NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #11 –
Supplemental

REQUESTED ACTION: Approval of a resolution offered by the Criminal Justice Section with respect to legislation to permit the sealing of criminal records.

Previously transmitted was the report of the Criminal Justice Section, which discusses the sealing of a record of criminal conviction. Attached herewith, is an erratum page that details edits to page 8 of the report.

Additionally, this memorandum summarizes below many of the main recommendations contained in the report.

The Section recommends that a statute to permit the sealing of a record of criminal conviction should include among its provisions the following considerations:

1. **Grade of Crime** –The Section recommends that such a statute should apply to Penal Law and non-penal law offenses that are within the defined classes of crimes (be they misdemeanors or felonies). Likewise, the statute should include petty offenses (non-criminal violations) and youthful offender adjudications.

2. **Type of Crime** – The Section recommends that **no** records involving sex crimes or crimes with victims who were children be eligible for sealing. Among felonies, only class "D" and "E" non-violent felonies shall be eligible for sealing.

3. **Time limitation until application can be made** – The Section recommends that such a statute should include a waiting period. It should provide that a person cannot apply for sealing until a "waiting period" (beginning on the date that the most recent sentence or resentence is imposed) elapses. 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. 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.

4. **Factors for the court to consider when reviewing a sealing application**. The Section recommends that such a statute should provide that 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 is ordered.** The Section recommends that such a statute should provide that 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.

6. **Filing Fee**. The Section recommends that such a statute should provide that applications for sealing 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.

7. **Number of applications that can be made –** The Section recommends that such a statute should provide that if a sealing application is denied, an applicant can reapply after one year.

8. **Effect of Sealing**. The Section recommends that 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.

9. **Unsealing for Cause.** The Section recommends that if, subsequent to the sealing of records, 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 such unsealed records shall be re-sealed.

10. **Waiver of Right Impermissible**. The Section recommends that 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.

The report was presented on an informational basis at the November 5 meeting. The section has been modified to provide further analysis and detailed recommendations.

The report will be presented at the January 27 meeting by Richard D. Collins and Jay Shapiro, co-chairs of the Section's Sealing Committee, and Xavier R. Donaldson, the Section's delegate to the House.