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8. *Id.*
9. *Id.*
10. *Id.*
11. *N.J. v. Andujar*, 247 N.J. 275, 284-285 (2021).
12. *Batson v. Kentucky*, 106 U.S. 79, 96 (1986).
13. *N.J. v. Andujar*, 247 N.J. 275, 300 (2021).
14. *Id.*
15. *Id.*
16. *N.J. v. Andujar*, 247 N.J. 275 (2021).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 313.
23. *Id.* at 284.
24. *Id.* at 308.
25. *Id.* at 308.
26. *Id.* at 284.
27. *Id.* at 284.
28. *Id.* at 283.
29. *Id.* at 284.
30. New Jersey State Bar Associate: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 42 (2021).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 40.
35. *Id.*
36. *N.J. v. Andujar*, 247 N.J. 275 (2021).
37. New Jersey State Bar Associate: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 32 (2021).
38. *N.J. v. Andujar*, 247 N.J. 275, 302 (2021).
39. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 33 (2021).
40. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 38 (2021).
41. Wash. Gen. R.37.
42. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 35 (2021).
43. Annie Sloan, *What to Do about Batson?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 Calif. L. Rev. 233, 253 (2020).
44. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 35 (2021).
45. *Id.* at 36.
46. *State v. Jefferson*, 429 P.3d at 480 (2018). (The Court acknowledged that the *Batson* analysis fails to adequately address race discrimination in jury selection. Therefore, the Court changed *Batson's* third step. The judge must now ask whether an objective observer could view race as a factor in the peremptory strike.)
47. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 35 (2021).
48. *Id.* at 37.
49. *Id.* at 41.
50. *Id.* at 27.
51. Liane Jackson, *The Chauvin conviction shows why diverse juries matter* (Aug 1, 2021).



EVICITION SEALING

By Danielle DalPorto and Makela Hayford

Evictions do not tell a tenant’s full story, or necessarily predict whether a potential tenant is likely to default on her rent. Yet landlords often search for eviction filings and judgments in making decisions about whether to rent to prospective tenants. Eviction sealing is a legal mechanism that may provide relief to those who have eviction filings or judgments on their record. It involves the removal of an eviction record on file with the court. This simple removal provides one less barrier to those seeking housing, a basic human need.

Few cities in the United States offer tenants the opportunity to seal their evictions. While Ohio does not create a right for eviction sealing, Cleveland’s housing court offers tenants limited eviction sealing. In 2018, Housing Court Judge Ronald O’Leary, a Republican appointee, established Cleveland’s formal eviction-sealing rule.¹ Currently, there are four potential options for a tenant to seal an eviction:

- a) The tenant defeats eviction or the Court dismisses the case;
- b) The landlord dismisses the case before adjudication;
- c) By written agreement of the landlord to seal the record; or
- d) The landlord prevails *and* the tenant remains eviction-free for five years, *and* extenuating circumstances brought about the eviction, *and* at least five years have passed since the landlord prevailed on the possession claim.²

Regardless of the sealing outcome, however, tenants must disclose prior evictions or filings if asked by prospective landlords.³

Although Cleveland Housing Court gives tenants the opportunity to seal their eviction records, the authors still find the existing eviction-sealing rule limiting and that it rules out a significant number of tenants. Viewing Cleveland’s eviction-sealing rule from a critical perspective, the authors conclude that while sealing evictions to destigmatize individuals who have experienced eviction is a step in the right direction, lawmakers or judges acting in this capacity should amend the rule to broaden the population of individuals who may leverage it. This

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article explores Cleveland’s rule-making process for eviction records sealing, the limitations of the existing rule and provides alternatives that seek to remedy those limitations, and also critiques the housing court sealing process from both landlords and housing researchers.

The process of establishing Rule 6.13 in Cleveland

Although Cleveland Housing Court judges always had the authority to manage court records as they saw fit,⁴ there was no formal process for sealing civil records until 2018, when the Court implemented Rule 6.13.⁵ The authors are aware that a number of considerations went into crafting this rule, including advocacy and education from the Legal Aid Society of Cleveland,⁶ but will limit their analysis to the considerations of the individual who had the final, decision-making authority—Judge O’Leary. In discussing the rule’s creation, he recalled a conversation he had with one court employee whose 20-year-old eviction prevented her from renting an apartment.⁷

While this employee’s willingness to share her story is commendable, her experience is atypical, to say the least. Not many people with eviction judgments against them have the opportunity to relay the subsequent negative effects directly to a housing court judge, especially one with the power to shape housing court policy.⁸ In fact, the average eviction hearing in the Cleveland Housing Court lasts less than five minutes.⁹ Tenants get just a few minutes in front of a magistrate—generally without legal representation,¹⁰ to make the case to stay in their homes. In the aftermath of an adverse judgment, lobbying policymakers (such as housing court judges) to mitigate the harmful effects of that judgment is surely not a top priority for tenants who now have seven to 14 days to leave their homes.¹¹

The same is not necessarily true for landlords. After seeking feedback through its website and newsletter on the issue,¹² the Cleveland Housing Court received about 30 written responses from landlords.¹³ Some openly opposed the rule, including the following west side landlord: “Simply put, I am against expungement of evictions...It’s difficult enough weeding our good tenants from bad tenants. If you expunge these records, my hands will be further tied, and unwanted tenants will find their way back in.”¹⁴ Of course, the comments of one landlord cannot be extrapolated to represent the views of the entire class. It is notable, however, that an eviction—even one that was ultimately dismissed or occurred decades ago—serves as a proxy for “bad tenant.” Indeed, this sort of rubber stamping is common practice in screening rental applications.¹⁵

Judge O’Leary weighed these concerns, stating that he wanted to balance the interests of both landlords and tenants in creating the rule.¹⁶ Admittedly, sealing eviction records makes it harder for landlords to compile lists of tenants with evictions to avoid renting to. But a landlord’s primary interest is to profit from renting the units he owns.¹⁷ Sealing eviction records only inhibits this interest if one assumes that tenants with evictions are less likely to pay rent, thus limiting these profits. Even if one makes this assumption, the weighing of interests is still landlords’ profits versus tenants’ need for shelter. Though the authors do not know exactly how Judge O’Leary handled these calculations, they do know which of the two groups publicly opposed any version of the proposed rule.¹⁸ Incidentally, it is also the group that is much more familiar with the court system¹⁹—the same group that demonstrably benefits from “repeat player” biases in housing court.²⁰



Whatever considerations went into its drafting, the rule currently allows the Court to seal eviction records, “when the interest of justice in sealing the record outweighs the interest of the government and the public in maintaining a public record of the case, including, for example, in the following circumstances:

1. The court dismissed or entered judgment for the tenant/movant on the claim for eviction;
2. The landlord dismissed the claim for eviction before adjudication of that claim;
3. The landlord stipulates, in writing to the Court, to sealing the record, except that sealing of a record solely on the basis of the stipulation by the landlord shall be granted only once in any five-year period; or
4. The landlord prevailed on the merits on the claim for eviction and **all** of the following occurred:
 - a. Extenuating circumstances led to the eviction; and
 - b. At least five years have passed since judgment was entered for the landlord; and
 - c. At least five years have passed since the tenant has had an adverse judgment granting an eviction in any jurisdiction.”²¹

Additionally, the Court requires tenants to serve written motions on the landlord who brought the eviction action, presumably out of concern for due process. The Court also gives landlords the opportunity to object to these motions.²² Lastly, “the Court may consider all relevant factors when reviewing a Motion to Seal Eviction Record, which may include, but are not limited to:

1. The disposition of the eviction claim;
2. Whether the sealing of the record is agreed to or disputed by the opposing party;
3. If the landlord received judgment on the eviction, the grounds upon which the judgment was granted;
4. Whether the movant has satisfied any money judgment issued in favor of the opposing party in the eviction case; and
5. Any other information relevant to the determination of whether justice requires the sealing of the record.”²³

In conjunction with the text of the rule, the Court²⁴ provided additional online instructions at the time of the rule’s implementation. These instructions urge tenants to consult

with a lawyer or housing specialist before filing; remind tenants that eviction records are *only* sealed in *limited* circumstances; and inform tenants that the Court typically considers a motion to seal an eviction record only once.²⁵ The next section will address the ways in which this rule and its further specifications fail to adequately protect tenants and consider their interests.

How Rule 6.13 fails tenants despite good intentions

The Cleveland Housing Court’s rule fails tenants in a number of ways. First, the limited circumstances in which a tenant can prevail are too narrow to protect those who need it. Second, the fact that the rule still requires tenants to disclose past evictions even if the court records are sealed²⁶ calls into question if this can even be called a remedy at all. Third, the rule in its current form is inaccessible even to tenants who qualify, as it requires them to navigate a not particularly user-friendly court system.

Local critic of the rule, James Scherer addresses the first and second point in his piece, “Changing the Rule that Changes Nothing: Protecting Evicted Tenants by Amending Cleveland Housing Court Rule 6.13.”²⁷ Here, Scherer highlights the absurdity of forcing tenants to disclose past evictions even after a motion to seal the court record is granted. First, he argues, this results in tenants only applying to rent from landlords who do not directly ask, which eliminates a number of subsidized units.²⁸ A rule supposedly designed to protect tenants with eviction records somehow does little to help the poorest subset of that group. Second, Scherer points out that this sort of disclosure is not even required in criminal record sealing.²⁹ The authors are baffled: how did the Court conclude that landlords who simply ask about past evictions have a greater interest in that information than employers who ask about criminal history—*despite* court orders to seal the records in either case?

Scherer also compared Cleveland’s policy to that of other jurisdictions, which automatically seal records when the action is dismissed or the tenant prevails.³⁰ He argues that Cleveland should amend the rule to adopt this practice.³¹ The authors agree. Under the current rule, a tenant could be prevented from obtaining housing if her landlord filed an entirely frivolous eviction action. Prospective landlords often do not decipher between dismissed actions and cases in which the eviction was granted,³²

meaning that a tenant could potentially lose out on future housing due to personal feuds with their landlord or mere incompetence. The problem is even worse when one considers that it is not uncommon for dockets to mistakenly list dismissals as tenant losses.³³

The authors agree with Scherer that at the very least, Cleveland should consider modifying the rule in the two ways discussed above. However, Scherer does not discuss just how difficult it is for tenants to prevail under the current rule. For a tenant’s motion to be granted, she needs to determine her eligibility, submit all necessary documentation—including an actual written motion, court records and an affidavit—serve it to the correct party and pay a \$25 filing fee.³⁴ Additionally, if she fails to do any of this correctly the first time, or if the Court uses its broad discretion under the rule to determine maintaining the record is in the public’s interest, she does not get a second chance.³⁵

It is almost unbelievable that a rule purported to balance the interests of tenants and landlords requires tenants to possess a sophisticated understanding of court proceedings, or hire a lawyer on top of the \$25 filing fee.³⁶ The Court seems to disregard both the financial constraints of a number of people who might be eligible for this relief and the hardships following an eviction that might make complicated legal filings even more difficult. It is clear that in practice, this is not a situation in which two parties’ interests are equally balanced. Cleveland should amend Loc.R. 6.13 by implementing both easier procedures and looser requirements for record sealing.³⁷ The next section will discuss common arguments against doing so.

Addressing landlords and researchers who use eviction records

Although the authors believe that sealing evictions can be a mechanism to help tenants achieve housing stability, the authors also recognize that there are parties whose interests are against sealing eviction records. Indubitably, the largest opposition comes from landlords. Their main argument is that sealed eviction records make it difficult for the landlords to determine whether or not a potential tenant will pay their rent.

Landlords often use eviction judgments and filings to assess the risk of a tenant and the

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likelihood that the tenant will not fulfill their rent obligations. But, housing advocates note that oftentimes, landlords use eviction records incorrectly: “[they] do not understand that an eviction filing is not equivalent to an eviction.”³⁸ For example, when an eviction is filed and the tenant prevails, courts still keep a record of this. Even in these instances, where a court has sided with the tenant, some landlords use the mere filing of an eviction to deny a potential tenant housing. Additionally, given the statistics around who is most often evicted—in many metropolitan areas it is poor black women—the record of eviction almost serves as a proxy for race and gender, two protected classes that landlords are not allowed to factor in their decisions about whether to rent or not.

Others with oppositional interests are some researchers and individuals affiliated with universities. This argument stems from the perception that sealed eviction records will distort the issue of housing instability altogether. Indeed, prominent housing researchers and advocates rely on eviction data to problematize the housing issues and to understand their systemic nature. A reduction of publicly available eviction data could have the potential to further marginalize the issue of housing. It may de-prioritize the issue in local governments. At worst, it could serve to reduce the amount of federal funds allocated to organizations serving those facing eviction such as the Legal Aid Society of Cleveland or Cleveland Housing Network.

Though eviction records carry significant data for researchers, it is also true that individuals who have experienced eviction suffer substantial collateral consequences. Collateral consequences are all the difficulties renters face with an eviction on their record—housing instability, mental health issues, familial strains, children struggling in school, loss of jobs, loss of income and other negative consequences. While the authors acknowledge the desire to research such issues is valid, there is also a clear need to remedy such issues. Sealing eviction records is a small step toward progress in that regard. It would seem quite counterproductive for researchers to prolong collateral consequences for the sake of academia.

While Cleveland Housing Court offers some support for tenants with past evictions, the rule for sealing eviction records needs to be amended to ensure that tenants’ interests

in privacy and the ability to rent housing in the future, free from stigma, are adequately protected. Additionally, when a judge acting as a policymaker purports to weigh the interests of two opposing parties, he must carefully consider which party has greater access to him as well as which group’s interests are more closely related to his own.

1. Before this, eviction record sealing was possible, but no formal rules existed on how to file such a motion. Additionally, The Legal Aid Society of Cleveland provided comments and recommendations on these rules. See Rachel Dissel, *Cleveland Housing Court Sets New Rules to Make Requests to Seal Evictions Easier*, CLEVELAND.COM, (Dec. 30, 2018) <https://www.cleveland.com/metro/2018/12/cleveland-housing-court-sets-new-rules-to-make-requests-to-seal-evictions-easier.html>.
2. Loc.R. 6.13(A).
3. Loc.R. 6.13(E).
4. See Rachel Dissel, *Cleveland Housing Court Sets New Rules to Make Requests to Seal Evictions Easier*, CLEVELAND.COM, (Dec. 30, 2018) <https://www.cleveland.com/metro/2018/12/cleveland-housing-court-sets-new-rules-to-make-requests-to-seal-evictions-easier.html>.
5. *Id.*
6. See *supra* note 1.
7. Dissel, *supra* note 2.
8. The authors acknowledge that Judge O’Leary made himself available to both tenants and landlords who wanted to discuss the rule. While this is commendable, it cannot fully account for the disparity in bargaining power and landlords’ greater ability to expend time and resources on this sort of issue. Nor does it rectify the general lack of access tenants have to the legal system as described in this article.
9. April Hirsh Urban, Aleksandra Tyler, *et al.*, *The Cleveland Eviction Study: Observations in Eviction Court and the Stories of People Facing Eviction*, Center on Urban Poverty and Community Development Case Western Reserve University (2019).
10. *Id.* at 19–22. The City of Cleveland increased access to representation by implementing a Right to Counsel program in 2019. This ordinance confers a legal right to representation for tenants who “occupy a dwelling with at least one child” and whose “annual gross income is less than or equal to 100% of the federal poverty guidelines.” Cleveland City Ordinance §375.12.
11. Tenants used to have such a resource—Cleveland Tenant Organization, but its closure further prohibits tenants’ voices from being heard. See Gus Chan, *Cleveland Tenants Organization, out of cash, suspends operations after more than 40 years*, cleveland.com, (Feb. 6, 2018).
12. Prior to the establishment of the local rule to seal evictions, the public was offered the opportunity to provide comments on the potential rule.
13. Dissel, *supra* note 2.
14. *Id.*
15. Kathryn A. Sabbath, *Erasing the “Scarlet E” of Eviction Records*, THEAPPEAL.ORG, (APR 12, 2021), <https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records/>
16. Dissel, *supra* note 2.
17. The authors acknowledge that this is an assumption based on the idea that rental properties are an investment, and the purpose of an investment is to turn a profit. However, some exceptions certainly exist.
18. Dissel, *supra* note 2.
19. See *supra* note 5.
20. Robin M. White, *Increasing Substantive Fairness and Mitigating Social Costs in Eviction Proceedings: Instituting a Civil Right to Counsel for Indigent Tenants in Pennsylvania*, 125 DICK. L. REV. 801–802 (2021).
21. Cleveland Municipal Housing Court Local Rule 6.13 (as of January 24, 2022).
22. *Id.*
23. *Id.*
24. Currently, Judge W. Mona Scott presides over the Court after defeating O’Leary in a 2019 election. See Cliff Pinckard, *W. Mona Scott Defeats Incumbent Ronald J. H. O’Leary for Cleveland Housing Court Judge*, CLEVELAND.COM, (NOV. 7, 2019), <https://www.cleveland.com/election-results/2019/11/w-mona-scott-holds-lead-over-incumbent-ronald-j-h-oleary-for-cleveland-housing-court-judge.html>.
25. Judge W. Mona Scott, *Motion to Seal Eviction Record Instructions*, CLEVELANDMUNICIPAL.ORG, (JAN. 17, 2020), http://clevelandmunicipalcourt.org/docs/default-source/housing-court-documents/housing-court-forms/motion-to-seal-eviction-record-instructionsdf0246cc4f76bf3972fff0000463da2.pdf?sfvrsn=e2174f3d_2
26. *Id.*
27. James Scherer, *Changing the Rule that Changes Nothing: Protecting Evicted Tenants by Amending Cleveland Housing Court Rule 6.13*, 69 CLEV. ST. L. REV. 720 (2021).
28. *Id.* at 739.
29. *Id.* at 729.
30. *Id.* at 729–731.
31. *Id.* at 742.
32. Sabbath, see *supra* note 9.
33. Adam Porton, Ashley Gromis & Matthew Desmond, *Inaccuracies in Eviction Records: Implications for Renters and Researchers*, 3–5, Housing Policy Database 382–384 (2020).
34. See *supra* note 17.
35. *Id.*
36. A telephone call with a Cleveland Housing Court Specialist revealed that the Court is willing to accept notarized Poverty Affidavits, which will reduce the fee to \$10.
37. At this point, it is worth noting that Garfield Heights Municipal Court has an almost identical rule. See Garfield Heights Municipal Court Local Rule 33.1. If smaller, local courts are looking to Cleveland as a model, it is even more important that Cleveland Housing Court amends its rule in these ways.
38. <https://www.documentcloud.org/documents/5669990-Hazel-Remesh-for-LAS-Comments-2018-10-31-1.html>; See also <https://www.cleveland.com/metro/2018/12/cleveland-housing-court-sets-new-rules-to-make-requests-to-seal-evictions-easier.html>.