COMMITTEE ON MEDIA LAW

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President Vincent E. Doyle, III
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Dear President Doyle:

The Committee on Media Law ("Committee") for the New York State Bar Association ("Association") wishes to express its opposition to the Association's endorsement of proposed legislation that would amend New York's Criminal Procedure Law and permit the sealing of records of certain non-violent and non-sexual misdemeanors and of class "D" and "E" non-violent felony convictions. The Association's recommended new section, 160.65 ("Section 160.65" or "the Section"), like New York Assembly Bill A6664 ("A.6664"), would also impose sanctions on third parties for the intentional disclosure of sealed conviction records.[1] Such legislation is patently unconstitutional and would likely be overturned by New York courts if enacted into law. Moreover, the proposed Section – recommended by the Association without the Committee's input or consideration on behalf of media interests – as well as both related Assembly bills, A.6664 and A1139 ("A.1139"), are unworkable and would undermine significant public interests in openness and transparency in our criminal justice system. [2]

As explained more fully below, the Association's proposed CPL Section 160.65, however well-intentioned, runs afoul of the state Constitution and the First Amendment by imposing criminal penalties and creating a private right of action

[1] This letter principally addresses the Association's proposed language for a new sealing statute, CPL Section 160.65, which was recommended in the Final Report and Recommendations of the Criminal Justice Section Sealing Committee Regarding Sealing of Certain Crimes In New York State, Amended December 2011 ("Criminal Justice Report") pp. 27-31. The letter is also in opposition to Assembly bills A.6664 and A.1139.

[2] The Committee has been consistent in its concerns about state legislation aimed at sealing conviction records, having submitted in 2009 a memo to the Association opposing two such bills (S.1708 / A.6065).

for disseminating information related to sealed convictions -- regardless of how the information is obtained, its newsworthiness or its veracity. Section 160.65 and bills A.6664 and A.1139 also undermine the public's strong interest in scrutinizing government misconduct, ignore the established New York principle of openness of criminal proceedings, and are ultimately unworkable as they would "seal" information that has already been publicly available and would remain publicly available from non-governmental sources.

In light of the concerns raised in this letter, the Committee respectfully requests that the Association suspend any future lobbying of the Legislature regarding this proposed section, or bills A.1139 and A.6664. In the interim, we would also ask for the opportunity to engage the Association on the legislation's merits.

I. PROPOSED CPL SECTION 160.65, BY IMPOSING CRIMINAL PENALITIES AND CREATING A PRIVATE RIGHT OF ACTION FOR DISSEMINATING INFORMATION RELATED TO SEALED CONVICTIONS, REGARDLESS OF WHETHER THE INFORMATION IS TRUTHFUL, NEWSWORTHY AND LAWFULLY OBTAINED, IS UNWORKABLE AND VIOLATES THE CONSTITUTION.

The United States Supreme Court has consistently upheld the public's right to publish in the face of laws that would prevent or penalize the publication of lawfully obtained truthful information. Subsection 14 of CPL Section 160.65, by imposing criminal penalties and creating a private right of action for the dissemination of information about convictions sealed under the law, without consideration for the information's veracity, its newsworthiness or how it was obtained, represents precisely the kind of law held to be impermissible under the First Amendment by our courts for the past 30 years.

It is a well-settled constitutional principle that a state may not punish the publication of legally obtained, truthful and newsworthy information without a showing that it is pursuing "a state interest of the highest order." See e.g., Bartnicki v. Vopper, 532 U.S. 514 (2001)("Bartnicki")(media defendants not liable for publishing truthful information that was lawfully obtained even if a third party violated the law); Florida Star v. B.J.F., 491 U.S. 524 (1989)("Florida Star") (civil damages action brought against newspaper for publishing rape victim's name, in violation of state statute, prohibited by First Amendment); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)("Daily Mail")(criminal statute prohibiting truthful publication of identity of juvenile offenders found unconstitutional).

Subsection 14, of Proposed CPL Section 160.65, states as follows:

> "14. **Published 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 published 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."

Upon close evaluation, it is clear this subsection would not meet the Supreme Court's test.[3]

First, the proposed subsection is unconstitutional as it prohibits and punishes the dissemination of truthful and newsworthy information about a sealed misdemeanor or felony conviction that was lawfully obtained. This is because: (1) information about non-violent, non-sexual misdemeanors or class "D" or "E" non-violent felony convictions can be truthful, if based on the official court record; (2) such information is certainly newsworthy, as it illuminates how criminal justice is applied in our state; and (3) in nearly all cases, information about such misdemeanor or felony convictions is not illegally obtained, given the general openness of state criminal record files and the fact that such information would be readily available to the public under the new statute years before it

[3] A virtually identical section to that sponsored by the Association is included as subdivision 13 of Bill A.6664, which deals with "sanctions and remedies for unauthorized publication of information regarding sealed records":

> 13. It shall be a class A misdemeanor to publish information, other than as delineated in paragraphs (A) and (B) of subdivision eleven of this section, 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 published 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.

could be sealed (five years for misdemeanors and eight for felonies, according to subsection 4 of the Section.)[4]

Second, Section 160.65 can hardly be said to be in furtherance of a state interest of the highest order since it is not workable. In order to effectuate a public gag on all information related to sealed non-violent, non-sexual misdemeanor or Class "D" or "E" felony convictions, the Section would have to impose an affirmative duty on news organizations, private databases and Internet providers to purge such information from their electronic or physical archives for all time. The duty will be difficult, if not impossible, to implement and monitor, given the scale of the archives that would need to be managed by these private actors. And given the Section's provision for civil and criminal sanctions, the failure to meet its requirements by these actors could be quite severe.

Where the past convictions of ex-offenders are already known in a community, the showing of a state interest of the highest order in protecting the ex-offenders from discrimination by concealing those convictions cannot be made. See Florida Star v. B.J.F., 491 U.S. 524, 535 (1989) ("punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act."). Indeed, the Supreme Court has repeatedly stated that by placing information in the public domain, the state must be presumed to have concluded that the public interest was served by such public dissemination or, relatedly, that meaningful public interest likely could not be found in restraining the further dissemination of information already in the public record. See, e.g. Florida Star, supra; Daily Mail; supra; Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975).

While this analysis alone demonstrates that the Section fails to further a state interest of the highest order, the point is further confirmed by prior Supreme Court decisions, which found it unconstitutional to penalize the dissemination of truthful and newsworthy information, lawfully obtained, of arguably far more sensitive material than non-violent, non-sexual misdemeanor or class "D" or "E" nonviolent, non-sexual felony convictions. See Florida Star, supra, (identity of rape victims); Smith v. Daily Mail Publishing Co. supra (identity of juvenile offenders).

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[4] Subsection 4 of Proposed CPL Section 160.65 states as follows:

> 4. Waiting Period. A person cannot apply until a "waiting period" (beginning on the date that the most recent sentence or re-sentence is imposed) elapses. During this period, there can be no convictions for a crime. The following waiting periods shall apply under this section:
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> (a) For a person who has been convicted of an eligible misdemeanor(s), adjudicated Y.O. or 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.
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> (b) For a person who has been convicted of an eligible non-violent "D" or "E" felony, adjudicated Y.O. on a felony, the waiting period shall be eight (8) years from the date of conviction or adjudication.

The Association's support for the new legislation is grounded in the ideas that "to err is human" and that ex-offenders should be given a "second chance."[5] Despite the laudable goals of reduced recidivism and successful re-entry and re-integration of ex-offenders into society, the proposed new CPL section would be ineffective in addressing these concerns. For the Section to achieve its purpose, it will require not only courts to seal their records, but all private databases, newspapers, websites and blogs to purge all information about sealed convictions. And the Section imposes this requirement without a state interest of highest order.

Further, while the Association's Criminal Justice Section may be correct that "without some sanctions, the law would have no teeth," introducing any sanctions for the intentional disclosure of sealed conviction records would only expose CPL Section 160.65 to formidable and ultimately insurmountable constitutional challenges.[6]

II. BY ALLOWING THE SEALING OF CERTAIN CRIMINAL RECORDS, PROPOSED CPL SECTION 160.65 IGNORES THE ESTABLISHED NEW YORK PRESUMPTION OF OPENNESS OF CRIMINAL PROCEEDINGS.

It is well settled that the public has both a First Amendment and common law right of access to judicial proceedings and records, including the briefs, motions and related papers filed in such proceedings. See, e.g., Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578 (1980); Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) ("Press Enterprise I"); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) ("Press Enterprise II").

The New York Court of Appeals also recognizes a presumption of openness. Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 437, 399 N.E.2d 518, 521-22 (1979). In the criminal context, the requirement of openness applies not just to trials, but also to pre- and post-trial proceedings. Associated Press v. Bell, 70 N.Y.2d 32, 37, 517 N.Y.S.2d 444 (1987). A heavy burden of proof is placed on the party seeking closure of court proceedings. In re Chase, 112 Misc.2d 436, 444, 446 N.Y.S.2d 1000, 1005 (N.Y. Fam. Ct. 1982) In addition, a presumption of openness in all state courts exists through section 4 of the Judiciary Law.[7]

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[5] Criminal Justice Report p. 3.

[6] Id. p. 27.

[7] This provision provides that "The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for

While section 4 of the Judiciary Law includes some exceptions to the overwhelming mandate for access to courts, closure of criminal proceedings or records to which there is a presumptive right of access is permitted only under rare circumstances when there is "cause shown that outweighs the value of the openness." Press-Enterprise I, 464 U.S. at 509; Associated Press, 517 N.Y.S.2d at 448 (there must be "specific findings" to override the public's presumptive right of access). See also People v. Burton, 189 A.D.2d 532, 597 N.Y.S.2d 488 (3rd Dept. 1993) ("[T]he burden is on those seeking to seal records to show that the public's right of access is outweighed by competing interests.")

Proposed CPL Section 160.65 does not protect any compelling interest as a basis for sealing misdemeanor or felony conviction records. First, since the trial and, in many cases, sentencing, would have already been completed by the time a sealing request is made under the proposed statute, there is no threat to the defendant's fair trial rights.

Also, there is no magic threshold of time after which the public's interest in access to criminal records diminishes to the point where it can be summarily outweighed by a misdemeanant's interest in sealing prior criminal convictions. Even after five years -- or longer -- the public interest in access to records of convictions remains as strong as it is on the day after the verdict is rendered.

The fact that the proposed statute would allow for the sealing of court documents, rather than the closure of court proceedings, is immaterial. The right of access to criminal court proceedings is not limited to a right to be physically present in a courtroom; it also includes a right to gather information about what happens in the courtroom.

Section 160.65 would provide, through subsection 9, that a court weighing a petition to seal a prior conviction 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 to the merits of the application or any matter deemed appropriate by the court in furtherance of determining the motion." But the section does not require the court to consider the public interest in open court proceedings and records and any application would only be served "upon the prosecuting agency that originally prosecuted the case," without notice to the public. See subsection 7. At the very least, the court considering a petition to seal

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divorce, seduction, abortion, rape, assault with intent to commit rape, criminal sexual act, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court." N.Y. Jud. Law § 4. See also Rule 216.1(a) of the Uniform Rules for N.Y.S. Trial Courts: "Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard."

the records of a prior conviction should be required to consider the public interest by applying the four-part test for closure of court proceedings and documents from Waller v. Georgia, 467 U.S. 39, 48 (1984)("Waller"), which our courts have used to evaluate the propriety of closure attempts under New York law. [8] See People v. Kin Kan, 78 N.Y.2d 54, 58, 571 N.Y.S.2d 436 (1991).

By ignoring the established history of access to criminal court records in New York, CPL Section 160.65 would severely impair the public's vital interest in accessible – and accountable – criminal courts, and engender suspicion about their operation. The Association should not advocate that the Legislature brazenly overturn New York's laudable and constitutionally mandated history of access to criminal court proceedings and records.

III. THE SEALING OF CERTAIN CRIMINAL RECORDS AS PROPOSED BY CPL SECTION 160.65 WOULD DRASTICALLY UNDERMINE THE PUBLIC'S STRONG INTEREST IN SCRUTINIZING GOVERNMENT MISCONDUCT.

The public's ability to scrutinize government conduct within the criminal justice system is critical for ensuring the protection of individual rights, guarding against government misconduct, and promoting public confidence in the fairness of the system. Proposed CPL Section 160.65 would considerably hinder the public's scrutiny of government and disregards strong policy rationales that warrant such oversight.

The Section proposes a procedure for permanent sealing of non-violent, non-sexual misdemeanor or felony conviction records in New York State, five or eight years after either the defendant's last conviction or adjudication. See p. 3 n.3, supra.

The notion that a whole group of criminal records could be "wiped" away from the public slate under the new legislation would inescapably undermine the public's trust in the criminal justice system. Absent open records, the public would not be able to question years later, among other things, whether sentencing was proportionate to a particular crime; whether people without influence were unduly penalized; and whether the system was effectively enforcing the law and meting out appropriate punishments.

These concerns about fairness and the public's trust do not diminish with time. Indeed, in some cases, a later criminal incident involving the same defendant, or questions about a prosecutor or judge, may make a full reading of the criminal

[8] As articulated in Waller, the test requires that: "[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure." Waller at 48.

history or record even more necessary and appropriate. As one court aptly explained, "[c]onfidence in the accuracy of its records is essential for a court, and for the authority of its rulings and the respect due its judgments. Such confidence erodes if there is a two tier-system, open and closed. If public records cannot be compared with the sealed ones, all of the former are put into doubt." CBS, Inc. v. United States District Court, 765 F. 2d 823, 826 (9th Cir. 1985).

Further, the Section ignores the fact that journalists, lawyers, social scientists and concerned members of the public consistently use open records of misdemeanor and felony convictions to evaluate political figures and to investigate and analyze problems in the legal system, such as racial profiling or other government abuses of power.[9] The Section would undermine such journalistic and academic inquiries that are dependent on criminal records.

In addition, the records of misdemeanor and felony convictions often provide important information on a generally applicable basis to the public. While it is easy to conjure up scenarios in which an otherwise law-abiding individual makes a single mistake that follows him for life in the form a misdemeanor or felony conviction, it is equally easy to conjure up scenarios in which the Section becomes law and New York State residents do not know whether a person caring for their children, looking after their own physical health or working for the welfare of their community has a criminal record. If ex-offenders need more protection from discrimination, the appropriate remedy is to toughen the existing anti-discrimination law, *see* N.Y. Correct. Law, §§ 750-55, not to broadly restrict the public's right of access to court records that have historically been open as a matter of constitutional right.

IV. PROPOSED CPL SECTION 160.65 CANNOT CHANGE HISTORY BY "SEALING" INFORMATION THAT HAS ALREADY BEEN PUBLICLY AVAILABLE FOR AT LEAST THE PRIOR FIVE YEARS, AND WILL REMAIN PUBLICLY AVAILABLE FROM OTHER SOURCES

It also seems highly unlikely that the Legislature could achieve its stated purposes of giving ex-offenders a second chance by restricting access to certain historical criminal records. Indeed, given the ubiquity of information in this Digital Information Age, there is little likelihood that access to an individual's misdemeanor or felony convictions will effectively be restricted to just a small

[9] Since 1980, for example, the New York City Police Department significantly expanded arrests for smoking marijuana in public view as part of a quality-of-life policing initiative. Using misdemeanor conviction data from the State Division of Criminal Justice Services, a study publicized by the New York Civil Liberties Union found that minorities were disproportionately more likely to be convicted and sentenced to jail for state drug crimes than their white counterparts.

number of government officials.[10] Moreover, brokers of private information will have the capacity and incentive to provide such records, and would retain data on sealed misdemeanors or felonies even after public databases are purged. Clearly, as long as there is a strong demand for criminal history information, there will be a market, perhaps even a black market, for such information. The unfortunate reality, then, is that ex-offenders will not be able to use sealing as a way to overcome the collateral consequences of their criminal past.

V. NEW YORK CORRECTION LAW PROVIDES AN ALTERNATIVE TO SEALING THAT AMELIORATES FOR EX-OFFENDERS THE NEGATIVE IMPACT OF A PRIOR CRIMINAL CONVICTION

To justify its support of proposed CPL Section 160.65, the Association's Criminal Justice Section enumerates many of the legal disabilities and social exclusions that ex-offenders face as a result of their convictions. However, the special group's report fails to acknowledge that Article 23 of the New York Correction Law already provides relief from some or all the legal limitations imposed by conviction records on potential jobs, employment opportunities, firearm possession rights, voting rights, or licenses.

Under Article 23 of the Statute, an ex-offender can apply for a Certificate of Relief from Disabilities or a Certificate of Good Conduct from the state once they have completed their sentence. N.Y. Correct. Law §701(1), 703-a (McKinney Supp. 2010). If granted, such certificates would "relieve an eligible offender of any forfeiture or disability, or … remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein." Id. Indeed, "[t]he very purpose of [certificates of relief under N.Y. Correction Law § 701] is to permit an individual who has made mistakes but has been rehabilitated to begin anew and become a productive member of society." Rodgers v. N.Y. City Human Res. Admin., 154 A.D.2d 233, 235, 546 N.Y.S.2d 581, 582 (1st Dep't 1989). With this in mind, it cannot be said that rehabilitated ex-offenders can only start anew in society with their criminal records sealed, an option already shown above to be an impossibility. See pp. 4 and 8, supra.

CONCLUSION

Despite its admirable goal of helping ex-offenders re-integrate into society by attempting to combat discrimination they may face in employment or other areas, proposed CPL Section 160.65, as well as A.6664 and A.1139, will not be

[10] Even assuming certain criminal records are not available outside state databases, the proposed legislation would nevertheless fail many ex-offenders who qualify for sealing, given their limitations on access to legal resources and the complicated legal process involved in sealing. Those most likely to be truly disadvantaged by a prior conviction – *i.e.*, people looking for low-wage employment, renters, people needing small loans – will also be the least likely to take advantage of the system.

effective in this regard and the legislation may be unnecessary in light of the relief provided by the New York Correction Law. Moreover, this goal does not supplant the staggering impact that this legislation would have, if passed into law, on the established right of the public and press to access such information. The proposed legislation would also undermine the scrutiny of government actions in prosecutions and denigrate New York's proud history of openness of courts and criminal proceedings. Section 160.65 and Bill A.6664, through their sanctions provisions, also present a serious constitutional defect that requires far more than a mild correction.

In light of these concerns, which were not examined by the House of Delegates of the Association, the Committee respectfully requests that the Association refrain from further lobbying of the Legislature regarding this proposed legislation and reopen its deliberations regarding its merits. The Committee stands ready to participate in full and frank discussions with the rest of the New York State Bar Association regarding the important interests implicated in this proposed legislation.

Respectfully submitted on behalf of the Committee:

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