



NEW YORK
CITY BAR

June 1, 2021

Via Email and/or Regular Mail

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Chief Judge of the State of New York
Court of Appeals
20 Eagle Street
Albany, NY 12207

Hon. Hector D. LaSalle
Presiding Justice
Supreme Court of the State of New York
Appellate Division, Second Department
45 Monroe Place
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Hon. Rolando T. Acosta
Presiding Justice
Supreme Court of the State of New York
Appellate Division, First Department
27 Madison Avenue
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Hon. Gerald L. Whalen
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Judge Carmen Beauchamp Ciparick
Chair
New York State Board of Law Examiners
Corporate Plaza Building
254 Washington Avenue Extension
Albany, New York 12203-5195

Re: Amending Question 26 of the New York Bar Application

Your Honors:

We are writing on behalf of the New York City Bar Association to urge the Administrative Board of the Courts (“Administrative Board”) to amend Question 26 of the Application for Admission to Practice as an Attorney and Counselor-at-law in the State of New York (“Bar Application”). Question 26, which requires New York Bar applicants to disclose information about all arrests and convictions, including confidential and sealed information, is in direct conflict with New York State law and efforts to foster greater equity and inclusion within the legal

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

profession. Principles of fairness and justice form the foundation of our profession. Including Question 26 in the application for admission to the New York Bar sends a harmful message to future practitioners about how they should interpret and apply the law and the function of the legal system in our communities.

We urge the Administrative Board to cease asking about the six categories of juvenile and criminal arrests and prosecutions that are protected from inquiry by Section 380.1 of the Family Court Act and Section 296(16) of the Executive Law. Section 380.1 of the Family Court Act and Section 296(16) of the Executive Law prohibit licensing bodies from inquiring about (1) juvenile delinquency arrests and prosecutions; (2) adult arrests terminated in the defendant's favor under Criminal Procedure Law ("CPL") § 160.50; (3) criminal cases adjourned in contemplation of dismissal under CPL §§ 170.55, 170.56, 210.46, 210.47, or 215.10; (4) noncriminal convictions sealed under CPL § 160.55; (5) criminal convictions sealed under CPL §§ 160.58 or 160.59; and (6) youthful offender adjudications under CPL § 720.35.¹ No licensing body in New York State maintains that it is wholly exempt from these statutes, with the exception of two: weapons licensing agencies, which are explicitly exempt,² and the Unified Court System ("UCS"), which licenses attorneys and is not exempt under any tenable reading of the law. To our knowledge, every other State or local licensing agency—including those that license childcare workers, teachers, finance workers, doctors, and healthcare workers—maintains a policy of not inquiring about these protected records.

At the end of this letter, we suggest replacement language that would bring Question 26 into compliance with Family Court Act § 380.1 and Executive Law § 296(16). We urge the Administrative Board to adopt this change as soon as possible.

I. QUESTION 26 VIOLATES NEW YORK STATE LAW

Question 26 conflicts with Family Court Act § 380.1 and Executive Law § 296(16), which limit inquiries that employers, licensing agencies, and others may make about a person's prior interactions with the criminal and juvenile legal systems. These protections are intended to limit collateral consequences, particularly for Black and brown communities, people with disabilities, LGBTQI people, and others who are disproportionately impacted by the criminal and juvenile systems in New York.

Question 26 of the Bar Application currently reads:

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

¹ Fam. Court Act § 380.1; Exec. Law § 296(16). This letter refers to the arrest and conviction records these statutes protect from inquiry as "protected records."

² Exec. Law § 296(16) ("The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons . . .").

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.

Family Court Act § 380.1(3) states that no person can be required to “divulge information pertaining to [juvenile delinquency arrests] or any subsequent proceeding,” except where specifically required by statute. Family Court Act § 380.1(2) further states that a juvenile delinquency adjudication may never operate to disqualify a person from receiving a “license granted by public authority” or from engaging in “any lawful activity, occupation, profession or calling.”

Executive Law § 296(16) states that, in connection with licensing, it is an “unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about” or take adverse action on the basis of any adult arrest or criminal accusation that was resolved in one of five ways: a termination in the applicant’s favor under section 160.50 of the Criminal Procedure Law (“CPL”); a criminal case adjourned in contemplation of dismissal under CPL §§ 170.55, 170.56, 210.46, 210.47, or 215.10; a noncriminal conviction sealed under CPL § 160.55; a criminal conviction sealed under CPL §§ 160.58 or 160.59; or a youthful offender adjudication under CPL § 720.35. The lone licensing activity expressly exempted from this provision is the regulation of deadly weapons.³

Question 26 violates the express terms of Family Court Act § 380.1 and Executive Law § 296(16) because it asks about *all* arrests and convictions, even the six categories of juvenile and criminal records that those statutes protect from inquiry. There is no statute that specifically requires or permits inquiry into these protected records for the purpose of attorney licensure. The introductory text to Question 26 notes that Judiciary Law § 90(1)(a) and CPLR 9404 authorize the Appellate Division to conduct a character and fitness review when considering Bar applicants. However, Judiciary Law § 90(1)(a) and CPLR 9404 do not make *any* mention of juvenile delinquency arrests, youthful offender adjudications, adjournments in contemplation of dismissal, cases terminated in a defendant’s favor, or sealed cases, let alone “specifically require or permit” inquiry into these protected records. The mere existence of a statutorily-authorized character and fitness review does not exempt any licensing regime from the requirements of Family Court Act § 380.1 and Executive Law § 296(16). Indeed, nearly every licensing body in New York State is required or permitted by statute to review the character or criminal history of license applicants; yet, to our knowledge, no licensing body other than UCS claims that its statutory authorization to review character and fitness wholly exempts it from the requirements of Family Court Act § 380.1 or Executive Law § 296(16). In our view, reading Family Court Act § 380.1 and Executive Law § 296(16) to allow for inquiries about protected records based on Judiciary Law § 90(1)(a) and CPLR 9404 is a strained and untenable interpretation of the law.

³ See *id.*

Question 26 also contravenes the purpose and spirit of the statutory schemes that prohibit inquiry into protected records. With respect to the Family Court Act, the New York Court of Appeals has made clear that “[d]elinquency proceedings are designed not just to punish the malefactor but also to extinguish the causes of juvenile delinquency through rehabilitation and treatment. Indeed, a hallmark of the juvenile justice system is that a delinquency adjudication ‘cannot constitute a criminal conviction’ and a juvenile delinquent ‘cannot be denominated a criminal.’” *Green v. Montgomery*, 95 N.Y.2d 693, 697-98 (2001) (citations omitted). As the Court of Appeals has stated, “The overriding intent of the juvenile delinquency article is to empower Family Court to intervene and positively impact the lives of troubled young people while protecting the public.” *In re Robert J.*, 2 N.Y.3d 339, 346 (2004). And, in passing Executive Law § 296(16) and the criminal statutes it references—Criminal Procedure Law §§ 160.50, 160.55, 160.58, 160.59, 170.55, 170.56, 210.46, 210.47, 215.10, and 720.53—the legislature sought to remove the stigma of contact with the criminal legal system for people whose case dispositions fit into one of five narrowly tailored categories.⁴

⁴ See, e.g., *People v. Patterson*, 78 N.Y.2d 711, 716 (1991) (“[T]he legislative objective [of CPL § 160.50] was to remove any ‘stigma’ flowing from an accusation of criminal conduct terminated in favor of the accused, thereby affording protection (i.e., the presumption of innocence) to such accused in the pursuit of employment, education, professional licensing and insurance opportunities.”); Letter from Senate Sponsor Dale M. Volker, August 24, 2007, Bill Jacket, L. 2007, Ch. 639, at 6A (noting that the amendment of Exec. L. § 296(16) to prohibit inquiries into and discrimination based on violations sealed under CPL § 160.55 and youthful offender adjudications under § 720.35 aimed “to reduce the roadblocks facing people with criminal histories and increase the number and quality of job opportunities available to people with criminal records to seek employment and not to be unfairly discriminated against because of a minor offense or youthful indiscretion.”); *People v. Modesto*, 922 N.Y.S.2d 920, 922 (Sup. Ct. 2011) (“Conditional sealing [under CPL § 160.58] is a narrowly tailored procedure enacted to provide a meaningful second chance for individuals who have a proven commitment to rehabilitation.”); *People v. Doe*, 89 N.Y.S.3d 594, 596 (Sup. Ct. 2018) (“The purpose of [CPL § 160.59], as Governor Cuomo indicated at the time of its enactment, is to ‘eliminate unnecessary barriers to opportunity and employment that form[erly] incarcerated individuals face and to improve the fairness and effectiveness of the state’s criminal justice system’ (see Press Release, ‘Governor Cuomo Announces Raise the Age Law that Seals Non-Violent Criminal Convictions Takes Effect October 7,’ Oct. 6, 2017, <https://tinyurl.com/y8ljq22t>). To this end, the Executive Law was amended to make it an unlawful discriminatory practice ‘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’ that resulted in a conviction that was subsequently sealed pursuant to the new statute (Executive Law § 296[16])”); L.2019, c. 55, pt. II, § 1 & subpt. O, § 1 (“This Part enacts into law major components of legislation that remove unnecessary barriers to reentry of people with criminal histories into society This Part also amends provisions of law to enact into law major components of legislation to prevent the use in a civil context, of past arrest information that did not result in a conviction because . . . the case has been adjourned in contemplation of dismissal This Subpart amends the human rights law to specify that considering arrests that are followed by an order adjourning the criminal action in contemplation of dismissal, which adjournments are not convictions or admissions of

It is concerning that, in vetting applicants' suitability to join the legal profession, the Administrative Board of the Courts and the four Character and Fitness Committees have adopted a practice so squarely at odds with the spirit and the letter of New York law.⁵ We urge the Administrative Board to revise Question 26 without delay.

II. QUESTION 26 IS IN DIRECT CONFLICT WITH EFFORTS TO ADDRESS RACIAL EQUITY AND INCLUSION IN THE LEGAL PROFESSION AND UNDERMINES PRINCIPLES OF FAIRNESS

Not only does Question 26 contravene the spirit and letter of New York law, but it deepens the racial inequities endemic to the legal profession.⁶ As UCS continues its work of evaluating and eradicating racism within the New York State Court system, it must examine its role as gatekeeper to the legal profession. Secretary Jeh Johnson, in his Report from the Special Advisor on Equal Justice in the New York State Courts, made clear that systemic racism, whether knowingly and unknowingly perpetuated, pervades not just the criminal legal system, but also the makeup of the bench.⁷ This lack of judicial diversity mirrors the significant lack of diversity in the legal profession generally. Lawyers of color make up a mere 17.8 percent of the industry, and only 6.8 percent of lawyers are Black or African American.⁸ In this moment of national reckoning—following the killings of Daniel Prude, George Floyd, Ahmaud Arbery, Breonna Taylor, and too

guilt under section 170.55 of the criminal procedure law, is an unlawful discriminatory practice for civil purposes.”). (All sites last visited June 1, 2021).

⁵ The practice also invites confusion. Executive Law § 296(16) states, “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 or criminal accusation did not occur.” We believe that some applicants, understanding that Question 26’s inquiry into protected records is unlawful, may choose not to disclose protected records on the ground that Executive Law § 296(16) specifically permits such nondisclosure.

⁶ See generally Report from the Special Advisor on Equal Justice in the New York State Courts (Oct. 1, 2020), <http://www.nycourts.gov/whatsnew/pdf/SpecialAdvisorEqualJusticeReport.pdf>.

⁷ See *id.* at 32, 66 (finding that although the state judiciary has become more diverse over the past 30 years, “when compared to the evolving demographics of the state, judges of color continue to be underrepresented on the bench, and the gap between the non-white share of the judiciary and non-white share of the population remains the same” and reporting that almost every attorney of color interviewed “reported incidents in which they were mistaken for someone other than an attorney or otherwise subjected to disparate treatment.”); Judicial Friends Ass’n. Report to the New York State Court’s Commission on Equal Justice in the Courts, (Aug. 31, 2020), at 11-12, <https://www.nycourts.gov/LegacyPDFS/ip/ethnic-fairness/pdfs/Judicial-Friends-Report-on-Systemic-Racism-in-the-NY-Courts.pdf> (finding that racial minorities are underrepresented in judicial and non-judicial supervisory positions within the Court system).

⁸ U.S. Bureau of Labor Statistics, Current Population Survey, Table 11: Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity in 2020 (2021), <https://www.bls.gov/cps/cpsaat11.pdf>.

many others--it is incumbent on the legal community to evaluate how practices and policies within the profession contribute to structural racism.⁹

Unquestionably, Question 26 of the Application for Admission to Practice as an Attorney and Counselor-at-law in the State of New York is one such practice that contributes to racial inequity in our profession. Today, 2.3 million New Yorkers have conviction records,¹⁰ and in both the criminal and juvenile legal systems, Black and brown communities are overrepresented due to decades of over-policing and prosecution of people of color.¹¹ As such, any general inquiry by the Character and Fitness Committees into arrest and conviction information disproportionately burdens applicants of color, and might chill individuals of color from pursuing a legal education in the first place. Indeed, people with arrest records who are considering applying to law school are well aware of Question 26; most New York law schools include language identical or similar to Question 26 in their law school admission application. By failing to comply with New York State law and requiring the disclosure of confidential and sealed information protected by the Family Court Act § 380.1 and Executive Law § 296(16), UCS only exacerbates the impact of racially disparate treatment in the criminal and juvenile legal systems, and tightens the gates to our profession even more.

As written, Question 26 also undermines principles of fairness. Family Court Act § 380.1 and Executive Law § 296(16) help mitigate the harms of criminal and juvenile legal system

⁹ We acknowledge and are pleased that this work has already begun. In the wake of George Floyd's death, Chief Judge DiFiore announced an independent evaluation of UCS's policies and practices to address institutional racism within the court system. *See* Press Release: Aiming to Advance Equal Justice in the Courts, Chief Judge DiFiore Announces Independent Review of Court System Policies, Practices and Initiatives (June 9, 2020), https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR20_24.pdf. UCS subsequently embraced and has begun implementation of the recommendations set forth in that evaluation, Secretary Johnson's Report from the Special Advisor on Equal Justice in the New York State Courts. *See* Press Release: Independent Review of Court System Policies, Practices and Programs Yields Recommendations Aimed at Advancing Equal Justice in the New York Courts (Oct. 15, 2020), http://www.nycourts.gov/LegacyPDFS/press/pdfs/PR20_44.pdf; Press Release: Court System Proceeds with Implementation of Proposals Made by Special Adviser on Equal Justice in the Courts (May 17, 2021), https://www.nycourts.gov/LegacyPDFS/press/PDFs/PR21_10.pdf. We view the proposed amendment of Question 26 as deeply connected to UCS's already-begun work to advance diversity and inclusion.

¹⁰ N.Y. State Council on Cmty. Re-entry and Reintegration, Employment (2021), <https://www.governor.ny.gov/criminal-justice-reform/new-york-state-council-community-re-entry-and-reintegration#top>.

¹¹ For example, according to the Division of Criminal Justice Service's data on New York State adult arrests and prison sentences by race, people of color comprised just 42 percent of the adult population in 2019 but constituted 65 percent of the arrests made that year. Div. of Crim. Justice Servs., NYS Adult Arrests and Prison Sentences by Race/Ethnicity in 2019 (2020), <https://www.criminaljustice.ny.gov/crimnet/ojsa/comparison-population-arrests-prison-demographics/2019%20Population%20Arrests%20Prison%20by%20Race.pdf>.

involvement, experienced disproportionately by Black and brown communities. These protections are the primary mechanism for ensuring that individuals are not permanently held back by their record in areas of civil life, including, importantly, employment. Recognizing the need to protect confidential criminal history information, at least six other states exempt sealed and expunged information from disclosure in their applications for admission to practice as an attorney.¹² It is time for New York to follow suit. This is a matter of fairness for the thousands of New Yorkers whose criminal or juvenile cases are sealed or otherwise favorably resolved. By failing to comply with New York State law, UCS sends an unequivocal message to prospective and current lawyers that arrest and conviction records are always relevant, irrespective of how one's case resolves or the legislature's intent.

By amending Question 26 to comply with Family Court Act § 380.1 and Executive Law § 296(16), the Administrative Board of the Courts can take an important step to address the systemic barriers that impede racial equity in our profession. Once this initial step has been taken, we believe that the Administrative Board should initiate conversations with people who have been involved in the juvenile and criminal legal systems, in order to evaluate next steps for increasing racial equity within the Bar admission process.

III. WE ASK THE ADMINISTRATIVE BOARD TO AMEND QUESTION 26

We ask that the Administrative Board amend Question 26 to read:

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 are currently adjourned in contemplation of dismissal, or sealed criminal cases.

Amending Question 26 would bring the question into compliance with the letter and spirit of New York law and help address racial inequality in our profession. It is incumbent upon those in the legal profession, and its gatekeepers, to be proactive in the fight for racial equality. We

¹² See State Bar of California, Frequently Asked Questions: Moral Character Determinations, at 4-5, <http://www.calbar.ca.gov/Portals/0/documents/admissions/moralCharacter/Moral-Character-FAQ.pdf>; Maryland Courts, Sample Character Questionnaire, at 11, 17, <https://www.mdcourts.gov/sites/default/files/import/ble/pdfs/samplefilingfees.pdf>; New Hampshire Judicial Branch, Petition and Questionnaire for Admission to the New Hampshire Bar, at 5, 12, <https://www.courts.state.nh.us/nhbar/petition.pdf>; Board of Law Examiners of the State of North Carolina, Character and Fitness Guidelines, at 2, <https://www.ncble.org/character-and-fitness-guidelines>; Texas Board of Law Examiners, Character and Fitness, <https://ble.texas.gov/character-and-fitness>; Virginia Board of Bar Examiners, Sample Character and Fitness Questionnaire, at 14, <http://barexam.virginia.gov/pdf/SampleCFQ.pdf>.

urge you to take the necessary steps to right the legal and moral wrongs encompassed by Question 26.

Thank you for your consideration. Should you have any questions or require any additional information, please contact Maria Cilenti, the City Bar's Senior Policy Counsel, at mcilenti@nycbar.org or (212) 382-6655.

Respectfully,

Children and the Law Committee
Melissa J. Friedman, Chair

Civil Rights Committee
Zoey Chenitz and Kevin E. Jason, Co-Chairs

Corrections & Community Reentry
Committee
Gregory D. Morril, Chair

Council on Children Committee
Dawne Mitchell, Chair

Council on the Profession Committee
Dean Matthew Diller and
Melissa Colon-Bosolet, Co-Chairs

Criminal Justice Operations Committee
Tess M. Cohen, Chair

Family Court and Family Law Committee
Michelle Burrell, Chair

LGBTQ Rights Committee
Danielle King and Geoffrey L. Wertime,
Co-Chairs

Minorities in the Profession Committee
Johan Erik Tatoy and Jonathan Waldauer,
Co-Chairs

Pro Bono and Legal Services Committee
Jennifer K. Brown and Nicole L. Fidler,
Co-Chairs

Cc: Chief Administrative Judge Lawrence K. Marks
Eileen Millett, Esq.