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Special Considerations in Sealing Criminal Cases for Noncitizen Clients June 2023

On May 5, 2023, the SJC held that charges ending in a not guilty finding are not subject to a constitutional presumption of public access, and in such cases, paragraph one of M.G.L. ch. 276 § 100C mandates the immediate sealing of those criminal cases. *Commonwealth v. J.F.*, 491 Mass. 824 (2023). While this decision is a significant win for most defendants, it poses specific concerns for noncitizens.

Special Concerns with Sealing Criminal Cases for Noncitizens

While sealing criminal charges is generally beneficial for people involved with the criminal legal system, sealing can have significant negative consequences for noncitizens. For those who are not U.S. citizens, sealing may do more harm than good. Immigration officials can access sealed records. When noncitizens are applying for lawful status, transitioning to a new status, or are fighting removal (deportation), immigration officials run a criminal background check and all records, even sealed records, will appear. Noncitizens must disclose sealed cases and often have the burden of producing certified copies of their criminal records to immigration officials. Failure to disclose or failure to provide certified records can lead to denials of immigration applications and even fraud charges.

Sealing criminal records raises the following issues for noncitizen clients:

- Noncitizens mistakenly believe they do not need to disclose sealed records and so fail to list them on applications and other immigration forms.
- Noncitizens have a hard time obtaining required certified copies of sealed records.
- Noncitizens often fail to alert their immigration attorney to sealed records, and they do not appear on CORIs, leaving immigration counsel unprepared to properly represent their clients.

Defense Attorneys: How to Advise Your Noncitizen Clients About Automatic Sealing:

Because of the requirements of immigration proceedings, in cases where automatic sealing is an option, noncitizen clients should be advised of the pitfalls of sealing (described above) and defense attorneys should advise noncitizen clients that they have the option to object to sealing. Clients should know that if they object to automatic sealing, they can still request to seal their records later.

If after receiving advice, noncitizen clients still want their record automatically sealed, defense counsel should request multiple certified copies of all documents in the court file before sealing a record. Defense counsel should keep a copy of the certified documents in their file and provide copies to their clients.

In cases where noncitizen clients seal their records, defense counsel should also advise that in any immigration setting the client must disclose sealed records. The records are not “gone” with respect to immigration.

Immigration Attorneys: How to Best Determine a Client’s Criminal Record:

An increased ability to seal criminal records and the possibility of automatic sealing will potentially make assessing criminal history more difficult for immigration attorneys. A CORI may not fully reflect the scope of a client’s criminal history. There are a few steps immigration attorneys can take to address this:

- Instead of relying on a CORI, immigration attorneys should always request an FBI background check.
- When interviewing new clients, immigration attorneys must now ask more detailed questions that address the possibility of records being sealed. For example, counsel may want to ask questions such as:
 - Have you ever had contact with a police officer?
 - Have you ever been in a courtroom?
 - Have you ever appeared in front of a judge or a jury?
 - Has anyone ever told you that something on your record is gone?

Sealing Legislation to Watch:

There are several bills pending in the Massachusetts House and Senate that would change sealing laws by shortening the period before defendants can request sealing and expanding the types of cases in which automatic sealing is mandated. (See [S998/H1493](#); [H1598/S979](#)). Because sealing can complicate immigration proceedings, it is important to be aware of any expansion in automatic sealing laws when working with noncitizen clients.

However, unlike the current automatic sealing statute, the pending legislation will allow for defendants and their representatives to access certified copies of documents without first requesting to unseal the case. While the expansion of sealing will continue to create difficulties in determining a noncitizen’s criminal record, once determined, accessing the records should not be as difficult if this legislation passes.

The IIU will continue to monitor pending legislation in this area and will keep you informed on the passage of anything that may impact our noncitizen clients.