, § 13351.5, subd. (a)

423 Veh. Code, § 13351.5, subd. (b).

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

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

426 Veh. Code, § 13200.

427 Veh. Code, § 22348, subd. (b).

428 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.[429] Where the accident involved injury or death, the DMV must immediately revoke driving privileges upon receipt of court records showing conviction under these provisions.[430]

Reckless Driving with Bodily Injury[431]

The court may suspend driving privileges for not more than six months.[432]

Failure to Stop at a Railroad Crossing[433]

The court may suspend driving privileges for not more than six months.[434]

Evading a Peace Officer[435]

The court may suspend driving privileges for not more than six months.[436]

Knowingly Causing an Accident for the Purpose of Defrauding an Insurance Company

The court *may* suspend driving privileges for not more than six months.[437] 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.[438]

Unlawful Driving or Taking of Vehicle (Auto Theft)[439]

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.[440]

429 Veh. Code, § 13201, subd. (a).

430 Veh. Code, § 13350, subd. (a)(1).

431 Veh. Code, § 23104.

432 Veh. Code, § 13201, subd. (b).

433 Veh. Code, § 22452.

434 Veh. Code, § 13201, subd. (c).

435 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).)

436 Veh. Code, § 13201, subd. (d).

437 Veh. Code, § 13201, subd. (e)(1).

438 Veh. Code, § 13201, subd. (e)(2).

439 Veh. Code, § 10851.

440 Veh. Code, § 13357.

§ 7.3 DRIVING RESTRICTIONS CHART

SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Pen. code, § 191.5 (a)	Gross vehicular manslaughter while intoxicated and with gross negligence.	Veh. Code, §§ 13351 (a)(3) and (b). Additional restrictions imposed for youth ages 13-20 pursuant to Veh. Code, §§ 13202.5 (a) and (d)(3).	DMV shall immediately revoke upon receipt of certified abstract showing person's conviction. For youth ages 13-20, the restrictions under Veh. Code, §§ 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.	Three years and to reinstate, proof of financial responsibility as required by Veh. Code, § 16430 is required. In addition to any penalties imposed by Veh. Code, § 13351 (revocation for vehicular manslaughter), for youth ages 13-20, one year suspension/ revocation. For each additional conviction court shall suspend or delay the issuing of a license for one additional year. 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 Veh. Code, § 13202.5 (c). The youth may also reduce the delay if no further convictions within 12 months, per Veh. Code, § 13202.5 (a).
Pen. Code, §191.5 (b)	Gross vehicular manslaughter while intoxicated and without gross negligence.	Veh. Code, § 13350 (b). In addition, for youth ages 13-20, Veh. Code, §§ 13202.5 (a) and (d)(3).	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. For youth ages 13-20, additional consequences are imposed and the same as those listed for Pen. Code, § 191.5 (a).	Per Veh. Code, § 13350 (c), one year and need proof of financial responsibility as required by § 16430. For youth ages 13-20 the additional penalties are the same as those listed above for Pen. code, § 191.5 (a).
Manslaughter 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).	Veh. Code, § 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 Veh. Code, § 16430.

SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Pen. Code, § 192.5 (a)	Gross vehicular manslaughter while operating a boat.	Veh. Code, § 13351 (a)(3) For youth ages 13-20, Veh. Code, §§ 13202.5 (a) and (d).	DMV shall immediately revoke upon receipt of certified abstract of record of court showing person's conviction. For youth ages 13-20, see Pen. Code, § 191.5.	Three years, and need proof of financial responsibility as required by Veh. Code, § 16430. For youth ages 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.	Veh. Code, §§ 13210, 13351.8	Under Veh. Code, § 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 Veh. Code, § 13210, 6 months for a 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.	Veh. Code, § 13351.5 (a)	DMV shall immediately revoke upon receipt of certified abstract of record of court showing person's conviction.	Veh. Code, § 13351.5 (b) provides that the revocation is permanent – DMV shall not reinstate driving privileges under any circumstances.

SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Veh. Code, §§ 2800.1, 2800.2 or 2800.3	Evading a peace officer under Veh. Code, §§ 2800.1 or 2800.2. Also evading a peace officer under Veh. Code, § 2800.3 if license is not revoked pursuant to Veh. code, § 13351 (a)(3).	Veh. Code, § 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 Veh. Code, § 16430.
Veh. Code, § 2800.3	Evading a peace officer causing serious bodily injury.	Veh. Code, § 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 Veh. Code, § 16430.
Veh. Code, § 10851	Unlawful driving or taking of vehicle (auto theft).	Veh. Code, § 13357	Upon the recommendation of the court, DMV shall suspend or revoke.	Duration of suspension / revocation not specified in Veh. Code, § 13357.
Veh. Code, § 20001	"Hit and run" – failing to stop or otherwise comply with § 20001 in an accident resulting in injury or death.	Veh. Code, § 13350 (a)(1)	DMV shall immediately revoke upon receipt of certified abstract of record of court showing person's conviction.	Per Veh. Code, § 13350 (c), one year and need proof of financial responsibility pursuant to § 16430.
Veh. Code, § 20002	"Hit and run" with property damage.	Veh. Code, § 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 Veh. Code, § 16430 required.
Veh. Code, § 22452	Failure to stop at a railway grade crossing.	Veh. Code, § 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 Veh. Code, § 16430 required.
Veh. Code, § 22348 (b)	Driving at a speed greater than 100 miles per hour.	Veh. Code, § 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 ages 13-20, if convicted of Veh. Code, § 23103 in lieu of Veh. Code, §§ 23103.5 or 23140 there is an additional driving consequence.	Veh. Code, § 13200 For youth ages 13-20, if adjudication for Veh. Code, § 23103 is in lieu of alcohol-related driving offense, then Veh. Code, §§ 13202.5 (a) and (d)(4).	Court may suspend, unless the violation requires mandatory DMV revocation For youth ages 13-20, if related to Veh. Code, §§ 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 ages 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 Veh. Code, § 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 Veh. Code, § 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.")	Veh. Code, § 13200 For youth ages 13-20, additional consequences pursuant to Veh. Code, § 13202.5 (a) and (d)(4).	Court may suspend, unless the violation requires mandatory DMV revocation. For youth ages 13-20, if related to Veh. Code, §§ 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 Veh. Code, § 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 ages 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 Veh. Code, § 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 Veh. Code, § 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.	Veh. Code, § 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 Veh. Code, § 16430 required.

SPECIFIC CHARGE	UNDERLYING OFFENSE	PENALTY PROVISION	CONSEQUENCE	LENGTH OF TIME
Veh. Code, §§ 23109, 23109.1	Speed contests	Veh. Code, §§ 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 Veh. Code, § 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 Veh. Code, § 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)	Veh. Code, § 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 Veh. Code, § 16430 required.
Veh. Code, § 23104	Reckless driving causing bodily injury.	Veh. Code, §§ 13200, 13201, 13350 (a)(3)	Per Veh. Code, § 13350 (a)(3), DMV shall immediately revoke upon receipt of certified abstract of record of court showing showing a person's conviction. However, per Veh. Code, § 13201 (b), the court *may* 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.	Veh. Code, § 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 Veh. Code, §§ 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	Veh. Code, §§ 23502 (c), 13352.6 For youth ages 13-20, additional consequences pursuant to Veh. Code, §§ 13202.5 (a) and (d)(4)	Court shall order DUI program and surrender of license to the court in accordance with Veh. Code, § 13550; DMV shall suspend upon receipt of certified abstract of record of court showing person's conviction. For youth ages 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.	Proof of completion of a driving-under-the-influence program and financial responsibility is produced for youth ages 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 Veh. Code, § 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 Veh. Code, § 13202.5 (c). The youth may also reduce the delay if no further convictions within 12 months, per Veh. Code, § 13202.5 (a).
Veh. Code, § 23152	Driving under the influence of alcohol or drugs	Veh. Code, § 13352 (a) for youth ages 13-20, additional consequences pursuant to Veh. Code, §§ 13202.5 (a) and (d)(4)	DMV shall immediately suspend or revoke upon receipt of an abstract showing conviction. For youth ages 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.	Six months, and no reinstatement without proof of financial responsibility and completion of qualified DUI program. for youth ages 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 Veh. Code, § 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 Veh. Code, § 13202.5 (c). the youth may also reduce the delay if no further convictions within 12 months, per § 13202.5 (a).
Veh. Code, § 23153	Driving under the influence of alcohol or drugs with injury.	Veh. Code, § 13352 (a) For youth ages 13-20, additional consequences pursuant to Veh. Code, §§ 13202.5 (a) and (d)(4), as listed for § 23152, above	DMV shall immediately suspend or revoke upon receipt of an abstract showing conviction. For youth ages 13-20, additional consequences as listed for § 23152, above.	Per Veh. Code, § 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. For youth ages 13-20, additional consequences as listed for Veh. Code, § 23152, above.

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.)	Veh. Code, § 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 Veh. Code, § 16430.

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 SCREENING QUESTIONS FOR NONCITIZEN YOUTH – DETERMINING POTENTIAL AVENUES FOR LEGAL STATUS

Immigration practice is one of the most complex and dynamic areas of law. Since a thorough description of the immigration consequences of juvenile delinquency involvement is beyond the scope of this publication, the following guidance to California juvenile practitioners is provided:

1) Develop a screening tool to determine which clients will need consideration in this area. A sample questionnaire[441] is provided in § 8.2, below; and

2) Reach out to a criminal/immigration expert in your office for assistance; if you do not have access to such an expert contact kbrady@ilrc.org to discuss resources potentially available from Immigration Legal Resource Center.

Is the Child a U.S. Citizen Without Knowing it?

1) Anyone born in the U.S. or Puerto Rico is a citizen, and anyone born in Guam, American Samoa or Swains Island is a national who can't be deported.

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

   - Was there a U.S. citizen parent or grandparent at the time of the person's birth?

     OR,

   - Before the person's 18th birthday, did both of these events happen (in either order): the child became a permanent resident, and at least one natural or adoptive (but not step-) parent having some form of custody over the child is or becomes a U.S. citizen. (Tip: Encourage the parent to become a naturalized U.S. citizen!)

3) Is the child currently under juvenile court jurisdiction (including delinquency) where the court has ruled (or could rule) 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) that it would not be in the child's best interest to be returned to the country of origin? The child may qualify for ***Special Immigrant Juvenile Status (SIJS)***.

   - The child need not be in foster care, and may be living with the non-abusive parent.
   - The child should stay under the jurisdiction of the court until their petition for SIJS has been approved. If this is not possible, the court should explicitly state that termination of jurisdiction is being done based on age.

4) Has the child been abused by a *U.S. citizen or permanent resident* spouse or parent, including adoptive, natural or stepparent? Has the child's

441 The checklist is courtesy of the Immigration Legal Resource Center (www.ilrc.org). Note that this is not an exhaustive screening guide. All youth with immigration concerns should seek an individualized consultation with an immigration legal services provider. To find providers in your area, visit: https://bit.ly/ianimmhelp.

parent been a victim of domestic violence by their U.S. citizen or permanent resident spouse? The child may qualify for ***VAWA relief.***

- Child doesn't need to be under court jurisdiction, and may be residing with the other parent.
- Child will need to show "good moral character."

5) Has the child been a victim of serious crime, including domestic violence, in the United States, or of human trafficking? The child may qualify for an ***S, T, or U visa***.

6) Does the child have a *U.S citizen or permanent resident parent or spouse* who is willing to petition for them? The child may qualify for a **family immigration petition.**

   - To immigrate through an adoptive parent the adoption must be completed by the child's 16th birthday. These laws are complicated if the child is from a country that is a signatory to the Hague Convention.

7) Does the child fear return to their country of birth because of *persecution?* Does the child come from a country that has recently experienced *civil war or natural disaster?* The child may qualify for other forms of relief such as **asylum or temporary protected status.**

8) Did the child enter the U.S. before June 15, 2007 and while under the age of 16? The child might be eligible for **Deferred Action for Childhood Arrivals (DACA).** After various executive actions and lawsuits, the DACA program is currently available *only for renewal applicants*. For more information, see https://www.ilrc.org/daca.

CHAPTER 9 FINANCIAL OBLIGATIONS (FINES, FEES, RESTITUTION)[442]

Although many of the financial obligations addressed in this section are *direct* consequences of a juvenile adjudication or admission, they are nevertheless 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/or restitution can literally force some families to have 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 financial failure and future punishment.

Three kinds of financial penalties may be imposed upon a youth: court fines and penalties, restitution fines, and victim restitution. When a youth is ordered to pay such penalties, a parent or guardian who has "joint or sole legal and physical custody and control" of the youth is presumed to be jointly and separately liable for the amount ordered, unless the parent or guardian demonstrates a financial inability to pay.[443]

§ 9.1 "COURT 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 offense[444] *if* the court finds that *the youth* has the financial ability to pay the fine.[445] In addition, in such cases, 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 for the full amount of the fine (as well as any applicable penalty assessments and/or victim restitution imposed).[446] The burden of proof is on the parent or guardian to rebut the presumption by demonstrating a financial inability to pay.[447]

PRACTICE TIP: Defense counsel should assert that the language of Welfare and Institutions Code sections 730.5 and 730.7 requires that the court make two separate findings of fact – both as to whether the youth and as to whether the parent can pay the fine. In addition, note that there is a longstanding legal principle that a parent may 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.[448] To this end, the parent may attempt to rebut the presumption of joint and several liability by producing evidence that he or she had no way of knowing about the youth's delinquent tendencies and also did not have effective control over the youth.[449]

PRACTICE TIP: Court fines may be imposed pursuant to Welfare and Institutions Code section 730.5 only when a youth is "adjudged a ward of the court." These fines would thus not apply in cases involving 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 (DEJ) under Welfare and Institutions Code sections 790, et seq.

442 *See also* Chapter 10, *Parental Responsibility*.

443 Welf. & Inst. Code, § 730.7, subd. (a).

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

445 Welf. & Inst. Code, § 730.5; *In re Steven F.* (1994) 21 Cal.App.4th 1070, 1079-1080. Please note that a fine imposed pursuant to section 730.5 cannot be imposed as a condition of probation. (*In re David C.* (2020) 47 Cal.App.5th 657, 671-672.)

446 Welf. & Inst Code, § 730.7, subd. (a).

447 *Ibid.*

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

449 *See ibid.*

450 *See* Welf. & Inst Code, § 730.5 ["[s]ection 1464 of the Penal Code (state penalty assessments) applies to fines levied pursuant to this section").]

451 *Ibid.*; Pen. Code, § 1464, subd. (a)(1).

452 Welf. & Inst Code, § 730.5; Pen. Code, §§ 1464, 1465.7, subds. (a) & (b).

453 Welf. & Inst. Code, § 730.5.

Youth may also be required to pay penalty assessments in addition to the amount of the court fine itself, which can substantially increase the amount of money due.[454] The State of California imposes a penalty of ten dollars for every ten dollars or every part of ten dollars for each fine imposed.[455] The state also imposes a surcharge of twenty percent of the base fine.[456] Each county also levies a penalty of seven dollars for every ten dollars of every fine.[457]

PRACTICE TIP: These penalties and surcharges can result in a substantial increase in the amount owed. For example, if the court were to impose a $100 fee on a youth, the youth would have to pay an additional $120 to the state and an additional $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.[458]

§ 9.2 "RESTITUTION FINES" UNDER WELFARE AND INSTITUTIONS CODE SECTION 730.6

In addition to the *discretionary* court fine discussed above, juvenile courts *must* also impose a *mandatory* restitution fine,[459] which is paid to the California Victim Compensation and Government Claims Board,[460] even if there is no actual "victim" of the youth's offense.[461] 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 ability to pay.[462]

Therefore, this restitution fine applies to youth on non-wardship probation under section 725, subdivision (a), but *not* to those on informal supervision pursuant to section 654.2.[463] 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 ($100) for misdemeanor offenses, and *must be between* one hundred dollars ($100) and one thousand dollars ($1,000) for felony offenses.[464] The restitution fine limits are per case,[465] *not* per sustained charge.[466] A separate hearing for the restitution fine is not required,[467] 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 statute requires *imposition* of the fine in all cases regardless of the youth's 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.[468]

The youth bears the burden of demonstrating his or her inability to pay, which may include his or her future earning capacity.[469] The court is not required, though, to make any express findings as to the factors bearing on the amount of the fine imposed.[470]

In unusual cases, the court may *waive* the restitution fine if the youth's case involves a felony and the court finds on the record that there are *compelling and extraordinary* reasons to do so.[471] Under such a

454 *See* Welf. & Inst Code, § 730.5 ["[s]ection 1464 of the Penal Code (state penalty assessments) applies to fines levied pursuant to this section").]

455 *Ibid.*; Pen. Code, § 1464, subd. (a)(1).

456 Welf. & Inst Code, § 730.5; Pen. Code, §§ 1464, 1465.7, subds. (a) & (b).

457 Welf. & Inst Code, § 730.5; Pen. Code, § 1464; Gov. Code, § 76000, subds. (a)(1), (a)(2).

458 Welf. & Inst. Code, § 730.5

459 Welf. & Inst. Code, § 730.6, subd. (b).

460 Welf. & Inst. Code, § 730.6, subd. (c).

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

462 Welf. & Inst. Code, §§ 730.6, subds. (a)(2)(A), (c)

463 Because youth on informal probation pursuant to section 654.2 are pre-adjudication, they obviously have not (yet) been "found to be a person described in Section 602."

464 Welf. & Inst. Code, §§ 730.6, subds. (b) (1), (b) (2).

465 *In re Paul R.* (1996) 42 Cal.App.4th 1582, 1586-1587; see also *People v. Schoeb (*2005) 132 Cal.App.4th 861.

466 Note, however, that nothing would appear to preclude a court from imposing a separate restitution fine for each sustained count, so long as the total amount of fines imposed did not exceed the statutory maximum amounts set forth in Welf. & Inst. Code §§ 730.6, subds. (b) (1) and (b) (2).

467 Welf. & Inst. Code, §§ 730.6, subds. (b) (1), (b) (2).

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

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

470 Welf. & Inst. Code, § 730.6, subd. (e).

471 Welf. & Inst. Code, § 730.6, subd. (g).

circumstance, the youth must perform community service in lieu of paying the restitution fine, unless the court finds compelling and extraordinary reasons for waiving the community service requirement and states those reasons on the record.[472] The mandatory penalties assessed on fines discussed in the preceding section are *not* assessed on restitution fines.[473]

PRACTICE TIP: In the landmark decision of *People v. Dueñas* (2019) 30 Cal.App.5th 1157, the Second District Court of Appeal held that due process prohibits courts from imposing fines[474] on any person who lacks the "present ability to pay" such fines. Although one appellate court has since declined to extend the holding of *Dueñas* to the juvenile restitution provision of section 730.6, the "ability to pay" litigation surrounding court fines and fees continues to brew.

Thus, although a youth's inability to pay does not, per the language of section 730.6,[475] affect a court's obligation to impose the restitution fine, defense counsel should nevertheless argue that the restitution fine can be imposed ***only*** in cases where court first makes an affirmative finding that the youth has the financial ability to pay it.[476]

PRACTICE TIP: A probation violation under Welfare and Institutions Code Section 777 does not give a court an opportunity to impose additional fines. [477]

§ 9.3 ADMINISTRATIVE FEES AND OTHER FINANCIAL OBLIGATIONS

Costs Associated with Juvenile Delinquency Proceedings

In addition to the other fines, penalties, and restitution, youth and their families traditionally had been assessed for the costs of a range of other services associated with the juvenile court process and dispositional orders. Specifically, prior to the passage of Senate Bill 190 in 2017, counties often required that youths and/or the person(s) financially responsible for them to pay for the cost of probation supervision.[478] These expenses often included the costs of home supervision and electronic monitoring.[479] Youths and the person(s) financially responsible for them were also jointly and severally liable for the costs of legal services rendered to the youth by an attorney.[480] Finally, parents, guardians, and other persons liable for the support of a youth were also allowed to be charged fees for support of delinquent youth while he or she was "placed, or detained in, or committed to" any institution or placement.[481] Senate Bill 190, however, prohibited counties from charging youth or their families for any of these costs. (See further discussion of Senate Bill 190 in Chapter 10, *Parental Responsibility*.)

DNA Collection Fees

Any youth who is adjudicated[482] for any felony offense is required to provide a DNA sample. Although DNA collection fees were not specifically addressed by Senate Bill 190, courts arguably may *not* impose these fees in juvenile cases. [483]

472 Welf. & Inst. Code, §§ 730.6, subds. (n), (o).

473 Welf. & Inst. Code, § 730.6, subd. (f) ["[t]his fine shall not be subject to penalty assessments"].

474 *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1164 (review denied March 27, 2019).

475 *In re M.B.* (2020) 44 Cal.App.5th 281, 283-284.

476 *Ibid.*

477 *In re Brian K.* (2002) 103 Cal.App.4th 39, 41.

478 *See* former Welf. & Inst. Code, §§ 903.2 (prior to amendment by Stats.2017, c. 678 (SB 190), § 22, eff. Jan. 1, 2018) and 904 (prior to amendment by Stats.2017, c. 678 (SB 190), § 27, eff. Jan. 1, 2018).

Prior to the passage of SB 190 defense counsel could argue that various probation associated fees did not apply to section 602 youth since they had not sustained the requisite conviction ; see e.g. *In re T.P.* (2006) 136 Cal.App.4th 1461 [mandatory lab fee under Health and Safety Code § 11372.5 required for any individual "convicted" of specified drug offenses cannot be imposed in juvenile cases because juvenile "adjudications" are *not* criminal convictions]; *Egar v. Superior Court* (2004) 120 Cal.App.4th 1306, 1308-1309 [mandatory $20 court security fee required upon every "conviction" for a criminal offense cannot be imposed in juvenile cases for the same reason].

479 *See* former Welf. & Inst. Code, § 903.2 (prior to amendment by Stats.2017, c. 678 (SB 190), § 22, eff. Jan. 1, 2018).

480 *See* former Welf. & Inst. Code, § 903.1, subd. (a) (prior to amendment by Stats.2017, c. 678 (SB 190), § 20, eff. Jan. 1, 2018).

481 *See* former Welf & Inst Code, § 903 (prior to amendment by Stats.2017, c. 678 (SB 190), § 19, eff. Jan. 1, 2018).

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

483 *Cf. In re T.P.* (2006) 136 Cal.App.4th 1461 [mandatory lab fee under Health and Safety Code § 11372.5 required for any individual "convicted" of specified drug offenses cannot be imposed in juvenile cases because juvenile "adjudications" are *not* criminal convictions]; *Egar v. Superior Court* (2004) 120 Cal.App.4th 1306, 1308-1309 [mandatory $20 court security fee required upon every "conviction" for a criminal offense cannot be imposed in juvenile cases for the same reason]; and Pen. Code, § 295, subd. (j) [authorizing the imposition of a DNA collection fee as part of the cost of incarceration chargeable to a defendant "convicted of an offense"].

Drug Testing Fees

Prior to the passage of Senate Bill 190 in 2017, youth who had committed a drug offense and were thereby subject to a drug-testing requirement as a condition of probation, were required to pay a reasonable fee for such tests.[484] Senate Bill 190, however, eliminated the drug-testing fee requirement.[485]

As of January, 2021, the State of California completely discharged all previously assessed juvenile court fees statewide, legally relieving young people and their families of any obligation to repay any of them with the passage of Senate Bill 129.[486]

§ 9.4 VICTIM RESTITUTION UNDER WELFARE AND INSTITUTIONS CODE SECTION 730.6

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.[487] Unfortunately, a youth's inability to pay is *not* a compelling or extraordinary reason to waive restitution, nor is it a factor for the court to consider in setting the amount of restitution.[488]

Although victim restitution is often determined at the time of disposition, if the precise amount of loss cannot be ascertained at disposition, the court must reserve jurisdiction to subsequently set the amount during the term of the youth's probation or commitment.[489] Victim 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 or her for his or her economic loss.[490] Restitution may be ordered for any youth "found to be a person described in Section 602," as well as youth on informal supervision under either section 654 or 654.2,[491] as a youth and/or on non-wardship probation under Section 725, subdivision (a).[492] Note, however, that in cases involving Deferred Entry of Judgment (DEJ), restitution is *discretionary*, and the youth's ability to pay *is* a factor for the court to consider in determining the amount of restitution that should be ordered, or whether restitution should be ordered at all.[493]

> **PRACTICE TIP:** Defense counsel will need to file a writ to contest a restitution order imposed on a youth on informal supervision under Welfare and Institutions Code section 654.2. A restitution order imposed as a condition of a youth's release on informal supervision under section 654.2 is not appealable, as it is neither a judgment nor an order after judgment for which an appeal was authorized under Welfare and Institutions Code section 800.[494]

If there are co-offenders, the court has discretion to order joint and several liability for restitution.[495] Should joint and several liability be ordered, 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.[496]

Statutorily, restitution would appear only to be available to *direct victims* of the relevant delinquent conduct.[497] The statutory definition of "victim" includes not only the "victim" him or herself, but also: immediate surviving family members of the (deceased) victim, the victim's primary caretaker, members and/or former members of the victim's household; and corporations, government agencies and other legal entitites, including government agencies responsible for repairing, replacing, or restoring public or privately owned

484 *See* former Welf. & Inst. Code, § 729.9 (prior to amendment by Stats.2017, c. 678 (SB 190), § 14, eff. Jan. 1, 2018).

485 Sen. Bill No. 190 (2017-2018 Reg. Sess.), § 14.

486 Sen. Bill No. 1290 (2019-2020 Reg. Sess.), § 1.

487 Welf. & Inst. Code, § 730.6, subd. (h).

488 *Ibid.*

489 *Ibid.* Typically a victim restitution determination will be made within a few months of disposition. However, even when it is made several years later, an appellate court has upheld the order, when it was satisfied that the defendant, who was still on juvenile probation, was not prejudiced by the passage of time. (*In re A.R.* (2022) 78 Cal.App.5th 184, 189-190.)

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

491 Welf. & Inst. Code, §§ 654.6. 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 the interests of justice would best be served, and specifies on the record its reasons for the decision. (Welf. & Inst. Code, § 654.3.)

492 Welf. & Inst. Code, § 730.6, subd. (a).

493 Welf. & Inst. Code, § 794; *G.C. v. Superior Court* (2010) 183 Cal.App.4th 371, 378.

494 See *In re M.T.* (2019) 43 Cal.App.5th 947, 952-954.

495 *In re S.S.* (1995) 37 Cal.App.4th 543, 550. Note that with restitution *fines*, however, co-offenders are *not* jointly and severally liable. (People v. Kuntz (2004) 122 Cal.App.4th 652, 655-658.)

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

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

property defaced with graffiti.[498] Following the passage of Marsy's Law in 2008, however, courts have held that restitution may also be imposed in juvenile cases for losses suffered by "derivative victims," such as the victim's immediate family members.[499]

PRACTICE TIP: Counsel should be prepared to respond to assertions that public agencies are "direct victims" in any given case – for example, when are fire and police departments or other emergency response services "direct victims" of an incident? Although government entities are considered a "direct victim" of a crime when they are the immediate object of the offense (e.g., a case involving tax evasion or theft of government property) public agencies are not considered "direct victims" for restitution purposes merely because they have spent money to investigate crimes,[500] apprehend criminals,[501] or fight fires.[502]

If your client is placed on probation for vandalism involving graffiti (Penal Code sections 594, 594.3, 594.4, 640.5, 640.6, or 640.7), be aware that restitution is governed specifically by section 742.16 of the Welfare and Institutions Code. Unlike the general restitution provision 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."[503] Note, however, that as of August 2022, legislation rendering restitution for graffiti damage under section 742.16 discretionary instead of mandatory is awaiting the Governor's signature.[504]

Also unlike section 730.6, section 742.16 allows a court to order a youth to physically "wash, paint, repair, or replace" property either in addition to, or in lieu of, actually paying restitution. [505] In the event that a court finds the imposition of full victim restitution to be inappropriate, and states the reasons for that finding on the record, a youth shall be required to perform community service instead. [506]

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.[507] However, the amount of restitution ordered is intended to "make the victim whole, not to give [the victim] a windfall."[508]

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).[509]

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, as well as to "further legislative objectives."[510] In addition, because the adult restitution statute is used in construing Welfare and Institutions

498 Welf. & Inst. Code, § 730.6, subd. (j).

499 *In re Scott H.* (2013) 221 Cal.App.4th 515, 522.

500 *See, e.g., Luis M. v Superior Court* (2014) 59 Cal.4th 300, 310.

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

502 *People v. Martinez, supra*, 36 Cal.4th at 394, 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, § 1203.1h); emergency response to a false bomb threat (Pen. Code, § 422.1).

503 Welf. & Inst. Code, § 742.16, subd. (a).

504 Assem. Bill No. 503 (2021-2022 Reg. Sess.) § 11.

505 *Ibid.*

506 *Ibid.*

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

508 *In re Anthony M., supra*, 156 Cal.App.4th at 1017, *People v. Fortune* (2005) 129 Cal.App.4th 790, 794-795. *But see In re Michael S.* (2007) 147 Cal.App.4th 1443, 1458, fn. 10 [suggesting that "at least some double recovery" might be permissible in situations where at least some amount of restitution is appropriate, even though the victim was already fully compensated by his or her insurer].

509 Welf. & Inst. Code, § 730.6, subds. (h) (1) – (h) (4).

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

Code section 730.6,[511] the list of losses for which restitution is appropriate includes losses such as:

- Relocation expenses, such as rental and utility deposits, interim lodging and food expenses, and clothing and personal items;[512]
- Legal fees resulting from attempts at execution of a restitution order (but not for fees incurred to recover general damages such as pain and suffering);[513]
- Installation or expansion of security mechanisms such as alarm systems, in cases involving violent felonies and/or domestic violence;[514]
- Psychological harm resulting from felony child sexual abuse;[515]
- Expenses for making a home or vehicle accessible when a victim is permanently disabled as a result of the delinquent conduct;[516]
- When the victim is an employer, the reasonable value of employee wages and benefits for time spent responding to the results of the delinquent conduct; [517] and
- Burial and cremation expenses.[518]

Note that this list is *not* exhaustive as the term "economic loss" is accorded "an expansive interpretation."[519]

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.[520] 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,[521] and is for the purpose of rehabilitating the youth.[522] 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.[523] In addition, courts may entirely delegate the task of determining restitution to the probation officer.[524]

Restitution and Insurance

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." Thus, payments a victim may receive from his or her own insurance for damage and/or injuries arising from a youth's conduct are *not* credited against the restitution order.[525] Similarly, even if a victim's medical expenses have already been fully paid for by Medi-Cal or Medicare, the youth still must pay restitution for the full amount of medical care provided.[526] However, the appropriate

511 *In re M.W., supra*, 169 Cal.App.4th at 4 [Pen. Code, § 1202.4, the adult criminal restitution statute, enumerates additional areas for which restitution may be ordered].

512 Pen. Code, § 1202.4, subd. (f)(3)(I). Note that this provision requires such expenses to be verified by law enforcement to be necessary for the victim's personal safety or by a mental health treatment provider to be necessary for the victim's emotional well-being.

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

514 Pen. Code, § 1202.4, subd. (f)(3)(J).

515 Pen. Code, § 1202.4, subd. (f)(3)(F).

516 Pen. Code, § 1202.4, subd. (f)(3)(K).

517 *In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1134; but see *Luis M. v Superior Court, supra*, 59 Cal.4th at 310 [Welf. & Inst. Code, § 730.6, does not authorize restitution for law enforcement investigative costs].

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

519 *In re Alexander A.* (2011) 192 Cal.App.4th 847, 854, fn. 4; *In re Johnny M., supra,* 100 Cal.App.4th at 1132.

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

521 *People v. Rubics* (2006) 136 Cal.App.4th 452, 462, overruled on different grounds in *People v. Martinez, supra*, 2 Cal.5th at 1103-1104.

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

523 *See, e.g., In re I.M.* (2005) 125 Cal.App.4th 1195, 1210 [restitution for funeral expenses was appropriate despite the fact that minor was not responsible for or involved with the victim's death because it served a rehabilitative purpose by "bringing home" to the minor the consequences of gang membership].

524 *In re Karen A.* (2004) 115 Cal.App.4th 504, 511. Note, however, that the *Karen A.* court held that if the amount of restitution determined by the probation officer is disputed, the youth maintains the right to request a hearing and have the court make its own independent determination. (*Id.* at fn. 5.)

525 *In re Tommy A.* (2005) 131 Cal.App.4th 1580, 1591-1592. Note that although the *Tommy A.* court expressly declined to address the issue of whether payments made by the insurer of a youth's parent or guardian would qualify as "restitution directly from the minor," other cases suggest that they *would* so qualify. (*See, e.g., In re Michael S., supra*, 147 Cal.App.4th at 1457 [upholding trial court's decision to credit payments made by the youth's mother's insurer against the youth's total restitution obligation]; *People v. Bernal* (2002) 101 Cal.App.4th 155, 167–168 [because payment made by adult offender's insurer was "directly from" offender, payment by insurer could be used by offender as an offset of his restitution obligation].)

526 *In re Anthony M., supra*, 156 Cal.App.4th at 1013-1014; *People v. Hove* (1999) 76 Cal.App.4th 1266, 1272. *Hove* notes the "Medi-Cal statute authorizes the department to file a claim against the estate of a

amount of restitution is the amount *actually paid* by an insurer, not the amount *initially billed* by a medical provider.[527]

If the victim is insured, restitution is *not* limited merely to his or her out-of-pocket loss (*i.e.* the amount of the victim's insurance deductible).[528] Instead, a victim is entitled to restitution in an amount sufficient to "fully reimburse" him or her for losses incurred as a result of the youth's conduct, whether or not a claim was first submitted to their insurance carrier, and whether or not they had already reimbursed by their insurer. [529]

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.[530]

PRACTICE TIP: Defense counsel should look carefully at documentation submitted by the victim for medical expenses. Often, the document is the initial invoice from a medical provider that does not account for the final settlement made by the insurance, which not only is usually a lesser amount than the amount initially billed, but also the maximum amount that a youth may be held responsible for.

Reducing and Overturning Restitution Orders

The first step in reducing or overturning a restitution order is to ask for a hearing, as the failure to request a restitution hearing waives the youth's right to appeal, so long as the court's order does not exceed the recommendation of the probation officer.[531] Conversely, though, imposition of restitution in excess of the recommendation of probation, made without notice or a reasonable opportunity to challenge the order, violates due process.[532] The standard of proof at a restitution hearing is preponderance of the evidence, not proof beyond a reasonable doubt.[533]

Restitution orders may generally only be overturned on appeal upon a finding of an abuse of discretion.[534] However, where the specific issue is whether or not a court has the authority to impose restitution in the first instance, the standard of review is *de novo*.[535] In addition, where the specific issue is the amount of restitution imposed, a trial court's factual findings must be supported by substantial evidence.[536]

PRACTICE TIP: Are "*Harvey waivers*" (which allow the court to order restitution for behavior in dismissed charges, under *People v. Harvey* (1979) 25 Cal.3d 754), applicable to juvenile cases? No, "*Harvey waivers*" are not required in juvenile cases because the juvenile court in all cases can order restitution for dismissed counts (and even for uncharged crimes), so long as the order is reasonably related to the crime of which the youth was found responsible for or to the extent it aids in preventing future criminality, whether a youth explicitly agrees to a "*Harvey waiver*" or not.[537] Although a juvenile court can order restitution for dismissed counts as long as there is evidence in the record to rationally conclude that the youth was responsible for other losses,[538] counsel should nevertheless argue that there must be substantial evidence to connect the minor with the other conduct for which restitution is sought.[539]

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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.)." (*Id.* at fn. 5.) *See also* 42 U.S.C. §§ 1396a (a) (25) (b), (a) (45), 1396k (a) (1) (A).

527 *In re Eric S.* (2010) 183 Cal.App.4th 1560, 1566; *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, 548-549 [the amount of tort damages in a civil case is the amount *actually paid* by insurance to the hospital, not the amount *billed.*]

528 *In re Brittany L., supra*, 99 Cal.App.4th at 1389-1390.

529 *Id.* at 1389.

530 *In re Michael S. supra*, 147 Cal.App.4th at 1457.

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

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

533 *People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.

534 *In re T.C.* (2009) 173 Cal.App.4th 837, 849; *see also People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542-1543 ["[n]o abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered"].

535 *In re Alexander A., supra*, 192 Cal.App.4th at 852.

536 *In re A.M., supra*, 173 Cal.App.4th at 674.

537 *In re T.C., supra*, 173 Cal.App.4th at 850.

538 *Luis M. v Superior Court, supra*, 59 Cal.4th at 309 [restitution must be for losses that can rationally be attributed to the minor]; *In re Maxwell C.* (1984) 159 Cal. App.3d 263, 266.

539 *See In re S.O.* (2018) 24 Cal.App.5th 1094, 1102-1103 [holding that juvenile courts may order restitution for dismissed and/or uncharged conduct as a condition of probation so long as there is substantial evidence to support the youth's involvement in the dismissed and/or

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,"[540] 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"[541] and thus can be challenged for vagueness. Although the burden is on the youth to prove that the victim's losses are less than what is claimed,[542] the "burden of refutation" may not be imposed on the youth by the victim's bare assertion that a stated amount is owed to him or her.[543] However, once the victim makes a *prima facie* showing that he or she actually incurred an economic loss as a result of the youth's actions, the burden shifts to the youth to disprove the amount of the losses claimed by the victim.[544] 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. Note, however, that a court may order restitution for the cost to repair the victim's property, even if the cost of repair exceeds the actual value of the property.[545] A youth does not have an automatic right to confront or cross-examine witnesses at a restitution hearing.[546]

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).[547] A victim must be notified at least 10 days before a proceeding to modify restitution.[548]

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 effective; for example, if the loss claimed by the victim is too highly attenuated from the actual conduct of the youth, any rehabilitative value restitution might otherwise have arguably would be eliminated.[549]

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.[550]

The court has "limited discretion" in "unusual situations specific to a particular crime, defendant, or other circumstance,"[551] to award less than full restitution, *if* it states on the record "compelling and extraordinary reasons" for a reduced award.[552] If the court does not order full restitution, the court must order community service as a condition of probation in lieu thereof.[553]

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 unpaid restitution debt.[554] The Bankruptcy Code does not apply to restitution orders,[555] nor do bankruptcy law's automatic stay provisions.[556]

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uncharged conduct and where imposition of the full amount of restitution would further the youth's rehabilitation].

540 Welf. & Inst. Code, § 730.6, subd. (h).

541 Welf. & Inst. Code, § 730.6, subd. (i).

542 *People v. Gemelli, supra,* 161 Cal.App.4th at pp. 1542-1543.

543 *In re K.F.* (2009) 173 Cal.App.4th 655, 665 [restitution claim based upon an "Explanation of Benefits" form from victim's insurer marked with the legend "This is not a bill" and showing the sum of "0.00" in the space marked "Your Obligation" was insufficient to establish that the victim actually incurred a loss of any amount]; *In re Travis J.* (2013) 222 Cal.App. 4th 187, 204 [value of the victim's property cannot be established simply by statements made by the victim to the probation officer]; *but cf. People v. Gemelli, supra*, 161 Cal.App.4th at 1543 [restitution claim may be based upon a property owner's statement made in the probation report about the value of stolen or damaged property].

544 *People v. Gemelli, supra*, 161 Cal.App.4th at 1543.

545 *In re Dina V., supra,* 151 Cal.App.4th at p. 489.

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

547 Welf. & Inst. Code, §§ 730.6, subd. (h)(2), 742.16, subd. (k).

548 Welf. & Inst. Code, § 730.6, subd. (h)(2).

549 *People v. Bernal, supra*, 101 Cal.App.4th at 162.

550 Pen. Code, § 1202.4, sudb. (f).

551 *People v. Giordano* (2007) 42 Cal.4th 644, 662.

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

553 Welf. & Inst. Code, § 730.6, subd. (n).

554 *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)(13); 11 U.S.C. § 1328(a)(3).

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

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

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 ask to have the basis for the calculation of the final restitution amount made on the record.[557]

A juvenile court's subsequent termination of probation and dismissal of case should not affect a timely appeal of a restitution order.[558]

In cases where a *parent or guardian* is ordered jointly and severally liable for restitution, the restitution order may be *vacated* if the parent or guardian can show, by a preponderance of the evidence, either that: (1) he or she was either not given notice of potential liability for payment of restitution prior to the petition being sustained; or that (2) he or she was not present during the proceedings wherein the petition was sustained and any subsequent restitution hearing.[559] Should the parent or guardian be able to so demonstrate, *he or she* is relieved of joint and several liability for restitution (*i.e.*, the youth's responsibility for restitution remains).[560] In addition, note that joint and several liability of a parent or guardian is subject to the maximum liability limits[561] set forth in Civil Code sections 1714.1[562] and 1714.3.[563]

Restitution as a Condition of Probation

Although a juvenile court is *required* to make a restitution order a condition of probation,[564] a youth may not be denied formal or informal probation solely because of his or her financial inability to pay restitution.[565] As discussed above, restitution orders do not have to be based *solely* on conduct for which a youth is adjudged a ward of the court.[566] Thus, even absent a direct connection between 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.* (2009) 173 Cal.App.4th 837, 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 of his 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), even though the charge was not sustained, because the order was reasonably related to deterring future delinquency.[567] Similarly, *In re A.M.* (2009) 173 Cal.App.4th 668, the court ordered the youth to pay cremation expenses of a pedestrian she hit and killed, even though 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.[568]

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."[569]

557 *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."]

558 This is so because Welfare and Institutions Code section 730.6, subdivision (l) provides that the restitution order "shall continue to be enforceable by a victim . . . until the obligation is satisfied in full;" *but see In re T.C.* (2012) 210 Cal.App.4th 1430, 1433 [restitution ordered as a condition of DEJ cannot be appealed unless and until judgment is entered as a result of the minor failing DEJ].

559 Welf. & Inst. Code, § 730.7, subd. (a).

560 *In re Jeffrey M.* (2006) 141 Cal.App.4th 1017, 1027.

561 Welf. & Inst. Code, § 730.7, subd. (a)

562 General civil parental liability is limited to an amount recalculated every two years based upon the Consumer Price Index. The current maximum amount is published in Appendix B of the California Rules of Court. As of July 1, 2021, the maximum amount was $47,100. (Civ. Code, § 1714.1.)

563 Civil parental liability in cases specifically involving discharge of a firearm limited to $30,000 in cases involving injury and/or death to one person, or $60,000 in cases involving injury and/or death to more than one person. (Civ. Code, § 1714.3.)

564 Welf. & Inst. Code, §§ 730, subd. (b), 730.6, subd. (a)(2)(B).

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

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

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

568 *In re A.M., supra*, 173 Cal.App.4th at 673; *see also In re I.M., supra*, 125 Cal.App.4th at 1209.

569 Welf. & Inst. Code, § 730.6, subd. (m); *In re Angel E.* (1986) 177 Cal.App.3d 415, 420-421.

PRACTICE TIP: Can probation properly be extended until the youth completes payment of restitution? Most likely not. While probation may not be revoked for non-willful failure to pay,[570] courts have upheld extending probation until the maximum period of jurisdiction has been reached in cases where full payment of restitution has not yet been completed.[571] However, because the sealing of juvenile court records may not be denied solely on the basis of unpaid restitution,[572] the more appropriate approach in such a circumstance would seem to be the conversion of the unpaid restitution amount to a civil judgment, instead of an extension of probation, by the entry of an Order for Restitution and Abstract of Judgment (Judicial Council Form JV-790). Such an order can be entered at any time, even after juvenile court jurisdiction would otherwise have expired, so long as the amount of restitution owed was determined prior to the expiration of jurisdiction.[573] Such an order is also enforceable as a civil judgment, which grants the victim the ability to, inter alia, collect interest on the unpaid amount of the debt, garnish the youth's wages, or place liens or holds or the youth's money or property.[574] In addition, while a civil judgment could have potential consequences on the youth's ability to obtain credit in the future, note that as of July 1, 2017, the three major national credit bureaus (Experian, TransUnion, and Equifax) have removed the vast majority of civil judgment records from consumer credit reports.[575]

PRACTICE TIP: Counsel for youth who have had civil judgments entered against them for unpaid restitution would be well advised, in many circumstances, to attempt to negotiate a settlement of the unpaid debt directly with the victim (also known as the "judgment creditor" following the entry of a civil judgment).

Restitution and Deferred Entry of Judgment (DEJ)

Although 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, such a result would seem highly unlikely in light of cases holding that successful completion of DEJ does not require payment of restitution in full, so long as all other conditions of DEJ have been satisfied.[576]

570 Welf. & Inst. Code, § 730.6, subd. (m).

571 *People v. Cookson* (1991) 54 Cal.3d 1091, 1100.

572 Welf. & Inst. Code, § 786, subd. (c)(2).

573 *In re Keith C.* (2015) 236 Cal.App.4th 151, 157; *In re J.V.* (2014) 231 Cal.App.4th 1331, 1332.

574 Civil Code, § 337.5, Code of Civ. P., § 683.020.

575 As a result of the National Consumer Assistance Plan (an agreement reached in 2015 between the three major credit reporting bureaus and 31 state attorneys general), the credit bureaus all agreed not to report any public record data unless the data specifically included the judgment debtor's name, address, and either their Social Security number or date of birth. Because the vast majority of civil judgment records (up to 96%, by some accounts) lack this required information, they were nearly all removed as of July 1, 2017. In addition, at least two of the three bureaus – Experian and TransUnion – have explicitly stated that they currently do not report any civil judgments whatsoever.

576 *In re J.G.* (2019) 6 Cal.5th 867, 869-870 [despite over $36,000 in unpaid restitution, minor found to have successfully completed DEJ after the amount of unpaid restitution was converted to a civil judgment because he was in compliance of all other terms of DEJ]; *see also* Welf. & Inst. Code, § 786(c)(2) [unfulfilled restitution order does not preclude finding of satisfactory completion of probation required for sealing juvenile court records].

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,[577] there may be separate parental financial responsibilities for a series of costs related to juvenile delinquency court 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.[578] If there is more than one such person, they may all be held jointly and severally liable for all applicable costs.[579]

§ 10.1 COSTS FOR WHICH THE PARENT MAY BE RESPONSIBLE

Prior to 2018, California law made parents financially liable for a number of costs related to juvenile delinquency cases, including the costs of support for youth, legal services to youth, separate registration fee for legal counsel, probation supervision, home supervision or electronic surveillance and detention and other confinement costs.[580] However, as described in further detail below, the passage of Senate Bill 190 (hereinafter "SB 190"), effective January 1, 2018, eliminated parental financial liability for these costs in juvenile delinquency cases.[581] Furthermore, as of January, 2021, the State of California completely discharged all previously assessed juvenile court fees statewide, legally relieving young people and their families of any obligation to repay any of them with the passage of Senate Bill 1290 (SB 1290).[582]

§ 10.2 PROCESS FOR DETERMINING ABILITY OF PARENT TO PAY COSTS

Prior to 2018, county boards of supervisors were allowed to designate a Financial Evaluation Officer (FEO) to determine ability of parent to pay reimbursable costs.[583] However, since SB 190 eliminated parental financial liability for juvenile delinquency case related costs, county designation of an FEO is no longer applicable in delinquency cases.

§ 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.[584] Prior to 2018, courts were allowed to require the youth's parents to pay for some or all of the cost of legal services provided.[585] The policy of holding parents responsible for the cost of the youth's legal representation was within the discretion of the board of supervisors of each county, and thus varied by county.[586] Following the passage of SB 190, however, parental financial liability for the costs of legal representation was eliminated entirely in juvenile delinquency cases.[587]

§ 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.[588] Prior to 2018, parents may have been held liable for the reasonable costs of support and maintenance of youth while he or she was detained pursuant to an order of the juvenile delinquency

577 These are discussed in Chapter 9, *Financial Responsibility (Fines, Fees and Restitution)*.

578 Pursuant to Welfare and Institutions Code, section 903, subdivision (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.

579 Welf. & Inst. Code, § 903, subd. (a).

580 *See* Welf. & Inst. Code, former §§ 903 (effective January 1, 2010 to December 31, 2017), 903.1 (effective January 1, 2010 to December 31, 2017), 903.15 (effective January 1, 2012 to December 31, 2017), 903.2 (effective August 17, 1996 to December 31, 2017), 903.25 (effective September 14, 1996 to December 31, 2017), 903.4 (effective January 1, 2013 to December 31, 2017).

581 Sen. Bill No. 190 (2017-2018 Reg. Sess.) §§ 19-24.

582 Sen. Bill No. 1290 (2019-2020 Reg. Sess.), § 1.

583 *See* Welf. & Inst. Code, former § 903.45 (effective June 27, 2013 to December 31, 2017).

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

585 *See* Welf. & Inst. Code, former §§ 903.1 (effective January 1, 2010 to December 31, 2017) and 903.15 (effective January 1, 2012 to December 31, 2017).

586 *See* Welf. & Inst. Code, former § 903.15, subd. (e) (effective January 1, 2012 to December 31, 2017) and § 903.47 (b).

587 Sen. Bill No. 190 (2017-2018 Reg. Sess.) §§ 20-21.

588 Welf. & Inst. Code, § 202, subd. (c).

court.[589] Following the passage of SB 190, however, parental financial liability for the costs of support and maintenance was entirely eliminated in juvenile delinquency cases.[590]

Similarly, when youth who were subject to a child support order were placed or detained by a juvenile court prior to 2018, agencies incurring costs on behalf of such youth were permitted to request reimbursement of such costs by asking the court to order the parent to pay a corresponding amount of child support.[591] SB 190, however, eliminated these provisions as well.[592]

§ 10.5 THE COST OF SUPERVISION

Prior to 2018, when a youth was under the supervision of the probation department, pursuant to an order of the juvenile court, courts were permitted to require that parents be liable for costs associated with the supervision.[593] These costs were allowed to include probation supervision, home supervision, or electronic surveillance by the probation officer.[594] Following the passage of SB 190, however, parental financial liability for the costs of probation supervision were entirely eliminated in juvenile delinquency cases.[595] Despite SB 190, however, if an electronic monitor is damaged or discarded while in the possession of a youth, courts may still order payment for the cost of replacement or repair subject to a determination that the person has the financial ability to pay.[596]

§ 10.6 THE COST OF SEALING JUVENILE RECORDS

After a period of five or more years following the termination of juvenile delinquency jurisdiction, a person may petition the court to seal his or her juvenile arrest and court records.[597] Starting on January 1, 2020, a court or a probation department may not charge an applicant a fee to file a petition to seal a juvenile record under Welfare and Institutions Code section 781.[598]

The California Legislature also repealed Welfare and Institutions Code section 903.3, which had allowed a court or county to charge applicants age 26 or older for investigation costs related to the filing of a section 781 record sealing petition.[599]

§ 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,[600] 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.[601] 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.[602]

Also, the court may require the parent to pay for or participate in programs related to the specific behavior of the youth. For example, in the case of a "first-time offender," parents may be ordered to attend anti-gang violence parenting classes if the court finds the presence of significant risk factors for gang involvement,[603] and the parent may be held liable for the cost of the classes if he or she is able to pay.[604] Similarly, 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.[605] However, the youth is

589 *See* Welf. & Inst. Code, former § 903 (a) (effective January 1, 2010 to December 31, 2017).

590 Sen. Bill No. 190 (2017-2018 Reg. Sess.) § 19.

591 *See* Welf. & Inst. Code, former § 903.4 (c)(1) (effective January 1, 2013 to December 31, 2017).

592 Sen. Bill No. 190 (2017-2018 Reg. Sess.) § 24.

593 *See* Welf. & Inst. Code, former § 903.2 (a) (effective August 17, 1996 to December 31, 2017).

594 *Ibid.*

595 Sen. Bill No. 190 (2017-2018 Reg. Sess.) § 22.

596 Welf. & Inst. Code, § 871, subds. (d) and (e).

597 Welf. & Inst. Code, § 781, subd. (a).

598 Welf. & Inst. Code, § 781.1.

599 See Assem. Bill No. 1394 (2019-2020 Reg. Sess.)

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

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

602 Welf. & Inst. Code, §§ 727, subds. (b) and (c).

603 Welf. & Inst. Code, § 727.7, subd. (a).

604 Welf. & Inst. Code, § 727.7, subd. (d).

605 Welf. & Inst. Code, § 729.6. Note, however, Assembly Bill 503, which, as of August, 2022, is awaiting the Governor's signature, would (1) eliminate the requirement that the juvenile court order counseling under section 729.6; (2) allow the court to order such counseling at its discretion; and (3) eliminate the requirement that the counseling be at the parent's expense. (Assem. Bill No. 503 (2021-2022 Reg. Sess.) § 6.)

required to attend such counseling whether or not the parent has the financial ability to pay.[606]

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.[607]

Graffiti Abatement

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 custody of the parents and the imposition of direct victim restitution is deemed in appropriate, the youth and his or parents 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.[608]

§ 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.[609] State law further provides 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).[610] Note, however, that the twenty-five thousand dollar ($25,000) maximum liability limit is subject to increase by a biannual cost-of-living adjustment. [611] As of the publication date of this manual, the last applicable cost-of-living adjustment, on July 1, 2021, set the current actual maximum liability limit at forty-two thousand, one-hundred dollars ($47,100). [612]

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).[613] Note, that this twenty-five thousand dollar ($25,000) maximum liability limit is also subject to the biannual-cost-of-living adjustment previously mentioned.[614] As mentioned, as of July 1, 2021, the date of the last applicable cost-of-living adjustment as of the publication date of this manual, set the current actual maximum liability limit at forty-two thousand, one-hundred dollars ($47,100). [615]

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.[616] 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.[617] This liability is in addition to any other liability imposed by law.[618]
Unlike the maximum liability limits for torts and graffiti described above, the maximum liability limits for firearms is <u>not</u> subject to any cost-of-living increase. [619]

606 *Ibid.*

607 Welf. & Inst. Code, § 654.

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

609 Civ. Code, § 1714.1, subd. (a).

610 *Ibid.*

611 Civ. Code § 1714.1 (c).

612 *See id.*, California Rules of Court, Appendix. B.

613 Civ. Code, § 1714.1 (b).

614 Civ. Code § 1714.1 (c).

615 *See id.*, California Rules of Court, Appendix. B.

616 Civ. Code, § 1714.3.

617 *Ibid.*

618 *Ibid.*

619 *Cf.* Civ. Code, § 1714.1 (c) and § 1714.3.

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.[620]

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 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 . . ."[621]

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, any act specified in Welfare and Institutions Code section 48915, subdivision (c)(1) to (c)(5) and any suspensions or expulsions related to violation of conduct in subdivisions (c), or (d) of Education Code section 48900.[622]

For those students that have an Individualized Education Program (IEP) the school must comply with the Individuals with Disabilities Education Act, (IDEA),[623] 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 *shall* transmit the youth's IEP to the agency that took the report.[624]

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

620 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 court 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.

621 Ed. Code, § 48909.

622 Ed. Code, § 48902.

623 20 U.S.C. § 1400 et seq.

624 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.")

> education and disciplinary records of the pupil are transmitted, as described in Section 1415(k)(6) 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.[625]

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."[626]

PRACTICE TIP: This legal obligation of schools to supply the discipline and special education records to law enforcement is rarely if ever complied with, and should be litigated. Counsel can pursue remedies for the youth through the administrative complaint process. Alternatively, counsel can request the court to appoint an independent education attorney to investigate and pursue the administrative complaint process. In addition, counsel can file a compliance compliant with the California Department of Education. If schools actually complied with this mandate, counsel would be provided with the special education records at arraignment, thus saving time and ensuring counsel is fully informed of the youth's educational issues at the outset of representation. However, if counsel is aware that there may be behavioral write-ups that would be detrimental to the case, counsel may not want to file an administrative complaint and obtain the records separately.

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.[627]

The notice "shall include only the offense found to have been committed by the minor and the disposition of the minor's case."[628]

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 minor 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."[629] 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.[630] Moreover, intentional violation of the confidentiality provisions is a misdemeanor punishable by a $500 fine.[631]

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.[632] If the youth returns to a different school

625 Ed. Code, § 48902, subd. (e).

626 See 20 U.S.C. § 1232g (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.

627 Welf. & Inst. Code, § 827, subd. (b)(2)(A).

628 *Ibid.*

629 *Ibid.*

630 Welf. & Inst. Code, § 827, subd. (b)(2)(B).

631 Welf. & Inst. Code, § 827, subd. (b)(2)(C).

632 Welf. & Inst. Code, § 827, subd. (b)(3).

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.[633]

Any information received from the court must be kept in a separate confidential file at the school of attendance and shall 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.[634] 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 respond within 30 days confirming that the records have been destroyed, or explaining why destruction has not yet occurred.[635]

Computerized Data System Access for School Districts

Under 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.[636] School districts are among the entities that may access this information.[637] 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.[638]

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.[639]

633 *Ibid.*

634 Welf. & Inst. Code, § 827(d)(1).

635 *Ibid.*

636 Welf. & Inst. Code, § 827.1, subd. (a).

637 *Ibid.*

638 *Ibid.*; see also Ed. Code, § 49076.

639 Welf. & Inst. Code, § 827.1, subd. (b.)

640 Ed. Code, § 48918.

641 Ed. Code, § 48918, subd. (b)(5).

642 Ed. Code, § 48918, subd. (a)(1).

643 *Ibid.*

§ 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 48910, 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[640] and these rules are often posted on a school district's website.

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 hearings[641] and are entitled to at least one postponement of an expulsion hearing for a period of no more than 30 calendar days[642]. Any additional postponement may be granted at the discretion of a school board.[643]

Technical rules of evidence do not apply in expulsion hearings.[644] Hearsay evidence is allowable, but the expulsion recommendation may not be based on hearsay alone.[645] Also, the panel may consider redacted (anonymous) statements if they find good cause to withhold the individual's identity, such psychological or physical harm.[646] Redacted sworn testimony is allowable even if a subpoena was issued for the witness.[647] 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.[648]

644 Ed. Code, § 48918, subd. (h)(1) [". . . 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].

645 Ed. Code, § 48918, subd. (f)(2).

646 *Ibid.*

647 Ed. Code, § 48918, subd. (i)(3).

648 *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

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.[649] 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.[650] 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.

(b) Possessed, sold, or otherwise furnished a firearm, knife, explosive, or other dangerous object, unless, in the case of possession of an object of this type, the pupil had obtained written permission to possess the item from a certificated school employee, which is concurred in by the principal or the designee of the principal.

(c) Unlawfully possessed, used, sold, or otherwise furnished, or been under the influence of, a controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code, an alcoholic beverage, or an intoxicant of any kind.

(d) Unlawfully offered, arranged, or negotiated to sell a controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code, 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 the liquid, substance, or material 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.

(g) Stole or attempted to steal school property or private property.

(h) Possessed or used tobacco, or products containing tobacco or nicotine products, including, but not limited to, cigarettes, cigars, miniature cigars, clove cigarettes, smokeless tobacco, snuff, chew packets, and betel. However, this section does not prohibit the use or possession by a pupil of the 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) (1) 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.

(2) Except as provided in Section 48910, a pupil enrolled in kindergarten or any of grades 1 to 3, inclusive, shall not be suspended for any of the acts enumerated in paragraph (1), and those acts shall not constitute grounds for a pupil enrolled in kindergarten or any of grades 1 to 12, inclusive, to be recommended for expulsion. This paragraph is inoperative on July 1, 2020.

(3) Except as provided in Section 48910, commencing July 1, 2020, a pupil enrolled in kindergarten or any of grades 1 to 5, inclusive, shall not be suspended for any of the acts specified in paragraph (1), and those acts shall not constitute grounds for a pupil enrolled in kindergarten or any of grades 1 to 12, inclusive, to be recommended for expulsion.

(4) Except as provided in Section 48910, commencing July 1, 2020, a pupil enrolled in any of grades 6 to 8, inclusive, shall not be suspended for any of the acts specified in paragraph (1). This paragraph is inoperative on July 1, 2025.

where there is no showing or finding of a significant and specific risk of harm."

649 Ed. Code, § 48900, subds. (a) – (r).

650 Ed. Code, § 48900, subd. (s).

(l) Knowingly received stolen school property or private property.

(m) Possessed an imitation firearm. As used in this section, "imitation firearm" means a replica of a firearm 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 Section 261, 266c, 286, 287, 288, or 289 of, or former Section 288a 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 purposes 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. For purposes of this subdivision, "hazing" means a method of initiation or preinitiation into a pupil organization or body, whether or not the organization or body is officially recognized by an educational institution, that 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. For purposes of this subdivision, "hazing" does not include athletic events or school-sanctioned events.

(r) Engaged in an act of bullying. For purposes of this subdivision, the following terms have the following meanings:

(1) "Bullying" means any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, and including one or more acts committed by a pupil or group of pupils as defined in Section 48900.2, 48900.3, or 48900.4, directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:

(A) Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property.

(B) Causing a reasonable pupil to experience a substantially detrimental effect on the pupil's physical or mental health.

(C) Causing a reasonable pupil to experience substantial interference with the pupil's academic performance.

(D) Causing a reasonable pupil to experience substantial interference with the pupil's ability to participate in or benefit from the services, activities, or privileges provided by a school.

(2)

(A) "Electronic act" means the creation or transmission originated on or off the schoolsite, by means of an electronic device, including, but not limited to, a telephone, wireless telephone, or other wireless communication device, computer, or pager, of a communication, including, but not limited to, any of the following:

(i) A message, text, sound, video, or image.

(ii) A post on a social network internet website, including, but not limited to:

(I) Posting to or creating a burn page. "Burn page" means an internet website created for the purpose of having one or more of the effects listed in paragraph (1).

(II) Creating a credible impersonation of another actual pupil for the purpose of having one or more of the effects listed in paragraph (1). "Credible impersonation" means to knowingly and without consent impersonate a pupil for the purpose of bullying the pupil and such that another pupil would reasonably believe, or has reasonably believed, that the pupil was or is the pupil who was impersonated.

(III) Creating a false profile for the purpose of having one or more of the effects listed in paragraph (1). "False profile" means a profile of a fictitious pupil or a profile using the likeness or attributes of an actual pupil other than the pupil who created the false profile.

(iii)

(I) An act of cyber sexual bullying.

(II) For purposes of this clause, "cyber sexual bullying" means the dissemination of, or the solicitation or incitement to disseminate, a photograph or other visual recording by a pupil to another pupil or

to school personnel by means of an electronic act that has or can be reasonably predicted to have one or more of the effects described in subparagraphs (A) to (D), inclusive, of paragraph (1). A photograph or other visual recording, as described in this subclause, shall include the depiction of a nude, semi-nude, or sexually explicit photograph or other visual recording of a minor where the minor is identifiable from the photograph, visual recording, or other electronic act.

(III) For purposes of this clause, "cyber sexual bullying" does not include a depiction, portrayal, or image that has any serious literary, artistic, educational, political, or scientific value or that involves athletic events or school-sanctioned activities.

(B) Notwithstanding paragraph (1) and subparagraph (A), an electronic act shall not constitute pervasive conduct solely on the basis that it has been transmitted on the internet or is currently posted on the internet.

(3) "Reasonable pupil" means a pupil, including, but not limited to, a pupil with exceptional needs, who exercises average care, skill, and judgment in conduct for a person of that age, or for a person of that age with the pupil's exceptional needs.

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;[651]
- 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;[652]
- 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;[653] or
- Has made terroristic threats against school officials or school property, or both, as defined.[654]

Mandatory Grounds for Expulsion

Under Education Code section 48915, subdivision (c), the principal or superintendent of schools *shall immediately suspend,* pursuant to Section 48911, and shall 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:

(1) Possessing, selling, or otherwise furnishing a firearm without prior written permission as specified;[655]

(2) Brandishing a knife[656] at another person;

(3) Unlawfully selling a controlled substance listed in Health & Safety Code section 11053 et seq.;

651 Ed. Code, § 48900.2.

652 Ed. Code, § 48900.3.

653 Ed. Code, § 48900.4.

654 Ed. Code, § 48900.7.

655 As set forth in Education Code section 48915, subdivision (c)(1) "Possessing, selling, or otherwise furnishing a firearm. This subdivision does not apply to an act of possessing a firearm if the pupil had obtained prior written permission to possess the firearm from a certificated school employee, which is concurred in by the principal or the designee of the principal. This subdivision applies to an act of possessing a firearm only if the possession is verified by an employee of a school district. The act of possessing an imitation firearm, as defined in subdivision (m) of Section 48900, is not an offense for which suspension or expulsion is mandatory pursuant to this subdivision and subdivision (d), but it is an offense for which suspension, or expulsion pursuant to subdivision (e), may be imposed."

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 Education Code section 48915, subdivision (c) to fulfill the federal mandate.

656 "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, subd. (g).)

(4) Committing or attempting to commit a sexual assault or committing a sexual battery as defined in subdivision (n) of section 48900;

(5) Possession of an explosive.[657]

Upon a finding that the pupil has committed one of the acts in Section 48915, subdivision (c), the governing board *shall* 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.[658]

Quasi-Mandatory Grounds for Expulsion

Under Education Code section 48915, subdivision (a), a superintendent or principal shall recommend expulsion for the following acts, **"**unless the principal or superintendent determines that expulsion should not be recommended under the circumstances or that an alternative means of correction would address the conduct:"

- 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… The possession of over-the-counter medication for use by the pupil for medical purposes or medication prescribed for the pupil by a physician;
- Robbery or extortion;
- Assault or battery, as defined in sections 240 and 242 of the Penal Code, upon any school employee.[659]

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.[660]

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 at are age appropriate and designed to address and correct the pupil's specific misbehavior as specified in Section 48900.5.[661]
- "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,

657 Ed. Code, § 48915, subd. (c).

658 Ed. Code, § 48915, subd. (d).

659 Ed. Code, § 48915, subds. (a)(1)-(a)(2). The provisions of section 48915, subdivision (a) can be confusing to some school administrators who mistakenly believe that they have no discretion but 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).

660 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.

661 Ed. Code, § 48900, subd. (v).

community or campus betterment, and teacher, peer, or youth assistance programs;[662]

» 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.[663] During the period of the suspension of the order, the pupil is deemed to be on probationary status;[664]

» A pupil suspended may be assigned to a supervised suspension classroom for the entire period of the suspension if the pupil poses no imminent danger or threat to the campus, pupils, or staff, or if an action to expel the pupil has not been initiated.[665]

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.[666] The due process protections are designed 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 10 consecutive school days, and for not more than 10 consecutive school days in that school year for separate incidents of misconduct.[667] Removal of a youth with a disability for more than 10 days is considered a change in placement,[668] and youth must receive a "manifestation determination" to ascertain whether the youth's behavior was a manifestation of his or her disability.[669] 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.[670] 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 10 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.[671]

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.[672]

§ 11.3 DIRECTIVES TO ATTEND "ALTERNATIVE" SCHOOLS OR PROGRAMS

Another consequence of juvenile court involvement is that youth may be diverted to alternative educational programs rather than attend 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.

In recognition of the high drop-out rates of detained young people under juvenile court jurisdiction, Education Code section 48645.5 provides that "[a] pupil shall not be denied enrollment or readmission to a public school solely on the basis that he or she has had contact with the juvenile justice system . . . ."[673] Note

662 Ed. Code, § 48900.6.

663 Ed. Code, § 48917, subd. (a).

664 Ed. Code, § 48917, subd. (c).

665 Ed. Code, § 48911.1, subd. (a).

666 Ed. Code, § 48915.5.

667 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).

668 20 U.S.C. § 1415(k)(1)(B).

669 20 U.S.C. § 1415(k)(1)(E)(i); Ed. Code, § 48915.5.

670 20 U.S.C. § 1415(d)(1)(D)(ii) & (k)(1)(F).

671 20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(b)(2).

672 Ed. Code, § 48900.5; see also Ed. Code, § 48915.5 [suspension and expulsion of pupils with exceptional needs].

673 Ed. Code, § 48645.5, subd. (b).

that section 48645.6, however, explicitly only applies only to *enrollment or readmission*; the section thus does not preclude a school from transferring or expelling a *currently enrolled* student based upon justice system contact.

However, system-involved youth are not without recourse in these situations. Education Code section 48853.5 allows such youth (broadly encompassed within the term "foster youth" for the purposes of this section)[674] to reenroll at the school they previously attended ("school of origin")[675], or to transfer to an another school, if so desired.[676] The school district's educational liaison for foster youth has an affirmative duty to "enroll the foster child even if the foster child . . . is unable to produce records normally required for enrollment, such as previous academic records, medical records, including immunization history. . . ."[677] Further, the liaison also has an obligation to enroll the youth "within two business days of the foster child's request for enrollment" and to "contact the school last attended by the foster child to obtain all academic and other records."[678]

The Education Code also requires the county's office of education and its probation department to have a joint transition planning policy that includes collaboration with school districts to coordinate education and services for youth in the juvenile justice system.[679] The county's office of education must assign transition oversight responsibilities to its existing personnel to work with the county probation department, and relevant local educational agencies to ensure that specified transition activities are completed for the pupil, including immediate enrollment in an appropriate public school in their community, acceptance of course credits for work completed while in custody, and immediate placement in appropriate courses based upon the coursework completed in custody, and to facilitate the transfer of, among other things, complete and accurate education records and the pupil's individualized education plan, when a pupil enters the juvenile court school.[680] The law also requires the county's office of education and the probation department to develop an individualized transition plan for a pupil detained for more than 20 consecutive schooldays and to have specified items accessible to the holder of the educational rights of the pupil upon the pupil's release. [681]

If the youth will be placed in a foster home, group home, or relative placement there is another section of the code 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."[682]

PRACTICE TIP: If a system-involved youth is encountering resistance to attending their school of origin or other school they wish to attend, counsel should consider filing a complaint with the relevant school district and/or with the California Department of Education directly citing the district's mandates pursuant to Education Code section 48853 and 48853.5 as applicable.

PRACTICE TIP: It should be determined 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.

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, the school

674 If a delinquency petition is filed against a young person pursuant to Welfare and Institutions Code section 602, they are considered a "foster youth" within the meaning of the section 48853.5. (Ed. Code, §§ 48853.5, subd. (a), 42238.01, subd. (b)(2).

675 Ed. Code, § 48853.5, subdivision (g); more specifically a "school of origin" is "the school that the foster child attended when permanently housed or the school in which the foster child was last enrolled. If the school the foster child attended when permanently housed is different from the school in which the foster child was last enrolled, or if there is some other school that the foster child attended with which the foster child is connected and that the foster child attended within the immediately preceding 15 months, the educational liaison, in consultation with, and with the agreement of, the foster child and the person holding the right to make educational decisions for the foster child, shall determine, in the best interests of the foster child, the school that shall be deemed the school of origin." (*Ibid.*)

676 Ed. Code, § 48853.5, subd. (f)(8)(B).

677 Ed. Code, § 48853.5, subd. (f)(8)(B).

678 Ed. Code, § 48853.5, subd. (f)(8)(C).

679 Ed. Code, § 48647, subd. (b).

680 Ed. Code, § 48647, subds. (c) & (d).

681 Ed. Code, § 48647, subds. (e) & (f).

682 Ed. Code, § 48853, subd. (g); see also Ed. Code § 48850, subd. (a); Welf. & Inst. Code, § 361, subd. (a).

district should have 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."[683] Governing Boards must also adopt rules and regulations establishing a procedure for requests for the filing, processing and review of requests for readmission.[684] 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."[685]

Community Schools[686]

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.[687] 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, if the community school has space.[688]

Community Day Schools[689]

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.[690] 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.[691] 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 agencies who work with at-promise youth; low pupil-teacher ratio; individualized instruction and assessment; and maximum collaboration with district support services including counselors, psychologists, and pupil discipline personnel.[692]

Juvenile Court Schools[693]

Juvenile court schools are established by COE's and operated in juvenile halls, camps, ranches, and group homes housing more than 25 youth.[694] 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.[695] 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.[696] 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.[697]

Nonpublic, Nonsectarian Schools (Including Group Home Schools)[698]

"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.[699] A range

683 Ed. Code, § 48916, subd. (b).

684 *Ibid*.

685 Ed. Code, § 48916, subd. (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, subd. (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, subd. (e).)

686 Ed. Code, § 1980 et seq.

687 Ed. Code, § 1981, subds. (a) & (c).

688 Ed. Code, § 1981, subd. (b).

689 Ed. Code, § 48660 et seq.

690 Ed. Code, § 48662.

691 Ed. Code, § 48663.

692 Ed. Code, § 48660.1.

693 Ed. Code, § 48645 et seq.

694 Ed. Code, § 48645.

695 Ed. Code, § 48645.3.

696 Ed. Code, § 48645.5.

697 Ed. Code, § 48645.5.

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

699 Ed. Code, § 56034.

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 special education needs 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.[700] The contract must also include an individual services agreement for each pupil, an evaluation process, and a method for evaluating progress. [701] However, responsibility for legally required reviews under the IDEA remains with the district, special educational local plan area, or county office.[702] 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.[703]

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 admission.[704] 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 Schools[705]

Continuation schools are designed for students 16 and older who are at risk of not completing their education.[706] 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.[707] 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.[708] 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.[709]

Students must be provided with four 60-minute classes per week[710] or 15 hours per week if they are not regularly employed[711] and an opportunity to complete academic courses for high school graduation.[712] 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.[713] 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.[714]

Independent Study

Independent study allows the youth to work on his or her own and periodically check in with a teacher.[715] Students may be placed in "independent study" in lieu of attending a school program only on a voluntary basis.[716] Before independent study may be given, the student must be offered the opportunity to participate in alternative classroom instruction[717] and an agreement to participate in independent study is valid for the

700 Ed. Code, § 56366.

701 *Ibid*.

702 *Ibid*.

703 Ed. Code, § 56366.9.

704 Ed. Code, § 56155.7.

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

706 Ed. Code, § 48400.

707 Ed. Code, § 48432.5.

708 *Ibid.*

709 *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.

710 Ed. Code, § 48400.

711 Ed. Code, § 48402.

712 Ed. Code, § 48430.

713 *Ibid.*

714 Ed. Code, § 48432.5.

715 Ed. Code, §§ 51745, 51747.

716 Ed. Code, § 51747, subd. (g)(8).

717 *Ibid.*

entire school year on a year round calendar.[718] Youth with disabilities ("children with exceptional needs" in California) may not be in independent study unless their IEP provides for such participation.[719] 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."[720]

Education Code section 51747 requires a school district offering an independent study program to adopt written policies covering how the program will offer students grade level instruction that is substantially equivalent to in-person classes and implement those policies in accordance with rules and regulations adopted by the district's superintendent.[721] The district must maintain a current written agreement with specified content for each independent study pupil on file. These agreements must include the 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 among other things. [722] Counsel should review the statute to see the complete list of required provisions that should be included in the independent study agreement.

§ 11.4 ADDITIONAL RESOURCES

Suspension/Expulsion

- Legal Services for Children, *Defending Students in Expulsion Proceedings,* Talia Kraemer & Zabrina Aleguire (12/21/2015), available at https://www.lsc-sf.org/wp-content/uploads/2016/02/LSC-Expulsion-Defense-Manual.pdf.
- The ACLU of Northern California, Tools for Achieving Fair Discipline - A Guide for Parents, Youth, Community Members and Advocates who want Equality and Fairness in School Discipline at https://www.aclunc.org/our-work/know-your-rights/tools-achieving-fair-discipline.
- Disability Rights California has several publications on suspension or expulsion of youth with disabilities available online: http://www.disabilityrightsca.org. One particularly useful manual is Special Education Rights and Responsibilities, Chapter 8, "Information on Discipline of Students with Disabilities," available at: https://serr.disabilityrightsca.org/serr-manual/chapter-8-information-on-discipline-of-students-with-disabilities/.

Zero Tolerance/School-to-Prison Pipeline

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. Here is a sampling of materials available online as of August, 2022:

- The Advancement Project, *Public Comments on Discriminatory School Discipline* (2021), available at https://advancementproject.org/resources/public-comment-on-discriminatory-school-discipline/,
- The Vera Institute, *A Generation Later: What We've Learned about Zero Tolerance in School*, available at https://www.vera.org/downloads/publications/zero-tolerance-in-schools-policy-brief.pdf.
- Public Counsel, *Fix School Discipline – A Toolkit for Community*, available at: http://www.fixschooldiscipline.org/wp-content/uploads/2017/04/comm_toolkit_final.pdf
- The ACLU of Pennsylvania hosts https://www.endzerotolerance.org/, which provides multiple materials directed at addressing the school-to-prison pipeline.
- The American Bar Association Juvenile Justice Section adopted a policy on Zero Tolerance in February 2001, which is available at https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/school_disciplinezerotolerancepolicies/. Several

718 Ed. Code, § 51747, subd. (e).

719 Ed. Code, § 51745, subd. (c).

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

721 Ed. Code, § 51747, subds. (a)–(f); Cal. Code Regs. tit. 5, § 11700 (e)–(l).

722 Ed. Code, § 51747, subd. (g).

resources related to the ABA's policy stance can be accessed at the child law section of its website (https://www.americanbar.org/groups/public_interest/child_law/).

Independent Study

The California Department of Education web site has a helpful page on independent study available at https://www.cde.ca.gov/sp/eo/is/.

CHAPTER 12
COLLEGE APPLICATIONS AND FINANCIAL AID

§ 12.1 COLLEGE AND UNIVERSITY ADMISSIONS

Beginning in the fall term of the 2021-2022 academic year, postsecondary educational institutions in California, with some specific exceptions, can no longer ask prospective students about their criminal history on an application or during the admissions process.[723] The legislation mandating this change, Senate Bill 118, exempts applications for professional degrees or law enforcement basic training courses and programs.[724] Generally, California's publicly funded colleges and universities did not collect this information.[725] However, many of the private institutions in this state utilized the "Common Application" which, until recently, asked applicants about their criminal history.[726] As of August 1, 2019, questions collecting an applicant's criminal history were removed from the "common" portion of the Common Application as well as the "School Report" portion.[727] The Common Application also removed its student disciplinary history question from both portions of the application starting in 2021; however, individual schools can still add this question back into its application process.[728]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.[729] 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.[730]

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. It 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.

§ 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, many nursing programs in California schools require applicants to disclose prior misdemeanor and felony *convictions* and obtain Live Scan[731] fingerprints to receive clearance for clinical programs.[732] Similarly, applicants to certain social work

723 Ed. Code, § 66024.5.

724 Sen. Bill No. 118 (2019-2020 Reg. Sess.) § 4

725 Joy Resmovits, *The federal government wants colleges to limit questions about applicants' criminal records*, Los Angeles Times, May 9, 2016, available at https://www.latimes.com/local/education/la-me-adv-criminal-question-admissions-20160506-snap-story.html

726 Jen Davis, Change to Criminal History Question for 2019-20 Application Year, Common App Blog, Aug. 19, 2018, available at https://www.commonapp.org/blog/change-criminal-history-question-2019-2020-application-year

727 *Ibid.*

728 Lindsay McKensie, *Common App Ditches High School Discipline Question, Inside Higher Ed*, Oct. 5, 2020, available at https://www.insidehighered.com/admissions/article/2020/10/05/common-app-stop-asking-students-about-their-high-school-disciplinary

729 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.

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

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

732 See, for example, California State University, Long Beach, School of Nursing, Nursing – Basic, B.S.N. indicating that "Criminal background

programs must provide Live Scan fingerprints and may not be placed in required field internships if they are not able to pass a criminal background check[733] 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.[734] The application does not limit federal financial aid for youth with juvenile court arrests or adjudications. It also no longer prohibits the receipt of Title IV aid by students with drug-related convictions.[735] Nonetheless, the 2022-2023 FAFSA still asks applicants to state whether they have "been convicted for the possession or sale of illegal drugs for an offense that occurred while [the applicant was] receiving federal financial aid (such as grants, work-study, or loans?"[736]

Students who are incarcerated have limited eligibility for federal student aid.[737] Generally, federal aid is not available while the student is incarcerated with the exception of Federal Pell Grants. [738] These may be available for otherwise eligible students confined in a local, municipal or county correctional facility or committed to a juvenile facility. [739] Students living in a halfway house or on probation may receive federal student aid.[740]

PRACTICE TIP: All information provided on the FAFSA is supplied to schools that the student designates on the FAFSA form.[741] 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), there is no mention of criminal or juvenile adjudications in the list of qualifying factors for Cal Grants.[742] However, Cal Grants are not available for those who are currently incarcerated.[743]

check, drug screen, health insurance, immunizations, medical clearance, and malpractice insurance are required for clinical coursework."
http://catalog.csulb.edu/preview_program.php?catoid=6&poid=3053

733 See, for example, California State University East Bay, Master of Social Work Program, Student Handbook and Field Manual, https://docs.google.com/document/d/1EqUtojOlRRavbLBkXnIA28SbrQfYhmjxToz1ly5n1Jk/edit#heading=h.aap3g8ti9pch

734 U.S. Department of Education, Student Aid on the Web, https://studentaid.gov/understand-aid/types.

735 In December, 2020, the FAFSA Simplification Act was enacted into law as part of the Consolidated Appropriations Act of 2021. This Act amended Section 484 of the Higher Education Act of 1965 (HEA), making three important changes to student eligibility criteria, including the elimination of the prohibition on receiving Title IV aid for students with drug-related convictions.

736 Free Application for Federal Student Aid (FAFSA) July 1, 2022 – June 30, 2023, available at https://studentaid.gov/sites/default/files/2022-23-fafsa.pdf

737 "Students with criminal convictions have limited eligibility for federal student aid," U.S. Department of Education, available at https://studentaid.gov/understand-aid/eligibility/requirements/criminal-convictions.

738 *Ibid.* and "Federal Student Aid for Students in Adult Correctional and Juvenile Justice Facilities," U.S. Department of Education, available at https://studentaid.gov/sites/default/files/aid-info-for-incarcerated-individuals.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 . . . "

739 "Students with criminal convictions have limited eligibility for federal student aid," *supra,* and "Federal Student Aid for Students in Adult Correctional and Juvenile Justice Facilities," *supra.*

740 *Ibid.*

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

742 See *How do I qualify for a Cal Grant?,* California Student Aid Commission, available at https://www.csac.ca.gov/post/how-do-i-qualify-cal-grant

743 *Ibid.*

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:[744]

- Arrests or detentions which did not result in conviction;
- 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.[745]

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:[746] arrest and detention information may be released concerning an arrest or detention of a peace officer, applicant for a position as a peace officer,[747] a nonsworn employee of a criminal justice agency, or an applicant for a nonsworn position within a criminal justice agency, 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.[748]
- Financial institutions:[749] "Any person who has been convicted of any criminal 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."[750]
- Health care facilities:[751] 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.[752]

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."[753]

Employers who can access criminal history information include:

- Public utility that operates a nuclear energy facility[754]
- Cable corporations[755]
- Positions involving supervision or disciplinary power over minors or any person under his or her care[756]

744 Lab. Code, § 432.7, subd. (a); Cal. Code Regs. tit. 2, § 11017.1(b)(2).

745 *Ibid.*

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

747 Peace officer is defined in Penal Code section 830.

748 Pen. Code, § 13203, subd. (a).

749 12 U.S.C. § 1829(a)(1)(A).

750 *Ibid.*

751 Lab. Code, § 432.7, subd. (f).

752 *Ibid.*

753 Pen. Code, § 11105, subd. (a)(2)(A).

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

755 Pen. Code, § 11105, subd. (c)(10)(A).

756 Pen. Code, § 11105.3, subd. (a).

- Security organizations[757]
- Financial institutions[758]
- Child day care facilities[759]
- Private schools[760]
- 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.[761]

In general, the criminal history that can be accessed is limited to convictions and arrests for offenses for which the person is awaiting trial.[762] Additionally, there are some limitations on disclosing convictions that are over 10 years old, with some exceptions.[763] According to the California Department of Justice (DOJ), the state summary criminal information that is provided to authorized employers does not include arrest or dispositional information which occurred when the youth was under 18 years of age, unless the youth was tried as an adult.[764]

There are some limited circumstances under which the Department of justice can send an arrest history to a employer. However, when that is permitted it is explicitly noted in the relevant statutes[765] and usually the DOJ is first charged with making a genuine effort to determine the disposition of the arrest.[766] And depending on who is seeking the arrest record, the DOJ may release the arrest record whether or not a disposition is available.[767]

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.[768] Furnishing a record to someone not authorized to receive it is a misdemeanor;[769] buying, receiving, or possessing a record that one is not authorized to have is a misdemeanor.[770]

PRACTICE TIP: All sealable juvenile records should be sealed as soon as the law permits.[771] Sealing should prevent the juvenile court history from being included in the criminal history information that is sent to potential employers.[772] 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 if it does happen. 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.

757 Pen. Code, § 11105.4, subd. (a).

758 12 U.S.C. § 1829(a)(1)(A); Fin. Code, § 550.

759 Health & Saf. Code, § 1596.871.

760 Ed. Code, § 44237.

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

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

763 Pen. Code, § 11105, subd. (n)(2)(A).

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

765 *E.g.,* Pen. Code, § 11105, subds. (k), (l) and (m).

766 *Ibid.;* Pen. Code, § 13203, subds. (c)(1)–(c)(3).

767 See Pen. Code, § 11105, subd. (k); cf. Pen. Code, § 11105, subd. (l).

768 Pen. Code, § 11140, subd. (b).

769 Pen. Code §11141

770 Pen. Code, §§ 11142 and 11143.

771 See Welf. & Inst. Code, §§ 781, 781.5, 786 and 786.5.

772 But see Penal Code section 13203 that on its face appears to create a possible exception for Peace Officer employment. However, this provision conflicts with Welfare and Institutions Code section 786.5 which requires the sealing of juvenile arrest records by law enforcement agencies, where the arrests led to a program of diversion or supervision.

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.

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 information regarding arrests to be sent – these are very specific and not numerous. 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.[773] As part of their licensing duty, the professions may obtain criminal history information.[774] 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.

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.[775]

Licensing boards may also deny a license to an applicant if the applicant has been convicted of a crime within

773 Bus. & Prof. Code, § 144.

774 Business and Professions Code section 144, subdivision. (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) Dental Board of California.

(6) California State Board of Pharmacy.

(7) Board of Registered Nursing.

(8) Veterinary Medical Board.

(9) Board of Vocational Nursing and Psychiatric Technicians of the State of California.

(10) Respiratory Care Board of California.

(11) Physical Therapy Board of California.

(12) Physician Assistant Board.

(13) Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board.

(14) Medical Board of California.

(15) California State Board of Optometry.

(16) Acupuncture Board.

(17) Cemetery and Funeral Bureau.

(18) Bureau of Security and Investigative Services.

(19) Division of Investigation.

(20) Board of Psychology.

(21) California Board of Occupational Therapy.

(22) Structural Pest Control Board.

(23) Contractors State License Board.

(24) Naturopathic Medicine Committee.

(25) Professional Fiduciaries Bureau.

(26) Board for Professional Engineers, Land Surveyors, and Geologists.

(27) Podiatric Medical Board of California.

(28) Osteopathic Medical Board of California.

(29) California Architects Board, beginning January 1, 2021.

(30) Landscape Architects Technical Committee, beginning January 1, 2022.

(31) Bureau of Household Goods and Services with respect to household movers

775 Bus. & Prof. Code, § 475.

the preceding seven years from the date of application that is substantially related to the qualifications, functions, or duties of the business or profession for which the application is made,[776] The seven-year limitation, however, does not apply if the applicant's conviction was for a serious felony pursuant to Penal Code section 1192.7, a crime that requires registration pursuant to Penal Code section 290, or a financial crime classified as a felony that is directly and adversely related to fiduciary qualifications for which the application is made.[777]

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."[778] 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."[779]

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.[780] A licensee cannot be required to reveal a record of arrest that did not result in a conviction or no contest plea.[781] 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.[782]

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.[783]

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776 Bus. & Prof. Code, § 480 subd. (a)(1)

777 Bus. & Prof. Code, § 480 subds. (a)(1)(A) & (a)(1)(B); Section 480 also makes allowances for expungements: an applicant shall not be denied a license for any conviction that has been dismissed pursuant to Penal Code sections 1203.4, 1203.4a, 1203.41, 1203.42, or if the applicant obtained a Certificate of Rehabilitation (Pen. Code §4852.01), a federal or state pardon, or a showing of rehabilitation. (Bus. & Prof. Code, § 480, subds. (a) & (b).)

778 *Schware v. Board of Bar Exam. of State of N.M.* (1957) 353 U.S. 232, 238-239.

779 *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.

780 Bus. & Prof. Code, § 481.

781 Bus. § Prof. Code, § 461.

782 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."

783 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, subd. (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.) For more information on the current requirements for this application, see the State Bar's website at: https://www.calbar.ca.gov/Admissions/Moral-Character.

For more information on how the State Bar determines moral character related to prior involvement in the criminal justice system see its Moral Character Determination Guidelines, available at: https://www.calbar.ca.gov/Portals/0/documents/admissions/moralCharacter/moral-character-determination-guidelines.pdf In general terms, the State Bar considers such things as: "The length of time since a conviction, the severity of the criminal conduct, and the number and frequency of convictions are given significant consideration. The following are additional factors that may mitigate or aggravate an act of misconduct, or demonstrate rehabilitation: role of applicant; age of applicant at time of offense; social factors of applicant; time since offense; intent; remorse, insight, accountability; completion of restorative justice; honorable discharge from military; successful completion of parole, probation, community supervision; completion of education, vocation, rehabilitation programs while incarcerated; community service beyond what is required by court; payment of fines, restitution, other financial obligations; conviction for conduct that has been legalized; rehabilitation related to factors that contributed to the offense; record sealed, expunged, dismissed; pattern of misconduct; attempt to conceal or mislead; type of offense (for example, offenses involving a breach of trust, great bodily harm, cruelty, or abuse of authority may be particularly relevant to moral character); number and type of victims. (*Ibid.*)

§ 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. [784]

Thus, "misdemeanors, juvenile adjudications, or convictions in foreign jurisdictions or tribal courts" and not bars to federal employment.[785] Whenever there is an exception to this general rule, it is explicitly noted in the relevant federal statutes.[786]

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 offenses[787] and all sealable arrests[788] should be sealed as soon as the law permits. Counsel should also advise youth that they can review what DOJ would send out to authorized employers, and licensing boards, by obtaining copies of their personal DOJ criminal history summary.[789]

784 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.

785 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.) https://www.americanbar.org/content/dam/aba/publications/criminaljustice/internalexile.pdf

786 But see 42 U.S.C. § 20911(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].

787 Welf. & Inst. Code, §§ 781, 786, 786.5.

788 Welf. & Inst. Code, §§ 781.5, 786.5.

789 Pen. Code, §§ 11120-11127. See https://oag.ca.gov/fingerprints/record-review.

CHAPTER 14
MILITARY SERVICE[790]

§ 14.1 ACCESS TO JUVENILE RECORDS

The existence of juvenile court records 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)[791] are subject to scrutiny and may require a waiver for enlistment.[792] The recruiter is key to successful induction to military service in the US Armed Forces. Service recruiters know the current level of personnel sought, and the desirable skills each branch needs. Military needs permit much more lenient rules in times of shortage; conversely, full ranks can make military entry more difficult depending on client's background.

Routine military background checks generally include contacting the Department of Justice and the Department of Motor Vehicles in the state where the applicant has most recently resided. Most military fields require some level of security clearance. If the applicant's field involves a high security clearance, the review will be 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 sealed documents. Security clearances may be denied if investigators find records that were not disclosed on security clearance applications forms. Nondisclosure may also result in terminating military service consideration altogether. Most entry level military service reviews and security clearance investigations will find traffic tickets, arrest records and any prior petitions or convictions, including those which may have been sealed by the court.

A conviction may not, in itself, be disqualifying, but most misdemeanor and all felony convictions 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. Accordingly, clients should fully disclose (and explain) any arrests and/or convictions, including juvenile adjudications.

Additionally, each branch has its own (changing) rules regarding what may (not) be waived to permit entry. 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 "ever trafficked, sold, or traded in illegal drugs."[793] Army recruitment standards state that waivers may not be obtained for applicants who are under the influence of alcohol or drugs at the time of application, have a history of abusing alcohol or drug dependence, have criminal or juvenile court charges pending or under civil court restraint, have more than one felony level conviction, or have received a conviction for a sex offense.[794]

> **PRACTICE TIP:** Given the ease of access to juvenile records, even those that have been sealed by the court, counsel should consider whether a Welfare and Institutions Code section 782 dismissal in the interests of justice is an option for a youth seeking to join a branch of the military. Section 782 can be a valuable tool for eliminating offenses which would otherwise disqualify one from joining the military. For further discussion on section 782 dismissals see the discussion on record sealing in § 3.6 of Chapter 3.

§ 14.2 RECRUITING ISSUES

Military recruiting practices depend on the current needs of the armed forces. Recruiting eligibility rules

790 Much of the information and advice included in this section was provided by Judith Litzenberger, a military law attorney and retired Naval Officer.

791 For example, petitions that result in resolution via Welfare and Institution Code sections 654, 725, 782 or 790 still may result in consequences for the youth even though: 1) the youth was never made a Section 602 ward; and, 2) even if successful completion results in dismissal and sealing. Some military branches may consider juvenile matters the same as adult matters when determining eligibility.

792 Each Military Service has its own criteria for enlistment. See generally https://www.goarmy.com/how-to-join/requirements.html; and, Army Regulation 601-210, Chapter 4, Enlistment Waivers (*Waiverable and Nonwaiverable Criteria and Administrative Instructions*) (August 2016) (available at http://milreg.com/File.aspx?id=1340. 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 Table 4-2 Nontraffic Offenses.)

793 Marines: Military Personnel Procurement Manual, Vol. 2, No. MCO-P110, 72C 3-95-3-105 (2004), Chapter 3, Question 4.

794 Army Regulation 601-210, *supra*, at pp. 43-45.

change with the fluctuating needs of the military. Military recruiting goals change with political, economic, or operational needs. There are no permanent rules for what convictions are disqualifying and what might end in granted waivers.[795] Those decisions vary widely and depend on timing of enlistment. When recruiting goals are being met without waivers, waivers are more likely to be denied. Context and timing are everything: Later, after six months, or in another recruiting district, or branch of service changes may make goals harder to meet. 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.[796] That said, felony convictions will tend to disqualify clients from joining the military except in times of very dire recruiting needs.[797]

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.[798] Those with sex crimes convictions which require registration,[799] domestic violence or other felony convictions which deprive one of gun possession are almost never permitted to enlist with a waiver.[800]

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 (or particular service branch) criminal history waivers" into a search engine. Counsel may also wish to actually call the local recruiting station or submit a Freedom of Information Act request to obtain current information.[801] Best to call the recruiter for the Armed Forces service branch of the youth's choice at the desired location for enlistment for the most current rules and regulations operating in your area.

Recruiters rule in enlistment; they are incentivized to enlist, and are rewarded for meeting goals. Recruiters can find ways for individuals to meet requirements if possible. Remember, irrespective of the rules, an individual recruiter may influence the decision to accept the youth into the military. Acceptance may be affected by the needs of the recruiter at the time of the application. It's helpful 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.[802]

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 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

795 See, e.g., www.airforce.com; www.navy.com; www.uscg.mil; www.marines.com; www.army.mil; and, http://www.goarmy.com/about/service-options/enlisted-soldiers-and-officers/enlisted-soldier.html

796 Army Regulation 601-210, *supra*, at p. 45.

797 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.

798 Army Regulation 601-210, *supra*, p. 44.

799 See Army Regulation 601-210, *supra*, at pp. 43-45.

800 See e.g. "The Lautenberg Amendment and How It Affects the Servicemembers," CPT Jake Yu, Legal Assistance Attorney, available at https://usacac.army.mil/sites/default/files/documents/sja/lautenberg.pdf; "Weapons Hold: A legal practitioner's guide to the Lautenberg Amendment" available at https://militarylawcenter.com/weapons-hold/; see also Chapter 14, *Military Service*.

801 At the time this handbook is being produced (August 2022), the following websites provide information on eligibility, waivers and disqualifications in the respective armed services: www.airforce.com; www.navy.com; www.uscg.mil; www.marines.com; www.army.mil; and, http://www.goarmy.com/about/service-options/enlisted-soldiers-and-officers/enlisted-soldier.html

802 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 TheBalanceCareers.com, including "How Criminal History Affects U.S. Military Enlistment," https://www.thebalancecareers.com/us-military-enlistment-standards-3354006 "Military Criminal History Moral Waivers," https://www.thebalancecareers.com/military-criminal-history-moral-waivers-3354042; and "Army Criminal History Waivers," https://www.thebalancecareers.com/army-criminal-history-waivers-3344759.

the admission was a *West/Alford* plea,[803] counsel can 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 will generally help your client 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.

§ 14.3 ELIGIBILITY TO VOLUNTARILY SERVE IN US ARMED FORCES

Persons voluntarily enlisting in the armed forces must:

- Be at least 17 years with parent's consent;
- Pass a physical exam;
- Pass an aptitude test with a passing score (depending on service);
- Have a high school diploma or GED to be enlisted;
- Be fluent in English; and,
- Swear an oath to defend the US Constitution.

Immigrants must also:

- Live in the US; and,
- Possess a permanent resident card.

803 An "*Alford* plea," stemming from *North Carolina v. Alford* (1970) 400 U.S. 25, 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 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.[804] 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 agreement[805] 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.[806] In California cities that have not adopted 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.[807]

§ 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.[808] 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.[809]

- 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 policies[810] for 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

804 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.)

805 Code Civ. Proc., § 1161, subd. (3). Note that until this provision sunsets on February 1, 2025, the ability to commence an unlawful detainer action under this provision is "subject to the COVID-19 Tenant Relief Act of 2020 (Chapter 5 (commencing with Section 1179.01)) if the neglect or failure to perform other conditions or covenants of the lease or agreement is based upon the COVID-19 rental debt." (See Code Civ. Proc., § 1161, subd. (3).)

806 Code Civ. Proc., § 1161, subd. (4); Civ. Code, § 3485.

807 Civ. Code, §§ 1946 and 1946.1.

808 42 U.S.C. § 1437 et seq.

809 24 C.F.R. § 5.850.

810 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].

» 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.[811]

Mandatory Exclusions (for Federal Housing)

Some housing exclusions for federal housing programs are mandatory, including:

» Persons subject to a lifetime sex offense registration requirement under a state sex offense registration program.[812]

» Persons convicted of the manufacture or production of methamphetamine on the premises of federally assisted housing.[813]

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.[814]

PRACTICE TIP: Sex offense registry information is not confidential and is available to the public.[815] However, as of January 1, 2021, youth required to register pursuant to Penal Code section 290.008 are no longer subject to a lifetime registration requirement.[816] Further, 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 707(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.[817]

» Violent criminal activity[818];

» Other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.[819]

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;[820]

» 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.[821] This doctrine is known as either the "fugitive

811 See, e.g., 24 C.F.R. § 960.203(c)(1)–(3) for public housing tenants.

812 42 U.S.C. § 13663. However, under the new registration laws, juvenile adjudications no longer automatically result in lifetime registration requirements. (See Pen. Code, §§ 290, subd. (f), 290.008.)

813 42 U.S.C. § 1437n(f).

814 42 U.S.C. § 1437d(q)(2).

815 PHA's can do background checks against sex offense registries and state/local law enforcement is authorized to disclose to PHA pursuant to 42 U.S.C § 13663. Juvenile sex offense information in California is not confidential under state law.

816 See Welf. & Inst. Code, § 290.5.

817 42 U.S.C. § 13661; See also 24 C.F.R. §§ 5.854 and 982.553.

818 42 U.S.C. § 13661; See also 24 C.F.R. §§ 5.855 and 982.553(a)(2)(ii)(2)

819 42 U.S.C. § 13661; See also 24 C.F.R. §§ 5.855, 5.859 and 982.553(a)(2)(ii)(3).

820 24 C.F.R. §§ 5.858, 5.859

821 24 CFR § 5.859

felon doctrine" or "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 Penal Code section 290 registrants (assuming this still applies), does not permit criminal history information of juveniles to be provided to Public Housing Authorities.[822] 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 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.[823]

One law review author noted the different ways in which juvenile records have been accessed to deny eligibility or to enforce eviction.[824] Methods included blanket orders granting housing authorities access to juvenile records for eviction proceedings[825] or by the housing authority obtaining confidential juvenile records and attaching them to eviction proceedings. [826]

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.[827]

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. 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, if at all now that the new Penal

822 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."

823 42 U.S.C. § 1437d(q)(1)(C).

824 *Henning, Eroding Confidentiality in Delinquency Proceedings: Should School and Public Housing Authorities be Notified?* (2004) 79 NYU L. Rev. 520, 566-567.

825 *Id.* at p. 567 (*Hous. Auth. v. Valverde* (Central Valley Mun. Ct. Apr. 5, 1996) (No. C96300004-9), unpublished case in Fresno, California).

826 *Id.* at p. 566, citing news article on ACLU lawsuit against San Francisco Housing Authority.

827 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.

Code section 290 registration laws, juvenile adjudications no longer automatically result in lifetime registration[828] 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 rehabilitation or family reunification, and protect the youth from adverse consequences, stigma, and harm).[829]

828 See Pen. Code § 290, subd. (f); see also Chapter 5, *Registration*, in this publication.

829 There are no reported housing authority cases on Section 827 access, but see, e.g., *Cimarusti v. Superior Court, supra,* 79 Cal.App.4th at p. 806; *R.S. v. Superior Court, supra,* 172 Cal.App.4th at p. 1054; Cal. Rules of Court, rule 5.552(b)(1)(E).

CHAPTER 16
PUBLIC BENEFITS

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.[830] 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.

§ 16.1 SOCIAL SECURITY ADMINISTRATION PROGRAMS[831]

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 II[832]

Old Age, Survivor, and Disability Insurance (OASDI), authorized by Title II of the Social Security Act, provides a monthly cash benefit[833] to individuals who are insured[834] and their qualifying dependents. The insured worker is eligible for benefits if he or she reaches retirement age[835] 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.[836]

Supplemental Security Income (SSI) – Title XVI[837]

Supplemental Security Income (SSI), authorized by Title XVI of the Social Security Act, provides a monthly cash benefit[838] and Medi-Cal eligibility[839] 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.[840]

830 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."

831 See the SSA website for consumer-friendly materials on these programs (http://www.ssa.gov).

832 42 U.S.C. § 402 et seq.; 20 C.F.R. § 404.1 et seq.

833 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.)

834 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.)

835 Retirement age is 62 (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).)

836 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 404.374.)

837 42 U.S.C. § 1381 et seq.; 20 C.F.R. § 416.101 et seq.

838 Calculators to help individuals estimate their current benefit levels are available on the Social Security Administration website. See Social Security Administration, Benefit Calculators, https://www.ssa.gov/benefits/calculators/.

839 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).

840 20 C.F.R. § 416.202.

§ 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.[841] Given that California juvenile adjudications are not felony convictions,[842] 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,[843] and does not apply to prisoners participating in approved vocational rehabilitation programs.[844]

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.[845] 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 publicly operated community residence that serves no more than 16 residents is not an inmate of a public institution and is eligible for SSI benefits.[846]

When an individual is ineligible to receive SSI because he or she is an inmate of a public institution SSI benefits can be suspended,[847] but if the individual is in the institution for more than one year he or she will have to reapply for benefits.[848] 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 eligibility[849] but will not be eligible to receive benefits until the first day of the month after he or she is released.[850]

§ 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.[851] 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.[852] To determine this, SSA will look at whether the claimant would still be considered disabled if the claimant were to stop using drugs or alcohol. 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,[853] 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

841 42 U.S.C. § 402(x); 20 C.F.R. § 404.468.

842 Welf. & Inst. Code, § 203; see POMS GN 02607.200 Special Legal Considerations For Prisoner Suspensions https://secure.ssa.gov/poms.nsf/lnx/0202607200.

843 20 C.F.R. § 404.468(a).

844 20 C.F.R. § 404.468(d).

845 42 U.S.C. § 1382(e)(1); 20 C.F.R. § 416.211. See 20 C.F.R. § 416.201 for definition of "inmate of a public institution."

846 42 U.S.C. § 1382(e)(1)(C); 20 C.F.R. § 416.211(c). For other exceptions to this general rule, see 42 U.S.C. § 1382(e)(1)(D); 20 C.F.R. §§ 416.211(b), (d).

847 20 C.F.R. §§ 416.1320 and 416.1325.

848 20 C.F.R. § 416.1335.

849 42 U.S.C. § 1383(m); POMS SI 00520.900 Prerelease Procedure – Institutionalization. https://secure.ssa.gov/apps10/poms.nsf/lnx/0500520900.

850 20 C.F.R. § 416.211(a).

851 20 C.F.R. § 404.1506.

852 42 U.S.C. §§ 423(d)(2)(C) and 1382c(a)(3)(J).

853 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. (42 U.S.C. §§ 402(x)(1)(A)(iv).)

under federal or state law.[854] Notwithstanding this rule, SSA may pay benefits to certain individuals for good cause based on mitigating circumstances.[855]

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 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).[856]

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.[857] 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.[858] Due to this case, SSA can no longer rely exclusively on outstanding probation and parole warrants as a basis for denying benefits to elderly and disabled individuals.

PRACTICE TIP: For more information about the "Fleeing Felon" Rule in Social Security Administration programs, contact the National Senior Citizens Law Center, http://www.nsclc.org. See also the Fleeing Felon Materials page at the HIV Law and Policy website, https://www.hivlawandpolicy.org/issues/fleeing-felon-materials.

§ 16.5 VETERANS' BENEFITS[859]

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"[860] and "pension."[861] 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.[862] The pension program is need-based and pays monthly benefits to those who served during a war period[863] and are now disabled due to a medical condition or age, or to their surviving family.[864]

The health care programs are available to veterans and their dependents who meet eligibility requirements.[865] VA health care programs[866] primarily cover low-income

854 42 U.S.C. §§ 402(x)(1)(A)(iv)&(v) and 1382(e)(4).

855 See POMS, GN 02613.025 Good Cause Provisions https://secure.ssa.gov/poms.nsf/lnx/0202613025

856 *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. https://www.ssa.gov/martinezsettlement/StipulationSettlement.htm.

857 See, e.g., POMS, GN 02613.010 Title II Fugitive Suspension Provisions, https://secure.ssa.gov/poms.nsf/lnx/0202613010.

858 Clark v. Astrue (2nd. Cir. 2010) 602 F.3d 140, 152.

859 See the VA website for information on the various Veterans Programs: http://www.va.gov/.

860 38 U.S.C. § 1110 et seq.

861 38 U.S.C. § 1521.

862 38 C.F.R. §§ 4.1 through 4.150.

863 "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. 2, 1990- present. See https://www.va.gov/pension/eligibility/.

864 38 U.S.C. §§ 1521(a) through (c).

865 See 38 U.S.C. § 1700 et seq.

866 See Department of Veterans Affairs Health Care Overview Online Edition, https://www.va.gov/healthbenefits/resources/publications/hbco/index.asp

veterans or veterans with certain service-related injuries. VA prescription drug coverage is available only to veterans, not their dependents.

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 Incarceration[867]

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.[868] During this period, the Secretary may pay the pension to the veteran's spouse or children.[869] When an individual receiving disability compensation is incarcerated, payments are limited depending on whether the disability was rated more or less than 20 percent disabling.[870] If more than 20 percent disabling, payments cannot exceed those listed for 10 percent disability.[871] If less than 20 percent disabling, payments cannot exceed one half of the amount listed for 10 percent disability. The limitations do not apply to veterans residing in a half-way house.[872]

Fugitive Felon[873]

The VA is prohibited from providing health care and services to veterans and beneficiaries identified as fugitive felons.[874] 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.[875]

PRACTICE TIP: Note that the VA rule is different from the 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 are other reasons to cancel the warrant, he or she must contact the Originating Agency that issued the warrant.[876]

§ 16.6 MEDICAID[877] AND MEDI-CAL[878]

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)[879] 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.

867 See, Department of Veterans Affairs, Justice Involved Veterans Fact Sheet, available at https://www.benefits.va.gov/BENEFITS/factsheets/misc/JusticeInvolved.pdf.

868 38 U.S.C. § 1505(a), 38 C.F.R. § 3.665.

869 38 U.S.C. § 1505(b).

870 38 U.S.C. § 5313(a)(1).

871 See table of payable rates at 38 U.S.C. § 1114.

872 38 U.S.C. § 5313(a)(2).

873 See Department of Veterans Affairs Fact Sheet on Fugitive Felon Program, available at https://www.va.gov/healthbenefits/resources/publications/IB10-1344_fugitive_felon_program.pdf.

874 38 U.S.C. § 5313B(a).

875 38 U.S.C. § 5313B(b).

876 See Department of Veterans Affairs Fact Sheet on Fugitive Felon Program, available at https://www.va.gov/healthbenefits/resources/publications/IB10-1344_fugitive_felon_program.pdf

877 42 U.S.C. § 1396 et seq.

878 Welf. & Inst. Code, § 14000 et seq.

879 The amount of FFP varies by state. Federal Medical Assistance Percentages (FMAP) are available on the Centers for Medicare and Medicaid Services (CMS) website. https://aspe.hhs.gov/federal-medical-assistance-percentages-or-federal-financial-participation-state-assistance

Inmate Payment Exclusion

Federal Medicaid law prohibits payment of FFP for services provided to an individual who is an inmate of a public institution.[880] 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,"[881] 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.[882]

Suspension of Coverage vs. Termination of Eligibility

Federal law and policy provide that the inmate payment exclusion affects payment for services *not* Medicaid eligibility.[883] 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.[884]

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.[885] 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.[886]

In-Patient Psychiatric and Hospital Care

Federal law allows Medicaid coverage for in-patient psychiatric services for individuals under 21.[887] 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.[888] Guidance from the federal Centers for Medicare and Medicaid Services (CMS) and its predecessor the Health Care Financing

880 42 U.S.C. § 1396d(31)(A); 42 C.F.R. § 435.1009.

881 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), https://www.courts.ca.gov/documents/BTB25-1I-05.pdf; Bussiere and Burrell, *Improving Access to Medi-Cal for Youth in the Juvenile Justice System, Youth Law Center* (November 2006), https://www.ylc.org/wp-content/uploads/2018/11/ImprovingAccesstoMediCal1.pdf .)

882 See Cal.Code Regs, tit. 22, § 50273; Medi-Cal Eligibility Procedures Manual Article 6. https://www.dhcs.ca.gov/services/medi-cal/eligibility/Documents/Article6-InstitutionalStatus.pdf

883 Centers for Medicare and Medicaid Services (CMS), Medicaid Directors Letter re: Ending Chronic Homelessness (May 25, 2004.), https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/2004.smdl.suspension%2520for%2520inmates%2520of%2520a%2520public%2520institution.pdf.

884 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 https://www.dhcs.ca.gov/services/medi-cal/eligibility/letters/Documents/c07-34.pdf , DHCS, ACWDL 10-06, *Suspension of Medi-Cal Benefits for Incarcerated Juveniles* (March 23, 2010), *available at* https://www.dhcs.ca.gov/services/medi-cal/eligibility/letters/Documents/c10-06.pdf

885 Welf. & Inst. Code, § 14029.5; DHCS, ACWDL 07-34 (January 2, 2008).

886 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), https://www.dhcs.ca.gov/services/medi-cal/eligibility/letters/Documents/c09-16.pdf.

887 42 U.S.C. § 1396d(a)(16) and (h).

888 *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). Welfare and Institutions Code sections 14053.8 and 14053.9 require the State Department of Health Care Services to develop processes to allow counties and the Division of Juvenile Facilities within the Department of Corrections and Rehabilitation to receive any available federal financial participation for acute inpatient hospital services and inpatient psychiatric services provided to juvenile inmates, as defined and as applicable, who are admitted as inpatients in a medical institution.

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.[889]

Transitional Medi-Cal for Former Foster Care Youth

Federal law allows states to provide Medicaid up to age 26,[890] regardless of income and resources, for youth who emancipate from foster care,[891] and California has picked up this option.[892] In order to qualify for this extended coverage, the youth must be eligible for Extended Foster Care.

§ 16.7 EXTENDED FOSTER CARE (AB 12)

Once foster youth turn 18 years old, California law permits these youth to voluntarily remain in foster care until their 21st birthday.[893] This is true regardless of whether the youth is in foster care as a result of being adjudged a dependent or a ward of the court.[894] Young adults who choose to participate in Extended Foster Care will have access to financial assistance,[895] transitional housing,[896] Medi-Cal (see above), assistance obtaining various forms of identification,[897] and assistance obtaining employment or applying to college.[898]

To be eligible for Extended Foster Care, the youth must have been "in foster care" on his or her 18th birthday.[899] In this context, being "in foster care" means simply being subject to a foster care placement order.[900] Foster care placements may include probation-supervised placements, such as group homes, foster family agencies, foster, and relative placements, but do not include secure correctional facilities, such as juvenile hall, or probation-supervised boot camps.[901] However, foster youth can qualify for Extended Foster Care despite being in custody on their 18th birthday provided the youth are subject to a foster care placement order. For example, youth who are ordered detained pending transportation to a Short-Term Residential Therapeutic Placement will be "in foster care" for purposes of Extended Foster Care eligibility.

PRACTICE TIP: It is important to ensure that the juvenile court issues a foster care placement order for incarcerated youth eligible for foster care before their 18th birthday. The practice of letting older youth run out their time in a juvenile detention facility will deprive youth of access to years of financial assistance, stable housing, Medi-Cal, and other benefits.

§ 16.8 INCOME AND FOOD AID

Temporary Assistance to Needy Families (TANF),[902] California Work Opportunity and Responsibility for Kids (CalWORKS)[903]

The Temporary Assistance to Needy Families (TANF) program provides block grants to states to assist low-income pregnant women and families with children deprived of support from at least one parent. The California Work Opportunity and Responsibility for Kids program (CalWORKs) is California's TANF program. Recipients receive cash assistance[904] and, for

889 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). https://hcpf.colorado.gov/sites/hcpf/files/December%202%2C%202008%20%20CMS%20Letter%20Responding%20to%20the%20Department%27s%20Questions%20Regarding%20the%20Implementation%20of%20SB%2008-006.pdf

890 42 U.S.C. § 1396a(a)(10)(A)(i)(IX)(aa).

891 42 U.S.C. §§ 1396a(a)(10)(A)(ii)(XVII) and 1396d(w).

892 Welf. & Inst. Code, § 14005.28, California Department of Social Services, All County Welfare Directors Letter (ACWDL) 00-41 (August 14, 2000), https://www.dhcs.ca.gov/services/medi-cal/eligibility/letters/Documents/c00-41.pdf.

893 Welf. & Inst. Code, § 10103.5, subd. (a),

894 Welf. & Inst. Code, § 11401, subds. (b)(1) and (b)(2),

895 Welf. & Inst. Code, § 11401, subd. (e),

896 Welf. & Inst. Code, § 11403.2, subd. (a)(1),

897 Welf. & Inst. Code, § 391, subd. (b.

898 Welf. & Inst. Code, § 391, subds. (c)(2).

899 42 U.S.C. § 1396d(w)(1)(B).

900 Welf. & Inst. Code, § 11400, subd. (v)(1),

901 See 42 U.S.C. § 672(c), Welf. & Inst. Code, § 727.1 et seq.

902 42 U. S.C. § 601 et seq.

903 Welf. & Inst. Code, § 11000 et seq.

904 Benefits are based on family size, county of residence, and other available income. CDSS issues 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 https://cdss.ca.gov/lettersnotices/entres/getinfo/acl/2009/09-20.pdf* .

those in the work program, supportive services, such as childcare as related to their assignments.

Supplemental Nutrition Assistance Program (SNAP), Food Stamp Program[905]

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 household members who buy and prepare food together. This may include unrelated individuals. 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,[906] or (2) violating a condition of probation or parole.[907] California has implemented these mandates in state law governing the CalWORKS[908] and Food Stamp programs.[909]

As described above, disqualification because of flight to avoid prosecution or confinement for a felony conviction should not apply to juvenile adjudications.[910] 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.[911] In 2015, the California Department of Social Services issued an All County Letter defining the terms "fleeing felon" and "probation or parole violators" for purposes of determining CalFresh eligibility.[912]

Felony Drug Convictions

Federal law prohibits individuals convicted of a felony that has as an element of possession, use, or distribution of a controlled substance[913] from receiving TANF[914] or SNAP[915] benefits unless the state affirmatively opts out of the ban or limits its duration.[916] This prohibition does not apply to conduct that occurred before August 22, 1996, regardless of date of conviction.[917]

In California, people can no longer be denied CalWORKs or CalFresh benefits on the basis of a prior felony drug conviction so long as the individual is compliant with the terms of his or her probation or parole.[918] However, 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.

§ 16.9 GENERAL ASSISTANCE AND GENERAL RELIEF PROGRAMS

All California counties operate a general assistance or general relief program to provide support for poor residents.[919] 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

905 7 U.S.C. § 2011 et seq.; Welf. & Inst. Code, § 18900 et seq.

906 In New Jersey the rule applies to high misdemeanors.

907 42 USC § 608(a)(9); 7 USC § 2015(k), 7 CFR part 273.11(n). In New Jersey the rule applies to high misdemeanors.

908 Welf. & Inst. Code, § 11486.5.

909 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).

910 See earlier discussion in this Chapter on the Fleeing Felon Doctrine and other limitations related to criminal history.

911 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 as Regional Letter 02-03. http://reentry.mplp.org/reentry/images/e/e8/USDA_flleingfelon_advisory.pdf

912 Cal. Dept. Soc. Servs., All County Letter No. 15-82 (Oct. 14, 2015), *available at* http://www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acl/2015/15-82.pdf.

913 As defined in the Fed. Controlled Substances Act, 21 U.S.C. § 802(6).

914 21 U.S.C. § 862a(a)(1).

915 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.

916 21 U.S.C. § 862a(d)(1).

917 21 U.S.C. § 862a(d)(2).

918 Cal. Dept. Soc. Servs., All County Letter No. 14-100 (Dec. 19, 2014), *available at* https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2014/14-100.pdf.

919 Welf. & Inst. Code, § 17000 et seq.

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,[920] or (2) violating a condition of probation or parole imposed under federal law or the law of any state.[921] 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. Most counties require persons with suspected substance abuse issues to participate in substance abuse programs, with violations of the rules of these programs without good cause (*e.g.*, 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.

§ 16.10 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.[922] 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.[923]

920 In New Jersey the rule applies to high misdemeanors.

921 Welf. & Inst. Code, § 17016.

922 Welf. & Inst. Code, § 11450.10.

923 Welf. & Inst. Code, § 11450.11.

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.[924] Penal Code section 29820 prohibits individuals from owning, possessing, or having custody of a firearm until at least the age of 30, where **BOTH** of the factors below apply.

(1) **FACTOR 1** - The youth was:

- alleged to have committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code;
- convicted of violating Section 11351 or 11351.5 of the Health and Safety Code by possessing for sale, or Section 11352 of the Health and Safety Code by selling, a substance containing 28.5 grams or more of cocaine as specified in paragraph (6) of subdivision (b) of Section 11055 of, or cocaine base as specified in paragraph (1) of subdivision (f) of Section 11054 of, the Health and Safety Code, or 57 grams or more of a substance containing at least 5 grams of cocaine as specified in paragraph (6) of subdivision (b) of Section 11055 of, or cocaine base as specified in paragraph (1) of subdivision (f) of Section 11054 of, the Health and Safety Code;
- convicted of violating Section 11378 of the Health and Safety Code by possessing for sale, or Section 11379 of the Health and Safety Code by selling, a substance containing 28.5 grams or more of methamphetamine or 57 grams or more of a substance containing methamphetamine;
- convicted of violating subdivision (a) of Section 11379.6 of the Health and Safety Code, except those who manufacture phencyclidine, or who is convicted of an act that is punishable under subdivision (b) of Section 11379.6 of the Health and Safety Code, except those who offer to perform an act that aids in the manufacture of phencyclidine;
- [e]xcept as otherwise provided in Section 1203.07, . . . convicted of violating Section 11353 or 11380 of the Health and Safety Code by using, soliciting, inducing, encouraging, or intimidating a minor to manufacture, compound, or sell heroin, cocaine base as specified in paragraph (1) of subdivision (f) of Section 11054 of the Health and Safety Code, cocaine as specified in paragraph (6) of subdivision (b) of Section 11055 of the Health and Safety Code, or methamphetamine;
- convicted of violating Section 11379.6, 11382, or 11383 of the Health and Safety Code with respect to methamphetamine, if the person has one or more prior convictions for a violation of Section 11378, 11379, 11379.6, 11380, 11382, or 11383 of the Health and Safety Code with respect to methamphetamine; or
- alleged to have committed an offense enumerated in Section 29805 or an offense described in Section 25850, subdivision (a) of Section 25400, or subdivision (a) of Section 26100.

(2) **FACTOR 2** – The youth was "subsequently adjudged a ward of the juvenile court within the meaning of Section of the Welfare and Institutions Code because [they] committed one of the offenses listed" in Factor 1 above."[925]

A violation of Penal Code section 29820, subdivision (c) 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.

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.[926] The Armed Career Criminal Act (18 U.S.C. § 924(e)) (ACCA) (which establishes a 15 year mandatory minimum term of imprisonment for

924 Penal Code, § 29820, subd. (b).

925 Penal Code, § 29820, subd. (a).

926 18 U.S.C. § 922(g)(1).

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.[927] In prosecutions under the ACCA, other Circuit Courts of Appeal have upheld the use of juvenile adjudications for qualifying convictions.[928]

PRACTICE TIP: A prohibition on gun possession, particularly where the prohibition springs from the commission of a domestic violence offense, will prevent the youth from being eligible for entry into the military.[929] 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.

Shortly before this publication went to press, the United States Congress passed the "Safer Communities Act," which among other things, establishes an enhanced review process for those under age 21."[930] The process involves an initial three day investigative period whereby the National Instant Criminal Background Check System (NICS) reviews juvenile and mental health records, including checks with state databases and local law enforcement, for buyers under 21 years of age.[931] If that search reveals a possible disqualifying record, NICS will have an extended window of no more than 10 business days total to complete the investigation.[932]

§ 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.

927 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 section 924(e) as including a finding that a person has committed an act of juvenile delinquency involving a violent felony). Under section 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).)

928 *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.

929 See, e.g. "The Lautenberg Amendment and How It Affects the Servicemembers," CPT Jake Yu, Legal Assistance Attorney, available at https://usacac.army.mil/sites/default/files/documents/sja/lautenberg.pdf; "Weapons Hold: A legal practitioner's guide to the Lautenberg Amendment" available at https://militarylawcenter.com/weapons-hold/; see also Chapter 14, Military Service.

930 Bipartisan Safer Communities Act, 117 P.L. 159; 18 USCS § 922(t)(1)(C)

931 18 USCS § 922(t)(1)(C)(ii).

932 18 USCS § 922(t)(1)(C)(ii).

CHAPTER 18
VOTING AND 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*[933] and therefore do not cause a loss of voting rights in California.[934] The only state constitutional voting limitations are for those who are "serving a state or federal prison term for the conviction of a felony." Similarly, the Elections Code limits registration as follows: "A person entitled to register to vote shall be a United States citizen, a resident of California, not imprisoned for the conviction of a felony . . . .."[935] The Elections Code specifically defines "imprisoned" in this context as meaning "currently serving a state or federal prison term."[936] Thus, while juvenile court cases do not limit voting rights, juveniles tried as adults and convicted of a felony are ineligible to vote while they are serving a state or federal prison term for that felony conviction.[937]

§ 18.2 JURY SERVICE

A juvenile sustained petition is not a *conviction*[938] and thus does not disqualify a person from serving as a juror or grand juror in the state of California.[939] However, juveniles tried as adults and convicted of a felony face the same restrictions as adult convicted felons.[940]

933 Welf. & Inst. Code, § 203; Elec. Code, § 2101, subd. (b)(2).

934 Cal. Const. art. II, § 4. Also, section 2101 of the Elections Code limits eligibility to vote for persons "imprisoned for the conviction of a felony." Also, section 1 of the Fifteenth Amendment to the United States Constitution provides that the right to vote may not be abridged because of a previous condition of servitude.

935 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).)

936 Elec. Code, § 2101, subd. (b)(1).

937 Cal. Const., art. II, § 4; Elec. Code, § 2101.

938 Welf. & Inst. Code, § 203.

939 Code Civ. Proc., § 203, subds. (a)(9) [limits jury service by excluding "[p]ersons while they are incarcerated in any prison or jail"]; (a)(10) [limits jury service by excluding "[p]ersons who have been convicted of a felony and are currently on parole, postrelease community supervision, felony probation, or mandated supervision for the conviction of a felony"]; and (a)(11) [limits jury service by excluding "[p]ersons who are currently required to register as a sex offender pursuant to Section 290 of the Penal Code based on a felony conviction"]. Penal Code section 893, subdivision (b)(3)'s restrictions on grand jury service, however, are significantly more stringent than those set forth in the Code of Civil Procedure, as they exclude any person, who has been convicted of malfeasance in office or any felony or other high crime.

940 *Ibid.*

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 regarding 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.[941]

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.[942] 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.[943]

In another case, the youth had attempted to drive a stolen vehicle into the United States.[944] 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 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.[945]

In yet another case, the youth was a United States citizen who resided with his mother in Mexico.[946] 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.[947]

Immigrants Traveling

When individuals seek reentry into the United States via immigration and customs checkpoints, they must be able to demonstrate that they are either admissible and have a valid visa (this includes lawful permanent residents), or are United States citizens to be allowed in to the country. Consequently, noncitizen youth who plan to travel and have had a juvenile delinquency adjudication should consult an immigration attorney about any possible consequences when leaving the country. Noncitizen youth without status should not travel as they will be inadmissible to enter upon their return to the United States.

Foreign County 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 are presented with the information available as of

941 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.)

942 *In re Daniel R.* (2006) 144 Cal.App.4th 1, 7-9.

943 *Ibid.*

944 *In re James C.* (2008) 165 Cal.App.4th 1198, 1201.

945 *Id.* at pp. 1204-1205.

946 *In re Alex O.* (2009) 174 Cal.App.4th 1176, 1178.

947 *Ibid.*

August, 2022:[948] Please, also note that this publication does not cover any vaccination or other public health requirements that may be in effect for travelers to foreign destinations.

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.[949] 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).[950] 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.[951]

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 may still be able to enter Canada."[952] 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.[953]

Depending upon the offense committed, the amount of time that has passed since it was committed, and how the individual has acted since the offense, the Canadian government may allow entry if the individual has:

- convinced an immigration officer that he/she/they meet the legal terms to be deemed rehabilitated, or
- applied for rehabilitation and were approved, or
- were granted a record suspension, or
- have a temporary resident permit.

The qualifying factors for each of these options are explained in some detail on the Canadian government's website.[954] Please note that the first option is risky because the immigration officer an individual encounters at the port of entry determines whether an individual is deemed rehabilitated, including whether, in the officer's discretion "enough time has passed since [the individual] finished serving the sentence for the crime."[955] If the officer does not deem the individual has been rehabilitated, entry into Canada will be denied.[956]

The remaining options most likely will to require a substantial amount of time for the application to be processed, so it's best to plan accordingly. For example, it can take well over a year for the rehabilitation application to be processed and the person to be found rehabilitated and thus able to enter the country. [957]

948 The individual web links change frequently, but country specific information is available through the United States Department of State, Bureau of Consular Affairs, at https://travel.state.gov/content/travel/en/international-travel/before-you-go/travelers-checklist.html.

949 Government of Canada, https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/inadmissibility/overcome-criminal-convictions.html.

950 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, e.g., https://www.tripadvisor.com/ShowTopic-g28923-i349-k6657766-Boarding_Alaska_Cruise_in_Vancouver_DUI_question-Alaska.html; https://www.reddit.com/r/Shambhala/comments/99kn0y/entry_into_canada_with_a_dui/?sort=qa; see also C.W. Nevius, Going to Canada? Check your past / Tourists with minor criminal records turned back at border, 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?")

951 *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.

952 Government of Canada, https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/inadmissibility/overcome-criminal-convictions.html.

953 *Ibid.*

954 Government of Canada, https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/inadmissibility/overcome-criminal-convictions.html.

955 *Ibid.*

956 *Ibid.*

957 *Ibid.*

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.[958] 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.[959] 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.[960]

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.[961] The tourist card may be obtained from immigration officials for a twelve-dollar fee upon arrival in country and is valid for 90-days.[962] There appear to be no restrictions on travel based on criminal convictions or juvenile adjudications. 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.[963]

Mexico

As of August 2022, all United States citizens - including youth - must present a valid passport, book or card, for travel to Mexico.[964] United States citizens entering the country by land and planning to travel beyond the immediate border area (approximately 12 miles / 20 kilometers beyond the border) do not need to obtain visas for tourist or family visits of less than 180 days, but they must obtain an entry permit called a Forma Migratoria Multiple (FMM) from a National Migration Institute (INM) office.[965] The form to apply for the FMM currently does not ask for information regarding criminal history.[966] Foreign nationals are required to apply for a visa, which will require disclosure about the applicant's criminal history. [967] In general terms, for either route of entry, misdemeanors are not going to result in denial. However, those convicted of more serious offenses, such as aggravated robbery, rape, smuggling firearms, drug-related crimes and manslaughter may be denied entry into Mexico. [968]

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 for tourist travel for 21 days or less, and a return ticket to the United States or an onward ticket to another country.[969] If the visitor plans to stay for longer than 21 days, then a visa extension must be obtained from a Philippine Consulate or Embassy prior to the trip, or

958 U.S. Dept. of State, Bur. of Consular Affairs, https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Guatemala.html, or find link through http://travel.state.gov.

959 U.S. Dept. of State, Bur. of Consular Affairs, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/Advice-about-Possible-Loss-of-US-Nationality-Dual-Nationality/Dual-Nationality.html.

960 U.S. Dept. of State, Bur. of Consular Affairs, https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Guatemala.html, and see form at https://igm.gob.gt/wp-content/uploads/2022/01/Visa-de-Turista-o-Viajero-para-paises-categori%CC%81a-C-VTV-IGM-INGLE%CC%81S-01-2022.pdf.

961 U.S. Dept. of State, Bur. of Consular Affairs, https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/ElSalvador.html.

962 *Ibid.*

963 U.S. Dept. of State, Bur. of Consular Affairs, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/Advice-about-Possible-Loss-of-US-Nationality-Dual-Nationality/Dual-Nationality.html.

964 U.S. Dept. of State, Bur. of Consular Affairs, https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Mexico.html.

965 *Ibid.*

966 *Ibid.*

967 *Ibid.*

968 *Ibid.*

969 U.S. Dept. of State, Bur. of Consular Affairs, https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Philippines.html; see also Embassy of the Philippines, Washington D.C., http://www.philippineshonolulu.org/about-the-philippines-dc/#travel.

from the Bureau of Immigrations once in the country.[970] The application for a United States citizen to visit the Philippines requires disclosure of the applicant's criminal history, if any.[971]

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.[972]

§ 19.2 RE-ENTRY INTO THE UNITED STATES

In addition, programs implemented by the U.S. Department of Homeland Security in 2006 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 he or she needs to make sure there are no active warrants before the he or she travels to a foreign country, to avoid being taken into custody by Homeland Security.[973]

§ 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,"[974] as discussed below, California cases have been less charitable.

Probation Conditions

Many courts impose probation conditions that order a youth not to be present in certain neighborhoods or designated geographic areas. While courts do have broad discretion to impose conditions limiting the youth's right to travel, the discretion is not unlimited. Any prohibition on travel must be reasonably related to the delinquent act or to future criminality.[975]

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 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. A number of gang injunctions have been upheld against challenges based on overbreadth, vagueness and violations of First Amendment rights of free speech and association.[976] 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

970 Embassy of the Philippines, Washington D.C., http://www.philippineshonolulu.org/about-the-philippines-dc/#travel.

971 http://www.philippineshonolulu.org/uploads/pdfs/Non_immigrant.pdf.

972 https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages.

973 U.S. Department of Homeland Security, *Privacy Impact Assessment for the Western Hemisphere Travel Initiative*, Aug. 11, 2006, page 2, *available at* https://www.dhs.gov/sites/default/files/publications/privacy_pia_cbp_whti.pdf. According to the United States Customs and Border Protection you can be detained for unpaid traffic tickets if a warrant has issued! See https://cbpcomplaints.cbp.gov/s/article/Article-754?language=en_US.

974 *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.

975 *In re Daniel R., supra*, 144 Cal.App.4th at pp. 7-9.

976 See *People* ex rel. *Reisig v. Acuna et al.* (2010) 182 Cal.App.4th 866; *People* ex rel. *Totten v. Colonia Chiques* (2007) 156 Cal.App.4th 31; *People v. Englebrecht* (2001) 88 Cal.App.4th 1236.

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[977] his or her travel may be severally 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* (1997) 14 Cal.4th 1090, has been widely criticized for both ignoring and misinterpreting the constitutional overbreadth and vagueness doctrines.[978] They suggest that important constitutional questions involving due process and the First Amendment remain.

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.[979] 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" will be apprised of the case.[980] 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.

977 (Pen. Code, § 166, subd. (a)(4)).

978 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).

980 *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].

CHAPTER 20 BECOMING A FOSTER CARE RESOURCE PARENT, ADOPTIVE PARENT, OR PROBATE GUARDIAN

§ 20.1 Effect of Juvenile Records

Past juvenile delinquency records may later interpose a barrier to becoming a resource parent or adoptive parent.[981] Prospective resource parents, adoptive parents, and their household members are subject to criminal background checks that may reveal unsealed juvenile delinquency records. The placing agency or foster family agency is required to deny approval for resource parents if they or members of their household have a "conviction" for anything other than a minor traffic offense unless the individual receives a "criminal record exemption."[982] Some convictions may be non-exemptible or may only be exempted after receiving a Certificate of Rehabilitation.[983]

Because California juvenile court adjudications are not deemed criminal convictions,[984] individuals adjudicated in California juvenile courts are not subject to the mandatory bars to approval as a resource parent. According to the California Department of Social Services, however, juvenile adjudications "may be investigated to determine if the underlying conduct should be used as a basis to deny or rescind a criminal record clearance or exemption" because the underlying conduct indicates a risk to the health and safety of the child.[985] The agency has the discretion to deny 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.[986] Thus the juvenile delinquency record may form the basis for investigating "inimical conduct" that may result in a discretionary bar. Prospective resource parents and other adults in the home must submit to a DOJ check (for in-state offenses), a Federal Bureau of Investigations (FBI) check (for offenses that occurred outside California), and a Child Abuse Central Index check.[987] The DOJ report will contain information about

- Every conviction of an offense;
- Every arrest for which trial is pending;
- Every arrest for which one would have to register as a person who has committed a sex offense 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 an arrest that resulted in the successful completion of a diversion program, exoneration, or a grant of relief pursuant to Section 851.91.[988] In addition, according to the DOJ,

981 As of January 1, 2017, all individuals providing a home for a child in foster care, whether related to the foster child or not, are required to be approved as and are referred to as "resource families." (Welf. & Inst. Code, § 16519.5; Health & Saf. Code, § 1517.) The term "resource family" includes individuals, couples, and families. (Welf. & Inst. Code, § 16519.5, subd. (c)(1).) An individual approved as a resource family is referred to as a "resource parent." (CDSS Resource Family Approval Written Directives Version 6.1 section 3-01 (72) (rev. 01/07/2020).) When an individual is approved to be a resource parent, they are also approved to become a guardian or adoptive parent. (Welf. & Inst. Code, § 16519.5, subd. (c)(4)(A).)

982 Health & Saf. Code, § 1522, subd. (a); Welf. & Inst. Code, § 16519.5, subd. (d)(2)(A).

983 Health & Saf. Code, § 1522, subd. (g); Welf. & Inst. Code, § 16519.5, subd. (d)(2)(A).

984 Welf. & Inst. Code, § 203; see also CDSS Resource Family Approval (RFA): Background Assessment Guide (BAG) section 115 (rev. 12/13/19), available at: http://www.cdss.ca.gov/Portals/9/CCR/RFA/RFA%20BAG%20(rev.3-28-19).pdf?ver=2019-03-29-085512-103

985 CDSS Resource Family Approval (RFA): Background Assessment Guide (BAG) sections 113, 115 (rev. 12/13/19).

986 Health & Saf. Code, § 1558, subd. (a)(2).

987 Health & Saf. Code, § 1522, subds. (a), (d)(1); Welf. & Inst. Code, § 16519.5, subd. (d)(2)(A)(I); Cal. Code Regs. tit. 22, § 89219. For further information about the Child Abuse Central Index, see Chapter 6, *Court Ordered Therapy and Counseling Consequences*. In the case of emergency placements with a family member or nonrelative extended family member, placing agencies may use an initial criminal check through the California Law Enforcement Telecommunications System (CLETS), to be followed by a DOJ fingerprint clearance check within ten days. (See Welf. & Inst. Code, § 361.4, subds. (b), (c).)

988 Pen. Code, § 11105, subd. (m)(3).

arrest and disposition information regarding juvenile conduct will not be disclosed unless the youth was prosecuted in adult court.[989]

Applicants must disclose convictions even when they have been pardoned, or the record sealed or expunged.[990] 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.[991] The approving agency has the discretion to deny an individual approval as a resource parent, or prohibit an individual from being employed by or residing 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.[992] 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 approval agency may not deny 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 and demonstrating that the conduct poses a risk to the health and safety of the child.[993]

The standards regarding criminal clearances and child placement have also been adopted as placement requirements in agency, independent, and inter-country adoptions outside of the foster care system.[994]

In order to become a child's guardian through the Probate Court process, an individual must be appointed by the Probate Court.[995] Prior to a court hearing on a guardianship petition, an investigation will be conducted into the guardian's "social history."[996] Investigators are entitled to conduct a DOJ check into a proposed guardian's criminal history.[997] In addition, the local child protection services agency is required to screen the proposed guardian for prior referrals for abuse or neglect.[998] If the proposed guardian is a nonrelative, the local public social services agency is required to file a report with the court that is of the same character as a report made with regard to an applicant for resource family approval.[999] The court cannot appoint a guardian who is required to register as a person who committed a sex offense where the victim was a minor.[1000] In addition, if a court finds that a proposed guardian has perpetrated domestic violence in the past five years, there is a rebuttable presumption that the guardian will not be appointed.[1001]

§ 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 "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.[1002] The Community Care Licensing Division of CDSS, however, indicates only that non-client adults residing in a foster care placement will be fingerprinted, and does not address fingerprinting of youth under the age of 18 residing in the home of an applicant or licensee.[1003]

Prior to an emergency placement with a relative or nonrelative extended family member, approving agencies 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

989 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.

990 Cal. Code Regs. tit. 22, § 80019(d)(1)(A).

991 Health & Saf. Code, § 1522, subd. (e).

992 Health & Saf. Code, § 1558, subd. (a)(2).

993 Health & Saf. Code, § 1522, subd. (e); see also CDSS Resource Family Approval (RFA): Background Assessment Guide (BAG) section 113 (rev. 12/13/19).

994 Fam. Code, §§ 8712, 8811 and 8908.

995 Prob. Code, § 1514.

996 Prob. Code, § 1513, subd. (a)(1).

997 Penal Code, § 11105, subd. (b)(23).

998 Prob. Code, § 1516, subd. (a).

999 Prob. Code, § 1543, subd. (a).

1000 Prob. Code, § 1514, subd. (b); Fam. Code, § 3030, subd. (a).

1001 Prob. Code, § 1514, subd. (b); Fam. Code, § 3044, subd. (a).

1002 Welf. & Inst. Code, § 827, subds. (a)(1)(I) & (a)(1)(J).

1003 CDSS Resource Family Approval (RFA): Background Assessment Guide (BAG) section 102 (rev. 12/13/19) [stating that "[a]pplicants and adults residing or regularly present in the home at the time of application must have a criminal record clearance or criminal record exemption . . . prior to approval. . . . Subsequent to approval, any new adults who may reside or be regularly present in the resource family home must submit fingerprints and obtain a clearance or exemption prior to initial presence in the home."]

"criminal record."[1004] However, that authorization does not apply to a child under the jurisdiction of the juvenile court.[1005] 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.[1006] 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.[1007]

PRACTICE TIP: An approving 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 approving 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 a juvenile delinquency record.

Resource family applicants who are denied may pursue an administrative appeal.[1008] The timelines for seeking an appeal can be short. Prospective resource families who are denied should be referred to a local legal aid or reentry legal services program for assistance with challenging the denial.

1004 Welf. & Inst., § 361.4, subd. (a)(1)(C) ["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. This subparagraph shall not apply to a child under the jurisdiction of the juvenile court."]

1005 *Ibid.*

1006 Los Angeles County Department of Children and Family Services, Procedural Guide No. 0070-559.10: Clearances (07/19/2022), available at: http://policy.dcfs.lacounty.gov/Content/Clearances.htm.

1007 *Ibid.*

1008 CDSS Resource Family Approval (RFA): Background Assessment Guide (BAG) section 124 (rev. 12/13/19) at p. 56, available at: http://www.cdss.ca.gov/Portals/9/CCR/RFA/RFA%20BAG%20(rev.3-28-19).pdf?ver=2019-03-29-085512-103.