

September 20, 2021

VIA EMAIL

Hon. Janet DiFiore
Chief Judge of the State of New York
Court of Appeals
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Albany, NY 12207

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Your Honors:

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 the coronavirus’ 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”). 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 and with the prior request of The Legal Aid Society in this regard on October 5, 2017, 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.

Justice in Every Borough.

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. The New York City Bar Association recently issued a powerful call for the Administrative Board to do so and to amend Question 26 of the Application for Admission to Practice as an Attorney and Counselor-at-law in the State of New York. [Media Listing | NYC Bar](#). The organizations signing on to this letter fully support this request. 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.

Question 26 Has a Racially Discriminatory Impact

It is well documented that Black and Latinx people in New York and elsewhere have been disproportionately arrested and subjected to disparate treatment in the criminal and juvenile legal systems.¹ Because of the vast and unfair overrepresentation of BIPOC in these legal systems, the decision to require disclosure of all arrest records on the Bar application perpetuates significant racial disparities in the legal profession.

First, this inquiry deters BIPOC who have an arrest record from even applying to law school. The

¹ See, e.g., REPORT FROM THE SPECIAL ADVISER ON EQUAL JUSTICE IN THE NEW YORK STATE COURTS 3 (Oct. 2020), available at <http://nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf> (“The sad picture that emerges is, in effect, a second-class system of justice for people of color in New York State.”); N.Y. DIV. OF CRIM. JUST. SERVS., NYS ADULT ARRESTS AND PRISON SENTENCES BY RACE/ETHNICITY IN 2019, at 1, available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/comparison-population-arrests-prison-demographics/2019%20Population%20Arrests%20Prison%20by%20Race.pdf> (noting that 38% of all 2019 fingerprintable adult arrests in New York State involved a Black individual, even though only 15% of the adult New York State population is Black); ELIZABETH HINTON ET AL., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM (May 2018), available at <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>; THE SENTENCING PROJECT, POLICY BRIEF: DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM (Nov. 2015), available at <http://www.sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf>; NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, REQUEST FOR PROPOSALS (Dec. 2015), available at https://ocfs.ny.gov/main/bcm/DMR_Section%20Seven%20of%20Grant%20RFP_2015.pdf.

Legal Aid Society has spoken to multiple 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. And, 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 law school admission application. Question 26 has a chilling effect and contributes to the underrepresentation of BIPOC in the legal profession.²

Second, we believe that Question 26 may have a disparate impact on those law graduates who are BIPOC. Although the data is lacking to determine if higher numbers of BIPOC law graduates are denied bar admission due to criminal history,³ it seems likely that BIPOC law graduates are disproportionately affected by Question 26 given the overrepresentation of BIPOC in the criminal and juvenile legal systems. Moreover, we know that individual New Yorkers of color with arrest records report experiencing the Character and Fitness process as intimidating and exclusionary. As a result, they feel that they don't "belong" in the legal profession, even if their arrest record does not ultimately preclude their admission. The Character and Fitness Review is often the first formal interaction that BIPOC law graduates have with the Bar. The Administrative Board should strive for that experience to be a positive one that fosters inclusion.

Question 26 Violates the Family Court Act

The Family Court Act protects individuals from being required to divulge exactly the type of information Question 26 seeks: information relating to their arrest as a juvenile delinquent or subsequent related proceedings. Specifically, Section 380.1(3) of the Family Court Act states in relevant part that no person can be required to "divulge information pertaining to [juvenile delinquency arrests] or any subsequent proceeding," except where explicitly required by statute. Family Court Act § 380.1(2) further states that a juvenile delinquency adjudication may never operate to disqualify a

² Although there has not yet been a statistical analysis of the deterrent effect of Question 26, a comparable study demonstrated that criminal record inquiries deter prospective applicants from completing college applications. The study found that almost two-third of applicants who started the State University of New York (SUNY)'s online college application and answered "yes" to the application's question about prior conviction record did not complete or submit the application. CENTER FOR COMMUNITY ALTERNATIVES, *BOXED OUT: CRIMINAL HISTORY SCREENING AND COLLEGE APPLICATION ATTRITION*, at v (Mar. 2015), available at <http://www.communityalternatives.org/wp-content/uploads/2019/11/boxed-out.pdf>. In other words, asking college applicants about their criminal records had a demonstrable chilling effect on application completion rates. *Id.* The study also found that SUNY's criminal history screening policy had a disparate impact on African American applicants. *Id.* at vi. After reviewing this study, SUNY removed the criminal record question from its college application form. Nancy L. Zimpher, Chancellor, SUNY, *Memorandum: Admission of Persons with Prior Felony Convictions* (Sept. 14, 2016), available at https://www.suny.edu/about/leadership/board-of-trustees/meetings/webcastdocs/Tab05_Admission%20of%20Persons%20with%20Prior%20Felony%20Convictions-Revised.pdf.

³ In September 2020, the Office of Court Administration responded to The Legal Aid Society's Freedom of Information Law request by advising that OCA does not maintain statistical reports indicating the race or ethnicity of applicants to the Bar, people denied admission to the Bar, or attorneys admitted to the Bar.

person from receiving a “license granted by public authority” or from engaging in “any lawful activity, occupation, profession or calling.” Because there is no exception, statutory or otherwise, that exempts Bar admission from these juvenile rights protections, Question 26 violates both of these Family Court Act provisions.

Question 26 further violates the public policy goals of the Family Court Act and juvenile delinquency system. Children as young as seven years old and as old as seventeen can be arrested and charged as juvenile delinquents. The juvenile delinquency system is a rehabilitative one, designed to help at-risk youth find a positive route toward a productive life. The Court of Appeals has described the above statute as functioning to meet the overarching rehabilitative objective: “Delinquency 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).

Question 26 Violates the Human Rights Law

Question 26 also violates the State Human Rights Law by asking about all arrests, even those that have been terminated in an individual’s favor, sealed, resulted in a youthful offender adjudication, or adjourned in contemplation of dismissal. The State Human Rights Law, Exec. Law § 296(16), prohibits the government from asking licensing applicants about or denying licensure on the basis of any arrest or criminal accusation that was resolved with 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, unless the inquiries into such cases are “specifically required or permitted by statute.” The only licensing activity expressly exempted from this provision is the regulation of deadly weapons. And, although Judiciary Law § 90(1)(a) and CPLR 9404 authorize the Appellate Division to conduct a character and fitness review, neither statute “specifically require[s] or permit[s]” the Appellate Division to inquire into the five types of sealed or otherwise protected criminal cases identified in the Human Rights Law. Indeed, almost all licensing agencies in New York State are required or permitted by statute to review the character or criminal history of license applicants—but, other than firearms licensing agencies, the New York State Bar is the only licensing agency that claims to be wholly exempt from Section 296(16) of the Human Rights Law.

Question 26 also contravenes the purpose of the Human Rights Law, and the Criminal Procedure Law sections it cross-references. In enacting these statutes, the legislature sought to remove the stigma of contact with the criminal legal system for people whose criminal case dispositions fit into one of five

narrowly tailored categories.⁴ By requiring people with sealed and confidential records to disclose those records, Question 26 is discouraging qualified candidates from becoming attorneys and re-erecting the roadblock removed by the legislature.

Question 26 Should Be Amended To Comport with the Law

We urge the Administrative Board to amend Question 26 to avoid making an unlawful request of applicants with respect to their arrest history. The following language would comport with the law:

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.

Bringing Question 26 into compliance with New York State law would signal that the Administrative Board is committed to racial equity and to increasing diversity in the profession. Once this initial step has been taken, we believe that further evaluation must be undertaken and longer conversations should be had with key stakeholders, including directly impacted people, about how to modify the Character and Fitness process so that BIPOC are empowered to study law and enter the profession.

Conclusion

Question 26 is unlawful and violates the very purpose of the Family Court Act and Human Rights Law: to protect individuals from discrimination based on their arrest history and to allow them to prosper in their education and profession without fear. We urge the Administrative Board to drastically revise the Bar admission process in New York State to advance racial justice and increase diversity in the profession. We believe that the Administrative Board's first step should be to revise Question 26 so that it complies with the Family Court Act and the Human Rights Law. We would be delighted to

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 better enforce CPL §§ 160.55 and 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.”).

speak with you about this and other ways to advance diversity, equity and inclusion in the legal profession. We look forward to hearing from you and thank you, in advance, for your time and attention to this important matter.

Respectfully,

Janet Sabel
Attorney-in-Chief/CEO
The Legal Aid Society

The Bronx Defenders

Brooklyn Defender Services

Center for Community Alternatives

Center for Family Representation

The Children's Law Center

Coalition of Reentry Advocates

Community Service Society of New York

The John Jay College Institute for Justice and Opportunity

Lawyers For Children

Legal Action Center

The Legal Aid Society

The Legal Aid Society of Rochester

Mobilization for Justice, Inc.

Neighborhood Defender Service of Harlem

Justice in Every Borough.

New York County Defenders

New York State Defenders Association

Queens Defenders

Youth Represent

cc: VIA EMAIL

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