TO: Members, Advisors, and Observers
Drafting Committee for the Criminal Records Accuracy Act

FROM: Robert J. Tennessen, Committee Chair
Steven L. Chanenson, Reporter
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DATE: March 9, 2017

RE: Upcoming Drafting Meeting

This memo provides an overview of the topics and questions that will need to be addressed during the March 2017 meeting of the Committee. We will gather together on Friday and Saturday, March 24 and 25, in Washington, DC.

The current draft reflects the comments and feedback through our last meeting. Significantly, it also reflects the recommendations of the Style Committee. As we expected and discussed during our last meeting, the Style Committee has helped us move to a system of fewer articles and more sections. Although the changes may seem a bit jarring at first, the Style Committee's edits were not intended to affect the substance. We hope that all of the substantive changes were accomplished deliberately based on the Drafting Committee's decisions. We are deeply grateful to the Style Committee and especially our Style Committee Liaison Nat Sterling for their hard work and extraordinary help.

This should be the Drafting Committee's last time in the same room before the July 2017 ULC Annual Meeting and the final vote on the Act. We do anticipate, however, the need to discuss the revisions and additions to both blackletter and discussion notes stemming from this meeting before the Annual Meeting. As such, we hope to arrange for a substantive conference call after our in-person meeting. Please bring your calendar with you so we can set that date while we are together.

Several substantive choices remain to be made or confirmed. Here are some of the major topics and questions we believe need to be addressed at our upcoming meeting:

1. Calendar Days:
    a. At the direction of the Style Committee, the timeframes have been changed from business days to calendar days. The idea is that it is better to use calendar days and to leave it to the state's general rules on marking time to determine what happens when a term ends on a holiday, etc.
    b. The issue of timing was on our agenda regardless. We had previously selected three bracketed timeframes: three days, 10 days and 40 days. [Alternative B, which is addressed more fully below, uses 48 and 72 hours.] Our intention was to encourage prompt reporting in the interest of accuracy while allowing a sufficient amount of time for the work to be done given the legitimate demands of other business. The Committee had never squarely addressed those bracketed timeframes. Even if those original suggested timeframes were acceptable, we now need to consider whether those suggestions need to be adjusted because they are calendar days and not business days.
2. Section 102:
    a. As directed, we added the definition of "accurate criminal history record information." This term is then incorporated numerous times throughout the balance of the act.
    b. Our notes indicate that the Drafting Committee decided in September to allow courts to opt out of the "contributing justice agency" definition. Do we want to provide a discussion note/legislative note with language for the opt-in alternative?

We believe that is not the best path, but would appreciate guidance from the Committee.

c. In September, our notes indicate that the Drafting Committee chose to exclude offenses under the Juvenile Act from the reportable event definition. We do have notes, however, indicating that some members of the Committee were still interesting in allowing the correction mechanisms of the act to apply to juvenile adjudications. This would be a challenging path to follow and we have not done so in this draft. We need guidance on this point. Specific suggestions on how to accomplish this, if it is deemed advisable, would be appreciated.

d. We have removed summary offenses that become a misdemeanor on a second offense because of a concern that this expands the collection of such records when a person never commits the second summary offense.

e. We believe that the Committee chose not to include the lack of prosecutorial action for 18 months as a reportable event under Section 102(11). However, we do have an indication that there may have been some support for this approach. We are merely highlighting the nature of the instructions we believe we received in September in case anyone wants to revisit it now.

f. At various points in the act (*e.g.,* Sections 204, 302 and 503), we refer to the dissemination and correction of criminal history record information for a non-criminal justice purpose. Do we need to define "criminal justice purpose" in Article 102? We are not inclined to do so, but would appreciate the views of the Committee.

3. Section 103(2):

    a. One of the very few substantive point of disagreement we had with the Style Committee concerns the public records section. The Style Committee proposed moving language from this section to Section 602(c)(2) because that is the only other place where the concept of a public record is discussed. The Committee did ask whether the provision was intended to have a broader application. We believe the provision does have a broader application. As described in the discussion note, it is designed to ensure that this act is not misinterpreted as limiting access to public court records.

II. Article 2:

a. This version of the act has Alternative A and Alternative B based on Judge Reigle's suggestions. Our notes from the last meeting left us without a clear sense of direction on which alternative to pick or how to merge them. A key distinction between the two is whether to treat all contributing justice agencies the same (Alternative A) or to break out different types of contributing justice agencies arrest status into different provisions (Alternative B). Thus, we would appreciate the Committee providing us guidance so we can submit a single version to the Style Committee for its final review in April.

b. We have modified both alternatives to reflect the role of the central repository as the hub of criminal history record information by removing language about disseminations to subjects. Our view is that act will drive accurate information to the central repository and that the central repository should be the entity

disseminating criminal history record information to subjects. None of this impacts law enforcement use.

III. Article 3:

a. The Committee has previously approved efforts to increase the accuracy of information released to persons other than the subject, in part by requiring the central repository to make a good faith effort to find and report dispositions. An additional related option may be to follow statutory language from Idaho, which applies to non-criminal justice/court disseminations and provides as follows: "Any release of criminal history data by the department shall prominently display the statement: "AN ARREST WITHOUT DISPOSITION IS NOT AN INDICATION OF GUILT." Idaho Code Ann. § 67-3008. This language would be in addition to the existing good-faith provisions. Adding the Idaho language would recognize that the central repository will be disseminating information for which no disposition is available because, for example, the case is still pending. The Idaho language will remind laypeople who receive this kind of information that an arrest is not the same as a conviction. We think that this provision is worth discussing at our meeting.

IV. Article 7:

a. Our notes indicate that we continued to discuss the minimum amount of the "actual compensatory damages" in what is now Section 701. It does not appear that we have squarely resolved the question of whether the $500 minimum award per violation is the right approach. Does this present an inappropriate financial risk to states in response to multiple minor violations of the act? If so, should the act limit the per-suit minimum award? Alternatively, does the Committee prefer to

eliminate the $500 minimum entirely, but allow for demonstrated compensatory damages plus costs and attorneys' fees?

b. Section 702(4) is currently a bracketed provision concerning fees for the cost of disseminating criminal history record information. We suggest removing the brackets from this provision. The provision is designed to keep the cost to the general citizenry low and permit indigent individuals at least annual access to their criminal history record information while respecting the expense this part of the system imposes on the general public.

There are other revenue paths to follow if the Committee is interested. For example, California appears to dedicate all fees generated by requests for criminal history record information to its Department of Justice.