2021 FALL/WINTER

VINDICATOR

THE MAGAZINE OF THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

THE POTENTIAL FOR RECORD SEALING:

Using Ohio's Expanded Eligibility Provisions To Help Our Clients Move Beyond Their Criminal Records

Ohio Supreme Court Weighs In On Reliability Of Anonymous Tips As The Basis For A Traffic Stop • Termination Of Sexual Registrant Status: The Difference Between Impetuous And Predatory • The Business of Law: Sales • Ethics

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MISSION STATEMENT

- To defend the rights secured by law of persons accused of the commission of a criminal offense;
- To educate and promote research in the field of criminal defense law and the related areas;
- To instruct and train attorneys through lectures, seminars and publications for the purpose of developing and improving their capabilities; to promote the advancement of knowledge of the law as it relates to the protection of the rights of persons accused of criminal conduct;
- To foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited continuing legal education programs;
- To educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the bill of rights and individual liberties;
- To provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

BENEFITS OF THE OACDL

LISTSERV - The OACDL listserv is our most popular member benefit. This on-line forum joins over 500 members from around the state. If you have a question, post it on the listserv and usually within minutes you have responses from some of the most experienced legal minds in Ohio.

AMICUS BRIEF - OACDL members provide amicus support for criminal cases.

CLE SEMINARS - The most up-to-date topics presented by nationally-recognized experts are available at incredible savings to OACDL members - including the annual Death Penalty and Superstar Seminars.

STRIKE FORCE - With OACDL, you never stand alone. OACDL members are here to aid.

LOBBYING - The OACDL actively lobbies state government by providing testimony on pending bills and working with other organizations with similar interests.

LEGISLATION - The OACDL monitors pending legislation and government activities that affect the criminal defense profession.

MENTOR AND RESEARCH PROGRAMS - OACDL offers a mentor program for new attorneys and resource telephone access for the assistance of all members.

NETWORKING - Networking functions allow current OACDL members and prospective members to interact. These functions are not only entertaining, but very valuable for old and new members alike.

LETTER FROM THE PRESIDENT

JERRY SIMMONS

President, OACDL

In the late 1980's several Ohio criminal defense attorneys attended a National Association of Criminal Defense Lawyers, the theme that year was "Strength in Numbers". The idea was that the NACDL had become an influential player in the criminal justice world nationally. They preached at the conference that the attendees should return to their home states and organize state organizations along the lines of NACDL. Upon their return the attorneys did just that. The Ohio Association of Criminal Defense Lawyers was born.

That first decade OACDL had periods where we had difficulty keeping up with our bills. One year some of the leaders became Lifetime Members simply to keep OACDL financially afloat, to be able to pay our expenses. Others, present company included, sponsored local fundraisers in our homes for the same purpose. We weathered that storm. Today we are more than 700 strong. When I look back at that history and compare then to today I feel very good. We have made it. We are a force in Ohio now; no longer an outrider.

The benefits of belonging to a statewide professional organization of attorneys are numerous. Years ago, I would never have imagined that a group of criminal defense attorneys could have any influence within the justice establishment. As a matter of fact I believed just the opposite. I believed that no one wanted to hear from those of us on this side of the courtroom. Actually, I believed that the "powers that be" would, as a matter of course, do the exact opposite of whatever we wanted. That is somewhat true even today, but because of the strength of this organization now, we have been given recognition as an important player in Ohio's justice system.

So, my advice today to all defense counsel reading this is-participate! We maintain a brief bank of criminal law issues on our website that our members send into us. That bank may well have; in fact, likely does have, a motion or case or guidance on an issue you have in your own cases. I know I personally have a pending case involving an involuntary manslaughter issue I was puzzling over, only to find out that past-president Jeff Gamso had that very same issue accepted by the Ohio Supremes. The reason I knew of it was through OACDL, I have gotten to know Jeff and in a casual conversation he told me about it. He sent me his brief and Memo in Support, and I prepared and filed a motion containing all his work. We are now awaiting a decision. If Jeff wins, my client wins. This is what we do. A big part of OACDL is our connection with lawyers all over Ohio. It is "Strength in Numbers". Simply look at our list serve. I read it at least twice a day. The information exchanged there is priceless.

In sum, since the inception of this organization we have become a force in Ohio. Those of you reading this who have not yet joined are missing out on a professional and personal experience that adds greatly to a defense lawyer's arsenal. We want to hear from you. We want you to join us. Together we can improve our own professional success and we can contribute to a lasting, important impact on our client's futures and on the criminal law in every county in Ohio.

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OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

DIRECTOR'S DIALOGUE

SUSAN CARR

EXECUTIVE DIRECTOR, OACDL

I want to thank Meredith O'Brien for her phenomenal work as President of this organization last year. And what a year it has been. We looked forward to 2021, bringing back in-person seminars, having our Superstar party, and enjoying the company of colleagues once again. We tried! We did have some very successful CLE's, and a fabulous trip to Myrtle Beach, but no Superstar party. Next year…

And, welcome to OACDL President Jerry Simmons. Jerry was the CLE chair when I first came onboard with OACDL. He has always been vested in the integrity of our training. I have no doubt that the OACDL seminars and webinars will continue to be outstanding.

The CLE Committee, headed by Ashley Jones, is working hard to create another fantastic year of seminars. Ashley is also committed to high level training for the criminal defense bar. We know you have so many choices, and thank you for supporting your organization. If you have a topic you would like to see us present, please let Ashley or me know. Input is always appreciated. One of members suggested another sex abuse seminar. He is now on the committee! Watch for Sex in the Spring seminar coming up next year.

The best news – we have a part-time assistant! Amy Nicol joined us in June. She will be at the in-person seminars with me, so stop by and say hi. She came to us after a short stint as a stay-at-home mom, and before that she worked at The Ohio State University in the football department. You are going to love her!

We are still in the process of adding Briefs and Motions to our website. Thank you to all who contributed to this effort! If you have a brief or motion you think would be valuable to our members, please send it to me. This will be an on-going endeavor, and your participation is needed and appreciated.

Dues notices will be going out the end of November and are due January 1. You can pay by mail or online at oacdl.org. Just click on the join/renew tab. The renew form is at the bottom of the page. If you would like to renew before we send out the renewal notices, you can save some paperwork!

As always, if there is anything I can do for you, please do not hesitate to call.

Susan

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2022 CLE SCHEDULE

January 17, 2022
Current Issues in Criminal Law
Virtual Live-Stream

February TBD 2022
Webinar

March 10 – 12, 2022
Advanced DUI

April TBD 2022
Sex in the Spring
Toledo

May TBD 2022
Webinar

June 2022
DUI Seminar/Webinar

September TBA, 2022
Tools for the Criminal Defense Toolbox Webinar

October 13 & 14, 2022
10/13 Annual Membership Meeting and Dinner Dance
10/14 Superstar Seminar

The CLE committee is planning on virtual seminars until June. They may add more to make sure you have the most current, up-to-date information possible to advance your trial skills! The DUI Committee changed the March DUI to June, in hopes of being able to meet in-person again. Keep an eye on your email for announcements.

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OHIO SUPREME COURT WEIGHS IN ON RELIABILITY OF ANONYMOUS TIPS AS THE BASIS FOR A TRAFFIC STOP

BRYAN HAWKINS

Anyone who practices OVI defense has almost certainly had a case that began with a tip or complaint reported to the police. Whether it be someone calling the Highway Patrol to report another driver weaving all over the road, or a drive through worker calling to report a motorist asleep in line, citizen tips form the basis of countless OVI cases every year.

Many times, the officer will (supposedly) observe independent indicia of impairment while following up on the initial tip, rendering the reliability of the tip irrelevant when determining the validity of the stop. However, sometimes an officer will initiate a traffic stop and subsequent OVI investigation based on nothing but the initial call or tip from a citizen. This raises a few important questions: at what point does that tip, on its own, justify a traffic stop and how do courts make that determination.

The Ohio Supreme Court, in *State v. Tidwell* , recently weighed in on this question, refining the framework that had been in place for over 20 years.

OHIO LAW PRE-TIDWELL

The Ohio Supreme Court established the general rules governing stops based on tips in 1999 with *Maumee v. Weisner* . There, the court held that when the "information possessed by the police before the stop stems solely from an informant's tip, the determination of reasonable suspicion will be limited to an examination of the weight and reliability due that tip. The appropriate analysis, then, is whether the tip itself has sufficient indicia of reliability to justify the investigative stop. Factors considered 'highly relevant in determining the value of [the informant's] report' are the informant's veracity, reliability, and basis of knowledge."

To assist in the assessment of these factors, the court separated informants in to three categories: (1) identified citizen informants, (2) known informants, and (3) anonymous informants. The second category, known informants, involves someone from the criminal world who has provided reliable information to the police in the past and rarely the basis of an OVI stop.

Identified citizen informants are typically regarded as highly reliable and do not often require a strong showing of other indicia of reliability. The court justifies this by saying "if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary."

Under *Weisner*, an anonymous informant, on the other hand, is viewed as being comparatively unreliable and their tips will "generally require independent police corroboration." This distinction was narrowed somewhat by the US Supreme Court in Navarette v. California.

In *Navarette*, the Supreme Court upheld a traffic stop based solely upon an anonymous tip. They held that the specific information provided by the caller, including the color, make, model, and license plate number of the vehicle involved, and the short duration of time between the initial call of a reckless driver and the traffic stop made the tip much more reliable. Furthermore, they also held

that the very act of placing a 911 call gave credibility to the tip as the 911 system has "features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity."

Ohio courts had followed the test laid out in Weisner for over two decades until this past year when the Ohio Supreme Court issued a ruling in *State v. Tidwell*.

"THAT LADY IS DRUNK"

The *Tidwell* case started when an Ohio State Highway Patrol trooper was conducting an accident investigation in a Speedway parking lot following an unrelated minor fender bender. While the trooper was completing his report, an unidentified customer walked out of the gas station and shouted "Hey, you need to stop that vehicle. That lady is drunk." The trooper never learned the identity of the customer, who left the scene without any further contact.

The trooper watched as the driver backed out of their parking space at what he described as "an unusually slow speed" with a blank stare on her face. Based only on the shouted tip and these minimal observations, the trooper walked in front of the car and gestured for Tidwell to stop. He then asked her to turn the vehicle off and hand him the keys. During this interaction, the trooper observed the odor of alcohol. Another officer arrived on the scene and ultimately concluded the OVI investigation that would result in Tidwell's arrest.

Tidwell filed a motion to suppress evidence based on the lack of justification to conduct the initial traffic stop, relying on the analysis found in *Weisner* and *Navarette*. The trial court granted the motion, and the First District Court of Appeals upheld that decision. The State appealed to the Ohio Supreme Court.

The Court began its analysis by discussing the different categories of informant tips. The defense argued that the tipster should be treated as an anonymous informant, while the state argued that the face-to-face nature of the interaction was enough to treat them as an identified citizen informant with a greater indicia of reliability. The court ultimately decided that:

> *"Rather than attempt to force the Speedway customer into one of the categories, we determine the reasonableness of this investigatory stop by considering the totality of the circumstances as they were known to Sergeant Illanz prior to the time he stopped Tidwell, together with reasonable inferences that could be drawn from the circumstances, keeping in mind that each piece of information may vary greatly in its value and degree of reliability."*

Under this new totality of the circumstances analysis, the Ohio Supreme Court found that since the tip was given in a "face-to-face" manner, it could still open the tipster up to some chance of criminal liability if the claim was false, as discussed in Navarette. They also held that the tipster conveying this information to the officer as the alleged offense was in progress afforded it a higher degree of reliability. These factors, coupled with the trooper's observation of Tidwell slowly backing out of her parking spot with a blank look on her face were enough for the Ohio Supreme Court to unanimously hold the stop was justified.

CONCLUSION

The Tidwell decision, like Navarette before it, seems to further erode the differentiation between identified citizen and anonymous informants. The Ohio Supreme Court's decision does not dispose of the distinction entirely here, but their use of a totality of the circumstances test seems to be a step down that road. As with any Supreme Court decision, the effects of Tidwell will take time to be felt at the appellate and trial court levels, but it is difficult to see this decision as anything but a lowering of bar for the justification of seizing a person for an investigatory stop.

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Bryan is an OVI and criminal defense attorney practicing throughout the Central Ohio area. He serves on the OACDL Publications committee and has presented on OVI topics at CLE seminars for the Columbus Bar Association, Ohio State Bar Association, and the OACDL.

1. State v. Tidwell, 2021-Ohio-2072.
2. Maumee v. Weisner, 87 Ohio St.3d 295, 720 N.E.2d 507, 1999-Ohio-68.
3. Id.
4. Id, quoting Illinois v. Gates, 462 U.S. 213, 233-234, 103 S. Ct. 2317, 2329-2330. 76 L.Ed.2d 527, 545 (1983)
5. Id, citing Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)
6. Navarette v. California, 572 U.S. 393, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014)
7. Id.
8. Tidwell, at ¶40.

THE POTENTIAL FOR RECORD SEALING: Using Ohio's Expanded Eligibility Provisions to Help our Clients Move Beyond Their Criminal Records

CULLEN SWEENEY,
Chief Public Defender Cuyahoga County

ERIKA CUNLIFFE,
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Ernest Oleksy[1]

It has become increasingly clear that collateral consequences, i.e. legal penalties that take away rights, access to programs or services, or impose other disadvantages beyond the sentence itself, typically follow our clients' criminal convictions. These consequences are numerous and endure long after these individuals successfully serve their sentences.[2] The Ohio Justice and Policy Center has "identified nearly 1,100 collateral sanctions in the Ohio Revised Code," with more than 850 sanctions that restrict access to jobs.[3] Although the collateral penalties vary depending on the offense, they all impede an offender's ability to successfully transition back into society.

Under Ohio law there has long been legal mechanisms through which former offenders could request to seal records of arrest and conviction. Initially, however, the law severely circumscribed the category of offender eligible for such relief. Until 2012, an individual could only have a single conviction and then the law was gradually expanded to individuals with no more than one felony and one misdemeanor conviction or two misdemeanors. In 2018 and then 2020 the General Assembly has adopted significant amendments to the record sealing law that dramatically expanded the pool of former offenders eligible to seal their records.

In 2016, the Cuyahoga County Public Defender's Office established an expungement[4] initiative and began handling record sealing cases. To date, the office has successfully assisted clients in sealing more than 4,000 criminal records in Cuyahoga County.

The benefits of record sealing to the clients we serve, not to mention society at large, are both quantifiable in terms of economic impact and incalculable in terms of releasing the offender from the weight of old convictions. As discussed further in this article, in addition to the peace-of-mind many successful applicants express after finally putting to rest unfortunate and difficult episodes in their past, many clients experience real economic gain and rely less on government assistance programs as a result.

This article seeks to encourage practitioners in both the public and private bars of this State to handle more of these cases overall. For public defenders, a systematic approach to this litigation has proven extraordinarily successful in Cuyahoga County. For private counsel armed with an understanding of the applicable law, the representation is straightforward, cost-effective, and offers measurable value to the client. The following discussion addresses the current law surrounding adult record sealing and its attendant, and somewhat convoluted, eligibility requirements.[5] Finally, we detail the expungement process that has evolved in Cuyahoga County and how it has helped many of our clients.

ELIGIBILITY TO SEAL ADULT CRIMINAL CONVICTIONS[6]

When evaluating eligibility to seal adult criminal convictions, there are four primary questions: 1) Can the offense itself be sealed?; 2) Has the individual totally satisfied the criminal sentence and waited the applicable amount of time?; 3) Is the person an "eligible offender," (an analysis which requires an evaluation of the person's entire criminal record)?; and 4) Does the individual have any pending criminal proceedings?

May the offense be sealed?

Ohio law specifically defines which criminal offenses can, and cannot, be sealed. In general, the law permits individuals to seal non-violent, lower-level felonies and misdemeanors. The law provides that the following convictions cannot be sealed:

- First or second degree felonies;
- Any offense where a mandatory prison term was imposed;
- Any felony or first degree misdemeanor where the victim was under 16 years old except for non-support of dependent cases;
- Traffic offenses, including OVIs;
- Most sex offenses; and, felony or first-degree misdemeanor offenses of violence[7] (except misdemeanor assault, inciting to violence, and inducing panic).

Has the individual satisfied the entire criminal sentence?

To be eligible to seal a criminal conviction, an individual must satisfy the entire criminal sentence and wait a specified amount of time. An individual satisfies their criminal sentence (referred to in the statute as final discharge), where they have completely served any term of confinement, finished any period of supervision (post-release control or probation), and paid all financial sanctions (fines or restitution). The Ohio Supreme Court is currently considering whether financial sanctions must be satisfied even if the individual is no longer on probation.[8] Financial sanctions do not include court costs, because they are not part of the criminal sentence. Some judges, however, are unwilling seal records with unpaid court costs.

Once the individual has fully satisfied the criminal sentence, they must then wait at least one year, for misdemeanors and felonies of the fourth and fifth degree, and three years, for felonies of the third degree, before they are eligible to seal their records.[9]

Is the individual an "eligible offender"?

Even if a particular offense can be sealed as a matter of law, there are further limitations on who is an "eligible offender" and therefore can seal their criminal record; those limitations relate to that individual's entire criminal record. Recent changes in the law have substantially expanded the eligible offender definition.

Under the current law, an individual may seal an unlimited number of felonies and misdemeanors as long they do not have any: 1) First, second, or third-degree felony convictions; 2) Felony sex convictions; and, 3) Conviction for an offense of violence of any degree (including even potentially eligible offenses such as M-1 assault).[10]

If an individual has convictions for F1s, F2s, or F3s, felony sex offenses, or offenses of violence, they may still be an "eligible offender" under a different statutory provision as long as they do not have more than the following number of convictions:[11]

- 2 felony convictions and 2 misdemeanor convictions
- 1 felony conviction and 4 misdemeanor convictions
- 4 misdemeanor convictions

There are several special rules that apply to counting convictions under this particular eligibility provision (but not the one for unlimited low-level felonies and misdemeanors):

- Traffic offenses (with just a few exceptions including OVIs), and minor misdemeanors (i.e. marijuana tick-

ets, disorderly conduct) do not count against eligibility. As a matter of equal protection and for purposes of determining expungement eligibility, courts must treat offenses as a minor misdemeanors if defined as such by the state code even if they are categorized more severely under the municipal code.[12]

- Two or more convictions that "result from or are connected with the same act" or "result from offenses committed at the same time" are counted as a single conviction.
- Two or three convictions that result from "related criminal acts" that occur within a three-month time period may be treated as a single conviction if they result from the same criminal charge, the same plea of guilty, or the same official proceeding (e.g. three drug offenses within three months that are handled together in the same criminal proceeding).

There are two other important rules related to counting the number of prior convictions in determining whether an individual is an eligible offender. First, convictions under City ordinances that would be minor misdemeanors under state law must, as an equal protection matter, be treated as such for the purpose of analyzing eligibility under the expungement statute.[13] Second, the trial court has discretion to disregard (i.e. not count) previously sealed records.[14]

Are there any other criminal proceedings pending against the individual?

Ohio law does not permit the sealing of a criminal record when the individual has another criminal proceeding pending. It might seem obvious that an individual should not apply to seal a criminal record if they have other pending criminal proceedings. However, sometimes the other "criminal proceeding" is simply a "warrant" based upon the individual's inability to pay a fine in an unrelated misdemeanor case.

BEYOND ELIGIBILITY, LITIGATING RECORD SEALING CASES

An individual that meets the aforementioned eligibility criteria has won more than half the battle. If the prosecutor does not object to record sealing, and the applicant meets the eligibility requirements, many judges will grant the motion and order the record sealing without a hearing. Nevertheless, "[e]xpungement is an act of grace created by the state, and so is a privilege, not a right."[15] Accordingly, the trial court has wide discretion in determining whether a particular applicant is sufficiently rehabilitated to justify this remedy.[16] At the same time, however, "expungement provisions are remedial in nature and must be liberally construed to promote their purposes."[17]

The statute provides that such decision-making requires the court to weigh any interest the State might claim in keeping the record public against the applicant's rehabilitation and need to have the record sealed. R.C. 2953.32(C). Under the circumstances, the trial courts discretion in the record sealing context is not unfettered.[18]

The court may not, for instance, deny the application to seal based solely on the nature of the offense.[19] Nor may the court categorically bar the applicant from having their record sealed based on the fact that they had had a prior record sealed.[20] In addition, if the trial court does deny the applicants motion, it must place its findings thereon in the record to demonstrate that it complied with R.C. 2953.32.[21] And, even if the Court places its findings on the record, the appellate court may still find an abuse of discretion in balancing or failing to properly balance the competing interests.[22]

CUYAHOGA COUNTY PUBLIC DEFENDER'S OFFICE EXPUNGEMENT INITIATIVE

In the past, if a prospective record sealing applicant was unable to retain counsel, they would file an expungement application pro se. Occasionally, the Public Defender's Office would become involved, but there was no system in place to assist individuals seeking to navigate that process. Very often motions to seal records would languish on the docket unnoticed, and few individuals were able to benefit from Ohio's record sealing law.

Yet, as the General Assembly continued to enlarge the category of former offenders who were eligible to apply for record sealing, the need for a more systematic approach to the litigation became apparent. In 2016, the Cuyahoga County Public Defender's Office initiated a system enabling it to assist all indigent applicants seeking to have their records sealed in the Court of Common Pleas.[23]

The process has worked well. Applications are addressed expeditiously, moving through the court system more fluidly. Even where the client's request

is denied, they receive the information they need to make themselves eligible, or to position themselves to benefit at a later date. As noted above, the system has enabled the office to help thousands of individuals with cases out of Cuyahoga County.

Recently, we have begun collaborating with the County Office of Reentry, the Legal Aid Society of Cleveland, and Case Western Reserve University Law School's Second Chance Clinic to provide a one-stop application for record sealing assistance.[24] This has provided a streamlined application process for individuals seeking to seal felony records (which we do) and misdemeanor records (which Legal Aid and the Second Chance Clinic address).

RECORD SEALING BENEFITS INDIVIDUALS, GOVERNMENT AGENCIES AND THE PUBLIC

As noted in this article's introduction, criminal records continue to affect individuals long after they have served their sentences and serve as obstacles to fully reengaging in society as citizens. The Ohio Justice and Policy has concluded that collateral sanctions related to convictions limit access to "one in four jobs statewide, cost[ing] individuals an estimated $3.4 billion in foregone wages."[25] Jobs impacted by collateral sanctions "pay $4,700 more on average and are growing at twice the rate of other jobs."[26] The record sealing/expungement process allows those eligible to prevent the public from viewing records relating to their past offenses. This process is intended to afford increased employment opportunities and access to social programs where these individual's criminal records would otherwise render them ineligible.[27]

Shortly after initiating its expungement initiative, the Cuyahoga County Public Defender's Office undertook to evaluate the financial impact that record sealing had on its clients. To that end, those individuals, who had successfully sealed their records, were asked to complete an anonymous survey requesting information about their employment status, financial circumstances, and reliance on government benefits before and after the application was granted. The survey was administered at least one year after the record was sealed. The survey's ultimate goal was to ascertain whether, and the extent to which, the Office's expungement initiative, fully participating in, and thereby expanding, the record sealing process, had a positive financial impact on their clients and Cuyahoga County, where most of those clients reside.

The initiative was fairly new and the survey sample was small at that point, with approximately 350 participants. Nevertheless, the survey's results confirmed the long recognized understanding that those who have had their records sealed are afforded more employment opportunities and increased access to social programs for which they would otherwise be ineligible due to their criminal record.[28] One factor in particular stands out – on average clients who were paid by the hour increased their earnings by more than $3.50 an hour. They also required less in food stamp assistance. Overall, the survey and evaluation that followed determined that individuals benefit financially from having their records sealed – either because they obtained employment where they were previously unemployed, or moved from part-time to fulltime employment.

CONCLUSION

In criminal defense work, we too often see laws that enhance the penalties to which our clients are exposed or those that expand the conduct for which those clients may be criminally penalized. In the record sealing context, the General Assembly has demonstrated that it views individuals with criminal records, but who have made sincere efforts to transition back into society, very differently. The difference record sealing can make to the lives of these individuals and the families that depend upon them is meaningful. But with the pool of former offenders eligible for this relief growing, their need for information and assistance is also growing. Countywide initiatives are an effective way of addressing the burgeoning record sealing needs of its citizens and such initiatives pay great dividends for the individual and the community as a whole.

Further, while the General Assembly has liberalized the law surrounding record sealing, there remain individuals who are both deserving and left behind – for example those with decades old convictions for offenses that remain categorically ineligible, such as aggravated assault, burglary, and F1 or F2 drug possession.. Under the current law, an individual convicted of aggravated assault 30 years ago and has not any further criminal convictions, that individual can still never seal their record and move beyond

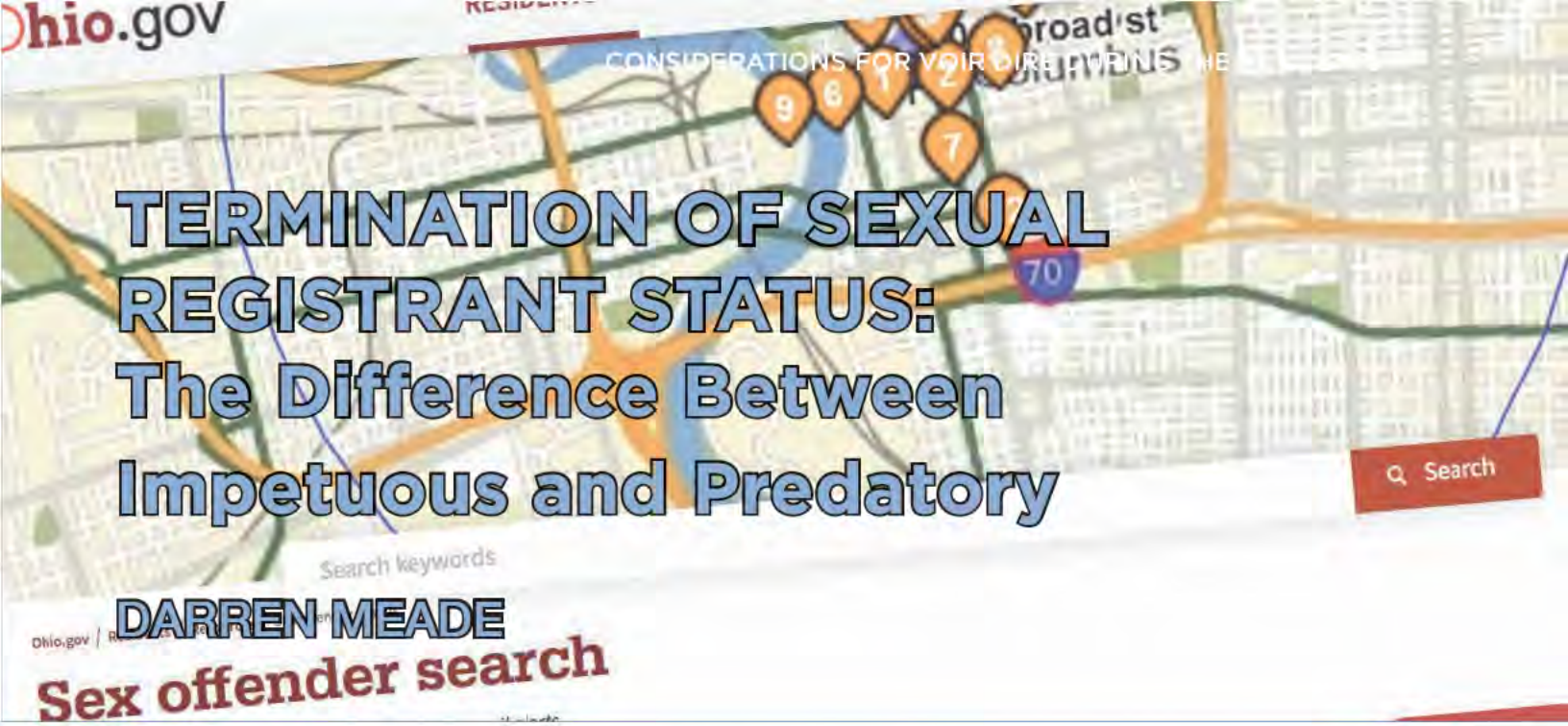
that single transgression. There is still more that can be done to expand access to expungement by affording more discretion to the courts for offenses committed long ago, but by a demonstrably rehabilitated individual.

Cullen Sweeney,
Chief Public Defender Cuyahoga County

Erika Cunliffe,
Assistant Public Defender

Ernest Oleksy

1. Mr. Oleksy, is currently a law clerk at the Cuyahoga County Public Defender Office and is in his first year of law school at Cleveland-Marshall College of Law.
2. Frank, et al., https://www.ocjs.ohio.gov/CollateralConsequences.pdf.
*3. Shields, M. and Thurston, P. (2018, December 18). **Wasted assets: The cost of excluding Ohioans with a record from work, at 4.***
4. The authors employ the terms expungement and record sealing in this article. In fact, expunging records – fully removing or ordering their destruction – occurs only rarely. This article, and the operant law, addresses record sealing rather than expungement, but the two terms have and continue to be used interchangeably.
5. Sealing, and, in fact, true expungement of most juvenile records are required under R.C. 2151.356. Those remedies and the processes they involve are not addressed in this article.
6. R.C. 2953.52 provides for the sealing of records after a not guilty finding, case dismissal, or grand jury no bill. This application may be filed as soon as the dismissal or not guilty entry is issued. Record sealing is not automatic in these circumstances. Successfully completed intervention in lieu cases fall under the provision as do arrest records that did not lead to any charges.
7. An entire list of these offenses of violence can be found in R.C. 2901.01(A)(9). The list is expansive, it includes attempts to commit the enumerated offenses, and several of the offenses listed are not colloquially seen as violent. For example, the provision treats the crimes of escape R.C. 2923.161, patient abuse/neglect R.C. 2903.34(A)(1) and Burglary R.C. 2919.22 (B)(1), (2), and (3) are included on this list. It is also notable that while assault under R.C. 2903.13, inciting to violence, 2917.01, and inducing panic, 2917.31 are violent offenses, they are misdemeanors and may be sealed, but only if the applicant but meets the eligibility requirements set forth under R.C. 2953.31(A)(1)(b).
8. State v. PJF, 2020-0700 (argument held 4/28/21)
9. R.C. 2953.32(A)(1)
10. R.C. 2953.31(A)(1)(a)
11. R.C. 2953.31(A)(1)(b)
12. In re T.S., 8th District. No. 109119, 2020-Ohio-5182.
13. Id.
14. State v. J.C., Cuyahoga No. 109730, 2020-Ohio-1617.
15. State v. Simon, 87 Ohio St.3d 531, 533, 2000-Ohio-474, 721 N.E.2d 1041 (2001), quoting State v. Hamilton, 75 Ohio St.3d 636, 1996- Ohio 440, 665 N.E.2d 669 (1996).
16. State v. A.S., 8th Dist. Cuyahoga No. 100358, 2014-Ohio-2187.
17. State v. M.D., 8th Dist. Cuyahoga No. 92534, 2009-Ohio-5694, ¶ 9
18. See, State v. G.F.A., 8th Dist. Cuyahoga No. 108113, 2019 Ohio 4978, emphasizing that R.C. 2953.32 "is to be liberally construed, the relief available is to be liberally granted, and it is an abuse of discretion not to do so."
19. State v. S.J., 8th Dist. Cuyahoga No. 108126, 2020 Ohio 183, ¶ 18.
20. State v. B.H. 8th Dist. Cuyahoga No. 106380, 2018 Ohio 2649.
21. Beachwood v. D.Z., 8th Dist. Cuyahoga No. 94024, 2010-Ohio-3320.
22. State v. S.J., Cuyahoga No. 108126, 2020-Ohio-183; State v. M.H, Cuyahoga No. 105589, 2018-Ohio-582.
23. Other Public Defender Offices have likewise become involved in record sealing. For instance, the Hamilton County Public Defender's Office has been running expungement clinics since 2013.
24. A link to the online record sealing application can be found at https://hhs.cuyahogacounty.us/divisions/detail/office-of-reentry
25. Shields, M. and Thurston, P. (2018, December 18). Wasted assets: The cost of excluding Ohioans with a record from work.
26. Id.
27. Silva, L. (2010, May 02). Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders. Retrieved November 16, 2017, from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773773
28. Watstein, Ryan D. Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects. Florida Law Review 61 (2009).



TERMINATION OF SEXUAL REGISTRANT STATUS: The Difference Between Impetuous and Predatory

DARREN MEADE

As criminal defense attorneys, we represent everyone, including some people who have done some bad things and made poor choices, then there are other times that you are unquestionably fighting for the good guy. This tale is of just such a case. This is one of those instances that reminds you why you became a criminal defense attorney to begin with.

The Stigma of a Sex Offender

In Ohio and many other states, when it comes to sex offender registration, it is equivalent to swatting flies with a sledgehammer. The general population thinks of a sex offender and immediately goes to the classic "child molester" stereotype of someone who is not fit for society and has deep rooted incurable issues.

The recurring questions are: what happens when the sex offender was young and impetuous as opposed to predatory? What happens when the sex offender was a hormone driven teenager—aka "a teenager"--with their younger teen significant other? Should that teen, barely an adult, have to carry a legal and on-line "child molester" label for literally decades to come? That was the fundamental issue of this case.

Background

This was a classic example of two teenagers meeting online and falling deeply in what teenagers refer to as love, but us adults refer to as lust. The unfortunate part was, he was 18, and she was 14. While such a Romeo and Juliet relationship is inappropriate and illegal, they believed they were in love and engaged in sexual relations. There was no force, coercion, use of intoxicants, or even grooming behavior involved. As much as a 14-year-old can be said to "consent" to sexual activity despite her relative immaturity, she did. In addition, the two had exchanged photo text messages. Her mother found out about the relationship, police were notified, and my client was ultimately convicted of F4 Unlawful Sexual Conduct with a Minor as well as F5 Disseminating Matter Harmful to a Juvenile.

Sentencing

At sentencing, the judge commented: "I think this is a terrible thing that I am required to put someone like you, who is no risk to the community on the sex offender registry. But the law says I have to do it." That statement alone gives so much insight into the laws surrounding sexual offender cases. My client was sentenced to probation with several weeks in the work release program. Based on his perfect behavior, he was released from community control early. However, as the judge noted the client was also required to be entered into the sex offense registry as a Tier II offender for a period of 25 years.

A Determined Mother

They say that there is no love like the love a mother has for her child. That was truly proven here. My client's mother, a real-estate attorney by trade, began lobbying in 2016 by meeting with as many interested parties as she could. This was no easy feat considering the stigma surrounding sex offenders. She met with the Ohio Sentencing Commission, the Ohio Judicial Conference, the Attorney General, and the Ohio Prosecuting Attorneys Association.

She solicited input from survivor groups and legislators and proposed draft legislation that mirrored a procedure in Alabama. The bill would allow an adolescent less than five years older than the minor, to petition to have his register terminated, provided there was no evidence of force, threat of force, or coercion. She began

researching states which had programs to rehabilitate youthful offenders and allowed relief after proof of rehabilitation.

Challenges included: the age of the minor, the age gap, the use of the word "force," and the potential for Ohio to lose JAG fund grants. She approached and ultimately gained the support of State Senator John Eklund (R-Geauga), a well-respected legislator and giant in Ohio criminal justice reform. After intensive investigation and seeking input from a variety of interested groups, Senator Eklund sponsored a bill that would eventually be enacted as R.C. Section2950.151, seeking to offer a select population of sex offenders the opportunity towards rehabilitation.

The next challenge: how do you define rehabilitation? She spent time with Senator Eklund and came up with a procedure that loosely followed the reclassification/ declassification of juveniles under O.R.C. 2152.84 and 2152.85. She spent the next five years making dozens, if not hundreds, of calls and trips to Columbus. She built a coalition, met with legislators, attended hearings, and testified in favor of Senate Bill 235 in 2018; and again, in favor of Senate Bill 47 in 2019.

She talked about the effect of "delayed adolescent brain development," argued "the consensual nature of the offense," and asked the legislators to allow these youthful offenders to achieve "redemption" and "become contributing members of society." The key phrase was: "these adolescents made a mistake before they were old enough to buy a beer," one which would require them to register until their mid-forties.

Legislation Passed, Time to File

Despite everything my client endured, he managed to remain in college, graduate with honors, find a management position, and a long-term girlfriend who loves him and accepts he made a poor choice when he was 18. He is genuinely the poster child for why this legislation needed to be passed.

Regardless of all those indicators of rehabilitation, filing the petition required massive effort. First, we had the client assessed by a psychologist who specializes in the assessment of sex offenders, Dr. David Roush, PhD, PSY, of Beavercreek. This assessment occurred over multiple days and included a wide multitude of tests that are considered indicators of sexual deviation in sexual offenders. I will note that Dr. Roush's assessment and testimony were both conducted with the height of professionalism and were crucial to our successful outcome here.

Challenge: The prosecutor's office opposed our motion to deregister my client. They wanted to reclassify him from a Tier II to Tier I offender, meaning he must register once a year as opposed to twice a year. We understood that because this was the very first petition under the new legislation, the prosecutor's office was going to be very conservative. However, this wasn't acceptable to us, not after the amount of blood, sweat, and tears that had gone into the legislation. My client would have remained a sex offender, that was not a win. We pressed on, fought hard at the hearing, put both my client and the assessing psychologist on the stand, and in the end were granted our termination of sexual registrant status. The judge who heard the petition has a deserved reputation for fairness but could not be mistaken as a defense-oriented "pushover" by any means.

The Test Case:

The legislation passed in April 2021, and our petition was filed within weeks of the statute going into effect. After hours of testimony and oral argument, the Court took the matter under advisement. Some weeks later the Court issued a 14-page decision granting the petition for deregistration. Not only was it reportedly the first petition ever filed under this new law, it was also apparently the first one granted. As our client's mother stated: "I am happy to say O.R.C. 2950.151, achieved the miracle we were hoping for in 2016. My son was removed from the sexual offense registry in June of this year. As a result, a tremendous burden has been lifted, both for him and our family." Pursuant to 2953.36(A)(3), the client is further now potentially eligible to file for sealing of the USCM conviction (as the Disseminating offense occurred on a separate date, there is case law indicating sealing the USCM conviction might thus not be prohibited by R.C. 2953.61).

Statutory Eligibility

R.C. 2950.151 does not open the floodgates for every sex offender. First, it only applies to those convicted of Unlawful Sexual Conduct with a Minor. Even then, there is very strict criteria that a sexual registrant must meet to be eligible.

- The person was under the age of 21 at the time of the charge,
- The court found the person to be at low risk of reoffending based on a pre-sentence investigation report,
- The sentencing court imposed one or more community control sanctions instead of a prison term and the person completed all conditions imposed,
- The person has not been convicted of another offense of unlawful sexual conduct with a minor, or other sex offense, or offense with a child as a victim,
- The minor with whom the person engaged in sexual conduct was 14 years old or older at the time of the charge and consented to the sexual conduct, and there was no coercion, force, or threat involved, and
- The person was not in a position of authority over the minor.

Practice Tips:

The legislation further offers the option of seeking a risk assessment or professional opinion, recommending relief under this section, from a licensed clinical psychologist, social worker, or other professional certified in sex offender treatment. Obviously, this should be sought by any practitioner seeking relief under this section.

When filing the petition, the court has three options: deny it entirely, move the offender from Tier II to Tier I, as previously noted, or grant the motion removing the applicant from SORN registration requirements entirely. In either of the first two options, the Court may not entertain another petition for three years after judgment. Determining whether to seek outright deregistration versus reduction to Tier I in the hope of opening the door to a later deregistration petition plus at minimum reducing a client's registration period by a decade, is a case-by-case strategic decision for counsel based on their client's circumstances and the court's predilections. As judges often don't like restricting their own discretion over a case, if a court is uncertain whether to offer your client Tier I status or complete deregistration "yet", it may help to argue that failing to do so at that point would tie the Court's hands from re-considering such modification for a full 3 years.

As additional potential applicants were subsequently referred to me by our client's mother, reviewing their cases revealed several potential statutory complications which, although arguably not intended by the legislature, will still affect many potential applicants.

First, the statute requires that an applicant has completed a sex offender treatment program certified by the Department of Rehabilitation and Correction pursuant to R.C. 2950.16. I've spoken with at least one potential applicant who was considered such low risk by the sentencing court that sex offender programming wasn't ordered as a community control term. One could theoretically have a client undergo such a program even years after release from community control in anticipation of filing a 2950.151 petition. However, many of these programs won't accept a client who is not in "active" risk of offending. Counsel may have to hunt very carefully in order to find an ODRC-certified program which will accept their now rehabilitated client.

Secondly, the statute requires that the applicant have been determined at sentencing to be at low risk of reoffending based on a presentence investigation report that included a risk assessment, assessed by the single validated risk assessment tool selected by the department of rehabilitation and correction under R.C. 5120.114. However, there are many courts which do not order an ORAS assessment or the like as was done with my client. A PSI may have been waived by the parties, or otherwise courts and probation offices do not necessarily incorporate such a quantifiable assessment like an ORAS test in their PSI process (notwithstanding the language of 5120.114(A)(2) stating such an assessment "shall" be used for an assessment for sentencing purposes, i.e. a PSI). I've thus encountered applicants whom, incongruously, may be prevented from filing due to the sentencing court not following an apparent statutory mandate, or even worse having been determined too small a risk to reoffend to warrant an ORAS assessment. While one might logically argue that a PSI which recommended community control, or at least didn't recommend prison and resulted in an ultimate sentence of probation, constitutes a "low risk assessment". However, the explicit reference to R.C. 5120.114 seems to preempt this argument, as said statute requires a specific quantifiable risk assessment. For now, it's unclear how to avoid such an obviously unplanned loophole, which required specific court action at time of sentencing years before 2950.151 was drafted.

Conclusion:

Having previously served as a prosecutor for 15 years, I know first-hand that there are those who fully belong on the sex offender registry, particularly repeat offenders. (However, there are so many cases like this of teenage lust acted on a year or two prior to being completely legal that, while inappropriate and illegal, resulting offenders rarely need to be on a sex offender registry for decades, if at all, to ensure public safety). In all too many of such cases, especially for lower tier level offenders, the cure is worse than the disease. Where politicians historically have unremittingly clambered over being "tough" on sex offenders, passage of 2950.151 provides an uncharacteristic, but welcome injection of reason and discretion to a generally unforgiving and inflexible area of Ohio law. Hopefully, it may signal a trend away from traditionally draconian registration laws being applied to offenders whom, in fact, present no realistic public threat.

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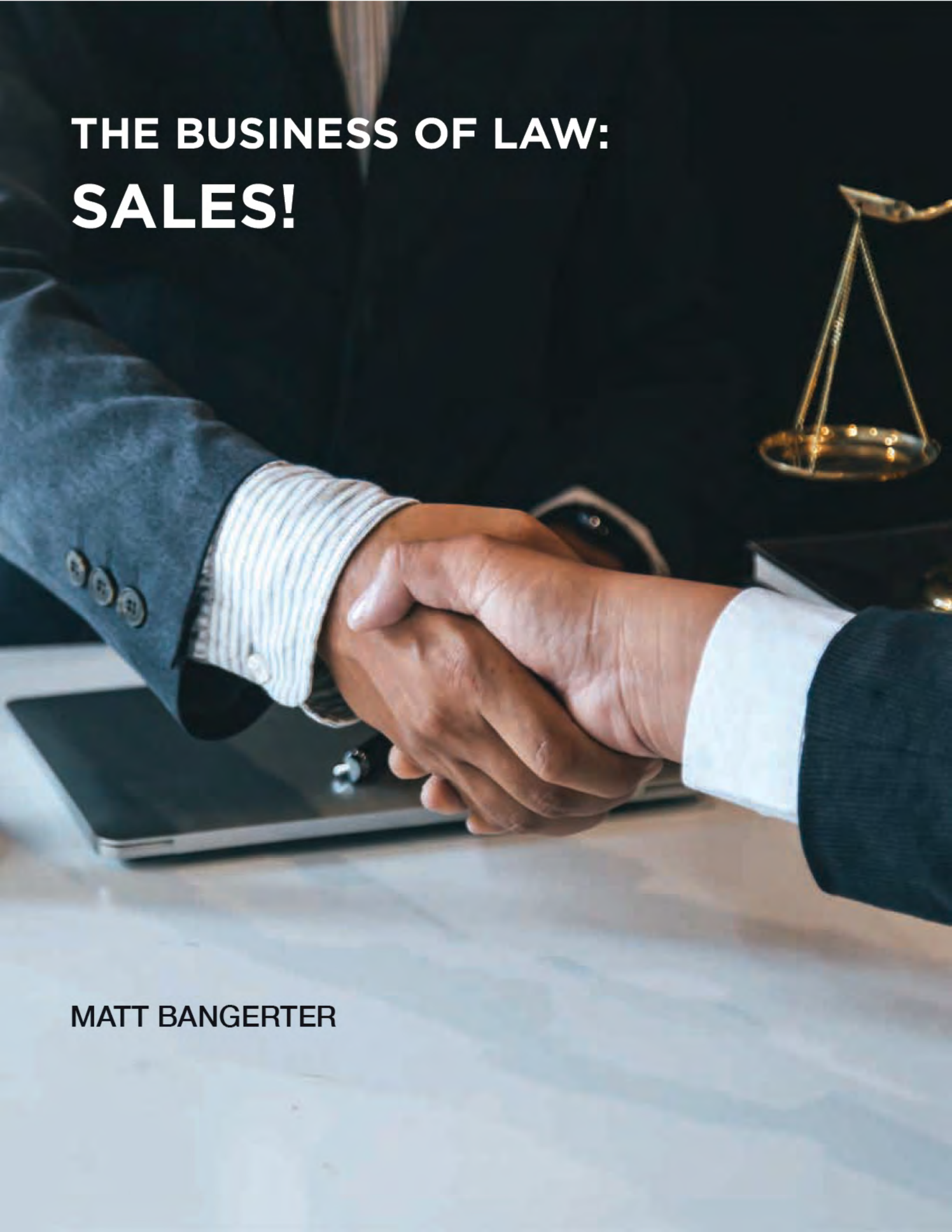
THE BUSINESS OF LAW:
SALES!



MATT BANGERTER

WHAT BUSINESS ARE YOU IN?

If you are an owner, principle, or partner in a private law firm, you probably answered this question wrong. Maybe you said you are in the business of law. Maybe you specified that you are in the business of criminal or OVI defense. Maybe you immediately thought about your "elevator speech."

The reality is that if you want your firm to survive, you are in the business of sales. At the end of the day, if you don't sign clients, you don't keep the lights on. It doesn't matter how skilled you are at trial, it doesn't matter how eloquently you write, and it doesn't matter whether you have one, or one hundred, lawyers in your office. The first thing you have to do in every case, for every client, is *sell*.

THE SALES CALL - Don't be the hero, be the guide!

Who doesn't want to be a hero? Especially in a profession like criminal defense where we defend those who can't defend themselves. We do this job because we do care, because we want to fight for those being flattened by the uncaring government colossus. There is a time for that, but that time is not in the sales call.

You are not Luke Skywalker – you are Obi Wan. You are not King Arthur - you are Merlin. You are not Aragorn, Frodo, or Sam (who we all know is the real hero of that story) – you are Gandalf. In Joseph Campbell's heroic monomyth, you are not the hero called to adventure – you are the "supernatural guide."

Your clients are the heroes of their own story. Your job during the sales conversation is not to be the knight in shining armor saving the day, but to dress your clients in their own shining armor.

There are a multitude of sales methods and sales methodologies – Sandler, Miller-Heiman, SPIN… the list goes on. Most of them tend to break the sales conversation into discrete steps, but there are commonalities. Build a rapport with the client. Determine their problem – sometimes called their "pain." Focus on that problem, really walk them through all the implications of not solving the problem. Then show them the benefits of working with you to solve that problem.
Remember that this is all about the client. Keep in mind these two acronyms:

> WAIT: "Why Am I Talking?"
> WAIST: "Why Am I *Still* Talking?"

A SAMPLE SALE SCRIPT

Below is a rough outline of our own initial sales call. This is not a script to follow word for word, but a loose framework of the elements that I try to touch on in a sales conversation.

1) Immediately demonstrate both empathy and authority.

Client: *"Hi, my name is John Doe. Something terrible has just happened to me and I've been charged with ____."*

Intake: "I'm sorry to hear that. How are you holding up?"

Or

"Nice to meet you, I'm sorry it's in these circumstances."

Intake: *"I'm really glad you called, Matt has handled hundreds of this kind of case, you guys are going to want to talk.*

2) Gently control the framework by presenting an agenda:

Intake: *"I actually have some time I can talk about your case right now if you'd like"*

Client: *"Sure, that sounds good."*

Intake: *"Great! We've had tons of these conversations and we've found a framework that is efficient for both of us, is it ok if I run through that real quick?"*

"First off, whether you hire us or not, everything we talk about is going to be confidential so you can be as open as you feel comfortable."

"In just a moment, we're going to get to know a little bit about you and who you are and what your biggest concerns are so we have some idea of what we want to shoot for."

"Then, I'm going to give you a chance to tell me what happened. And, I'm probably going to have a few follow-up questions."

"Then, after I have my arms around your case, I'm going to share with you the way We approach cases, sort of the overall 3-step plan."

"And finally, if all that sounds good and we think we're a good fit for each other then we'll talk about fees and how to move forward."

"And if we aren't a good fit, that's fine too, and we can part as friends."

"Does that all sound good?"

3) Build rapport.

Intake: *"Ok, so tell me a little about yourself. Where do you live?..."*

This is where I typically gather contact information and put together a personal background of the client. Look for commonality and ways that you can build a personal connection. If the client has three little kids and you have three little kids, share! And most importantly, care!

4) Get the case overview.

Intake: *"Ok, great. So… tell me what happened that Friday night."*

This is where you dig into the case. Demonstrate empathy as much as you can. Ask them what their biggest concerns are, and mirror those back to them:

Intake: *"So I'm hearing that your are concerned about…" (going to jail, losing my license, etc.)*

5) Avoid the "sausage factory."

When you are hungry at a picnic, you have a problem that you want to solve. The best available solution might be to eat a hot dog. You want a solution to your problem, you don't necessarily want to know everything that goes into the grinder to create the hot dog solution. Lawyers have a tendency to go into great detail about statutes and law and case preparation techniques. Most clients don't care. They don't want to hear about the "sausage factory" that manufactures the solution. They have a problem or concern – which ideally you identified in the previous step - and they just want a solution.

Intake: *"So I mentioned to you the overall '3-step plan' I use when I approach cases."*

"The first thing is to get to know you. We need to know who you are, what your fears are, what your goals are, so we can start to craft a strategy for your case."

"Next, I spend some time tearing apart your case to see what issues I can find and use that to negotiate the best offer I can get from the prosecutor or to prepare the best defense at trial."

"Finally, I can present to you an analysis of the strengths and weaknesses in your case and give you a recommendation on how to proceed."

6) The close.

Intake: *"Having said all that and learned a little bit about you, I think we'd be a pretty good fit for each other. What do you think?"*

Always close! A "close" doesn't have to be a sale, it is simply an express commitment to a next step. For example, a close could be getting an agreement to touch base the next day after the client talks to a spouse or parent. That is a far more preferable outcome than the client leaving you with "I'll give you a call sometime in the future." The goal is to never leave the next step unclear.

CONCLUSION

Sales, like practicing law, is a skill that can be improved through training and practice. I encourage you to take a look at your own intake process and think about ways to improve it. Feel free to insert anything from this article, with my sincere hope that it makes you a little more money. Every paying client's case starts with their decision to hire you. That makes sales the most universal part of every paid case, which means improving your sales skills will have a direct and immediate impact on your top-line revenue.

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ETHICS

Why Simple Human Error May Result in Complicated Consequences: the Inadvertent Disclosure of Confidential and/or Personally-Identifying Informat

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When submitting an electronic case filing to the Cuyahoga County Common Pleas e-filing portal, the system makes you check a box to verify the document complies with Rule 45's provisions governing the filing of documents containing personally-identifying information.
This checkbox routinely forces me to reconsider the material within, or attached to, our court filings - was the client's SSN redacted from that Institutional Summary Report? Did I accidentally use the full name of that alleged minor victim? Are there un-redacted medical records still attached to that expert report?

If the e-filing portal did not regularly compel me to consider this, I am sure there are times I would forget – inadvertent disclosure is oftentimes simple human error. But it is possible this simple human error could equate to an ethical violation and/or a violation of court orders that require Ohio attorneys to exercise special care when filing documents with sensitive information relative to clients and/or third parties.

Consider the harm. In certain circumstances, the harm caused by inadvertent disclosure could be significant - especially within the area of criminal defense given the involvement of alleged victims, the sensitive facts underlying sexual offenses, the frequent relevance of medical records, etc.

But the risk is inherent to every other practice area as well - for instance, commercial litigation commonly involves sensitive information about company operations, often of a sensitive financial nature. Probate litigation often involves allegations of mental incompetence and/or the inability to handle one's personal assets - implicating financial, medical, personal information, etc.

In sum, the importance of this consideration cannot be overstated to any particular type of attorney licensed to practice in Ohio - the rules implicated by the disclosure of personallyidentifying information could potentially be violated (albeit inadvertently, in most cases) by any of us.

Rule 45(D) of the Rules of Superintendence for Ohio Courts requires the party filing any document to "omit personal identifiers from the document" by filing a separate, specified (and sealed) form detailing the nature of the information omitted. Sup. Rule 45(D)(3) makes clear that the responsibility for omitting personal identifiers rests with the "filing party" - the attorney who signs off.

Sup. Rule 44(H) defines "personal identifiers" as: "social security numbers, except for the last four digits; financial account numbers, including but not limited to debit card, charge card, and credit card numbers; employer and employee identification numbers; and a juvenile's name in an abuse, neglect, or dependency case, except for the juvenile's initials or a generic abbreviation such as "CV" for "child victim."

Many courts codify Rule 45(D) in their Local Rules of Court and/or administrative orders. All divisions of the Cuyahoga County Court of Common Pleas - criminal, civil, domestic relations, probate, and juvenile - have adopted Rule 45(D) as either a Local Rule of Court or a standing Administrative Order.

A violation of a court order can lead to an action for contempt - and a contempt finding, under certain circumstances, can be sustained despite the issue of intent. In any event, a finding of contempt can carry serious direct and collateral consequences - both personally and professionally.

Depending on the circumstances, an inadvertent disclosure could be found to violate the Ohio Rules of Professional Conduct on a broader scale than Rule 45, as the "type" of harmful disclosure is not limited by definition - and if proven against you, the violation could result in possible sanctions.

Rule 1.1 requires us to provide competent representation to our clients, and competent representation requires (among other things) the "thoroughness [] reasonably necessary for the client." Similarly, Rule 1.3 requires attorneys to act with reasonable diligence in representing a client. Comment [2] reinforces both Rules 1.1 and 1.3 by requiring a lawyer to "control [his/her] work load so that each matter can be handled competently."

For example, a situation in which one is accused of not exercising the level of thoroughness reasonably necessary for the client based upon the disclosure(s) of sensitive and/or confidential information as to their own client through an inadvertent document filing. This particular hypothetical also implicates the issue of whether inadvertent disclosure would waive the attorney-client privilege.

Rule 1.6 prohibits the disclosure of information "relating to the representation of a client, including information protected by the attorney-client privilege under applicable law," unless a condition or exception applies as enumerated in subsections (a) and (b) - I.e. a situation in which an attorney inadvertently files a document (perhaps as an exhibit) that has that attorney's handwritten work product noted during a prior meeting with the client, and is accused of violating Rule 1.6(a).

Because your duty is to the client, your responsibility to the client requires you to "subordinate the interests of others[.]" But Rule 4.4 (Comment [1]) also prohibits the rights of third parties from being "disregarded" - it is important to keep the privacy and dignity of third persons in mind each and every time you submit a filing, by whatever manner.

Rule 4.4 of the ORPC requires lawyers to "not use means that have no substantial purpose other than to embarrass, harass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person" - I.e. a situation in which an attorney is accused of violating Rule 4.4 for filing a Motion with sensitive and/or confidential information about a nonparty to the litigation.

Rule 4.4 also requires lawyers to promptly notify the senders of inadvertent disclosure(s) if documents are received that noticeably include them.

In the context of professional disciplinary proceedings (should a case go that far) the presence ofaggravating and mitigating circumstances is a crucial inquiry in evaluating the appropriate sanction to be imposed. Among the list of aggravating factors set forth in Section 13 of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio is "[t]he vulnerability of and resulting harm to victims of the misconduct." Where an inadvertent disclosure causes an individual significant harm, this factor could weigh heavily against you.

Clerical mistakes and simple human errors are inevitable – as document filing systems and techniques continues to advance, the opportunities for error could also increase.

It is necessary for Ohio attorneys to exercise special care in document filings to protect themselves, their clients, and third parties from the inadvertent disclosure(s) of confidential and/or personally-identifying information – and it is important to recognize the possible consequences for failing to do so, especially where the potential for harm is significant.

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