



HUMAN RIGHTS

The newsletter of the Illinois State Bar Association's Section on Human Rights

Expungement. What is it good for? (with apologies to Edwin Starr)

By Thomas A. Bruno

Section 5.2 of the Criminal Identification Act (20 ILCS 2630/5.2) allows certain arrests, supervisions and convictions to be either expunged or sealed. But what good does this do?

Hardly a day goes by anymore in my Central Illinois criminal defense practice that I don't receive a telephone call from a former or potential client asking me about expungement or sealing a case. No doubt there are many lawyers who have carved out a part of their practice or even created a niche practice centered on shepherding an expungement case through the labyrinth of paperwork and client questions. I realized long ago I could not profitably do so.

The expungement client presents with many questions. After spending a significant amount of time with a typical client on the phone in a large portion of cases the lawyer is faced with advising the client or potential client that the remedy of

expungement or sealing is not available to them. Clients typically then want to know why and how their criminal history will adversely affect them in school, employment and many other aspects of life.

It's at this point that I generally refer the client to the wonderful resources available on the Illinois State Appellate Defender Web site (<http://www.state.il.us/defender/>) and to the State Appellate Defender "instruction guide," available as a 23 page PDF document. In fact, for e-mail inquiries (which are becoming more common in my practice) I keep the PDF on my computer and find myself simply sending it off to a client with a note that I don't handle this type of work.

Why would any self-respecting capitalist attorney want to turn away a segment of the public seeking to retain his services? In my practice it's

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Expungement reconsidered

By Joshua D. Carter

Thomas Bruno's commentary regarding the limitations of the expungement process in Illinois gives light to several important issues in this somewhat murky area of the law. While I share his frustration with the availability of certain "expunged" information through the internet or other sources, and I certainly appreciate his kind words with regard to our office's expungement materials, I think the article fails to consider the significant benefits of an expungement (or, alternatively, the sealing) of a qualifying criminal record.

What is it good for? In short, for the legal pro-

tections that arise from a criminal record being expunged or sealed. Such records are not available to employers through the official channels and, perhaps more importantly, it is illegal under the Illinois Human Rights Act for an employer to consider any criminal history information which has been ordered expunged or sealed. (775 ILCS 5/2-103) Further, under Section 12 of the Criminal Identification Act, an employer who asks a prospective employee about past criminal history must include on the application "specific

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largely because sorting the wheat from the chaff is not economically feasible. I dread the inevitable disappointment that comes when the client realizes that expungement in the year 2010 is a virtually meaningless gesture.

Try this experiment: Type the phrase "background check" into your Google search bar. Your web browser comes alive with hundreds of private sector Web sites located around the world that will gladly provide a compendium of everything that ever appeared on the Internet in exchange for your modest fee. In the modern era this is how employers frequently vet potential employees.

None of these private sector purveyors of information are under any obligation to expunge my clients' "transgressions" from their database. In fact, the private sellers of Internet information pride themselves on having a robust product and it is contrary to their pe-

cuniary interests to delete anything regardless of whether the authorities at the courthouse want to pretend it never happened.

This realization, in turn, has caused me to modify the remarks I make when I explain to a criminal defendant what the future holds should he or she accept the State's offer of court supervision, for instance. While I very well may explain to them the procedures currently available for expunging or sealing records in the future I take the additional time to point out to them that no one is going to order Google to expunge a newspaper article about my client's arrest nor will any order entered in Illinois likely be persuasive for a content purveyor in Moldavia to erase the records they offer for sale.

In yesterday's world where the official government agencies were the only reliable source of information about one's criminal history a court order directing them to de-

stroy all records was meaningful. In the modern world, however, the public has long since learned that if they want to obtain these records it is much easier to enter their credit card number at three in the morning while sitting in their underwear than it is to get in their car and go to the courthouse or police station to check a prospective employee's background.

I would never suggest that a client with deep enough pockets who wants to have the official records destroyed should refrain from so doing. Lawyers owe it to their clients to suggest why this may not necessarily mean that a future employer, landlord or father-in-law will not figure out that at some time they were charged and acquitted or charged and placed on court supervision. ■

Thomas A. Bruno is a member of the Human Rights Section Council and practices in Urbana.

Expungement reconsidered

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language which states that the applicant is not obligated to disclose sealed or expunged records of conviction or arrest. Employers may not ask if an applicant has had records expunged or sealed." (20 ILCS 2630/12(a))

Should an employer discover expunged or sealed criminal history information on the internet and use that information against a prospective or current employee, that employer runs the risk of liability under the Human Rights Act. While the system is far from perfect, and such a case can be hard to successfully pursue against an employer, I think it is unlikely that employers are rampantly ignoring the dictates of the HRA. In my experience, people who have been confronted with this problem have often successfully gained employment by providing a copy of the court's order granting expungement or sealing to the employer.

Unfortunately, it is unquestionably true that people are not always given that option. The HRA notwithstanding, there are likely to be situations in which the employer simply doesn't contact the applicant again after finding the "expunged" information online, thereby depriving the potential employee of

the opportunity to explain the situation. Mr. Bruno's suggestions for thoroughly explaining the limitations of a potential expungement or sealing to criminal defendants are therefore well-taken.

Expungement and sealing are imperfect remedies, but they can be, and often are, the difference in an individual obtaining housing or employment. Additionally, many employers take background checks very seriously and use the much more accurate Illinois State Police fingerprint checks as their preferred method. In these cases, the expunged or sealed information will not be returned to the employer, and the prospective candidate will be in a much better position than if the record had not been expunged or sealed by the court.

Mr. Bruno's commentary makes some excellent points regarding the potential availability of expunged or sealed criminal history information through private "background check" companies, and his advice regarding how to advise clients on these issues is certainly important. The piece is an excellent discussion of an issue about which not many are fully (or even at all) aware. However, while

there are indeed potential avenues for someone to discover expunged or sealed information in cyberspace, there are in fact many potential benefits to the client who is lucky enough to qualify for an expungement or sealing of his or her criminal history. ■

Joshua D. Carter is Staff Attorney, Expungement Division, Office of the State Appellate Defender.



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Privacy rulings in tabloid journalism cases weaken protection for rest of press

By Jan Dennis

Press freedoms are eroding as courts step in to restore personal privacy battered by an explosion of tabloid reporting on the Internet and 24-hour news outlets hungry for fresh stories, a study by a University of Illinois legal expert warns.

Amy Gajda says long-held boundaries for news coverage have narrowed in a recent spate of privacy rulings, which could ultimately have a chilling effect on mainstream journalists whose watchdog role helps safeguard against corruption and other misconduct.

"It's easy to condemn journalism as a whole, feeling that something needs to be done about tabloid reporting," she said. "But restricting that sort of reporting can also restrict very legitimate news reporting, creating fear of liability that suppresses disclosures of scandals and corruption. That would ultimately be a very bad thing for society."

For nearly a half-century, courts gave the media broad leeway to delve into personal lives – in deference to First Amendment rights and buoyed by respect for journalism that peaked in the wake of Watergate and other reporting triumphs, according to a research paper published in the California Law Review.

Effectively, courts declined to second-guess editorial decisions, said Gajda, a professor of law and of journalism.

The mere fact that stories were published or broadcast would be considered proof of newsworthiness – often making them privileged under law – so lawsuits seeking damages under privacy torts were routinely tossed out.

But she says courts have begun imposing their own judgments about what qualifies as news over the last decade as a dramatic surge of reality TV, celebrity coverage and tabloid reporting have muddled the line between news and entertainment, tarnishing media esteem and heightening concerns about privacy.

"Courts are putting nearly everyone under this umbrella of journalism, and rightly feel that some Internet blogs and other related media go too far," Gajda said. "As those outlets push the boundaries of what is appropriate, courts are increasingly likely to

push back, curbing First Amendment rights and favoring privacy rights."

A 2007 Ohio Supreme Court ruling, for example, expanded grounds for privacy claims against the media and others, suggesting that "as the ability to do harm has grown, so must the law's ability to protect the innocent," the study said.

Gajda says one of the most worrisome cases involves a court's refusal to dismiss an intentional infliction of emotional distress claim filed by the sister of a prosecutor who committed suicide as police were about to arrest him for allegedly soliciting sex with a 13-year-old on NBC's "To Catch a Predator."

"The ruling is dangerous because journalists will be responsive to it," she said. "If it's suddenly not appropriate to report on a prosecutor who is allegedly involved in the kind of crime he's supposed to prosecute and help prevent, it could severely limit what the media covers regarding public officials in general."

In the "To Catch a Predator" case and others, courts have used journalism's own ethics codes against media defendants, an emerging tool that Gajda says gives the illusion of deference to the profession but instead hands judges an opening to selectively condemn editorial decisions.

She says the "To Catch a Predator" ruling zeroed in on ethics provisions that suggest reporters "show good taste" and intrude into private lives only when there is an "overriding public need," but failed to examine the story and coverage as a whole.

"Reporters and editors are in the best position to sort out of the often-conflicting provisions of an ethics code and come to a reasoned, ethical response to coverage," Gajda said. "Judges have no training in journalism, generally, and may hone in on a provision like 'show good taste' and decide that a reporter has failed. The same with a jury."

But she rejects arguments that journalism should abandon ethics policies to dodge similar rulings.

"That is the wrong response, especially today when some bloggers and others clearly don't understand the need for ethics and could actually learn something from journalism's ethics codes," Gajda said. "The more that

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news organizations are seen as relying on ethics and self-policing, the more likely it is that courts will stay out of the way."

To halt the judicial turn away from press freedoms, she suggests a standard that would hold journalists liable only when their professional peers widely agree that coverage has crossed the line. Media sued under privacy torts could defend themselves by providing examples of stories on similar events by legitimate news organizations.

"Ethical standards would thus be relevant, but court inquiry would properly be refocused on the professional judgments of journalists rather than journalistic instincts of judges and jurors," Gajda wrote. "Liability would require a consensus of the defendant's own colleagues that his actions were indefensible."

She says the test would maintain the "breathing room" that the U.S. Supreme Court has said is necessary to ensure robust reporting, while also offering recourse to people who are truly wronged by news coverage.

"I think there is recognition at all levels that there needs to be some way to limit harmful reporting," Gajda said. "My concern is that journalism not be dragged down by those who set out to do harm to others." ■

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

June

Wednesday, 6/2/10- Friday, 6/4/10- Chicago, ISBA Regional Office—CLE Fest Classic Chicago- 2010. Presented by the Illinois State Bar Association. 1:00 - 5:40; 8:00-5:40; 8:00-12:40.

Monday, 6/7/10- Webinar—Conducting Legal Research on FastCase. Presented by the Illinois State Bar Association. *An exclusive member benefit provided by ISBA and ISBA Mutual. Register at <<https://www1.gotomeeting.com/register/773109137>>. 12-1

Thursday, 6/10/10- Chicago, ISBA Regional Office—Legal Writing: Improving What You Do Everyday. Presented by the Illinois State Bar Association. 8:30 - 12:45.

Wednesday, 6/16- Thursday, 6/17/10- Chicago, Wyndham Hotel—Great Lakes Benefit Conference 2010. Co-Sponsored by the Illinois State Bar Association.

Friday, 6/18/10- Chicago, ISBA Regional Office—ISBA's Reel MCLE Series: Michael Clayton--How Many Ethical Breaches Can You Spot? Master Series Presented by the Illinois State Bar Association. 2-5:15.

Friday, 6/18/10- Quincy, Stoney Creek Inn—Legal Writing: Improving What You Do Everyday. Presented by the Illinois State Bar Association. 8:30-12:45.

Monday, 6/21/10- Webinar—Advanced Legal Research on Fastcase. Presented by the Illinois State Bar Association. *An exclusive member benefit provided by ISBA and ISBA Mutual. Register at <<https://www1.gotomeeting.com/register/863461769>>. 12-1

Thursday, 6/24/10- Friday 6/25/10- St. Louis, Hyatt Regency St. Louis at the Arch—CLE Fest Classic St. Louis- 2010. Presented by the Illinois State Bar Association. 11:00-4:40; 8:30-4:10. ■



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