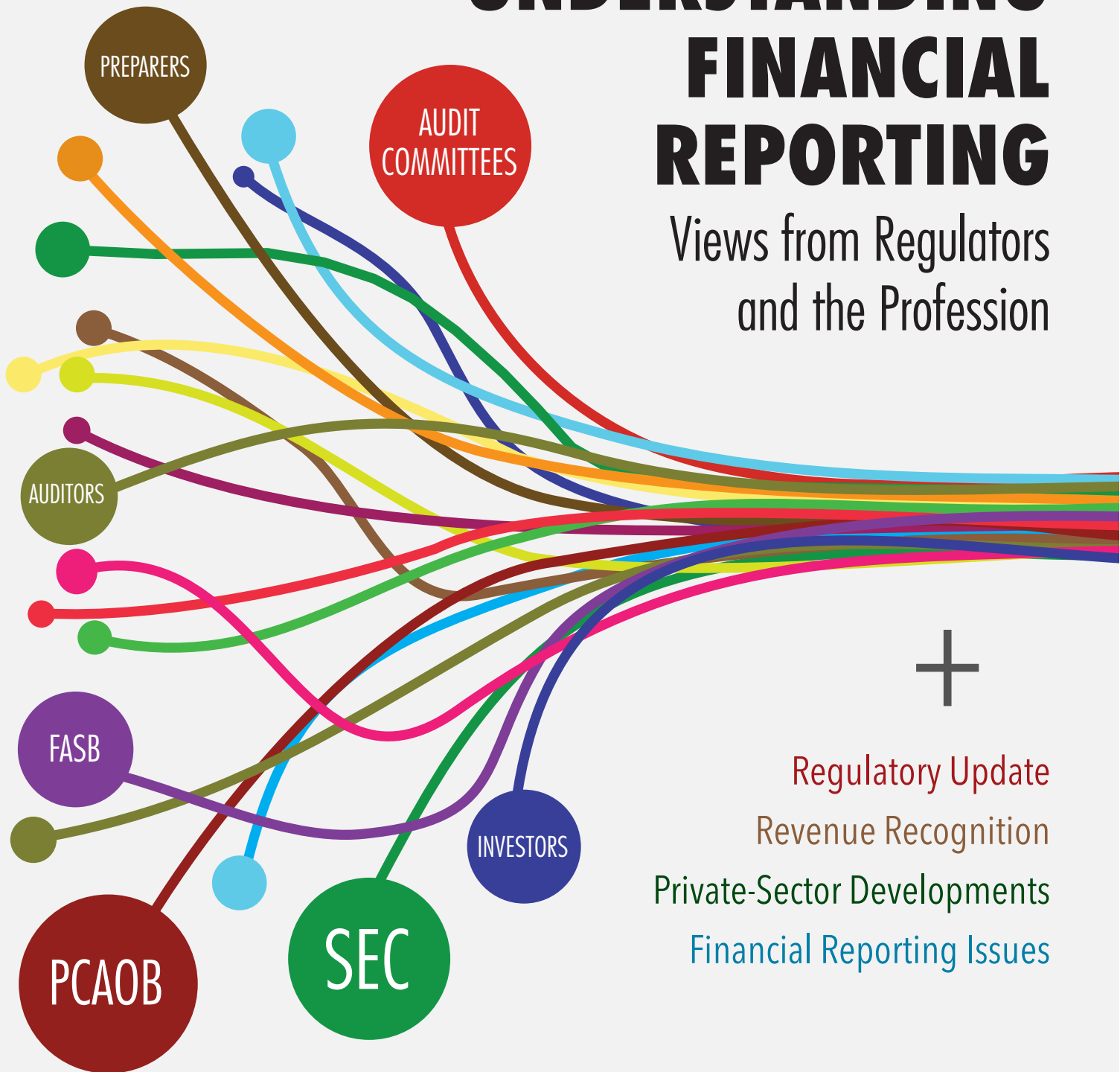


# The CPA Journal

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# Erasing the Big Mistake

## *Sealing Records of Criminal Convictions for Licensed Professionals*

By Sharon P. Stiller and  
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As a teenager, John D. was wild. At age 19, he was caught in a car with drugs and convicted of criminal possession of a controlled substance. Instead of being issued a long prison sentence, he was given an opportunity to change his life—he was sentenced to complete a residential drug treatment program and a term of probation. This allowed John to get the help he needed. After he fulfilled his court mandate, he graduated from college with a bachelor's of science degree in accounting. Now, years after his misstep, he has started to seek employment as a junior accountant; however, his past continues to haunt him. Every application to a large firm (and some small ones) contains the dreaded words, "Have you ever been convicted of a crime?" John worries that he'll never be able to rise to the top level in his profession because of a mistake he made in his youth.

Does an encounter with the law for a nonviolent offense have to put a stain on one's record, particularly when that individual seeks to enter a licensed profession? The answer is a resounding no to those who are familiar with the protections provided by New York's Criminal Procedure law, which permits sealing conviction records for some defendants who participate in certain treatment programs.

### **Background**

John could have taken advantage of this record-sealing protection following his arrest by participating in a qualifying judicially sanctioned treatment program. But he can also take advantage of the sealing protection later, when he realizes the impact the conviction has on his chances of obtaining a desired license or job. Even if John knew nothing about the statu-

tory protection at the time of his arrest, he might be eligible for record sealing later if he voluntarily participated in a qualifying program following his arrest and has subsequently lived a law-abiding life.

In *People v. Brocki*, 2013 WL 6360628, 2013 N.Y. Slip Op. 23409 (2d App. Term 2013), the appellate term reversed the criminal court's decision of ineligibility because the movant entered treatment

victed of any misdemeanor or felony, the sealed conviction becomes unsealed permanently under CPL section 160.58(8). [It appears that unsealing will occur by operation of law if a person is arrested for any misdemeanor or felony; however, a misdemeanor or felony arrest that results in a noncriminal conviction (disorderly conduct or a traffic infraction) will trigger the resealing by operation of law.]

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voluntarily without a judicial order and the program was not judicially sanctioned. The appellate court ordered a hearing to determine whether the defendant's program was "similar in terms of duration and intensity" to judicial diversion programs, which "would make him eligible to have the records in question sealed."

New York Criminal Procedure Law (CPL) section 60.58 permits a court to seal all official records and papers relating to an individual's arrest, prosecution, and conviction that led to their participation in a judicially sanctioned drug treatment program. Sealing the record also enables the court to seal up to three prior eligible misdemeanors [see CPL section 16058(2)].

In the example above, John's criminal conviction could be sealed because he participated in a judicially sanctioned or similar drug treatment program; however, the sealing is conditional. If John is again con-

Short of executive clemency, CPL section 160.58 is the exclusive remedy for having a record "expunged" in New York State. If John is already a licensed CPA, he might be required under the state licensing laws to report the conviction. Once a sealing order is obtained, it would be relevant to militate against the fact of the conviction in connection with a determination of whether John has engaged in unprofessional conduct. For example, the Rules of the Board of Regents [section 29.10, subdivision 14(e)] of the New York State Education Department define conviction of a felony or misdemeanor as "reportable events," and provide that failure to report within 45 days is "unprofessional conduct."

If John's conviction is sealed, he would be protected by New York Executive Law section 296(16); the sealed conviction could not be used as a basis for an adverse employment decision, nor could an employ-

er inquire about such a sealed conviction. [See New York Executive Law section 296(19); see also *Clemons v. Wellpoint Companies Inc.*, 2013 WL 1092101 (N.D.N.Y. 2013), 11.] Furthermore, no applicant is required to divulge information relating to a CPL section 160.58 sealing. This puts a conditionally sealed offense on the same level as an acquittal after trial or a plea to a noncriminal offense, such as disorderly conduct. (See also CPL sections 160.55, 160.50.) People in a similar situation as John, who have truly shown a commitment to successful rehabilitation, stand to benefit greatly from this sealing relief.

### The Statute: CPL Section 160.58

On April 7, 2009, then-Governor David Paterson signed into law the Drug Law Reform Act of 2009, which included the provision for conditional sealing pursuant to CPL section 160.58. This retroactive sealing provision went into effect on June 6, 2009, and is the first conditional sealing statute enacted in New York.

At the time of this article's publication, the conditional sealing statute is only available for certain convictions, namely any article 220 (controlled substance) or article 221 (marijuana) misdemeanor or felony offenses, including both sale and possession [see CPL section 160.58(1)]. In addition, conditional sealing is available to a person who has been convicted of those offenses listed in CPL section 410.90(3), commonly known as "Willard" offenses. ["Willard is a Drug Treatment Campus (DTC) operated by the NYS Department of Correctional Services (DOCS) in collaboration with the Division of Parole and the state Office of Alcohol and Substance Abuse Services (OASAS). . . . The Willard program was created as an intermediate sanction—with teeth—to deal with the problem of relapse," <http://www.oasas.ny.gov/cj/programs/Willard.cfm>.] These include non-violent felonies for crimes such as grand larceny, possession of stolen property, and other related substance abuse motivated crimes. Interestingly, a literal reading of CPL sections 160.58 and 410.90(3) would seem to allow the conditional sealing of a felony grand larceny conviction but not provide the same sealing for the conviction of misdemeanor petit larceny.

If the individual was convicted of one of these offenses or is facing prosecution

for one of these offenses, the defendant might wish to take advantage of the ability to participate in a judicially sanctioned drug treatment program, successful completion of which is a precondition to obtaining the benefit of sealing. CPL section 160.58 requires that the defendant participate in a drug treatment program prescribed by statute, which includes a judicial diversion program pursuant to CPL article 216; a drug treatment alternative to prison (DTAP); or a judicially sanctioned drug treatment program of similar duration, requirements, and level of supervision [CPL section 160.58(1)].

Finally, the defendant has to complete the program and all other aspects of the sentence in order to obtain the sealing benefit [CPL section 160.58(2)(c)]. This typically requires either the favorable termination of probation or the passing of the period of conditional discharge, which is either one year from the date of sentencing for a misdemeanor or three years for a felony [see New York Penal Law section 65.05(3)]. Other than this minimum "waiting period," there is no requirement that the motion be filed within a certain time period.

### No Discrimination if Record Is Sealed

Upon the granting of an application for conditional sealing pursuant to CPL section 160.58, the court will order that "all official records and papers relating to the arrests, prosecutions, and convictions, including all duplicates and copies thereof, on file with the division of criminal justice services or any court shall be sealed and not made available to any person or public or private agency," except—

- the defendant or defendant's agent;
- any qualified agencies defined in N.Y. Executive Law section 835(9) (e.g., Office of Court Administration, Department of Probation, district attorneys' offices), but only when acting within the scope of their law enforcement duties;
- any law enforcement agency or agency responsible for issuing gun licenses with respect to an application for such license; and
- any employer of police or peace officers with respect to an application for employment [CPL section 160.58(6)].

As such, conditional sealing truly masks a blemish on a person's record, unless the applicant subsequently becomes the sub-

ject of a criminal investigation, applies for a pistol license, or seeks employment in law enforcement.

New York law specifically protects an applicant or employee from any repercussions as a result of a sealed conviction. The New York Human Rights Law provides that it is an unlawful discriminatory practice to inquire about or act adversely to an individual whose records have been sealed pursuant to CPL section 160.58 [see N.Y. Executive Law section 296(16)]. Similarly, this protective law does not require an individual to divulge information pertaining to a sealed record. Consequently, applicants can be safely advised they do not need to check the box on the job application that causes so many convicted persons to be declined employment.

### Practical Benefits

New York has recognized in several ways that being convicted of a crime can have a lasting effect on an individual seeking employment or licensure. New York's public policy is to protect a convicted offender from adverse consequences, unless there is a direct relationship between the job and the conviction or the conviction indicates a danger to persons, the public, or property (see N.Y. Corrections Law section 752). Even then, employers must review a variety of factors, such as the age of the offense, the age of the offender when the crime was committed, the seriousness of the offense, and whether there was a certificate of relief from civil disabilities, among other matters (see N.Y. Corrections Law section 752).

The legislature has provided the judiciary with a means of rewarding those who have changed their lives by protecting them from a major barrier to successful employment—an unsealed criminal conviction. Licensed professionals who fear that they will not be hired if the conviction is revealed should consider taking advantage of the benefit offered by CPL section 160.58. □

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