Delegates Back Proposal to Seal Criminal Records

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Defendants who are convicted of non-violent crimes but avoid future wrongdoing would get a fresh start under a proposal backed by the New York State Bar Association's House of Delegates.

The bar group's policy-making body on Jan. 27 overwhelmingly approved a resolution supporting passage of legislation to authorize sealing the criminal records of reformed offenders.

Richard D. Collins of Collins, McDonald & Gann in Mineola, the co-author of the recommendation, said the state bar wanted to address the "indirect, collateral" effects of a conviction. He observed that the bar adopted a report six years ago that warned of the impact of such collateral consequences.

See Amended Report regarding sealing of certain crimes.

"A criminal conviction rides with someone for the rest of their lives in New York state," Mr. Collins told the House of Delegates gathered at the Hilton New York for its annual meeting. "There is no way from ever getting out from under it. As a criminal defense practitioner, I have many clients who made a mistake 10, 15, 20 years ago. Now they are applying for a license or they are applying to go into a new career...and now in the age of Googling information, everybody's past transgressions are readily acceptable to everybody in the world in a background check."

Mr. Collins said that people with criminal records can be barred from more than 100 licensed professions in New York. The same applies to individuals seeking housing or education, he said.

See an essay, Collateral Consequences, from today's Law Journal.

The state bar proposal calls for a five-year waiting period for the sealing of the criminal records of juveniles and five to eight years if they are adults, depending on the offense. That would run from the date sentence is imposed.

The sealing requirement would not apply in instances where people committed violent or sexual offenses or crimes involving children or the elderly.

"This is not something that addresses habitual offenders or career criminals or something along those lines," Mr. Collins told state bar members. "The only crime that would be encompassed here to be eligible to be sealed would be low-level felonies, D and E felonies, and even of the D and E felonies, only non-violent D and E felonies."

Mr. Collins said that one felony or up to three misdemeanors could be sealed, depending on the eligibility of the offender. The determination would be made by a state judge.

"If you are eligible, and if you go through a waiting period where you have had no other convictions, you haven't been re-arrested and you haven't been convicted of another kind of crime, you can then make an application to a judge," Mr. Collins said. "But a judge still has to listen to you, listen to what a prosecutor has to say on it and ultimately the judge will have discretion as to whether or not this application should be granted."
Sealing would not have any effect on the ability of authorities to gain access to a prior offender’s DNA records, if sought.

The proposal was approved by a voice vote, with only a few dissenters.

The state bar report was co-authored by Jay Shapiro of White & Williams in Manhattan.

The authors opted to use the term "sealing" in the report rather than "expungement" after "much deliberation and debate."

The report said "sealing" is more accurate because records could be unsealed if an offender is prosecuted for future crimes. "Expungement" refers to the permanent destruction of records, which the bar report does not advocate.

"Under the association’s proposal the records would not be permanently destroyed ('expunged') but rather rendered inaccessible and protected unless and until an act of recidivism (in which case they would 'spring back' into full effect)," the report says.

Mr. Collins acknowledged that once the criminal information is in a public database there is little that can be done to suppress it. He said, however, that he would support a penalty for the "wilful disclosure" of the information after the offender has met the requirements to have the records sealed. There is no penalty provision currently in the proposal.

There is at least some interest among Democrats in the Legislature in passage of a statute authorizing sealing.

Both A1139/S682—sponsored by Assemblyman Joseph Lentol, D-Brooklyn, and Senator John Sampson, D-Brooklyn—and A6664/SS43—offered by Assemblyman Daniel O’Donnell, D-Manhattan, and Senator Ruth Hassell-Thompson, D-Mount Vernon—would accomplish that goal. However, neither has moved out of committee.

"I hope the [bar] association pushes this forward," Mr. Collins said after his presentation to the House of Delegates. "As a criminal defense lawyer, I see this happening."

Before the House of Delegates acted, Janet DiFiore, the Westchester County district attorney who is president of the state District Attorneys Association, wrote to the state bar that she and other prosecutors had several concerns about the proposal and the bills before the Legislature.

She said a sealing law could open up "seemingly unlimited" opportunities for sealing conviction records in a "vast number" of cases, creating an undue strain on the courts and district attorneys' offices as they respond to burdensome motion practice.

Prosecutors are also concerned about restrictions to their access to criminal records without court orders under the state bar proposal, Ms. DiFiore said.

If the difficulty of offenders obtaining state licenses is a concern, Mr. DiFiore said, "it seems more reasonable to first consider amending licensing restrictions based on criminal convictions before the more drastic approach of hiding information from the people and the press by the invocation of a legal fiction."

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