

DRUG ENFORCEMENT AND POLICY CENTER

Commentary on the Disclosure of Sealed or Expunged Criminal History During Character and Fitness Reviews for the Practice of Law in Ohio

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OVERVIEW

Article IV, Section 2 of the Ohio Constitution grants the Ohio Supreme Court the authority to create rules regarding admission to the practice of law and those rules are codified in the Ohio Rules for the Government of the Bar. Currently, the Rules for the Government of the Bar require applicants seeking admission to the Ohio Bar to disclose expunged criminal records, even though disclosure is not required for the vast majority of other occupations/licensures. The current paper argues that the Ohio Supreme Court should consider making the Ohio Rules for the Government of the Bar consistent with Chapter 2953 of the Ohio Revised Code, thus allowing individuals with expunged criminal records (as well as pardoned and sealed records) to deny the existence of such records.¹

SECTION I: THE OHIO BAR REQUIRES DISCLOSURE OF SEALED OR EXPUNGED CRIMINAL HISTORY

The Ohio Bar considers an applicant's criminal history when determining whether the applicant possesses the requisite character and fitness to practice law. Rules for the Bar's character and fitness process in Ohio are largely contained in Rule 1 of the Ohio Rules for the Government of the Bar. As part of the Bar's process to determine character and fitness, applicants must answer a questionnaire that contains inquiries about criminal history (see Rule 1 Section 2). Important to the discussion here, sealed or expunged criminal history must also be disclosed. Section 13 (D)(1) states that "[t]he applicant has the burden to prove by clear and convincing evidence that the applicant possesses the requisite character, fitness, and moral qualifications for admission to the practice of law. An applicant's failure to provide requested information, including information regarding expungements and juvenile court proceedings, or otherwise to cooperate in proceedings before the admissions committee may be grounds for a recommendation of disapproval."

Further, likely prompted by the above rules, some Ohio law schools explicitly notify applicants that disclosure of sealed or expunged criminal history is required in their application process. For example, the University of Akron School of Law's website states the following:

You have a duty to be truthful and accurate as well as a duty to reveal all information even if you do not have complete documentation. You need to disclose details of the result of any criminal charges. Even if the charges were dismissed, adjudication was withheld, a conviction was reversed, a conviction was set aside, a conviction was vacated, a conviction was expunged, or the record sealed, **you must provide disclosure.**

¹ Note that individuals with convictions from other states are eligible for expungement in Ohio. See Ohio revised Code Section 2953.32 (B)(1).

Case Western Reserve University School of Law's website states:

If you have been subject to any criminal proceedings, they must be disclosed even if they were juvenile adjudications or have been dismissed, expunged, sealed or similarly disposed of.

University of Dayton School of Law's website states:

Please disclose details of the results of any criminal charges. Disclosure is required even if the charges were dismissed, conviction was reversed, a conviction was set aside, a conviction was vacated and even if the conviction was expunged or the record was sealed.

SECTION II: THE OHIO REVISED CODE PERMITS INDIVIDUALS TO DENY THE EXISTENCE OF SOME SEALED OR EXPUNGED RECORDS

Various sections of Ohio Revised Code permit individuals to deny the existence of sealed or expunged records. For example, Section 2953.34 (L)(1) states that "[i]n any application for employment, license, or any other right or privilege, any appearance as a witness, or any other inquiry, a person may not be questioned with respect to any record that has been sealed pursuant to section 2953.33 of the Revised Code.² If an inquiry is made in violation of this division, the person whose official record was sealed may respond as if the arrest underlying the case to which the sealed official records pertain and all other proceedings in that case did not occur, and the person whose official record was sealed shall not be subject to any adverse action because of the arrest, the proceedings, or the person's response." Further, for expunged convictions, courts "shall order all official records of the case that pertain to the conviction . . . expunged . . . and . . . all index references to the case that pertain to the conviction . . . deleted" (see Section 2953.32 (D) (2) (a)). Additionally, that section also states that expunged convictions "shall be considered not to have occurred" (see Section 2953.32 (D) (2) (b)).³ The only exception is that expunged convictions can be retained by "the bureau of criminal identification and investigation . . . for the limited purpose of determining an individual's qualification or disqualification for employment in law enforcement."⁴

SECTION III. THE OHIO SUPREME COURT SHOULD CONSIDER MAKING THE OHIO RULES FOR THE GOVERNMENT OF THE BAR CONSISTENT WITH CHAPTER 2953 OF THE OHIO REVISED CODE

As demonstrated above, Ohio law schools and the Ohio Bar require disclosure of sealed or expunged records despite Ohio statutes that do not require disclosure in many circumstances. While Article IV, Section 2 of the Ohio Constitution grants the Ohio Supreme Court the authority to create rules regarding admission to the practice of law (meaning the Ohio Supreme Court is not bound by Chapter 2953 of the Revised Code), several factors support creating consistency between the Ohio Rules for the Government of the Bar and Chapter 2953 of the Revised Code.

First, expungement means that official records are destroyed so that they are permanently irretrievable. Requiring applicants to disclose and discuss expunged convictions could result in inadvertent misstatements if applicants no longer have any documentation of the underlying criminal records and/or if their recollection is limited.

Second, some could argue that there is value (via public perception of the legal profession) to having bar admission rules that are consistent with laws of the state that virtually every other individual/entity is obligated to follow.

Third, and related to the second factor, while one could argue that public trust in the legal profession is so paramount that disclosure of expunged convictions should be required, this argument would not be based upon any empirical evidence. To address the third factor, the Ohio Supreme Court could conduct research to determine whether public trust in the legal system would be harmed by removing the requirement to disclose expunged convictions.

² Ohio Revised Code Section 2953.33 Sealing of official records after not guilty finding, dismissal of proceedings, grand jury no bill, or pardon.

³ See also Ohio Revised Code Section 2953.35 and Section 2953.36. Note that records of expunged convictions pursuant to Section 2953.32 are retained for the limited purpose of determining an applicant's eligibility for employment in law enforcement (see Section 2953.32 (D)(5)).

⁴ Ohio Revised Code Section 2953.32 (D)(5). See Ohio Revised Code Section 2953.34 for instances when sealed records can be retained.