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**FRIEDMAN & FEIGER
 • UPCOMING EVENTS •**

- January 7, 2017 Forrest Smith speaks to children on "How To Be World Changers," CAS Studio 7 Performance Studio.
- January 29, 2017 Friedman & Feiger sponsors the SPCA's Paws Cause "2017 PAWSITIVELY Dallas Strong" event benefitting the South Dallas spay neuter program. Mary Spencer Clinic at Village Fair, 2400 Lone Star Drive, Dallas.
- February 24, 2017 Jason Friedman speaks on Legal Ethics with Jeanne M. Huey at the Family Law Section Bench Bar 2017, 9:15 a.m., The Highland Hotel, 5300 Mockingbird Lane, Dallas.
- March 30, 2017 Janelle Friedman and Yvette Feiger invite you and a guest to attend a Spring Essential Energy reception for women business leaders featuring Olympian and Author Suzy Hamilton, 6 p.m. to 8 p.m., Tootsies, 8300 Preston Road, Dallas. RSVP: lmash@fflawoffice.com
- April 4, 2017 Board members Janelle Friedman and Ilona Friedman invite you to the Kidney Texas Spring Tea, 2 p.m., Home of Debby Mullen, 15 Milford Court, Dallas. RSVP: lmash@fflawoffice.com
- April 12, 2017 Janelle Friedman and Yvette Feiger invite you and a guest to attend a Spring Essential Energy reception for women business leaders featuring Jodi Sandman, CEO and Founder of Crescala Fashion Development, and Fashion Designer Nha Khanh, 6 p.m. to 8 p.m., Tootsies, 8300 Preston Road, Dallas. RSVP: lmash@fflawoffice.com

Contact for Info: jfriedman@fflawoffice.com

**JASON FRIEDMAN HONORED
 BY THE TEXAS BAR FOUNDATION**

Jason Friedman has been elected to membership in the Fellows of the Texas Bar Foundation. Fellows of the Foundation are selected for their outstanding professional achievements and their demonstrated commitment to the improvement of the justice system throughout the State of Texas. Election is a mark of distinction and recognition of Jason's contributions to the legal profession.

The Texas Bar Foundation is the largest charitably funded bar foundation in the country. Founded in 1965 by lawyers determined to assist the public and improve the profession of law, the Texas Bar Foundation has maintained its mission of using the financial contributions of its membership to build a strong justice system for all Texans.



NEW LAW OFFICE IN PUERTO RICO

Friedman & Feiger has a new law office in Puerto Rico:

FRIEDMAN, FEIGER, ALCALA, JIMENEZ & NISSMAN, LLC
 El Caribe Office Building, 53 Palmeras Street, Suite 102
 San Juan, PR 00901
 787-945-5055 or Toll Free: 1-855-FFLAW60

FRIEDMAN & FEIGER
 ATTORNEYS AT LAW

FOREST PARK AFTERMATH.
 HEALTHCARE PROVIDERS: IT'S TIME FOR A CHECKUP.

BY: LAWRENCE J. FRIEDMAN



Whether you are a physician, operate a hospital, Ambulatory Surgery Center (ASC), pharmacy owner, operate a CLIA laboratory, or a Management Services Organization, you need a legal checkup. The Forest Park indictments, together with several cases reported in the winter of 2016, are sending a definite message to healthcare providers. Although the message has always been, "compliance with the law" is critical to your success, the new message begs the question "what law"?

Federal agencies and prosecutors (as well as insurance companies in civil actions), have become creative in using unusual statutes for the purpose of seizing, or recouping your property, imposing fines, and in some cases, pursuing criminal prosecution. This can be seen not only in the Forest Park indictments last November, but also in two recent federal civil court opinions.¹ These federal court cases involved hospitals or ASCs and various business arrangements. All were alleged to constitute healthcare fraud, which should be simple enough to plead. There is a federal statute simply entitled, "Health Care Fraud," 18 U.S.C. §1347.

However, surprisingly, you won't find the federal Health Care Fraud Statute relied upon anywhere in the 44-page Forest Park indictment and you won't find it either in the 29-Page Houston *DAC Surgical Partners* opinion or in the Houston Court's *Humble Surgical Hospital* case. It's just not there.

Instead of pleading federal Health Care Fraud directly, these cases rely on statutes which are practically unknown to most healthcare providers. These include: "Travel Act," 18 USC §1952, which makes it a crime to use interstate commerce in the commission of *another crime*. The "other crime" is then curiously said to be the "Aiding and Abetting" 18 U.S.C. §2 of violations of the "Texas Commercial Bribery Statute," Tex. Penal Code §32.43 (which sounds very similar to the Anti-kickback statute and the Texas Patient Solicitation statute, Occ. Code §102.001.)

In our opinion, this signals a weakness in these federal cases. These cases rely upon unknown statutes, because the known healthcare fraud statutes are *too well known*, and therefore, *known to be defensible by experienced lawyers*.

The best defense, however, is to stay out of trouble in the first place. And because of these creatively pled statutes, an immediate legal checkup is advised. As an example, the "Texas Commercial Bribery Statute," Tex. Penal Code §32.43, though creatively pled, contains a very simple defense: "Notice to the beneficiary," is a defense to the charge. The "Texas Patient Solicitation Statute," Tex. Occ. Code §102.001 contains a similar notification requirement. This is because both statutes have their roots in professional conflict of interest ethical principles, which also contain a notice and consent requirement. These and many similar problems can be avoided with a careful, early, and thorough legal checkup.

It is, therefore, imperative that all healthcare providers obtain a healthcare compliance checkup, to guide your compliance with all potentially applicable statutes, including those new statutes, before the government or insurance companies come knocking at your door.

At Friedman & Feiger, our lawyers are experienced in all aspects of healthcare compliance, healthcare litigation, civil and criminal defense, and the statutes employed by prosecutors, government agencies and insurance fraud investigation units. Please schedule your healthcare compliance checkup today, before these agencies come knocking.

Sincerely,

¹*DAC Surgical Partners v. United Healthcare Services, Inc.* -F.Supp.-S.D. Tex. Houston (Civil Action No. 4:11CV1355. December 8, 2016); *See also Aetna Life Insurance Company v. Humble Surgical Hospital, LLC* - F. Supp. - (Civil Action H121206. U.S. Dist. Court S.D. Hous. Div. December 31, 2016.)

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FINRA: THE EXPUNGEMENT PROCESS

By: SHAUNA A. IZADI



We have successfully expunged disciplinary records of financial advisors. FINRA - the self-regulatory organization for the nation's 640,000 plus financial brokers – has made its mission to “make sure the securities industry operates fairly and honestly.” In line with this mission, FINRA created BrokerCheck, a consumer-facing database that allows investors, i.e. the public to easily search the disciplinary records of advisors and firms registered with the organization. BrokerCheck was created to help investors make informed choices about the individuals and firms with which they may wish to do business.

Although premised on a sound objective, it can also have a chilling effect on financial representatives who may be targeted by overzealous or shaded customers who may have been a victim of a downfall market. In November of 2010, the SEC approved amendments to FINRA Rule 8312 which governs the release of information through BrokerCheck. This expansion essentially required firms to release and disclose any complaints in a broker's personnel file for 10 years. In some cases, firms, in an abundance of caution, often disclosed representatives' entire personnel files, notwithstanding whether such complaints were ever arbitrated or litigated.

BrokerCheck's purpose is legitimate, but it also can certainly be misleading. For instance, it is not uncommon that every representative in the firm or the particular team to be sued to ensure that all proper parties are joined, but they are later voluntarily dismissed after uncovering no wrongdoing by a particular broker. Notwithstanding the dismissal, the claim will appear on the representative's BrokerCheck. If a broker has no settlements or terminations with the customer, why is it important to the investment community to be included in the database?

Also, BrokerCheck can be misleading in that some situations where settlements under \$25,000 were made. It is very common for broker-dealers to pay off smaller claims to avoid the cost of FINRA arbitration. These cases are often motivated by the client hoping to recoup market losses. Even if the representative wants to fight the claim, the broker-dealer often has the discretion to settle in order to avoid the costs of arbitration. As a result of the settlement, the representative will get a mark on their BrokerCheck even though they could be guiltless.

So what action can you take if you have a groundless mark on your BrokerCheck record? If the entry is completely erroneous or inaccurate, a broker can dispute it through BrokerCheck by filing a BrokerCheck dispute form. And if FINRA determines there is any merit, then they will instigate an investigation to determine whether it should be removed or 'archived.'

Lastly, the broker may seek expungement through arbitration in order to remove the “complaints” from their BrokerCheck. FINRA has made the expungement process exceedingly more difficult over the years to prevent expungement of customer complaints. FINRA has characterized expungement as an “extraordinary remedy” that should not be granted without that financial advisor meeting a very heavy burden of proof.

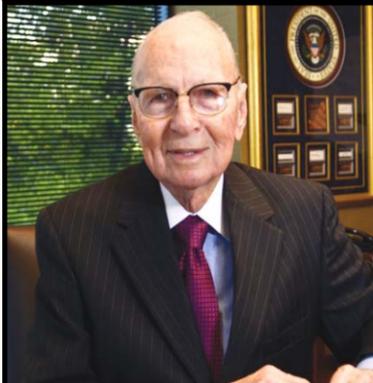
In order to get any record expunged, a unanimous arbitration panel [two from the public and one from the industry] that had been selected by the parties [the broker is the Claimant and most often his/her brokerage firm is the Respondent] has only three grounds to grant a request for expungement, which are:

- (1) The claim, allegation, or information is factually impossible or clearly erroneous; **OR**
- (2) The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; **OR**
- (3) The claim, allegation, or information is false.

It can be a somewhat costly and time-consuming process, but not compared to the importance of a clean record. If the arbitrators unanimously decide to expunge any records, then a petition will need to be filed in state court. The court must make a finding that the arbitrators followed the protocol for granting such extraordinary relief.

The expungement process is timely and expensive, but when weighed against the lasting effects of expungement, it is process worth pursuing. For additional information, please contact Shauna Izadi via email at: sizadi@fllawoffice.com.

2016 OUTSTANDING DIRECTORS AWARD



PLEASE JOIN US IN CONGRATULATING FRIEDMAN & FEIGER LLP'S VERY OWN, FORREST SMITH!!!

Not only was Forrest recently awarded the 2016 Outstanding Directors' Award by the Dallas Business Journal, he was **also** recognized as this year's recipient of the **Lifetime Achievement Award**.

The 2016 Outstanding Directors Awards honor directors, boards and committee members who have demonstrated the vital leadership and business savvy necessary to help guide their business' success. Forrest Smith, who currently serves as chairman of the Better Business Bureau Serving North Central Texas, first began focusing on the North Texas community during his time as counsel for Mobil Oil Corporation. In today's competitive business environment, high performing leaders like Forrest have never been more important.



EXPUNGE OR SEAL YOUR CRIMINAL RECORD

By: JASON H. FRIEDMAN



The New Year is just around the corner and you are making a list of your New Year's resolutions - one of which is a new job. You want to work at a Fortune 500 Company so you are cleaning up your resume. You begin to review the employment application and it asks you about any prior arrests and you are thinking I might have been arrested in college, but it was nothing - I was smoking marijuana in the quad and it has been 10 years, so it won't come up in a background search. Think again! Every Fortune 500 runs an extensive background search.

You have likely heard the terms “expunged” or “sealed” with regards to a criminal record. However, most people do not understand the difference between the two processes or know what criminal records to which they apply. In Texas, under TEX. CODE. CRIM. PROC. ANN. art. 55.01(a), a person is entitled to an expunction of arrest records, essentially if that person's arrest does not lead to a conviction, the conviction is overturned, or if there is never a trial on the alleged offense, and the person has been released, without court-ordered supervision (there are limitations under the statute, for example Class C misdemeanor offenses are not subject to the rule). If an expunction is not an option for a criminal record, you may be able to petition the court for an order of nondisclosure (an order to seal the record) under TEX. GOV'T CODE ANN. § 411.081(d).

You may usually petition the court for an order of nondisclosure under TEX. GOV'T CODE ANN. § 411.081(d), if you were placed under deferred adjudication community supervision under Section 5, Article 42.12, of the Code of Criminal Procedure (i.e. the individual pleaded no contest or guilty to an offense for which the judge put off or deferred the finding of guilt and ordered a sentence of community service with certain terms and conditions) that subsequently receives a discharge and dismissal under the statute. Like the expunction statute, the nondisclosure statute imposes other requirements and limitations with regard to the criminal records for which you may seek an order of nondisclosure (See TEX. GOV'T CODE ANN. § 411.081 to see all requirements to obtain an order of nondisclosure and limitations). For example, an order for nondisclosure is not available until after the second anniversary of the discharge or dismissal of certain misdemeanor offenses and not until after the fifth anniversary of the discharge or dismissal of a felony offense.

The difference between an expunction and a nondisclosure is that an expunction is a total destruction of a criminal record - it's as though it never existed - whereas a nondisclosure is essentially a “big secret.” After a court has entered an order of nondisclosure, only specific state agencies have access to the record for which the court entered the order.

In both situations, you may deny the existence of the arrest or prosecution for which you obtained the expunction or nondisclosure, including in job applications. If you obtain a nondisclosure order, you may even deny the existence of the arrest or prosecution to state licensing agencies that still have access to the record.

The process for obtaining an expunction or an order of nondisclosure and the acceptable documentation varies from court to court.

I do not recommend waiting until you need a record expunged or sealed because the entire process can be lengthy - it usually takes at least 120 days. First, the petition is filed and then if an order is granted, the court notifies all agencies in position of your record are notified to expunge or seal it. Although you may deny an arrest or prosecution as soon as a court enters an order of nondisclosure or expunction, private entities (like the ones that run background checks for employers) that purchase information from the Department of Public Safety are likely still in possession of records pertaining to the arrest or prosecution, and will have 90 days after they receive notice of the expunction or order of nondisclosure to either return all records and files pertaining to the arrest or prosecution or to obliterate the records and notify the court of its action.

If you are interested in seeing if you are eligible to have a past record sealed or expunged, contact Jason Friedman via email at: jhfriedman@fllawoffice.com.

FRIEDMAN & FEIGER, LLP SUPPORTS EQUAL ACCESS TO JUSTICE

Friedman & Feiger LLP is pleased to announce that it has pledged support to the Dallas Bar Association's 2017 Campaign for Equal Access to Justice benefitting the Dallas Volunteer Attorney Program (“DVAP”).

While a criminal defendant's right to representation by an attorney is guaranteed by the Sixth Amendment to the U.S. Constitution, which requires the “assistance of counsel” for the accused “in all criminal prosecution,” there is no guarantee for representation to indigent individuals involved in a civil proceeding. In today's society, the need for attorneys who are willing and able to represent the less fortunate is steadily rising, and available resources are limited. Through the Campaign for Equal Access to Justice, local businesses and attorneys are able to support the operations of DVAP in their mission to provide a variety of crucial pro bono legal services to the needy.



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