

Breaking Down Barriers to Record Clearing: *A Survey of the Field*

Prepared by Community Legal Services of Philadelphia
Through the National Record Clearing Project



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CLEARING PROJECT



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Authored by the following Community Legal Services of Philadelphia staff members:

Jessa Boehner, Paralegal

Janet Ginzberg, Senior Staff Attorney

Jamie Gullen, Supervising Attorney

Katie Svoboda-Kindle, Staff Attorney

Thank you to the following survey participants:

Abigail Nicole Parrish
Barbara Griffin
Christine Campbell
Felicia Espinosa
Gwendolyn Washington
Jennifer Cuesta
Kate White
Larri Thatcher
MacKenzie Canniff
Pauline Quirion
Rob Poggenklass
Sara Cherry
Sue Garten
Vinuta Naik

Akil Roper
Brenda Smeeton
Daniel R Kuehnert
Fernando Ferrer
Hollie Petersen
Judy Whiting
Kathryn A. Bushue
Laura Clauson Ferree
Matthew Rosen
Rashida Harmon
Russ Novack
Sarah Whittington
Sunny Jo
Zachary Gautier-Klos

Amy Petkovsek
Brian R. Furgal
Danielle Morales
Gabriel Moses
Jarrell Mitchell
Kate Weaver Patterson
Katina Miner
Linda Renick
Nikki Hunt
Richard Cozzola
Samantha Reiser
Satcha Robinson
Susan Lund

For more information, or to speak with one of the report authors, please contact:

Jessa Boehner, jboehner@clsphila.org

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INTRODUCTION

Clearing criminal records can be life-changing, leading to employment, higher wages, housing, educational opportunities, and more. For the one in three Americans who have a criminal record, record clearing is one of the most important tools to overcoming barriers and accessing opportunity. In the wake of the COVID-19 pandemic, when unemployment rates remain high, it is more important than ever that people are able to get their old and minor records cleared up so they can have the best possible chance to engage in the workforce. Yet research tells us that only about 6.5% of people who are eligible for record clearing through a petition-based process are able to apply for record clearing and make their way through the process.ⁱ

FOR THE ONE IN THREE AMERICANS WHO HAVE A CRIMINAL RECORD, RECORD CLEARING IS ONE OF THE MOST IMPORTANT TOOLS TO OVERCOMING BARRIERS AND ACCESSING OPPORTUNITY.

This “second chance gap” means that even in states with broad eligibility guidelines for record clearing, the vast majority of people who could benefit never will.ⁱⁱ The “second chance gap” has many potential causes, including lack of awareness about record clearing laws and eligibility.ⁱⁱⁱ There are also significant barriers in every state across the country that make it difficult for people to access and navigate the record clearing process to completion, especially without the help of a lawyer.^{iv} While every state varies in its laws and procedures for record clearing, what is consistent throughout the country is that record clearing procedures that rely on individuals initiating petition-based processes are fraught with a variety of challenges and barriers that serve to lock people out of the relief for which they are eligible and desperately need.

These barriers are cumulative, at best making the entire record clearing process longer and more arduous. The longer the time from start to finish, the more discouraging to potential applicants and the more limiting of advocates seeking to maximize the record clearing services they can provide. Moreover, many of these barriers act as hurdles that must be crossed, and failing to clean any hurdle prevents a case from being cleared.

Fortunately, states have also piloted innovative solutions to overcoming these barriers and scaling up record clearing to help thousands, and even millions, more people qualify. From funds that can help people pay filing fees and court fines and costs so they can qualify for record clearing to Clean Slate laws that automate the process of record clearing using technology, there are solutions both large and small that can make a sizable dent in the “second chance gap.”^v

This paper will provide a comprehensive overview of the various barriers and challenges to record clearing that exist in a variety of states, based on a survey of the field of record clearing practitioners. It will also provide key takeaways and recommendations for policy reform.

Advocates can use this paper to see how their state matches up with the rest of the states as to each of the record clearing barriers. Your legislature, courts and district attorneys may think that the way that your state's process is run is the only way; this paper can show otherwise. The paper also serves as a checklist of the barriers, helping you to diagnose the most significant barriers in your process so that you can advocate for the policy solutions to them.

METHODOLOGY

To establish a comprehensive picture of record clearing procedures across the country, representatives from U.S.-based legal aid programs were surveyed. The online survey consisted of 107 possible questions spanning a wide array of topic areas. Both quantitative and qualitative data was collected through a mixture of multiple choice, short answer, and open-ended narrative responses.

Topics Covered

A wide variety of issues relating to record clearing were covered comprehensively in the survey including the following.

- *Access to Records:* Respondents were asked about the process of accessing criminal records in their jurisdiction, including: whether records are available online or in physical form only; which types of records are available publicly; the wait time to receive or access records; and any costs associated with the process.
- *Motions:* The survey collected information about how respondents draft record clearing motions, including the average length of time required for drafting; what technological tools are available; and what types of documents or other information is mandatory to accompany the motion.
- *Standards for Record Clearing:* Survey takers were asked if any subjective information must be included in record clearing motions, such as proof of rehabilitation, and whether prosecutorial objections are permitted.
- *Procedural Barriers:* Information was compiled about various procedural barriers that impede the record clearing process, including pre-hearing reviews, whether in-person or other hearings are required, difficulties with filing, and requirements to serve documents to other parties as part of the process.
- *Fines, Costs, and Fees:* Other survey questions covered associated fines, costs, and fees, including whether fines and costs rendered as part of the case to be cleared must be paid before a case is eligible for clearing, costs related to actually obtaining criminal records or other paperwork needed for motions, and filing fees for the motion.

Overview of the Respondents

Legal representatives from more than 30 states are represented in the survey results, reflecting different parts of the country, rural and urban areas, and a wide array of population sizes. We thank them for their expertise and their time in assisting us.

Responses from the following states are included in the report: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, DC, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, West Virginia, Wisconsin.

FINDINGS

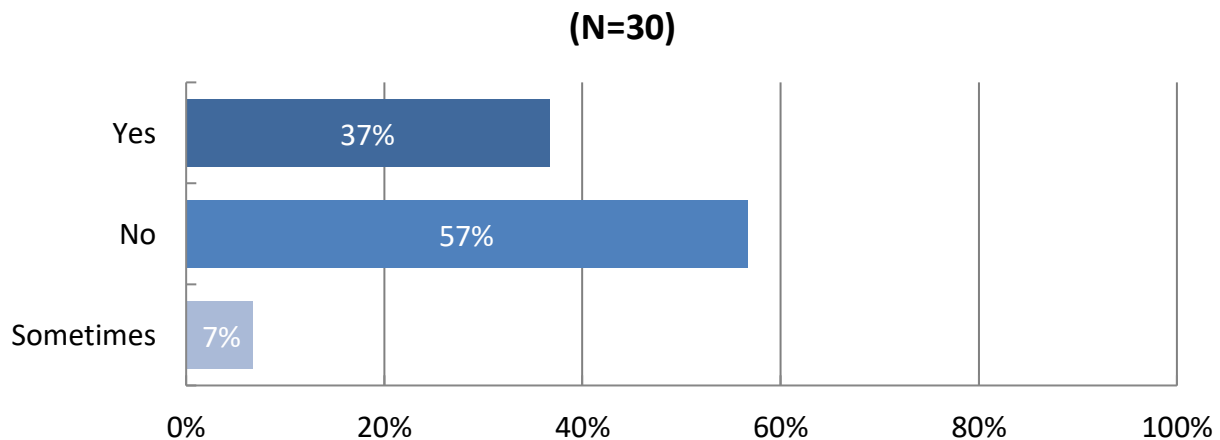
Access to Records

Accessing criminal records is a central part of record clearing work. As a general matter, complete and accurate records are necessary to make an eligibility determination. Without knowing what is on individuals' records, it is impossible to know whether they qualify for record sealing. For this reason, access to records is central to all record clearing work.

ACCESSING CRIMINAL RECORDS IS A CENTRAL PART OF RECORD CLEARING WORK.

Additionally, in some jurisdictions, petitioners are required to provide copies of their records when they file record clearing petitions. According to our survey results, 43% of respondents are required to include official criminal record documents in their record clearing petitions, at least some of the time. (See Table 1.)

Table 1: Are you required to include official criminal record documents with every record clearing petition?



a. Online access

The easiest and most efficient way to access records is through a criminal record database that is free, online, and available to the public. This type of database not only allows attorneys to easily access records, but also for individuals to access their own records. Even before Clean Slate, Pennsylvania's criminal record database allowed for the "Expungement Generator," an automation program used by attorneys to search for records and build petitions using the information scraped from the records.

It is important to note, however, that easily accessible criminal record databases have a dark side. The information in those databases is also readily available to members of the public who can use criminal record data to deny employment, housing, volunteer opportunities and more. According to our survey results, some advocates have decided to forego the benefits of efficient record access in an effort to make records less accessible to the public at large.

Our survey results show that advocates around the country lack access to complete and reliable online records. Sixty (60) percent of respondents stated that they did, at least sometimes, obtain criminal record documents online as part of their practice. (See Table 2.) Twenty-seven (27) percent of respondents said it was not possible at all to view a criminal record online in their state, while 23% said it was "sometimes" possible, and 50% said it was possible. (See Table 3.) Of the 50% who answered "Yes" (that they could view their client's records online), only 40% said that *most* criminal records were publicly available online. (See Table 4.) Consequently, only 20% of total respondents enjoy the ability to have public access to most criminal records online.

Our survey respondents' individual comments about obtaining records helped to explain and contextualize these numerical findings. Many respondents commented that online records were incomplete or inaccurate. Therefore, even when the records were available online, they were required to obtain paper records to make sure their work was accurate. Others noted that only recent records (e.g. from the last 5, 10 or 15 years) were available online, while older records were only available in paper form. This is particularly significant to record clearing work because advocates often clear old criminal records. Where online records are not reliable and complete, they do not significantly decrease the burden of obtaining records.

Table 2: How do you obtain criminal record documents in your area?

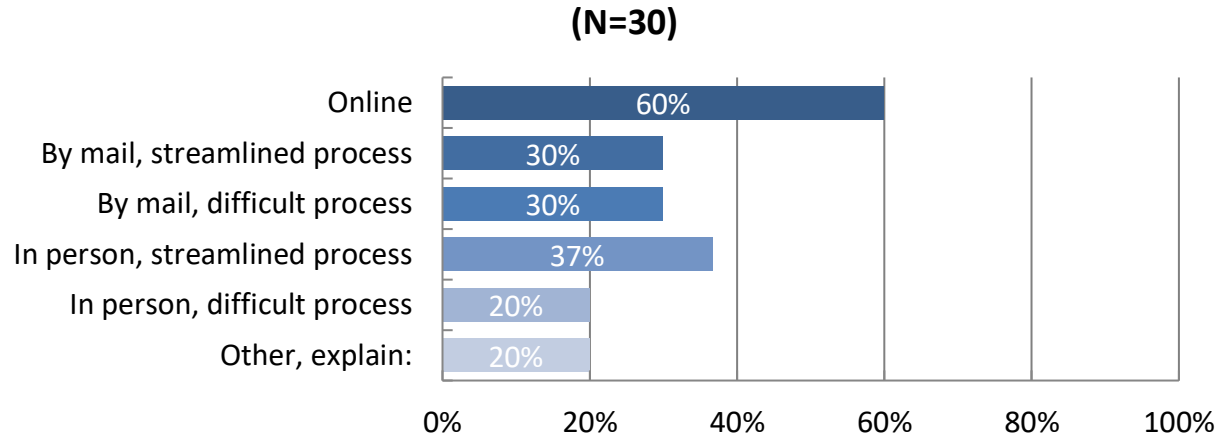


Table 3: Is it possible to view a client's criminal record online in your state?

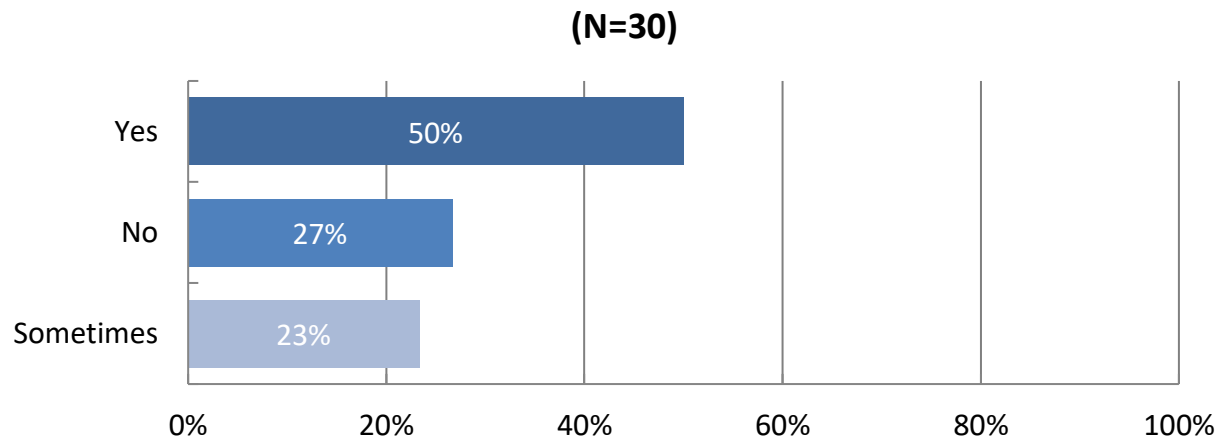
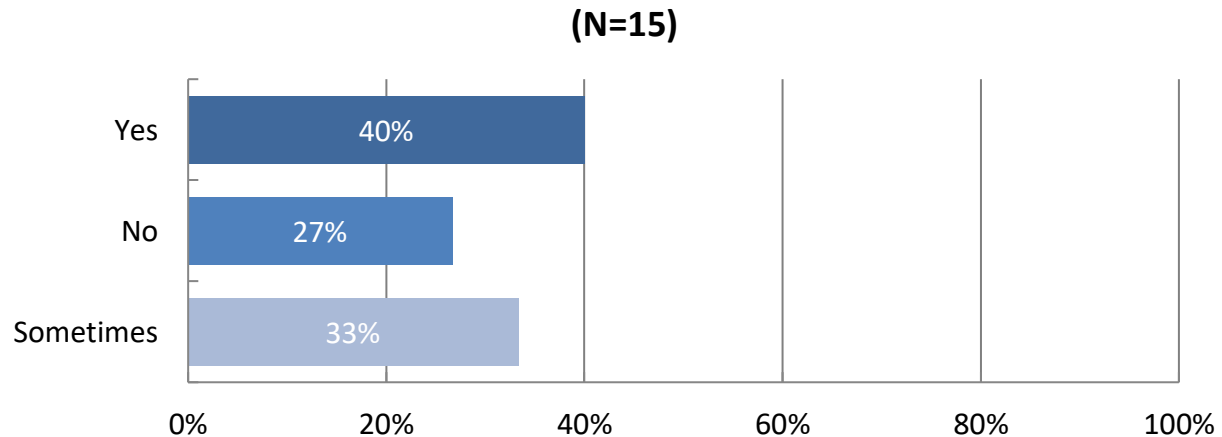


Table 4: For those who answered “Yes” [Table 3: Is it possible to view a client’s criminal record online in your state?], are most criminal records publicly available online?



b. Less online access for those who most need the records

Ironically, obtaining records is an especially burdensome requirement for those who most often need to obtain the records. Out of our total survey respondents, 37% indicated that they were always required to include a copy of official criminal records with their record clearing petitions. (See Table 1.) We will call this 37% the “records-required group.” Our survey results showed that the records-required group has the most difficult time obtaining records, making this a pervasive and significant barrier to record clearing.

The records-required group reported having more difficulty obtaining criminal records than the respondents overall. Only 27% obtain records online, while another 36% get records through a difficult in-person process and 27% get them through a mail-in process. (See Table 5.) The comparison between the records-required group and all respondents is striking: For example, 60% of all respondents can obtain criminal record online, but only 27% of the records-required group can do so. (See Table 6.)

Moreover, within the records-required group, online criminal records appear to be less complete. Only 45% of the group answered “Yes” when asked whether it was possible to view a client’s criminal record online (See Table 7.), and only 20% of those who answer “Yes” said that *most* criminal records were available online (See Table 8). Consequently, only 9% of the records-required group had the ability to access their client’s records online and have public access to most criminal records online.

Table 5: How does the records-required group obtain criminal records?

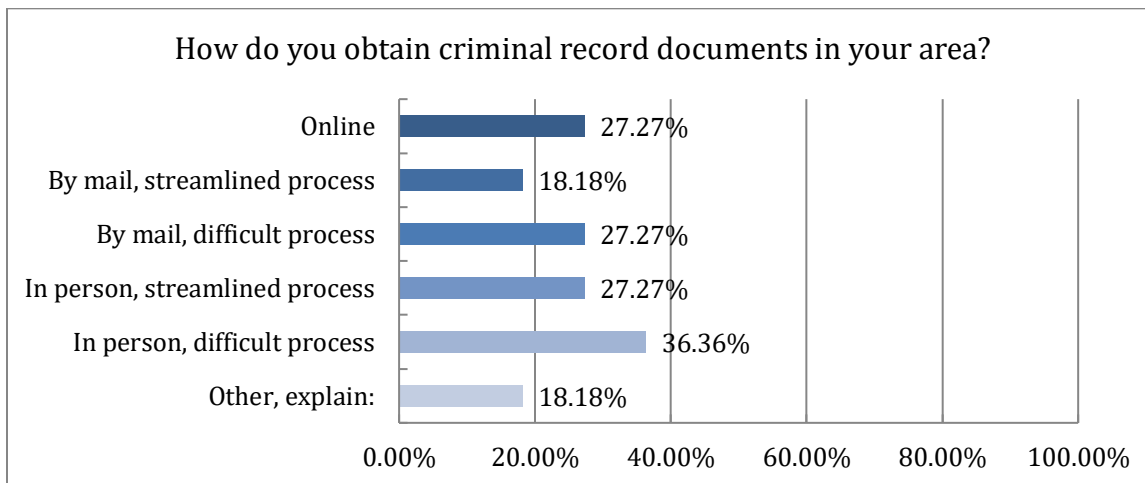


Table 6: Comparison of how records are obtained by all respondents versus the records-required group.

	All Respondents	Respondents who are always required to include official criminal record documents (37% of total respondents)
Online	60	27
By mail, streamlined process	30	18
By mail difficult process	30	27
In person, streamlined process	37	27
In person, difficult process	20	36
Other	20	18

Table 7: Is it possible for respondents in the records-required group to view a client's criminal record online?

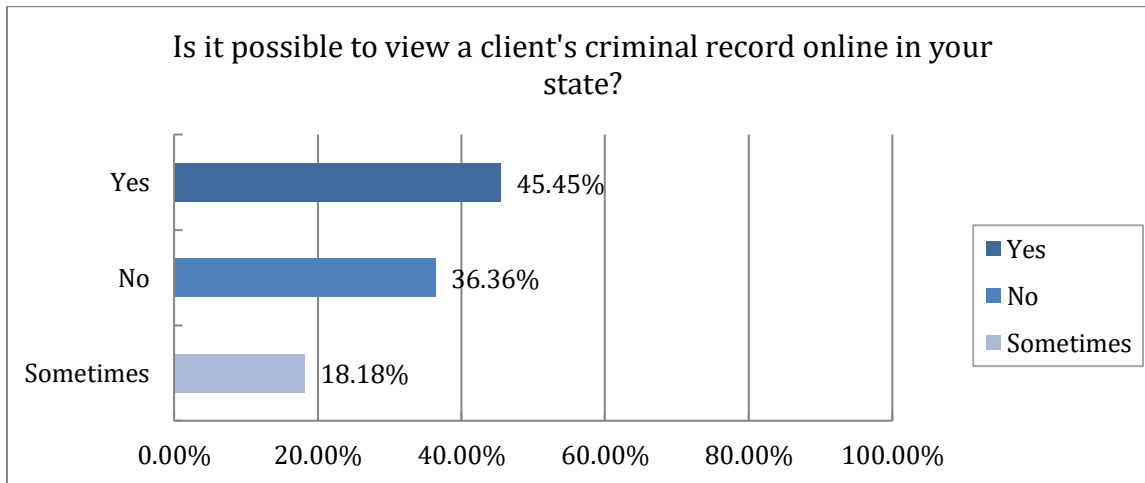
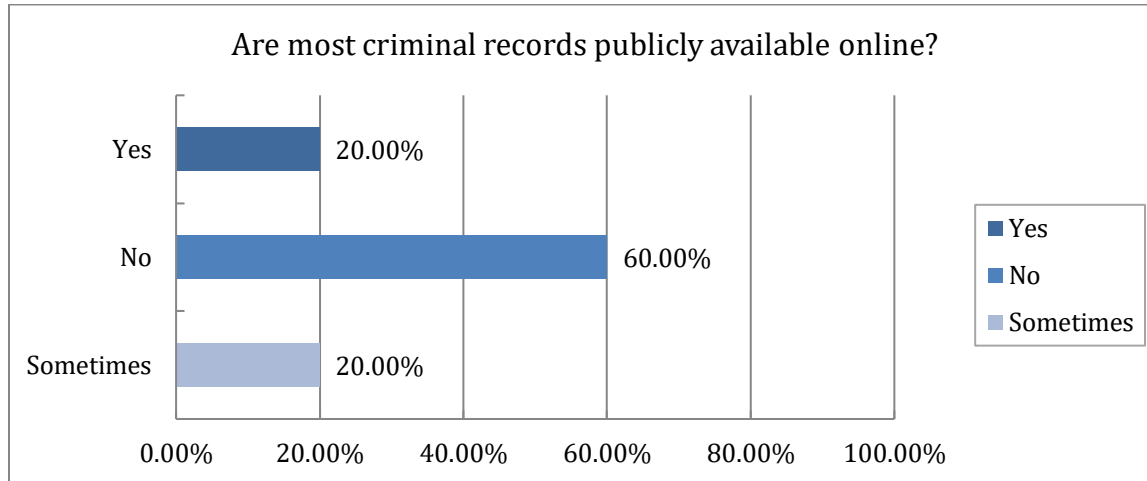


Table 8: For records-required respondents who answered “Yes” above [Table 6: Is it possible to view a client’s criminal record online?], are most criminal record publicly available online?



c. Work hours and delays

Obtaining records can be a difficult and time-consuming requirement for many record clearing advocates, even if they are not required to provide copies of criminal records with their petitions. Our survey results showed that 63% of respondents waited a week or longer, on average, for the documents they needed to file a record clearing petition. Twenty-six (26) percent regularly waited two weeks or more for those documents. (See Table 9.)

Obtaining records is particularly difficult for those who cannot access complete and accurate records instantly through an online database. If we focus on the survey respondents who cannot view their client’s record online, we see that obtaining paper records is a predictably time-consuming process. A full 62.5% of those respondents reported that they regularly waited a week or more for their required documents. (See Table 10.)

Moreover, advocates often spent a significant number of work hours accessing those records, along with other information they need for a petition. Forty-three (43) percent of respondents spent one hour or more collecting documents and information they needed to file a record clearing petition. (See Table 11.) These time-consuming processes are not only problematic because they delay record clearing, but also because a work-intensive motion practice makes it more difficult for advocates to perform record clearing on a large scale.

*OBTAINING RECORDS
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MANY RECORD
CLEARING ADVOCATES.*

Table 9: What is the approximate wait time for the required documents?

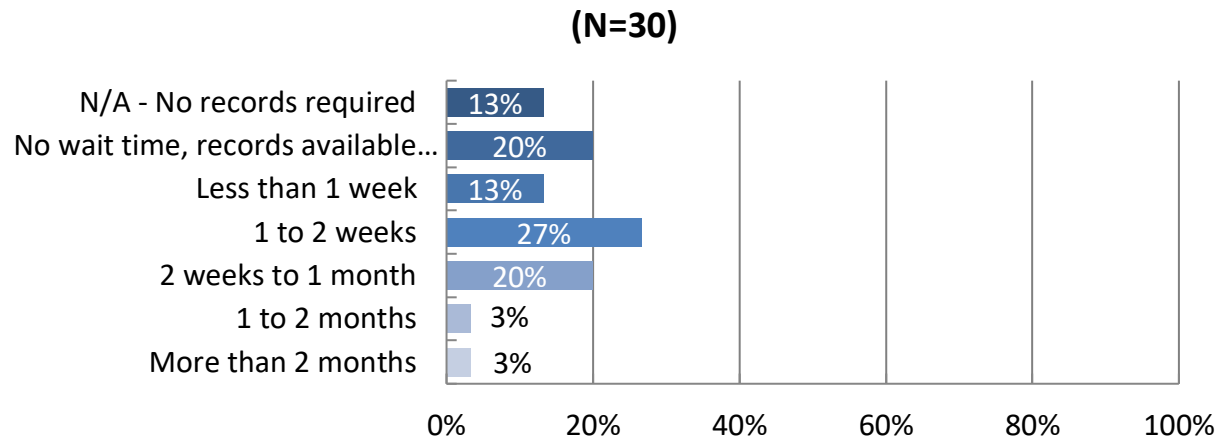


Table 10: For those we cannot view their client's criminal record online, what is the approximate wait time for the required documents?

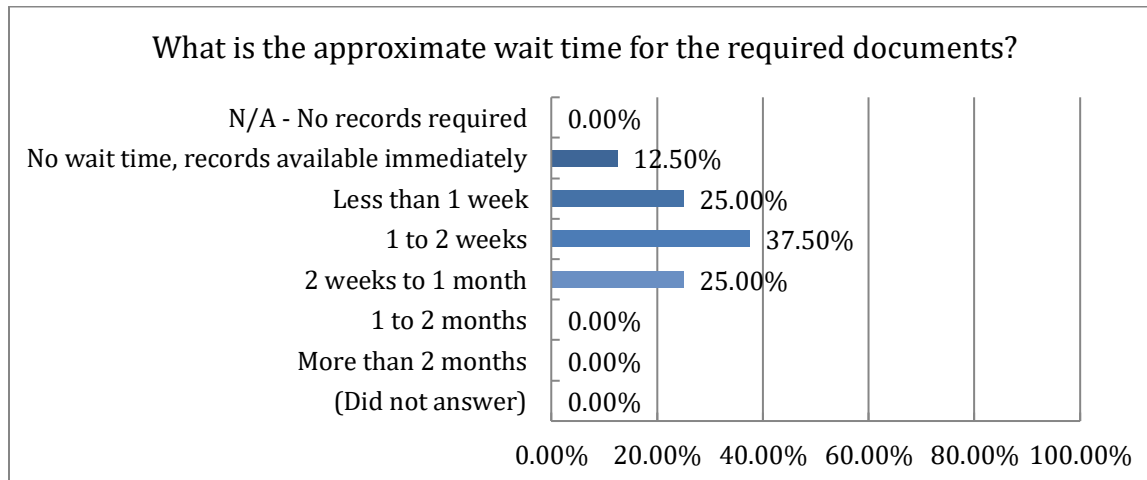
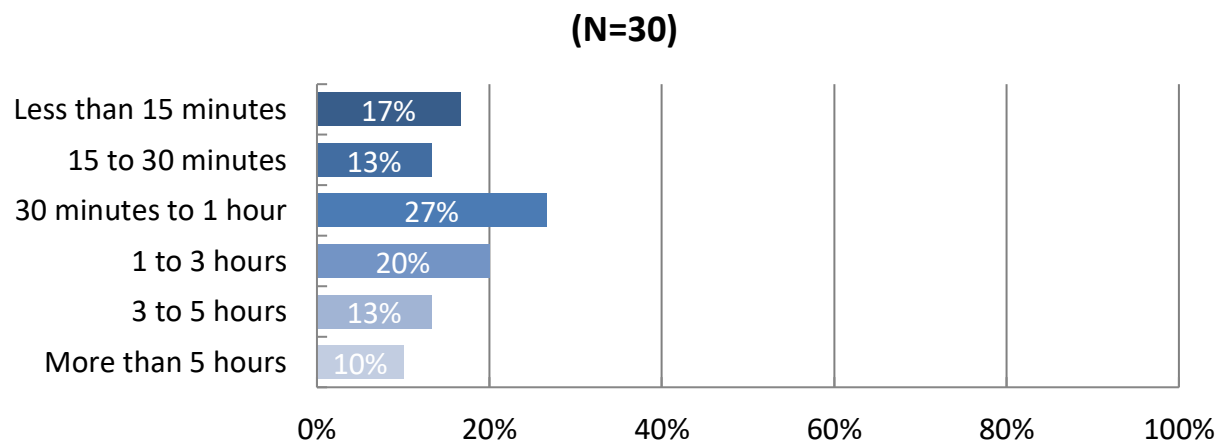


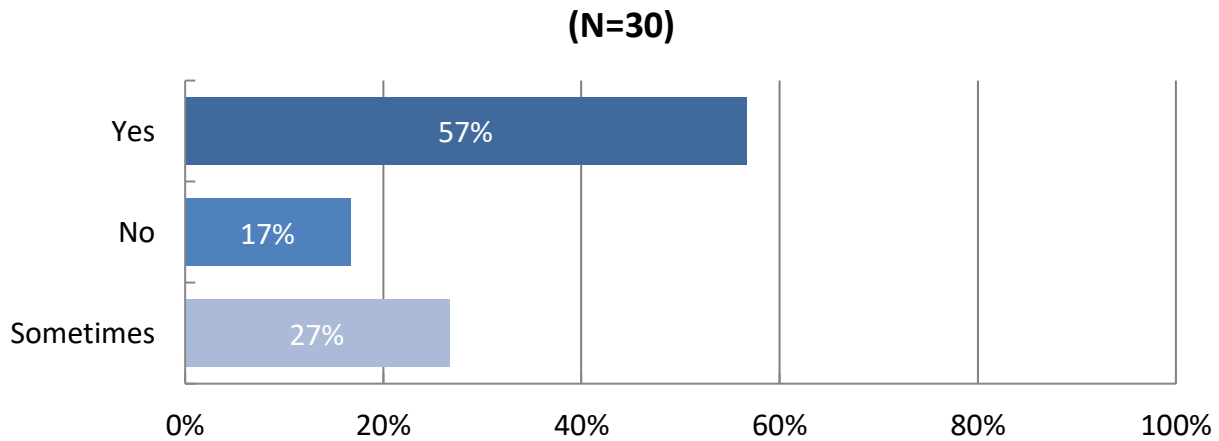
Table 11: On average, how long do you spend gathering required records and information for one record clearing petition?



d. Financial burden of obtaining records

Obtaining records can also create a financial barrier to record clearing. Eighty-four (84) percent of respondents reported that there were always or sometimes fees to obtain the criminal records they needed. (See Table 12.) According to our respondents, these costs ranged from \$5 to \$160. Respondents commented that fees for records were often calculated by page, increasing the burden for individuals with longer criminal records. Other respondents explained that they had to pay for access to online records.

Table 12: Are there mandatory fees to obtain criminal records that are required for record clearing petitions?



e. Other findings about obtaining records

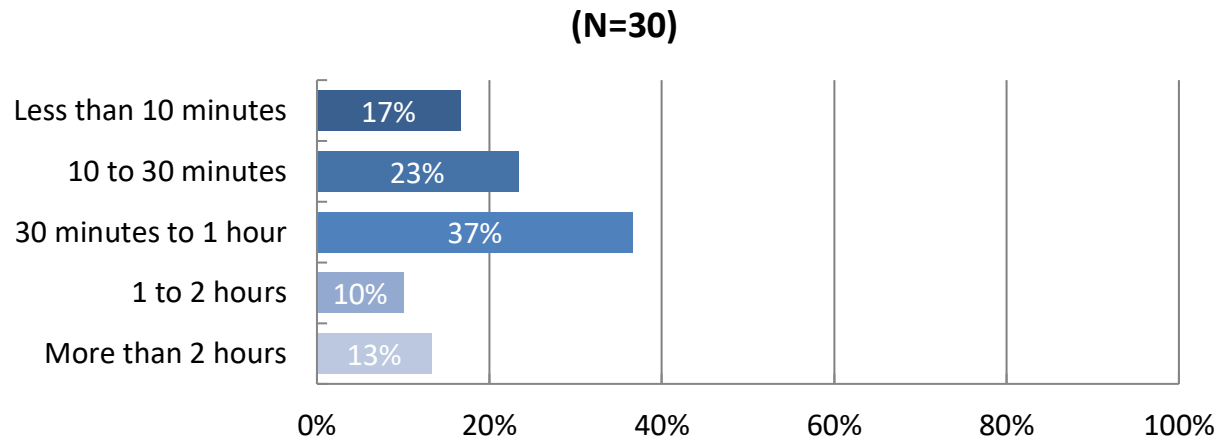
Our survey provided other important details about obtaining criminal records, including:

- The difficulty and delay obtaining records is not caused by requirements to obtain FBI records: Only 3% of respondents reported that they were ever required to include FBI records with their findings, and even then FBI records are only “sometimes” required.
- An added complication for practitioners is that requirements for petitions can vary even within a state: 33% reported that requirements can vary between jurisdictions.
- Our respondents noted other difficulties associated with obtaining records in their jurisdictions, including:
 - uncooperative court clerks
 - non-centralized records
 - records kept in inconvenient locations
 - multi-step processes for obtaining records
 - fingerprint requirements

Preparing the Motion

For most of our respondents, preparing and writing a petition does not appear to be a significant barrier to record clearing. Seventy-seven (77) percent of respondents spend one hour or less writing the motion itself, while 40% spend half an hour or less.

Table 13: On average, how long does it take to prepare one record clearing petition after the necessary documents are obtained?



By focusing on the 33% for whom it takes more than one hour to prepare a motion, we see which aspects of the petition-writing process are more work- and time-intensive. We will call the 33% who take more than one hour the “long motion group.”

One significant factor separating the long motion group from the respondents generally is the requirement to include personal details about their clients in the record clearing motion. Eighty-six (86) percent of the long motion group were required to include detailed facts about their clients at least some of the time. (See Table 14.) While 43% of the long motion group reported that they were always required to include client details, only 17% of total respondents reported the same requirement. (See Table 15.) It is easy to understand how including detailed client information (e.g., to argue that the petitioner is rehabilitated) would increase the time required to write a record clearing petition.

Two other significant factors separate the long motion group from the larger group: First is the requirement to include official court documents. While only 37% of respondents generally are required to include official court documents, 71% of the long motion group said they were required to do so. (See Table 16.) Second is the use of technology to help create the record clearing petition. While 50% of respondents generally utilize technology to create petitions more efficiently (e.g. by auto-populating information into the motion), only 14% of the long motion group utilize technology. (See Table 17.)

Table 14: For those who take more than one hour to complete a record clearing petition, are you required to include detailed facts about your client (e.g. to show rehabilitation) in record clearing petitions?

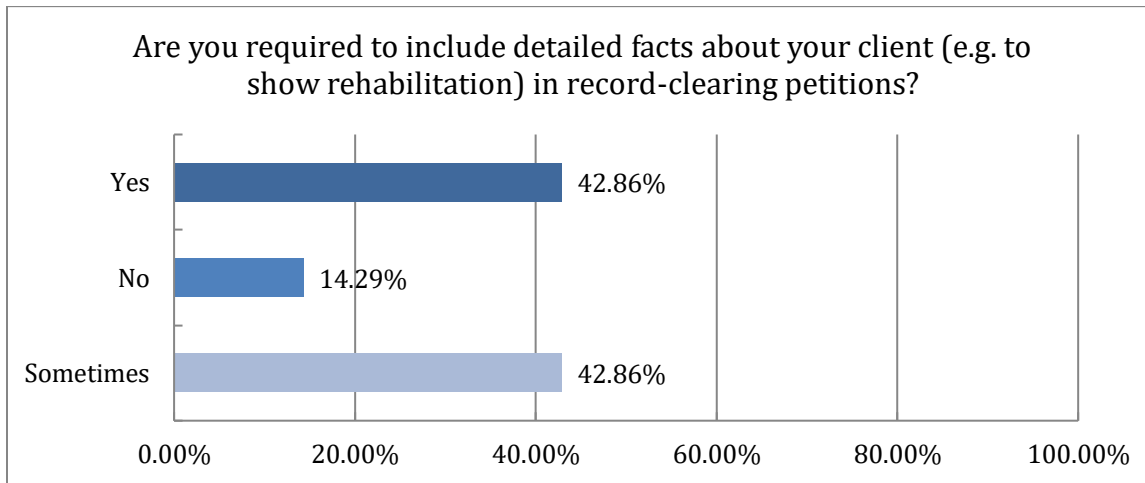


Table 15: Comparison of requirement to include detailed facts about client, between all respondents and respondents who take more than one hour to complete petition.

	All Respondents	Respondents who spend more than one hour preparing a record clearing petition
<i>“Yes” required to include detailed facts about your client in record clearing petitions</i>	17	43
<i>“Sometimes” required to include detailed facts about your client in record clearing petitions</i>	43	43
<i>Not required to include detailed facts about your client in record clearing petitions</i>	40	14

Table 16: For those who take more than one hour to complete a record clearing petition, are you required to include official criminal record documents with every record clearing petition?

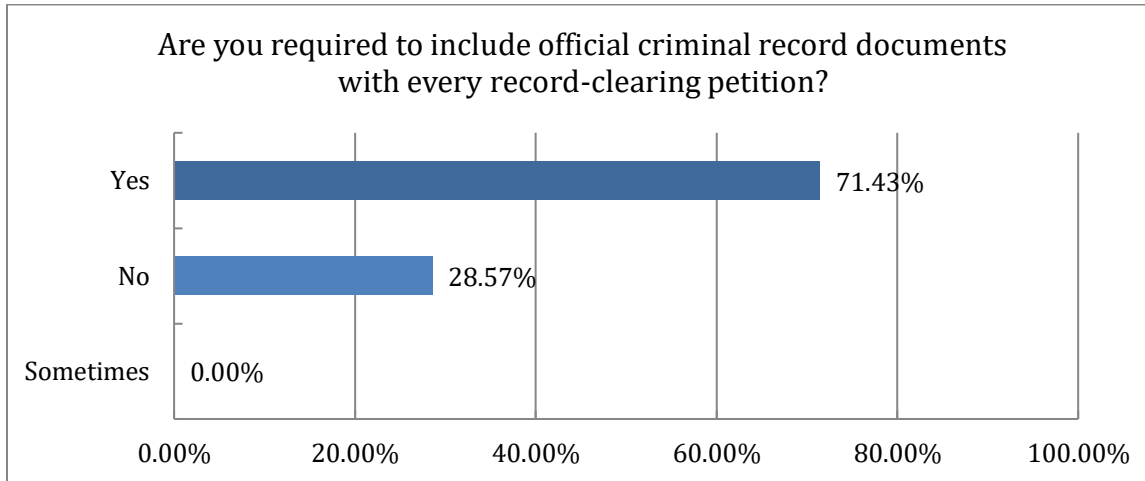
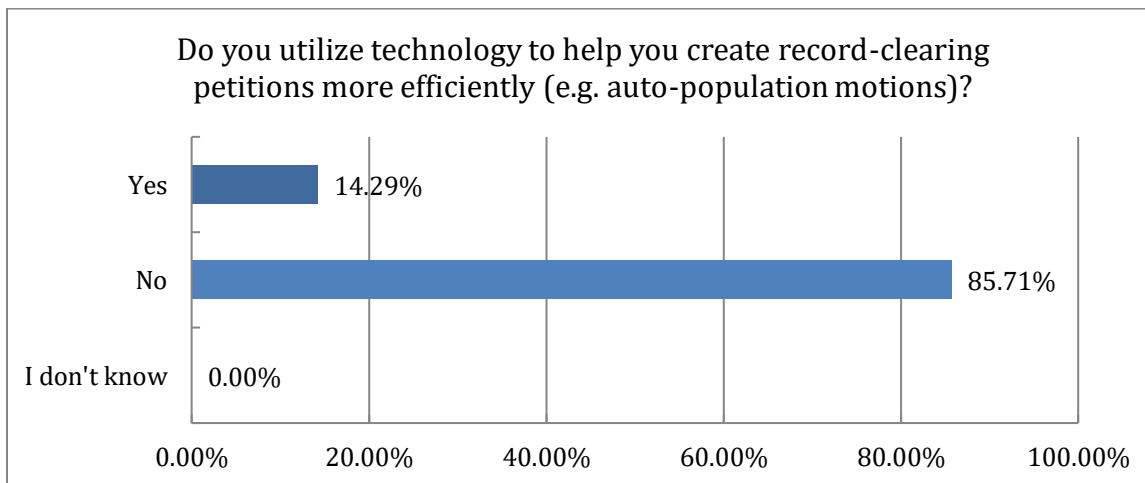


Table 17: For those who take more than one hour to complete a record clearing petition, do you utilize technology to help you create record clearing petitions more efficiently (e.g., auto-population motions)?



Proving Rehabilitation

Jurisdictions vary with regard to what criteria allows for a record to be cleared. In some, record clearing is based on simple, technical guidelines such as the disposition of a charge (i.e. ending in acquittal or being dismissed) or the amount of time that has passed since the charge or conviction. Record clearing practitioners in many jurisdictions face the more complicated issue of having to present more subjective information, such as rehabilitation or prejudice faced by the petitioner by the continued existence of the record. Sixty (60) percent of respondents to the survey reported that rehabilitation of the petitioner has to be proven at least sometimes for certain types of motions. (See Table 18.)

Preparing and presenting this information can be a work-intensive process. Of the 17% of respondents who reported that they are always required to include personal facts about their clients' stories and histories for purposes of proving rehabilitation, 80% do not utilize technology to help them write motions. (See Table 19.) Gathering the information in the first place is time-consuming; 60% of this group report that it takes longer than three hours to collect information for a rehabilitation argument and for 40% it can take as long as five hours. (See Table 20.)

Presenting evidence on rehabilitation also more often necessitates an appearance in court. Forty (40) percent of respondents who always include personal facts about their clients stated that they are always required to attend court on the petition, and similarly 40% of the petitioners themselves are required to appear (See Tables 21 and 22.), while one hundred percent of respondents noted that prosecutors sometimes object to the petition. Prosecutorial discretion will be addressed in more detail later in this report.

Table 18: Are you required to include detailed facts about your client (e.g. to show rehabilitation) in record clearing petitions?

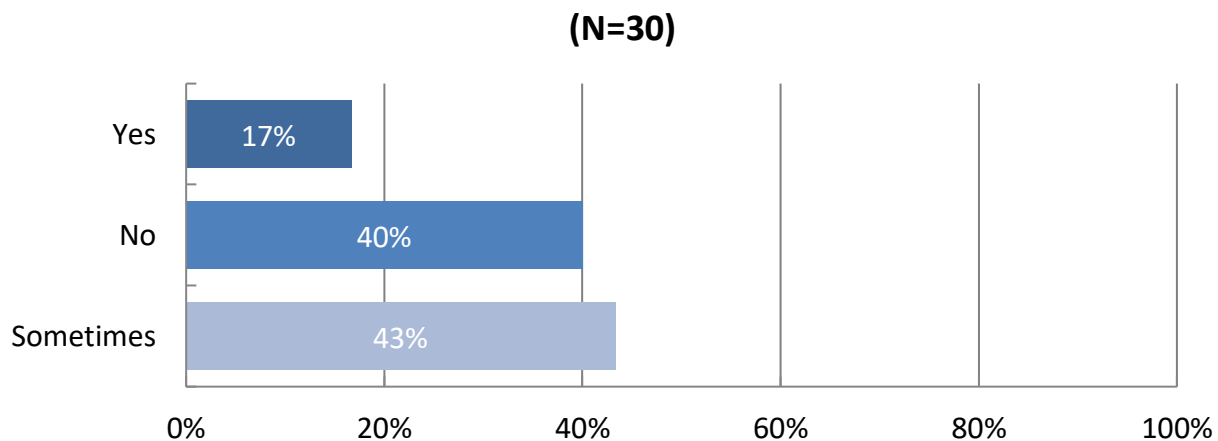


Table 19: For those who always include personal facts about your clients, do you utilize technology to help you create record clearing petitions more efficiently?

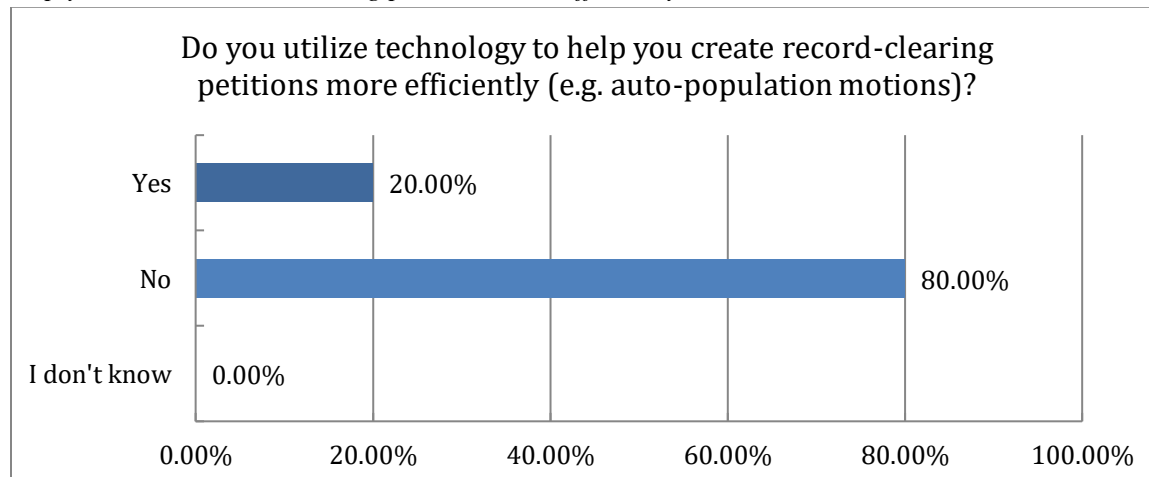


Table 20: For those who always include personal facts about your clients, on average, how long do you spend gathering required records and information for one record clearing petition?

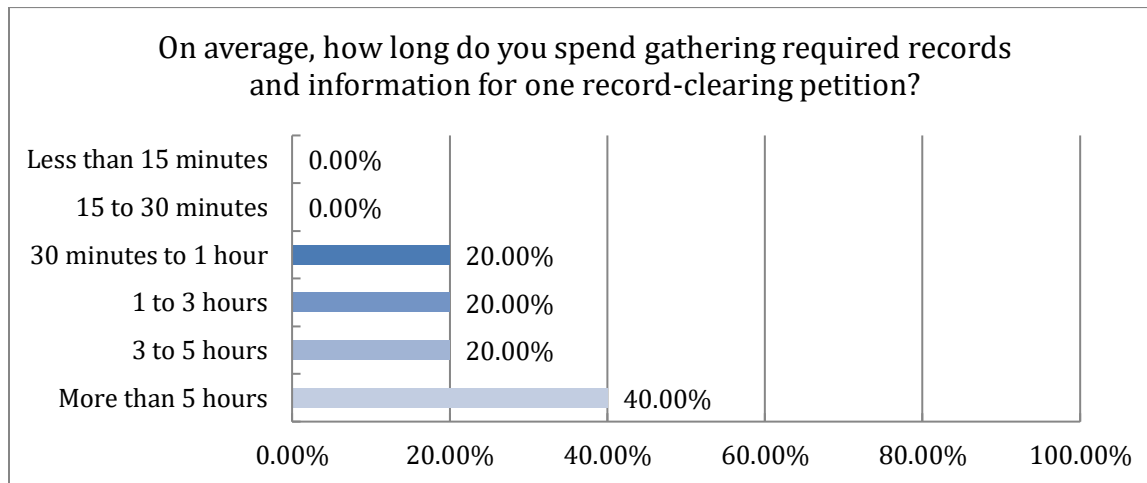


Table 21: For those who always include personal facts about your clients, are you, the attorney, always required to appear in court to address your record clearing petitions?

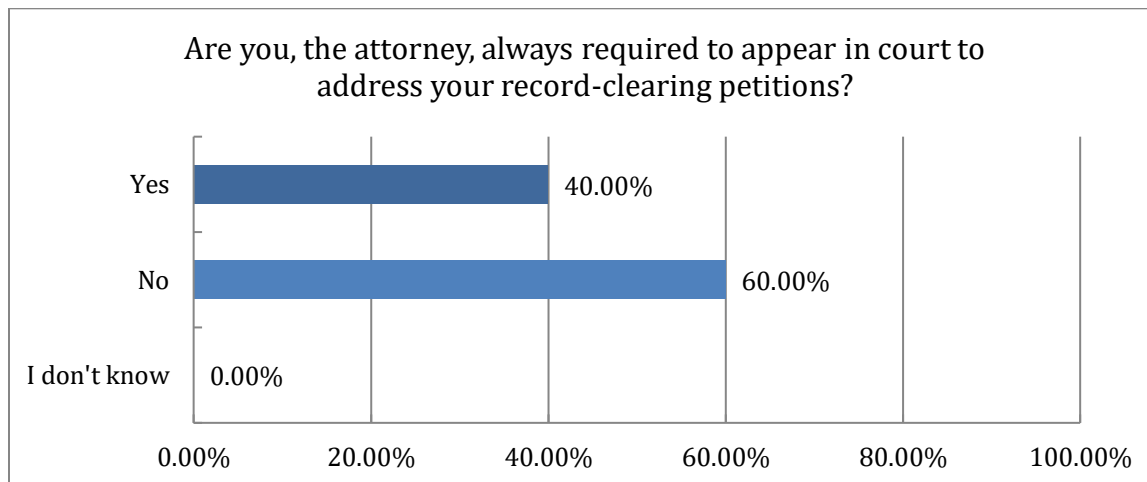
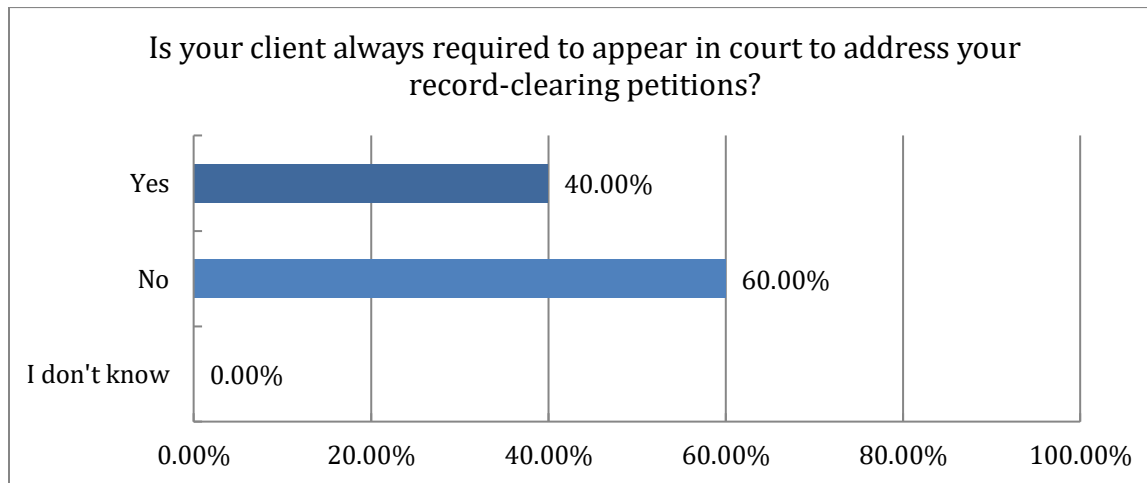


Table 22: For those who always include personal facts about your clients, is your client always required to appear in court to address your record clearing petitions?



Pro Se Filings

Our survey showed that individuals attempting to navigate the record clearing process without a lawyer all too often face insurmountable hurdles. Eighty-three (83) percent of survey respondents said it was at least “somewhat difficult” for *pro se* individuals to file for record clearing; fifty-seven (57) percent described the process as “difficult”, “very difficult” or “almost impossible.” (See Table 23.)

Only 63% of our survey respondents said that government resources are available in their practice area to help *pro se* individuals file record clearing petitions. (See Table 24.) Our respondents noted that these resources were insufficient, even where they existed, because they did not sufficiently help *pro se* people understand the law or procedure, which is often complicated. Moreover, even when people without lawyers are given form petitions or assistance, they often do not complete the process because the procedural requirements are too daunting.

INDIVIDUALS ATTEMPTING TO NAVIGATE THE RECORD CLEARING PROCESS WITHOUT A LAWYER ALL TOO OFTEN FACE INSURMOUNTABLE HURDLES.

Table 23: In your opinion, filing a record clearing petition pro se in your area is:

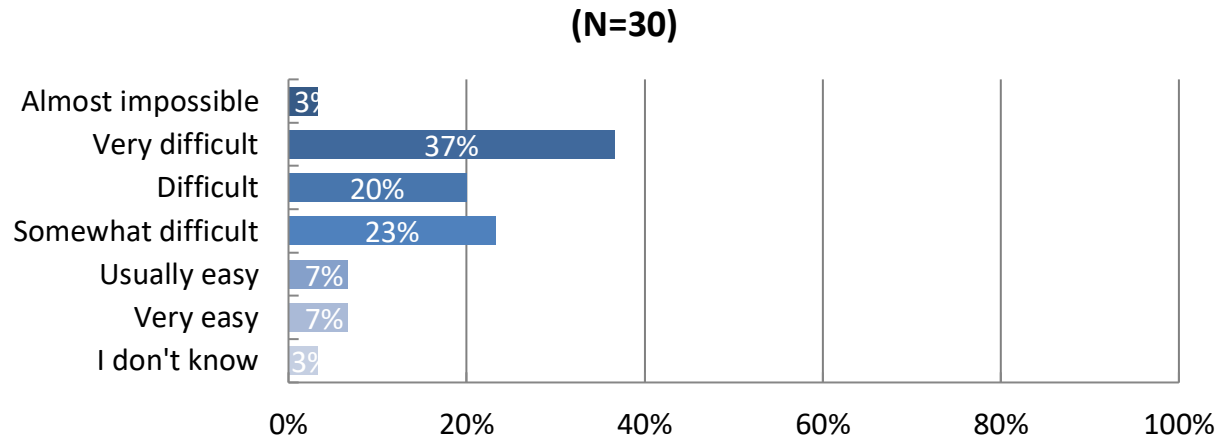
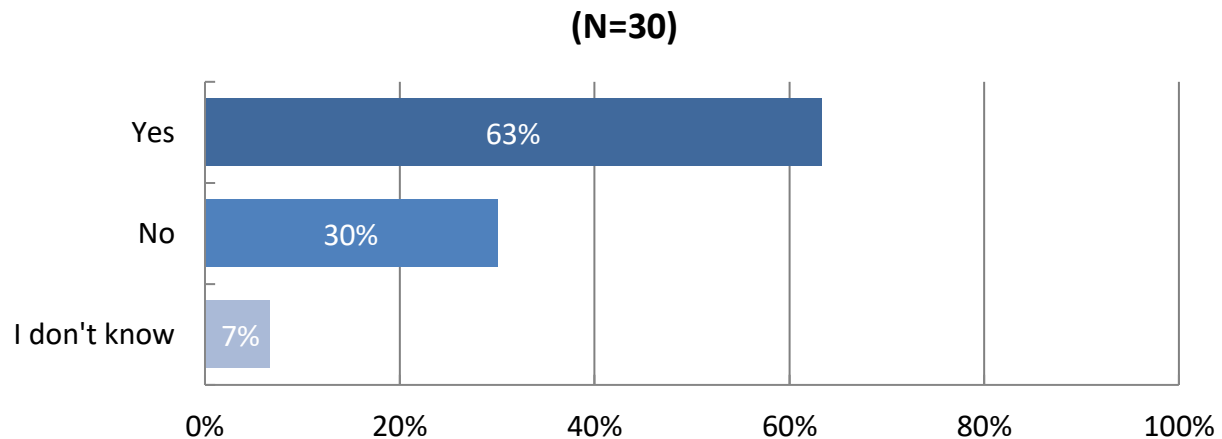


Table 24: Are government resources available to help pro se individuals file record clearing petitions?



Filing and Serving the Petition

Before a record clearing petition can be granted by a court, it must be filed and served to the appropriate parties. In many jurisdictions, this is a manual process that creates more work for the individual or advocate, and therefore creates a barrier to record clearing. Only 37% of our survey respondents reported that petition filing could be done electronically. An additional 30% said petitions can “sometimes” be filed electronically. (See Table 25.) Most respondents used mail or in-person delivery to comply with service requirements.

A 70% majority said that the prosecution must be served with the filing, making the service requirements more onerous. (See Table 26.) Notably, service requirements may create an even more significant barrier

for *pro se* filers who lack institutional knowledge, access to filing systems, and relationships with court actors.

Filing can also create a barrier by being a source of fees. Ten (10) percent of respondents reported that there are filing fees associated with service. (See Table 27.) Fees, fines and costs will be discussed in detail later.

Table 25: Can record clearing petitions be electronically filed in your area?

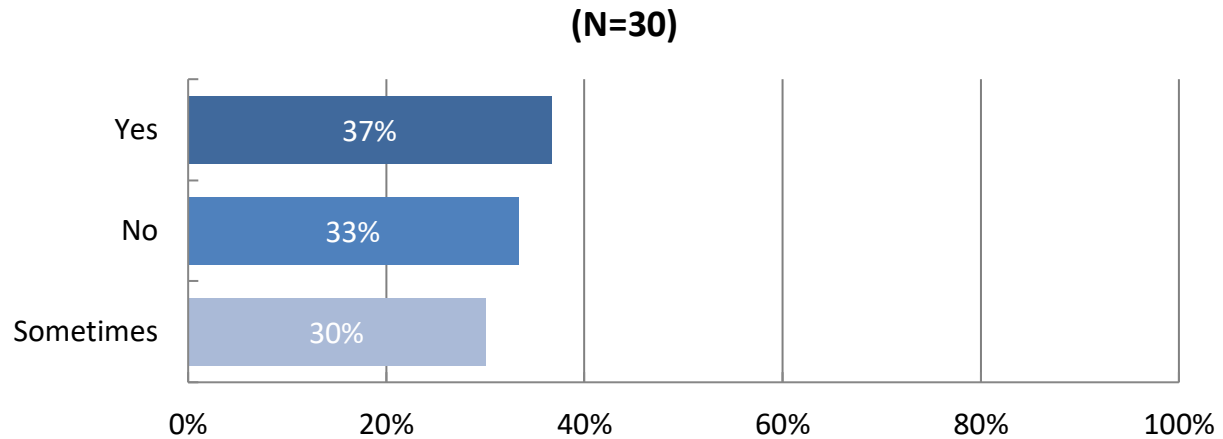


Table 26: To comply with service requirements at the time of filing, do you send the record clearing petition to other parties (e.g. the prosecutor)?

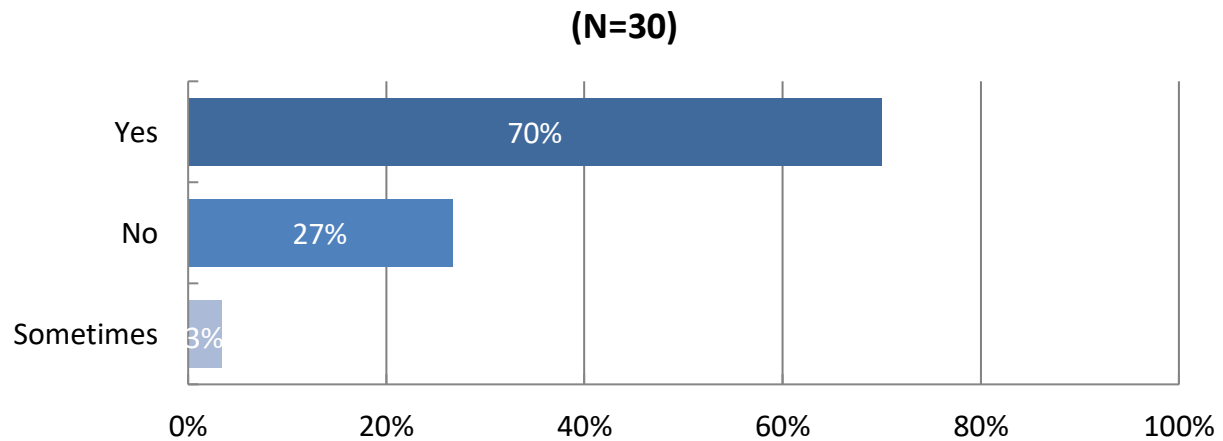
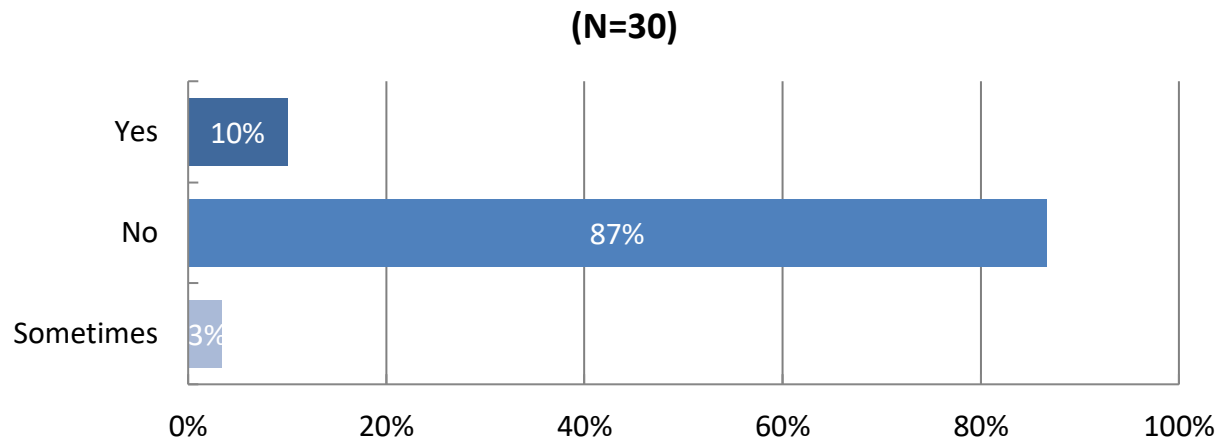


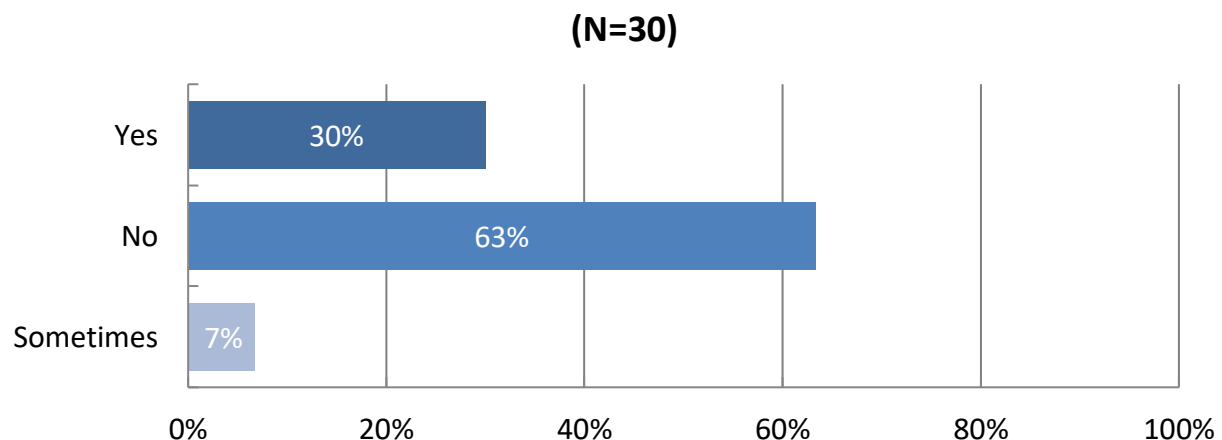
Table 27: Are fees required to comply with service requirements?



Administrative Pre-Hearing Review

In some jurisdictions, the record clearing process does not begin with the preparation and filing of a motion in court. Instead, there is a required administrative review process run by the police, prosecutor's office, or other agency. Thirty (30) percent of respondents said their state required an administrative, pre-hearing review by the prosecutor or police records repository. (See Table 28.) The administrative review often results in an eligibility determination, though the purpose and procedure vary widely among States. These administrative review processes are problematic because they are lengthy – sometimes causing months-long delays--and because they can add extra costs ,sometimes hundreds of dollars.

Table 28: Are there administrative procedures that must be completed before a court petition may be filed in your area (e.g. application approval by the police or other agency)?



Filing Fees

In addition to the fees required to obtain necessary records and to comply with service requirements, our survey showed there are other fees associated with filing record clearing petitions: Sixty (60) percent of survey respondents said there were sometimes or always mandatory filing fees for record clearing petitions. (See Table 29.) These fees range from around \$30 to around \$650. Seventy (70) percent of respondents said that filing fees are routinely waived for indigent petitioners. (See Table 30.)

Table 29: Are there mandatory filing fees for record clearing petitions?

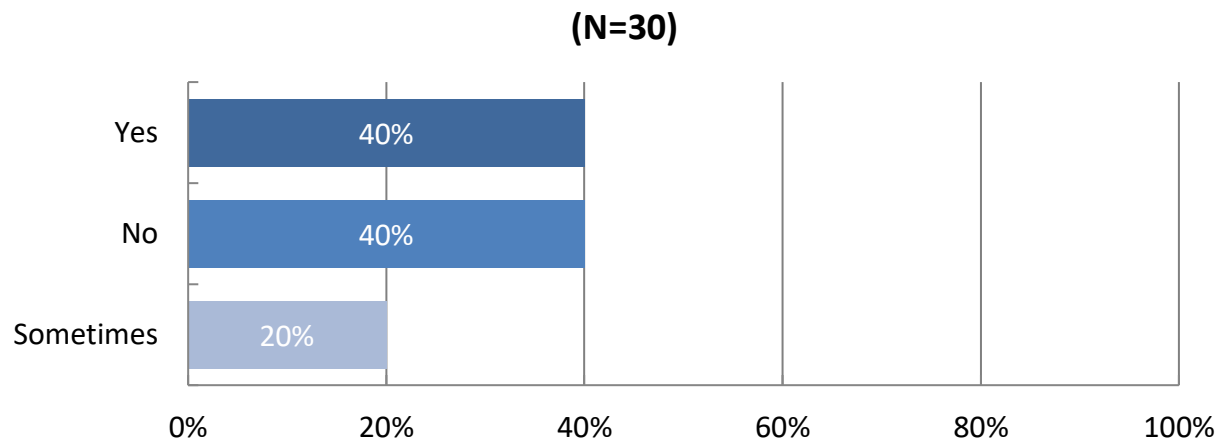
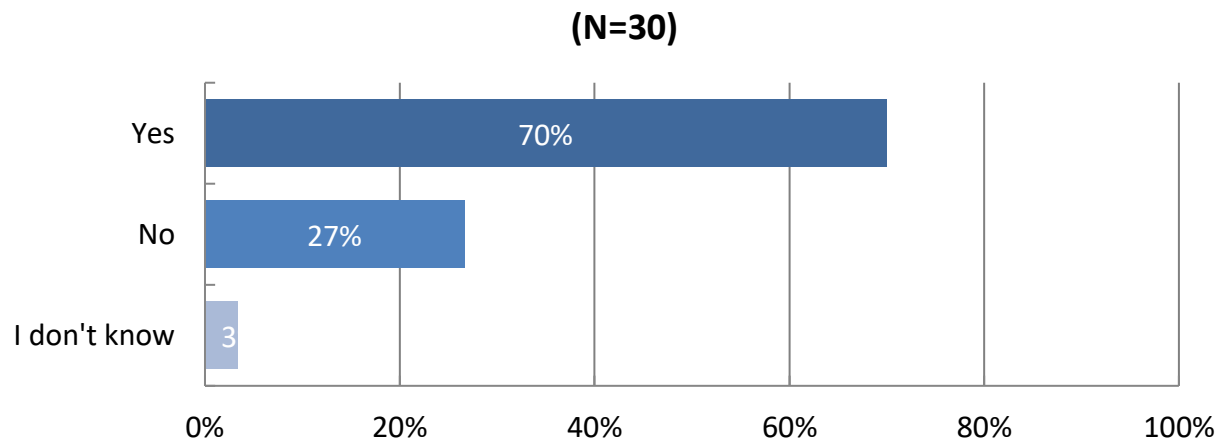


Table 30: Are filing fees routinely waived for indigent petitioners (e.g. in forma pauperis petitions)?



Fines and Costs

Fines and costs--debts imposed on people charged with or convicted of crimes--remain a significant barrier to record clearing in most jurisdictions. Only 10% of our survey respondents reported that fees are *not* a barrier to record clearing (that payment of fees is never required). Half of our survey respondents said that all fees associated with the petitioned-for case must be paid before that case record can be cleared. Seventeen (17) percent said all fees must be paid on all of the petitioners' cases, even cases that are not being cleared. Twenty-three (23) percent said that some fees, or fees under some circumstances, must be paid off before a case can be cleared. (See Table 31.) Some survey respondents noted that judges will use their discretion to require payment of fines and costs, even when the law does not require it.

FINES AND COSTS--DEBTS IMPOSED ON PEOPLE CHARGED WITH OR CONVICTED OF CRIMES--REMAIN A SIGNIFICANT BARRIER TO RECORD CLEARING IN MOST JURISDICTIONS.

We can focus on the 90% of respondents for whom fines and costs are a barrier to record clearing to find out more about these problematic debts. Forty-four (44) percent of this group said that fees were imposed on convictions and non-convictions alike, creating the troubling possibility that innocent petitioners have to pay fees to clear their records. (See Table 32.) The majority of this group said that fees were imposed not only by the court, but also after conviction by the jail or probation office. (See Table 33.) Most of the respondents in this group who could estimate the average court and postconviction costs in their jurisdiction said that they averaged between \$300 and \$1000. (See Table 34.)

Table 31: Which court fines and costs must be paid before a record clearing petition is granted?

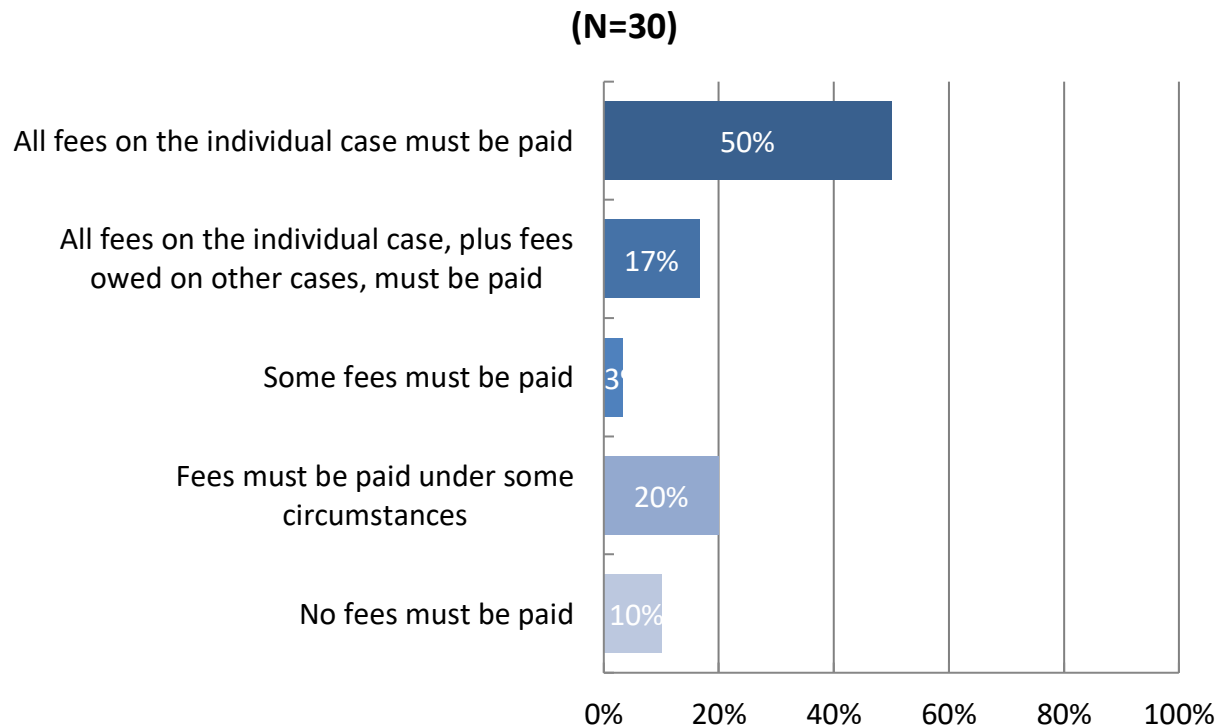


Table 32: For those who are required to pay at least some fees some of the time before a record clearing petition is granted, are court fines and costs regularly imposed in criminal cases in your area?

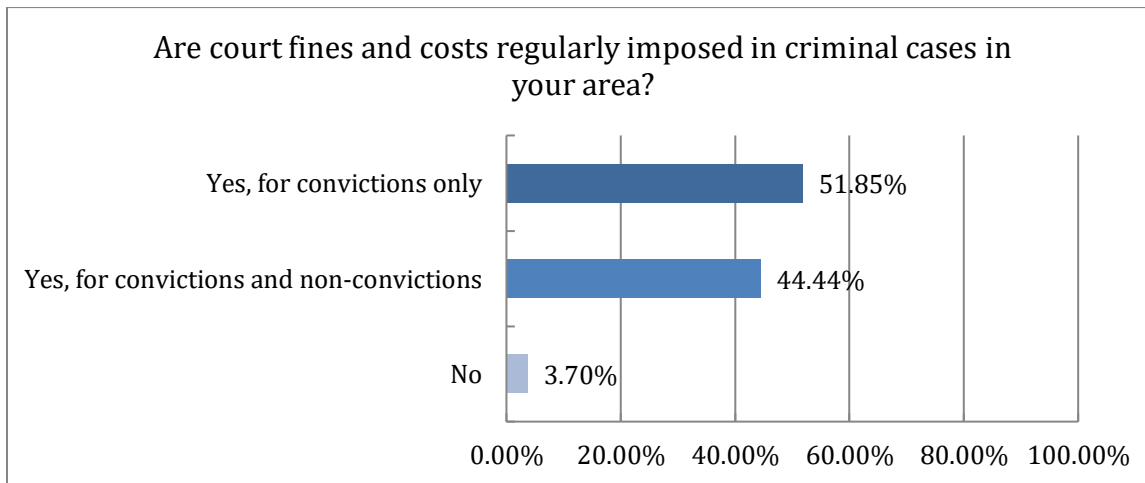


Table 33: For those who are required to pay at least some fees some of the time before a record clearing petition is granted, check all post-convictions fees that are routinely added to court fines and costs in your area:

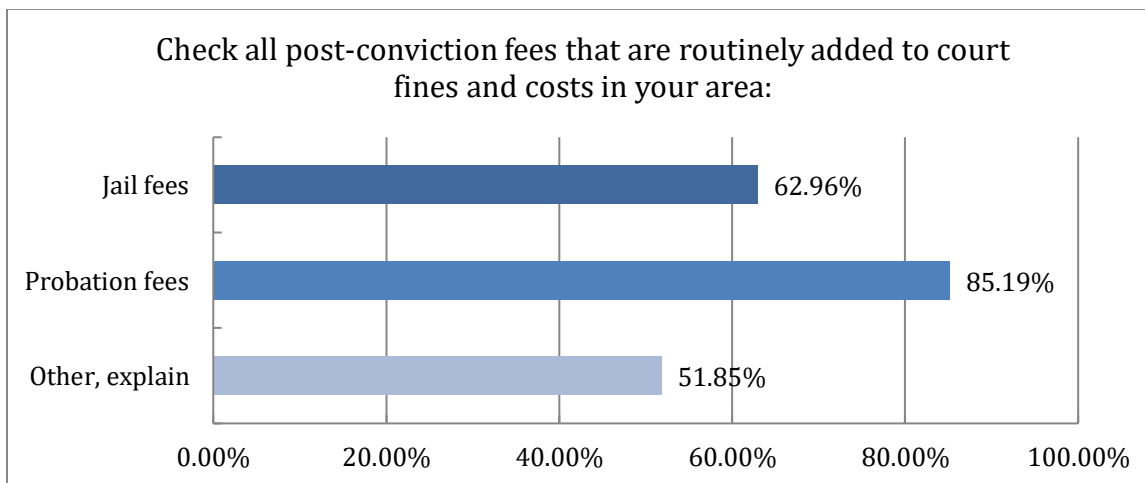
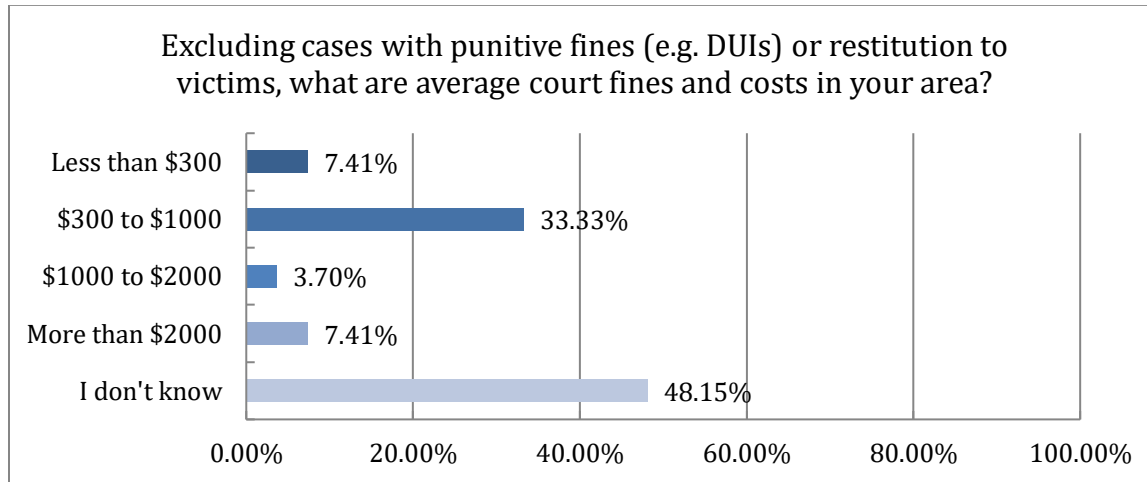


Table 34: For those who are required to pay at least some fees some of the time before a record clearing petition is granted, excluding cases with punitive fines (e.g. DUIs) or restitution to victims, what are average court fines and costs in your area?



Prosecutorial and Judicial Discretion

A factor that often complicates and delays record clearing is the prerogative of prosecutors in many jurisdictions to object to record clearing petitions. Seventy-seven (77) percent of practitioners surveyed reported that prosecutors sometimes or regularly object to record clearing motions. (See Table 35.) The respondents who reported that prosecutors sometimes or regularly objected were more likely to include personal facts about their clients in record clearing petitions; seventy-four (74) percent sometimes or always included facts about their clients to prove rehabilitation or for other reasons. (See Table 36.) Of the group, 83% report that they regularly or almost always win. (See Table 37.)

Table 35: How often do prosecutors object to your record clearing petitions?

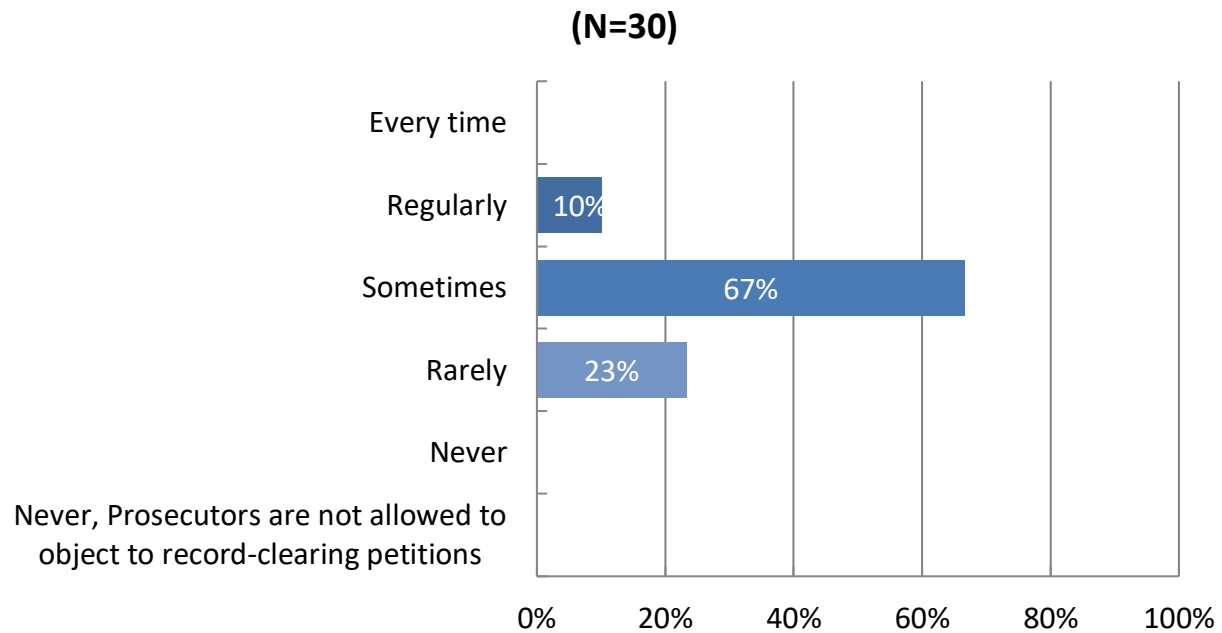


Table 36: For those who said that prosecutors sometimes or regularly object, are you required to include detailed facts about your client (e.g. to show rehabilitation) in record clearing petitions?

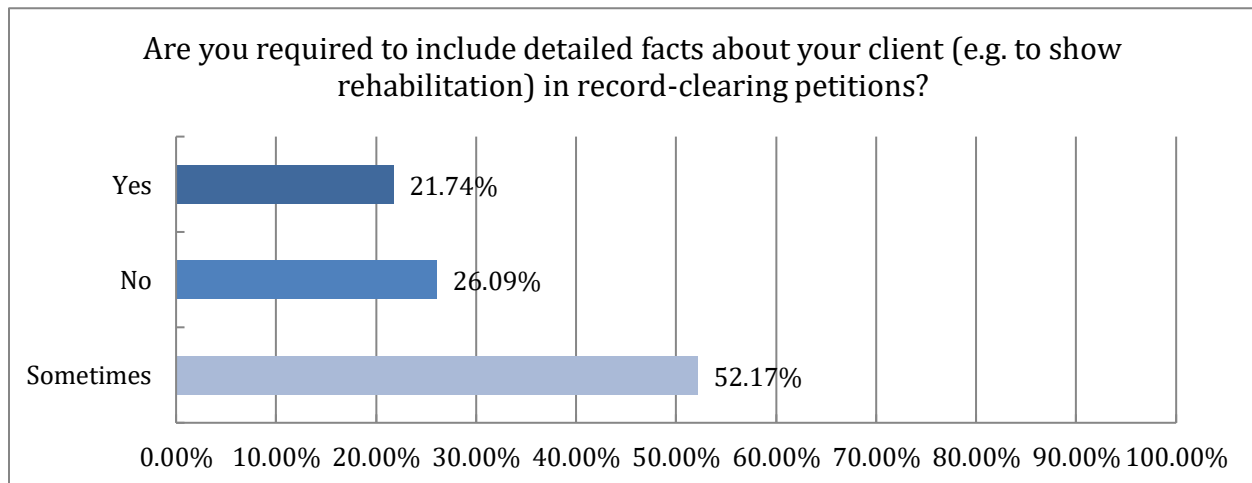
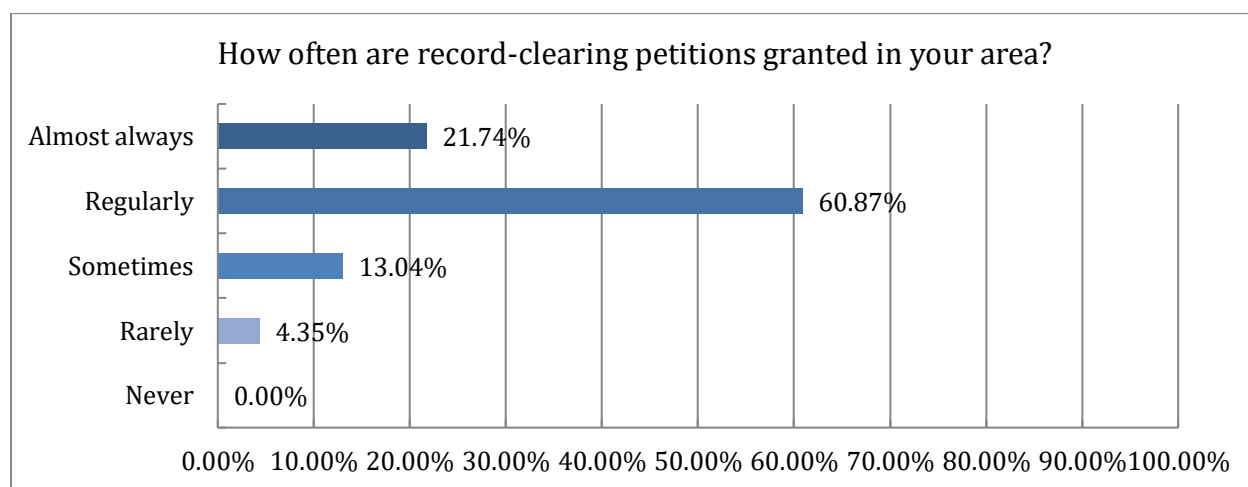


Table 37: For those who said that prosecutors sometimes or regularly object, how often are record clearing petitions granted in your area?



Hearings

A vast majority of record clearing petitions are adjudicated without the need for a court appearance by either the attorney or the petitioner. Only 17% of survey respondents stated that an attorney must always appear in court to address the record clearing motion. (See Table 38.) Even fewer (13%) reported that the client must always appear at the hearing. (See Table 39.)

Even in those jurisdictions requiring a court appearance by attorneys, only a minority generally require more than the appearance itself. Only 33% of respondents reported that they need to put on substantive legal arguments on behalf of their clients. (See Table 40.) A mere 10% report that they regularly have to introduce any evidence. (See Table 41.)

Table 38: Are you, the attorney, always required to appear in court to address your record clearing petitions?

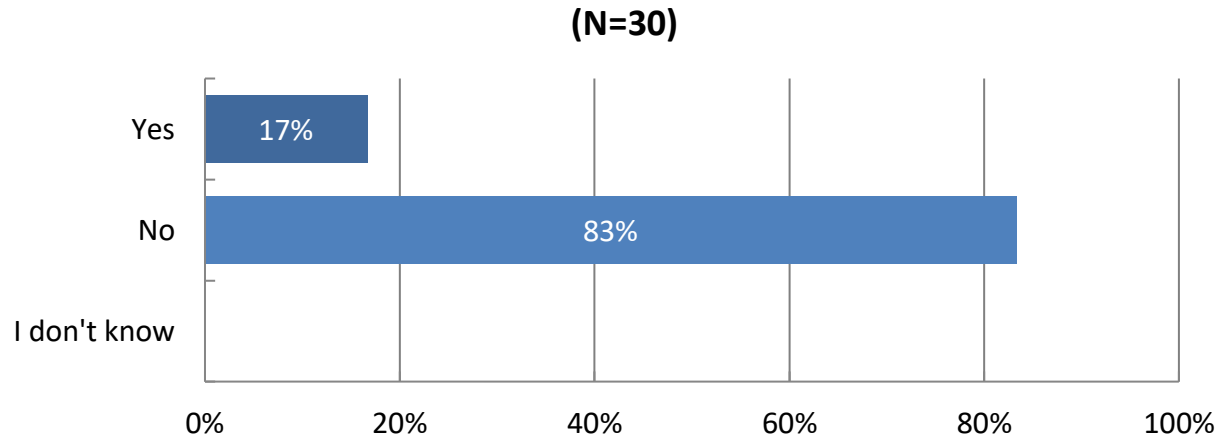


Table 39: Is your client always required to appear in court to address your record clearing petitions?

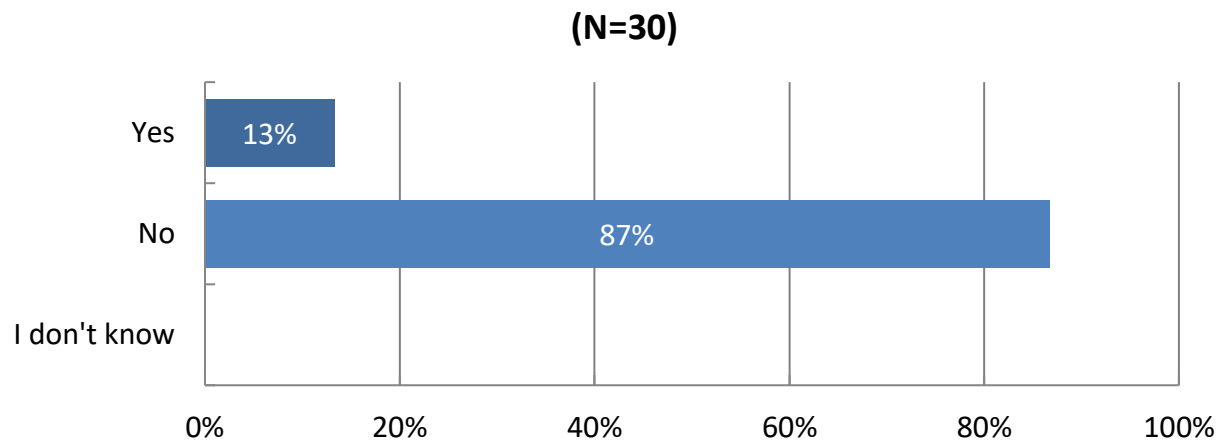


Table 40: Do you regularly make substantive legal arguments in record clearing petition hearings?

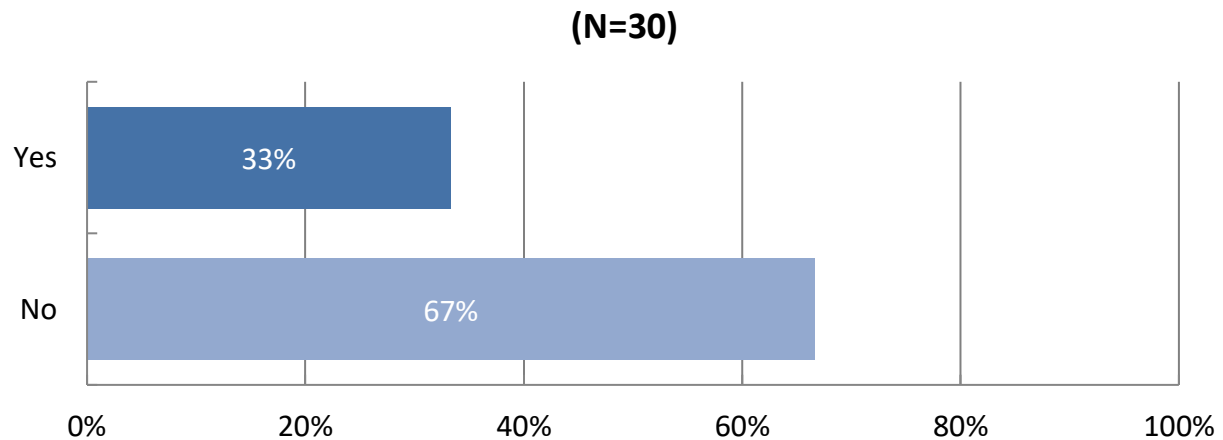
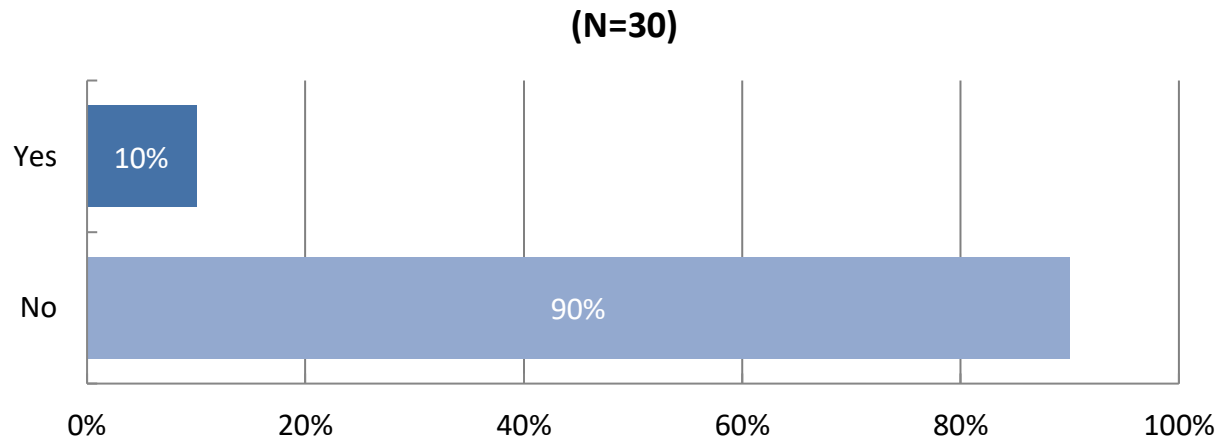


Table 41: Do you regularly put on evidence (e.g. call witnesses) in record clearing petition hearings?

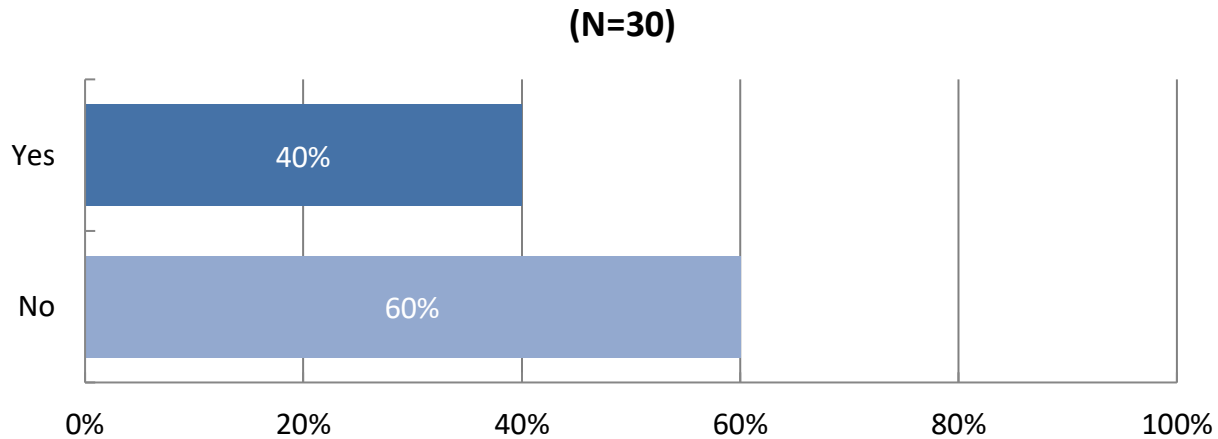


Judicial Efficiency

As the above responses to the survey demonstrate, the process of writing, filing and presenting record clearing petitions is often time-consuming and labor-intensive, creating barriers to people who are trying to clear their records. Furthermore, only 40% of respondents reported that the courts in their jurisdictions have instituted procedures to make record clearing more efficient. (See Table 42.) Some of these procedures include: using a standardized form petition, waiving hearing requirements, designating particular judges to adjudicate record clearing petitions, utilizing personnel in the clerks' offices, and setting hearing dates at the time of filing.

THE PROCESS OF WRITING, FILING AND PRESENTING RECORD CLEARING PETITIONS IS OFTEN TIME-CONSUMING AND LABOR-INTENSIVE.

Table 42: Do the courts in your area employ any practices to process record clearing petitions in an efficient, streamlined way?



Removing Records from the Applicable Databases

Even after petitioners are ultimately successful in having their petitions granted and their records ordered cleared, additional barriers may arise in the record clearing “after-care,” getting the records actually removed from the applicable databases.

For example, in 20% of responding jurisdictions the petitioners’ representatives are always required to notify or serve other parties to execute the record clearing; an additional 7% are sometimes required to do so. (See Table 43.) Seventeen (17) percent of respondents reported that pro se individuals who have record clearing petitions granted are required to serve or notify other parties. (See Table 44.) This additional step can add significant time to the record clearing process; 37% of survey respondents noted that the record clearing process takes from 6 to 9 months. Another 10% said that it takes more than nine months. (See Table 45.)

37% OF SURVEY RESPONDENTS NOTED THAT THE RECORD CLEARING PROCESS TAKES FROM 6 TO 9 MONTHS. ANOTHER 10% SAID THAT IT TAKES MORE THAN NINE MONTHS.

Finally, even after the record clearing process is completed and any required notification sent to the relevant databases, records still sometimes are not successfully cleared. As many as 37% respondents to the survey reported that they often see ostensibly cleared records appear on background checks. (See Table 46.) For those who see cleared records on background checks, 91% report that cleared cases are reported by commercial background checkers, 36% say they are reported by state repositories, and 9% say they appear on FBI checks. (See Table 47.) Only 3% of respondents said that there was a standard procedure in their jurisdictions to notify private background-checking companies that records had been cleared. An additional 3% noted that authorities in their area “sometimes” notify background-checkers. (See Table 48.)

Table 43: If a record clearing petition is granted in your area, are you required to notify or serve other parties to execute the record clearing (i.e. remove the record from the applicable databases)?

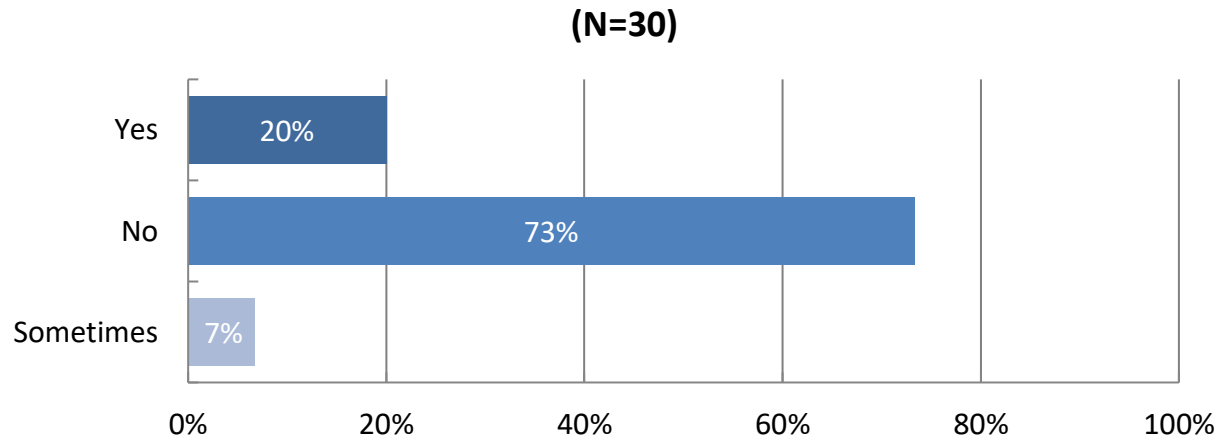


Table 44: If a pro se record clearing petition is granted, is the pro se individual required to notify or serve other parties to execute the record clearing (i.e. remove the record from the applicable databases)?

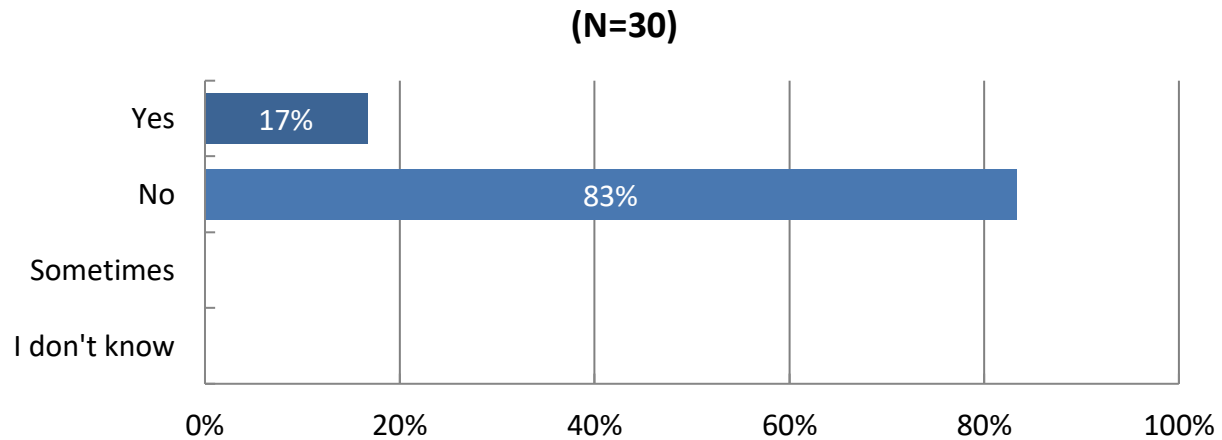


Table 45: On average, how long does the record clearing process take, counting from the time the motion is filed to the time that the record is cleared from the relevant database(s)?

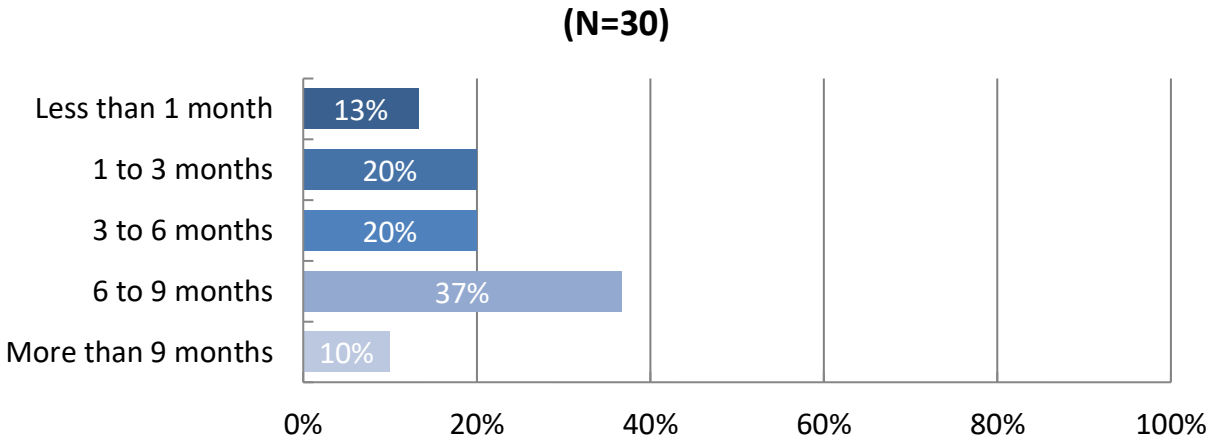


Table 46: Do you often see cleared cases on background checks?

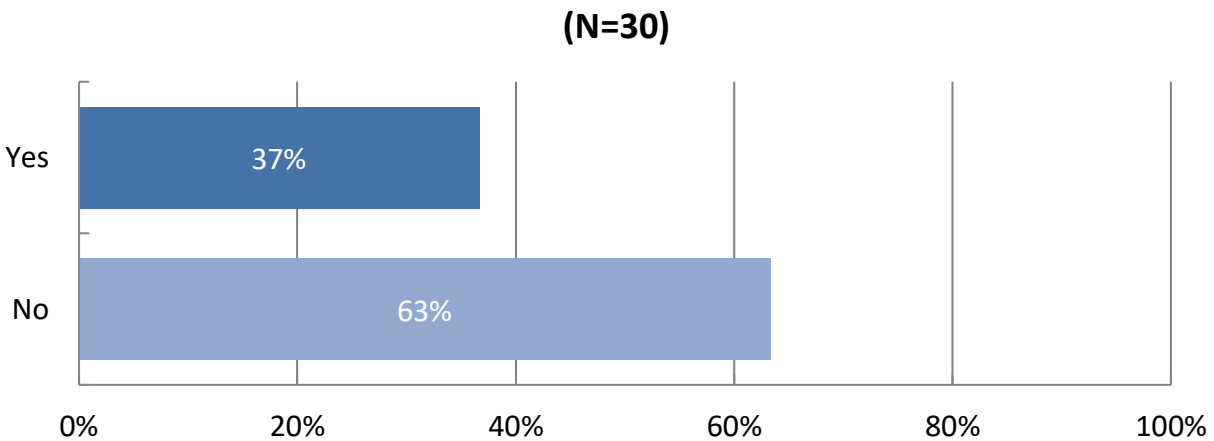


Table 47: For those who answered “Yes” above (Table 46: Do you often see cleared cases on background checks?), what type of background checks? (check all that apply)

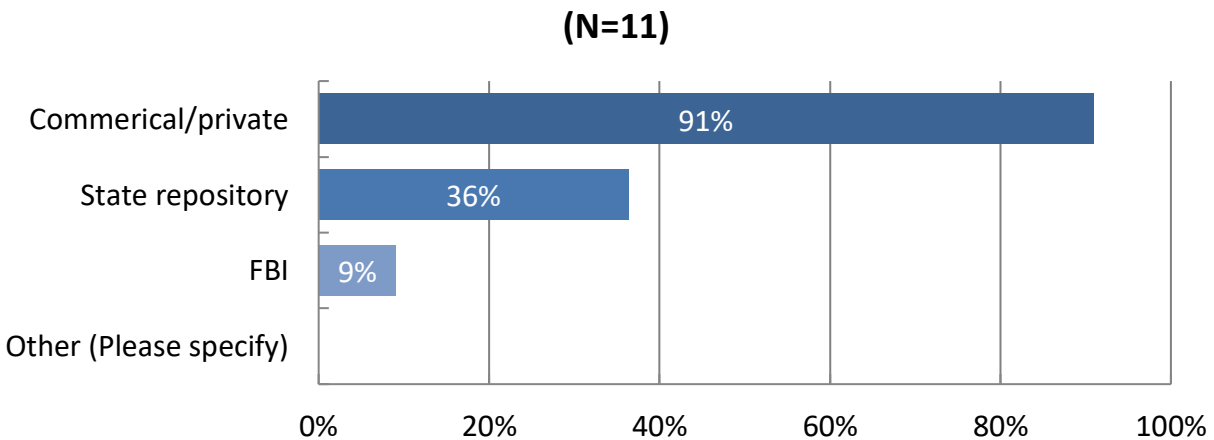
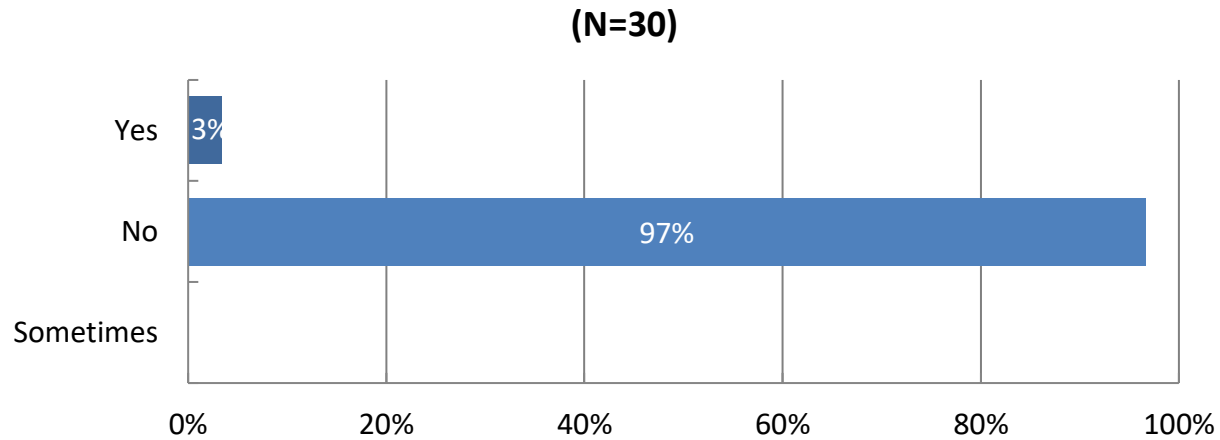


Table 48: Is there any procedure in your area to notify commercial background check companies after cases have been cleared?



POLICY RECOMMENDATIONS

While there are a variety of ways to address the barriers discussed above, there is one policy solution that is most comprehensive in its ability to eliminate most, if not all, of the barriers to record clearing: Clean Slate.

Clean Slate Laws

Clean Slate laws flip the traditional record clearing process on its head - rather than placing the burden for petitioning the court on the individual with a record, Clean Slate uses technology to allow courts and law enforcement repositories to run computer queries to identify eligible cases and clear them through automation. As the COVID-19 pandemic has essentially frozen many manual-based record clearing processes around the country, it is especially worth noting the importance of Clean Slate systems that can continue to offer record clearing relief even when traditional court system access is closed.

Clean Slate works to eliminate most of the barriers identified above: preparing motions, proving rehabilitation, pro se filing, filing and serving petitions, pre-hearing reviews, filing fees, prosecutorial and judicial discretion, hearings, and judicial efficiency. The remaining barriers can be addressed through a well-designed Clean Slate program as well.

AS THE COVID-19 PANDEMIC HAS ESSENTIALLY FROZEN MANY MANUAL-BASED RECORD CLEARING PROCESSES AROUND THE COUNTRY, IT IS ESPECIALLY WORTH NOTING THE IMPORTANCE OF CLEAN SLATE SYSTEMS THAT CAN CONTINUE TO OFFER RECORD CLEARING RELIEF EVEN WHEN TRADITIONAL COURT SYSTEM ACCESS IS CLOSED.

For example, some Clean Slate laws, like Pennsylvania's, included requirements to pay court fines and costs in order to be eligible for automated record clearing. However, Pennsylvania recently passed Act 83 of 2020, an amendment to its Clean Slate law that removes the requirement to pay court fines and costs to qualify for record sealing. Now, only restitution to victims must be paid in order to qualify for automatic and petition-based sealing.

Similarly, Clean Slate laws can also proactively address the removal of records from applicable databases. Through the design of the law, it is possible to use the automated process to clear records from court and law enforcement databases.

The one barrier that Clean Slate may actually make harder is access to records. By design, Clean Slate is clearing from public view large swaths of records that used to be publicly available. In designing a Clean Slate law, it is essential that the subject of the record and attorney are still able to gain access to the record. This is important for a variety of reasons, including being able to show what happened in the case for immigration purposes, and to prove a record has been sealed to an employer if that employer is either allowed access under the law or if the record has been inaccurately reported on a background check. While Clean Slate may make access to records more challenging for advocates, the trade-off of removing this damaging and stigmatizing information from the public realm is undoubtedly worth it.

In Pennsylvania, the first state to pass a Clean Slate law, more than 36.7 million cases have been sealed to date, helping around one million individuals^{vi}. Five times as many misdemeanor convictions were sealed in the first year through Clean Slate than had ever been sealed by petition previously in the state. Clean Slate is clearly the surest way to eliminate the barriers to record clearing that cause the “second chance gap.”^{vii}

However, Clean Slate is harder to implement in some states based on the way records are stored and maintained, and may be difficult to pass legislatively in some states. Advocates who are interested in launching a Clean Slate campaign can seek assistance from the Clean Slate Initiative.^{viii} For advocates looking to address the barriers discussed in this report through other means, fortunately there are smaller scale solutions as well.

Access to Records

While generally advocates can agree that having widespread public access to criminal records is harmful for individuals with records, it is still important for individuals and their advocates to be able to access records for a variety of reasons. Therefore, an ideal system will limit public access to records, while having easy and streamlined methods for individuals or their advocates to access records. Access to records should be free or very low cost to low-income individuals, should not entail lengthy wait times, and ideally should be available through electronic request processes.

Fines and Costs

When possible, payment of fines and costs should be decoupled from record clearing completely. In the majority of states that do not completely destroy cleared records, courts can still collect debt after a case is cleared. For that reason, there is no harm to the state from allowing people to clear records where debts are still owed. The state may even benefit since people with cleared records are able to earn more income and will be more able to pay.

In states where payment of fines and costs remains a requirement for record clearing, other creative approaches have arisen. Court debt funds similar to bail funds have been created to help address this debt. Philanthropies have helped individuals pay court debt in compelling circumstances. There are also litigation-based strategies to reduce or waive debt retroactively based on the inability of the individual to pay the debts. There are also legislative efforts afoot around the country to develop stronger ability-to-pay requirements up front so that low-income individuals are not saddled with enormous debts they can never hope to pay.^{ix}

Filing Fees

Similarly to fines and costs, there have been creative fund-based approaches to help people be able to file petitions, especially in places that have exorbitant filing fees.^x In addition, states may be able to work through their court rules committees to develop strong *in forma pauperis* (IFP) procedures. For example, low-income individuals represented by legal aid organizations or who receive public benefits could be automatically found to be eligible for IFP status and have filing fees waived. For other people who cannot afford filing fees, they can file a simple IFP affidavit explaining why they cannot afford to pay and have the filing fees waived. For states that lack any of these procedures or routinely deny IFP requests, there could be potential litigation regarding lack of access to the courts for low-income petitioners.

Preparing and Filing Petitions

While every state differs in how much information is required in its petitions, in the vast majority of states technology could be utilized to streamline the petition drafting process. Even in states that require significant individualized information, having a baseline way to generate all of the biographical and court data required into a template petition that can then be edited is still a tremendous time-saver for advocates. Technology tools such as Docassemble or the Expungement Generator can greatly simplify the process of drafting petitions.^{xi}

In addition, electronic filing systems can make filing petitions (especially in bulk) much easier. If courts do not already have functional electronic filing systems, that is an important push for reform. In electronic systems, not only can petitions be filed easily on a computer, but they can be automatically served on

District Attorneys or other relevant parties. In states where prosecutors have a review and consent process, even that can be handled electronically. This greatly reduces the paperwork and time burden on advocates.

For pro se filers who may not have easy access to technology tools or e-filing systems, having easy ways to file simple petitions in person at the courthouse is essential. States or localities should develop simple petition templates that can be used and easily filed, and ideally court staff would be available to help pro se petitioners fill out and complete the filing and serving process.

Proving Rehabilitation, Administrative Pre-Hearing Review, Prosecutorial/Judicial Discretion, Hearings and Judicial Efficiency

In the many states that have robust hearing processes that are subject to significant prosecutorial and judicial discretion, the record clearing process can be slowed down significantly and individuals may be less likely to ultimately have their records cleared. Even where such processes are required by law, advocacy with prosecutors' offices and courts can significantly streamline these procedures.

For example, if prosecutors have significant discretion to object or agree to record clearing, being able to come to a general understanding of cases where they will agree can be helpful. Developing a procedure whereby prosecutor consent bypasses the need for a judicial hearing is a way to significantly shorten the time frame for record clearing. In addition, developing court processes that promote efficiency, such as mass-approving and processing uncontested cases, can make record clearing significantly more efficient.

There are also opportunities for law reform – both legislative and litigation-based. In states that put a significant burden on petitioners to prove they should have records cleared, there may be due process arguments that can be made – especially if petitioners are trying to clear non-conviction records.^{xii} Legislative reform can also help create presumptions of eligibility if certain criteria are met that can only be overridden if good cause is shown. Of course, a Clean Slate law where discretion and review are removed entirely when the eligibility conditions are met remains the ideal in terms of efficiency.

Removing Records from the Applicable Databases

Whether by law, rule, or court agreement, there are important ways to ensure that records are properly cleared from all the places they are most likely to be accessed for purposes of employment, housing, and more. Record clearing laws and rules can specify the agencies to be served with record clearing orders and require those agencies to comply with such orders. Ideally, the courts themselves will take on the burden of ordering other law enforcement agencies to remove records when the courts order it.

In addition, courts can require commercial background screeners to remove cleared cases from their databases. Many court systems contract directly with these screeners to sell them court or law

enforcement data in bulk. Those contracts should include requirements to promptly remove cases when they have been cleared. To streamline this process, Pennsylvania’s “LifeCycle” approach is highly effective. Pennsylvania’s Administrative Office of Pennsylvania Courts (AOPC) sends a list every week to its bulk purchasers informing them of the cases that have been cleared and instructing them – and their downstream users -- to remove the cases from their records.^{xiii} This clear notice is the best practice for ensuring compliance from background screeners.

In any event, if screeners report cases that have been cleared, they can be liable under the Fair Credit Reporting Act (FCRA).^{xiv} A number of boutique consumer rights law firms specialize in FCRA litigation and can be good partners, especially for states where background screeners are not directly notified when cases are cleared and are routinely misreporting them.

CONCLUSION

While significant barriers interfere with the promise of record clearing reaching all those who are eligible, there is also significant momentum around the country to scale up eligibility for and access to record clearing. As Clean Slate campaigns continue to take off in states around the country, the future of barrier-removal is in the automation of the record clearing process. However, petition processes are likely to remain, and there are steps that states, localities, courts, and advocates can take to ensure easier, more streamlined, and more effective relief reaches the millions of Americans struggling under the weight and burden of their criminal records. These steps are essential to closing the “Second Chance” gap.

ⁱ Prescott, J.J. and Starr, Sonja B., Expungement of Criminal Convictions: An Empirical Study (March 16, 2019). Harvard Law Review, Vol. 133, No. 8, pp.2460-555 (June 2020), available at <https://ssrn.com/abstract=3353620> or <http://dx.doi.org/10.2139/ssrn.3353620>.

ⁱⁱ See Chien, Colleen V., America's Paper Prisons: The Second Chance Gap (December 16, 2020). 119 Mich. L. Rev. 519 (2020), available at <https://ssrn.com/abstract=3265335> or <https://dx.doi.org/10.2139/ssrn.3265335> (coining the phrase “the second chance gap”).

ⁱⁱⁱ Expungement of Criminal Convictions: An Empirical Study, *supra* note 1, at 2502.

^{iv} *Id.* at 2502-03.

^v *Id.* at 2553-54.

^{vi} See Center for American Progress, RELEASE: On Its One Year Anniversary, Pennsylvania’s Clean Slate Law Has Cleared Nearly 35 Million Records, available at <https://ampr.gs/3sEVFoa>.

An up-to-date tally of the number of cases sealed can be obtained from the Administrative Office of Pennsylvania Courts at: <http://www.pacourts.us/learn/learn-about-the-judicial-system/clean-slate-expungement-and-limited-access>.

^{vii} More information about Pennsylvania’s Clean Slate law can be obtained at www.mycleanslatepa.com.

^{viii} The Clean Slate Initiative can be reached by contacting info@cleanslateinitiative.org or campaigns@cleanslateinitiative.org.

^{ix} See Fines and Fees Justice Center, First Steps Toward Equitable Fines and Fees Practices: Policy Guidance on Ability-to-Pay Assessments, Payment Plans, and Community Service, available at <https://bit.ly/3dmddyP>.

^x See Leah Jordan, Fox13Memphis, *Clean Slate: New law makes clearing your record, getting back to work easier*, available at <https://bit.ly/3ud3Isr> (describing fund of Memphis organization Just City to pay expungement filing fees. Tennessee has since reduced and then eliminated its filing fees).

^{xi} Tony Abraham, Generocity, *Here’s the Technology Wiping Criminal Records at Those New Expungement Clinics*, <https://generocity.org/philly/2016/09/29/technology-criminal-records-expungement-clinics/>.

^{xii} See *Commonwealth v. Wexler*, 494 Pa. 325 (1981) (establishing a state constitutional right to petition for expungement of non-conviction records, placing the burden on the state to justify retention of records).

^{xiii} See Agreement Concerning Bulk Distribution of Electronic Case Record Information on Recurring Basis, available at <https://bit.ly/3dkIYZh>. For more information on AOPC’s LifeCycle file, see our webinar on “expungement aftercare” available at: <https://www.youtube.com/watch?v=u22iUSIodbg>.

^{xiv} See Nat’l Consumer Law Center, Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing, available at <https://www.nclc.org/issues/rpt-broken-records-redux.html>.