

THE SUPREME COURT OF OHIO
COMMISSOIN ON RULES OF SUPERINTENDENCE

Comment on Proposed rules of Superintendence 44-47

By The Employment Law Clinic
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The Employment Law Clinic

The Employment Law Clinic at Cleveland-Marshall College of Law of Cleveland State University provides students the opportunity to represent clients in employment cases filed in federal and state courts and agencies. Clinic students receive instruction on various aspects of federal and state administrative and courtroom proceedings stemming from employment claims. For instance, clinic students regularly represent clients in unemployment compensation hearings. Students also advocate on behalf of clients with discrimination claims based on gender, race, religion, age, national origin, color, the exercise of First Amendment rights, protected immigration status, and physical or mental disability. This comment is written by Thomas Fitzpatrick as a student project under the supervision of Clinical Professor Gordon J. Beggs.

The Problem

Proposed Rule of Superintendence 46(A)(1)(a) would authorize Ohio Courts to sell their records in bulk in electronic format. This rule is of concern because it substantially undermines Ohio's criminal record-sealing statutes: Ohio Revised Code §2953.32 (applies when defendants are found guilty) and §2953.52 (applies when defendants are found not guilty, when charges are dismissed or when a grand jury returns a no bill).

The following is an example of how these proposed rules undermine Ohio's record-sealing statutes. A "background checking" company regularly buys court records in bulk. One of its record purchases contains the information that first-time offender Jane Doe has been found guilty of a crime. At a later date, Jane Doe's record is sealed. The background checking company, however, is unaware of the sealing. Jane Doe, with a newly sealed record, steps up her search for better employment and housing now that she has the protection of Ohio Revised Code §2953.33(B) (prohibiting

applications for employment or other right or privilege from questioning a person about sealed or expunged convictions unless the question bears a direct and substantial relationship to the position for which the person is being considered).

Jane applies for numerous jobs with employers that use the background checking company that indirectly bought Jane's record prior to its sealing. Each time Jane applies for a job, her potential employer runs a background check and finds she has a criminal conviction on her record. As a result, Jane is never hired. Jane applies to live in numerous apartment buildings and houses owned by landlords that use the background checking company that bought Jane's record. Each time Jane applies to move into a new apartment, her landlord runs a background check and finds she has a criminal conviction on her record. As a result, Jane cannot find a better place to live. Jane Doe may never know her sealed record is still accessible by the background checking company's customers, and thus may never even have an opportunity correct the problem.

Policy

The legislative intent behind Ohio's record-sealing statutes was to provide some ex-offenders a "second chance." By allowing them to seal or expunge their criminal records, the Ohio legislature assisted ex-offenders in reentering Ohio communities and becoming productive members of society. Through these statutes the legislature increased the chances of ex-offenders to obtain adequate employment and housing, decreasing the likelihood of recidivism. The proposed rules of superintendence, as written, would undermine this legislative action.

A criminal record acts as a significant barrier to anyone seeking employment. A New York Times article entitled *Criminal Records Erased by Courts Live to Tell Tales* by Adam Liptak appeared in Section A, Page 1, on October 17th, 2006. As reported in that article, roughly 80% of large or medium sized employers conduct background checks on applicants for employment according to Debbie A Mukamal, the director of the Prisoner Reentry Institute at John Jay College of Criminal Justice in New York. *Boom Times a Bust: Declining Employment in Less-Educated Young Men*, a report published by the Center for Law and Social Policy, states 60% of employers would not

hire a person with a criminal record. Studies utilizing employment testers indicate a criminal record decreases job opportunities for Caucasians by 50% and African-Americans by 64%. *Id.*

A 2007 article entitled “The Missing Class: The Near Poor” by Victor Tan Chen and Katherine S. Newman, published in Volume 16, Number 6 of *Poverty & Race*, states over two-thirds of the incarcerated population were gainfully employed prior to arrest. When ex-offenders are unable to obtain employment their earning potential is significantly lowered. This puts additional stress on households that make, on average, poverty wages. *Id.* In addition, a decrease in employment opportunities increases incentives for ex-offenders to sell drugs. *Id.*

Effective community reentry is a critical issue in Ohio. According to a November 14th, 2007 press release from the Ohio Department of Corrections, Ohio’s prison population has reached an all time high of 50,016 incarcerated persons. All but a few of these inmates will reenter society. According to Sandra Bizzell, Executive Officer for Human Services and Workforce Planning of Cuyahoga County, each year roughly 7,000 ex-offenders reenter Cuyahoga County alone. An inability to obtain employment after release creates incentives for ex-offenders to engage in criminal activity in order to support themselves or their families. The result is higher recidivism rates and a decreased likelihood that ex-offenders can become productive members of Ohio communities.

Unrestricted access to court records by background checking companies has already caused problems in other states. According to Adam Liptak’s previously mentioned article, residents of Florida, New York, Minnesota, and Texas have been affected by background checking companies reporting expunged or sealed records. The problem is expressed bluntly by the district clerk for Tarrant County in Fort Worth, Thomas A. Wilder, who refused to sell court records in bulk on principle. When interviewed about the problem he asked “How the hell do I expunge anything if I sell tapes and disks all over the country?” Judge Sandford Blake, the administrative judge of the criminal division of the 11th Circuit of Miami said background checking companies’

failure to update their records to reflect orders to seal or expunge records has left him feeling frustrated and helpless. *Id.*

The article gives several examples of how selling criminal records in bulk has undermined the ability of defendants to later expunge or seal their records. A Minnesota man described a background checking company distributing information about an expunged 1992 felony conviction as well as erroneous information about a crime he did not commit. The information came up in background checks and prevented the man from obtaining work for six months. Another example discussed in the article is that of a Florida woman who obtained a court order expunging an arrest stemming from a domestic dispute. The woman later applied to purchase a condominium. Part of the application process was a background check. Although the arrest and any related criminal records were ordered expunged, a background checking company still reported the incident, and the deal fell through. *Id.*

Mr. Liptak's article also discusses similar problems arising when background checking companies disclose crimes that, under state law, are not reportable to potential employers. Mr. Guevares, for example, was convicted of disorderly conduct more than a decade ago in New York. New York bars database companies from reporting such offenses to employers. Nonetheless a database company reported the disorderly conduct charges to the Tyco Healthcare Group, which had offered Mr. Guevares a job that would have doubled his annual salary to over \$40,000. After finding out Mr. Guevares had a criminal record, Tyco promptly withdrew the offer. *Id.*

Adam Liptak's article is a stark warning that background checking companies need to be closely supervised. When left unchecked such companies handle court records with a "customer first" mindset that offers insufficient protection to individuals with sealed, expunged, or otherwise nondiscloseable criminal records.

Lack of Safeguards in the Proposed Rule

A provision in proposed rule 46(A)(1)(b) appears to address this issue in principle by stating that anyone who purchases records in bulk shall keep the information current. The language in proposed rule 46(A)(1)(b) falls short of being effective for several reasons. First, there is no requirement for frequent purchase and replacement or regular supplementation of out-of-date information. Under the proposed

rule as currently written, it is unclear what “keep[ing] the information current” requires. Private background checking companies may reasonably interpret it as requiring monthly, quarterly, semi-annual or annual updates to their information. The latter interpretations are troublesome, as they may seriously interfere with an individual’s ability to find employment or obtain housing for substantial periods of time.

Second, there is no requirement that courts monitor compliance by purchasers of data with the rule’s purported standard. Similarly, there is no specification of sanctions should a company be discovered to be noncompliant. It is critical that there be an effective enforcement mechanism in the rule as individuals have no way to discover they have been denied employment because their potential employer accessed a sealed criminal record. This lack of oversight and consequence may result in background checking companies updating less frequently in order to keep their costs down.

It also creates an incentive for frequently-updating companies *not* to remove sealed or expunged records from their databanks. The customers of such companies are potential employers or landlords, who are paying for as much information as they can get on their applicants. Such customers should be willing to pay a premium for searches from companies with reputations for producing the greatest amount of important information, such as criminal backgrounds. Rather than replacing old court records with a subsequent bulk purchase, a company may simply “stack” files from each purchase by integrating new information into their old database without removing any old information. This would allow a company to avoid removing records that have been sealed or expunged while still keeping their database current on new convictions.

It appears that a very small percentage of applicants affected by disclosure of sealed or expunged records would become aware they are affected. According to the Adam Liptak’s New York Times article, one of the larger background checking companies says only one out of every thousand consumer background checks leads to a consumer contact disputing or complaining about the information provided. While these numbers may suggest that the company’s information is accurate, a more likely

explanation is that people are unaware when they are affected by an inaccurate report. As a matter of practice Ohio employers do not tell applicants why they have been denied employment. Thus, it is unlikely applicants would ever know there is a problem.

Finally, there appears to be no sufficient remedy for an injury to an affected individual. As such, even in the unlikely event applicants became aware that a background checking company was inaccurately reporting their criminal history, there would be no simple or practical recourse. Affected individuals may be able to argue a civil remedy, but will likely find little comfort after the fact. Arguing a novel tort or contract theory will not provide effective relief to affected individuals who are unable to obtain housing or employment while their lawsuit is pending in Ohio's overworked courts. The publicity and subsequent court record that would accompany this course of action would further serve to defeat the intent of Ohio's sealing statutes and perhaps even make it counterproductive for affected individuals to attempt to bring a suit.

Recommendation

We recognize there are legitimate reasons for accessing some court records for purposes of background checks. Proposed rule 45(B) allowing remote access to court records does not present the same issues as proposed rule 46(A)(1)(a). Requiring background checking companies that use court records to remotely access those records provides important protections. First, it gives Ohio courts near-complete control over their records, ensuring that they will accurately reflect orders to seal or expunge. Second, it only allows background checking companies to access court records at the time they need them for any particular background check, guaranteeing those records will be up-to-date. Together, these protections force background checking companies to only search up-to-date court records that accurately reflect orders to seal or expunge each time a criminal background search is conducted.

Unless comparable safeguards can be established for sales in bulk under proposed rule 46(A)(1)(a), that provision should not be adopted and no such sale should be permitted.

Respectfully Submitted,

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