



New York State Pro Bono Clemency Initiative

**Training Guide for Lawyers
April 2016 Update**

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Introduction

Thank you for your interest in Governor's Cuomo's pro bono clemency initiative and volunteering to prepare clemency applications for eligible individuals with New York State convictions.

The New York State Constitution and the Executive Law provide the Governor with the power to grant clemency in the form of reprieves, commutations, and pardons for almost all convictions (except treason and impeachment offenses).

Clemency requests commonly come in two forms: commutations of sentence and pardons. Generally speaking, a commutation is a sentence reduction, including release from incarceration where appropriate, and a pardon provides unique relief for individuals who have completed their sentences but remain disadvantaged by their criminal history.

The Governor engages a careful, holistic review of each clemency application with officials from the Executive Chamber, Department of Corrections and Community Service, the District Attorney's office associated with each particular case, the Board of Parole, and the Office of Victims Services.

In October 2015, Governor Cuomo announced a new initiative to provide clemency applicants with assistance from volunteer attorneys to help prepare their applications. The goal of this initiative is to develop strong applications for the Governor to review. Volunteer attorneys will come from a number of partner legal organizations. If you are reading this you are affiliated with one of these organizations.

This guide will give you the basic information that you will need to:

- (1) Accept a case assignment;
- (2) Understand your client's criminal justice experience from conviction through incarceration and/or post-sentencing supervision;
- (3) Understand New York State clemency law and the Governor's guidelines for granting commutations and pardons; and
- (4) Create a comprehensive clemency application on behalf of your client.

This guide and the accompanying two-hour Webinar training were created by the New York State Executive Chamber and the Department of Corrections and Community Supervision to provide all the tools you need to assist your client.

Your service to individuals who can benefit from your advocacy is very much appreciated.

Thank you.

Part One: How to Take a Case

A. Signing up with an Affiliated Legal Partner

If you wish to represent, on a volunteer basis, an individual seeking clemency from the Governor, you should indicate your interest to a legal organization that is a recognized partner in this pro bono clemency initiative. The current list of legal organizations includes:

- The New York State Bar Association
 - The New York County Lawyer's Association
 - The New York City Bar Association
 - The New York State Association of Criminal Defense Lawyers
 - The Legal Aid Society of New York
 - The Bronx Defenders
- You must be affiliated with one of these organizations to receive a case referral. These organizations will make sure that you are an attorney in good standing, by checking your record with the New York State Office of Court Administration, and that you fulfill any other participation requirements set by the individual organizations.

B. Receiving a Referral from the Coordinator at your affiliated Legal Partner

1. **Prima Facie Screening:** All initial clemency requests are routed through the Executive Clemency Bureau (“Clemency Bureau”), a unit within the New York State Department of Corrections and Community Supervision (“DOCCS”). Requests are pre-screened by the Clemency Bureau make sure that the request meets the prima facie (“on its face”) criteria for clemency eligibility established by the Governor. Your potential client’s case will be pre-screened for these baseline eligibility criteria before you receive the referral.
2. **For Commutations,** this prima facie criteria is:
 - i. The person is serving a sentence of at least one year;
 - ii. The person has served at least half of their sentence; and
 - iii. The person is not eligible for parole within one year of his or her application for a commutation of sentence.
3. **For Pardons,** applications will be passed on by the Clemency Bureau to a volunteer attorney if:

- i. The relief that the applicant requests is not otherwise available through a Certificate of Relief from Disabilities or a Certificate of Good Conduct.¹ In many cases, such relief includes preventing the immigration consequences of a conviction, such as deportation.
- ii. The applicant seeks to set aside a conviction because overwhelming and convincing proof of evidence becomes available after the applicant's appeals have been exhausted. These applications are not common – most claims of innocence are pursued through habeas corpus petitions or petitions for a new trial. Pardons by reason of innocence are a specific statutory form of relief, however, and occasionally individuals make such applications. See Exec. L. § 19.

Applicants whose request for relief could be met by a Certificate of Relief from Disabilities or a Certificate of Good Conduct will be provided instructions about how to apply for these Certificates by the Clemency Bureau.

4. **Assignment by a Legal Partner Coordinator:** Each affiliated legal partner will designate a coordinator for this project. Once coordinators receive referrals from the Clemency Bureau, the coordinators will distribute referrals among their membership as they see fit. The Clemency Bureau will pass on eligible applicants to each legal partner's coordinator, based upon:
 - i. Geography. Applicants are located in correctional facilities throughout New York State. Some affiliated legal partners will have volunteer lawyers located throughout the state, and some will have lawyers located in or close to New York City only. While a visit between an attorney and an applicant is not required, geographic proximity between the lawyer and the applicant can help facilitate a visit or visits. Some organizations may also require a specific geographic nexus between the applicant and where the organization is based (e.g., residency or conviction in a particular county).
 - ii. Equitable Representation from affiliated legal partner. Each partner has signed on to this project because they want their members to have the opportunity to help. In order to equitably distribute these opportunities, the Clemency Bureau will make sure that all partners receive referrals.

5. **Nondisclosure agreement:** In order to get a referral to review, you must sign a nondisclosure agreement. [Attachment A] You will be reviewing sensitive

¹ Certificates of Relief from Disabilities and Certificates of Good Conduct remove automatic barriers to employment, licensing and “all forfeitures, disallowances, bars” resulting from a criminal conviction, with some exceptions based on specific crimes (e.g. no firearms licenses for A-1 felonies). Certificates of Relief from Disabilities are available for people convicted of multiple misdemeanors and up to one felony; Certificates of Good Conduct are available for people convicted of more than one felony, but cannot be issued until a waiting period of one to five years passes from release, depending on the crime. See Correction Law §700-706.

information about an applicant who is not yet your client, and it would not be appropriate for you to share or discuss this information with anyone outside of the coordinator at the legal partner organization, or your colleagues within your law firm.

C. Reviewing the Referral

1. **Contents of the referral:** You will receive a referral package from your organization's coordinator that will include:
 - i. A cover letter summarizing the applicant's prima facie eligibility from the Clemency Bureau, including, for commutation cases, a calculation showing how the applicant has served at least half of his or her sentence, and containing the estimated release date.
 - ii. A release from the applicant authorizing his or her attorney to review various relevant documents held by DOCCS and by the individual. [Attachment B]
 - iii. The initial application from the individual requesting clemency.
 - iv. A Clemency Case Status Report Sheet. [Attachment C]
 - v. Copies of the following documents from DOCCS about the applicant's disciplinary and programming experience during incarceration:
 - a. Uniform Sentence and Commitment Sheet
 - b. Crime and Sentence Information Summary
 - c. Inmate Overview Page
 - d. Inmate Disciplinary History
 - e. Case Plan
 - f. Inmate Program Assignments
 - g. Training Achievement and Potential Employability Report
 - h. Locator System Printout

You should carefully review the referral information. Information on how to interpret the documents is found in Part Two of this training guide.

D. Accepting the Referral and Engaging the Client

As you review the referral, remember that the applicant is relying on a volunteer lawyer to help him or her present the strongest case possible to the Governor. It is expected that you will take the case, absent a conflict of interest, or a determination, shared by your affiliated legal organization's coordinator, that a case for clemency cannot be presented.

Upon determining whether to accept or decline your assigned referral, you will then submit a Clemency Case Status Report Sheet to the Executive Clemency Bureau indicating your decision. [Attachment C]

If you decide to take the case, please send the applicant an engagement letter. A sample engagement letter is enclosed. [Attachment D]. We prefer that you adopt this letter, instead of sending out your or your firm's standard engagement letter, which may be difficult to understand, and may deal with a number of contingencies that are unlikely to occur in your representation of a clemency client.

Once you receive the signed engagement letter back from the applicant, your representation has begun. You should notify:

1. The coordinator at your affiliated legal organization who will be responsible for tracking your representation, including checking in with you on occasion to see how the case is progressing, providing support, and getting an estimate for when you will file the application.
2. The Clemency Bureau, who will list you as the attorney-of-record for that applicant and can help you set up your initial phone call with your client.

E. Initial Phone Call with Client

Once you are listed as attorney-of-record for an applicant, the Clemency Bureau will help to set up a 30-minute call with your client. This call will be confidential. DOCCS will assist you to facilitate future calls, as necessary.

F. Visits with your Client

Visiting your client in person to gather more information and establish a rapport is encouraged, but is not required. [Attachment E] describes how to set up an attorney visit at a DOCCS facility.

Part Two: Understanding Your Client's Criminal Justice Experience, From Conviction through Incarceration

A. Understanding your Client's Current Conviction

The following items will help you gain a full understanding of your client's current conviction(s):

1. ***Penal Law Definition:*** The conviction(s) for which your client is currently incarcerated for, or, in pardon cases, your client's most recent conviction, can be found in the Uniform Sentence and Commitment sheet that accompanied him or her to prison. A sample of this document is found at [Attachment F]. The conviction will be expressed as a New York State Penal Law citation, for example: PL 160.15 (Robbery in the 1st Degree).

To understand the basic elements of the crime, you should look it up in the Penal Law.

2. ***The Presentence Report:*** The statute defining the offense describes its basic elements, but does not tell you about the facts of your client's crime(s). The document before the clemency review team at the Governor's office that describes the facts related to the offense is the Presentence Report (PSR). The presentence report is written by a probation officer tasked with creating a comprehensive picture of the defendant to aid the court in rendering a sentence. It is not prepared by defense counsel, and defense counsel does not have a chance to review and edit the report before it is submitted to the court so bear that in mind as you review. However, it is the one document that the court relies on, and the clemency reviewers also rely on, to get a sense of the defendant's actions leading up to the offense. The document also touches on the applicant's culpability vis-a-vis other actors during the commission of the offense. An argument for clemency is in part an argument for mitigation, and it is here that you will get the facts of the case that can help build that argument. Consider how old the applicant was at the time of the crime, whether the applicant was impaired in some way when committing the crime, and, again, the role of other actors.

[Attachment G] is a sample Presentence Report.

Access to the Presentence Report is carefully controlled by statute, and so you will need to get a court to order DOCCS to produce the PSR to you. The Pro Bono Clemency Project and the Office of Court Administration have worked out a streamlined process that should result in orders being issued in a timely manner. First, you will make a motion for production of the PSR to the Administrative Judge

of the judicial district containing the county in which your client was convicted. You should use the sample motion form enclosed as [Attachment G-1]. A list of Administrative Judges by district is enclosed as [Attachment G-2]. Please put the designation “Pro Bono Clemency Program” on the envelope containing the motion. The Administrative Judge will review the motion and either issue the order to produce the form himself or herself, or send the motion to the sentencing judge with the understanding that the sentencing judge will issue the order. The practice will vary from district to district, depending on the preferences of the Administrative Judge. The order will go to DOCCS, which has the PSRs, and DOCCS will send the PSR to you.

3. ***Speak to Your Client About the Offense:*** What can he or she tell you about what happened, and why? If the client’s account of what happened varies widely from that in the presentence report, remember that the clemency process is not a re-litigation of the criminal case, unless your client is asking for a pardon based upon innocence (NY Exec. L. § 19). The clemency review team will look at the Presentence Report for the facts of what happened; your client’s more useful contribution goes to “why.” The review team is looking for attributes that make the applicant deserving of the extraordinary relief of clemency.
4. ***Speak with the Previous Defense Counsel:*** With your client’s permission, reach out to the previous defense counsel on the case. He or she may be able to add perspective as you are putting together a narrative of that, with factual accuracy, describes the offense in a way that is persuasive of mitigation.
5. ***Conduct Independent Research on Your Client’s Case:*** Search for news articles and other information about the case on the Internet. Some cases receive widespread media attention that could provide a sense of how the local community was (or still is) affected by the crime(s).

B. Understanding your Client’s Previous Offenses

The following items will help you gain a full understanding of your client’s previous conviction(s), if any:

1. ***Official Records: The Repository Inquiry (Rap) Sheet.*** The New York State Division of Criminal Justice Services (“DCJS”) maintains official criminal history records, also commonly known as “rap sheets” (record of arrest and prosecution). Although a rap sheet can appear daunting at first, take your time to look it over carefully and begin to feel comfortable with its format and language. The extent of an applicant’s previous criminal history is something that fits into your client’s

narrative. From the previous criminal history, you will be able to tell if the current offense fits into a history of behavior or is not part of such a pattern.

[Attachment H-1] is a Sample Rap Sheet and [Attachment H-2] is a detailed guide on how to read a DCJS rap sheet.

2. ***Speak with Your Client:*** Your client can tell you about his or her criminal history, although your client may not remember it in the same detail you will find in the presentence report or on a rap sheet. That is human nature – most people, for example, could not relay their medical history from memory with the same accuracy that one would get from reviewing a medical chart. You are looking not as much for exact recollection as for details about what was happening in his or her life that lead to the series of criminal activities that you will find on the rap sheet.

C. Understanding Your Client’s Prison Experience and Record of Conduct

In most cases, your client has spent years, in most cases, living in DOCCS prison facilities. [Attachment I] provides an overview of the DOCCS system and some basic terminology that will be helpful to know as you interact to your client about his or her prison experience.

In the referral from the Clemency Bureau, you will find several documents from DOCCS about your client. Detailed instructions on how to read each document can be found in [Attachment J]. These documents include:

1. ***The Uniform Sentence and Commitment Sheet.*** The Order contains basic information about the conviction and the sentence, including the penal code citation. [Attachment E]
2. ***Crime and Sentence Information Summary*** from the DOCCS computer system about the conviction and sentence. This document briefly summarizes the crime, drawing from the Presentence Report. [Attachment K]
3. ***FPMS Inmate Overview Page*** from the DOCCS computer system. [Attachment L]
4. ***Inmate Disciplinary History.*** This computerized sheet summarizes the disciplinary charges and findings against your client during incarceration. [Attachment M] Reading it carefully involves cross referencing the charge with the description of the rule that is alleged to have been broken. The Rules can be found in the New York Code, Rules and Regulations, 7 N.Y.C.R.R. § 270.2.
5. ***A Case Plan*** for your client prepared by DOCCS’s program staff. [Attachment N]
6. ***Inmate Program Assignments,*** a computerized sheet of each program that your client has been assigned and any completions of such programming. [Attachment O]
7. ***A Training Achievement and Potential Employability Report*** on your client, also from the DOCCS computer system. [Attachment P]

8. *A Locator System Printout* of your client's journey through the DOCCS system, including every correctional facility at which he or she was incarcerated. [Attachment Q]

You should review these documents using the guide and go over them with your client. Your client's explanations of what happened in each disciplinary incident is important. Your client is provided Inmate Misbehavior Reports for each disciplinary charge, and after a hearing for each charge, he or she is given a Disciplinary Hearing Disposition. You may ask your client for these documents, which will give you more factual background for each charge. Similarly, ask your client why he or she completed certain programs and what programs he or she did not complete, and why. It may be that certain programs were not offered at the facilities at which they were housed [Attachment R].

Part Three: Understanding the Law of Clemency

The Governor's power to grant clemency in the form of commutations of sentences, pardons and reprieves is found in the New York State Constitution and reiterated in NY Executive Law §§ 15-19.

A. NY State Constitution Article IV, Section 4.

“The governor shall have the power to grant reprieves,² commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he or she may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, the governor shall have power to suspend the execution of the sentence, until the case shall be reported to the legislature at its next meeting, when the legislature shall either pardon, or commute the sentence, direct the execution of the sentence, or grant a further reprieve. The governor shall annually communicate to the legislature each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which the convict was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve.”

B. NY Executive Law §§ 15-19.

Article 2-A of the Executive Law reiterates the State Constitutional provisions:

Exec. L. § 15: “The governor has power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to the regulations provided in this article.”

Exec. L. § 16: “[The governor] may also suspend the execution of the sentence, upon a conviction for treason, until the case can be reported to the legislature, at its next meeting, when the legislature must either pardon or commute the sentence, direct the execution thereof, or grant a further reprieve.”

Exec L. § 17: “[The governor] must annually communicate to the legislature, each case of reprieve, commutation or pardon; stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve.”

Exec. L. § 18: “If any person who has been discharged from imprisonment, by virtue of any parole, conditional pardon, or conditional commutation of his sentence, shall violate such condition or neglect to perform it, his parole, pardon or commutation shall be void and he shall be remanded to the place of his former imprisonment and there confined for the unexpired term for which he had been sentenced. Determination of the

² A reprieve refers to the Governor's ability to suspending the execution of a death penalty sentence.

violation of such parole, pardon or commutation and reincarceration therefor shall be had in the manner prescribed in the correction law.”

Exec. L. §19:

Upon motion duly made therefor, the judgment of conviction must be set aside and the indictment, information or complaint dismissed by the court in which the defendant was convicted, in a case where the defendant shall receive a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which he was convicted and further stating that such finding of innocence is based upon evidence discovered after the judgment of conviction was rendered and after the time within which to make a motion for a new trial on newly discovered evidence had expired. Such setting aside of a judgment of conviction and dismissal of an indictment, information or complaint against a defendant shall place the defendant in the same position as if the indictment, information or complaint had been dismissed at the conclusion of the trial by the court because of the failure to establish the defendant's guilt beyond a reasonable doubt.

C. **Case Law on Clemency:** There is very limited case law on clemency because, simply put, “commutation is a matter of grace not of right” *Roberts v. New York*, 160 N.Y. 217 (1899). Grants of clemency are not subject to judicial review, “unless illegal or impossible conditions are attached.” *Vanilla v. Moran*, 272 App. Div. 859, aff’d 298 N.Y. 796. The most recent case available on clemency is from 1977, in which Judge Miner, before joining the U.S. Court of Appeals for the Second Circuit, reviewed an Article 78 proceeding challenging the denial of a sentence commutation in a sympathetic case. Judge Miner noted that despite the favorable fact pattern, the power to grant reprieves, commutations and pardons was conferred upon the Governor and a court could not order him to grant commutation. *Sturnialo v. Carey*, 394 N.Y.S. 2d 137 (1977).

D. **Executive Guidance on Clemency:**

1. **Commutations:** The Executive has issued guidance on the prima facie eligibility for commutations, which can be found on the Governor’s website at <http://www.ny.gov/services/apply-clemency>. Applicants referred to volunteer lawyers meet this basic eligibility standards. This standard, again, is:
 - i. Individual has been sentenced to at least a year of incarceration;
 - ii. Individual has served at least half of his or her sentence; and
 - iii. Individual is not yet eligible for parole within a year of the individual’s application for clemency.

When reviewing eligible clemency applications, the Governor is looking at the individual behind the application. The application should tell the story of that individual: what brought him or her to the commission of the crime; what were the mitigating factors, if any; what has the person done with his or her life since the

conviction; and what risk does the person present to public safety, which includes the appearance of public safety.

In reviewing these stories, the Governor is looking – broadly – at factors that make the best case for the extraordinary relief of clemency. Although the factors are independent, it is unlikely that an application will be considered without considerable evidence of rehabilitation.

- i. **Rehabilitation:*** A strong application will present an individual who has made exceptional strides in self-development and improvement; has made responsible use of available rehabilitative programs; and has addressed identified treatment needs.

You should look carefully at your client’s prison participation record and consider what he or she has achieved compared to what was offered in each of the facilities where your client was incarcerated. You should also obtain other evidence of rehabilitation from your client and his or her family members or supporters – such as re-establishing relationships with children or family members, or corresponding with community groups, including faith-based groups and re-entry organizations.

The application must address how returning a person to the community will not jeopardize public safety.

- ii. **Illness, Disability, Age:*** A strong application will present circumstances that make a person’s return to the community all the more compelling, such as an individual’s health issues or circumstances relating to the person’s age. For example, a person convicted at a very young age and whose culpability for the crime may be less pronounced as a result of that age or an older individual facing severe health issues. In these instances, applications could include a compassionate argument for the applicant not spending their last years behind bars. The application must address how returning a person to the community will not jeopardize public safety.
- iii. **Inequity:*** A strong application will show how further incarceration would constitute a gross unfairness because of the basic inequities involved. This factor is highly individualized, but when you believe you have a case in which further incarceration raises the specter of gross unfairness and inequity, particularly vis-a-vis the outcomes afforded other, similarly situated individuals, please develop this point for the Governor’s consideration. Again, the application must address the effect of the release upon public safety.

- 2. Pardons:** The Executive’s guidance states that Pardon applicants must demonstrate a specific and compelling need for relief and a substantial period of good citizenship.

- i. **Need for the pardon:*** Unless there are exceptional and compelling circumstances, a pardon will not be considered if the applicant has other administrative remedies available to him or her, such as a Certificate of Relief from Disabilities or a Certificate of Good Conduct. These Certificates remove statutory bars to working in or being licensed to perform most occupations. Certificates of Relief from Disabilities are available to people convicted of misdemeanors and not more than one felony; a Certificate of Good Conduct is available to people convicted of multiple felonies. The Certificate of Good Conduct requires the applicant to live crime free in the community for a period of time (5 years for A and B felonies; 3 years for C,D, and E felonies; 1 year for misdemeanors). Pardons are not meant to short change these waiting periods, absent, again, exceptional and compelling circumstances.

Certificates do not provide relief against deportation or the failure to re-enter the country after leaving, however, so this relief is often sought by a pardon.

- ii. **Good citizenship:*** The guidance states that those seeking a pardon should provide examples of rehabilitation and positive accomplishments since conviction and release. These examples should be drawn both from incarceration and from time in the community, since pardons are most often granted to individuals who have completed their sentences and lived successfully in the community for some period of time.

Part Four: Building a Strong Application Package

A. Contents of the Application Package

There are no constitutional or statutory requirements for what documents must be included in a clemency application – the application will be as unique as the individual described within. Drawing on examples of well-constructed applications that have been presented to the Governor’s office, we recommend:

1. ***A Written Request for Clemency from the Attorney*** on behalf of the client that contains a well-reasoned argument for why clemency should be granted. The written request should include:
 - i. An Executive Summary;
 - ii. Early life and family background;
 - iii. Prior criminal history, if any, and mitigating factors, if any;
 - iv. The client’s current conviction, including a factual description together with any mitigating factors, if any;
 - v. Behavior during incarceration, including:
 - i. Disciplinary record;
 - ii. Record of programming and rehabilitation; and
 - vi. For a pardon request, accomplishments and behavior after incarceration;
or
 - vii. For a commutation request, description of plans for re-entry
2. ***A letter from the client.*** The client will have already submitted a letter requesting clemency that was reviewed as part of the initial screening – this letter should at the very least not contradict the earlier letter and should hopefully build upon it. Reviewers will be looking for a sense of the applicant’s contrition, the applicant’s sense of purpose and goals for his or her life, any special needs or challenges the applicant is facing. Understanding that applicants have a variety of educational backgrounds, the reviewers are looking less at grammar and more at discovering the person behind the application.
3. ***Letters of support*** from employers, teachers, co-workers, community leaders and family members. The Governor is looking to see if the applicant has made an impact on his or her community and if the community is invested in his or her return. Although each letter of support should be individualized, we have included a list of relevant content that could be discussed. [Attachment S]
4. ***Records of accomplishments***, including diplomas, certificates, awards, commendations, etc.

5. *DOCCS records* that back up representations about the applicant's disciplinary history and program participation.
6. *For commutations: representations confirming re-entry plans.* Letters from prospective employers, community service organizations, re-entry support groups to back up re-entry plans referenced in the application narrative. For example, if the narrative says that the applicant plans to work with the Urban League of Buffalo to secure employment and will be assigned a case manager to assist in reintegration, then a letter from the Buffalo Urban League confirming these details would be helpful.

[Attachment T] contains a list of re-entry taskforces and organizations throughout New York State that can be contacted to help an applicant and his representatives develop a re-entry plan.

B. Submitting of the Application Package

Once your application package is complete, you should notify the coordinator at your affiliated legal organization and please submit:

Electronically:

PardonsAndCommutations@doccs.ny.gov

-OR-

By mail:

New York State Department of Corrections and Community Supervision

Attn: Executive Clemency Bureau

The Harriman State Campus

1220 Washington Ave, Albany, NY 12226-2050

C. Additional Information:

If you have questions or concerns please contact the Clemency Bureau at 518-457-7565.