

Ants Under the Refrigerator?



Removing Expunged Cases from Commercial Background Checks

BY SHARON M. DIETRICH

After years of avoiding getting into trouble again (or after having charges dropped), your client is thrilled to get a court order “clearing” a criminal case by expungement or sealing or whatever name your state uses. Newly confident, he or she applies for a job, an apartment, a place in a college class. But despite the court order, the expunged case comes to light in a background check, and the opportunity for work, a home, and an education is denied. Your client is back to square one.

Such individuals are not alone because removing a criminal case from the public records is no insurance that it has been removed from privately held databases that are used by commercial background checkers. As I advise clients, hopefully they will no longer be affected by the expunged case, but they should think of expungement like ants in their kitchen: you may think you’ve got them all only to later discover that one or two have escaped under the refrigerator. (See Joe Palazzolo & Gary Fields, *Fight Grows to Stop Expunged Criminal Records Living On in Background Checks*, WALL ST. J., May 7, 2015.)

Commercial background checks that report expunged cases thwart public policy, judicial orders, and an individual’s attempts to move forward. But it doesn’t have to be this way. In fact, when commercial background checkers report expunged cases, their conduct implicates the federal Fair Credit Reporting Act. (15 U.S.C. §§ 1681 *et seq.*) This article looks at why expungements are so important, why commercial background screeners sometimes report expunged cases, and how this problem can be corrected.

Expungements: A Critical Reentry Tool

About one in three Americans has a criminal record of some kind. (Jo Craven McGinty, *How Many Americans*

Have a Police Record? Probably More Than You Think, WALL ST. J., Aug. 7, 2015.) Coinciding with the increase in numbers of people with criminal records is a growth in background screening. Eighty-seven percent of employers, 80 percent of landlords, and 66 percent of colleges screen for criminal records. (Rebecca Vallas & Sharon Dietrich, *One Strike and You’re Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, CENTER FOR AM. PROGRESS (Dec. 2, 2014), <http://tinyurl.com/p5nd95m>.) Because criminal records have constituted an increasingly serious barrier to these and many other critical needs of life, they have become a significant cause of poverty in this country. (*Id.*)

These civil consequences of criminal records are very keenly felt by the clients of civil legal aid programs. In the Community Legal Services Inc. program serving low-income Philadelphians, 941 of 1,389 new employment law clients in 2014—or 68 percent—sought help related to their criminal records, which was by far the most common single type of employment law service requested. Typically, the clients asked for representation in an “expungement” of their criminal records. They knew that eliminating a record that has been repeatedly hampering them is their best chance at moving forward in their lives.

The demand for expungements and other record-clearing remedies has been clearly heard by state policymakers nationwide, who have been willing to give former offenders a fresh start. Between 2009 and 2014, at least 23 states, as diverse as Mississippi, Indiana, and California, expanded their expungement or sealing laws. (Ram Subramanian, Rebecka Moreno & Sophia Gebreselassie, *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009–2014*, VERA INST. FOR JUST. (Dec. 22,

2014), <http://tinyurl.com/oxksywx>.) The trend is to permit even convictions—felonies as well as misdemeanors—to be expunged after a period of desistance from crime.

These expanded record-clearing laws are consistent with the findings of relatively new criminology research into “redemption”—the point at which a former offender is no more likely than a member of the general population to commit a crime. This research finds that recidivism risk declines steadily with time free from reoffending, and that a criminal record does not predict future criminality after three to four years for a single conviction, and 10 years for multiple convictions. (Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *CRIMINOLOGY* 327, 331 (2009).)

Expanded state expungement laws, therefore, serve the strong public policy purpose of eliminating collateral consequences for people who no longer present heightened risk of crime. Unlike “ban the box” and other laws that maintain criminal records but ask that they be considered fairly, expungement laws do not require employers and others obtaining background checks to follow the law; instead, the case is not presented for consideration at all. This remedy is not only popular with people with criminal records; in my experience, countless employers tell people that they will consider the candidate if a case has been expunged. And perhaps best of all, the elimination of a criminal case from the public records is a way to broadly address collateral consequences, not just a single type such as employment. Simply put, record clearing is one of the best tools in the growing fight to return people with criminal records into the mainstream in this country. (See Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 Wis. Law R. 321, available at <http://tinyurl.com/qg4nkwx>.)

The next wave in expanded record-clearing remedies is a concept known as “Clean Slate.” This model statute would provide for the sealing of misdemeanor convictions after 10 years for an individual without another felony or misdemeanor conviction. Infractions would be sealed after five years, and nonconvictions shortly after the disposition becomes final. The key to the Clean Slate concept, though, is that the sealing would be done automatically, without the filing, adjudication, and implementation of many thousands of petitions for all eligible persons. This automatic implementation is the innovative path that will make clearing a criminal case a reality for large numbers of people. No longer will qualified individuals need to obtain a lawyer to file and then wait for court consideration and implementation; indeed, they need not even be cognizant of the right to having their record cleared. And resources are saved for

courts, district attorneys, and law enforcement staff who no longer will need to handle the ever-increasing numbers of petitions. (Vallas & Dietrich, *supra*.)

But despite this encouraging trend, a major stumbling block remains. Simply put, no one can assure a client that an expunged case will never reappear—even when public record keepers, such as the courts and the central repository (often the state police), have removed it. Any one of the hundreds of commercial background screeners may still report the case. Hence my advice to clients: Always be on alert for those stray ants under the refrigerator. The key for both policymakers and individuals is to identify available methods to root out these cases from the private databases, as well as public ones.

Background Screeners' Reporting of Expunged Cases

While criminal justice professionals are accustomed to working with public sources of criminal records, the same is not true for most civil users. Theoretically, employers, landlords, and others can check the large number of court websites that make criminal case information readily available for free, but generally they do not. Unless required by law, they tend not to obtain criminal records from their state's central repository, nor do they typically “Google” the individuals they are screening. Because they are not experts in criminal law, civil users choose to buy reports from commercial background screeners. Such services provide a broad check prepared by professionals with criminal record expertise that they can comfortably rely upon when deciding whether to exclude someone as a risk based on his or her criminal history.

Although relatively little information is publicly available about the commercial background screening industry, it is known to be huge and growing. The industry's revenues were recently estimated at \$2 billion. (*Background Check Services in the US: Market Research Report*, IBIS-WORLD (Aug. 2015), <http://tinyurl.com/pt5ralk>.) The three largest providers (First Advantage, SterlingBackCheck, and HireRight) alone produced 56 million background checks in a recent 12-month period. (Max Mihelich, *Special Report: More “Background” Noise*, WORKFORCE (Sept. 5, 2014), <http://tinyurl.com/ppjguac>.) Unlike the credit reporting industry, with its three companies, the criminal record screening industry includes hundreds of companies, many of them small. The industry is virtually unmapped, and a potential employer could buy a background check on a job applicant from any of these hundreds of companies.

Commercial background checkers almost never begin a report by directly checking public data, such as court records. Instead, virtually every commercial background screener begins by running a query of a database maintained by one of a handful of middlemen that obtain data in bulk directly from public sources, usually the courts. If there is no match between the person whose record is being checked and the database, the report indicates that the person has no criminal cases.

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But what happens once there appears to be a “hit” depends on the commercial screener preparing the report. Many companies, especially the larger ones, conduct little verification of that match before issuing a background check reporting the case. Others view the database as a “pointer file,” a starting point rather than the end. They verify the results against courthouse records, often sending court runners to review files. About 200 of these companies have signed on as members of a loose affiliation called “Concerned CRAs” (consumer reporting agencies), certifying that they verify the results of a database search before reporting a case (www.concernedcras.org). This verification has critical implications for removing cases that may still be in the privately held database but that have been removed from public records because of expungement.

At this point, it is well accepted that commercial background screeners are “consumer reporting agencies” within the meaning of the Fair Credit Reporting Act (FCRA). Two accuracy-related provisions of that statute are implicated by the reporting of expunged cases. First, consumer reporting agencies must “follow reasonable procedures to assure maximum possible accuracy.” (15 U.S.C. § 1681e(b).) Second, in the employment context, unless a consumer reporting agency provides contemporaneous notice to the person being screened that it is providing a background check to the employer, it must use “strict procedures” to ensure that the information is “complete and up to date.” (15 U.S.C. § 1681k.) There are no regulations interpreting these broad terms. However, the background screening industry is regulated by two federal agencies, the Federal Trade Commission (FTC) and the relatively new Consumer Financial Protection Bureau (CFPB).

Despite the commands of the FCRA and the federal oversight, many commercial background reports are far from accurate, presenting a host of problems. (See PERSIS S. YU & SHARON M. DIETRICH, NAT’L CONSUMER LAW CTR., *BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES* (2012), <http://tinyurl.com/c6pjac6>.) One of the most notable, and prejudicial, accuracy issues is the reporting of expunged or sealed cases. Some delay for commercial databases to remove expunged cases is understandable; it takes some time for them to learn of the expungement and eliminate the case. But expunged cases are often reported long after they have been removed from public records. In one instance, the expunged case was reported by a national screening company 20 months after it had been removed by the Pennsylvania courts from their publicly available website.

There are numerous reasons that commercial background screeners sometimes report expunged cases. From a technical perspective, when databases are updated, the combination of new and old data may not reveal the absence, because of expungement, of a case that previously was reported. This technical flaw is exacerbated by many companies having no procedure whatsoever to learn of expunged cases, short of waiting to hear from a wronged subject of a background check through an internal “dispute” procedure required by the FCRA that a case had been expunged. Because many do not

verify database hits (and discover that expunged cases no longer exist in public records), expunged cases will be reported.

The failure of many commercial background checkers to employ any mechanism to identify and remove expunged cases appears on its face to contravene the FCRA’s accuracy provisions. At least five class actions have challenged this error as a violation of the FCRA. All but one settled, with practice changes, and the remaining case is still pending. (See *FCRA Class Actions*.)

Avoid Reporting Expunged or Sealed Cases

Fortunately, there are steps that can be taken to protect persons whose cases have been expunged from having the cases reappear in commercial background checks. Some of these steps can be taken by and for individuals; others, by courts seeking to ensure that their expungement orders are enforced or by policymakers looking to protect their expungement initiatives.

Warn clients they may see expunged or sealed cases again. Give them the example of the ants that escape under the refrigerator. Help them understand that criminal case data goes into many databases, and rooting it all out may be a challenge. Encourage your clients to keep copies of their expungement orders in a safe place (in case they need them later to prove that the cases were expunged) and to contact you for follow up if an expunged case reemerges.

Take steps to remove clients’ expunged or sealed cases from commercial databases. You can try (or recommend that your clients try) to register an expungement with the Expungement Clearinghouse (www.expungementclearinghouse.org). This clearinghouse collects and transmits expungement orders to its members in the background screening industry for free. Beware of a competitor of this website that charges for the same service. The Foundation for Continuing Justice, which operates the clearinghouse, indicates that its updates reach 500 background screening companies. Alternatively, you can send the expungement orders to the dominant companies in the industry or ask for a “full file disclosure” to determine whether your client’s expunged cases are still in their databases. A list of these larger companies may include ADP, Backgroundchecks.com, EmployeeScreenIQ, First Advantage, General Information Services, HireRight, Kroll Background America, IntelliCorp, and SterlingBackCheck.

Similar to the better-known right to a “free credit report,” people have the right to see their “specialty credit reports,” such as criminal background checks. (Dan Rutherford, *You Have a Right to See Specialty Consumer Reports Too*, CFPB (Nov. 29, 2012), <http://tinyurl.com/bp6ytnu>.) To try to obtain data that is in a database but may not yet have been reported to an employer or other customer, be sure to request the “file” rather than the “reports” made by the screener. The CFPB offers a list of contacts. (See CFPB, *LIST OF CONSUMER REPORTING AGENCIES* (2015), <http://tinyurl.com/7cyz8jw>.) If the expunged cases are still reported, the client should file a “dispute” in response to the disclosure and submit a copy of the expungement order; doing so is likely to result in the case

being removed. Such disputes are much better done in the full file-disclosure process, rather than after an employer gets an erroneous report that may cost the client a job.

Public sellers of bulk data should provide lists of expunged cases to the industry. The Administrative Office of Pennsylvania Courts (AOPC) has devised an elegantly simple solution to the problem of commercial background screeners that have not removed expunged cases from their databases. After fielding phone calls from Pennsylvanians complaining that their expunged cases were showing up in background checks, AOPC created a data file provided on a monthly basis that it calls a "LifeCycle file," which lists expunged cases to be removed from private databases. AOPC contractually requires that this file be used by bulk purchasers of their data and any and all downstream users to remove expunged cases.

This LifeCycle file has not eliminated the problem in its entirety in Pennsylvania, as some in the industry have not used it or applied it properly. However, when faced with class action litigation, these companies have quickly rectified their practices. And certainly Pennsylvanians with expungements have much greater expectations that their expunged cases will be removed than people in states without such an innovation. Yet, Pennsylvania is virtually alone in providing the industry with affirmative notice of cases that should no longer be reported.

All bulk sellers of criminal record data to the background screening industry (often the administrative offices of state courts) should develop a procedure similar to the Pennsylvania courts' LifeCycle file that specifically identifies expunged or sealed cases that should be removed from privately held data. The data purchasers and their downstream users should be required to use this list to remove expunged cases as a term of the purchase agreement. The seller should periodically audit the bulk purchasers to ensure that the file is being used and should check on any complaints that indicate that the file is not being used. AOPC can be contacted for more information about the Pennsylvania courts' LifeCycle file.

Make complaints to the CFPB or the FTC. Both the CFPB (<http://tinyurl.com/7ljv2tl>) and the FTC (<http://tinyurl.com/nptahxp>) provide an online complaint mechanism for the industries that they regulate. The filing of a complaint to the CFPB results in an interaction between the client and the screener that is brokered by the agency and that could resolve a background check issue not remediated in a dispute. Moreover, the federal agencies track patterns identified by complaints that may result in enforcement action against background screeners with substandard practices. Recently, the CFPB obtained a notable consent order from General Information Services and e-Backgroundchecks.com, two of the largest background screeners, requiring improvements to their screening practices. The order included a requirement that the screeners use proprietary software in their possession to identify and remove expunged cases. (USA, CFPB, Admin. Proceedings File No. 2015-CFPB-0028 (Oct. 29, 2015), at 6–7, 12, <http://tinyurl.com/nczpjqu>.)

FCRA Class Actions

Reporting of expunged cases was challenged in at least five class actions brought under the Fair Credit Reporting Act:

- *Henderson v. HireRight Solutions, Inc.*, No. 10-459 (E.D. Pa. 2010).
- *Robinson v. General Information Services, Inc.*, No. 11-7782 (E.D. Pa. 2011).
- *Roe v. Intellicorp Records, Inc.*, No. 1:12-cv-2288 (N.D. Ohio 2012).
- *Giddiens v. LexisNexis Risk Solutions, Inc.*, No. 2:12-cv-02624-LDD (E.D. Pa. 2012).
- *Stokes v. RealPage, Inc.*, No. 2:15-cv-01520-JP (E.D. Pa. 2015).

The first four of these cases were settled; the fifth remains in active litigation. The settlements in these cases typically discontinued the use of stale data or required the screener to change its practice to verify data.

Pursue litigation under the FCRA. This approach should bring relief for a client who has sustained lost wages or other damages because of the reporting of an expunged or sealed case. Individual cases are not overly complicated and have some deterrent effect if the client recovers a monetary award. Practice changes by the screener are not likely to be obtained in response to an individual case, although one would like to think that having been put on notice of a deficiency by the lawsuit would prompt a background screener to examine its practices. At the least, individual cases will set up a "willfulness" claim for compensatory and punitive damages if there is a subsequent class action for this practice.

Practice changes regularly are negotiated as a component of settlements of FCRA class actions, even though most circuits have ruled that private parties cannot obtain injunctions under the statute. Moreover, the likely monetary damages in a class action should be a deterrent.

Encourage purchasers to use background screeners that verify their data. Employers and other purchasers of background checks often express exasperation that the reports provided by their screeners are not accurate. The answer? Get a better screener! By pledging to verify the results of a database query, the members of Concerned CRAs deserve consideration. When a commercial screener verifies potential "hits" at the courthouse before reporting them to a purchaser, expunged cases are not likely to be reported. (See Thomas Ahearn, *Expunged Criminal Records Appearing in Background Checks Unnecessarily*, EMP. SCREENING RESOURCES (May 7, 2015), <http://tinyurl.com/o674t6t>.)

Conclusion

When commercial background checks report criminal cases that have long been expunged, a great deal of frustration ensues. Policymakers are frustrated that their efforts to expand expungement have been thwarted. Courts

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relating to the representation.” (MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (emphasis added).) This applies equally to former counsel.

The indigent defendant's former attorney lacks the authority to allow a third party access to a former client's confidential information *without the client's informed consent*. “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” (MODEL RULES OF PROF'L CONDUCT R. 1.0(e).)

The attorney-client privilege belongs to the client, not the attorney. (*Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).) The attorney cannot waive the attorney-client privilege except with the consent of the client. Similarly, counsel cannot waive the work product privilege without the client's consent.

Former counsel may wish to provide the court ordering the transfer of the files with a signed and dated written statement by the client that, after being advised by former counsel, the accused does not consent to the transfer of the litigation files as ordered by the court.

Even assuming the former assigned counsel has been discharged by the court for unethical or otherwise improper conduct in the case, is it appropriate for the judge to order the former attorney to turn over the client's litigation files to either the clerk's office or the judge's staff? Here again the answer should be no. Instead, the judge should immediately appoint, albeit only temporarily, an attorney to receive the litigation file and to safeguard its confidentiality until appointment of permanent replacement counsel, who can then request the file from the lawyer “safekeeping” the file. Laments that temporarily assigning an attorney to perform this function will be an unnecessary expense should be readily discounted. An indigent defendant should have continuous representation once assigned counsel has been initially provided—even if that interim counsel will have little to do pending the appointment of substitute counsel—not only to assume possession of the litigation file, but also to be available to the defendant should an emergency arise.

What is the impact on an indigent defendant when informed by court order that his or her former defense attorney must transfer the client's litigation file to the court clerk or the judge's office until a replacement counsel is assigned? The indigent defendant will undoubtedly be concerned that any information in that file, whether adverse or beneficial to the defense, will be available to someone other than a defense attorney representing the client's best interests. The impression generated by this approach is one that is incompatible with the

integrity of the judicial process. The temporary possession of the defense litigation file by a third party, even though ordered by the court, will always raise questions as to whether the confidentiality of that file was breached, either inadvertently or without proper authorization, during the period the file was not in the hands of the defendant's counsel, whether present or former counsel.

A counsel who is no longer representing an indigent defendant and who is in possession of that client's litigation file has an ethical obligation to resist a court order directing counsel to transfer that file to a third party, such as the court clerk or the judge's office, for safekeeping, pending the appointment of a new attorney to represent the defendant. A criminal defense attorney, not a third party, should be the custodian of the defense litigation file at all times because of the attorney's continuing ethical obligations to safeguard the confidentiality and integrity of that file. That remains true even when the defendant is an indigent represented by appointed counsel. ■

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are frustrated that their orders have failed. Most important, people who were counting on the fresh start promised by the expungement procedure are frustrated, and may have experienced a major life setback as a result. But eliminating a criminal case is the best remedy for people who have paid their debts to society and no longer present heightened risk of criminal behavior. If the case is not known, then employers, landlords, and others need not be relied upon to apply the law properly or use sound discretion when evaluating that case. We can, and should, be prepared to deal with the background screeners who must be brought into line to avoid undermining the efficacy of this crucial remedy for people who are trying to put their lives back on track. ■

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