

COALITION OF  
**JOURNALISTS FOR**  
**OPEN GOVERNMENT**  
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August 3, 2007

Laurel G. Bellows, Esq.  
Chair, House of Delegates  
American Bar Association  
321 North Clark Street  
Chicago, IL 60610

Dear Ms. Bellows:

We write on behalf of the Coalition of Journalists for Open Government and its undersigned member organizations in opposition to the recommendations to the House of Delegates of the ABA Commission on Effective Criminal Sanctions, which are on the calendar for your August 2007 sessions in San Francisco.

We opposed an earlier version of this report and were pleased when it was withdrawn. We are dismayed that a proposal even more deleterious to the public's right to know and to transparency in our justice system is now pending before the House of Delegates..

We make clear at the outset that we take no position on other aspects of the commission's work to encourage prisoner re-entry into society. That is a worthy goal that has been covered by many of our our members in news stories and supported in editorials.

We believe the recommendation that criminal case records be automatically sealed when there is no conviction is radical and ill-considered, and will do serious damage to the public's confidence in the judicial system. We believe the proposal to allow subsequent sealing of conviction records opens the door to special interest pleadings and another assault on the integrity of the system.

Last winter, our coalition and the Reporters Committee for Freedom of the Press outlined in some detail why we opposed the commission's earlier proposal. We stand by those criticisms and here state our broader concerns about the new version.

The commission's commentary that its proposal should be considered valid "to the extent permitted by the First Amendment" is disingenuous. What is being suggested takes away the presumption of openness that has guided our courts for more than 200 years. Our government of the people does not permit a "star chamber" system. The proposal should be rejected on constitutional grounds alone.

Moreover, the commission has cited no body of law to support its recommendation. The fact that two state court decisions have supported sealing records in individual cases with no consideration of the constitutional issues involved does not provide justification; nor does the fact that some states have provided for the expungement of certain records in minor cases.

The commission's proposal calls for automatically closing records in which charges are dismissed. The reasoning behind this appears to assume a flawless justice system that never errs in its case dispositions. But just as we know that many innocent people have been convicted and sent to prison, we know that many guilty people have avoided trial or have not been convicted. How, then, can the ABA even suggest that arrest and trial information of those not convicted be denied a concerned public?

Under this proposal, the public, and the press as its surrogate, could review and judge for itself only by gathering all relevant information on all criminal charges before trial and then being present at every trial, an obvious impossibility. No ex post facto review or investigation by a concerned public, by the media, by advocacy groups, or by academics would be possible. A significant portion of the criminal justice system – the records most likely to reflect its failures – would be closed to all but the established law enforcement system, which may have been complicit in those failures.

The unintended consequences of the proposal would be a significant unfairness, and quite possibly abuse of the system by today's information entrepreneurs. The sealing of records would serve to shield those not convicted only if their arrest or court proceedings have not already been publicly reported in some manner. It would not protect those individuals whose arrests and trials had been reported. Their names and records would be just a Google search away, without ready access to exculpatory information.

Adding to the inequities, we can imagine this leading to an expansion of the data-mining industry in gathering and selling the records of arrests and initial court filings. This would result in the information that this proposal would deny the average citizen being available at a price to corporations and others who could afford to pay. What would then be public-for-a-price is the same black spot but with no access to the public record that shows why or how the mark was expunged. We believe this is likely to result in far greater injustices and abuse of information than anything the proposal's sponsors might point to or envision under the current system of transparency.

There is an even greater reason for concern: the integrity of our justice system. We have come to believe in the rule of law because we have been able to see it operate, warts and all. Deny the public, and its surrogate, the press, access to a significant portion of the justice system and its accountability and subsequent public confidence will be lost. This proposed closure of all records of proceedings when there was not a finding of guilt is an open invitation to corruption. As the Reporters Committee previously noted earlier this year, put into action, this proposal would “eliminate the ability of the public and press to act as watchdogs of the criminal justice system.”

The second provision, calling for the subsequent sealing of conviction information, is simply naïve, and can only do more harm than good. Here again, reports and other information already in the public domain remain there, a few clicks away. The public would then have access only to limited, rather than complete, information about the process that found an individual innocent. Moreover, those most likely to avail themselves of this records purge forward are most likely to be those who can afford representation. And here, too, the basic information about arrest and conviction are still certain to be available at data mines.

The inevitable consequence of both of these provisions is that the public loses. It loses access to information it on occasion needs. It loses an open court system and with it confidence in a critical branch of government.

This proposal would turn on its head more than two centuries of confidence building in and support for our court system and the rule of law. It would take away the public’s right to know about and to examine the full operation of its courts, effectively burying information about vast numbers of criminal cases in the United States.

In addition, the commission’s plan would create an unwieldy, multi-tiered information system in which details of charges could be reported by the news media and obtained by individual citizens while pending, but that same information could be disclosed subsequently only if there is a conviction, and then might later be sealed.

As this coalition told the House of Delegates last winter, “Closing these records could have the effect of shielding those inside the criminal justice system who want to avoid being held accountable for actions they take on behalf of the public.”

We believe the proposal before the House of Delegates is a major first step toward destroying the public's confidence in the judicial system. We urge you to reject this well-intended but badly flawed proposal of the Commission on Effective Criminal Sanctions and to focus on other means to bring about improvements to the nation's prisoner re-entry apparatus.

Pete Weitzel for  
The Coalition of Journalists for Open Government  
Criminal Justice Journalists  
Reporters Committee for Freedom of the Press  
American Society of Newspaper Editors  
Association of Alternative Newsweeklies  
Associated Press Managing Editors  
National Association of Hispanic Journalists  
National Conference of Editorial Writers  
National Freedom of Information Coalition  
National Newspaper Association  
National Press Club  
Radio Television News Directors Association  
Society of Professional Journalists  
Washington Coalition for Open Government