

## 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 you 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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