This workshop was held at the 2017 Equal Justice Conference in Pittsburgh, Pennsylvania

Title:
Collateral Consequences: Representing Criminal Defendants in the Civil Forum

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This panel will discuss the challenges of representing clients charged with crimes in collateral civil proceeding. With the inequities of the criminal justice system as a backdrop, the panel aims to provide advocates with tools to understand and effectively mitigate collateral civil consequences of arrest and conviction.
COLLATERAL CONSEQUENCES:
REPRESENTING THE CRIMINAL DEFENDANT IN THE CIVIL FORUM

ABA/NLADA Equal Justice Conference May 2017
NDS - COMMUNITY BASED HOLISTIC DEFENSE
What is the goal?

- Community Centered
- Client Representation
- Underlying Issues
NDS - COMMUNITY BASED HOLISTIC DEFENSE

How do we achieve it?

- Prediction & Prevention
- Collateral = Direct
- Team Representation
  - Civil
  - Criminal
  - Immigration
  - Family
  - Social Workers
  - Advocates
  - Investigators
  - Administrative Support
NDS - COMMUNITY BASED HOLISTIC DEFENSE

How does it work?

- Point of Intersection
- Pre-Arrest/Arraignments
- Initial Contact/ACS
- Predicate Notice/Notice of Petition
- Community Intake/Community Clinics
Representation in Practice: Sandra Rodriguez

- Criminal Justice
- Family Court
- Benefits
- Unemployment
- Eviction Proceeding
“COLLATERAL” CONSEQUENCES

- Civil penalties that occur as the result of an arrest or conviction but are not a punishment imposed directly as part of a criminal sentence.
- Roughly 48,000 collateral consequences nationwide.
- Database: niccc.csgjusticecenter.org/
WHAT DO COLLATERAL CONSEQUENCES LOOK LIKE?

- Practically:
  - Loss or denial of housing
  - Loss or denial of employment
  - Property forfeiture
  - Destabilization

- In the Civil Courts:
  - Presumption of guilt
  - Fewer Constitutional protections
  - Lower burden
  - Higher stigma
Stable housing is central to the stability of individuals, families, and communities.

Stable housing helps reduce recidivism while homelessness creates the risk of future arrest.

Yet a single arrest can lead to eviction.
IDENTIFYING CONSEQUENCES - HOUSING

- Public housing & Federally Subsidized eviction or denial
  - Dep’t of Housing & Urban Dev. v. Rucker
  - 42 U.S.C. § 1437d(l)(6)
IDENTIFYING CONSEQUENCES - HOUSING

- Private landlord eviction or denial
- Denial: Background Checks
- HUD Guidelines
- Eviction: NYC Illegal Use Proceeding
IDENTIFYING CONSEQUENCES - HOUSING

- Law enforcement forfeiture
  - Ex: NYPD Nuisance Abatement
  - Ex: Memphis, TN Investigations
- Inability to pay due to arrest-related job loss
Information sharing – sometimes automatic – can lead to suspension, termination or loss of job and/or occupational license due to arrest or conviction.
IDENTIFYING CONSEQUENCES - EMPLOYMENT

- Minimal federal protections
  - FCRA permits disclosure of conviction history on commercial background checks
  - FBI database communicates history to state agencies
  - EEOC admonishes discrimination based on record alone for protected groups
  - May not qualify for Unemployment Insurance Benefits if fired due to arrest

- Some state protections:
  - Banning the box (NYC Fair Chance Act)
  - Anti-discrimination
IDENTIFYING CONSEQUENCES - EMPLOYMENT

- State Licensing Regimes
  - NY DOS: Occupational Licenses
  - Automatic Info Sharing
  - Results in likely suspension, termination
IDENTIFYING CONSEQUENCES – ASSET FORFEITURE

- Seizure of property that is proceeds or instrumentality of a crime
  - See 19 U.S.C. § 1607
- Commonly: vehicle, cash, homes
IDENTIFYING CONSEQUENCES – ASSET FORFEITURE

- May relinquish right to property as part of plea deal
- May or may not be recourse
  - Federal District Court mitigation or remission
  - Short time lines
  - Lower burden of proof
TOOLS FOR EFFECTIVE ADVOCACY

- Characterization
- Context
- Collaboration
How we characterize our clients and their criminal justice involvement can reduce stigma and separate them from that one moment in time.

Keep in mind, a criminal conviction is not the final word.
Facts
- No Prior Incidents in NYCHA
- Guilty plea
- Disorderly conduct
The Respondent was only convicted for disorderly conduct upon her guilty plea. She is a good tenant and does not deserve to be evicted.
TOOLS – CHARACTERIZATION

Avoid language that reinforces culpability like:

- Arrest
- Criminal
- Inmate
- Prisoner
- Convicted
- Guilty
Use language that treats every arrest or conviction as an allegation

- Accused/Accusations
- Alleged/Allegations
- Incident
- Charged with/Criminal Justice involvement
- Entered a Plea/Terminated
- Offense/Infraction
- Disposition/Resolution
- Resolved/Completed
Use identifiers that gives insight into your client’s identity outside of an arrest or conviction.

- Family role
  - Mother/father
  - Caretaker
- Community role
  - Basketball coach
  - Volunteer

- Employment and credentials
  - Veteran
  - Retiree
  - Graduate

- Their name
The Respondent was only convicted for disorderly conduct upon her guilty plea. She is a good tenant and does not deserve to be evicted.
Tools – Characterization

Facts
- No Prior Incidents in NYCHA
- Guilty plea
- Disorderly conduct
TOOLS – CHARACTERIZATION

Language
☐ No prior incidents = lifelong tenant, unblemished tenancy
☐ First Arrest = Incident
☐ Guilty Plea = Result
☐ Conviction = Disposition

Identifiers
☐ Family - single mother to 2 young children
☐ Employment - school aide for 10 years
☐ Name - Sandra Rodriguez
Sandra Rodriguez, a single mother to two young children, a beloved school aide at her local elementary school and a lifelong tenant of NYCHA does not deserve to be evicted. Though this incident ultimately resulted in a disposition of disorderly conduct, Ms. Rodriguez’ otherwise unblemished tenancy commands that she and her family should not be rendered homeless.
Give context to your client’s experience before, during, and after their encounter with the criminal justice system to foster better understanding within the civil courts that one moment in time does not define your client.
TOOLS - CONTEXT

Facts
- Search warrant executed
- Arrested
- 48 hours in holding
- Charges reduced at arraignments
- Guilty plea
- Disorderly conduct
- Sealed after one year
TOOLS - CONTEXT: PRE-ARREST

- Report filed with the police
- Investigation
  - Canvass
  - Interview Witnesses
  - Obtain Video Surveillance
  - Photo Arrays
  - Search Warrants
- Seeking probable cause to make an arrest
What is a Search Warrant?
- Directs officers to search for specific property at a specific location and to return that property to the Court.

Requirements for a Search Warrant
- Probable cause;
- supported by oath or affirmation;
- particularity with respect to place
- particularity with respect to property sought.

**No Knock -- only if knocking would be dangerous, or risk the effect investigation of a crime.**
Warrantless arrest

- Most arrests happen without a warrant
- Can be based on hearsay
- Can happen anywhere
Scenario: You’re negotiating with the public housing authority’s attorney to settle Sandra’s housing case because there was only one instance of alleged illegal activity. Opposing counsel cuts you off: “Counselor, a search warrant was executed, we all know that means there must have been more than one instance of illegal activity!”
Facts:
- Probable cause
- Confidential informant
- Mr. Rodriguez named
Example:
This search warrant was supported by a confidential informant who allegedly made a purchase from Mr. Rodriguez, the only individual named in the warrant, on a single occasion outside the building. The hearsay affidavit from the confidential informant proves only that there was probable cause to believe evidence of a crime may be found in a place, not that the crime occurred there.
TOOLS - CONTEXT: POST-ARREST

- Booking Process
  - Arrest
  - Removal to precinct
  - Pedigree & Fingerprints
  - Interrogation
  - Line-Up
  - Transport to Court
  - Complaint Drawn
  - DA Interrogation
  - CJA/Arraignment
Arraignment
- Critical initial appearance.
- What happens at an arraignment?
  - Client advised of charges
  - Dispositions
  - Bail/Release
    - Ability to Pay vs. Dangerousness
    - Cash/Bond/Alternatives
Scenario: While Sandra is awaiting her next court date, she tries to get Unemployment Insurance Benefits because she’s been suspended. At a hearing contesting her denial, the attorney for the Department of Education argues that her suspension was her fault because she was required to report her arrest within 24 hours and, furthermore, she was charged with a felony, so the DOE had no choice but to suspend her.
TOOLS – CONTEXT: POST-ARREST

Facts:
- Held for 48 hours
- Charges reduced to misdemeanor
- Released without bail
Example: Ms. Rodriguez was unlawfully held for over 48 hours before she was ever formally charged or had the opportunity to see a judge or meet with an attorney. At her arraignment, the charges were immediately reduced to a misdemeanor because the prosecutor knew Ms. Rodriguez was not the person actually involved in any crime. As soon as she was released on her own recognizance and able to place a phone call, she followed DOE procedure.
Clients Feel Incredible Pressure to Plead Guilty
- Work Obligations
- Family Obligations
- School Obligations
- Mandatory Minimum Sentences
- Lack of Confidence in System; Attorney
- Threat of Bail
- Post-Indictment Plea Restrictions
Components of a Plea

- Communication to the Court that client accepts the plea.
- Questions and comments from the Court ensuring that the client understands the rights he or she gives up by pleading guilty.

- Factual allocution
  - Can often be negotiated
  - *Alford* pleas
What is a Re-pleader/Deferred Sentence?
- Temporary plea where sentence not imposed (or imposed revocably)
- Upon completion of conditions, initial plea withdrawn and lesser plea entered or case dismissed
  - Still made admissions in an allocution
- “Non-plea re-pleaders”
  - i.e. NYS diversion
Scenario: You’re back in housing court with Sandra, arguing that she didn’t have any knowledge of the illegal activity, but the judge says, “Well, she plead guilty to a crime, so she clearly had some knowledge of what was going on.”
Facts
- Court delays
- Single mother
- Sole provider
- Unable to work
- Disorderly conduct plea
Example: Although Sandra adamantly contested the charges against her, she faced the prospect of *waiting a year or more* to prove her innocence at trial. Meanwhile, her open case *prevented her from working* at the job she loved and relied on in order to provide for her two children. So, as the sole breadwinner in her family, she entered a *plea to a non-criminal violation disposition* to resolve the case and return to work.
Why do cases get dismissed?
- Successful Diversion
- Speedy Trial
- Grand Jury Dismissal
- Facial Insufficiency
- Interest of Justice
- ACD, or similar mechanism
  - Could have conditions
  - Pre-plea
TOOLS - CONTEXT: SENTENCING

- Revocable vs. Irrevocable?
- Jail vs. Prison
- Probation vs. Parole (vs. Post-Release Supervision)
Dismissals, non-criminal dispositions, and older convictions may be sealed or equivalent.

In NYC, a disorderly conduct violation typically seals within 1 year.

Purpose: to put the accused in position occupied before arrest.
Scenario: You’ve managed to drag Sandra’s housing case out for several months. Now it’s been over a year since she took her plea, and her case is sealed. But you’re heading to trial and opposing counsel argues that they should be able to use the records in the proceeding anyway.
Example: Because this disorderly conduct violation has been sealed, any record of the arrest is deemed a nullity, and the sealing laws command that Ms. Rodriguez be returned back to the position she occupied before her arrest, as if it never happened.
Facts

- Search warrant executed
- Charges reduced
- Guilty plea
- Disorderly conduct
- Sealed after one year
Sandra Rodriguez, a single mother to two young children, a beloved school aide at her local elementary school and a lifelong tenant of NYCHA does not deserve to be evicted. After faced with the prospect of waiting months, unable to work, to prove her innocence at trial or resolving her case with a disorderly conduct violation so that she could return to work to provide for her children. Ms. Rodriguez’ otherwise unblemished tenancy commands that she and her family should not be rendered homeless.
Communicate with your client

- Are they facing concurrent/collateral proceedings?
- What are their goals/priorities in each?
TOOLS – COLLABORATION

Communicate across practices

- Develop relationships with attorneys and offices across practices if you’re not in a holistic office.
- Talk to criminal attorneys about how various dispositions may impact civil proceedings
- Collaborate to protect clients in each forum
  - Statements made in civil cases can be used in criminal proceedings!
  - Statements made in plea allocutions can also be helpful/hurtful to civil proceedings
- Stress your client’s goals in the civil proceeding to ensure representation is client centered in each forum
Collaboration

- Client goals: providing for her family, avoiding culpability
- Trial or Plea: 6-12 months would have prevented her from working
- Disposition: Disorderly Conduct seals
- Collateral Housing Case: Record of arrest now sealed
Sandra Rodriguez, a single mother to two young children, a beloved school aide at her local elementary school and a lifelong tenant of NYCHA does not deserve to be evicted. After faced with the prospect of waiting months, unable to work, to prove her innocence at trial or resolving her case with a disorderly conduct violation so that she could return to work to provide for her children. Ms. Rodriguez’ otherwise unblemished tenancy commands that she and her family should not be rendered homeless.
Sandra Rodriguez, a single mother to two young children, a beloved school aide at her local elementary school and a lifelong tenant of NYCHA does not deserve to be evicted for a singular incident. After faced with the prospect of waiting months, unable to work, to prove her innocence at trial or resolving her case with a disorderly conduct violation so that she could return to work to provide for her children. Even then, evidencing the minor nature of this matter, Ms. Rodriguez’s case resulted in a non-criminal disposition that is sealed. A mother, a caregiver and an upstanding tenant, Ms. Rodriguez should not be rendered homeless.
Our clients’ legal issues rarely happen in a vacuum. Understanding collateral consequences in the larger context of the criminal justice system is key to providing client-centered representation and combating misconceptions about arrests and convictions that brand our clients as criminals.

- Identify when a civil proceeding is a collateral consequence
- Educate yourself about aspects of the criminal justice system that overlap in the civil case
- Collaborate with attorneys across practices
- Remember your client is defined by more than a single moment!
QUESTIONS?

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