



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #6

REQUESTED ACTION: Approval of the report and recommendations of the Working Group on Question 26 of the New York State Bar Examination Admission Application.

Question 26 on the Application for Admission to Practice as an Attorney and Counselor-at-Law in the State of New York (“Admission Application”), asks an applicant, “Have you ever, either as an adult or a juvenile, been cited, ticketed, arrested, taken into custody, charged with, indicted, convicted, or tried for, or pleaded guilty to, the commission of any felony or misdemeanor or the violation of any law, or been the subject of any juvenile delinquency or youthful offender proceeding? Traffic violations that occurred more than ten years before the filing of this application need not be reported, except alcohol or drug-related traffic violations, which must be reported in all cases, irrespective of when they occurred. Do not report parking violations.” Concerns have been raised as to the inequity inherent in criminal record screening and the resulting chilling effect on people of color considering admission to higher education and the legal profession.

In June 2021 the New York City Bar Association contacted the Administrative Board and the State Board of Law Examiners to request that the Admission Application be revised to conform to the requirements of the State Human Rights Law and the Family Court Act as to record information requests. Thereafter, OCA sought NYSBA’s position on this issue, and President T. Andrew Brown appointed the Working Group with representatives from sections and committees with relevant experience.

The Working Group recommends that NYSBA support revision of the Admission Application to conform to the Human Rights Law and the Family Court Act. In addition, the Working Group recommends training for Character and Fitness committee members and court staff to ensure that review is in compliance with these requirements as well as the Corrections Act. To this end, the Working Group recommends revision of the Admission Application to clearly state that applicants are not required to disclose arrests not then pending that did not result in conviction; sealed convictions; adjournments in contemplation of dismissal; and youthful offender adjudications.

The report will be presented by David R. Marshall, chair of the Working Group.



NEW YORK STATE
BAR ASSOCIATION

Report and Recommendations of the **Working Group on Question 26 of the New York State Bar Examination Admission Application**

January 2022

The views expressed in this report are solely those of the Working Group and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

REPORT OF THE WORKING GROUP ON QUESTION 26 OF THE NEW YORK STATE BAR EXAMINATION ADMISSION APPLICATION

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INTRODUCTION AND EXECUTIVE SUMMARY

In October 2020, the Court-appointed Special Adviser on Equal Justice in the New York State Courts reported that interviews with nearly 300 court personnel, court users and court watchers painted a “sad picture” of “a second-class system of justice for people of color in New York State,” mirroring the finding of the Court-appointed Minorities Commission in 1991 that “there are two justice systems at work in the courts of New York State, one for Whites, and a very different one for minorities and the poor.”¹ Noting that “[t]he very notion of equality under law is today cast in serious doubt,”² the Court’s Special Adviser called for “a strong and pronounced rededication to equal justice under law by the New York State court system.”³

The magnitude of the Special Adviser’s concern is amplified by data regarding the adverse disparate impact that contact with the criminal justice system has on people of color who are New York State residents. A 2018 analysis showed that whites make up 55% of the State’s population but only 33% of total arrests, while Blacks make up only 15% of the population but account for 38% of total arrests.⁴ Racial disparities are particularly egregious with respect to drug-related arrests. Although surveys show that marijuana and other drug use does not differ by ethnicity or race, except for comparatively higher marijuana use by white college students, “at the height of New York’s prosecution of drug crimes, about 90% of people incarcerated for such crimes were Black and Latino.”⁵ Because contact with law enforcement can generate a criminal record even in the absence of a conviction, an estimated 7.4 million people in New York State have a criminal record, according to a 2010 survey of Bureau of Justice Statistics data.⁶

The racial disparities associated with our criminal justice system prompted the authors of a paper on the use of criminal records in evaluating applicants for college admission to conclude that, “Because racial bias, whether deliberate or inadvertent, occurs at every stage of the criminal justice system, screening for criminal records cannot be a race-

¹ Report From the Special Adviser On Equal Justice In the New York State Courts, at 3 (October 1, 2020), <https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>.

² *Id.* at 8.

³ *Id.* at 8–9.

⁴ Report to the New York State Court’s Commission On Equal Justice In the Courts, THE JUDICIAL FRIENDS ASSOCIATION, INC., at 24–25 (August 31, 2020), <https://www.nycourts.gov/LegacyPDFS/ip/ethnic-fairness/pdfs/Judicial-Friends-Report-on-Systemic-Racism-in-the-NY-Courts.pdf>.

⁵ Boxed Out: Criminal History Screening and College Application Attrition, CENTER FOR COMMUNITY ALTERNATIVES, at 41–42. (March 1, 2015), <https://www.communityalternatives.org/wp-content/uploads/2019/11/boxed-out.pdf>.

⁶ *Id.*

neutral practice.”⁷ Data showing the effects of criminal record screening are difficult to collect, especially with respect to the chilling effect screening may have on people of color considering whether or not to begin the application process, given the reputational, emotional and financial burdens of disclosing and explaining a criminal record to a group of strangers on a screening committee. However, a survey conducted by the Stanford Center on the Legal Profession found that “many individuals with criminal records are deterred from applying to law school in the first place. Of our 88 survey respondents – all with criminal records – 47 indicated they were ‘considering applying to law school.’ When asked the question, ‘Why have you not yet applied for law school’ over half cited concern about passing the moral character component as one of the top three reasons. One individual wrote, in the space provided for comments: ‘I thought because I had a felony there was no chance [,] so I never tried.’”⁸ Similarly, a study of criminal record screening on applicants for admission to the SUNY system of colleges and universities found that “for every one applicant rejected by Admissions Review Committees because of a felony conviction, 15 applicants are excluded by felony application attrition. This suggests it is the questions about criminal history records, rather than rejection by colleges, that are driving would-be college students from their goal of getting a college degree.”⁹

Despite the inequity inherent in criminal record screening, and its chilling effect on people of color considering admission to higher education and the legal profession, there is no reliable evidence that criminal record screening has benefits for the public or the legal profession that outweigh the disparate adverse impact on people of color. Reviewing the literature in the social and psychological sciences concerning the relationship between conduct and character, Deborah Rhode, a pre-eminent scholar of legal ethics, concluded, “There is no basis for assuming that one illegal act, committed many years earlier under vastly different circumstances, is a good predictor of current threats to the public.”¹⁰ A team of investigators who examined criminal record disclosure on the Connecticut bar application found that “the information collected during the character and fitness inquiry

⁷ Marsha Weissman et al., *The Use of Criminal History Records in College Admissions: Reconsidered*, at 25 (Nov. 2010), <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>.

⁸ Caroline Cohn, Debbie Mukamal, Robert Weisberg, *UNLOCKING THE BAR: Expanding Access to the Legal Profession for People with Criminal Records in California*, STANFORD LAW SCHOOL, STANFORD CENTER ON THE LEGAL PROFESSION, at 31 (July 15, 2019), <https://law.stanford.edu/publications/unlocking-the-bar-expanding-access-to-the-legal-profession-for-people-with-criminal-records-in-california/>.

⁹ *Boxed Out: Criminal History Screening and College Application Attrition*, CENTER FOR COMMUNITY ALTERNATIVES, at 13 (March 1, 2015), <https://www.communityalternatives.org/wp-content/uploads/2019/11/boxed-out.pdf>.

¹⁰ Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 *Law & Social Inquiry* 1027, 1034 (2018).

does not appear to be very useful in predicting subsequent lawyer misconduct.”¹¹ The investigators cautioned, moreover, that because “the focus on past criminal conduct may perpetuate racial and class biases” due to “disparate treatment in the criminal justice system,” the Connecticut bar’s requirement that applicants disclose criminal record information in connection with “the character and fitness inquiry may deter some people from applying to law school who might have made good lawyers had they done so.”¹²

New York State law governing the use of criminal records by the State’s licensing agencies and employers has made it clear how the people of New York, acting through their elected officials, have decided to strike the balance between protecting the public from discrimination and protecting the public from crime. In the New York State Human Rights Law (Executive Law § 296(16)) and the Family Court Act (§ 380.1(3)), New York State has prohibited mandated disclosure of certain arrest records, sealed convictions, juvenile proceedings, and youthful offender adjudications in connection with applications for professional licensing and employment. Although specific exemptions are set forth in the statutes – including, for example, for the licensing of firearms or the employment of law enforcement personnel – no exemption is provided for licensing lawyers. Indeed, Judiciary Law § 53.1, in authorizing the Court of Appeals to adopt rules regulating admission of attorneys to practice, authorizes only rules which are “not inconsistent with the constitution or statutes of the state.” The misalignment between the spirit and letter of New York State law regarding permissible criminal record inquiry and the breadth of disclosure demanded by the bar admission application will widen further in the event of enactment of the Clean Slate Bill, which is pending before the State Legislature and requires automatic sealing of criminal records on a timetable related to the type of offense.

Notwithstanding the explicit requirements of State law, the Application for Admission to Practice as an Attorney and Counselor-at-Law in the State of New York (“Admission Application”) currently requires applicants to disclose any and all criminal justice system involvement, regardless of the outcome or seriousness of the offense, except for parking tickets and certain stale traffic violations. For example, Question 26 on the Admission Application asks: “Have you ever, either as an adult or a juvenile, been cited, ticketed, arrested, taken into custody, charged with, indicted, convicted, or tried for, or pleaded guilty to, the commission of any felony or misdemeanor or the violation of any law, or been the subject of any juvenile delinquency or youthful offender proceeding? Traffic violations that occurred more than ten years before the filing of this application need not be reported, except alcohol or drug-related traffic violations, which must be reported in all cases, irrespective of when they occurred. Do not report parking violations.” Question 26 is one of at least four questions on the Admission Application that require disclosure of criminal justice system involvement.¹³ To ensure that applicants interpret and respond to

¹¹ Leslie C. Levin, Christine Zozula, Peter Siegelman, *A Study of the Relationship between Bar Admissions Data and Subsequent Lawyer Discipline*, UNIVERSITY OF CONNECTICUT, at 42 (March 15, 2013), <http://ssrn.com/abstract=2258164>.

¹² *Id.* at 5.

¹³ Bar Admissions Questions Pertaining to Mental Health, School/Criminal History, and Financial Issues, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, at 79 (February 2019),

these questions in the broadest manner, the Admission Application warns: “Candor throughout the admission process is required of all applicants, and even convictions that have been expunged should be disclosed in response to this question.”

In June 2021, the New York City Bar Association (“NYCBA”) wrote to Chief Judge Janet DiFiore, the four Presiding Justices of the Appellate Divisions, and the Chair of the State Board of Law Examiners to request that Question 26 be revised to conform to the provisions of the New York Human Rights Law and the Family Court Act limiting criminal record information requests. In September 2021, Counsel for the New York State Office of Court Administration (“OCA”) asked T. Andrew Brown, president of the New York State Bar Association (“NYSBA”), for NYSBA’s position on the issue of criminal record disclosure in the bar admission process. President Brown, in turn, solicited opinions from representatives of a number of NYSBA committees and sections with relevant experience and expertise, including the Criminal Justice Section, the Children and the Law Committee, the Committee on Legal Aid, the Committee on Legal Education and Admission to the Bar, the Young Lawyers Section, and the Committee on Diversity and Inclusion (collectively, the “Select Committees’ Representatives”). Statements from the Select Committees’ Representatives are appended hereto.

For the reasons detailed in the appended statements, the Select Committees’ Representatives recommend that the NYSBA join the NYCBA in requesting that the Court of Appeals revise the Admission Application so that it complies fully with the New York State Human Rights Law and Family Court Act.¹⁴ It is also recommended that the Court arrange for the instruction and training of Character & Fitness (C&F) Committee members and court personnel involved in the bar admission process to ensure that their review and certification of bar applicants is limited to adult convictions and, as to those convictions, complies with Article 23-A of the New York Corrections Law. To accomplish that purpose, it is respectfully submitted that the Admission Application should be revised to clearly state in the preamble to Sections F, G and H of the Application that applicants are not required to disclose in response to any question, oral or written, including but not limited to Question 26, information about (i) arrests not then pending that did not result in

<http://www.bazelon.org/wp-content/uploads/2019/05/Bar-Application-Character-and-Fitness-Questions.pdf>.

¹⁴ The OCA recently informed President Brown that it had decided to reject the NYCBA’s request regarding Question 26 at its December 2021 meeting without waiting for the NYSBA’s report because it had considered and rejected a similar request in 2018 and the NYCBA’s report, in its view, offered no new information requiring reconsideration of that 2018 decision. It is the hope and expectation of the NYSBA’s Working Group that the OCA and the Administrative Board of the Courts will give careful consideration to the data and scholarly sources cited in this report, as well as the first-hand information provided in the appendices from practicing lawyers and law school officials who work every day with the individuals adversely affected by impermissibly broad criminal record screening. It is submitted, respectfully, that ample grounds for re-consideration can be found there.

conviction, (ii) sealed convictions, (iii) adjournments in contemplation of dismissal, (iv) juvenile proceedings, and (v) youthful offender adjudications.¹⁵

¹⁵ Whether the Admission Application should distinguish between disclosure of criminal justice involvement within the U.S. and disclosure of criminal records accumulated outside the U.S. is an issue that may require separate consideration in light of the large number of foreign applicants for admission to the New York bar. Because this report focuses on factors specific to criminal justice and legal education in the U.S., no recommendation is made here regarding disclosure of criminal records from foreign jurisdictions.

APPENDIX A: STATEMENT FROM THE CRIMINAL JUSTICE SECTION

The Criminal Justice Section of the New York State Bar Association has examined Question Number 26 and submits that the question not only violates provisions of Executive Law § 296 (16) and Family Court Act § 380.1, but has a disparate impact on people of color when it requires applicants for admission to disclose contacts with the criminal legal system, especially those that do not result in a formal arrest or prosecution; cases that have been sealed or dismissed; juvenile delinquency proceedings or youthful offender adjudications. Sealing of some criminal convictions became law in New York as a result of a Report and Recommendation of the Criminal Justice Section. The House of Delegates adopted the Report, and, after much NYSBA lobbying and lengthy negotiations, Criminal Procedure Law § 160.59 was enacted. The thrust of the Report was a recommendation to permit those convicted of certain crimes to be able to have their records sealed so that they could move on with their lives and not have opportunities to obtain a job or rent an apartment (just as examples) denied to them as a result of a prior record. Question 26 goes beyond inquiring about convictions when it mandates disclosure of incidents where “you were taken into custody.” This would require anyone subjected to “stop and frisk,” for example, to reveal that, as “custody” in the criminal justice world means, “if a reasonable person in that situation believes that they are not free to leave.” The litigation over “stop and frisk” established that it was overwhelmingly conducted against young people of color. Certainly, it would not be unreasonable for a young person, especially if that person is a minority, who is stopped by the police and frisked, to believe that they were not “free to leave” – and thus were in custody and required to reveal this in response to Question 26. A recent Court of Appeals decision, *People v. Wortham*, 2021 N.Y. Slip Op. 06350, 11- 23-21, described a New York City Police Department policy of handcuffing and questioning all occupants of a home or apartment that is being searched, regardless if any contraband is recovered or an arrest made. The Court indicates that the People conceded that this resulted in these individuals being “in custody.” Again, an applicant would have to reveal this when answering Question 26. What a negative impact this question must have on any individual, especially an individual from a disadvantaged community, when considering a career in the law.

The NYSBA Task Force on Racial Justice and Police Reform highlighted the implicit bias faced and the disparate treatment of minorities in the criminal legal system. Question 26 requires an applicant to reveal any violations of law. When an individual is convicted of a “violation” they are routinely advised that this is not a criminal conviction and will not result in a criminal record. In addition, violation pleas are “sealed.” Many cases are resolved in this fashion, not necessarily because of the validity of the charges, but as an expeditious vehicle to get an individual out from the criminal legal system or in some instances out of custody. As people of color comprise a majority of those involved in the criminal legal system, this question has a significantly disproportionate impact on their ability to enter the legal profession. The same holds true for a plea that results in a youthful offender (“YO”) adjudication. The accused and their family are properly advised that this will not result in a criminal record or a conviction, and the proceedings will be sealed. Question 26, by requiring an applicant to list youthful offender adjudications violates the intent of the youthful offender statute with a resulting disparate impact on minority youth who make up a majority of those prosecuted in our criminal legal system. As those of us who practice

in this area know all too well, many cases regardless of the guilt of the accused are resolved with “YO” to enable an accused to get out of the system without a record and without spending countless days in court rather than in work or school. Raise the Age was a national movement to remove certain teenagers from the adult legal system. The intent of this legislation was to provide young people, whose brain functioning was not fully developed, with an opportunity not to have a criminal record that would follow them for the rest of their lives. Once again Question 26 eliminates the protection that this legislation sought to provide. It clearly violates Family Court Act § 380.1 and should not remain in its current overly broad form. The trend today is to minimize, to the extent possible, the impact of contacts with the criminal legal system that can prevent individuals from leading a lawful and productive life. The Criminal Justice Section submits that Question 26 goes in the completely opposite direction, especially as the criminal legal system has a disparate impact on and implicit bias against people of color, and therefore should be eliminated or amended as proposed.

APPENDIX B: STATEMENT FROM THE COMMITTEE ON CHILDREN & THE LAW

Our committee studied the marked impact of Question 26 on juveniles with records who have rehabilitated themselves or are trying to do so by pursuing legal studies and careers.

Question 26 is at clear odds with the rehabilitative purpose of the juvenile justice system. That system is built upon the premise that with appropriate treatment and training, youth who have committed crimes are capable of becoming law-abiding members of society who should not be forever tainted by their youthful mistakes. Both the Family Court Act (“FCA”) and the Human Rights Law (“NYHRL”) include provisions reflecting this important premise.

According to the FCA, “No adjudication under this article shall operate as a forfeiture of any right or privilege or disqualify any person from holding any public office or receiving any license granted by public authority. Such adjudication shall not operate as a disqualification of any person to pursue or engage in any lawful activity, occupation, profession or calling.”¹⁶ Similarly, the NYHRL provides, “It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute . . . 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 . . . or by a youthful offender adjudication . . .”¹⁷

No statute authorizes the Board to ask applicants to the bar about their sealed criminal records. And, because there seems to be no reason for the inquiry regarding youthful involvement in the criminal justice system, apart from adversely impacting the application, that inquiry is entirely irrelevant to the application for admission to the bar and should be eliminated.

Requiring applicants to divulge information regarding youthful interactions with the criminal justice system presents an untenable conflict with the sealing provisions of the FCA and NYHRL. The FCA declares, in no uncertain terms, “[u]pon termination of a delinquency proceeding in favor of the respondent, all official records and papers, including judgments and orders of the court, relating to the arrest, the prosecution and the probation service proceedings, shall be sealed and not made available to any person or public or private agency.”¹⁸ And, “[e]xcept where specifically required by statute, no person shall be required to divulge information pertaining to the arrest of the respondent or any subsequent proceeding under this article.”¹⁹ Similarly, the Human Rights Law provides “An individual required or requested to provide information in violation of this subdivision may respond as if the arrest, criminal accusation, or disposition of such arrest

¹⁶ FCA § 381.1(2).

¹⁷ Exec. Law § 296(16).

¹⁸ FCA § 375.1.

¹⁹ FCA § 380.1(3).

or criminal accusation did not occur.”²⁰ Question 26 gives applicants an untenable choice: either disclose the confidential/sealed information and risk facing the adverse inferences that may be drawn therefrom, or withhold the information and face the ramifications that may flow from their omission. That choice seems all the more impossible for an applicant who has, indeed, been rehabilitated and had no further brush with the law.

On disposition of a juvenile delinquency proceeding, family court judges often reassure the youth that – as provided for in the statute – records pertaining to the matter are not public and should not prevent them from seeking higher education, gainful employment, or public office. The message is, to say the least, encouraging. It tells them that the law recognizes that adolescents are capable of growth and if they comply with the law, they need not fear that the matter impact their ability to become anything they want to be – even an attorney.

The law appropriately tells youth that the future is theirs to create. And so, it is not hard to imagine the disappointment, shock and horror that must be felt by an aspiring lawyer who learns that despite all they have accomplished, and despite the reassurances of the family court judge, and despite the clear language of the law, information regarding that juvenile justice involvement may be revealed as part of the inquiry into whether they should be permitted to practice law.

For these reasons, Question 26 must be revised.

²⁰ Exec. Law § 296(16).

APPENDIX C: STATEMENT FROM THE COMMITTEE ON LEGAL AID

As our country undergoes a long-overdue reckoning on race, institutions must take action to advance diversity, equity, and inclusion. Recent highly visible acts of police brutality against Black, Indigenous and other people of color (BIPOC) and COVID-19's cruel and disparate impact on communities of color amplify the urgent need to root out racial inequities. Chief Judge Janet DiFiore has taken an important step toward this end by commissioning the October 1, 2020 *Report from the Special Adviser on Equal Justice in the New York State Courts*. The Report calls for a "Commitment From the Top" to eliminate racial bias, including a review of rule changes pertaining to the State judiciary. Consistent with this recommendation we call on the Administrative Board of the Courts (the "Administrative Board") to reform the bar admission process to reduce racial injustice in the legal profession.

Inclusion and diversity in the legal profession will not only improve the quality of representation but will enhance the perceived legitimacy of the profession's institutions. As providers of legal services, we meet BIPOC New Yorkers who are reluctant to apply to law school or have decided not to do so at all because they are afraid their arrest record will prevent them from being admitted to the bar. Law school is very expensive. That expense simply does not make sense for people who believe they will subsequently be denied bar admission due to their arrest record. Also, prospective law students with arrest records are well aware of Question 26 even before they begin law school; most New York law schools include language identical or similar to Question 26 in their admission applications. Question 26 has a chilling effect and contributes to BIPOC underrepresentation in our profession, especially in legal services and defender organizations where we strive to recruit lawyers with shared lived experiences similar to the communities we serve.

As gatekeepers to the legal profession, the Administrative Board must act now to reassess its practices through a racial justice lens and remove institutional barriers to bar admission. As an initial step, we urge the Administrative Board to revise Question 26 of the Character and Fitness Application for Admission to Practice Law in New York State, which unlawfully requires bar applicants to divulge information about all arrests, including juvenile delinquency arrests and sealed arrests. Specifically, Question 26 on the bar application asks:

Have you ever, either as an adult or a juvenile, been cited, ticketed, arrested, taken into custody, charged with, indicted, convicted or tried for, or pleaded guilty to, the commission of any felony or misdemeanor or the violation of any law, or been the subject of any juvenile delinquency or youthful offender proceeding? Traffic violations that occurred more than ten years before the filing of this application need not be reported, except alcohol or drug-related traffic violations, which must be reported in all cases, irrespective of when they occurred. Do not report parking violations.

This question violates public policy, has a racially discriminatory impact, and patently violates the law. As a necessary first step to removing racially discriminatory structural

barriers and in order to bring this question into compliance with the Family Court Act and the Human Rights Law, Question 26 must now be amended.

APPENDIX D: STATEMENT FROM THE COMMITTEE ON LEGAL EDUCATION AND ADMISSION TO THE BAR

The Committee on Legal Education and Admission to the Bar (“CLEAB”) focused its analysis of Question 26 on two issues: (1) how do the Character & Fitness (“C&F”) Committees in the judicial departments use the information requested by Question 26; and (2) what impact does Question 26 have at the law school level, both on individuals with criminal justice involvement who are considering applying to law school and on law school admissions officials who handle admissions. In that connection, interviews were conducted with officials in the judicial departments who have a role in the C&F process and with deans of the 15 law schools in New York who play a role in recruiting and admitting students to their schools.

The C&F Committee Process

The statutory authority for C&F Committees is found in New York CPLR 9401, which provides that “[t]he appellate division in each judicial department shall appoint a committee of not less than three practicing lawyers for each judicial district within the department, for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state.” C&F Committee members are typically attorneys in good standing with at least five years of practice experience who are appointed by and serve at the pleasure of the presiding justice of the judicial department in which they serve. In one judicial department, for example, where more than 100 attorneys serve as C&F Committee members, they are appointed to serve a five-year term and are limited to two terms of service.

A prerequisite for admission to the New York bar is a certificate from a C&F Committee stating that the Committee “has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission.” CPLR 9404. The CPLR empowers the C&F Committees to conduct their investigation by means of a “statement or questionnaire” from the applicant but does not define what constitutes good character or fitness to practice law or specify what evidence shows satisfactory character and fitness to practice. Likewise, the CPLR does not dictate the contents of the applicant statement or questionnaire, except to mandate disclosure of the applicant’s prior addresses and dates of residence. The CPLR directs the C&F Committees to refuse to certify an applicant in only one circumstance, namely, when the applicant cannot prove: “1. that he supports the constitutions of the United States and of the state of New York; and 2. that he has complied with all the requirements of the applicable statutes of this state, the applicable rules of the court of appeals and the applicable rules of the appellate division in which his application is pending, relating to the admission to practice as an attorney and counselor at law.” Notably for the purposes of this analysis, the CPLR does not direct C&F Committees to inquire about an applicant’s criminal justice involvement or to deny certification to an applicant with a criminal record.

An application that discloses a criminal record in response to Question 26 will be flagged during the initial screening of applications conducted by staff attorneys in the office of the judicial department clerk. The screeners may request supplemental information from the

applicant about the incidents disclosed and, when a more serious criminal history is disclosed, assign that application for review by a panel of three C&F Committee members rather than the customary single-member review. Most applicants, including those with minor criminal justice system involvement, are interviewed by a single C&F Committee member shortly before or the same day that the applicant is scheduled to take the oath of admission to the bar. In rare instances raising substantial issues regarding admissibility, an applicant may be scheduled for a more formal hearing before a C&F Committee panel. It was estimated that fewer than 1% of the thousands of applications for admission processed each year require a hearing. Included in that 1% are applicants whose disclosures about prior employment or educational discipline, financial difficulties, or other negative events (i.e., not simply a record of criminal justice involvement) raise character and fitness concerns. Only a handful of these hearings result in denial of admission to the bar and, in the recollection of the departmental officials interviewed, denials based solely on an unacceptable criminal history are exceedingly rare. Because the bar admissions process, including the basis for a denial of admission, must by law be kept confidential, unless the denial is challenged in a court action, no data are publicly available concerning the handling of applicants with criminal justice involvement. Consequently, it is not possible to describe how many applicants – and with what degree of criminal justice involvement – are asked for supplemental information, assigned to a three-member C&F panel for review, scheduled for a hearing, or denied admission.

Interviews with well-informed court personnel indicate that the number of applicants denied admission due to criminal justice involvement is very low. On the other hand, it is clear that the opportunity for stereotypical thinking, implicit bias, or even actual prejudice to taint the bar admission process is high. C&F Committee members are not necessarily experienced in the practice of criminal law, family law, or civil rights law, nor are they required to be familiar with the requirements of the New York Human Rights Law and the Family Court Act concerning criminal record issues. Newly appointed C&F Committee members are mentored by seasoned members and can shadow them at the outset of their terms of service; they receive a formal two-hour orientation in at least one judicial department; and they can consult experienced attorneys in the clerk's office for guidance. However, there does not appear to be any written policy statement or practice handbook given to C&F Committee members that describes the categories and quantum of evidence they should rely upon to evaluate applicants or the standards they should and should not apply to that evidence to determine whether the applicant has the character and fitness to practice. Enlisting the personal and professional beliefs and experiences of hundreds of individual attorneys to certify, without formal training or guidance, "good moral character" simply cannot guarantee uniform and fair consideration of bar applicants in accord with the policy judgments and legal requirements set forth in the New York Human Rights Law and Family Court Act. As Justice Hugo Black candidly observed in *Konigsberg v. State Bar of California*, 353 U.S. 252, 262–63 (1975):

The term "good moral character" has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However, the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted

to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.

To eliminate any potential for the inequities inherent in criminal record screening to infect the bar admission process, the Court of Appeals and the Administrative Board of the Courts should (i) revise the questionnaire used by the four judicial departments to state that an applicant need not supply any information, orally or in writing, that licensing agencies are prohibited from requesting by the Human Rights Law and Family Court Act; (ii) prohibit the C&F Committees from relying on such information from other sources in evaluating applicants for admission to the bar; (iii) ensure compliance with Corrections Law §§ 752-753 when inquiring about and evaluating convictions, and (iv) adjust the questionnaire and C&F process, as appropriate, to conform to the requirements of the Clean Slate Bill, if enacted, which is described in detail below.

The Effect of the Pending Clean Slate Bill on Attorney Admissions

Among the factors that need to be considered regarding questions related to an applicant's criminal history are the restrictions imposed by law on the ability of the committees to ask such questions. There are some restrictions found in current law, but a bill pending in the legislature would significantly increase these restrictions. Neither would prohibit such questions in every instance.

We first examine current law. Subdivision 16 of section 296 of the Executive Law prohibits any "person, agency, bureau, corporation or association, *including the state . . .*" (emphasis added) from inquiring about any arrest or criminal accusation not currently pending that was terminated in favor of the individual whose response is sought. Similarly, these entities may not inquire about a criminal proceeding that concluded with an order adjourning the proceeding in contemplation of dismissal or about a youthful offender adjudication.²¹

They are also barred from seeking information when a conviction is sealed after completion of a rehabilitative program²² or by the court pursuant to an application for sealing by the defendant under a procedure that was added in 2017.²³ However, these sealing provisions are quite limited. The rehabilitative provisions apply only in narrow circumstances. The 2017 statute has seldom been used because the burden is on the person who was convicted to apply for a sealing order by commencing a new proceeding.

In addition, all of these provisions apply in defined situations, such as those relating to employment or credit. Among the situations to which they are applicable is licensing. There are exceptions, such as when an applicant seeks a gun license or a position in a

²¹ Inquiry about adult convictions that have not been sealed is permissible, provided the inquiring licensor or employer complies with Article 23-A of the Corrections Law, NY Corr. Law §§ 750, *et seq.* (2016).

²² Criminal Procedure Law §§ 160.59 and 160.60.

²³ Criminal Procedure Law § 160.55.

police department. However, there is no exception for lawyers seeking admission to the bar.

Finally, the law provides that an individual who is asked a question that is prohibited by any of the above provisions may respond “as if the arrest, criminal accusation, or disposition . . . did not occur.”

As noted above, the legislature is seeking to amend these provisions with a bill commonly known as the “Clean Slate Bill”.²⁴ It would substantially enhance the criminal matters that are sealed. The sponsor’s memorandum, which would become part of the legislative history if the bill were enacted, describes its purpose as follows: “This bill gives effect and meaning to the often-repeated aphorism that people who have completed their sentences have ‘paid their debt to society.’” It will help to assure that their “continued punishment . . . will end . . .”

The memorandum further explains that “Once an individual’s ‘debt to society’ is paid, justice requires that the individual not be further punished . . . This Act will provide such individuals with a Clean Slate to move on with their lives and not be punished in perpetuity. It aims to end perpetual punishment by requiring the expungement of certain records . . .”

The fundamental provisions of this complex bill are that the records of vehicle and traffic violations are expunged after three years; misdemeanor convictions are expunged three years from the date of sentencing; and felony convictions are expunged seven years from the date of sentencing. For these provisions to be implemented, the defendant may not have a criminal charge pending at the time of expungement, be under probation or parole supervision for the crime or have been convicted of a sex offense. Like the current law, the bill contains exceptions.

Under the bill, the formerly convicted individual would not need to take any action. Rather, the Division of Criminal Justice Services would be required to take the necessary steps when the record of an individual is to be sealed. It would notify the Office of Court Administration, the court in which the individual was convicted, and all appropriate prosecutors’ offices, police departments and law enforcement agencies. Upon receiving such a notice, each recipient must immediately seal the record.

There is a provision in the statute that would result in its provisions being applied retroactively. For convictions prior to the effective date, the statute would require “appropriate relief promptly,” with sealing to take place no later than two years from that date.

Finally, the statute would amend current subdivision 16 of section 296 of the Executive Law, described above, so that its current provisions would apply to records sealed by virtue of the clean slate statute. Clearly, this statute would greatly expand the number of

²⁴ A. 6399A.

cases in which the records are sealed and about which the convicted person cannot be questioned, or, if questioned, decline to answer.

For the Character and Fitness Committees, the bill, if enacted, would severely limit their ability to ask candidates about their prior convictions. Basically, all convictions, other than those that fall within an exception, would be sealed after the applicable time period had expired, and the information would not be available to the committees.

The Impact of Question 26 on Law School Admissions

Of the 15 law schools in New York, all but one – SUNY Buffalo Law School – require applicants for admission to disclose at least some criminal record information on their application forms. Most of them request disclosure that is identical or substantially similar in scope to the information requested in Question 26. A few limit their requests to convictions, but even they request disclosure of juvenile and youthful offender convictions. When law schools were asked why their schools request criminal record information, nearly two-thirds answered that they do so because the bar application asks for that information. About one-third answered that they make the request as part of their effort to comply with ABA Accreditation Council rules requiring law schools to admit only students who they reasonably believe are capable of obtaining admission to the bar, including passing the character and fitness review.

The number of applicants who disclose criminal justice involvement on their law school applications is small but not negligible. Ninety percent of the respondents to our survey of New York law schools said that criminal justice involvement appears in at least 1% of their applications each year, and two-thirds reported that such disclosure appears on more than 5% of their applications annually. It is worth noting in connection with that statistic that applicants to law school are required to have a college degree, so that the chilling effect of criminal record screening identified in one study at the college level has already eliminated some criminal-justice-involved individuals from the law school applicant pool.²⁵ Although there are many reasons applicants to law school fail to complete their applications, and our survey did not probe those reasons, two-thirds of survey respondents who answered reported that up to 10% of applicants to their law schools who disclose criminal justice involvement fail to complete the application process.

Admissions committee officials at the law schools, like their counterparts handling admissions in the State's judicial departments, exclude only a small number of applicants because of their criminal records. At the law school level, survey respondents reported that the applicant's criminal record played a role in denying admission to between 1% and

²⁵ "Our data analysis and review of SUNY policies show that asking applicants about past felony convictions has a chilling effect, discouraging people from completing the application process, and often ending their hopes of a college degree. We see that many people abandon their plans for a college education when faced with the gauntlet of questions and investigation into their background." See Boxed Out: Criminal History Screening and College Application Attrition, CENTER FOR COMMUNITY ALTERNATIVES, at 43 (March 1, 2015), <https://www.communityalternatives.org/wp-content/uploads/2019/11/boxed-out.pdf>.

10% of applicants who disclosed such a record. In other words, at least 90% of applicants with criminal records are offered admission to law school. According to our survey respondents, once admitted to the law school, students with criminal records are indistinguishable from other students with respect to involvement in post-admission disciplinary actions or conduct code violations. Thus, the predictive value of criminal record disclosure in identifying applicants who pose a risk of future misconduct is as much a poor justification for such disclosure in law school admissions as it is in bar admissions.²⁶

Whether there is a genuine need to revise Question 26, and whether it is worth the time and effort to do so, should be evaluated in light of two particularly noteworthy survey responses:

1. Our survey respondents were unanimous in predicting that their law schools would revise their applications to reflect any change by the Court of Appeals to Question 26.
2. One admissions dean, after reporting that he has given presentations to college students about law school at which students have publicly and vocally criticized law schools for asking about criminal justice involvement in the face of abundant evidence that the criminal justice system is biased against people of color, and those students of color have demanded to know why they should attend a school or join a profession that acquiesces in that injustice, observed: “Magnitude of harm is not the issue – any single person of color chilled [by the disclosure requirement] is too much.”

²⁶ “The information collected during the character and fitness inquiry does not appear to be very useful in predicting subsequent lawyer misconduct.” See Leslie C. Levin, Christine Zozula, Peter Siegelman, *A Study of the Relationship between Bar Admissions Data and Subsequent Lawyer Discipline*, UNIVERSITY OF CONNECTICUT, at 42 (March 15, 2013), <http://ssrn.com/abstract=2258164>.

APPENDIX E: STATEMENT FROM THE YOUNG LAWYERS SECTION

Impact on Attorneys from Underrepresented Groups

The Young Lawyers Section sought the input and view of those directly affected by stop and frisk and similar policies regarding Question 26. Anecdotally, we can confirm that people privately share that they were indeed worried about the effect that this question would have on whether or not they could be admitted to practice in New York following successful completion of the bar exam. Almost all of those who shared this anecdotal evidence with us were Black men. We were unsuccessful in getting anyone to come forward to tell their story and, though powerful, this evidence remains anecdotal.

Given the underrepresentation of Black men and women in the legal profession, coupled with the anecdotal evidence, we suggest that Question 26 should be seen as a potential barrier to the profession given the expensive and time-consuming process to become an attorney. It is likely that this process, combined with a history of being targeted by police conduct which might require a disclosure under Question 26's unjustifiably broad wording, may have deterred an immeasurable number of young people from the study of law.

The Question does not appear to provide any benefit which would even come close to justifying the deterrent effect that we have found in anecdotal evidence alone. In this context, the broad nature of this question could be characterized as an endorsement of structural racism by the profession.

Amplification of These Consequences by Student Debt

Any time we discuss attorney admission, we must place it in the context of student debt and the effect of growing debt on young people and their decision to study law. Many law students and young attorneys find themselves to be in debt by amounts that far exceed those of attorneys who entered the job market a few decades ago. For example, in 2009, the New York Times reported that a bar applicant was denied admission based on his debts of nearly half a million dollars.²⁷ While this applicant had a larger debt than the average student, it is not uncommon for recent law school graduates and newly admitted attorneys to experience debts of a quarter of a million dollars.

Making the decision to study law with no guarantee that one will be admitted to practice is a gamble that has now become a high stakes gamble. Given that certain aspiring attorneys may be deterred from beginning that journey because the breadth of Question 26 essentially requires them to make disclosures that we know have resulted from these individuals having been targeted for unconstitutional and inappropriate reasons, it cannot

²⁷ See Jonathan D. Glater, *Finding Debt a Bigger Hurdle Than Bar Exam*, N.Y. TIMES (July 1, 2009), https://www.nytimes.com/2009/07/02/business/02lawyer.html?_r=1; In the Matter of Anonymous, an Applicant for Admission to the Bar, N.Y. App. Div. 3d. (March 6, 2009), <http://decisions.courts.state.ny.us/ad3/Decisions/2009/D-11-09Anonymous.pdf> (the applicant was later admitted to practice in 2012 and is currently registered with no history of public discipline).

be ignored that this can create a significant barrier to undertaking the study of law that will have a negative effect on the diversity of the profession.

It cannot be ignored that, in the 20th Century, discriminatory practices in character and fitness were consciously used to prevent diversity in the profession and even became a vehicle for McCarthyism.²⁸ If Question 26 still has the effect of deterring diverse individuals from pursuing a career in law, it must be viewed as a relic of the purposeful exclusion of these individuals from the practice of law and as something that has no place in the modern process of bar admission.

No Justification for Requiring a Broader Disclosure to Enter the Profession

Question 26 is significantly broader and vaguer than the disclosure requirements for admitted attorneys. Whereas admitted attorneys are only required to disclose convictions, those applying for admission have to report everything from convictions to mere accusations to even brief stops for questioning. The legal profession is charged with protecting the rights of those accused of a crime on the understanding that mere accusation without conviction should not negatively affect the accused. And yet, in deciding who becomes a part of this profession, Question 26 sends the strong message that accusations and even mild or brief suspicions, often based in bias, should subject the individual – even unreasonably accused or suspected – to deterrence from the process of joining the profession. This is absurdly inappropriate in its hypocrisy.

As the natural home of law students and those applying for admission within the New York State Bar Association, the Young Lawyers Section strongly objects to applicants being subjected to any disclosure requirement broader than that required of practicing attorneys.

²⁸ See Derek Davis, *A Higher Bar*, CHARACTER AND FITNESS Vol. 4 Issue 3 (March/April 2018), <https://thepractice.law.harvard.edu/article/a-higher-bar/>.

APPENDIX F: STATEMENT FROM THE COMMITTEE ON DIVERSITY, EQUITY, AND INCLUSION

I. INTRODUCTION AND EXECUTIVE SUMMARY

Several NYSBA entities – including the Committee – were directed to expeditiously review and report on the matter. In response to NYSBA President Brown’s directive, the Committee has collectively reviewed Question 26 and analyzed the legal and policy considerations surrounding the proposed amendment or elimination of Question 26. Throughout our review and preparation of this response, we have focused specifically on Question 26 and its impact on our ongoing efforts to foster diversity, equity, and inclusion within the profession.

a. Question 26 on the Application for Admission

Question 26 on the application for admission to the New York State bar currently reads as follows:

“Have you ever, either as an adult or a juvenile, been cited, ticketed, arrested, taken into custody, charged with, indicted, convicted or tried for, or pleaded guilty to, the commission of any felony or misdemeanor or the violation of any law, or been the subject of any juvenile delinquency or youthful offender proceeding? Traffic violations that occurred more than ten years before the filing of this application need not be reported, except alcohol or drug-related traffic violations, which must be reported in all cases, irrespective of when they occurred. Do not report parking violations.”

b. The NYC Bar’s Report and Recommendation

On June 1, 2021, the New York City Bar Association (“NYC Bar”) published a report which set forth its concerns regarding the legality and potential inequities contained within Question 26. The NYC Bar report identified the following two core issues in its report: (1) that Question 26 violates New York State law by requiring disclosure of *all* arrests and convictions in express contradiction of the protections afforded and limitations imposed by the Family Court Act and the New York Human Rights Law; and (2) that Question 26, as written, is in direct conflict with efforts to address racial equity and inclusion in the legal profession and undermines principles of fairness.

With respect to the first issue, the NYC Bar noted that Family Court Act (“FCA”) § 380.1(3) and the New York Human Rights Law (“NYHRL”), New York Executive Law § 296(16) include limitations on employers, licensing agencies, and other entities on inquiries regarding arrests and/or certain convictions unless otherwise expressly required or permitted by law. Both laws are intended to protect individuals who have (1) juvenile contacts with the criminal justice system, (2) convictions that have been sealed, or (3) obtained dispositions of criminal matters in their favor. In each instance, the law should shield those individuals from future repercussions or further penalties.

With respect to the second issue, the NYC Bar report raised concerns of systemic inequities that are so intertwined in our society, including the disproportionate prosecution and arrests of those in Black and brown communities, that any inquiry of arrests and conviction would likewise disproportionately affect and chill members of those communities from even pursuing admission to the profession and practice of law.

c. The Office of Court Administration’s Request for NYSBA’s views concerning the revision of Question 26

The Office of Court Administration referred this matter to NYSBA for a comprehensive review and report. For reasons explained in greater detail herein, the NYSBA Committee on Diversity and Inclusion concurs with the NYC Bar’s assessment and conclusion that the current language in Question 26 is in violation of the letter and spirit of New York law, specifically the protections afforded to individuals under the FCA and the NYHRL as it relates to inquiries about arrests and certain convictions.

At the conclusion of its report, the NYC Bar provided a proposed amendment to Question 26 that removes the obligation to report sealed convictions, juvenile delinquency arrests or adjudications, youthful offender adjudications, criminal cases currently adjourned in contemplation of dismissal, or sealed criminal cases. It is the Committee’s position that such an amendment would bring the question into compliance with New York law and improve deeply rooted systemic racial inequities, while simultaneously maintaining the integrity of the profession and achieving the general purpose of Question 26 in the overall attorney application and admission process.

II. QUESTION 26 IS UNLAWFUL AS WRITTEN

a. The New York State Human Rights Law Applies to Licensing Agencies, Including BOLE and C&F Committees

The NYHRL exists as “an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights.”²⁹ NYHRL § 290(3) provides, *inter alia*, that:

“[T]he state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity . . . not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.”

In essence, the NYHRL was promulgated to eliminate and prevent discrimination in employment and licensing, among other things.

²⁹ See NYHRL § 290(2).

Although the term “licensing agency” is not a defined term in NYHRL § 292, we can conclude from the language set forth in the relevant section of the NYHRL that it applies to licensing agencies, including the Board of Law Examiners (“BOLE”) and/or the Character and Fitness (C&F) Committees, because such agencies are responsible for, and serve as the gateway to, admission to the bar and the ability to practice law in the state.

b. The NYHRL Prohibits Questions About Arrests Not Pending and Sealed Convictions, with Exceptions Not Applicable to Bar Applicants

New York Human Rights Law § 296(15) prevents licensing agencies from denying admission to candidates based on the applicant’s “having been convicted of one or more criminal offenses, or by reason of a finding of lack of ‘good moral character’ which is based upon his or her having been convicted of one or more criminal offenses”. However, the NYHRL does not specifically bar licensing agencies from inquiring as to an individual’s conviction history.

Notwithstanding the foregoing, the fact that the NYHRL does not expressly forbid licensing agencies and other entities from inquiring into an applicant’s conviction history leads us to question what other purpose the gathering of such information could serve. Considering the potentially inflammatory nature of such an inquiry alongside the extremely high likelihood that such information would adversely impact or negatively skew a licensing agency’s overall assessment of an applicant, the continued inclusion of Question 26 as it currently reads must be intensely scrutinized.

Even though the NYHRL does not specifically preclude inquiry into an applicant’s conviction history, it unequivocally precludes licensing agencies from posing questions about arrests that are not pending and sealed criminal convictions. Specifically, NYHRL § 296(16) provides that it is unlawful for a licensing agency to make any inquiry into an arrest that is not pending, or which was sealed, or resulted in a youthful offender adjudication. While NYHRL § 296(16) contains exceptions to this rule, none of those exceptions apply to New York State bar applicants.

To comply with the NYHRL, BOLE and/or the C&F Committees must limit their respective inquiries regarding prior arrests to matters that are currently pending. For practical reasons, the likelihood of an applicant having such information to report is unlikely. Accordingly, this Committee recommends that BOLE and/or the C&F Committee cease inquiry on this subject, or, at the very least, narrowly tailor the question to seek only lawful and relevant information about the applicant’s past.

c. The Family Court Act Prohibits Compelling a Person to Disclose a Juvenile Arrest or Conviction

Family Court Act § 380.1(3) prohibits the compelled disclosure of any information pertinent to the arrest of a respondent juvenile, but there is an exception, “where [disclosure is] specifically required by statute”. However, other provisions of the FCA

state unequivocally that a limited number of agencies will invariably have access to juvenile court records.³⁰ Thus, disclosure is both prohibited and authorized under the FCA, and there is no legal guidance to reconcile these provisions.

BOLE administers bar admissions under the auspices of the New York State Court of Appeals (“Court of Appeals”). This affiliation clouds our ability to fully ascertain whether BOLE is entitled to sealed court records. It is not clear whether BOLE is an “Agency” within the meaning of the statute. Moreover, it is unclear whether the Court of Appeals is authorized to open sealed court records when there is no case or controversy at issue.

With regard to bar admissions, each respective New York State Appellate Division has the ultimate discretion to determine an applicant’s character and fitness in any way it sees fit. Thus, we are left questioning whether an inquiry into juvenile adjudication qualifies as a situation that is “specifically required by statute” under FCA § 380.1(3). Such inquiries do not appear to be statutory because they are discretionary and could differ among various Appellate Division C&F Committees.

Unlike the NYHRL, which seemingly includes BOLE and C&F Committees as a “licensing agency,” it would be a stretch to place the C&F Committees into the limited category of agencies – including law enforcement agencies – that have access to court records under the FCA. In addition, the FCA directs certain acts or proceedings to be automatically sealed under § 375.1; but again, there are specific people and agencies, including Federal and State Law Enforcement, that are permitted to ask the Court for access to sealed juvenile adjudications.

The latter category could be where authorization can be found for a bar examiner to request a sealed record from the court but in no way meets the standard “where specifically provided by statute”. The law is very clear that Professional Licenses can be obtained with sealed records – no unsealing necessary. The agencies that may request sealed records from the court for vetting a job applicant are statutorily limited: agencies within the criminal justice system; courts; law enforcement related jobs; and any employer who will be issuing a firearm for job duties.

Accordingly, Question 26 is unlawful under the FCA insofar as it asks for an applicant’s disclosure of “any juvenile delinquency or youthful offender proceeding”. Taking the position that BOLE is not an “agency” under the FCA, BOLE does not qualify for access to sealed juvenile records, and the inquiry is improper. Furthermore, such records cannot be unsealed absent a showing that the Court of Appeals can open sealed juvenile records when there is no case or controversy; or that the C&F Committees that are delegated to the Appellate Divisions fit within any of the definitions set forth in FCA § 375.1 for who is entitled to apply to unseal records.

³⁰ See *e.g.*, FCA Section 380.1(3) and Section 380.1(4).

Notwithstanding the sealed or unsealed status of a juvenile proceeding, FCA § 380.1 specifically restores respondents in a juvenile proceeding their rights and privileges, including the right to hold elected office.

For all of these reasons, Question 26 violates citizens' civil rights expressly granted under FCA § 380.1(2).

III. QUESTION 26 TENDS TO EXCLUDE UNDER-REPRESENTED GROUPS FROM THE LEGAL PROFESSION IN NEW YORK

a. The New York State Bar and Bench are Not Representative of the Diversity of the State's Population or the State's Law School Students

It is axiomatic to state that people of color are under-represented in all facets of the law. The New York State bar and bench are no exception. In July 2020, the American Bar Association reported that although African Americans represent roughly 13 percent of the United States population, only 5 percent of all lawyers in the United States are African American.³¹ African Americans have been consistently underrepresented; there has been no change in their participation in the legal field in more than a decade.

This disparity in the legal profession extends beyond the African American community specifically and is prevalent among almost all communities of color. Under-representation within the Hispanic community is even more glaring. The Hispanic community composes an identical 5 percent of the legal population despite representing roughly 19 percent of the United States population. Less than 3 percent of licensed attorneys are Asian American even though the Asian American community accounts for roughly 6 percent of the United States population. Native Americans represent less than one-half of a percent of licensed attorneys. There are no reliable statistics concerning the number of LGBTQIA+ practicing attorneys, but approximately 3 percent of attorneys practicing in firms identified as members of that community.

By contrast, white men and women have been and continue to be over-represented within the legal profession. Though 60 percent of all United States residents identify as non-Hispanic whites, that particular ethnic group makes up the overwhelming majority of licensed attorneys in this country, accounting for nearly 86 percent of the legal profession. Throughout the nation, our profession has fallen short in its efforts to diversify the practice of law. There exists a widening chasm within the legal profession wherein minorities and people of color are under-represented while the majority segment of our population is over-represented.

Given minority under-representation and majority over-representation within the legal profession, it is not surprising that the state and federal judiciary does not reflect the

³¹ See American Bar Association, *ABA Profile of the Legal Profession 2020* at 34, <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>.

diversity of our society at large. More than 80 percent of all federal judges identify as non-Hispanic whites. Diversity on the federal bench is underwhelming with less than 10 percent of federal judges identifying as African American, and less than 7 percent identifying as Hispanic. Representation from both groups has decreased over the last four years. Though Asian American representation on the federal bench increased in the last four years, Asian Americans still represent less than 3 percent of federal judges. There are only two Native American federal judges in the United States.

The New York State judiciary is more diverse than the federal system in that approximately seventy percent of New York State judges identify as non-Hispanic whites.³² African Americans represent 14 percent of the New York State Judiciary, with Hispanic Americans representing 9 percent and Asian Americans comprising another 3 percent.³³

b. Question 26 Has a Chilling Effect on Potential Applicants to Law Schools and Prospective Applicants to the New York State Bar

This committee agrees without exception that Question 26 should be amended insofar as the question explores arrests without conviction, youthful offender adjudications, and sealed criminal dispositions. It is impossible to objectively quantify the effect that such an inquiry has on a given applicant, but there is no doubt that many individuals with prior arrests and sealed criminal dispositions are uncomfortable and embarrassed disclosing information that should not be open for public discussion as a matter of law. This places a prospective law student in the unenviable position of determining whether to invest in a legal education without any assurances that they will be deemed morally fit to practice law after receiving their law degree and passing the bar examination.

c. Question 26 Has a Disparate Impact on BIPOC Applicants

Additionally, inquiries such as those found in Question 26 adversely impact diversity within the legal profession because people of color are between five and 10 times more likely to be arrested than their white counterparts.³⁴ Insofar as a mere arrest is evidence of nothing, that portion of question 26 has little probative value, if any at all. Moreover, as discussed above, youthful offender adjudications and sealed criminal matters exist so that youthful indiscretions and trivial criminal matters do not burden or restrict individuals who may go on to become productive members of our society. Forcing prospective applicants to disclose such information only serves to reinforce negative stereotypes that far too often plague people of color in society as a whole and the legal profession in particular.

³² See Statewide Judicial Demographics Report, <https://ww2.nycourts.gov/court-research/srjd-report.shtml>.

³³ *Id.*

³⁴ See Pierre Thomas, John Kelly & Tonya Simpson, *ABC News Analysis of Police Arrests Nationwide Reveals Stark Racial Disparity*, ABC NEWS (New York) (June 11, 2020), <https://abcnews.go.com/US/abc-news-analysis-police-arrests-nationwide-reveals-stark/story?id=71188546>.

d. Question 26 Interferes with the Rehabilitative Purposes of the Juvenile and Adult Criminal Justice System

It is difficult to fully prepare for the future if a person is routinely reminded of past errors. The policy behind sealing certain criminal convictions is consistent with the purpose of the FCA and NYHRL in general; to dissuade individuals from criminal behavior and place them on a path toward productive citizenship. The idea that the legal profession has the ability to disregard the laws of New York State in order to inquire about arrests and other matters that are no longer accessible is contrary to the purpose of the laws that have been discussed in this report. As such, Question 26 should be amended or eliminated.

This is not to suggest that an amendment to question 26 will have a significant impact on diversity within New York's legal profession. Indeed, the lack of complete diversity within the legal profession is rooted directly in the socioeconomic disparities that have existed in this country since its inception. Those issues must be addressed at their core if we intend to truly diversify this profession so that New York State attorneys are as diverse as the clients they represent.

IV. REVISING QUESTION 26 WILL NOT IMPAIR THE CHARACTER AND FITNESS COMMITTEE'S ABILITY TO PROTECT THE INTEGRITY AND REPUTATION OF THE STATE'S LEGAL PROFESSION AND CONSUMERS OF LEGAL SERVICES

a. Information about Arrests not Resulting in Conviction and Sealed Convictions has Little Relevance on an Applicant's Fitness to Practice Law

There is no legitimate legal basis to inquire into an arrest that did not result in a conviction. Although probable cause is determined based upon a law enforcement officer's subjective assessment, the standard for criminal liability and conviction is objective, based upon the judgment of the community in the form of a jury, or the observations of a judge. The inability to prove that an individual is guilty beyond a reasonable doubt will inevitably result in the dismissal and disposition of all criminal matters. An applicant for admission to the New York State bar should not be compelled to re-litigate, or even discuss, an arrest that did not result in a conviction in a court of law.

Similarly, the minor infractions, violations, and low-level misdemeanors that are subject to sealing under New York State Law have little to no bearing on an applicant's character and fitness to practice law. In fact, the adjournment in contemplation of dismissal ("ACD") procedure found in the FCA and New York Criminal Procedure Law ("CPL") § 170.55 state without equivocation that such dismissals are ordered "in the furtherance of justice". The FCA requires consent from the accused individual and endows the court with discretion to grant the order. ACD dispositions in adult criminal matters on the other hand require consent from all parties and the court. As such, ACD dispositions are in most instances the result of consent from at least one party to the litigation and the court. Regardless, the end result is a dismissal that the parties have concluded is in the interest

and furtherance of justice. Such dismissal should not be a subject of inquiry for potential applicants to the New York State bar.

Prior convictions may also be sealed under CPL § 160.59. The statute sets forth the criteria for sealing prior convictions and requires (1) that it has been at least ten years since the conviction(s), (2) that the applicant has not been convicted of a crime with those 10 years, and (3) that the matter is not a sex offense, violent felony, or serious felony. Thus, although convictions that are ultimately sealed pursuant to CPL § 160.59 may have some relevance to an applicant's fitness to practice law, the relevance of those sealed convictions is diminished by the passage of time and the subsequent lawful behavior that is a prerequisite to such sealing.

To be sure, there are prior convictions that have and should have prevented individuals from being licensed to practice law. Few could legitimately argue that prior adult criminal conduct is relevant and probative to an applicant's fitness to practice law. However, these are the situations in which additional information must be obtained during the C&F interview process. Conversely, an isolated arrest has little bearing on an individual's character or fitness to practice law. Juvenile adjudications and sealed criminal matters are similarly irrelevant.

b. The Improper Information About Arrests and Sealed Convictions Received from Question 26 Has No Actual Use or Practical Utility to C&F Committees Aside from Evaluating Whether the Applicant is Forthright in Their Response

The main issue of contention is the current requirement to disclose sealed convictions, arrests, and youthful offender adjudication. In preparing these comments, our subcommittee representatives spoke with C&F Committee members within the State's jurisdiction. We were informed that that question 26 is designed to determine whether the candidate will be candid and open. In some jurisdictions, the inquiry is cursory and often limited to follow-up questions concerning the final disposition and whether the candidate was represented by counsel.

We were further informed that there is routinely no opposition from applicants, and the information is readily provided in most instances in this jurisdiction. Although the committee can access an individual candidate's RAP sheet, we were told that such requests are rarely made. The information provided suggested that no applicant has been denied admission to the bar based upon an arrest that was disclosed during the admissions process.

Thus, it seems the purpose of Question 26's inquiry into otherwise non-public contacts with the criminal justice system is to test an applicant's ability to be forthright about matters that they may not be comfortable disclosing. This legitimate purpose must be balanced against the governing principles of law that we are bound to uphold, as well as our collective desire to welcome under-represented populations into a legal profession that undoubtedly needs increased diversity.

BOLE and the C&F Committees should not be permitted to inquire into arrests that did not result in criminal convictions because the presumption of innocence was never rebutted. Likewise, the FCA and NYHRL protections surrounding sealed convictions are meaningless if an otherwise law-abiding applicant must disclose and discuss those same matters years later. Surely, there are other methods that can be used to test an applicant's candor that are consistent with law and policy.

V. REVISING QUESTION 26 WILL HAVE A POSITIVE EFFECT ON THE NEW YORK STATE BAR AND THE BAR ADMISSION PROCESS

Each of the foregoing points demonstrate that Question 26 must be revised at a minimum. Insofar as the current iteration of Question 26 results in an inquiry into non-pending arrests, sealed convictions, and juvenile adjudications, it does not comply with the mandates of the NYHRL and FCA.

Moreover, Question 26 disproportionately impacts those communities of color that have proven more likely to have contacts with the criminal justice system and presents yet another obstacle to creating representative diversity within our profession. Lastly, those portions of Question 26 that delve into matters that are otherwise not accessible to the public have no probative value regarding a candidate's fitness to practice law. The integrity and reputation of the New York State Legal Profession are best served when our state bar promulgates policies and procedures that comport with the laws of our state.

In light of the foregoing, we propose that Question 26 of the application for admission to the New York State bar should be amended to read as follows:

Do you have any unsealed convictions or are you the defendant in a pending criminal case? Traffic violations that occurred more than ten years before the filing of this application need not be reported, except alcohol- or drug-related traffic violations, which must be reported unless they are sealed. Do not report parking violations, juvenile delinquency arrests or adjudications, youthful offender adjudications, criminal cases that have been adjourned in contemplation of dismissal or sealed criminal cases.

As noted at the outset, this Committee concurs in large part with the NYC Bar's assessment of question 26, and we believe the proposed amendment complies with the laws of New York State and the objectives of NYSBA.