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**AMERICAN BAR ASSOCIATION
COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS
CRIMINAL JUSTICE SECTION
NATIONAL DISTRICT ATTORNEYS ASSOCIATION
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION**

REPORT TO THE HOUSE OF DELEGATES

Recommendation

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop policies governing access to and use of criminal records for non-law enforcement purposes that would balance the public's right to information against the government's interest in encouraging successful offender reentry and reintegration.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop systemic reporting systems that will maximize reliability, integrity, authenticity and accuracy of criminal records. Where records are to be made available for non-law enforcement purposes, jurisdictions should implement procedures to present records to the lay reader in comprehensible form;

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop and implement procedures to permit an individual or the government to challenge the accuracy of criminal history record information in an official system of criminal records. Any record determined to be inaccurate or incomplete should be promptly corrected, and all determinations should be reported to the individual and the government in a timely fashion.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to establish standards and appropriate controls to ensure accuracy and reliability of criminal records. Private companies should be restricted to the extent legally possible from reporting records that have been sealed or expunged. If such companies are permitted to reveal a sealed or expunged record, they should be required at the same time to report the fact that the record has been sealed or expunged and the legal effect of such action.

REPORT*

In the past ten years, criminal records¹ have become widely available and put to use for a variety of non-law enforcement purposes.² Technological advances coupled with heightened security concerns have enabled and encouraged employers and landlords to seek access to criminal history information about applicants for jobs and housing, and even about incumbent employees.³ Private screening companies have taken most of the work out of finding out an individual's complete criminal record, making it practicable for an employer in Colorado to find out about the trouble that his newest employee got into as a youngster 20 years ago in New Jersey.⁴

In some states, criminal history information – including arrest records that did not result in a conviction -- is freely available on the internet to members of the public. A “Google” search for someone's name may bring up an unsolicited offer from a private screening company to do a criminal background check on the person for a nominal fee.⁵

* Note: Report revised March 3, 2007, in response to certain changes made in the black letter prior to House action.

¹ The Commission was assisted in the preparation of this report by a paper presented at its March 3 hearing by Sharon M. Dietrich, Managing Attorney, Community Legal Services, Inc., *Expanded Use of Criminal Records and Its Impact on Re-entry*, available at <http://www.abanet.org/cecs>. Ms. Dietrich points out in her paper that there is no monolithic “criminal record” being examined by employers and others. Rather, criminal history record information is generally made available to the public through a variety of sources: state criminal record “central repositories” (often maintained by the State Police), the courts, private vendors which prepare reports from public sources, and even correctional institutions and police blotters. A few states have a central repository of all criminal records information. For example, Massachusetts has its Criminal Offender Record Information (CORI) system, a computerized system established in the 1970s that tracks information about anyone in Massachusetts who has been arraigned on a criminal charge. See Boston Foundation, *CORI: Balancing Individual Rights and Public Access*, available at <http://www.tbf.org/uploadedFiles/CORI%20Report.pdf>. (“CORI Report”).

² A survey conducted more than a decade ago for the U.S. Justice Department found that 47.3 million individuals had state criminal histories, and 25 million individuals had criminal history records in the FBI's NCIC. Some FBI criminal information is duplicative of state records. *Use and Management of Criminal History Record Information: A Comprehensive Report at 25*, Bureau of Justice Statistics (1993), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cchuse.pdf>.

³ For example, from June 1, 2001 through May 31, 2002, noncriminal justice requests comprised more than half of the fingerprints submitted to the FBI for processing, compared to around nine percent in 1993. Paul L. Woodard and Eric C. Johnson, *Compendium of State Privacy and Security Legislation: 2002 Overview at 9*, NJC 200030 (U.S. Department of Justice, Bureau of Justice Statistics, Nov. 2003) (“Compendium”).

⁴ A recent report estimated that there are hundreds, maybe even thousands, of regional and local screening companies, in addition to several large industry players. See SEARCH, The National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (2005); see also Compendium, *supra* note 3 at 7-8. Among the latter, the report noted that ChoicePoint conducted around 3.3 million background checks in 2002, most of which included a criminal record check. USIS Transportation Services reported having 30,000 clients and processing more than 14 million reports per year.

⁵ According to a national task force report, “[T]he Internet greatly facilitates (and encourages) access to information for which the browser would not be inclined to make a trip to the courthouse.” Compendium,

Even some courts are taking steps to make their records more generally accessible to the public.⁶

Particularly since 9/11, a heightened concern for internal security has translated into a spate of new laws requiring records checks upon application for various professional occupations and employments.⁷ Numerous federal and state laws bar people with a criminal record from working in areas with some security nexus, such as transportation, and with vulnerable populations such as children and the elderly, without regard to the nature of the conviction, how long ago it occurred, or what the people have since made of their lives.⁸ Even if a law does not create an absolute bar to employment or licensing, people with a record are unlikely to be given an opportunity in a climate that rewards risk-avoidance.⁹ Quite apart from the devastating effect on individuals who have

supra note 2 at 29. Ms. Dietrich testified that in Pennsylvania, for instance, accessibility to records from both the Central Repository and the courts has been greatly facilitated by the Internet. In November 2002, the Pennsylvania State Police implemented its "PATCH system," a mechanism for ordering a criminal record over the internet. In the first year that the PATCH system was in operation, the PSP completed 567,209 background checks, up from 412,324 requests processed the previous year. At the PSP's budget hearing before the Senate Appropriations Committee in the spring of 2005, its Commissioner testified that the State Police had performed 1.7 million criminal record checks in the prior year. See Dietrich, *supra* note 1 at 3; see also Glenn May, *Online Background Checks Booming*, Pittsburgh Tribune - Review (Nov. 30, 2003).

⁶ Ms. Dietrich testified that the Administrative Office of Pennsylvania Courts ("AOPC") is planning to make criminal record information even more readily available to the public. It has established a website on which the criminal court docket sheets from the entire state will be made available to anyone with Internet access. Unlike a PSP record check through the Internet, the AOPC record check is nearly instantaneous and requires no fee.

"Advocates have argued that AOPC's website will greatly increase the barriers already encountered by [people with criminal records] in Pennsylvania. The response has been that court records have always been publicly available, so why should someone who wants to see them be forced to undergo the effort of traveling to the courthouse? The answer is in a concept known as "practical obscurity." The making of records available to the public at the courthouse balances public access with some privacy for [convicted persons,] because it requires some effort to obtain the information. This balance is upset when information is available at the click of a computer mouse."

Deitrich, supra note 1 at 4.

⁷ The commercial vendors reported significant increases in business immediately after 9/11, with ChoicePoint reporting a 30% increase and HireCheck reporting a 25% increase. See SEARCH, *supra* note 4 at 32. Employers confirm that criminal record checks have increasingly become what Ms. Dietrich calls "a staple in their hiring processes." A member survey conducted by the Society for Human Resource Management in 2003 revealed that 80% of its organizations conduct criminal background checks, up from a 51% response rate in a 1996 survey.

⁸ Ms. Dietrich reported that in Pennsylvania, 43 different occupations in which some people with convictions are barred from working have been identified, from accountants through veterinarians. See Community Legal Services, Inc., *Legal Remedies and Limitations on the Employment of Ex-Offenders in Pennsylvania* (Oct. 2004). Law students at the University of Toledo Law School compiled an inventory of the conviction-related employment disqualifications applicable in Ohio, and came up with well over 200. See Kimberly R. Mossoney and Cara A. Roecker, *Ohio Collateral Sanctions Project*, 36_U. TOLEDO L. REV. 611 (2005).

⁹ The press has managed to inflame public sentiment, with sensational headlines trumpeting the shocking news that a certain employer or industry employs people who have at some point in the past been convicted

worked hard to put their past behind them, serious problems of inaccuracy and misidentification are making life miserable for people who in fact have no record at all.

In most states, a routine background check can also bring up criminal records that did not result in conviction (including arrest records that resulted in no charges, charges that were dismissed, acquittals/reversals, and deferred adjudication or probation before judgment). While some states prohibit employers from taking arrest records into account in an employment decision, most do not. For a variety of reasons, it is more likely that the average African-American male will have accumulated an arrest record by the time he reaches his early twenties, adding to the other factors that contribute to a significantly lower chance of employment in this group, and underscoring the importance of addressing the disqualifying effect of arrest records by themselves. .

Taken together, these trends have made it more difficult than ever to overcome the stigma of a conviction or the associated legal disabilities. Most troublesome for public safety, they have created an environment in which even the most motivated ex-offenders cannot provide for themselves and their families, making them likely candidates for recidivism. Ironically, well-intentioned government efforts to enhance security may be taking us in the opposite direction.

To be sure, employers are entitled to know whether the person who is applying for a job has a criminal record that would cast doubt upon his or her fitness for the position being applied for, just as they are entitled to know that an existing employee has been arrested for conduct that would jeopardize the public safety or public trust. To take the most extreme example, an airline should be entitled to know if an applicant for a pilot's job has a record of DUI or drug possession arrests, just as it should be entitled to know if one of its current pilots has been arrested as the result of a bar fight. A bank or store should be entitled to know if an applicant for employment has been convicted of embezzlement or theft, just as a pharmacist should be entitled to know if a prospective employee has a lengthy record of drug arrests. Crafting a balanced records access policy that satisfies an employer's legitimate need to know as well as an employee's equally legitimate need to be able at some point to move on with his life -- and the government's interest in helping him do so -- is one of the more important challenges of an effective criminal records policy.

The resolutions recommended by the Commission urge jurisdictions to establish records systems that control access to and use of criminal history information for non-law enforcement purposes, balancing the public's reasonable right to know against the government's compelling interest in encouraging successful offender reentry and reintegration. States that have open access policies should consider whether systems that

of a crime. See e.g., Sherri Ackerman, *Felons Can Be Child Care Workers*, Tampa Tribune (Dec. 18, 2005), available at <http://news.tbo.com/news/MGBYVZEVICHE.html>. Recent research shows that almost 16 million people in the United States have a felony record. See Christopher Uggen, et al., "Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders," *Annals, AAPSS*, 208 (May 2006). Given the ever-expanding reach of the criminal justice system, one can imagine that at some point in the not-too-distant future more people might have a criminal record than not.

regulate public access, such as the Massachusetts CORI system, would better serve the several competing social interests.¹⁰ Open access systems, like some registries, tend to be ineffective in enhancing public safety, because they tend to discourage the sort of offender reintegration that reduces recidivism. The citizenry cannot and should not be put in the position, as individual employers and landlords and neighbors, of making public policy through ad hoc individual decisions based solely upon an individual's criminal record.¹¹

The Commission also urges that jurisdictions take steps to maximize the reliability and accuracy of criminal records. The Commission heard testimony about the hardship caused by inaccurate and incomplete reporting, by mistaken identity and false positives based on similar names, and by the growing phenomenon of criminal identity theft.¹² Compounding these record inaccuracies is the difficulty of correcting them. Jurisdictions should therefore implement procedures to minimize the possibility of false positives, to allow individuals or the government to challenge the accuracy of criminal history record information, and to remedy the problem of inaccurate or incomplete records in a timely manner.¹³ Finally, we recommend that all dispositions be reported in

¹⁰ See CORI Report, *supra* note 1. In Massachusetts access to court records is not subject to the same constraints as the state-wide CORI system, but court records are not centralized nor are they conveniently available by electronic means. See *Globe Newspapers v. Fenton*, 819 F. Supp 89 (D. Mass. 1993)(CORI violated First Amendment to extent it denied public access to court-maintained alphabetical indices of defendants in closed criminal trials without an individualized judicial determination on an adequate record that a particular defendant's name had to be sealed or impounded to serve a compelling state interest). Under Massachusetts law, records of felony convictions may be "sealed" by the office of probation after 15 years (ten years for misdemeanors), a remedy that has apparently not attracted the same challenge from the press. See Mass. Gen. Laws ch. 276, § 100A

¹¹ Elsewhere in our recommendations (see Report No. 103C, *supra*) we urge jurisdictions to work with employers and others who have a legitimate need for access to criminal record information to encourage its more efficient use, and thus to encourage employment of persons with criminal records where appropriate. Except in cases where there is a statutory requirement that an agency or employer conduct a criminal background check, non-law enforcement agencies and employers seeking access to an individual's criminal record should be required to demonstrate that the public interest in receiving such information clearly outweighs the individual's interest in security and privacy.

¹² See Dietrich, *supra* note 1 at 8-13. Criminal identity theft is a particularly pernicious type of erroneous criminal record, occurring when a person who is arrested gives the name, date of birth, and/or social security number of another person. Criminal identity theft is not an uncommon occurrence. The primary criminal justice report examining this phenomenon estimated that 400,000 Americans were victimized by criminal identity theft in a year's period. See *Report of the BJS/SEARCH National Focus Group on Identity Theft Victimization and Criminal Record Repository Operations* at 2 (Dec. 2005), available at <http://www.search.org/files/pdf/NatFocusGrpIDTheftVic.pdf>.

¹³ Ms. Dietrich recommends that, in order to avoid false positives, "date of birth and social security number should be mandatory search criteria. Never should "matches" be provided for solely a name match. Moreover, because false positives can be avoided in a fingerprint-based system, the FBI should continue to avoid providing name-based checks." See Dietrich, *supra* note 1 at 16.

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a timely fashion, which is particularly important where a disposition is favorable to the defendant.

The question of public access to criminal records is a nettlesome one with which the Commission wrestled. Because unrefined criminal record information can be difficult to read and misleading to lay readers, it should be presented to members of the public in a comprehensible and useful form. In addition, the Commission considered whether jurisdictions should take steps to ensure that only law enforcement agencies have access to records of closed cases that did not result in a conviction, including arrest records that resulted in no charges, charges that were dismissed, acquittals/reversals, and deferred adjudication or probation before judgment. Most statewide criminal record repositories limit public inspection of records of closed cases that did not result in a conviction, including cases where charges were dismissed or set aside after successful completion of a period of probation, pursuant to a deferred adjudication or deferred sentencing scheme. Similar policies have been held to raise First Amendment issues where applied to court records.¹⁴ The Commission's decided to defer, until the August 2007 House meeting, making a recommendation on what if any limits ought to be placed on access to criminal history information.

Finally, the Commission urges jurisdictions to establish standards for and monitor the activities of entities that are in the business of conducting criminal background checks for employment and other purposes, and to establish appropriate controls for accuracy and reliability of records. The Federal Trade Commission has taken the position that the Fair Credit Reporting Act covers the activities of private screening companies, which means that an employer seeking information about an applicant's criminal record from a screening company must first get the applicant's written authorization, then provide the applicant with the copy of any investigative report generated, and notice of any adverse action taken.¹⁵ With stepped-up education of

¹⁴ The automatic statutory sealing provisions applicable to court records not resulting in a conviction in Massachusetts were held unconstitutional in *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 506-07 (1st Cir. 1989) (sealed records must be made available to media unless there has been an individualized finding that sealing was necessary to effectuate compelling governmental interest; court distinguished between provisions providing for automatic sealing by probation office of certain non-conviction records, which it held unconstitutional, and those providing for case-by-case sealing determination by court, which it sustained). It is not clear whether a similar constitutional objection could be raised with respect to law enforcement or repository records. Compare *U.S. Dept. Of Justice v. Reporters Committee*, 489 U.S. 749 (1989) (personal privacy exemption of FOIA prohibited the disclosure of an FBI rap sheet to a third party without the consent of the record subject) with *Globe Newspaper Co. v. Fenton*, 819 F.Supp. 89, 92-93 (D.Mass.1993) (court docket sheets maintained in central records repository must be disclosed).

¹⁵ Where an employer requests a criminal record report from a commercial vendor for purposes of a hiring decision it is regarded as a "consumer report" and is thus governed by the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* Among the duties that FCRA imposes in such a situation are the following: 1) The employer must provide a clear written notice to the job applicant that it may obtain a consumer report. 15 U.S.C. § 1681b(b)(2). 2) The employer must obtain written authorization from the job applicant to get the report. 15 U.S.C. § 1681b(b)(3). 3) If the employer intends to take adverse action based on the consumer report, a copy of the report and a Federal Trade Commission Summary of Rights must be provided to the job applicant before the action is taken. 15 U.S.C. § 1681b(b)(3). This requirement permits a job applicant to address the report before an employment decision is made. Afterwards, the employer, as

employers about the requirements of the FCRA, and enforcement of its requirements by the FTC, individuals should have greater protections from mistake, and from unwarranted invasions of privacy.

Apart from whatever limits on public access are imposed by the state repository of records, the Commission notes that in many states courts are given authority, upon an individual's petition, to seal (or expunge, set aside, vacate, annul) that individual's record of conviction, upon successful completion of sentence, or at some reasonable time thereafter. Most states provide that such judicial sealing or expungement orders restore recipients to the legal status he or she enjoyed prior to conviction, and permit them to deny that they were ever convicted, including when asked to report prior convictions on an employment application. In a few states the record is destroyed entirely.¹⁶ The Commission determined to defer action on a proposal to endorse judicial sealing or expungement as a general restoration mechanism, instead endorsing the more transparent relief orders called for in the Commission's Report No. 103C.¹⁷ However, the

a user of a consumer report, must notify the job applicant that an adverse decision was made as a result of the report and must provide, among other things, the name, address and telephone number of the credit agency and the right to dispute the accuracy or completeness of the report. 15 U.S.C. § 1681m(a).

¹⁶ The Bureau of Justice Statistics reports that 26 states, the District of Columbia, Puerto Rico, and the Virgin Islands have statutes that provide for the expungement of at least some felony convictions, and that in 10 of those states, Puerto Rico, and the Virgin Islands, the record is destroyed by the State criminal history repository. In 12 States and the District of Columbia, the record is retained with the action noted on the record. *See Survey of State Criminal History Information Systems, 2003, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sschis03.pdf>*. However, even expunged convictions generally remain available to courts and law enforcement agencies, and ordinarily revive in the event of a subsequent offense. *See Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide at 39-61 (W.S. Hein, 2006), condensed at <http://www.sentencingproject.org/rights-restoration.cfm>*.

¹⁷ *See* Report 103C on Employment and Licensure of Persons with a Criminal Record, *supra*. Only a handful of jurisdictions make judicial sealing or expungement generally available for adult felony convictions (Arizona, Kansas, Massachusetts, Nevada, New Hampshire, Puerto Rico, Utah, Washington). Most of these states impose an eligibility waiting period that varies depending upon the seriousness of the offense, and exclude the most serious offenses altogether. For example, Nevada courts have authority to seal all records related to a conviction, upon the offender's request, after an eligibility waiting period ranging from three years for misdemeanors, to 15 years for more serious felonies. Nev. Rev. Stat. § 179.245(1)(a). This relief is unavailable to sex offenders, and also to anyone who has been arrested during the eligibility waiting period. In New Hampshire, convictions may be "annulled" following completion of the sentence and expiration of a waiting period ranging from 1 to 10 years. N.H. Rev. Stat. Ann. §§ 651:5(III) and (IV). Washington courts are authorized to "vacate" the record of conviction, upon application, for Class B felonies after 10 years, and for Class C felonies after five. Wash Rev. Code §§ 9.94A.640, 9.95.240, 9.96.060. Class A felonies are ineligible for this relief. Oregon's expungement remedy applies only to minor (Class C) felonies. Or. Rev. Stat. § 137.225(1) through (12). An additional number of states offer an expungement or sealing remedy to first offenders and/or non-violent offenders, or to probationers or misdemeanants, or to those who have received an executive pardon. The purpose of these statutes is generally rehabilitative, and most of them permit an applicant for employment to deny having been convicted. *See Love, id.* at 39-61. Sealing remedies may permit individuals to deny the fact of their conviction on employment applications, but they generally do not limit access by law enforcement agencies, or preclude reliance on the conviction in a subsequent prosecution or sentencing.

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Commission does believe that private screening companies should be restricted to the extent legally possible from reporting records that have been sealed or expunged, or whose public availability has been otherwise limited.¹⁸ If such companies are permitted to reveal a sealed or expunged record, they should be required at the same time to report the fact that the record has been sealed or expunged and the legal effect of such action.

Respectfully submitted,

Stephen A. Saltzburg, Co-Chair
James R. Thompson, Co-Chair

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¹⁸ See SEARCH report, *supra* note 4 at 22-26.