

FAMILIES AGAINST NARCOTICS

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EXPUNGEMENT AND SENTENCING OPTIONS

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TAB 1

HOLMES YOUTHFUL TRAINEE ACT

In Michigan, pursuant to MCL 762.11 and MCL 762.13, individuals from the age of 17 until their 21st birthday who are convicted of a crime may be eligible for Holmes Youthful Trainee Act (HYTA) to avoid a public record of conviction. For individuals that are at least 21 years old, but you're than 24 years old, HYTA can be obtained with the consent of the prosecutor and the Court. In this manner, the convicted individual can report to employers and colleges that they do not have a criminal record. An assignment of HYTA shall not be deemed a conviction of a crime and such person shall suffer no civil disability, right or privilege following his or her release from such status because of such assignment as a youthful trainee. The rationale behind HYTA is that young persons often have issues with immaturity and flawed judgment, and in some instances should be given a second chance so the conviction will not hurt them in the future.

All proceedings relative to the sentence imposed under HYTA are closed from public inspection. The records are available to the Courts, the Department of Corrections, the Department of Social Services, the criminal defense attorney, and law enforcement in the performance of their duties. The victim of the crime also is not precluded from receiving notice, information, and records that otherwise are closed to public inspection (see MCL 780.752a, MCL 780.781a, MCL 780.811b).

For any case in which HYTA might be applicable it is important to retain an experienced criminal defense lawyer. This is something that should not be left to chance or second rate legal representation. It is too important.

A conviction under HYTA is considered for Michigan Sentence Guideline purposes if the individual gets into trouble in the future unless the conviction is barred under the 10 year gap rule. However, it is not considered for purposes of habitual offender status if the individual who successfully completes a HYTA sentence is charged with a crime in the future. It is also important to know that if you are not a citizen of the United States and you receive HYTA status after pleading guilty to an offense, that conviction (or even admitting to a crime) can still be considered against you for immigration purposes including deportation.

Under HYTA, the sentencing Judge is not required to impose a sentence within sentencing guidelines. The sentencing Judge has the option of imposing a sentence of probation, probation with conditions (for example, drug treatment), probation with conditions after a period of incarceration in jail, SAI boot camp, or a prison term of up to 3 years. If a prison sentence is imposed under HYTA it is a flat sentence (for example: 1 year in the Michigan Department of Corrections), rather than an indeterminate sentence (for example: 1 to 15 years in the Michigan Department of Corrections). This can be extremely beneficial if the individual is charged with an offense such as Home Invasion 1st Degree with guidelines that would otherwise mean a prison sentence. The individual would not be at the mercy of the Michigan parole board if a flat prison sentence was imposed. Furthermore, an individual charged with felony firearm (use of

a firearm in the commission of a felony) can avoid the mandatory prison sentence if they receive HYTA status for the conviction.

Another advantage of HYTA is that the individual can avoid driver's license sanctions which some non-traffic convictions sometimes impose. For example, an individual with no prior record who is convicted of Delivery or Manufacture of Marijuana faces a 6 month suspension of driving privileges with a restricted license allowed after 30 days. Under HYTA this driving sanction through the Michigan Secretary of State is avoided.

Individuals not eligible for HYTA include person that are convicted of: a felony that carries a maximum punishment of life in prison (for example: Armed Robbery, 1st Degree Criminal Sexual Conduct, Carjacking); a major controlled substance offense (for example: Delivery of Heroin, Cocaine, Methamphetamine, Ecstasy; Possession with Intent to Deliver Heroin, Cocaine, Methamphetamine, Ecstasy); OR a traffic offense (for example: drunk driving).

In order to be placed on HYTA status the individual must plead guilty. An individual is technically ineligible for HYTA if he or she is found guilty after a trial or if he or she tenders a plea of no contest. The individual also must consent to being placed on Holmes Youthful Trainee Status. Although rare, a sentencing Judge is not prohibited to giving HYTA status to an individual with prior convictions, prior HYTA status, prior 7411 status, prior 769.4a status, or any other prior advisory sentence status.

If the individual is convicted of violation of probation, the Court has the discretion to revoke the previously granted HYTA status. If HYTA is revoked the conviction becomes public. Furthermore, the individual is technically subject to his or her original sentencing conditions – the original sentence guidelines would technically apply; mandatory sentencing would apply (for example, the sentencing Judge would have to impose the 2 year mandatory prison sentence for felony firearm first offense if HYTA is revoked); a DNA test would be ordered; license sanctions would be imposed if required by statute due to the original conviction.

If you are not guilty of the allegation, and wish to contest it in Court, you should hire an experienced criminal lawyer to defend you. HYTA is meant for individuals who are guilty of the charged offense, and who want to plead guilty. Do not compromise yourself if you are innocent.

TAB 2

MICHIGAN DELAYED SENTENCING

MICHIGAN 7411

While many believe that a first offense marijuana possession results in a slap on the wrist, i.e. fines, probation, minor misdemeanor on your record, nothing could be further from the truth. There is one punishment that is overlooked or unknown– the mandatory driver's license suspension. That's right– you get busted with pot, or any other controlled substance, you lose your driver's license and there's no getting around it. For how long depends on the offense. First offense: your license is suspended for six months. Second offenses: the suspension is for one year. With this harshest of penalties the legislators did decide to give a ray of light to those convicted, albeit a small one. The judge may grant you a restricted license (only drive to school, work, medical appointments, court-mandated activities) after 30 days for a first offense and after 60 days for a second offense. Notice the word may is used and not shall. That's right, the judge doesn't have to grant you a restricted license, although they often do.

When sentenced, some judges will even entertain your petition to have it placed into the sentencing order that you will automatically receive a restricted license after the appropriate waiting period. However, there are many judges who will make you come back and file a motion or petition for a restricted license. When it comes to drug convictions Michigan doesn't mess around. Apparently the legislators thought that it wasn't enough to be placed on probation and all the requirements that goes along with it, so to add a heightened incentive they decided to take your license away. The problem is that not very many people realize this until it's too late.

Many clients ask if there is a way to avoid losing their driving privileges over such a conviction as it is extremely difficult or near impossible for many people to lose their license, even if it's only for a month or two. The problem is that it is a mandatory part of the statute that neither the judge or prosecutor can do anything about in terms of pleas or bartering. However, there is one option where this blow can be avoided but there's a catch: it can only be used once.

Michigan has a delayed sentence option for drug use and possession crimes under MCL 333.7411 or 7411 for short. It allows those who have never been convicted of either use or possession of a controlled substance, such as marijuana, cocaine, heroin, or second time offenders of an imitation controlled substance to plead guilty under 7411. It is only for use and possession charges and not for serious drug charges such as drug dealing, manufacturing, or maintaining a drug house. You enter a plea of guilty and the judge sentences you to probation which could include random drug and alcohol testing and completing drug classes. If you successfully complete all the requirements the judge sentences you to, then no judgment of guilt will appear on your public record. More importantly, since the judgment of guilt is never entered, the Secretary of State doesn't impose any driver's license sanctions either. It's important that you meet the requirements in a timely fashion or else you run the risk of having the judge revoke your 7411 status which means it will not only appear on your public record, but you will lose your driver's license. Remember: 7411 is a one-time deal

whether you succeed or not. There are no second opportunities so make sure you don't lose it.

Even if you believe the case against you is weak, 7411 is just too good of a deal to pass up. It's just not worth the risk of having a criminal record and losing your driver's license when you don't have to. If you are facing a drug possession or use charge, ask your lawyer about 7411 and he will be able to tell you if you're eligible and can petition the judge if you are eligible.

Delayed Sentencing Under MCL 771.1

Delayed sentencing under MCL 771.1 usually refers to a conditional future dismissal. The statutory language does not actually promise a future dismissal, but this is how judges and prosecutors routinely interpret the provisions of MCL 771.1. The statute actually states that:

"In an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082. When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court's records. The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay."

MCL 771.1 can be applied to virtually any case, including "all prosecutions for felonies, misdemeanors, or ordinance violations other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or major controlled substance offenses." It is most commonly used in retail fraud, domestic violence cases, and local ordinance cases. **IMPORTANT:** A conviction under MCL 771.1 goes on a person's criminal record while the case is pending. This can have harsh ramifications, since an employer might discover the pending charge. Also, driver's license sanctions, such as license sanctions for a drug crime, will not be avoided by using MCL 771.1.

TAB 3

Comparison Between Deferred Judgments, Delayed Sentences, and Traditional Sentences

Action	Deferred Judgment of Guilt ¹	Delayed Sentence ²	Traditional Sentencing
Pleads guilty or is found guilty	Judgment of guilt not entered.	Judgment of guilt entered on underlying charge.	Judgment of guilt entered.
Supervision or sentencing options	Defer entry of the judgment of guilt and place on probation. May place in drug court, veterans' treatment court, or mental health court, if otherwise eligible.	May supervise under delay up to 1 year. The court shall enter an order stating the reason for the delay upon the court's records.	Proceed to sentencing. Court may place on traditional probation or in drug treatment court.
Monetary Assessments	May assess a fine, costs, probation oversight, and restitution. Minimum State Cost required if any combination of fines, costs, and other assessments ordered. Crime Victim Assessment required as applicable to violation. Bond shall be applied to monetary sanctions.	May assess a fine, costs, probation oversight, and restitution. Minimum State Cost required if any combination of fines, costs, and other assessments ordered. Crime Victim Assessment required as applicable to violation. Bond shall be applied to monetary sanctions.	May assess a fine, costs, probation oversight, and restitution. Minimum State Cost required if any combination of fines, costs, and other assessments ordered. Crime Victim Assessment required as applicable to violation. Bond shall be applied to monetary sanctions.
Caseload Reporting	Report as Guilty Plea, Bench Verdict, or Jury Verdict.	Report as Guilty Plea, Bench Verdict, or Jury Verdict.	Report as Guilty Plea, Bench Verdict, or Jury Verdict.
MSP Criminal History Reporting	Report deferred judgment of guilt.	Report judgment of guilt, including monetary assessments. Enter "sentence delayed until _____" in free-text area of the disposition report. Do not enter any adjudication on a notice of enhanced sentence. ³	Report judgment of guilt, including monetary assessments. At sentencing, report judgment of sentence, including any disposition on any enhanced sentencing notice.
SOS Abstract Reporting	Report Minor in Possession as "deferred" if under MCL 436.1703; otherwise no reporting required.	Abstract reportable offenses pursuant to MCL 257.732.	Abstract reportable offenses pursuant to MCL 257.732.
Court Record Status	Nonpublic at time of deferral/assignment.	Public. (For drug court participants, the file is public, but record of participation in drug court is nonpublic.)	Public/ (For drug court participants, the file is public, but record of participation in drug court is nonpublic.)
Supervision or Probation is Successfully Completed			
Court Action After Probation Period Ends	Discharge from probation and dismiss.	Conviction on underlying charge remains. Court discharges defendant from probation.	Conviction remains. Court discharges defendant from probation.
MSP Criminal History Reporting	Report successful completion of probation and dismissal.	Report judgment of sentence. Include the final disposition on any enhanced sentencing notice.	None required.

Comparison Between Deferred Judgments, Delayed Sentences, and Traditional Sentences

Updated 1/15/14

Action	Deferred Judgment of Guilt	Delayed Sentence	Traditional Sentencing
SOS Abstract Reporting	Report dismissal if Minor in Possession under 436.1703; otherwise no reporting required.	Abstract any changes to reportable offenses pursuant to MCL 257.732.	None required.
Court Record Status	Nonpublic at time of deferral/assignment.	Public. (For drug court participants the file is public, but record of participation in drug court is nonpublic.)	Public. (For drug court participants, the file is public, but record of participation in drug court is nonpublic.)
Supervision or Probation is Unsuccessfully Terminated			
Court Action After Probation Period Ends	Enter judgment of guilt. Discharge probation as unsuccessful and proceed to further sentencing at court's discretion.	Proceed to sentencing.	Revoke probation and proceed to further sentencing at court's discretion.
MSP Criminal History Reporting	Report judgment of guilt and sentence, including jail or prison time if applicable.	Report the sentence imposed, including jail or prison time when applicable or disposition on any enhanced sentencing notice.	Report any amended sentence, including jail or prison time imposed when applicable.
SOS Abstract Reporting	Report date judgment of guilt entered if a reportable offense pursuant to MCL 257.732.	Abstract changes to reportable offenses pursuant to MCL 257.732.	None required.
Court Record Status	Public. (For drug court participants, the file is public, but record of participation in drug court is nonpublic.)	Public. (For drug court participants, the file is public, but record of participation in drug court is nonpublic.)	Public. (For drug court participants, the file is public, but record of participation in drug court is nonpublic.)

Endnotes

¹ MCL 762.13, HYTA; MCL 333.7411, Controlled Substance; MCL 769.4a, Domestic Violence; MCL 750.350a, Parental Kidnapping; MCL 750.430, Health Professional Practicing Under Influence; MCL 436.1703, Minor in Possession of Alcohol; MCL 750.430, Licensed Health Care Professional Practicing under the Influence of Drugs or Alcohol. MCL 600.1076(6) Drug Treatment Court, MCL 6001206(1)(i) and MCL 600.1209(6) Veterans Treatment Court, MCL 600.1090, et seq. Mental Health Court

² MCL 771.1 "in an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court under chapter 10A of the Revised Judicature Act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082. When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court's records. The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay."

³ On a notice of enhanced sentence, the enhancement is not determined until sentencing. In many delayed sentence cases, the court may have approved a plea agreement that would provide for a reduction in the enhancement (e.g. a 3rd offense notice on a DWI reduced to a 2nd offense notice upon successful completion of probation).

TAB 4

Current to 4/12/2019

Expunge a Juvenile Adjudication

By Nicholas Roumel

Step-by-Step Guidance

Step 1: Understand what "expungement" means in the context of juvenile adjudications.

Persons subject to juvenile court proceedings for criminal offenses (which occurred before their 17th birthday) are not convicted but rather are "adjudicated." Expungement has the effect of setting aside a juvenile's adjudication. This permits the person to honestly tell potential employers and others that he or she has not been convicted of a crime. However, even an expunged criminal record can be used for some purposes. See Additional Practice Guidance for an explanation on the effect of expungement.

Step 2: Determine whether the adjudication may be expunged.

Not all clients are eligible to have their juvenile adjudications expunged, and not all juvenile adjudications are capable of being expunged. To help you determine whether your client is eligible to have his or her particular adjudication expunged, see the flowchart below. *See also* MCL 712A.18e.

Step 3: Obtain the necessary form to expunge the adjudication.

To expunge the adjudication, you must fill out SCAO form JC 66, Application to Set Aside Adjudication. You will need the certified copy of the order of disposition (see step 4) to complete the application.

This form also contains the order for use if the application is granted.

Step 4: Order a certified copy of the order of disposition.

Contact the court where the adjudication occurred and order a certified copy of the order of disposition. MCL 712A.18e(4)(b). Be patient, as records more than five years old are often in

storage, converted to microfiche, or otherwise difficult to access. There is a small charge for this process, currently \$10 for a certified copy of the adjudication record and \$1.00 for each page of the record. It is recommended that you make a personal visit to the court to pick up the certified copy. It never hurts to be friendly with a helpful court clerk in person.

Step 5: Get your client fingerprinted.

Your client must obtain a set of his or her fingerprints. Contact your local police agency. Police are called upon frequently to fingerprint people for various applications, licensing procedures, etc., and should accommodate your request for fingerprinting. They may schedule an appointment, or they may advise you to simply walk in during designated times.

The fingerprints will be taken on an applicant card (RI-7). Fill out the card completely. You may have to pay an application fee to the police agency.

Step 6: Complete and make copies of the application.

Once you obtain a certified copy of the order of disposition, complete the questions on the application, which are relatively simple to answer. You may apply to have more than one adjudication set aside on the same form only if the offenses were filed together on the same petition. If the offenses were adjudicated on separate petitions, you must complete a separate application form for each petition. You will need an original plus five copies of both the application to set aside the adjudication and the certified record of the order of disposition.

Step 7: Have the application signed under oath.

The client must sign the application under oath in front of a notary public or the court clerk. The client must bring a photo identification to show when signing the application. There may be a fee to have the application signed in front of a notary public. Either have the client sign one copy of the application form in front of the notary public or the clerk and make five additional copies of the application form later, or print and bring all six copies of the completed and unsigned application form to sign in front of the notary public or the clerk. If you decide to have the application signed in front of a notary public, you can still file your application in person with the court.

Step 8: File the application with the court.

File with the court clerk the signed and notarized original of the application, all five copies, and the original certified copy of the order of disposition. The clerk will set a hearing date, keep the certified copy of the order of disposition and the original application, and return the five copies of the application with the hearing date noted in the "Notice of Hearing" section of the application.

Of the remaining copies of the application and order of disposition, one of each will be sent to the Michigan State Police (see step 9), and one of each will be sent to the attorney general and

prosecuting attorney (see step 10). Be sure to keep in your files the remaining two copies of the application and the order of disposition.

Step 9: Serve the application on the Michigan State Police.

Mail the following items to the Michigan State Police:

- a copy of the Application to Set Aside Adjudication
- a copy of the certified order of disposition
- the fingerprint card
- a \$25 fee payable to the State of Michigan

The address for the state police is

Michigan State Police Criminal Justice Information Center P.O. Box 30634 Lansing, MI 48909

For questions or problems, call the state police at 517-241-0606.

Step 10: Serve the application on the attorney general and the prosecuting attorney.

At least seven days before the hearing, mail a copy of the application and a copy of the order of disposition to the attorney general and the prosecuting attorney for the county in which the adjudication took place.

The address for the attorney general's office is

Michigan Department of Attorney General Corrections Division P.O. Box 30217 Lansing, MI 48909

The address for the prosecuting attorney for the county in which you received the adjudication is obtainable from a variety of sources, such as the *Michigan Bar Journal*, the telephone book, or online, at Prosecuting Attorneys Association of Michigan. You can also ask the court clerk.

Step 11: Complete the proof of service and file it with the court.

After mailing the copies to the attorney general, prosecuting attorney, and state police, complete the proof of service on the remaining two copies of the Application to Set Aside Adjudication. This is contained in the section at the bottom of the application entitled "Proof of Service." Simply check the appropriate boxes, fill in the dates, and sign and date at the bottom. Keep one copy of this form, with the completed proof of service, for your records, and mail or personally file the original with the court clerk.

Step 12: Prepare for the hearing.

All judges handle juvenile expungements differently. Some will grant the expungement automatically if the applicant is eligible; others will want strong evidence of good character. Be ready for the latter approach, and be prepared to present the following at the expungement hearing:

- If your client has been in school, bring copies of transcripts.
- If your client has been working, bring a résumé and letters of reference from employers.
- If your client has done volunteer work or community service, bring evidence of what has been done and letters, if available.
- If your client has been rehabilitated (drug or alcohol intervention, psychological treatment, and religious or spiritual guidance from a place of worship), bring proof.
- Bring letters of support from friends, family members, or others who know your client well and can vouch for his or her good character. Consider bringing some of these key people to the hearing. Even if the judge does not want to hear from them, it will make a positive impression to be able to tell the judge that your client's parents, partner, boss, and best friend are at the hearing to lend their support.

If the adjudication to be expunged was assaultive in nature, the prosecutor will give the victim written notice of the request for expungement, including a copy of the Application to Set Aside the Adjudication. Therefore, an applicant with an assaultive crime should be prepared for the possibility that the victim will contact the judge to oppose the expungement or even appear at the hearing. Either the prosecutor or a representative from the Attorney General's office, or both, may also appear.

Step 13: Complete the process.

If the judge grants the expungement, check with the court clerk to make sure the court will send copies of the order to the Michigan State Police Central Records Division. You may want to send copies yourself to the attorney general and prosecuting attorney at the addresses listed in step 10.

After a couple of months, you may wish to contact the Michigan State Police Criminal Records Division, at 517-241-0600, to make sure that your client's record was expunged.

Step 14: Understand the implications of an expunged record.

Expungement of a juvenile adjudication has the effect of setting aside a juvenile's adjudication. This permits your client to honestly tell a potential employer that he or she has never been convicted of a crime. However, even an expunged criminal record can be used for some purposes. For an explanation of what you can expect after expungement, see Additional Practice Guidance.

When to Use

Use this How-To Kit to determine whether your client is entitled to expunge a juvenile adjudication (one which occurred prior to the client's 17th birthday) and to obtain such an expungement. This Kit will also instruct you on the implications of the expungement in terms of your client's pursuit of a career or an education.

Using these materials is not a substitute for the attorney's independent judgment, drafting, and research.

Other Resources

Books

- Michigan Criminal Procedure (see chapter 12)

Other How-to Kits

- Expunge an Adult Conviction

Other Helpful Links

- Michigan State Police (“Search, Modify, Locate, Set Aside or Expungement of Criminal History Records”)

Additional Practice Guidance

Flowchart

The following series of questions will enable you to determine whether your client’s adjudication can be expunged:

1. Is the adjudication for an offense that if committed by an adult would be a felony for which the maximum punishment is life imprisonment? If yes, you may *not* expunge the adjudication. MCL 712A.18e(2)(a). If the answer is no, proceed to the next question.
2. Is the adjudication for a traffic offense, such as drunk driving, driving without a license, or any other criminal misdemeanor or felony under the Traffic Code (MCL 257.1 et seq.)? If yes, you may *not* expunge the adjudication. MCL 712A.18e(2)(b). If the answer is no, proceed to the next question.
3. Is the adjudication for an offense for which the juvenile was tried as an adult and which resulted in a conviction under MCL 712A.2d? If yes, you may *not* expunge this offense via the juvenile expungement procedure in MCL 712A.18e. (The conviction may be set aside under the adult expungement statute, MCL 780.621.) If the answer is no, proceed to the next question.
4. Does the client have more than one juvenile offense that would be a felony if committed by an adult and more than three juvenile offenses (of which not more than one may be a juvenile offense that would be a felony if committed by an adult)? If yes, you may *not* expunge the additional adjudications. MCL 712A.18e(1). In other words, to be eligible for expungement, a juvenile may have committed no more than three offenses—a combination of one that would be considered an adult felony and two that would be adult misdemeanors—OR up to three offenses that would be considered misdemeanors, with no felonies. If the answer is no, proceed to the next question. Note that multiple

adjudications arising out of a series of acts that were in a continuous time sequence of 12 hours or less and that displayed a single intent and goal constitute one offense, provided that none of the adjudications were (a) an *assaultive crime*, as defined in MCL 712A.18e (7)(a) (which in turn refers to MCL 770.9a), (b) an offense involving the use or possession of a weapon, or (c) an offense with a maximum penalty of 10 or more years imprisonment. MCL 712A.18e(1).

5. Does the client have any adult convictions for felonies in addition to the adjudication the client wants to have expunged? If yes, the adjudication may *not* be expunged. If the answer is no, proceed to the next question.
6. Has it been less than one year since the disposition for the adjudication? If yes, you may *not* expunge the adjudication. MCL 712A.18e(3). Note that a disposition is not considered completed for purposes of the expungement statute until the completion of any term of detention for that adjudication. *Id.* If the answer is no, proceed to the next question.
7. Is the person less than 18 years of age? If yes, you may *not* expunge the adjudication no matter how many years it has been since the disposition has been completed. If the answer is no, proceed to the expungement process.

Personal Visit

It is highly recommended that you personally visit the court where the juvenile adjudication occurred to pick up the certified copy of the order of disposition in person. You may be able to obtain the order by phone or mail, but if you visit you can accomplish all of the following in one stop:

- get the precise information about the adjudication from the certified record
- complete the Application to Set Aside the Adjudication (see step 6)
- have the court clerk notarize the application (see step 7)
- obtain a hearing date from the clerk (see step 8)

Effect of Expungement

In general, once an adjudication is set aside under the expungement statute, the person is legally considered not to have been adjudicated of the juvenile offense. In Michigan, most employers may not legally ask about criminal history that did not result in a conviction. MCL 37.2205a. But there are exceptions that may cause a criminal history to haunt a person after expungement.

First, you have only expunged a conviction, not erased the arrest or the court proceedings. Accordingly, even after expungement, some employers may inquire beyond the matter of whether there is a criminal conviction and require an applicant to disclose an arrest, a plea of guilty or no contest, or a finding of guilt by a judge or jury. Many employers are specifically authorized by statute to conduct criminal history checks, and certain government or law enforcement agencies are not limited to determining only whether a conviction was obtained. In addition, anyone with \$10 can obtain a person's criminal history from the state police website, which may still reveal the arrest.

Also, employers in other states may be bound by laws different than Michigan's and may be allowed to ask about arrests that did not result in conviction. No law prohibits licensing agencies from holding your arrest record against you, including agencies overseeing medical, legal, financial, and even horse-racing fields. Colleges and graduate schools are free to ask about anything to do with one's criminal history—and often do. Landlords may ask about arrests on rental applications.

Finally, expunged convictions are still considered convictions for purposes of immigration deportation, may not affect a Secretary of State abstract, will not alter registration as a sexual offender, and may be considered in sentencing if the person is ever convicted of another offense. See MCL 780.622 for other things unaffected by expungement.

Once again, a person whose conviction is expunged may only answer “no” to the question “Have you ever been convicted of a crime?” If an application inquires into the fact of arrest or asks about criminal dispositions taking place before expungement, one may need to obtain legal advice as to whether the question may legally be asked, and if so, how to answer it.

If a person does ever need to explain the circumstances of an expunged conviction, it is best to handle the explanation the same way as was done at the expungement hearing before the judge and to be prepared with strong evidence of rehabilitation since the crime occurred.

Despite the limited protection offered by an expungement, successfully setting aside a conviction can go a long way in helping a person have a fresh start in life, whether it be in finding employment or pursuing an education.

Forms

Application to Set Aside Adjudication(s)



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TAB 5

Current to 4/12/2019

Expunge an Adult Conviction

By Nicholas Roumel

Step-by-Step Guidance

Step 1: Understand the meaning of expungement.

Expungement has the effect of setting aside a criminal conviction, which permits the person to honestly tell potential employers and others that he or she has not been convicted of a crime. However, even an expunged criminal record can be used for some purposes. See Additional Practice Guidance for a more detailed explanation of how an expunged conviction might still be used against a person.

Step 2: Research the law.

Carefully review the expungement statute, MCL 780.621.

Step 3: Determine whether a conviction may be expunged.

Not all clients are eligible to have their adult convictions expunged, and not all convictions are capable of being expunged. To help you determine whether your client is eligible to have his or her particular conviction expunged, see the flowchart below. After reviewing the flowchart, if you believe the conviction is expungeable, proceed to step 4.

Step 4: Obtain a copy of the forms you need to expunge the conviction.

See SCAO form MC 227, Application to Set Aside Conviction, and SCAO form MC 228, Order on Application to Set Aside Conviction. Note that these forms do not mention the term *expungement*. The forms include detailed instructions on the expungement process and the information needed to file the application.

Step 5: Order a certified copy of the conviction record.

Contact the court where the conviction occurred and order a certified copy of the conviction record. MCL 780.621(8)(b). Be patient, as records more than five years old are often in storage, converted to microfiche, or otherwise difficult to access. There may be a small charge for this

process (\$10 statutory fee under MCL 28.273(2)) plus \$1 per page). Also, it never hurts to be friendly and courteous to a helpful court clerk.

The exact format of the conviction record is not critical. You may obtain a certified copy of the judgment of sentence, probation order, or register of actions. Just be sure there is something from the court that sufficiently describes both the charge and the exact date of conviction (the date of sentence or the date any term of imprisonment was completed). You will need this information for the expungement application.

In addition, you will need to make five copies of the record of conviction for use during the application process.

To obtain the prior record of conviction, it is highly recommended that you personally visit the court where it occurred. You may be able to perform this step by phone or by mail, but if you visit, you can do all of the following:

- Get the precise information about the conviction from the certified record.
- Have the court clerk notarize the application.
- Obtain a hearing date from the clerk.

Step 6: Obtain copies of the applicant's fingerprints.

To obtain fingerprints, contact your local police agency, which will generally accommodate this process (police are called upon frequently to fingerprint people for various applications, licensing procedures, or other purposes). The police department may schedule an appointment or may advise you to simply walk in during designated times.

The fingerprints will be taken on an applicant card (RI-8). Fill out the card completely. You may have to pay an application fee to the police agency.

Step 7: Complete and make copies of the application to set aside conviction.

Once you obtain a certified copy of the correction record, complete the application to set aside the conviction. Use MC 227. You will also need to make five copies of the application.

Step 8: Have the application signed under oath.

The client must sign the application under oath in front of a notary public or the court clerk. The client must bring a photo identification to show when signing the application. There may be a fee to have the application signed in front of a notary public. Either have the client sign one copy of the application form in front of the notary public or the clerk and make five additional copies of the application form later, or print and bring all six copies of the completed and unsigned application form to sign in front of the notary public or the clerk. If you decide to have the application signed in front of a notary public, you can still file your application in person with the court.

Step 9: File the completed application with the court clerk.

File the following items with the court clerk where the original conviction was entered:

- the original signed and notarized application
- the original certified copy of the prior conviction
- five copies of both the application and the certified record of the prior conviction

The clerk will set a hearing date and return the five copies with the hearing date filled in under the “Notice of Hearing” section of the application form. The Michigan State Police (MSP) has requested that hearings be set at least 90–120 days from filing to ensure that they will have time to respond to the application.

Step 10: Assemble everything you need to mail the application to the appropriate agencies.

You will need to have the following items ready:

- five copies of the completed application to set aside the conviction, with the hearing date filled in
- five copies of the certified copy of the conviction
- one set of fingerprints (MCL 780.621(9))
- a \$50 fee payable to the State of Michigan (MCL 780.621(10))

Step 11: Mail the application materials to the required agencies.

The following materials must be mailed to these agencies:

1. To the MSP:
 - a copy of the application
 - a copy of the certified record of conviction
 - the fingerprint card
 - the \$50 fee payable to the State of Michigan

For questions or problems, call the MSP at 517-241-0606.

2. To the attorney general:
 - a copy of the application
 - a copy of the certified record of conviction

Use the following address for the Attorney General: Michigan Department of Attorney General, Corrections Division, P.O. Box 30217, Lansing, MI 48909

3. To the prosecutor’s office for the county in which the applicant was convicted:

- a copy of the application
- a copy of the certified record of conviction

Obtain this address from the *Michigan Bar Journal*, from the telephone book, online, at Prosecuting Attorneys Association of Michigan, or by simply asking the court clerk.

Keep the remaining two copies of the application and the certified record of conviction.

Step 12: Complete a proof of service and file it with the court.

On one of the remaining two copies of the application, complete the section at the bottom entitled "Proof of Service." Simply check the appropriate boxes, fill in the dates, and sign and date at the bottom. Make a copy of this form with the completed proof of service for your records, and mail to or personally file the original with the court clerk.

Step 13: Prepare the order on application to set aside conviction.

Use SCAO form MC 228. Fill out the heading with your case information and print the form, leaving the body of the order to be completed by the judge. Make four copies and take it to the hearing with you.

Step 14: Prepare for the hearing.

All judges handle expungement hearings differently. Some will grant the expungement automatically if the applicant is eligible; others will want strong evidence of good character. Be ready for the latter.

- If the applicant has been in school, bring copies of transcripts.
- If the applicant has been working, bring a copy of his or her résumé and letters of reference from employers.
- If the applicant has done volunteer work or community service, bring evidence of what he or she has done and letters, if available.
- If the applicant has been rehabilitated, bring proof. This could include drug or alcohol intervention, psychological treatment, and religious or spiritual guidance from a personal place of worship.
- Have letters of support from friends, family members, or others who know the applicant well and can vouch for his or her good character. Consider bringing some of these key people to the hearing. Even if the judge does not want to hear from them, it will make an impression to simply mention to the judge that the applicant's parents, partner, boss, and best friend are at the hearing to lend support.

If the crime to be expunged was assaultive in nature or a serious misdemeanor, the prosecutor will give the victim written notice of the request for expungement, including a copy of the application to set aside the expungement. Therefore, you should be prepared for the possibility

that the victim will contact the judge concerning the expungement or even appear at the hearing. Advise the applicant to be respectful, apologetic, and contrite concerning the victim and the circumstances of the offense and to be appropriately introspective.

Serious misdemeanor is defined in MCL 780.811(1)(a) and includes a long list of offenses, including domestic violence, stalking, breaking and entering, illegal entry, child abuse, indecent exposure, injuring a worker in a work zone, and certain offenses involving minors, computer communications, firearms, and alcohol and/or personal injury accidents.

Step 15: If the judge grants the expungement, provide the appropriate follow-up.

If the judge grants the expungement, complete the process. Check with the court clerk to make sure he or she will send copies of the order to the MSP Central Records Division. You may want to send copies yourself to the attorney general and the prosecutor, to the same addresses listed in step 11.

After a couple of months, double check the applicant's record to make sure that the conviction was expunged. Check the MSP website, using the Internet Criminal History Access Tool, and if there are problems, contact the MSP Criminal Records Division, at 517-241-0600. See also the Additional Practice Guidance regarding the effect of an expungement.

Note that if the convicting court denies an expungement petition, a person cannot file another petition concerning the same conviction or convictions with the convicting court until three years after the date the court denies the previous petition, unless the court specifies an earlier date for filing another petition in its order denying the petition. MCL 780.621(6).

When to Use

Expungement of a criminal conviction has the effect of setting the conviction aside and allows the person whose conviction has been expunged to represent that he or she has not been convicted of a crime. The setting aside of the conviction can go a long way in helping a person who is trying to find employment and otherwise needs a fresh start in life. This How-To Kit provides step-by-step guidance on how to obtain an expungement of an adult conviction.

Using these materials is not a substitute for the attorney's independent judgment, drafting, and research.

Other Resources

Books

- Michigan Criminal Procedure (see chapter 12)

Other How-to Kits

- Expunge a Juvenile Adjudication

Other Helpful Links

- Michigan State Police (“Search, Modify, Locate, Set Aside or Expungement of Criminal History Records”)

Additional Practice Guidance

Flowchart

The following flow chart will help you determine if a conviction is expungeable.

1. Is it a felony for which the maximum punishment is life in prison?
 - If *yes*, you may not expunge the conviction (with the limited exception of human trafficking offenses noted below). MCL 780.621(3)(a)
 - If *no*, proceed to the next question.
2. Is it a violation or attempted violation of MCL 750.520c, .520d, and .520g (criminal sexual conduct), MCL 750.136b(3) (child abuse in the second degree), or MCL 750.136d(1)(b)–(c) (child abuse in the second degree in the presence of another child)?
 - If *yes*, you may not expunge the conviction. MCL 780.621(3)(b).
 - If *no*, proceed to the next question.
3. Is it a violation or attempted violation of MCL 750.520e (criminal sexual conduct in the fourth degree) that occurred after January 12, 2015?
 - If *yes*, you may not expunge the conviction. MCL 780.621(3)(c).
 - If *no*, proceed to the next question.
4. Is it a misdemeanor traffic offense, such as drunk driving, driving without a license, or any other criminal misdemeanor under the Michigan Vehicle Code, MCL 257.1 et seq.?
 - If *yes*, you may not expunge the conviction. MCL 780.621(3)(d).
 - If *no*, proceed to the next question.
5. Is it a felony conviction for domestic violence if the person has a previous misdemeanor conviction for domestic violence?
 - If *yes*, you may not expunge the conviction. MCL 780.621(3)(e).
 - If *no*, proceed to the next question.
6. Is it a violation of MCL 750.462a et seq. (human trafficking) or 750.543a et seq. (terrorism)?
 - If *yes*, you may not expunge the conviction. MCL 780.621(3)(f).
 - If *no*, proceed to the next question.
7. Does the person have more convictions than are permitted by the expungement statute?

- Before 2011 PA 64 (eff. June 23, 2011), if the person had more than one conviction, expungement was not available under MCL 780.621(1). *People v Dudas*, 134 Mich App 66, 350 NW2d 834 (1984). Expungement is unavailable even if the multiple convictions arose from the same criminal transaction and they occurred on the same date. *People v Blachura*, 176 Mich App 717, 440 NW2d 1 (1989). As amended effective January 12, 2015, the expungement statute permits a person convicted of not more than one felony and not more than two misdemeanors to petition the convicting court to set aside the felony. MCL 780.621(1)(a). A person who is convicted of not more than two misdemeanor offenses and no other felony or misdemeanor offenses may petition the convicting court or courts to set aside one or both of the misdemeanor convictions. MCL 780.621(1)(b). Also, a person who is convicted of fourth-degree criminal sexual conduct (or an attempt) before January 12, 2015, may petition to set aside the conviction if he or she has not been convicted of another offense other than not more than two minor offenses (which is defined as a misdemeanor or ordinance violation for which the maximum term of imprisonment does not exceed 90 days, the maximum fine is not more than \$1,000, and the person who committed the offense is not more than 21 years old). MCL 780.621(1)(c). The provision added in 2011 that permitted expungement if a person had no more than two minor offenses in addition to the one sought to be expunged was removed from the statute by 2014 PA 463.
 - A person may seek to set aside convictions under the prostitution-related offenses of MCL 750.448–.450 or similar local ordinance if he or she committed the offense as a direct result of being a victim of a human trafficking violation. MCL 780.621(4), amended by 2016 PA 336 (Mar 14, 2017). An application under this provision may be filed at any time following the date of the conviction, and more than one conviction may be set aside. MCL 780.621(7).
 - Except for human trafficking offenses, a person generally may proceed with expungement under two circumstances: (1) the person has no more than one felony and two misdemeanor convictions, or (2) the person has no more than two misdemeanor convictions. If either of these exceptions apply, proceed to the next question.
8. Effective January 12, 2015, deferred convictions (whether a misdemeanor or a felony) under the following statutes are considered a misdemeanor conviction in determining eligibility for expungement:
- MCL 436.1703 (purchase, consumption, or possession of alcoholic liquor by minor)
 - MCL 600.1070 (admission into drug treatment court) and 600.1209 (veterans treatment court)
 - MCL 762.13 (assignment as youthful trainee under the Holmes Youthful Trainee Act) or 769.4a (domestic violence)
 - MCL 333.7411 (controlled substances)

- MCL 750.350a (taking or retaining child by adoptive or natural parent) or 750.430 (licensed health care professional engaging in practice with unlawful bodily alcohol content of .05 or more or under the influence of a controlled substance)
- any other Michigan state or local law similar in nature and applicability to those listed above that provides for the deferral and dismissal of a felony or misdemeanor charge

MCL 780.621(2).

- *Caution:* Be forewarned, however, that, in deciding whether to grant the expungement petition, the court may consider negatively any previous convictions that have already been set aside.
 - If the person is still within the limit for convictions under MCL 780.621(1), proceed to the next question.
9. Has it been at least five years since any of the following occurred last?
- imposition of the sentence for the conviction that the person seeks to set aside
 - completion of probation imposed for the conviction that the applicant seeks to set aside
 - discharge from parole imposed for the conviction that the applicant seeks to set aside
 - completion of any term of imprisonment imposed for the conviction that the applicant seeks to set aside
 - If *no*, you may not yet expunge the conviction. MCL 780.621(5).
 - If *yes*, proceed to the next question.
10. Are there any other criminal charges pending?
- If *yes*, you may not expunge the conviction. MCL 780.621(8)(f).
 - If *no*, proceed to the next question.
11. Are you still not sure of the person's criminal history? You can order Michigan criminal history records online with a credit card using the Internet Criminal History Access Tool.

Understand the Effect of Expungement

In general, once a conviction is set aside under the expungement statute, the person whose record has been expunged is legally considered not to have been convicted of a crime. For example, the person may honestly answer “no” if a potential employer asks, “Have you ever been convicted of a crime?”

That should be the end of the matter. In Michigan, most employers may not legally ask about criminal history that did not result in a conviction. *See* MCL 37.2205a. But there are exceptions that may cause a criminal history to haunt a person after expungement.

First, bear in mind that only the conviction has been expunged. The expungement process does not erase the arrest or the court proceedings. Accordingly, even after expungement, some employers may inquire beyond the matter of whether there is a criminal conviction and require an applicant to disclose an arrest, a plea of guilty or no contest, or a finding of guilt by a judge or jury. Many employers are specifically authorized by statute to conduct criminal history checks, and certain government or law enforcement agencies are not bound by whether a conviction was obtained.

Also, employers in other states may be bound by different laws than are Michigan employers, and they may be allowed to ask about arrests that did not result in conviction. There is no law that prohibits licensing agencies from holding an arrest record against a person, including medical, legal, financial, and even horse-racing licenses. Colleges and graduate schools are free to ask about anything to do with one's criminal history and often do. Landlords may ask about arrests on rental applications. Finally, expunged convictions are still considered convictions for purposes of immigration deportation, may not affect a Secretary of State abstract, will not alter registration as a sexual offender, and may be considered in sentencing if the person is ever convicted of another offense. See MCL 780.622 for other things unaffected by expungement.

Regardless of the law governing what may be asked about criminal history, anyone with \$10 can obtain a person's criminal history from the MSP website, Internet Criminal History Access Tool, which may still reveal the arrest.

Once again, a person whose conviction is expunged may only answer "no" to the question "Have you ever been convicted of a crime?" If an application inquires into the fact of arrest or regarding criminal dispositions taking place before expungement, your client may need to obtain separate legal advice as to whether the question may legally be asked, and if so, how to answer it. If a person does ever need to explain the circumstances of an expunged conviction, the best advice is to handle it the same way as the expungement hearing before the judge and to be prepared with strong evidence of rehabilitation since the crime occurred.

Despite the reality of expungement's limited protection, successfully setting aside a conviction can go a long way toward helping a person find employment and otherwise have a fresh start in life.

Forms

Application to Set Aside Conviction

Order on Application to Set Aside Conviction