NEW YORK STATE BAR ASSOCIATION

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FINAL REPORT AND RECOMMENDATIONS OF THE CRIMINAL JUSTICE SECTION SEALING COMMITTEE REGARDING SEALING OF CERTAIN CRIMES IN NEW YORK STATE

Amended, December 2011

The Committee is solely responsible for the contents
of this report. This report is not the official position of the
Association unless and until adopted in whole or in part
by the House of Delegates of the Association
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Purpose

We recognize that to err is human. All of us from time to time make mistakes. Some mistakes, those involving the violation of a criminal statute, can have life changing impact, not merely upon the offender, but the offender's family and the community at large. "Expungement of record" or "sealing of record" are legal mechanisms which refer to the act or practice of officially preventing public access to particular criminal records in the absence of a court order.

At the outset, after much reflection, we have opted to use the term "sealing" rather than "expungement" for a "second chance" mechanism. This decision was reached after much deliberation and debate. By definition, the term "expungement" refers to a permanent destruction of records, so it will only be used in this report as it is used in the New Jersey statute. The word "sealing" for our mechanism is more appropriate and accurate for many reasons. It is the word currently used in CPL Article 160 to refer to the protective mechanism for those who are acquitted of crimes or have their cases dismissed; why then, would a different or arguably stronger term be used for those who admit their guilt? Moreover, as will be explained, under the Association's proposal the records would not be permanently destroyed ("expunged") but rather rendered inaccessible and protected unless and until an act of recidivism (in which case they would "spring back" into full effect). Sealing a person's criminal record requires balancing competing interests. On the one hand, a person with a criminal record has, after a suitable period of lawful living and rehabilitation, an interest in pursuing employment, licensing, housing, education, and other benefits without the stigma of a prior arrest or

conviction. In other words, the "second chance" described above. On the other hand, society has an interest in having access to people's criminal records for future crime investigations and in order to make hiring, rental, and other decisions about individuals.

In May 2006, the State Bar's Special Committee on Collateral Consequences of Criminal Proceedings issued a Report and Recommendations to the House of Delegates entitled "Re-entry and Reintegration: The Road to Public Safety." It was adopted by the House of Delegates. The Special Committee set forth in its mission statement:

> The legal disabilities and social exclusions resulting from adverse encounters with the criminal justice system often erect formidable societal barriers for criminal defendants, people with criminal records, those returning to their communities after incarceration, and their families. These consequences are far-reaching, often unforeseen, and sometimes counterproductive.

The Special Committee noted that without employment, ex-offenders cannot meet their own or their families' basic needs, and that a criminal conviction can be an insurmountable hurdle to employment:

> The most common issue many people face is filling out the job application itself. Preliminary questions such as "Have you ever been convicted of a crime?" or "Have you ever been arrested?" pose a major obstacle to gaining employment. The decision whether to answer honestly can determine whether the previously arrested or incarcerated individual even gets a chance to interview for a job, much less be hired. Under New York Human Rights Law § 296, it is an "unlawful discriminatory practice … to make any inquiry about … or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual." Although it is permissible under Corrections Law § 752 to inquire into criminal convictions, an employer may not refuse to hire an applicant based on the prior conviction, absent a "direct relationship" between the offense and the employment, or unless employment would involve an "unreasonable risk" to property or safety. If an individual who has been convicted of a crime lies when asked whether he has ever been convicted to avoid the social stigma associated with a conviction, his or her employment may be legally terminated for lying on an employment application. [at page 17]

People with past criminal convictions face other obstacles in the quest for employment. The Special Committee noted that "[o]ver 100 occupations in New York State require some type of license, registration, or certification by a state agency. … For example, an individual with a criminal conviction cannot obtain a license to work as a barber because 'a criminal history indicates a lack of good moral character and trustworthiness required for licensure.' Similarly, people are often barred from gaining employment, or often lose employment, with a government employer if ever convicted of a crime." [at page 18 – 19]

The Special Committee notes that "some of the most draconian consequences follow from misdemeanors and non-criminal violations":

> • A plea to disorderly conduct, defined by New York law as a non-criminal offense, makes a person presumptively ineligible for New York City public housing for three years.
> • Two convictions for turnstile jumping make a lawful permanent resident noncitizen deportable.
> • A conviction for any crime bars a person from being a barber, boxer, or bingo operator.
> • Simple possession of a marijuana cigarette cuts off federal student loans for a year.
> [at page 381, citations omitted]

The Special Committee noted that in recent decades, "seemingly cost-free 'tough on crime' policies" have proliferated. Contemporaneously, technology has dramatically increased the availability of criminal history data. The Committee characterized the "steady accretion of collateral sanctions and the exponential increase in criminal history data availability" as a "perfect storm." Criminal history background checks have become so widespread that "in 2002, for the first time, the FBI performed more fingerprint-based background checks for civil purposes than for criminal investigations" [at page 384].

"Despite various sealing regimes for certain criminal prosecutions in New York, employers, landlords, and the public routinely gain access to these records," the Committee notes. [at page 385].

> For example, defense attorneys and *judges* routinely advise hundreds of defendants each day in New York courts that their guilty plea to a violation – a non-criminal offense – will be sealed and not available to anyone. This advice is patently false. Under CPL § 160.55, the prosecutor, police, and DCJS records are sealed, but the court records remain public. Because OCA sells access to its records in a statewide Criminal History Record Search based on name and date of birth, the records of all violations convictions – and the original charges – are readily available to anyone with $52 and the desire to find out about their neighbor, employee, or tenant.

[at page 385][1] The Committee also noted that "hundreds of private, commercial background screening businesses access these data sources and create their own repositories" offering their services to the private sector and "80% of large corporations perform background checks on job applicants, and 69% of small businesses do." [at page 385]. These percentages have likely further increased in the last 5 years, and landlords and credit report companies also now routinely run criminal history background checks.

The Committee concludes in its Recommendations that as the "public access to records has increased, the importance of sealing criminal history records has skyrocketed." [at page 394] The Report references Section 160.50 of the Criminal Procedure Law (CPL), which protects persons who are acquitted or whose cases are dismissed, and Section 160.55 of the CPL, which extends protection to those whose prosecution terminates with a conviction of a non-criminal "violation" (petty offense),

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[1] OCA has changed its policy and is no longer providing information about violation convictions. Of course, there is nothing to stop OCA from changing its position in the future. And of course, because the old policy was in place for a long time, there are plenty of these records floating around, especially with the criminal record search services.

and Section 720.35 CPL, which seals the records in "Youthful Offender" adjudications. However, the Committee pointed out that technology and legal amendments have eroded the protections afforded by sealing. In discussing petty offenses, the Committee stressed the distinction between the use of records by law enforcement and by those outside law enforcement for collateral purposes. "In our view, the only legitimate use would arise in the context of a new criminal case where the individual is charged with a new crime. If law enforcement retains access to a sealed court record for use in any new criminal proceeding, then there is no legitimate law enforcement purpose in keeping the record unsealed for use by the public." [at page 396] Most significantly, in conclusion based on all the findings it made, the Special Committee stated that "The Legislature should create a new sealing provision to seal, automatically or upon application, certain felony and misdemeanor convictions after a certain period." [at page 397]

We follow upon the Special Committee's findings, report, and recommendations, and also acknowledge the efforts of a past working group, the Subcommittee on Misdemeanor Sealing of the Criminal Justice Section. The need for a mechanism to allow ex-offenders to move beyond their past convictions has been recognized by the State Bar's adoption of the Special Committee's Report. In addition, the New York City Bar in January 2011 issued a "Report of the Criminal Justice Operations Committee Proposing Legislation that Would Allow for the Sealing of Records Containing Certain Arrest, Petty Offense, and Youthful Offender Information." The report detailed the insufficiency of the current sealing mechanisms in the context of Youthful Offender adjudications and petty offenses.

More recently, members of the Legislature have proposed bills to address the situation. Two bills have been introduced to provide ex-offenders with a second chance. Our Committee was initially formed for the purpose of analyzing the two pending bills and to offer recommendations to the Executive Committee of the Criminal Justice Section as to what position, if any, the Bar Association should take with respect to the bills. This Report examines the components or "elements" of the two bills, along with New Jersey's corresponding statute for guidance, and presents the suggestions and recommendations of the committee members and the overall conclusion of the committee. Some of the content of this report has been amended since its original presentation to the Executive Committee and House of Delegates in order to address the feedback received and in order to support a more specific proposal for legislation. However, the fundamental principles remain intact.

Background

Currently, New York State has no expungement or sealing law applicable to adults who are convicted of felonies or misdemeanors (other than drug defendants who have completed judicial diversion programs, DTAP programs or sentences of parole supervision under CPL 410.91 [Willard], and this section (160.58 CPL) does not apply to any convictions prior to 2009). Other than these exceptions, a conviction follows an ex-offender to the grave. The pending bills are an effort to create a balance between the interests of ex-offenders and the interests of law enforcement and other members of the public. A sealing law will be based on views on a variety of factors. This committee has identified the following elements of such a statute:

1. Grade of Crime
2. Type of crime

3. Time limitation until application can be made
4. Standards for the court in the law
5. Procedure, including when a hearing is ordered
6. Fee/surcharge
7. Number of applications that can be made
8. Community service option
9. Definition of sealing
10. Burden
11. DNA/fingerprints

Analysis of Bill A6664

This bill (hereinafter called the O'Donnell bill) would establish a procedure for an individual with a criminal record, who has completed his or her sentence and has been arrest-free for a specified waiting period, to apply to the sentencing court, on notice to the prosecutor, for an order sealing the record of conviction. The expressed purpose of the O'Donnell bill is to help currently law-abiding individuals keep, regain or gain employment by strengthening mechanisms intended to prevent employment discrimination against ex-offenders. The elements of the O'Donnell bill are as follows.

1. Grade of Crime

The O'Donnell bill would seal both misdemeanors and felonies.

2. Type of Crime

The O'Donnell bill would seal both violent and non-violent felonies, but not sex crimes.

3. Time Limitation

An application can be made in six months for a non-criminal offense; one year for two or more non-criminal offenses; one year for a misdemeanor; three years for more than one misdemeanor; five years for a non-violent felony; ten years for two or more non-violent felonies; ten years for a violent felony; and twenty years for more than one

violent felony. The Court may shorten the waiting period for good cause.

4. Factors the Court Should Consider

The O'Donnell bill does not expressly state which factors the court should take into consideration when making a determination. However, the O'Donnell bill requires that an application include: (a) a list of each of the petitioner's convictions in New York state, any conviction in any other state or in federal court, the sentence for each such conviction and the date of the sentence, (b) a statement as to the termination of each aspect of the sentence for each of the above-listed convictions, including the dates of termination from probation, parole or other supervisory sentences, a statement as to the existence of any orders of protection and the end date of such, and a statement as to the completion of any conditional sentences or any other conditions of sentence imposed by the court or by law, (c) a description of the nature and circumstances of each crime listed in section (a), and (d) a description of the nature of the petitioner's personal circumstances since the conviction, which shall establish that the petitioner is entitled to relief.

5. Procedure

The application is to be made to the sentencing court, and applications may be referred to magistrates, who may grant applications for misdemeanors and non-criminal offenses, and make recommendations to the judge regarding felonies. The application must be served on the original prosecuting agency on 21 days notice, with an opportunity for the prosecutor to answer seven days prior to the return date. The court may conduct a hearing as to any issue of fact or law and must issue a written decision stating reasons for the decision, unless the application is granted without objection. Either party may appeal.

6. Upfront Fee/Back-end surcharge

There is an upfront fee of $95.00.

7. Number of applications that can be made if turned down, and how often?

The O'Donnell bill does not expressly state whether or not a petitioner can reapply after the initial application is denied.

8. Community service option

The O'Donnell bill does not expressly mention a community service option.

9. Definition/Effect of sealing (both arrest and conviction rendered a nullity?)

The conviction and the arrest are rendered a nullity. However, the Division of Criminal Justice Services, the Department of Correctional Services, and all local jail or prison agencies shall maintain a sealed record in their databases that will not be accessible except to law enforcement agents or prosecution agencies in the course of a criminal investigation or prosecution, or upon a court order or court-ordered subpoena ordering release of the information. In the event the applicant is arrested subsequent to the sealing of the records, the unsealed record shall be included in the Division of Criminal Justice Services "NYSID" (New York State Identification Number) sheet that is printed out based on the applicant's fingerprints. A court, upon determining it is in the interests of justice to unseal a record, shall order its unsealing, which shall allow the prosecutor and the court to access the records of their agency pertaining to that arrest. Any such unsealed files shall be made available to the defendant and his or her attorney.

10. Burden

For violations (non-criminal offenses), misdemeanors and nonviolent felony convictions, there is a rebuttable presumption that the application will be granted unless

sealing will harm public safety or would not serve the interests of justice. For violent felony convictions, there is a rebuttable presumption that the application will not be granted, unless the applicant establishes multiple factors, including complete rehabilitation that the crime was an aberration and is not likely to recur.

11. DNA/fingerprints

Fingerprints will be kept on file.

Analysis of Bill A1139

1. Grade of Crime

This bill (hereinafter called the Lentol bill) would permit the sealing of certain non-violent misdemeanor or non-sexual misdemeanor criminal offenses. It does NOT include felonies of any kind.

2. Type of Crime

The Lentol bill excludes from sealing crimes under Penal Law articles 120, 130, 135, 150, 235, 245, 260, 263, 265, and 400. It also excludes: killing or injuring a police animal as defined in section 195.06, harming an animal trained to aid a person with a disability in the first degree as defined in section 195.12, promoting prostitution in the fourth degree as defined in section 230.20, riot in the second degree as defined in section 240.05, inciting to riot as defined in section 240.08, aggravated harassment in the second degree as defined in subdivision three of section 240.30, criminal interference with health care services or religious worship in the second degree as defined by section 240.70, harming a service animal in the second degree as defined in section 242.10, dissemination of an unlawful surveillance image in the second degree as defined in section 250.55, or any specified offense subject to the provision relation to hate crimes as

defined in section 485.05 of the penal law. Additionally, an eligible misdemeanor shall not include criminal solicitation, conspiracy, attempt, or criminal facilitation to commit any violent felony offense as defined in section 70.02 of the penal law, or any sex offense as defined under subsection two of section 168(a) of the correction law.

3. Time Limitation

An application can be made five years after the completion of a sentence provided the person has not been convicted of an offense during the last five years and is not the subject of an undisposed arrest.

4. Factors for the court to consider

When reviewing an application, the court may consider any relevant factors, including but not limited to: (a) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions, (b) the character of the defendant including what steps the petitioner has taken since the time of the offense toward personal rehabilitation, including treatment, work, school, or other personal history that demonstrates rehabilitation, (c) the defendants criminal history, (d) the impact of sealing the defendant's records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety, and (e) any statement made by the victim of the offense where there is in fact a victim of the crime.

5. Procedure, including when a hearing is ordered (is no hearing the default?)

After the petitioner applies, the court will notify the district attorney of each jurisdiction in which the defendant has been convicted of an offense with respect to which sealing is sought, and the court or courts of record for such offenses, that the court is considering sealing the records of the defendant's eligible misdemeanor convictions.

Both the district attorney and the court shall be given a reasonable opportunity, which shall not be less than thirty days, in which to comment and submit materials to aid the court in making such a determination. When the court notifies a district attorney of a sealing application, the district attorney shall provide notice to the victim, if any, of the sealing application by mailing written notice to the victim's last-known address. At the request of the defendant or the district attorney of a county in which the defendant committed a crime that is the subject of the sealing application, the court may conduct a hearing to consider and review any relevant evidence offered by either party that would aid the court in its decision whether to seal the records of the defendant's arrests, prosecutions and convictions.

6. Upfront Fee/Back-end surcharge

There is an upfront mandatory fee of $80.00, which shall be waived for indigent defendants.

7. Number of applications that can be made if turned down, and how often?

The Lentol bill does not specify how many applications can be made or how often.

8. Community service option

The Lentol bill does not specify whether there is a community service option.

9. Definition/Effect of sealing (both arrest and conviction rendered a nullity?)

When a court orders sealing, all official convictions, including all duplicates and copies on file with the Division of Criminal Justice Services or any court shall be sealed and not made available to any person or public of private agency. Sealed records shall be made available to the defendant or the defendant’s agent, qualified agencies when acting within the scope of their law enforcement duties. An agency responsible for issuing a gun

license, or any prospective employer of a police office or peace officer. If, subsequent to the sealing of records a person is arrested for or formally charged with any misdemeanor or felony offense, such records shall be unsealed immediately and remain unsealed unless the arrest results in a termination in favor of the accused.

10. Burden (on petitioner)

The Lentol bill does not specify who has the burden of persuasion.

11. DNA/fingerprints

The Division of Criminal Justice Services shall retain any fingerprints, palm prints, photographs or digital images.

Analysis of New Jersey's Expungement Statute

1. Grade of Crime

New Jersey will expunge the record of certain misdemeanors and felonies.

2. Type of Crime

Serious felonies (murder, manslaughter, treason, anarchy, kidnapping, rape, forcible sodomy, arson, perjury, false swearing, robbery, embracery, or a conspiracy or any attempt to commit any of the foregoing, or aiding, assisting or concealing persons accused of the foregoing crimes) shall not be expunged, nor will large quantity drug crimes of cases involving public officials abusing their duties.

3. Waiting period before application can be made

A person is eligible after ten years (5 years for petty disorderly offenses) if no subsequent or prior convictions.

4. Standards for the court for review (factors to consider)

In coming to a determination, the court must balance the need for the availability of the records against the desirability of having a person's records expunged.

5. Procedure, including when is a hearing ordered (is no hearing the default?)

Upon the filing of a petition for relief pursuant to this chapter, the court shall, by order, fix a time not less than 35 nor more than 60 days thereafter for hearing of the matter. If, prior to the hearing, there is no objection from those law enforcement agencies notified or from those offices or agencies which are required to be served, and no reason, as provided in section 2C:52-14, appears to the contrary, the court may, without a hearing, grant an order directing the clerk of the court and all relevant criminal justice and law enforcement agencies to expunge records of said disposition including evidence of arrest, detention, conviction and proceedings related thereto.

6. Upfront Fee/Back-end surcharge

Upfront fee of $95.00.

7. Number of applications that can be made if turned down, and how often?

The New Jersey statute does not specify how many applications can be made if a petitioner is turned down.

8. Community service option

The New Jersey statute does not specify whether or not there is a community service option.

9. Definition/Effect of expungement (both arrest and conviction rendered a nullity?)

Unless otherwise provided by law, if an order of expungement is granted, the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred, and the petitioner may answer any questions relating to their occurrence

accordingly. However, agencies possessing sealed information can consult the information to ascertain if applicants for expungement have had offenses expunged before, and for purposes of sentencing, parole, corrections classification, and hiring for criminal justice agencies.

10. Burden (on petitioner)

There is a rebuttable presumption in favor of expungement.

11. DNA/fingerprints

Expunged records include complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, "rap sheets" and judicial docket records.

Feedback Regarding Proposed Legislation

An analysis of the New Jersey, Lentol, and O'Donnell bills resulted in the recognition of eleven elements of a statute of this type. This Committee evaluated these elements, and also received feedback and input from other groups, both shortly before and after the presentation of the original Report to the Executive Committee and House of Delegates. The Criminal Justice Section of the New York County Lawyers' Association provided suggestions, and did various members of the NYSBA Executive Committee and House of Delegates. Feedback was also sought from the judiciary and from prosecutors (by the Section Chair to the New York District Attorney's Association) and the New York State Association of Criminal Defense Lawyers. The Executive Committee of the Criminal Justice Section, in accepting this amended report, voted to change the number of misdemeanor convictions which can be sealed pursuant to this sealing provision from one (1) to three (3) but to retain the limit of a single felony conviction.

1. Grade of Crime

Of the seven members who provided feedback, the majority felt that is was best to include all misdemeanors and D and E felonies. However, two members also want to include B and C felonies. One member stated that he would be opposed to expunging A or B felonies; but would be okay with C, D, and E non-violent felonies. Another member suggested that in addition to all grades of non-violent felonies, D and E violent felonies should also be sealed. The justification for including violent felonies was that not all violent felonies are actually violent, and the legislative rationale to label them as such (potential for violence etc.), does not hold true later on in life where no further transgressions have occurred. Most members stated that there were strategic advantages for starting out with misdemeanors first, then adding amendments that would include felonies. The Committee believes that the statute should apply to Penal Law and non-penal law offenses that are within the defined classes of crimes (be they misdemeanors or felonies).

Feedback from NYCLA and other sources has raised the issue of petty offenses (non-criminal violations) and Youthful Offender (Y.O.) adjudications. While, sealing provisions do exist for these situations, as noted by the Special Committee, the protection afforded is quite limited. It has been suggested that those convicted of only petty offenses or adjudicated Y.O. should have the same protections as those convicted of crimes, and we agree.

2. Type of Crime

The members unanimously stated that sex crimes should not be sealed. However, one member believes an argument can be made for giving the courts discretion to look at the age based sex crimes, such as situations that were consensual in fact, if not in law. A majority of the members also excluded violent crimes, two of whom specified crimes of violence where a weapon was used. One member suggested the exclusion of any sex crimes or violent crimes, and discretionary exclusion of any crime where the basis for the arrest was a sex crime, where the defendant pled to a non-sex crime. That member further suggested discretionary exclusion of any crime with a weapon and any crime where the basis for the arrest was a weapon crime, where the defendant pled to a non-weapon crime. It has further been suggested that crimes involving children as victims should be excluded as well. There was debate over whether Vehicle and Traffic Law crimes such as drunk driving should be included; at this point, they are not included.

3. Waiting period before application can be made

In the original Report, the members unanimously agreed that the waiting period should be three years for the first misdemeanor conviction. One member suggested that the waiting period be five years for a second misdemeanor conviction or a felony conviction. Another member also agreed with a five-year waiting period for two or more misdemeanors, but suggested an eight-year waiting period for a felony. A different member suggested that the waiting period for a felony be ten years. But, if there is a "spring back" provision (see below) when the defendant commits a new felony, the waiting period should be shortened to five years. Another member suggested that the waiting periods should be ten years for felonies, three years for misdemeanors, and no waiting period for violations contingent upon completion of any conditions. Another

person stated that while waiting periods are politically attractive they have the effect of exacerbating the collateral consequences of a conviction because they extend the period during which the petitioner may be denied employment, licensing, housing, education, and other benefits. That member also suggested that the waiting periods be kept as short as politically possible.

Much input was received subsequent to the submission of this Committee's original Report. The State Bar President suggested that there be a specific waiting period recommended for felonies. There were also suggestions that the waiting period for misdemeanors was too short. It should be noted that in New Jersey, the waiting period begins at the time of the expiration of sentence, not the date of the imposition of sentence. So, for example, for a class "A" misdemeanor committed in 2011 upon which a sentence of probation was imposed in 2012, the waiting period would begin at the completion of the 3 years probation in 2015. A 3 year waiting period would mean that eligibility for relief might not vest until 2018 – seven years after the crime. If a 5 year waiting period were imposed for A misdemeanors with probation, the actual term between the crime and the application for relief could be as long as nine years. The approach to the waiting period seems to improperly penalize those who receive probationary sentences over those who are incarcerated for similar charges. The better approach would seem to be to tie the waiting term to the date of the conviction (sentence or resentence) itself. All in all, we advocate a 5 year waiting period for misdemeanors and petty offenses and an eight year waiting period for felonies.

The statute will apply to judgments of conviction of Y.O. adjudication (covered by the statute) that predate the effective date.

4. Factors the Court Should Consider

Most members agreed that the factors should be kept vague and open-ended and include a catchall provision such as "and any other factor that should be considered in the interest of justice." The members stated these factors should be suggested as examples to courts, not hard and fast rules and not exclusive. One member stated that too many factors and specificity might appear overly burdensome. Two members included lists of factors for the court to consider. The first list included: circumstances of the initial crime, defendant's age, defendant's role in crime, motive for crime, and activities since conviction. The factors to be considered under the rubric of activities since conviction are: community service, re-arrests including without convictions, letters of reference educational efforts and employment activities. The other list of factors included: circumstances of the crime, petitioner's conduct during prison/parole/probation, any prior bad acts, attempts at rehabilitation, activities after committing crime, and public safety.

Subsequent feedback has confirmed that while the factors should not be hard and fast rules, legislation should contain some specific guidance for the courts. Adapting language from the Lentol bill: When reviewing an application, the court may consider any relevant factors, including but not limited to: (a) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions, (b) the character of the defendant including what steps the petitioner has taken since the time of the offense toward personal rehabilitation, including treatment, work, school, community service, or other personal history that demonstrates rehabilitation, (c) the defendant's criminal history, (d) the impact of sealing the defendant's records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on

public safety, and (e) any statement made by the victim of the offense where there is in fact a victim of the crime. The court shall grant the application unless sealing the records will harm public safety or would not serve the interests of justice. If the court deems it necessary, the court may order a report as to the applicant's background and circumstances from an independent consultant, expert or agency deemed qualified by the court to prepare such a report.

5. Procedure, including when a hearing should be ordered (is no hearing the default?)

The members were split about what the procedure should be. One member stated that the default should be no hearing and if there is opposition and/or the court sua sponte finds a substantial basis, to support denial, the court can order a non-evidentiary hearing. Another member suggested that the defendant should apply and notice should be given to the DA, and whether or not the DA responds, the court should make the final decision. One person stated that the default should be no hearing until the DA puts a material fact in issue. That member went on to say that if "hearing" is expressly defined to include any airing of the issue, and not an evidentiary hearing, the hearing requirement would be unimportant. Another person suggested that the default should be no hearing and the application should be granted; then if the court finds a substantial basis which might support denial of the request, then a non-evidentiary hearing should be held. Another member suggested that the default is to have a hearing unless the prosecution consents. One member suggested that once the petitioner files, the court has an opportunity to review all submissions, including hearsay documentation. If the parties agree to the facts, no hearing should be required. If the facts are contested, a hearing should be held.

It should be noted that the system in place in New Jersey places much of the administrative burden on the applicant, who must provide notice of his application to numerous interested parties besides the District Attorney, including Probation and Corrections (if applicable). The application itself is quite extensive.

There should also be a provision for appeals by either party.

6. Upfront Fee/Back-end surcharge

One member was in favor of an initial application free ranging from $100-$250, primarily to make the bill more attractive to the Legislature. Two members suggested that there be an upfront non-refundable fee. One member did not think that there should be a surcharge, and another suggested a nominal fee. Another member suggested that there be a back-end surcharge, but did not specify an amount. All of the members agree that the fee should be waived for demonstrable indigence.

7. Number of applications that can be made if turned down, and how often

The members were split on the number of applications that can be made and how often they can be made. One member stated that a petitioner who is tuned down should be able to file a new application every other year, but the application must contain new information. Two of the members believed a petitioner should be able to reapply once a year with renewal as often as requested but only on a showing of changed circumstances. One member agreed with one application per year, but did not require a showing of changed circumstances. Another member also agreed with the once a year application with a showing new evidence, changed circumstances, or actual prejudice. One member suggested that a petitioner who is denied should be able to reapply an unlimited amount

of times, but no more than once every two years. Another member suggested that a petitioner be able to reapply three to five years after the denial of the first application on a showing of good cause. One person also suggested a ban on any person who already had a prior misdemeanor or felony sealed and then was later convicted of committing any other crime, and a ban on any person with two separate felonies so that the sealing would still leave a felony conviction on the record.

8. Community service option

The members were split about whether or not there should be a public service requirement. One member said there should not be a community service option. Two other members said that it is not important. Another member said that if it is considered, it should be evaluated under the same factors as suggested the court use to review in section four (see above). One member believes the option is unnecessary unless it will help in getting the bill passed. However, three members suggested that the court should be able to impose community service as a discretionary condition.

There was debate within the Criminal Justice Section Executive Committee as to whether the imposition of a community service condition constituted ex post facto punishment. The majority appeared to believe that it could be construed as a condition of the relief application rather than an additional punishment or component of sentence, but others expressed the concern that it could be challenged and that it simply wasn't worth including it.

9. Definition/Effect of sealing (both arrest and conviction rendered a nullity?)

Most members stated that the language of CPL 160.50 should apply and that the conviction and arrest should be treated as if they never occurred – a nullity, so to speak.

Six of the seven members who answered believed there should be a "spring back" provision so that if a new arrest for a felony occurred within the mandated time period it would trigger an enhanced sentence for a repeat offender (predicate felony status). One member stated that ideally, a person who manages to get a prior conviction sealed should never have it "spring back." He went on to say that if it is a first misdemeanor conviction that gets sealed it should never serve as a predicate for a later elevation of charges. The issue of whether or not it is a crime that may serve as a basis for a later elevation can be considered by the judge upon deciding whether or not to grant the sealing application but once it is granted it should be final. He stated that he would agree to a felony "springing back" for predicate status as a "bone" or compromise to those who feel it is necessary in order to get the bill passed but felt very strongly that the committee should not leave out all contentious issues up front and risk having no bargaining power. Another member suggested that there should be an automatic temporary unsealing upon a new arrest, which could generate a permanent conviction.

The Committee recommends that the legal effect of a successful motion pursuant to this section be spelled out in the statute, just as it is in the New Jersey statute. In this way, there will be no confusion about what a successful petitioner may say or write concerning a sealed offense.

Subsequent feedback to this Committee has revealed the "spring back" provision to be in need of much further clarification. NYCLA expressed the following:

> There was concern that the report did not sufficiently detail the "spring-back" provisions contained in the O'Donnell legislation, which clearly specifies that sealed offenses would count towards predicate felony status and toward penal law offenses that are enhanced based on a prior conviction. The report also does not mention that the Lentol Bill is silent on this piece. Although the report is

clear that the Committee members believe that effects should be spelled out in the statute, it may be useful to highlight that the O'Donnell Bill is very specific on this issue, since this could be an important element to opponents of sealing.

We have addressed concerns by making the "spring back" provision much more specific in our Recommendations below.

NYCLA also questioned whether there should be a reciprocal spring-back provision that would allow defense attorneys to get access to sealed records of a prosecution witness. As victims and witnesses are not charged with new crimes, such a provision would not conform to the anti-recidivist purposes of a spring-back provision; in fact, it would defy the overall spirit of the initiative.

Another issue not addressed was what sort of sanction should exist for intentionally disclosing sealed records. Without some sanctions, the law would have no teeth. A misdemeanor seems the appropriate grade of offense.

To effectuate the new provision, a change to the Executive Law is also required, adding the new sealing section into the existing law making it a discriminatory practice, unless otherwise authorized, to inquire about or act adversely to an individual whose case was sealed.

Lastly, the ability to apply for sealing should not be subject to waiver at the time of plea.

10. Burden

Most members stated that the burden should be the petitioner's by a preponderance of the evidence. One member suggested that the burden be clear and convincing evidence and that the judge should be required to specify in the decision the

reasons why the court is granting the request. That member further suggested that for misdemeanors there should be a rebuttable presumption of rehabilitation and non-danger to public safety, after the waiting period has elapsed.

The New Jersey system places the burden of moving forward on the applicant, who must submit that all requirements for expungement are met. The practical effect is a rebuttable presumption in favor of the relief if the requirements are met. The New Jersey system requires very little court time or resources, while providing a source of revenue (application fees).

11. DNA/fingerprints

A majority of members stated that DNA and fingerprints should be kept in a database, available only for law enforcement and criminal court purposes, or special cases such as law enforcement positions and bar admissions. One member believed that DNA and fingerprints should be destroyed if the application is granted.

DNA information is kept on file in order to solve future crimes. It is not usable by landlords or employers, and thus is not relevant to concerns of collateral consequences. The general consensus of the Committee is that destroying DNA evidence would hinder law enforcement objectives to the benefit of recidivists, while adding no protection to the rehabilitated ex-offender.

As to fingerprints, it will be necessary for them to remain on file in order to implement a "spring back" provision for recidivists.

Recommendations to the Committee

Based upon the co-chairs' review of the responses received from the committee members, as well as the discussions that were held concerning the proposed legislation,

the committee recommends that the Executive Committee and House of Delegates vote in favor of the following proposal:

The Criminal Justice Section recommends that the New York State Bar Association adopt the following Proposal to amend the criminal procedure law and the executive law, in relation to applications for sealing a record of conviction.

The criminal procedure law should be amended by adding a new section 160.65 to read as follows:

§ 160.65 Sealing record of conviction or adjudication.

1. **Eligible Applicants.** A person is eligible to apply to seal a record of conviction, or in the case of Youthful Offenders, an adjudication, subject to the provisions contained in this section. The record sought to be sealed must be the applicant's only felony criminal conviction or adjudication. In the case of misdemeanors, no more than three (3) misdemeanor convictions or adjudications are subject to sealing pursuant to this section. Further, an applicant must be duly terminated and discharged from every aspect of the sentence, including incarceration, probation, parole, conditional release, post-release supervision, conditional discharge, and/or any order of protection on this or any other matter against the applicant must have expired. There can be no undisposed arrests at the time of application.

2. **Grade of Crime.** An eligible applicant must have been convicted of a Penal Law crime(s) or a non-criminal offense(s), or adjudicated a Youthful Offender (Y.O.) under Section 720.35 CPL.

3. **Type of Crime**. For the purposes of this section, no records involving sex crimes or crimes with victims who were children are eligible for sealing. Among felonies, only class "D" and "E" non-violent felonies are eligible.

4. **Waiting Period**. A person cannot apply until a "waiting period" (beginning on the date that the most recent sentence or resentence is imposed) elapses. During this period there can be no convictions for a crime. The following waiting periods shall apply under this section:

(a) For a person who has been convicted of an eligible misdemeanor(s), adjudicated Y.O. on a misdemeanor, or convicted of a non-criminal offense(s), the waiting period shall be five (5) years from the date of the most recent conviction or adjudication.

(b) For a person who has been convicted of an eligible non-violent "D' or "E" felony, or adjudicated Y.O. on a felony, the waiting period shall be eight (8) years from the date of conviction or adjudication.

5. **The Application.** An application under this section shall be sworn to under penalty of perjury and shall include:

(a) A list of each of the petitioner's convictions in New York State, any convictions in any other state or in federal court, the sentence for each such conviction and the date of the sentence. Non-criminal convictions outside New York State need not be included.

(b) A statement as to the termination of each aspect of the sentence for each of the above-listed convictions, include the dates of termination from probation, parole or other supervisory sentences, a statement as to the existence of order or orders of protection and the end date of such, and a statement as to the completion of any conditional sentences or any other conditions of sentence imposed by the court or by law, although this shall not be construed to require a person to have restored driving or other privileges that have been lost, suspended or revoked due to the conviction.

(c) A description of the nature and circumstances of each crime listed in paragraph (a) of this subdivision.

(d) A description of the nature of the petitioner's personal circumstances since the conviction, which shall establish that the petitioner is entitled to the relief provided in this section.

6. **Filing Fee**. Applications under this section shall be accompanied by a fee of ninety-five (95.00) dollars. The filing fee shall be waived only upon a finding of an applicant's indigence. When imposed, the filing fee shall be paid to the clerk of the court or administrative tribunal that rendered the conviction.

7. **The Application**. The application for sealing a record of conviction shall be served upon the prosecuting agency that originally prosecuted the case. The prosecuting agency may file an answer to the application prior to the return date of the motion. If the applicant was on probation, the applicable Probation Department shall be served. An application for sealing a record of conviction shall be made to the judge who originally sentenced the applicant. In the event such judge is unavailable, or in the discretion of the supervising or administrative judge of that court, application shall be made to a sitting judge in the court in which the conviction was ordered. The court may grant an application on submissions if the prosecuting agency does not file an opposition. If there is objection, the court must review the issues of fact and law and determine the merits of the application.

8. **Factors to Consider**. When reviewing an application, the court may consider any relevant factors, including but not limited to: (a) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions, (b) the character of the defendant including what steps the petitioner has taken since the time of the offense toward personal rehabilitation, including treatment, work, school, community service, or other personal history that demonstrates rehabilitation, (c) the defendant's criminal

history, (d) the impact of sealing the defendant's records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety, and (e) any statement made by the victim of the offense where there is in fact a victim of the crime. The court shall grant the application unless sealing the records will harm public safety or would not serve the interests of justice. If the court deems it necessary, the court may order a report as to the applicant's background and circumstances from an independent consultant, expert or agency deemed qualified by the court to prepare such a report.

9. **Hearings**. Upon the request of either party or sua sponte, the court may conduct a hearing as to any issue of fact or law or in the court's discretion, may hear testimony or accept written submissions relating the merits of the application or any matter deemed appropriate by the court in furtherance of determining the motion. When the court orders a hearing and the applicant is financially unable to afford counsel, the court must assign counsel.

10. **Decision on an Application**. A decision granting or denying an application under this section shall be in writing and shall state the reasons for the court's ruling, unless the court grants the application without objection or written response by the prosecutor, in which case the court may issue an order without a written decision. If sealing is denied, applicant can reapply after one year.

11. **Effect of Sealing**. A sealed conviction shall not operate as a disqualification of any person to pursue or engage in any lawful activity, occupation, profession or calling unless so ordered by the court. Except where specifically required or permitted by statute or upon specified authorization of a superior court, no such person shall be required to divulge information pertaining to the sealed record. Such person shall be permitted to respond in the negative to the question "Have you ever been convicted of a crime or violation?" or to any question with the same substantive content. The protection is the same as CPL section 160.50: a nullity. Under existing law, non-governmental employers are not permitted to ask prospective applicants if they have been "arrested."

12. **Sealing Process**. When a court orders sealing pursuant to this section, all official records and papers relating to the arrests, detentions, prosecutions, and convictions, including all duplicates and copies thereof, on file with the division of criminal justice services or any court shall be sealed and not made available to any person or public or private agency; provided, however, the division shall retain any fingerprints, palm prints, photographs, or digital images of the same. Sealing will not have any impact on DNA evidence or information on file. Records shall be unsealed only pursuant to court order except that the following agencies may maintain records in the following manner:

(a) The department of criminal justice services shall maintain a sealed record in its database in a manner that will not be accessible to anyone other than law enforcement agents or prosecution agencies in the course of a criminal investigation or prosecution, or upon a court order or court-ordered subpoena ordering release of the information. In the event the applicant is arrested subsequent to the sealing of the

records, the unsealed record shall be included in the department of criminal justice services "NYSID" sheet that is printed out based on the applicant's fingerprints. A court, upon determining it is in the interests of justice to unseal such a record, shall order its unsealing, which shall allow the prosecutor and the court to unseal the records of their agency pertaining to that arrest. Any such unsealed files shall be made available to the defendant and his or her attorney.

(b) The department of correctional services and all local jail or prison agencies shall maintain sealed records in a manner that precludes the public from obtaining information relating to the arrest, detention or conviction of the individual whose record has been sealed, including but not limited to removal from all publicly available databases on the internet and otherwise. However, such agencies shall maintain a record of individuals who have been in custody which shall be kept by a custodian of those records within the agency. In the event the inmate shall be readmitted to the facility, the custodian is authorized to re-open such files, to be used solely for the agency's official purposes.

13. **Unsealing for Cause**. If, subsequent to the sealing of records pursuant to this subdivision, the person who is the subject of such records is arrested for or formally charged with any misdemeanor or felony offense, such records shall "spring back" and be unsealed immediately and remain unsealed; provided, however, that if such new misdemeanor or felony arrest results in a termination in favor of the accused as defined in subdivision three of section 160.50 of this article or by conviction for a non-criminal offense as described in section 160.55 of this article, such unsealed records shall be re-sealed pursuant to this section. Nothing in this section shall change the sentencing provisions in the penal law. A sealed record, unsealed at the time of a re-arrest, shall continue to qualify as a conviction for sentencing purposes and may be used to establish an element of a crime as provided in the penal law.

14. **Publishing Sealed Information**. It shall be a class A misdemeanor to publish information regarding the arrest, detention or conviction of an individual whose record has been sealed. A person aggrieved by a violation of this section shall have the right to institute a civil proceeding, regardless of whether a criminal action was commenced. A plaintiff is entitled to five hundred dollars for each occurrence along with the actual damages caused by the disclosure of such sealed record. Law enforcement, prosecution officials and employees of the office of court administration shall have a defense to a criminal or civil action under this section if they believed, in good faith, that they were permitted or required by law to disclose a sealed conviction. There shall be no prosecutorial or law enforcement immunity under this section for any government official who knowingly and intentionally publishes a sealed record which such official knows to have been sealed under this section. If a conviction is unsealed pursuant to a new arrest, the provisions of this subdivision shall not apply.

15. **Appeals.** Either party may appeal as of right from the court's order. The appealing party must serve notice of appeal upon the court and the opposing party within thirty days of the service of the court order. If the order is appealed by the prosecuting agency, such notice of appeal shall be deemed a stay of the order to seal the records. The prosecuting

agency shall perfect the appeal within sixty days, or the sealing order shall immediately take effect unless the court grants an extension of the time to perfect the appeal upon good cause shown by the prosecutor. The appeal shall be taken to the same court to which the appeal of the original conviction could have been brought. The standard of review at the intermediate appellate court shall be abuse of discretion. The decision of an intermediate appellate court shall be appealable to the Court of Appeals upon the issuance of a certificate granting leave pursuant to CPL 460.20.

16. **Waiver of Right Impermissible**. The waiver of the right to make an application under this section may not be a condition of a guilty plea entered in any case in New York State.

17. **Executive Law**. Subdivision 16 of section 296 of the executive law, as separately amended by section 3 of part N and section 14 of part AAA of chapter 56 of the laws of 2009, should be amended to include the new section 160.65, making it an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding under the new sealing provision.

Conclusion

Complicated and difficult questions should never justify a retreat from a problem that deserves resolution. That principle guided the Sealing Committee and the Section's Executive Committee as they approached the issues discussed in this report. The Section's Executive Committee appreciates that there are many variables that could be subject to discussion and debate by the Association. Nevertheless, difficult questions should not be a reason not to proceed to a solution to a problem. The benefits of a sealing bill to those who deserve such treatment warrant this remedy.