Criminal Law
A legal boomerang

June 29, 2006 By: Julie Kay

In 1999, a 20-year old college student was arrested for petty theft in
Miami-Dade County after stealing a shirt from J.C. Penney.

Like most first-time offenders, the young man completed a pretrial diversionary
program, performed community service, paid a fine and got his case dismissed.
The record was expunged. He never got into any more trouble with the law.

Seven years later, the man applied for a job and was turned down.

Curious about why, he checked his record on Westlaw, an Eagan, Minn.-based legal
database company, and was shocked to find that the supposedly expunged record of
his misdemeanor appeared on Westlaw's widely available computerized database. He
immediately called his lawyer, Kenneth Hassett of Miami.

Hassett told the client, who did not want to be identified for this article,
what he tells many of his clients who have called him with the same complaint -
that the computerized record systems of the Miami-Dade clerk of courts, Florida
Department of Corrections and Florida Department of Law Enforcement are "not
secure" and that expungement has become meaningless.

"In the electronic and Internet age, sealing or expunging in many cases just
doesn't exist," he said.

The Miami-Dade County Enterprise Technology Services Department sells criminal
records information to four data mining companies, including Atlanta-based
ChoicePoint, the largest provider of data information in the country. The other
three are Seisent, Court Venture and First American SafeRent.

The records sold include daily electronic bulletins of jail bookings and a
biweekly file of all defendants charged with felonies or misdemeanors, according
to Ronald Feingold, a county systems analyst.

Miami-Dade Circuit Judge Stanford Blake, administrative head of the court's
criminal division, said it is inappropriate for the county to sell information
about cases that were supposed to be expunged.

"I don't think we should be in that business," Blake said. He urged any
attorneys who have had this experience to call him.

Miami-Dade Chief Judge Joseph P. Farina Jr. did not return a phone call
Wednesday seeking comment. But court spokeswoman Eunice Sigler said, "The 11th
Judicial Circuit itself does not sell court records. We do not feel it is
appropriate to comment on the alleged practices of another branch of government
or governmental entity."

Miami-Dade Clerk of the Courts Harvey Ruvin declined to comment.

Responding to complaints

Hassett's client is not alone in encountering this problem of expunged records
becoming public. Criminal defense attorneys, privacy rights experts and civil
rights lawyers in Miami and elsewhere say they're increasingly concerned that
data mining companies are obtaining and posting criminal records of juveniles
and adults that were supposed to be expunged from official records.

"This is becoming a problem," Miami criminal defense attorney Michael Catalano
said in a recent mass e-mail to members of the Florida Association of Criminal
Defense Lawyers. "These companies know so much about our clients, so sealing and
expunging does not mean it 'goes away.' Something needs to be done about this."

Feingold said he did not know whether data mining companies like ChoicePoint
remove expunged or sealed files from their databases later. "We have no
authority to force them to do that," he said.

John Shaughnessy, senior director of corporate communications at Westlaw, said
that in Miami-Dade, Westlaw buys information about criminal records from a
third-party "aggregate" company, which obtains it directly from the courthouse.

Some South Florida criminal defense lawyers and privacy rights experts expressed
outrage over the release of supposedly expunged and sealed criminal records.

"This is extremely concerning," said Sherwin Siy, staff counsel at the
Electronic Privacy Information Center in Washington, D.C. "A fundamental part of
the justice system is the allowance of expungement as a chance for a clean
start. If records are being sold to data brokers, that undermines that. There
shouldn't be a stigma that follows your for the rest of your life."

"That is absolutely a violation of peoples' privacy rights and
unconstitutional," said Lida Rodriguez, a partner at Duane Morris in Miami and a
past president of the ACLU of Miami. "The county should not be selling records,
especially expunged records, for a profit. This is another example of why the
government cannot be trusted to keep records private, whether it be phone
records or bank records."

But others say that, in the age of computerized data bases and the Internet, no
one should have any expectation of privacy about their records. "You can never
get rid of data," said Robert Jarvis, a law professor at Nova Southeastern
University. "Anybody who thinks that information once created goes off and dies
is kidding themselves."

Juvenile records at risk

Under Florida statute, first-time offenders committing misdemeanors and certain
nonviolent felonies such as third-degree theft can enter a pretrial diversion
program. After attending classes, paying a fine and sometimes performing
community service, a defendant can ask the judge to dismiss the case and expunge
his or her criminal record. The request is usually granted.

Files can also be sealed - which means they are not destroyed but stored by the
clerk's office and closed with tape - if a first-time offender enters a plea and
the judge withholds adjudication.

Expunging or sealing records are thought of as ways to wipe the slate clean for
young people who get into minor legal scrapes such as marijuana possession,
petty theft or vandalism. Expungement means that the stigma of having a criminal
record does not follow them throughout their lives and hurt their chances of
finding employment, obtaining credit, getting a lease or a mortgage, or even
gaining U.S. citizenship.

All states have similar provisions for expunging criminal records. But Florida's
open records laws give data mining companies greater access to more records than
they have in other states, said Carlos Martinez, Miami's chief assistant public
defender.

Criminal defense lawyers say they are increasingly hearing from clients who
complain that even though their cases were officially expunged, they are being
repeatedly turned down for jobs on the basis of their criminal records. When the
clients check their history on legal databases such as Westlaw, they discover
that their criminal record still shows up.

Carlos Martinez, the Miami-Dade chief assistant public defender, said the
problem has grown in the last six months as employers and landlords increasingly
turn to database companies such as ChoicePoint and Westlaw for background
checks. Both he and Hassett have met with court and county officials in an
effort to resolve the problem.

The problem, according to the two defense lawyers, is that while the clerk of
the courts is the official keeper of court files, the county has won the battle
to become the keeper of electronic court records.

Martinez said he's particularly concerned about the security of juvenile
records, and his office is proposing state legislation to maintain the privacy
of those records. The bill did not make it out of committee this year.

Some attorneys are considering a different way to solve the problem - through
class action litigation. Strategy sessions have been held and the lawyers are
looking for a good defendant to lead the class, someone who was injured by the
incorrect posting of expunged records on a database.

Companies respond

Miami criminal defense attorney David Edelstein said he has come up with an
effective way of dealing with expunged criminal cases that show up on
ChoicePoint databases. He faxes the court expungement order to ChoicePoint and
the company removes all criminal references for that individual. "They've been
cooperative," he said.

In the case of Hassett's 20-year-old client, however, Hassett said Westlaw
refused to change its record without getting a verification of the expungement
directly from the court.

Westlaw's Shaughnessy said that if a person has a complaint about an expunged
record showing up in the Westlaw database, the person should call Westlaw, which
will remove the information provided there is "reasonable confirmation," such as
the judicial expungement order.

Mitchell Gersten, business information officer of data services for ChoicePoint,
said his company collects criminal records from two sources around the country -
the administrative office of the courts and departments of corrections. In some
counties around the country, the company pays for the information, while in
other counties the information is freely available, he said.

Gersten acknowledged some problems arising from delays in receiving updated
information from courts, including information about expungements. "It takes a
period of time, depending on the court, for the changes to roll up to us," he
said. "There are definitely inefficiencies or cases where the courts do not
communicate effectively."

For that reason, he said, ChoicePoint has established a formal consumer dispute
process by which individuals can contest information on their records.
ChoicePoint promises to quickly investigate the matter and correct any errors.
But by then, damage can already be done.

ChoicePoint spokesman Chuck Jones acknowledged that the company has been sued by
individuals who claimed they suffered damage as a result of inaccurate criminal
background information provided by ChoicePoint. He did not provide details on
the cases.

Until a solution is found, attorney Michael Catalano said he counsels clients
that in applying for jobs, apartment leases, or any filling out any applications
that ask for an arrest record, they should probably disclose any arrest - even
if the case record was expunged.

"In the days before the Internet, they could tell people they were never
arrested," he said. "But today, the rule is to disclose."

Editor's note: Westlaw, a subject of this story, and ALM Media Inc., parent of
the Daily Business Review, recently entered into a five-year content exchange
agreement.

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