

**STUDY COMMITTEE ON CRIMINAL RECORDS ACCESS AND ACCURACY
FINAL REPORT TO SCOPE AND PROGRAM**

Submitted by Robert J Tennesen, Chair

December 16, 2013

The Study Committee on Criminal Records Access and Accuracy (the “Study Committee”) has completed its work and respectfully submits this final report, which describes the work of the Study Committee, provides an overview of the recent outreach efforts undertaken by the Study Committee, explains the need for a uniform act in this area, identifies issues for consideration by a drafting committee, and expresses the conclusions reached by the Study Committee.

I. The Study Committee

At the Uniform Law Commission (ULC) 2012 Annual Meeting in Nashville, Tennessee, a group of interested parties proposed to the ULC Committee on Scope and Program (“Scope and Program”) that a study committee be appointed to review the possibility of a uniform act addressing criminal history records. Scope and Program recommended that *a study committee be formed to explore the desirability and feasibility for drafting a uniform act relating to the accuracy of and access to criminal records*. The ULC Executive Committee, shortly thereafter, approved the appointment of a Study Committee on Criminal Records Accuracy and Access.

The Study Committee began its work in the fall of 2012 with two goals in mind: (1) to determine if a drafting project is feasible after a review of all the issues and; (2) if so, to identify issues to be addressed by a drafting committee. Over the course of the past eighteen months, the Study Committee met by conference call four times: October 2012, March 2013, June 2013, and a final conference call was held in December 2013. The Study Committee also prepared and submitted interim reports in January and June of 2013 to Scope and Program.

At the Study Committee’s October 2012 meeting, it was decided that the Study Committee would primarily focus on issues relating to accuracy. Most members of the Study Committee feel that the subject of access to criminal records is too broad and complex to be adequately addressed in a single uniform act. With that said, the Study Committee recognizes that there may be some unavoidable overlap between the accuracy of and access to criminal records.

Since the submission of its June 2013 Interim Report to Scope and Program, the Study Committee continued its outreach to potential stakeholders including: law enforcement on various levels; state offices, such as public safety departments and bureaus of criminal apprehension; judicial organizations, including those representing both trial and appellate courts, the National Center for State Courts and the Conference of Chief Justices; Conference of State Court Administrators (COSCA); probation officers; prosecutors; SEARCH (the National Consortium of Justice Information and Statistics) and the Federal Bureau of Investigation. The Study Committee made substantial progress as a result of its outreach efforts, which are discussed in more detail in the next section of this report.

II. Recent Outreach Efforts

The Study Committee deferred its final report to Scope and Program in order to use the last six months to seek input from additional experts and potential stakeholders. Over the past five months, I, in conjunction with ULC staff, have identified and communicated with representatives from the following organizations: (1) Consumer Financial Protection Bureau, (2) Federal Bureau of Investigation, (3) National Center for State Courts, (4) National Conference of State Legislatures, (5) Administrative Office of the Courts, (6) Conference of State Court Administrators (COSCA), (7) Council of State Governments, (8) International Association of Chiefs of Police; (9) National Association of Attorneys General, and (10) National Association of Criminal Defense Lawyers. As a result of this outreach, we have added a significant number of observers to the Committee roster, many of whom provided valuable feedback and participated in the most recent December 2013 Study Committee meeting. *See the current Study Committee roster, attached to this Final Report as Attachment 1.*

We provided each of the aforementioned organizations with the Study Committee's June 2013 Interim Report and solicited their feedback as to the desirability and feasibility of a drafting project on the accuracy of criminal records. The representatives from each of these organizations expressed a keen interest in the work of Study Committee. Some expressly stated the need for corrective legislation and their support for moving forward with a drafting project, and no one objected to the creation of a drafting committee.

Input received from the Federal Bureau of Investigation (FBI) was especially welcomed given the FBI's active involvement in the gathering and retention of criminal records. The representatives from the FBI gave an overview of the federal process for gathering and retaining criminal records from the states, explaining the various databases. In addition, they were able to provide insight on the key issues that contribute to the inaccuracies of criminal records. One point worth stressing is that a major source of inaccuracies is incomplete records, including the lack of disposition information after an arrest record has been entered in a database. The FBI representatives believe that a uniform act that could address this issue on the state level would be highly beneficial.

Other Materials

Since our June 2013 Interim Report, the Study Committee has had an opportunity to review additional materials important to the work of the Study Committee, such as the July 2013 report from the National Employment Law Project (NELP). The NELP report examines the problem of incomplete and inaccurate records found in the FBI databases and the impact it has on millions of lives. One of the authors of the report, Madeline Neighly, joined the Study Committee as an observer and has expressed support for moving forward with a drafting project. It is noted that some observers question the statistical validity of this and other reports reviewed by the committee. However, in keeping with the ULC goal of reaching out to all persons and organization that have an interest in the issue, the report is identified and does not exclude other studies and reports that will be considered by a drafting committee if one is approved.

III. The Need for a Uniform Law to Address the Accuracy of Criminal Records

The accuracy of criminal records has become increasingly important given the widespread availability and use of this information beyond the traditional purpose of law enforcement. Criminal records are now used to determine eligibility for employment, housing, credit, and other purposes.

Availability and Use of Criminal Records

The use of and access to criminal records have exponentially increased over the last two decades and especially since September 11, 2001. Factors contributing to the increase in the use of and access to this information include: the ease of access to public records due to advancement in technology; the expansion of federal and state laws that exclude persons with criminal records from certain educational programs, licenses, occupations and activities; the use of criminal records by employers and landlords to bar persons with criminal records in circumstances even if they are not required to do so by law¹; and the use of criminal records to determine credit worthiness in some situations.

Criminal record information is available to the public through a variety of sources including state criminal record “central repositories” (often maintained by the State Police), the courts, sheriffs, police, and private vendors that prepare reports from public sources².

Types of Inaccuracies Associated with Criminal Records

The most common types of inaccuracies associated with criminal records include:

- Incompleteness, which includes records with no information on the disposition after an arrest or other charge has been entered in a database.
- Errors that appear in a public record include: incorrect data entry has resulted in a listing of the wrong offense or the attribution of an offense to the wrong individual; the same offense has been listed twice (making the record look like there were two offenses); and the disposition of arrests has not been reported long after charges were dropped³.
- Criminal identity theft: when a person who is arrested gives the name, date of birth, and/or social security number of another person. It is estimated that 400,000 Americans were victimized by criminal identity theft in a year’s period⁴.
- “False positives” and “false negatives”: mismatches that occur in searches of both public records and in commercial prepared background checks because the search criteria for a database permit “false positives” – that is, a criminal record is attributed to someone who is not the person charged with the offenses – and, conversely, “false negatives” –

¹ Love, Roberts & Klingele, *Collateral Consequences of Criminal Convictions: Law, Policy and Practice* (NACDL/West 2013), Section 5:1, at page 279.

² *Id.*, Section 5:1, at page 279.

³ *Id.*, Section 5:8, at page 286.

⁴ *Report of the BJS/SEARCH National focus group on Identity Theft Victimization and Criminal Record Repository operations* (Dec. 2005).

situations where a criminal record or case is not attributed to the person who was arrested.

- Errors in reports prepared by commercial vendors including but not limited to: mismatches; multiple reports; reporting cases that have been expunged; reporting cases with dispositions that are not up-to-date; and presenting information in a confusing and prejudicial fashion⁵.

Factors Regarding Inaccuracy in State Criminal Records

All states report arrest data to a central repository and in turn to the FBI databases. However, the results of an arrest are not systematically reported to the central repository and on to the FBI. Examples include (1) release without a charge, (2) dismissal of a charge by a prosecutor, (3) dismissal or acquittal by a court, and (4) reversal of a conviction by an appellate court.

There is presently no effective solution for a person whose identity has been stolen or when someone else's criminal records are confused with their records.

The format of criminal history records and the method of presentation are confusing and difficult to understand even to experienced prosecutors. Former Minnesota District Attorney Robert M.A. Johnson said that he had trained staff assigned to review and interpret criminal records, and it was still was often difficult for his staff to understand the records.

Legal Framework Governing the Dissemination of Criminal Records

In the 1970's, the U.S. Department of Justice ("DOJ") implemented regulations establishing minimum criteria for the handling of criminal history information by federally funded state and local criminal justice agencies. These DOJ regulations led to virtually all states having passed legislation governing the dissemination of criminal records. Unlike court records, however, the dissemination of records from states' central repositories is closely regulated⁶.

State Laws Governing Accuracy⁷

Although the DOJ regulations do not require enactment of state laws governing the accuracy and completeness of criminal records, all states and territories except the Virgin Islands had adopted such a statute by 1991. Thirty-seven states require audits of the central repository. All but two states have laws requiring procedures by which people can review their records and seek corrections of inaccuracies, commonly known as "access and review" procedures.

If state laws requiring access and review procedures are in place, however, the existence of these procedures does not necessarily mean that criminal records are accurate. There appears to be a disconnection between state statutes on criminal records and the accuracy of criminal records. Moreover, an access and review procedure can come too late for someone who has been denied

⁵ Love, Roberts & Klingele, *Collateral Consequences of Criminal Convictions: Law, Policy and Practice* (NACDL/West 2013), Section 5:18, at pages 296-297.

⁶ 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).

⁷ Love, Roberts & Klingele, *Collateral Consequences of Criminal Convictions: Law, Policy and Practice* (NACDL/West 2013), Section 5:8, at page 285

employment housing, or credit based on a public record that is incorrect. So it is important to ensure that records are initially accurate.

Federal Laws Governing Accuracy

The accuracy of state criminal records is critical because they are the primary source of data included in “credit” and “consumer” reports. Inaccurate records at the state and local level propagate through the criminal records keeping system.

With respect to a state’s ability to legislate on the matter of criminal records, federal preemption warrants consideration. As discussed earlier in the report, it federal law does not restrict a state’s ability to legislate on the accuracy of criminal records. Generally speaking, federal law regulates commercially prepared criminal background reports through the Fair Credit Reporting Act (“FCRA”). The FCRA applies broadly to “consumer reports” prepared by commercial vendors, including criminal background reports and credit reports.

The FCRA establishes four primary legal obligations on commercial preparers⁸:

1. Prohibiting reporting obsolete arrests and other non-convictions that are more than seven years old, pursuant to U.S.C. §§ 1681 c(a)(5), and 1681 c(b)(3);
2. Requiring the use of “reasonable procedures” to ensure “maximum possible accuracy” of the information in the report, pursuant to 15 U.S.C §1681e(b);
3. Requiring that, when a criminal record is purchased for employment screening, the preparer must either notify the person that the public record is being reported and provide the name and address of the person who is requesting the information at the time the report is provided, or the preparer must maintain strict procedures to insure that the information it reports is complete and up to date, pursuant to 15 U.S.C. §1681k; and
4. Requiring that, if the completeness or accuracy of the information is disputed, the preparer must reinvestigate the information within 30 days of receiving notice of the dispute and delete or modify the information if it is found to be inaccurate or incomplete or cannot be verified, pursuant to 15 U.S.C. §1681i.

Federal enforcement of FCRA is shared by the Federal Trade Commission and the Consumer Financial Protection Bureau. As a general matter, FCRA does not preempt the entire field of credit reporting, but only preempts state laws that are inconsistent with the FCRA or that cover issues as to which the FCRA expressly preempts state law⁹.

IV. Issues for Consideration by a Drafting Committee

The Study Committee believes that, if a drafting project on criminal records accuracy were to be undertaken by ULC, the following issues should be considered in the course of such a project.

General Issues

⁸ *Id*, Section 5:15, at page 292.

⁹ *Id*, Section 5:25, at page 303.

1. (a) What information should be included in a criminal history record?
(b) What events or actions should be included in a criminal history record?
(c) Should juvenile records be included in a criminal history record?
2. Should criminal records be uniform in presentation?
3. How should expunged or sealed criminal records be addressed?

Observers to the Study Committee were divided on this issue. Some observers argued that states should report expunged information to background check agencies. Other observers felt that background checking agencies should only report the criminal history that currently is being reported by the law enforcement/judiciary system and should not have historical information, if it is no longer being reported. The latter group of observers argues that, by expressly reporting expunged criminal records, the relief that the expungement provides is undermined.

Issues Related to Accuracy

Below is a list of issues and other matters related to accuracy that the Study Committee believes should be considered by a drafting committee.

4. A drafting committee should:
 - (a) Examine and address systematic problems of inaccurate criminal records;
 - (b) Develop a solution for the person whose identity has been stolen or to whom another person's crimes have been attributed;
 - (c) Define what constitutes an accurate criminal record;
 - (d) Identify the all actors responsible for collecting, maintaining, and disseminating the information found in a criminal record;
 - (e) Define the duties and legal obligations of the state actors regarding accuracy;
 - (f) Consider developing appropriate and enforceable remedies for a person whose record is inaccurate; and
 - (g) Review existing procedures and laws that address accuracy and completeness of criminal records.

The process of compiling and maintaining criminal records in the states was discussed in great detail by the Study Committee. In review: states maintain a repository of criminal records under existing state laws; arrest information is fed into the state repository from law enforcement and forwarded to the various federal databases; but the disposition by the prosecutors and the courts is not consistently reported to the state repository and hence to the federal databases.

5. A drafting committee also should consider appropriate requirements to ensure the security of criminal records and prevent improper access to or tampering of those records.

V. Conclusions

The study committee has carefully considered the Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts and has concluded that some of the criteria for establishing a drafting project have been met for a project on criminal records accuracy. Specifically:

- There is an obvious reason for a uniform or model act on the accuracy of criminal records and preparation of such an act will be an important and practical step toward uniformity of state law. There is a reasonable probability that such an act might be enacted in a substantial number of states. Experience indicates that acts are most successful when there is no strong opposition and when there are stakeholders that will expend significant resources to gain enactment. In this instance, there is consensus that criminal records need to be accurate for the parties that rely on this information and the citizens who are affected by these records. It seems the inherent that all who use criminal history reports desire accuracy. The criminal defense bar including public defenders and probation officers are likely to have a strong motivation to support legislation that improves accuracy.
- Such an act will facilitate interstate cooperation between states and resolve significant issues in this area of law.
- None of the negative criteria set forth in the Statement of Policy apply.

Support for Drafting a Uniform Act

The Study Committee and observers are unanimously of the view that the inaccuracy, including the incompleteness, of criminal history records on the state level is problematic and needs to be addressed. No one who participated in the work of the Study Committee has expressed opposition to proceeding with a drafting project. However, some observers have expressed a strong preference that, if the project goes forward, it be limited to drafting provisions that deal with state or local government actions concerning the creation and dissemination of criminal records, and that any ULC act not impose any obligations or duties on third party providers of criminal records.

Recommendation

The Study Committee recommends that a drafting committee be formed to prepare a uniform law on the accuracy of criminal records.