Webinar
Expungement “Aftercare”: What Comes Next Once the Record is Cleared?

November 19, 2019
National Record Clearing Project

- Brought to you by Community Legal Services, funded by the W.K. Kellogg Foundation.
- Let us know your expungement practice needs (webinars, conferences, amicus briefs, papers, etc.).
- On the list-serve? (ncsc-list@googlegroups.com)
- Email Jboehner@clsphila.org.
Speakers

- **Matt Visser**, President, Victig Background Solutions.
- **Sharon Dietrich**, Litigation Director, Community Legal Services, Philadelphia.
Life Cycle of a Criminal Case: Arrest/Disposition/Expungement

- Arrest
- Central Repository (often State Police)
- FBI
- Commercial Screeners
- Courts
- Data Brokers
What We Will Cover

• **David Price:** How AOPC tries to have expunged/sealed cases removed from data of bulk purchasers.

• **Matt Visser:** How expunged cases end up in commercial background checks; tips to avoid this.

• **Sharon Dietrich:** Post-expungement client education; tips for rectifying reporting of expunged cases in public and commercial checks.
Price: AOPC as Provider of Data

- PA’s electronic data environment.
- PA’s expungement practice.
- Problem addressed by LifeCycle file.
What is the LifeCycle file, and how does it work?

Enforcement mechanisms.

Effectiveness.

Replication in other states?
Visser: Commercial BGCs

• Background on the commercial screening industry.
• Preparation of a background check.
  • Where does the data come from?
  • How is it assembled?
• Do all screeners do their jobs the same way?
Visser: Expunged Cases in BGCs

- Industry position: Are screeners obligated by the FCRA to not report expunged/sealed cases?
- How do properly expunged cases wind up in commercial background checks?
- How screeners can avoid this.
- “Expungement Clearinghouse.”
- Advice for expungement lawyers.
Post-Expungement Client Education

- **Client must know:**
  - What, if anything remains on the record.
  - How s/he can answer application questions.
- **Discuss any limited access, tailored to the person’s circumstances.**
- **Discuss any likely “ants under the refrigerator” problems (e.g. FBI).**
Fair Credit Reporting Act

- **Commercial screeners’ legal obligations**
  - Follow “reasonable procedures to assure maximum possible accuracy” (15 USC § 1681e(b)).
  - For employment, “strict procedures” to ensure information is “complete and up to date”, unless they provide contemporaneous notice instead (15 USC § 1681k).
  - For employment, right to pre-adverse action notice (15 USC § 1681b(b)(3)).
  - Right to dispute (15 USC § 1681i).
  - Right to “full file disclosure” (15 USC § 1681g).
FCRA-based Tactics

• Dispute a bad report.
• Order a “full file disclosure.”
• Send screeners an expungement order?
• FILE A LAWSUIT! (or connect with one of the lawyers who will). Lawsuits are law reform!
Challenging FBI Records

• Common problems.
  • Missing dispositions.
  • Expunged cases still showing up.
• Technically, there are 3 ways to correct errors
  • 1) Ask state central repository to correct record with FBI *(best way!)*.
  • 2) Submit challenge directly with FBI online at www.edo.cjis.gov
  • 3) Submit a written request to FBI’s CJIS Division.
Contact Us!

- David Price: David.Price@pacourts.us
- Matt Visser: mvisser@victig.com
- Sharon Dietrich: sdietrich@clsphila.org
Reporting Expunged or Sealed Cases in Commercial Background Checks
Violates the Fair Credit Reporting Act

The Fair Credit Reporting Act (the FCRA) governs the accuracy of criminal background checks prepared by commercial screeners. While there is not much case law holding that the FCRA prohibits commercial screeners from reporting expunged or sealed cases, there is little doubt that it does.

Two FCRA provisions apply:

- Commercial screeners must use “reasonable procedures” to insure “maximum possible accuracy” of the information in the report. 15 U.S.C. §1681e(b).

- A commercial screener reporting public record information for employment purposes which “is likely to have an adverse effect on the consumer’s ability to obtain employment” must either notify the person that the public record information is being reported and provide the name and address of the person who is requesting the information at the time that the information is provider to the user or must maintain strict procedures to insure that the information it reports is complete and up to date. 15 U.S.C. §1681k.

Numerous FCRA class actions have been brought under one or both of these provisions to challenge a commercial screener’s reporting of expunged or sealed cases.


All of these cases were settled, with the settlement typically requiring the discontinuation of the use of stale data or the screener to change its practice to verify data.

Only one reported case clearly addresses whether a commercial screener violates the FCRA by reporting an expunged or sealed case, although in dicta. In **McNamara v. HireRight Solutions Inc.**, 2014 WL 321790 (N.D. Ill. Jan. 29, 2014), the Court considered whether the screener had complied with the FCRA given how it had reported a case in which the person had received a diversionary sentence under Illinois law. HireRight reported the disposition as “pled guilty-found guilty” and
the sentence as “supervision terminated satisfactory,” which was concededly accurate. But the plaintiff objected because it did not report a subsequent order discharging him as a defendant and dismissing the disorderly conduct charge against him. The statutory scheme permitted the outcome to be expunged or sealed two years after discharge and dismissal, but that record-clearing had not yet occurred. In rejecting the plaintiff’s position, the Court concluded:

McNamara simply does not have a clean record. He did not rid himself of his guilty plea or the Circuit Court's finding of guilt by completing his supervision, and HireRight may continue to report both dispositions—until, of course, they are sealed or expunged—without fear of liability under the FCRA.

The commercial screening industry does not dispute that its members should not report expunged or sealed cases – if they know they have been expunged or sealed. Instead, they sometimes contend that they have not violated the FCRA when reporting criminal cases post-expungement or sealing because they are unaware that cases in their databases have been expunged or sealed. For more information on this issue, including steps that advocates can take to avoid expunged or sealed cases showing up on background checks, see Sharon M. Dietrich, “Ants under the Refrigerator? Removing Expunged Cases from Commercial Background Checks,” Criminal Justice (American Bar Ass’n Section of Criminal Justice, Winter 2016).

Finally, there is concern that reporting an expunged or sealed case could be considered “technically accurate,” because there was once a case that was publicly reportable. But the weight of authority is against this technical accuracy approach. See Smith v. HireRight Solutions, Inc., 711 F. Supp. 2d 426, 433 n. 5 (E.D. Pa. 2010). Moreover, as one commentator has written, “[b]ecause Section 1681k(a)(2) requires that reports be complete and up to date, a [commercial screener] that reports a criminal record but left out a subsequent expungement would be foreclosed from using the technical accuracy approach as a defense.” Noam Weiss, “NOTE: Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act,” 78 Brooklyn Law Rev. 271, 295 (Fall, 2012).

Bottom line: If a commercial screener has reported an expunged or sealed case and should have known better (if it had refreshed its data, verified the case’s existence by checking courthouse records, etc.), the FCRA is implicated, and a case can be made that both 15 U.S.C. §1681e(b) and 15 U.S.C. §1681k have been breached.

A recent ruling may have an unwanted impact, though. In Aldaco v. RentCrow, Inc., 921 F.3d 685 (7th Cir. 2019), the Seventh Circuit ruled that what constitutes a “conviction” for purposes of the FCRA is defined by federal law, not state law. According to the court, a state criminal case
terminates in a “conviction” if there has been a guilty plea, even if the ultimate outcome is a
dismissal after completion of a diversionary program. Id. at 689. Would the outcome here have
been different if Ms. Adalco’s criminal case had been expunged – relief she could have sought in
state court but did not? Following this decision, arguments from counsel for the background
screening industry that an expunged or sealed conviction does not cease to be a “conviction” for
FCRA purposes – and can continue to be reported – can be anticipated. In responding to such an
argument, one might note that the Aldaco claim arose under 15 U.S.C. §1681c c(a) (limiting the
time during which non-convictions can be reported), not under 15 U.S.C. §1681e(b) (accuracy
claims) or §1681k (strict procedures/up-to-date information). Also, one might look to state record-
clearing law for any right for the client not to reveal an expunged or sealed case.

For more information, contact Sharon Dietrich, Community Legal Services, Inc., at
sdietrich@clsphila.org.
Ants Under the Refrigerator?

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,
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/pt5rrlk.) 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 a 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/c69ja6c.) 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.expungehelp.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/bp67tmu.) 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 screeners. The CFPB offers a list of contacts. (See CFPB, List of Consumer Reporting Agencies (2015), http://tinyurl.com/7cy2b3w.) 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 crimina 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/7ljy2l1) and the FTC (http://tinyurl.com/hptahxpl) 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:


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 injunctive relief 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 (continued on page 54)
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 attorneys-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.

ANTS
(continued from page 29)

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.
CRIMINAL JUSTICE

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Technology Symposium

ALSO IN THIS ISSUE

• Crime Fighting Machines
• Challenges in International Cybercrime Investigations
• Data Technology and the Fourth Amendment
• Removing Expunged Cases from Commercial Background Checks
When a criminal record is “sealed,” that means that most people can’t see it.
A sealed record cannot be seen or considered by:
- The general public
- Landlords
- Schools
- Licensing boards
- Most employers -- Employers who do not use FBI background checks won’t see a sealed criminal record. That means the vast majority of employers won’t see a sealed record.

When a criminal record is “sealed,” you can deny it ever happened.
You are allowed to deny your sealed cases if you are asked by someone listed above. See below for important exceptions to this rule.

You still have access to your own full criminal record, so you can see what cases were sealed.
- The easiest way to get a record of your sealed cases is to visit the clerk of courts in a Pennsylvania courthouse and ask for your complete record, including sealed cases.
- You can also order your entire record – called an “Access and Review” – from the Pennsylvania State Police, but currently that can take months.
- To see the criminal history information that is available to the general public (your unsealed record), visit The Unified Judicial System of Pennsylvania at https://ujsportal.pacourts.us and search by your name.

In these limited situations, your sealed record can be seen and used:
- Law enforcement purposes (police, prosecutors and criminal courts)
- Gun ownership and use applications (including permits to carry and Act 235)
- Immigration
- International travel
- Other court cases, sometimes (dependency, custody, or protection from abuse cases)
- Admission to the bar to be a lawyer
- Limited situations where federal law requires a background check for employment
- FBI records will show sealed cases, but they may be considered only where required by federal law (see reverse side for types of jobs affected and more information)

If you are asked about your sealed record by someone listed here, you should not deny your record. You should explain you have a record that has been sealed.

For new developments or more information about sealing, see www.MyCleanSlatePA.com.
Some jobs require FBI background checks, which currently include sealed records. Examples include:

- Schools
- Police departments
- Jobs requiring regular contact with children
- Caring for older adults, if you moved to PA in the last 2 years
- Banks
- Airports and seaports, if working as a screener or with access to secured areas
- Casinos
- Insurance and securities industries
- HAZMAT-endorsed commercial driver’s licenses
- Any job requiring a fingerprint-based FBI background check.
- Foster care and adoption require FBI background checks.

You will know that you are getting an FBI check because you will have to provide fingerprints. You will usually get the check through the State’s vendor, IDEMIA. For more information, see https://bit.ly/2ttuOkz.

If you are asked by someone listed above, you should not deny your sealed record. However, most of the time your sealed record should not cause you to lose your job because most employers are not allowed to make decisions based on sealed records.

- You should prepare to prove to the employer that your case is sealed by showing your sealing order or by getting an “Access and Review” from the State Police.
- Banks, airports, seaports and jobs requiring HAZMAT-endorsed commercial driver’s licenses can consider a sealed record when deciding whether to hire or fire.
- If you have a problem with an employer and an FBI check, seek legal help.
- If your job requires a FBI background check, look into expungement.

If your sealed record continues to cause problems for you, or if you know your job requires FBI background checks, you may want to seek expungement.

Your sealed record may be eligible for expungement if:

- Charges were dismissed or withdrawn by the judge or prosecutor
- Charges were dismissed after completing a diversion program
- You were found not guilty by a judge or jury
- You were convicted of a summary offense and have not been arrested for 5 years
- You are 70 years of age or older and have not been arrested for 10 years

For new developments or more information about sealing, see www.MyCleanSlatePA.com.
AGREEMENT CONCERNING BULK DISTRIBUTION OF ELECTRONIC CASE RECORD INFORMATION ON RECURRING BASIS

This AGREEMENT made this ____ day of __________, 20__ is entered into by the Administrative Office of Pennsylvania Courts ("AOPC") of the Unified Judicial System (UJS) of the Commonwealth of Pennsylvania, with offices at 5035 Ritter Rd, Suite 700 Mechanicsburg, Pennsylvania, 17055, hereinafter called the "COMMONWEALTH" and ____________________________ ("SUBSCRIBER").

The purpose of this AGREEMENT is to establish the terms and conditions under which the COMMONWEALTH agrees to provide the SUBSCRIBER with a recurring bulk distribution of electronic case record information.

Terms and Conditions of AGREEMENT

1. DEFINITIONS.

A. "CPCMS" means the Common Pleas Criminal Court Case Management System.

B. "Electronic Case Record" means information or data created, collected, received, produced or maintained by a court or office in connection with a particular case that exists in the PACMS, CPCMS, or MDJS and is provided in response to bulk distribution requests, regardless of format.

C. "MDJS" means the Magisterial District Judge Automated System.

D. "PACMS" means the Pennsylvania Appellate Courts Case Management System.

E. "Request for Bulk Distribution of Electronic Case Records" means any request regardless of the format the information is requested to be received in, for all or a subset of electronic case records that is releasable to the public pursuant to the provisions of the Electronic Case Record Public Access Policy of the Unified Judicial System of Pennsylvania.

2. SERVICES.

A. The COMMONWEALTH will provide SUBSCRIBER with electronic case record information from the PACMS, CPCMS and/or MDJS consistent with the provisions of the Electronic Case Record Public Access Policy of the Unified Judicial System of Pennsylvania.

B. For those SUBSCRIBERS receiving electronic case record information from the CPCMS and/or MDJS, the COMMONWEALTH will provide a LifeCycle file on a weekly basis, which SUBSCRIBER shall use as, described in Section 3(b) and (c).
C. When the electronic case record information is requested in electronic media, the COMMONWEALTH shall, in its sole discretion, determine the appropriate format.

D. The COMMONWEALTH specifically reserves the right, in its sole discretion and at any time without prior notice, to make any changes it deems appropriate relating to the information and data provided under this AGREEMENT. Such changes include, but are not limited to altering the format of the information, file structures, display changes, operating hours, computer programs and network services.

E. Recent entries made in the court filing offices may not be immediately reflected in the electronic case record information provided. Neither the courts of the COMMONWEALTH nor the COMMONWEALTH assumes any liability for inaccurate or delayed data, errors or omissions. Electronic case record information should not be used in place of a criminal history background check, which can only be provided by the Pennsylvania State Police. Employers who do not comply with the provisions of the Criminal History Record Information Act (18 Pa.C.S. § 9101 et seq.) may be subject to civil liability in 18 Pa.C.S. § 9183.

3. OBLIGATIONS OF SUBSCRIBER.

A. SUBSCRIBER shall notify its users, customers, clients or other third party recipients that the electronic case record information received from the COMMONWEALTH is not an official case record; official case records are maintained by the court in which the record was filed.

B. SUBSCRIBER shall retrieve and access on a weekly basis the appropriate LifeCycle file(s) created by AOPC and update their data accordingly. Each file will contain a list of CPCMS or MDJS cases that must be removed from subscriber data in order for the same to remain current and up to date. Therefore, subscribers of only CPCMS information will need to retrieve and access the CPCMS LifeCycle file. However, subscribers of CPCMS and MDJS information will need to retrieve and access two LifeCycle files, one for each system: CPCMS and MDJS. The MDJS LifeCycle files will be located at: https://ftp.pacourts.us (Directory: SEMIPRIVATE/ACTIONS/LIFECYCLE/MDJS/WEEKLY/PUBLISH). The CPCMS LifeCycle files will be located at: https://ftp.pacourts.us (Directory: SEMIPRIVATE/ACTIONS/LIFECYCLE/CPCMS/WEEKLY/PUBLISH).

C. SUBSCRIBER agrees to promptly comply with all COMMONWEALTH instructions and directions concerning the electronic case record information provided, including the LifeCycle files. Failure to comply may result in immediate termination of this AGREEMENT.
D. After accessing and retrieving the LifeCycle file(s) as required by paragraph 3(B), the SUBSCRIBER shall promptly make the file(s) available to all users, customers, clients or third parties who received electronic case record information from the SUBSCRIBER that originated with the COMMONWEALTH. In addition, the SUBSCRIBER shall require all users, customers, clients or other third party recipients to promptly remove from their data any CPCMS and/or MDJS cases that are listed in the file(s). Failure by the SUBSCRIBER or the SUBSCRIBER'S users, customers, clients and/or other third party recipients to comply with these requirements may result in the termination of this AGREEMENT by the COMMONWEALTH at any time without notice.

E. SUBSCRIBER shall timely make all payments due to the COMMONWEALTH in accordance with Section 5.

F. In the event of termination of this AGREEMENT, SUBSCRIBER agrees to immediately stop all use of the electronic case record information that has been provided by the COMMONWEALTH, including LifeCycle files, remove all such data from its databases, notify its users, customers, clients or other third party recipients to stop using the data, and ensure that users, customers, clients or other third party recipients remove the data from their databases.

G. The SUBSCRIBER agrees to provide the following disclosure statement to each user, customer, client or other third party recipient at the time any electronic case information is provided. The SUBSCRIBER shall ensure that the following statement is displayed or provided every time electronic case information is provided:

"The data or information provided is based upon information received by the Administrative Office of Pennsylvania Courts ("AOPC"). AOPC makes no representation as to the accuracy, completeness or utility, for any general or specific purpose, of the information provided and as such, assumes no liability for inaccurate or delayed data, errors or omissions. Use of this information is at your own risk. AOPC makes no representations regarding the identity of any persons whose names appear in the records. User should verify that the information is accurate and current by personally consulting the official record reposing in the court wherein the record is maintained."

H. The SUBSCRIBER agrees to provide the COMMONWEALTH with a list of all the SUBSCRIBER'S websites, subsidiaries, affiliates, customers, clients and other third party recipients that use or distribute information obtained from the COMMONWEALTH, and all other names, which the SUBSCRIBER uses in the course of doing business. The SUBSCRIBER agrees to update this list and send it to the COMMONWEALTH within
thirty (30) days of any change. The SUBSCRIBER also agrees to provide, upon the written request of the COMMONWEALTH, a list of the SUBSCRIBER'S subsidiaries, affiliates, users, customers, clients and other third parties who have accessed, during specified dates, any of the information provided by the COMMONWEALTH to SUBSCRIBER.

I. The SUBSCRIBER shall delete any electronic case record information that is inadvertently included in the data or information provided by the COMMONWEALTH and is excluded from public access under Section 3.00 of the Electronic Case Record Public Access Policy of the Unified Judicial System of Pennsylvania. A copy of this policy is attached. The SUBSCRIBER shall take other appropriate action to ensure that such electronic case record information is not disclosed to others.

J. The SUBSCRIBER shall designate a Contract Administrator who shall be the sole point-of-contact with regard to all contractual matters.

4. AUDITS

A. The COMMONWEALTH may, at its discretion, perform audits of the SUBSCRIBER to verify compliance with the terms and conditions of this AGREEMENT and the appropriate use of the information and data provided by the COMMONWEALTH. The SUBSCRIBER agrees to cooperate with the COMMONWEALTH in the event of such an audit.

B. SUBSCRIBER agrees to provide the COMMONWEALTH with access at no charge to any database created using the data or information from the electronic case record information as well as an online account for the SUBSCRIBER'S service with valid user login identifiers and passwords for the purposes of monitoring and auditing contract compliance. SUBSCRIBER shall also provide to the COMMONWEALTH copies of materials and information that SUBSCRIBER provides its subscribers, customers, clients or other third parties.

5. FEES

A. SUBSCRIBER agrees to pay all amounts due under this AGREEMENT, as described in “Attachment A - Fees”, as appended to this AGREEMENT. The schedule of fees in Attachment A is subject to change. SUBSCRIBER will be provided at least thirty (30) days' notice before the effective date of any change in fees.

B. The COMMONWEALTH may terminate service, without notice, to SUBSCRIBER if SUBSCRIBER'S account is overdue.

6. LIMITATION OF LIABILITY
A. SUBSCRIBER acknowledges and accepts that all information and data provided under this AGREEMENT may be subject to error or omission and correspondingly agrees that the COMMONWEALTH and the courts of the Unified Judicial System of the Commonwealth of Pennsylvania shall not be responsible or liable in any way whatsoever for the accuracy and completeness of any data provided or for the use of the information or data provided. Specifically:

i. The COMMONWEALTH and the courts of the Unified Judicial System of the Commonwealth of Pennsylvania shall not be liable for any demand or claim, regardless of form of action or venue thereof, for any damages resulting from the use of any information, data or other materials provided under this AGREEMENT.

ii. THE COMMONWEALTH and the courts of the Unified Judicial System of the Commonwealth of Pennsylvania shall not be liable for any demand or claim, regardless of form of action or venue thereof, for any damages arising from incorrect or incomplete information or data provided under this AGREEMENT.

iii. THE COMMONWEALTH and the courts of the Unified Judicial System of the Commonwealth of Pennsylvania shall not be liable to SUBSCRIBER or any other party for any loss, including revenue, profits, time, goodwill, computer time, destruction, damage or loss of data, or any other indirect, special, or consequential damage which may arise from the use, operation, or modification of data provided under this AGREEMENT.

B. THE COMMONWEALTH provides no warranties, express or implied, including the implied warranty of fitness for a particular purpose, that the information or data provided under this AGREEMENT is accurate, reliable, timely or complete. It is expressly understood by the parties that it is SUBSCRIBER'S responsibility to verify information or data obtained through this AGREEMENT with official court information reposing at the court where the official case records resides.

C. Personal liability. No official, director, officer, agent or employee of the COMMONWEALTH or the courts of the Unified Judicial System of the Commonwealth of Pennsylvania shall be charged personally or held personally liable to SUBSCRIBER under any term or provision of this contract because of any breach hereof or because of its execution, approval or attempted execution.

7. WARRANTIES.
A. THE COMMONWEALTH provides the electronic case record information as is.

B. Use of this information is at the risk of the requestor.

C. The COMMONWEALTH makes no representation as to the accuracy, completeness or utility, for any general or specific purpose, of the information provided and as such, assumes no liability for inaccurate or delayed data, errors or omissions.

D. The electronic case record information contained in the PACMS, CPCMS and MDJS is not supported by fingerprints. Therefore, it should not be used for the purpose of linking cases to specific individuals.

E. THE COMMONWEALTH provides no warranties of any kind or nature, express or implied, in connection with the services the COMMONWEALTH provides pursuant to this AGREEMENT including that the service will be uninterrupted.

8. TERMINATION

A. Either party by written notice may immediately terminate this AGREEMENT, PROVIDED if the SUBSCRIBER'S account is overdue; the COMMONWEALTH may terminate the SUBSCRIBER'S service without notice.

B. COMMONWEALTH may terminate this AGREEMENT at any time without notice and penalty, if the COMMONWEALTH determines that such termination is in the COMMONWEALTH’S best interest.

C. In the event that the COMMONWEALTH terminates this AGREEMENT, the COMMONWEALTH will have any remedy available to it under law or equity.

D. In the event of termination of this AGREEMENT and should subscriber wish to re-subscribe, SUBSCRIBER will be required to sign the then-current version of the Agreement Concerning Bulk Distribution of Electronic Case Record Information on Recurring Basis and pay any outstanding balance in order to resume service.

9. ASSIGNMENT. SUBSCRIBER shall not assign or transfer any interest in this AGREEMENT without prior written approval of the COMMONWEALTH. The COMMONWEALTH reserves the right to assign or transfer the AGREEMENT to any person, office or entity under the control
of the COMMONWEALTH, as it deems appropriate or as ordered by the Commonwealth of Pennsylvania.

10. SURVIVAL. The provisions of Paragraphs 3, 4(a), 5, 6, and 7 of this AGREEMENT shall survive the termination of this AGREEMENT.

11. SEVERABILITY. If any provision of this AGREEMENT or application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or applications of this AGREEMENT, which can be given effect without the invalid provision or application, and to this end, the provisions of this contract are severable.

12. WAIVER. No term or provision hereof shall be deemed waived and no breach or default excused by the COMMONWEALTH unless such waiver or consent shall be in writing. Any consent by the COMMONWEALTH to, or waiver of breach or default by the SUBSCRIBER, whether express or implied shall not constitute consent to, waiver of, or excuse for any different or subsequent breach or default.

13. GOVERNING LAW. This AGREEMENT shall be interpreted, construed, and enforced in accordance with the laws of the Commonwealth of Pennsylvania. In the event of any conflict between the laws of the Commonwealth of Pennsylvania and any provision of this AGREEMENT, the laws of the Commonwealth shall automatically preempt such provisions in this contract and become a part of this AGREEMENT, fully binding on the parties hereto. Venue and jurisdiction for any disputes arising under this Agreement shall lie in Pennsylvania.

14. INDEMNIFICATION. SUBSCRIBER agrees to indemnify, defend and hold harmless the COMMONWEALTH its agents, officers and employees; and the Unified Judicial System of Pennsylvania, its agents, officers and employees from all claims, suits, or actions of whatever nature resulting from or arising out of the activities of the SUBSCRIBER or its officers, employees, subcontractors, agents, clients or customers under this AGREEMENT.

15. SUBSCRIBER INFORMATION

Subscriber’s Name: _______________________________
Business Name: _______________________________
Contract Administrator: __________________________
Technical Contact: ______________________________
Address: ______________________________________
City, State, ZIP: _________________________________
Phone Number: _________________________________
Fax Number: ________________________________
Email Address: ________________________________

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16. ENTIRE AGREEMENT. This AGREEMENT contains the entire AGREEMENT between the parties. No amendment or modification changing its scope or terms has any force or effect unless it is in writing and signed by all parties to the AGREEMENT with the exception of periodic fee changes set forth in Attachment A.

17. RETURN OF CONTRACT. Failure to sign and return this contract within fifteen (15) days of receipt will result in withdrawal of approval and denial of this request.

18. AVAILABILITY OF STATE FUNDS. The performance of COMMONWEALTH'S duties under this AGREEMENT is subject to the availability of State Funds to enable it to perform those duties.

19. The COMMONWEALTH shall designate a Contract Administrator, who shall be the single authority to act for the COMMONWEALTH under this contract. Whenever the COMMONWEALTH is required by terms of the contract to provide written notice to the SUBSCRIBER, such notice must be signed by the Contract Administrator, or in that individual's absence, or inability to act, such notice shall be signed by the Contract Administrator's designee.

IN WITNESS WHEREOF, this AGREEMENT has been executed by and on behalf of the parties hereto, the date and year first written above.

Accepted by:

ADMINISTRATIVE OFFICE OF PA COURTS
(COMMONWEALTH) SUBSCRIBER

By: ____________________________ By: ____________________________

Name: __________________________ Name: __________________________

Title: __________________________ Title: __________________________

Date: __________________________ Date: __________________________

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