Sealing Criminal History Records for Convictions under CRS §§ 24-72-701 et seq.

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This article explores the significant changes made in 2019 to Colorado's statutes for sealing criminal history records for convictions and discusses how to address sealing from a practitioner's perspective.

The 2019 legislative session resulted in the most significant changes to Colorado's various statutes addressing the sealing of criminal history records in at least a decade—perhaps since 1977. The new laws, which greatly expand the ability to seal criminal history records, apply primarily to convictions. They also modify the sealing process and alter some effects of a sealed record. This article discusses these legislative changes and their practical implications for practitioners and their clients.[1]

Evolution of the 2019 Legislative Changes

The Criminal Justice Act of 1977 allowed courts to seal all criminal records, including convictions.[2] However, in 1988 the General Assembly reversed course and excluded individuals convicted of offenses from eligibility.[3] In 2008 the tide began to flow the other way, starting with the ability to seal some drug convictions.[4] The General Assembly added the ability to seal offenses committed by human trafficking victims in 2012.[5] Petty and municipal offenses were approved for sealing in 2013.[6] Crimes related to posting intimate photographs on the internet were added in 2014.[7] In 2016, Colorado instituted a simplified sealing procedure that allowed for more rapid and less expensive sealing of many criminal records when charges did not result in a conviction.[8] While significant, all of those changes pale in comparison to the scope of the 2019 amendments and additions, which vastly expand the ability to seal criminal convictions at the misdemeanor and low- to mid-felony levels. Highlights of the new provisions include:

- the ability to seal class 2 and 3 misdemeanors and all drug misdemeanors (two years after final disposition).[9]
- the ability to seal class 4, 5, and 6 felonies, class 1 misdemeanors, and class 3 and 4 drug felonies (three years after final disposition).[10]
- the ability to seal all other eligible offenses (five years after final disposition).[11]
- the continued exclusion of convictions for misdemeanor traffic offenses, traffic infractions, DUI/DWAI, sex offenses, child abuse, domestic violence, cases with extremely aggravated circumstances, Victim Right's Act matters, felony cruelty to animals, and certain other enumerated matters.[12]

The statutory changes are retroactive, applying to "all eligible cases."[13] Aside from the above exclusions, the law creates a path for sealing otherwise ineligible misdemeanors.[14] The law allows sealing of deferred judgments for misdemeanor sex offenses but still excludes a deferred felony sex offense.[15]

Both prosecutors and defense counsel should become very familiar with the 2019 statutory changes. Beyond the criminal sentence, those with convictions face substantial impacts from having a criminal record. For example, criminal conviction records, searchable during the job application process, are frequently a determining factor in employment decisions.[16] Defense counsel should be mindful of the downstream ability to seal a criminal record when negotiating a disposition.

Because the statutory changes now make the records from many resolved cases sealable, counsel should consider their legal and moral responsibility to notify former clients, many of whom may have been previously advised of the legal inability to seal their records.[17] Generations of prior defendants with criminal convictions are now able to seal those records but may not know it.

Sealing Criminal Convictions

The centerpiece of the 2019 legislation is the novel ability to seal misdemeanor and felony criminal convictions.[18] Although the legislation identifies numerous subcategories of crimes that remain ineligible for sealing, the door is now open to seal a significant percentage of previously ineligible convictions. Before 2019, the general rule was that criminal convictions could not be sealed, other than those specifically enumerated by statute.[19] The 2019 changes flip this analysis to a presumption of eligibility to seal, with carve-outs for ineligible categories.

The 2019 legislation sets out a graduated plan allowing for more rapid sealing of lesser offenses with fewer requirements. As the offense level ramps up from less to more serious, so too do the requirements or hurdles to sealing. The lowest level of convictions eligible for

SEALING REQUIREMENTS BY OFFENSE LEVEL

OFFENSE	TIME FROM FINAL DISPOSITION	NOTICE TO DA REQUIRED	HEARING REQUIRED	STANDARD FOR COURT
Petty offense/ drug petty offense	1 year	Yes	No	Shall
Misdemeanors 2–3, drug misdemeanors	2 years	Yes	If DA objects or if the charge is a VRA offense	Shall, if no objection or not VRA offense; otherwise, may
Felonies 4–6, drug felonies 3–4, misdemeanor 1	3 years	Yes	If no DA objection and not a VRA offense, hearing is discretionary; otherwise, hearing is mandatory	May
All other eligible offenses	5 years	Yes	Mandatory	May
Otherwise ineligible misdemeanors; unclear if there are any carve-outs	No longer a threat	DA consent "or" all other requirements must be met; unclear if DA must be notified to proceed with alternative requirements	Unclear; not set forth in the statute	Court must find that the need to seal is "significant and substantial" and public disclosure is no longer necessary to protect or inform the public; unclear whether shall or may, but probably may (discretionary)

sealing, petty offenses and drug petty offenses, can now be sealed one year after final disposition of the case[20] (for practical purposes, when the court's jurisdiction ends; e.g., when probation terminates). For eligible petty offenses, there is no mechanism for a court hearing and sealing is mandatory, as the statute provides "the court *shall* order that the records be sealed . . . ."[21]

By contrast, to seal offenses more serious than a class 4 felony, notice to the district attorney (DA) is mandated, a hearing is required, and sealing is discretionary as indicated by the "may" language in the statute.[22] Offenses from low-level misdemeanors to mid-level felonies fall in between those two poles as indicated in the accompanying chart.

Pursuant to CRS § 24-72-706(1)(c), all sealings require a custodian of records list and a verified criminal history. Victim Rights Act (VRA) offenses, as enumerated in CRS § 24-4.1-302(1), require a hearing under CRS § 24-72-706(1)(f)(II).

The Basic Process

The motion to seal is filed in the criminal case in which the conviction occurred[23]—this is juxtaposed with earlier versions of Colorado sealing statutes in which a new civil case had to be opened to seal a criminal case. That step has been removed except where no case was originally filed in state court.[24]

Notice to the prosecution is required.[25] While the notice requirement is essentially irrelevant for practitioners—electronic filing of a motion to seal will automatically be routed to the prosecution—pro se defendants filing on paper at the courthouse will have to ensure compliance.

All motions require a list of custodians.[26] While this list would obviously include the arresting agency, the prosecution, and the court, practitioners should be aware of less obvious but equally important custodians. Additional custodians could include:

- an alternate detention facility, if a defendant was arrested somewhere other than the county of origin for the case and either bonded there or was extradited;
- public and private probation offices, if probation was transferred at some point during the probation period and multiple probation offices must be notified; and
- pretrial supervision offices.

It is crucial to ensure that all custodians are notified because those not listed and served are under no obligation to follow a sealing order. Practitioners would likely find a client

understandably irate were a background check to reveal the existence of a sealed conviction due to a failure to list and serve all custodians.

Because the statute applies retroactively, defendants may seek to seal some very old cases. These cases may have incomplete records, and clients may struggle to fill in the gaps many years later. To avoid potential client complaints, practitioners are advised to create a written client certification that the client has informed the practitioner of all known custodians. Then, if an unanticipated custodian is missed, the practitioner has some coverage. This is particularly important where the attorney did not originally represent the client in the case being sealed.

For those unsuccessful in their first attempt to seal, the law mandates a 12-month wait before another petition can be filed.[27]

Determining Eligibility

The statute charges the court with conducting an initial review for eligibility,[28] which is based on a facial reading of the motion and allows the court to take judicial notice of matters outside the motion.[29] The statute does not delineate the additional matters that may be considered, but at a minimum, the initial review necessarily involves examining whether

- the requisite time period has passed for sealing for the most serious crime being sealed;
- the defendant owes restitution, fines, court costs, late fees, or other fees ordered in the case, unless the order was vacated;[30] and
- the defendant was convicted of a criminal offense "since the date of final disposition of all criminal proceedings against him or her or since the date of defendant's release from supervision, whichever is later."[31]

If the defendant does not meet the statutory requirements for any of these factors, sealing will be barred.

As to the criminal record, the statute requires provision of the appropriate record, at the petitioner's expense. The record must be no staler than 20 days old at the time the petition to seal is filed and must be lodged with the court no later than 10 days after the filing of the petition.[32] The state court website provides instructions on obtaining the background check from the Colorado Bureau of Investigations (CBI).[33]

> "Thus, counsel on both sides must consider the strategic implications of the timing of convictions and how that could later affect eligibility to seal a criminal conviction. But regardless of how the parties strategically approach this issue, a plea agreement cannot include a waiver of the right to seal, which the statute specifically prohibits."

CRS § 24-72-706(1)(f) does not address the less obvious nuances of the criminal background check requirement. One implication is that the requirement that a defendant have no new convictions seemingly only applies to the record being sealed. This indicates that a petitioner might have an older record that would not bar sealing the newest case in time. And because the only requirement vis-à-vis the sealing is that there be no new "conviction" after the case concludes, a new conviction accrued during a defendant's probationary/supervision period is potentially affected. For example, a defendant on probation who receives one or more new convictions during the probationary period could potentially have all his or her records sealed after the supervision period ends and after the requisite time frame.

This is a real-world issue, as probation generally does not end while a pending new case exists. Generally, when a new crime is alleged during a probationary period, a probation violation complaint is filed, which effectively tolls the probationary period until resolution of the entire circumstance—the new cases and the probation violation. Thus, someone could accumulate new cases and convictions during probation, all of which might eventually be eligible for sealing. Often, a global disposition is reached resolving both the probation violation and the new law violation. If those violations are resolved simultaneously, the statute seems to leave open the possibility of sealing both at a later time.

This raises practical considerations for criminal lawyers. For the defense attorney looking at the client's entire record, an agreement resolving a probation violation and new cases simultaneously seemingly leaves the door open for sealing multiple convictions at a later time. For the prosecutor who determines that a particular record should not be sealed, ensuring the conclusion of one case before another would be important. This could be accomplished by terminating probation unsuccessfully in the first matter and subsequently resolving the second matter, so that the first-in-time case could not

later be sealed. Thus, counsel on both sides must consider the strategic implications of the timing of convictions and how that could later affect eligibility to seal a criminal conviction. But regardless of how the parties strategically approach this issue, a plea agreement cannot include a waiver of the right to seal, which the statute specifically prohibits.[34]

Another implication arises where a more recent crime resolves without a conviction, such as by way of a diversion or a deferred judgment. This could preserve the eligibility to seal the older case. For example, a defendant could have a prior conviction that would otherwise be eligible for sealing, absent a new conviction. During the negotiation process for the newest case, both the prosecutor and defense counsel should be aware of the import of their negotiations on the eligibility to seal such prior conviction. For some defendants, particularly those whose older and previously sealable matter was a felony, it could be worthwhile to make concessions when negotiating the new case to maintain eligibility to seal the conviction. Such concessions might include incarceration or harsher sanctions. Prosecutors should be aware of these considerations and decide whether it's desirable to allow particular defendants to preserve their eligibility to seal.

The Hearing

If the court preliminarily determines eligibility, it must proceed as set forth for each level of crime as indicated in the accompanying chart.

For petty offenses and petty drug offenses, the court "shall" seal the record. The statute does not establish any mechanism for a hearing or prosecutorial objection, nor does it provide a balancing test for the court. Court discretion and hearings enter the picture at the next offense level up.

For class 2 or 3 misdemeanors and all drug misdemeanors, the statute allows for prosecutorial objection. But if there is no objection from the DA, the process works the same as for petty offenses. Sealing appears mandatory, and no hearing or court discretion is afforded. However, if the prosecutor objects, or a victim in a VRA case requests a hearing, the court must hold a hearing. The standard at such a hearing is the succinctly stated "privacy balancing test" enunciated in *D.W.M. v. District Court County of Pitkin*.[35] This same test applies for many of the offenses discussed below and requires the court to determine whether "the harm to the privacy of the defendant or the dangers of unwarranted, adverse consequences to the defendant outweigh the public interest in retaining public access to the conviction records."[36] The court is charged with considering "at a minimum" (1) the severity of the offense to be sealed, (2) the defendant's criminal history, (3) numbers and dates of convictions the defendant seeks to seal, and (4) the need for a government agency to maintain the records.[37] This directive implies that more factors may be considered, though what "more" might entail is not defined.[38]

Class 4, 5, and 6 felonies, level 3 or 4 drug felonies, and class 1 misdemeanors also have a split procedure.[39] In the absence of DA objection, and if the VRA is not implicated, the court may grant the matter "with or without a hearing."[40] If there is a prosecutorial objection or a VRA victim request for hearing, a hearing must be held and the privacy balancing test applied.[41]

If there is a request to seal any other matter, a hearing is required and the court must apply the privacy balancing test.[42] It is unclear which crimes fall within the "any other offense language,"[43] because the CRS § 24-72-706(2)(a) exclusionary list removes most higher level felonies from consideration. Drug felony level 2 crimes are not on the exclusion list, so presumably crimes at that level could be sealed under this catchall section. All class 1 to 3 felonies under CRS Title 18 and drug felony level 1 crimes are excluded and thus not eligible for sealing.[44] The statute contains a smattering of unclassified felonies related to the Air Quality Control Program,[45] most of which the average criminal practitioner will never encounter. Perhaps the legislature was referring to these obscure crimes when it inserted the "any other offense" section.

For those attempting to seal otherwise ineligible misdemeanors, there is not yet any explication of the multipart standard that must be proven by the petitioner where the prosecution does not consent.[46] The statute mandates the familiar clear and convincing standard but then nebulously requires proof that the petitioner's need for sealing is significant and substantial, the passage of time is such that the petitioner is no longer a threat to public safety, and public disclosure is no longer necessary to protect or inform the public.[47] Because the offenses seemingly covered by this subsection are for significant matters such as prior DUIs and misdemeanor domestic violence, litigation will likely ensue that may clarify the contours of this area. Pioneers into this new territory will have to strike out into the unknown and see what results they achieve.

Relevant Legal Authority

To date, there is no appellate case law interpreting the 2019 statutory changes. *Robertson v. People*,[48] a 2017 case, addresses the *D.W.M.* privacy balancing test from the perspective of sealing a deferred judgment. In *Robertson*, the Court of Appeals reversed and remanded, due in part to an insufficient trial court record reflecting how the court weighed and considered the *D.W.M.* factors. The takeaway for practitioners and trial courts is that findings must "reflect adequate consideration of the pertinent factors,"[49] which must include at least the enumerated statutory list and may also take into account such factors as "the strength of the government's case . . ., the petitioner's age and employment history, and the specific adverse consequences the petitioner might suffer if the records were not sealed."[50]

While this is not a particularly detailed roadmap for sealing hearings, it reflects the current dearth of explanatory case law on the topic. Since 1988, this area of the law has engendered little dispute, which makes sense from a practical perspective. Matters previously subject to sealing included those that prosecutors already deemed worthy of a significant reduction in consequences, such as deferred judgments. If a prosecutor previously made the decision not to saddle a defendant with a conviction—knowing that sealing was a likely outcome upon successful completion—that same prosecutor would be unlikely to later oppose sealing. But this analysis has significantly changed. Now, with defendants eligible to seal a host of previously ineligible charges

and convictions, prosecutors may be far less willing to accede to motions to seal, and the number of contested hearings could increase. This may ultimately result in a more robust case law analysis of this legal niche.

Impacts of Sealing

Sealing a criminal conviction neither vacates the conviction[51] nor operates as a pardon. There is no reason to believe that, under Colorado law, sealing a conviction would restore the right to possess a firearm or act as a prophylactic to the charge of possession of a weapon by a previous offender.[52] Federal law also does not offer a safe harbor in this regard as it defines a conviction by reference back to the original jurisdiction—"what constitutes a conviction . . . shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."[53]

To the extent that a sealed conviction was a predicate offense as part of a compounding situation, sealing also provides no protection for a defendant's future behavior; for example, a first public indecency conviction is a petty offense and a second is a class 1 misdemeanor,[54] and a fourth misdemeanor domestic violence case can be prosecuted as a felony.[55] Because sealing does not vacate the conviction for the prior offense, nothing suggests that a subsequent matter would not be eligible for prosecution at whatever enhanced level the statutes might allow.

Further, the 2019 legislation mandates unsealing if a new conviction is entered after sealing the former matter.[56] While there is no statutory mechanism to accomplish unsealing, presumably prosecutors will be able to spot new cases and inform the court in their jurisdiction and their colleagues in other jurisdictions as to the need to unseal a specific matter. Defense attorneys likely now have an obligation to advise clients with sealed matters who have a new case that a consequence of conviction would include unsealing the older matter. The statute also includes a provision that allows a member of the public to petition for unsealing of the record by showing that some new circumstance now affects the result of the balancing test.[57] How the public would know about the sealed conviction unless the matter was a VRA case is unclear.

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While it may be self-evident and common sense, sealing is only effective as to those entities who are served with the sealing order and therefore must comply. This includes criminal justice agencies such as the court, prosecutor, and investigating law enforcement agencies, and can also include a private custodian in the business of providing this type of information to others,[58] such as a private background check agency. The easiest way to test the effectiveness of the sealing is to purchase a private background check, post-sealing, from an entity that draws from multiple potential sources. If the check comes back clean, that is a reasonable indication that the conviction at issue was not picked up by private sources. If the check comes back with hits from private background check agencies, the sealing order must be served on each to gain their compliance. It is better to expend the effort on a background check shortly after sealing than to have a client surprised later by a job rejection when a sealed conviction pops up in a search.

Unfortunately, testing a sealing in this way does not handle social media postings about the sealed conviction. Not much can be done in this arena. Social media postings, whether self-initiated by the defendant or posted by others, are difficult or impossible to remove. Once information is out in the digital world, it probably cannot be reversed. Therefore, it's good practice to advise every client at the inception of a criminal action to not post anything to social media platforms. This is not a complete shield from later social media checks by prospective employers and others, but it is probably the most effective offense.

News articles are similarly hard to deal with. The press, for good reason, is protected by the First Amendment and can publish factual articles about ongoing criminal cases, whether they result in a conviction or not. These remain searchable later and could prejudice a defendant, even one who has a sealed conviction. This is no less true for the defendant who is acquitted and otherwise resolves a case short of conviction and has the matter sealed.

While sealing a conviction does not erase many vestiges of prior conduct, it still carries significant benefits that make sealing worthwhile. The most obvious benefit is that "employers, state and local government agencies, officials, landlords, and employees [can]not require an applicant to disclose any information contained in sealed conviction records in any application or interview or in any other way" and the applicant does not have to disclose the sealed conviction in response to questioning.[59] The applicant may actually dissemble, stating that he or she was never convicted.[60] And an applicant cannot be denied solely for refusing to disclose a sealed conviction record.[61]

While this provision allows the applicant's nondisclosure, it offers no protection from disclosure of an applicant's conviction by another source such as social media, which a potential employer could then consider anyway. This situation makes it even more crucial to ensure, to the extent possible, that all traces of the sealed conviction are removed from possible searchable sources.

Finally, there are sealing exceptions for (1) Colorado bar examiners, allowing them to

inquire as to bar applicants about all sealed arrest and criminal records that come to their attention "through other means," and (2) for the state Department of Education, allowing it to inquire as to records regarding pending sealings for licensed educators or applicants for an educator's license.[62] Sealed records can also be used for a variety of criminal justice purposes as outlined in the statute.[63] This list is so extensive that it essentially negates the sealing for criminal justice purposes.

Conclusion

The 2019 statutory changes regarding sealing criminal convictions expanded the types of convictions subject to sealing. These changes are intended to help defendants regain some privacy and dignity and enhance their employability. But the statutes leave open a number of substantive and procedural questions. Future case law will likely provide practitioners additional guidance on the requirements for sealing criminal records. In the meantime, counsel on both sides must carefully consider the implications of sealing in each case. CL

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NOTES

1. This article does not comprehensively address sealing of records for matters not resulting in convictions because the statute has remained relatively consistent in that regard since 2016, notwithstanding some recodifying. *See generally* CRS §§ 24-72-701 et seq.
2. Ch. 340, sec. 1, § 24-72-308, 1977 Colo. Sess. Laws 1249.
3. Ch. 190, sec. 3, § 24-72-308, 1988 Colo. Sess. Laws 979.
4. Ch. 393, sec. 2, § 24-72-308.5, 2008 Colo. Sess. Laws 1938.
5. Ch. 174, sec. 7, § 24-72-308.7, 2012 Colo. Sess. Laws 623.
6. Ch. 289, sec. 10, § 24-72-308.9, 2013 Colo. Sess. Laws 1544.
7. Ch. 283, sec. 3, § 24-72-709, 2014 Colo. Sess. Laws 1166.
8. CRS § 24-72-702.5 (repealed).
9. CRS § 24-72-706(1)(b)(II).
10. CRS § 24-72-706(1)(b)(III).
11. CRS § 24-72-706(1)(b)(IV).
12. CRS § 24-72-706(2)(a).
13. CRS § 24-72-706(3).
14. CRS § 24-72-706(2)(b).
15. CRS § 24-72-703(12)(d)(II).
16. Leasure and Anderson, "Recognizing Redemption: Old Criminal Records and Employment Outcomes," 41 *Harbinger* 271 (Mar. 2017).
17. Courts, probation, and parole must now advise defendants as to their rights concerning sealing. CRS § 24-72-703(9).
18. CRS § 24-72-706.
19. Categories of convictions previously eligible for sealing under pre-2019 statutes included some drug convictions, CRS §§ 24-72-704, -705, and -710; prostitution related records, CRS § 24-702-706; public transportation fair evasion, CRS § 24-72-707; some petty offense and municipal court records (three years after conclusion), CRS § 24-72-708; and some records related to the internet posting of intimate photographs, CRS § 24-72-709.
20. This is a reduction from the three-year requirement in prior legislation. *See, e.g.*, CRS § 24-72-705(b)(I), which allowed for sealing of petty drug offenses three years after final disposition of the case.
21. CRS § 24-72-706 (1)(f)(I) (emphasis added).
22. CRS § 24-72-706(1)(f)(IV).
23. CRS § 24-72-706(1)(a).
24. *But, c.f.*, CRS § 24-72-708 (because no state court case exists when attempting to seal a municipal record, the state opens and then concomitantly seals a state civil action).
25. CRS § 24-72-708(2)(b).
26. CRS § 24-72-706(c).
27. CRS § 24-72-703(3).
28. CRS § 24-72-706(1)(d).
29. *Id.*
30. CRS § 24-72-706 (1)(e).
31. CRS § 24-72-706(1)(f)(I)–(IV).
32. CRS § 24-72-706(c).
33. https://www.courts.state.co.us/Forms/Forms_List.cfm?Form_Type_ID=104. JDF 611 provides downloadable step-by-step instructions, with instructions for locating the necessary forms.
34. CRS § 24-72-703(11).
35. *D.W.M. v. Dist. Ct. Cty. of Pitkin*, 751 P.2d 74 (Colo.App. 1988).
36. CRS § 24-72-706(g).
37. *Id.*
38. *Id.*
39. CRS § 24-72-706(1)(f)(III).
40. *Id.*
41. *Id.*
42. CRS § 24-72-706(1)(f)(IV).
43. *Id.*
44. CRS § 24-72-706(2)(a)(IV)(J).
45. *See, e.g.*, CRS § 25-7-122.1(3)(a) (knowing endangerment of air quality) and CRS § 34-21-106(2) (revealing stamped confidential mine information).
46. CRS § 24-72-706(2)(b).
47. *Id.*
48. *Robertson v. People*, 410 P. 3d 1277 (Colo. App. 2017).
49. *Id.* at 1283.
50. *Id.*
51. CRS § 24-72-703(2)(a)(II).
52. CRS § 18-12-108.
53. 18 USC § 921(a)(20).
54. CRS § 18-7-301.
55. CRS § 18-6-801(7).
56. CRS § 24-72-703(2)(V).
57. CRS § 24-72-703(5)(c).
58. CRS § 24-72-701(8), referring to CRS § 24-72-302(11).
59. CRS § 24-72-703(2)(D)(I).
60. *Id.*
61. *Id.*
62. CRS § 24-72-703(2)(d)(II) (bar examiners) and (III) (Department of Education).
63. *See generally* CRS § 24-72-703.