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FOR DISCUSSION ONLY

# **UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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Draft for March, 2007 Drafting Committee Meeting

*WITH PREFATORY NOTE AND COMMENTS*

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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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March 12, 2007

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# UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT

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# UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT

## Prefatory Note

Both the criminal justice system and society as a whole are faced with managing the growing proportion of the free population that has been convicted of a state or federal criminal offense.<sup>1</sup> In a trend showing little sign of abating, the U.S. prison population has increased dramatically since the early 1970s.<sup>2</sup> Prison growth is large in absolute and relative terms; in 1974, 1.8 million people had served time in prison, representing 1.3% of the adult population. In 2001, 5.6 million people, 2.7% of the adult population, had served time. The Department of Justice estimates that if the 2001 imprisonment rate remains unchanged, 6.6% of Americans born in 2001 would serve prison time during their lives<sup>3</sup>--this may be an underestimate given that the incarceration rate has increased every year since 2001.

In addition to those serving or who have served prison time, an even larger proportion of the population has been convicted of a criminal offense without going to prison. Over 4 million adults were on probation on December 31, 2003, almost twice as many as the combined number on parole, in jail or in prison.<sup>4</sup>

The growth of the convicted population means that there are literally millions of people being released from incarceration, probation and parole supervision every year. Of course, they must successfully reenter society or be at risk for recidivism. Society has a strong interest in preventing recidivism. An individual who could have successfully reentered society but for avoidable cause reoffends generates the financial and human costs of the new crime, expenditure of law enforcement, judicial and corrections resources, and the loss of the productive work that the individual could have contributed to the economy.

As the need for facilitating reentry becomes more pressing, several developments have

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<sup>1</sup> A growing literature deals with reentry. *See, e.g.*, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS OF THE COMMUNITY (2005); REGINALD A. WILKINSON, ED., REENTRY BEST PRACTICES: DIRECTOR'S PERSPECTIVES (Association of State Correctional Administrators 2004); MARC MAUER & MEDA CHESNEY-LIND, EDS., INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (New Press 2002); CHRISTOPHER MELE & THERESA A. MILLER, EDS., CIVIL PENALTIES, SOCIAL CONSEQUENCES (Routledge 2005); JEREMY TRAVIS & MICHELLE WAUL, EDS., PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES AND COMMUNITIES (Urban Institute Press 2005); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (Urban Institute Press 2005).

<sup>2</sup> In October, 2005, the Bureau of Justice Statistics reported that the rate of growth of the national prison system had diminished to 1.9%, which was less than the average annual growth rate of 3.2 % since year-end 1995, but still positive. Paige M. Harrison & Allen J. Beck, *Prisoners in 2004*, at 1, Bureau of Justice Statistics Bulletin (Oct. 2005, NCJ 210677).

<sup>3</sup> Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 1, Bureau of Justice Statistics Special Report (Aug. 2003, NCJ 197976).

<sup>4</sup> Laura E. Glaze & Seri Palla, *Probation and Parole in the United States, 2003*, at 1, Bureau of Justice Statistics Bulletin (July 2004, NCJ 205336).

made it more difficult. First, a major challenge for many people with criminal records is the increasingly burdensome legal effect of those records. A second major development is the availability to the all arms of government and the general public, via Internet, of aggregations of public record information, including criminal convictions, about all Americans.<sup>5</sup> Twenty years ago, an applicant might not have been asked for her criminal record when renting an apartment or applying for a job, and it would have been difficult for even an enterprising administrator to find, say, a 15 year old, out-of-state, marijuana offense. Now, gathering this kind of information is cheap, easy and common.<sup>6</sup>

Apart from impairment of self-esteem and informal social stigma, a criminal conviction negatively affects an individual's legal status. For many years, an individual convicted of, say, a drug felony, lost his right to vote for a period of time or for life,<sup>7</sup> could not possess a firearm,<sup>8</sup> and was barred from service in the military<sup>9</sup> and on juries, state and federal, civil and criminal.<sup>10</sup> If a non-citizen, the convicted individual could be deported.<sup>11</sup> These disabilities have been called "collateral consequences" "civil disabilities" and "collateral sanctions." The term "collateral sanction" is used here to mean a legal disability that occurs by operation of law because of a conviction but is not part of the sentence for the crime. It is "collateral" because it is not part of the direct sentence. It is a "sanction" because it applies because and only because of conviction of a criminal offense.

In recent years, collateral sanctions have been increasing. To identify just some of those applicable to individuals with felony drug convictions, 1987 legislation made individuals with drug convictions ineligible for certain federal health care benefits;<sup>12</sup> a 1991 law required states to revoke some driver's licenses upon conviction or lose federal funding,<sup>13</sup> in 1993, Congress made individuals with drug convictions ineligible to participate in the National and Community Service Trust Program.<sup>14</sup> In 1996, Congress provided that individuals convicted of drug offenses would automatically be ineligible for certain federal benefits;<sup>15</sup> a year later, Congress rendered

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<sup>5</sup> See, e.g., BUREAU OF JUSTICE STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION (Aug. 2001).

<sup>6</sup> Corinne A. Carey, *No Second Chance: People With Criminal Records Denied Access To Public Housing*, 36 U. TOLEDO L. REV. 545, 553 (2005) ("Increasingly, private landlords are following the lead of public housing and screening people for criminal histories").

<sup>7</sup> See JEFF MANZA & CHRIS UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (Oxford forthcoming). Convicted individuals may also be ineligible to hold public office. See, e.g., *State ex rel. Olson v. Langer*, 256 N.W. 377 (N.D. 1934) (North Dakota governor removed from office based on conviction rendering him ineligible to vote).

<sup>8</sup> 18 U.S.C. § 922(g).

<sup>9</sup> 10 U.S.C. § 504.

<sup>10</sup> See Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003).

<sup>11</sup> See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000).

<sup>12</sup> 42 U.S.C. § 1320a-7(a)(3), added by Pub. L. 100-93, Aug. 18, 1987, 101 Stat. 680.

<sup>13</sup> 23 U.S.C. § 159, added by Pub. L. 102-143, Title III, § 333(a), Oct. 28, 1991, 105 Stat. 944.

<sup>14</sup> 42 U.S.C. § 12602(e), added by Pub. L. 103-82, Sept. 21, 1993, 107 Stat. 785.

<sup>15</sup> 21 U.S.C. § 862a, added by Pub. L. 104-193, Title I, § 115, Aug. 22, 1996, 110 Stat. 2180.

them ineligible for the Hope Scholarship Tax Credit.<sup>16</sup> In 1998, individuals convicted of drug crimes were made ineligible for federal educational aid<sup>17</sup> and for residence in public housing.<sup>18</sup> In addition, 1988 legislation authorized state and federal sentencing judges to take away eligibility for federal public benefits.<sup>19</sup>

Like Congress, state legislatures have also been attracted to regulating convicted individuals. Studies of disabilities imposed by state law or regulation done by law students in Arizona, Maryland and Ohio show literally hundreds of collateral sanctions on the books in those states.<sup>20</sup> These laws limit the ability of convicted individuals to work in particular fields, to obtain state licenses or permits, to obtain public benefits such as housing or educational aid, and to participate in civic life.

The legal system has not successfully managed the proliferation of collateral sanctions in several respects. One problem is that collateral sanctions are administered largely outside of the criminal justice system. Court decisions have not treated them as criminal punishment, but mere civil regulation.<sup>21</sup> The most important consequence of this principle is in the context of guilty pleas. In a series of cases, the Supreme Court held that a guilty plea is invalid unless “knowing, voluntary and intelligent.”<sup>22</sup> Courts have held that while a judge taking a guilty plea must advise of the “direct” consequences—imprisonment and fine—defendants need not be told by the court or their counsel about collateral sanctions.<sup>23</sup> For example, the Constitution does not require that a defendant pleading guilty to a drug felony with an agreed sentence of probation be told that, even though she may walk out of court that very day, for practical purposes, her life may be over: Military service, higher education, living in public housing, even driving a car, may be out of the question. Inevitably, individuals with convictions, most not legally trained, are surprised when

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<sup>16</sup> 26 U.S.C. § 25A(b)(2)(D), added by Pub. L. 105-34, Aug. 5, 1997, 111 Stat 788.

<sup>17</sup> 20 U.S.C. § 1091(r), added Pub.L. 105-244, Title IV, § 483(a) to (f)(1), Oct. 7, 1998, 112 Stat. 1735.

<sup>18</sup> 42 U.S.C. § 13662, Pub.L. 105-276, Title V, § 577, Oct. 21, 1998, 112 Stat. 2640.

<sup>19</sup> 21 U.S.C. § 862, added by Pub. L. 100-690, Title V, § 5301, Nov. 18, 1988, 102 Stat. 4310.

<sup>20</sup> See Law, Criminal Justice and Security Program, University of Arizona, *Collateral Sanctions: A Comprehensive Study of the Ongoing Effects of Criminal Convictions in Arizona* (2006); Kimberly R. Mossone & Cara A. Roecker, *Ohio Collateral Consequences Project*, 36 U. TOLEDO L. REV. 611 (2005); Re-Entry of Ex-Offenders Clinic, University of Maryland School of Law, *A Report on Collateral Consequences of Criminal Convictions in Maryland* (2004). An April, 2006 Florida Executive Order directs collection of collateral sanctions by all state agencies. See Fl. Exec. Order No. 6-89 (April 25, 2006) (available at [http://sun6.dms.state.fl.us/eog\\_new/eog/orders/2006/April/06-89-exoftf.pdf](http://sun6.dms.state.fl.us/eog_new/eog/orders/2006/April/06-89-exoftf.pdf)).

<sup>21</sup> See Gabriel J. Chin, *Are Collateral Sanctions Premised On Conduct Or Conviction?: The Case Of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1686 n.10 (2003) (citing Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1357-64 (1991); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 692-707 (1999)).

<sup>22</sup> See *Guilty Pleas*, 33 GEO. L.J. ANN. REV. CRIM P. 363, 373 (2004).

<sup>23</sup> See, e.g., *Foo v. State*, 102 P.3d 346, 357-58 (Hawai'i 2004); *People v. Becker*, 800 N.Y.S.2d 499, 502-03 (Crim. Ct. 2005); *Page v. State*, 615 S.E.2d 740, 742-43 (S.C. 2005). For a discussion of this principle, see Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002).

they discover statutory obstacles they were never told about. The major exception to the exclusion of collateral sanctions from the guilty plea process is in the area of deportation. About half of American jurisdictions provide by rule, statute or court decision that defendants must be advised of the possibility of deportation when pleading guilty.

The criminal justice system must pay attention to collateral sanctions. If the number of statutes triggered is a reliable indicator, collateral sanctions in many instances are what is really at stake, the real point of achieving a conviction. In state courts in 2002, 59% of those convicted of felonies were not sentenced to prison; 31% received probation and 28% jail terms.<sup>24</sup> In a high percentage of cases, the real work of the legal system is done not by fine or imprisonment, but by changing the legal status of convicted individuals. The legal effects the legislature considers important are in the form of collateral sanctions imposed by dozens of statutes. Yet the defendant as well as the court, prosecutors and defense lawyers involved need know nothing about them. As a recent resolution of the National District Attorney's Association recognizes, "the lack of employment, housing, transportation, medical services and education for ex-offenders creates barriers to successful reintegration and must be addressed as part of the reentry discussion."<sup>25</sup>

This Act deals with several aspects of the creation and imposition of collateral sanctions. The provisions are largely procedural, and designed to rationalize and clarify policies and provisions which are already widely accepted by the states.

Section 3 proposes that collateral sanctions and disqualifications contained in state statutes or regulations be collected in individual titles of the state code and state administrative code. The titles will be known as *Collateral Sanctions*.

Sections 4 and 9 propose to make the existence of collateral sanctions known to defendants at important moments: When deciding whether to plead guilty, so they can make an informed decision (Section 9), and when leaving the custody of the criminal justice system, so they can conform their conduct to the law (Section 4). Given that collateral sanctions and disqualifications will have been codified, it will not be difficult to make this information available.

Section 5 defines the judgments that count as convictions for purposes of imposing collateral sanctions, excluding those that have been reversed or set aside, as well as arrests, and other charges not leading to a final judgment.

Section 6 limits the collateral sanctions and disqualifications applicable to employment,

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<sup>24</sup> Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2002*, at 2, Bureau of Justice Statistics Bulletin (Dec. 2004, NCJ 206916).

<sup>25</sup> NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY ISSUES §4(a) at 7 (Adopted July 17, 2005).



educational benefits, housing and licensing. It is a modified version of Section 4-1005 of the Model Sentencing and Correction Act which has been widely adopted in the states.

Section 7 is designed to ensure that collateral sanctions are imposed by decision of the state legislature, if at all, prohibiting creation of sanctions by ordinance, policy or regulation, unless authorized by statute.

Section 8 works in conjunction with Section 6, creating a Certificate of Rehabilitation for individuals convicted of crimes who can demonstrate law-abiding behavior consistent with successful reentry and desistence from crime. The Certificate of Rehabilitation would give potential public and private employers, landlords and licensing authorities concrete and objective information about an individual under consideration for an opportunity. It could facilitate the reintegration of individuals with convictions whose behavior demonstrates that they are making efforts to conform their conduct to the law.

Section 10 provides that convicted individuals who have been released from prison should have the right to vote.

Some of the issues have been anticipated by the ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2003), and the solutions they propose will be mentioned.

# UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT

**SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Collateral Sanctions and Disqualifications Act.

**SECTION 2. DEFINITIONS.** In this [act]:

(1) “Collateral sanction” means a penalty, disability, or disadvantage, however denominated, that is imposed by law as a result of an individual’s conviction for a felony, misdemeanor, or other offense, but not as part of the judgment of the court. The term does not include terms of imprisonment, probation, parole, supervised release, fines, assessments, forfeiture, restitution, or the costs of prosecution.

(2) “Disqualification” means a penalty, disability, or disadvantage, however denominated, that an administrative agency, official, or a court in a civil proceeding is authorized but not required to impose on an individual convicted of a felony, misdemeanor, or other offense on grounds related to the conviction.

### Comment

[Question from Style Committee to Drafting Committee: “Do these definitions apply to juveniles: Suggest clarification in comments.”]

The definitions in paragraphs (1) and (2) are taken from the ABA Standards.<sup>26</sup> They are intended to exclude from the definition of collateral sanction or disqualification direct criminal punishment, such as fine, imprisonment, probation, parole, or supervised release, and the incidents and conditions of those direct punishments. They are also intended to exclude private conduct, such as the hiring decisions of private employers. Covered actions generally include such things as denial of government employment and elective or appointive office, ineligibility

<sup>26</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-1.1 (3d ed. 2004) (hereinafter, “ABA CRIMINAL JUSTICE STANDARD”).

1 for government licenses, permits, or contracts, disqualification from public benefits, public  
2 education, public services, or participation in public programs, and elimination or impairment of  
3 civil rights, such as voting, or serving on juries.  
4

5 Whether one of these disabilities is a “collateral sanction” or a “disqualification” depends  
6 on how it is applied. If a medical licensing board by law, regulation or policy “must” deny a  
7 license to an applicant with a felony conviction, then it is a collateral sanction, because the effect  
8 is automatic. If a medical licensing board “may” deny a license to those with felony convictions,  
9 then the regulation or policy is a “disqualification.”<sup>27</sup> However, if a criminal court at sentencing  
10 takes away a medical license as punishment,<sup>28</sup> the action is neither a collateral sanction nor a  
11 disqualification. Even if they are enforced by criminal sanctions, restrictions which are not part  
12 of the sentence and apply only to convicted individuals constitute collateral sanctions.  
13

### 14 **SECTION 3. PUBLICATION OF COLLATERAL SANCTIONS AND** 15 **DISQUALIFICATIONS.**

16 (a) Not later than [date], the [Revisor] shall:

17 (1) prepare a compilation of statutory collateral sanctions and disqualifications  
18 containing citations to, and the text of, or short descriptions of, the provisions of all statutes of  
19 this state imposing collateral sanctions or disqualifications;

20 (2) prepare a compilation of administrative collateral sanctions and  
21 disqualifications containing citations to, and the text of, or short descriptions of, all  
22 administrative rules of this state imposing collateral sanctions or disqualifications;

23 (3) publish the compilations as an appendix to the state codes; and

24 (4) include cautionary language at the beginning of each compilation notifying  
25 users that:

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<sup>27</sup> Statutes requiring disclosure of criminal convictions, and allowing the decision-maker to consider them as part of a “good moral character” or general fitness analysis implicitly constitute disqualifications.

<sup>28</sup> See, e.g., *United States v. Singh*, 390 F.3d 168 (2d Cir. 2004) (forfeiture of medical license as punishment for drug offense).

1 (A) the list of citations and descriptions contained in the compilation,  
2 although intended to be comprehensive, is not necessarily complete;

3 (B) there are additional collateral sanctions and disqualifications that are  
4 not listed in the compilation imposed by the laws or regulations of the United States and of other  
5 states; and

6 (C) the citations and descriptions in the compilation are not substantive  
7 and may not be used to construe, expand, or limit the meaning of any law or regulation.

8 (b) The Revisor shall make available in a single document, the full text of:

9 (1) the compilations prepared in subsection (a);

10 (2) all provisions of the [insert name of enacting state] Constitution imposing  
11 collateral sanctions or authorizing disqualifications; and

12 (3) all provisions of the law of this state offering relief from collateral sanctions  
13 or disqualifications, and all provisions describing the procedure for seeking relief.

14 (c) The document required in subsection (b) shall:

15 (1) in addition to other methods of distribution, be made available without charge  
16 on the Internet;

17 (2) be published within [four months] after preparation of the tables; and

18 (3) be updated at least after each regular session of the Legislature.

### 19 **Comment**

20  
21 In a very real sense, having the status of “felon” is like being a regulated industry. In  
22 effect, each state already has a title of its code called *Collateral Sanctions*, regulating the legal  
23 status of this group in scores or hundreds of ways. But instead of publishing these laws together  
24 in volume “C” of the code, the statutes have been divided up and scattered. The sanctions have  
25 proliferated unsystematically, with a prohibition on individuals with felony convictions obtaining

1 one kind of license popping up in one corner of a state's code, a prohibition on obtaining some  
2 other kind of government employment appearing in an agency's regulations.  
3

4 While some disabilities may be well-known, such as disenfranchisement and the firearms  
5 prohibition, in most jurisdictions no judge, prosecutor, defense attorney, legislator or bureaucrat  
6 could identify all of the statutes that would be triggered by violation of the various offenses in the  
7 state's criminal code.<sup>29</sup> Although the information would be useful to many people, including  
8 judges, prosecutors, defense lawyers and those supervising individuals with convictions, as well  
9 as legislators and other policymakers, it would be extremely costly for any of them to develop the  
10 information on their own. The dispersion of these laws and regulations defeats the purpose of  
11 having published codes in the first place.  
12

13 Section 3(a) proposes that Revisors of Statutes create tables of statutes and regulations,  
14 with short descriptions of, and citations to, all provisions creating collateral sanctions and  
15 disqualifications. These tables would not be positive law, but would be appendices to the  
16 relevant titles of the state code, and the code of regulations, and would be made available  
17 separately. These tables would create a single document that readers could consult to understand  
18 the state of the law. No substantive change in the meaning of the laws is intended through this  
19 compilation, and the tables would so state. Yet, collecting collateral sanctions from a state's  
20 code and administrative regulations, and describing them in simple, plain language, would make  
21 the formal written law knowable to those who use and will be affected by it.  
22

23 Some states do not have codified regulations. In those states, the law should require  
24 boards, agencies and other promulgators of regulations to notify the revisor of statutes of new  
25 regulations creating collateral sanctions or disqualifications.  
26

27 Although these tables would not replace the underlying law they describe, they should be  
28 officially published as appendices to states' codes. This would assist in ensuring that the tables  
29 remain current and complete; if published unofficially, they might well go out of date. Further,  
30 including the tables in the codes will give legislators an opportunity to examine the state's  
31 collateral sanctions as a collection. At the moment, it is virtually impossible for policymakers  
32 and the public to make informed judgments about whether collateral sanctions are overabundant,  
33 just right, or insufficient.  
34

35 The ABA Standards recommended formal codification, i.e., removing such provisions  
36 from their current locations and transferring them in toto to a new title. *See* ABA CRIMINAL  
37 JUSTICE STANDARD 19-2.1. However, this might leave the amended laws confusing and difficult  
38 to understand, and most of the benefit of full codification can be achieved by creating the  
39 summary proposed here.  
40

41 Once the new tables are created, they should be made available widely; this is the goal of

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<sup>29</sup> See footnote 20, *supra*, for a listing of state compilations.

1 Section 3(c). For each state, the table from the codes and administrative code will present only  
2 part of the picture: also relevant are sanctions imposed by the state Constitution, and any  
3 provisions available for relief. These four categories of information largely cover the area, and  
4 for the benefit of those who do not have ready access to a full set of the state code and  
5 administrative regulations, should be made available as a body. Certainly these documents  
6 should be viewable and downloadable on the Internet without charge, and if feasible distributed  
7 as a hardcopy booklet.  
8

#### 9 **SECTION 4. ADVISEMENT AT SENTENCING OR UPON RELEASE.**

10 (a) If an individual convicted of a crime is not sentenced to a term of imprisonment or  
11 other incarceration, the court at the time of sentencing shall provide written notice that collateral  
12 sanctions and disqualifications may apply to the individual and that the law provides ways to  
13 obtain relief from some of them. The court shall also give the individual appropriate information  
14 about public and private agencies that offer assistance to individuals seeking relief from  
15 collateral sanctions and disqualifications.

16 (b) Within 30 days before release, an officer or agency releasing an individual from  
17 imprisonment or other incarceration shall advise the individual that collateral sanctions and  
18 disqualifications may apply to the individual because of the conviction and that the law provides  
19 ways to obtain relief from some of them. The officer or agency shall also give the individual  
20 appropriate information about public and private agencies that offer assistance to individuals  
21 seeking relief from collateral sanctions and disqualifications.

#### 22 **Comment**

23 [Question from Style Committee to Drafting Committee: "Should incarceration be defined?"]

24 Section 10 of this Act contemplates that individuals will get notice of collateral sanctions  
25 at the time of arraignment, but many defendants will have received notice months or years before  
26 release from custody, and therefore are likely to have no recollection of what they were told.  
27 Individuals in prison, of course, are subject to strict rules which are well known so there would

1 generally be little value in informing prisoners about the largely theoretical additional level of  
2 regulation. However, once individuals with convictions are no longer in the physical custody of  
3 the criminal justice system, they should be informed that their conduct and status is subject to  
4 special restriction. The point is not fairness to the defendant in making the decision how to  
5 plead; the conviction by this stage is a fact. Rather, formal advisement promotes enforcement of  
6 the law. If, for example, individuals convicted of felonies do not know they are prohibited from  
7 possessing firearms, they may violate the law out of ignorance when they would have complied  
8 with the law had they known.<sup>30</sup> In *Lambert v. California*,<sup>31</sup> the Court found a due process  
9 violation in convicting an individual with a felony conviction of violation of a registration  
10 provision of which she had no knowledge or reason to know.

11  
12 This section also requires notice of provisions of law providing for relief from collateral  
13 sanctions.<sup>32</sup> To the extent that states provide for relief, they have concluded that it is fair to the  
14 individual and beneficial to society to let at least some individuals with convictions pay their debt  
15 to society and move on. Notification to all individuals with convictions will facilitate the  
16 participation of deserving but legally unsophisticated individuals. Failure to provide notice as  
17 contemplated in Section 4 does not invalidate the applicability of the collateral sanctions, or  
18 provide a cause of action for money damages.

19  
20 The notice contemplated by this section is modest. There is no right to counsel upon  
21 being discharged from prison, probation or parole. The note could be a line printed on a form  
22 ordinarily issued in the course of processing an individual, stating:

23  
24 You should be aware that a number of legal restrictions apply to individuals  
25 convicted of criminal offenses, including restrictions on their ability to possess

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<sup>30</sup> See, e.g., *United States v. Bethurum*, 343 F.3d 712 (5<sup>th</sup> Cir. 2003) (defendant properly convicted of being felon in possession of a firearm, notwithstanding claim that he would not have pleaded guilty had he realized he would not be entitled to possess a firearm); *Sadiq v. State*, 387 N.W.2d 315 (Iowa) (affirming conviction in spite of defendant's claim that he was not told he could not possess a firearm), *appeal dismissed*, 479 U.S. 878 (1986).

<sup>31</sup> 355 U.S. 225 (1957).

<sup>32</sup> Several states require by statute or court rule that this information be made available, others no doubt make it available by policy or informally. See, e.g., NEB. REV. STAT. § 29-2264(1) (order on completion of probation "shall include information on restoring other civil rights through the pardon process, including application to and hearing by the Board of Pardons"); AZ. R. CRIM. P. 29.1 ("Prior to his or her absolute discharge, a probationer shall receive from his or her probation officer, or the court if there is no probation officer, a written notice of the opportunity to have his or her civil rights restored, to withdraw his or her plea of guilty or no contest, or to vacate his or her conviction."); 15 CAL. CODE REGS. § 2511(B)(7) (requiring advice to parolees of "procedure for obtaining a Certificate of Rehabilitation"); N.Y. R. UNIF. TRIAL COURTS § 200.9(a) ("Whenever a defendant has been sentenced to a period of probation . . . and if such defendant is apparently eligible . . . the probation officer . . . shall inform the defendant of his right to make application . . . for a certificate of relief from disabilities, and shall provide such defendant with the required forms . . . to make application to the court if he or she should wish to do so.") cf. MD. CODE, CRIM PROC. § 6-232(a) (requiring notice of right to have conviction expunged in certain circumstances); MD. RULES, Rule 4-329 (same).

1 firearms. The list of restrictions imposed by the law of this state, and the  
2 available legal procedures for getting them removed, is available on the internet at  
3 <http://www.doc.gov/collateralsanctions>. The Legal Aid Society offers a program  
4 to assist individuals with convictions in obtaining relief from legal barriers.  
5

## 6 **SECTION 5. EFFECT OF REVERSAL, VACATION OR NULLIFICATION.**

7 (a) A conviction does not give rise to a collateral sanction or disqualification if the  
8 conviction has:

9 (1) been reversed, vacated, or otherwise set aside on appeal or in post-conviction  
10 proceedings by a court in the jurisdiction where the conviction was obtained or by a court of the  
11 United States; or

12 (2) been the subject of a full and unconditional pardon [in this state] [in the  
13 jurisdiction of conviction].

14 (b) A conviction does not give rise to a collateral sanction if it is the subject of a  
15 certificate of good conduct issued under Section 9 [or in another state], or been nullified,  
16 expunged, set aside, or vacated.

17 (c) For the purpose of imposing a collateral sanction or disqualification, an arrest,  
18 accusation, complaint, indictment, information, or other proceeding not leading to a conviction,  
19 is not evidence that any fact alleged in the course of the associated proceeding is true.

### 20 **Comment**

21 Section 5 regulates the application of collateral sanctions by defining conviction. It  
22 excludes convictions which were found to have been the result of an miscarriage of justice by a  
23 court of competent jurisdiction; convictions which have been reversed or otherwise set aside; and  
24 pardoned convictions. Section (a)(4) provides that a conviction covered by a one of the forms of  
25 relief based on rehabilitation shall not count for purposes of imposing collateral sanctions.  
26

27 Section 5(b) makes clear that arrests or charges not leading to conviction cannot be the



1 basis for imposing a collateral sanction, nor can they constitute evidence that the accusation is  
2 true. However, nothing prohibits an arrest from being the basis for further inquiry, or the  
3 underlying facts being the basis for disqualification.  
4

5 **SECTION 6. LIMITATION OF COLLATERAL SANCTIONS AND**  
6 **DISQUALIFICATION RELATED TO EMPLOYMENT, EDUCATION, HOUSING, AND**  
7 **LICENSING [TO PREVENT RECIDIVISM AND PROMOTE PUBLIC SAFETY.]**

8 (a) In this section, “state” means:

9 (1) the state acting directly and through its departments, agencies, officers, or  
10 instrumentalities, including municipalities, subdivisions, educational institutions, boards, and  
11 commissions, or their employees, and

12 (2) government contractors (including subcontractors of any degree) made subject  
13 to this section by contract, statute or ordinance.

14 (b) Except as provided in subsection (d), the state, solely because of an arrest or criminal  
15 charge that is not pending, or a conviction for which an individual is not currently incarcerated,  
16 may not:

17 (1) refuse to hire, or otherwise discriminate against an applicant with respect to  
18 the compensation, terms, conditions, or privileges of employment; [or]

19 (2) refuse to admit, or otherwise discriminate against an applicant with regard to  
20 an educational opportunity or housing[; or] [.]

21 [(3) suspend, revoke, or refuse to issue or renew a license, permit, or certificate  
22 necessary to practice or engage in an occupation, profession, trade, or business.]

23 (c) The state may exclude an applicant, after individualized inquiry, from employment,

1 educational opportunities, housing, or licensing [on grounds related to] [based on] a prior  
2 conviction if the decision-maker determines, based on any relevant facts and circumstances,  
3 including any relevant facts and circumstances of the prior conviction, that the individual is  
4 presently not qualified. In determining whether the prior conviction renders the individual  
5 presently unqualified for the opportunity at issue, the following factors must be considered:

6 (1) any increased risk to the safety or welfare of individuals or the public if the  
7 opportunity is granted, including whether granting the opportunity will provide an occasion for  
8 the commission of similar offenses;

9 (2) whether granting the employment, educational opportunity, housing or license  
10 at issue will facilitate the individual's reintegration into society, and thereby promote public  
11 safety, reduce recidivism, and encourage civic and individual responsibility, including the  
12 obligation of all individuals to support themselves and their families;

13 (3) the facts and circumstances underlying the crime and their relation, if any, to  
14 the duties or functions of the occupation, profession, or educational opportunity;

15 (4) the individual's rehabilitation and conduct since the offense, including  
16 whether the individual has committed an offense since conviction, and whether the individual has  
17 received a certificate of good conduct under Section 9 or certificate of relief from collateral  
18 sanctions under Section 8;

19 (5) the individual's age when the offense was committed;

20 (6) the time elapsed since commission of the offense and since release; and

21 (7) whether other individuals who engaged in the prohibited conduct underlying  
22 the applicant's conviction, whether or not convicted, would be disqualified.

(d) Subsection (b) is not applicable to law enforcement agencies including the state attorney general, prosecutor's offices, police departments, sheriffs' departments, the state police, and the department of corrections. [However, law enforcement agencies in their discretion may consider employment applications from individuals with criminal records).]

(e) This section does not create a private right of action for damages and does not eliminate any legal right or remedy.

### Comment

The principle that at least some licenses and employment opportunities should not be arbitrarily denied to people with criminal convictions is well established in state codes. As Margaret Love's research shows,<sup>33</sup> more than 30 states have statutory restrictions on collateral sanctions and disqualifications imposed by state actors. Many of these statutes seem to be based on the Model Sentencing and Corrections Act. These restrictions fall into four categories:

Hawaii,<sup>34</sup> New York,<sup>35</sup> Pennsylvania<sup>36</sup> and Wisconsin<sup>37</sup> regulate consideration of a conviction in public and private employment and occupational licensure.

Arizona,<sup>38</sup> California,<sup>39</sup> Colorado,<sup>40</sup> Connecticut,<sup>41</sup> Florida,<sup>42</sup> Kentucky,<sup>43</sup> Louisiana,<sup>44</sup> Minnesota,<sup>45</sup> Missouri,<sup>46</sup> New Jersey,<sup>47</sup> New Mexico,<sup>48</sup> and Washington<sup>49</sup> prohibit disqualification from public employment and occupational licensure solely on grounds of conviction, but do not

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<sup>33</sup> See MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE, Ch. 4 (William S. Hein & Co., forthcoming 2006).

<sup>34</sup> HAW. REV. STAT. § 831-3.1.

<sup>35</sup> N.Y. CORRECTIONS L. §§ 750-56.

<sup>36</sup> 18 PA. C.S. ANN. § 9124-25.

<sup>37</sup> WISC. STAT. ANN. § 111.321 & § 111.335.

<sup>38</sup> AZ. REV. STAT. § 13-904(E).

<sup>39</sup> CAL. BUS. & PROF. CODE §§ 490, 493. See also CAL. CODE REGS. Tit. 2, § 7287.4(d)(1)(B).

<sup>40</sup> COLO. REV. STAT. § 24-5-101.

<sup>41</sup> CT. GEN. STAT. ANN. § 46a-80.

<sup>42</sup> FLA. STAT. ANN. § 112.011.

<sup>43</sup> KY. REV. STAT. § 335B.020.

<sup>44</sup> LA. STAT. ANN.-R.S. 37:2950.

<sup>45</sup> MINN. STAT. ANN. § 364.01-.10.

<sup>46</sup> ANN. MISSOURI STAT. §§ 314.200 & 561.016.

<sup>47</sup> N.J. STAT. ANN. §§ 2A:168A-1 & 2C:51-1.

<sup>48</sup> NEW MEX. STAT. ANN. §§ 28-2-1 to 28-2-6.

<sup>49</sup> WASH. REV. CODE ANN. § 9.96A.020.

1 regulate private employment. Kansas<sup>50</sup> prohibits disqualification from public and private  
2 employment but does not regulate occupational licensing.

3  
4 Arkansas,<sup>51</sup> Delaware,<sup>52</sup> Indiana,<sup>53</sup> Maine,<sup>54</sup> Michigan,<sup>55</sup> Montana,<sup>56</sup> North Dakota,<sup>57</sup>  
5 Oregon,<sup>58</sup> South Carolina<sup>59</sup> Texas<sup>60</sup> and Virginia<sup>61</sup> regulate occupational licensing but not  
6 employment.

7  
8 Illinois<sup>62</sup> Massachusetts,<sup>63</sup> Ohio,<sup>64</sup> Oklahoma, and West Virginia<sup>65</sup> bar consideration of a  
9 conviction only when rights have otherwise been restored or a conviction vacated or expunged.

10  
11 Although the laws vary in specifics, most statutes provide that a conviction shall not be  
12 an absolute bar. However, almost all also permit the conviction or the facts underlying it to be  
13 weighed by the decision-maker on a case by case basis, depending on whether it is “directly” or  
14 “substantially” related to the employment or license at stake.

15  
16 The principle that convictions should be disqualifying only if related to the current  
17 opportunity is deep in the law. Of the minority of states without general laws, many nevertheless  
18 require some sort of nexus in the context of at least one licensing or regulatory regime. At least  
19 10 states use the test alone,<sup>66</sup> at least 7 others provide that a felony *or* a crime substantially

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<sup>50</sup> KAN. STAT. ANN. § 22-4710.

<sup>51</sup> ARK. CODE ANN. § 17-1-103(a).

<sup>52</sup> 75 DEL. LAWS c. 262.

<sup>53</sup> IND. CODE § 25-1-1.1-1.

<sup>54</sup> 5 MAINE REV. STAT. ANN. § 5301.

<sup>55</sup> MICH. COMP. LAWS ANN. § 338.42.

<sup>56</sup> MONT. CODE ANN. § 37-1-201.

<sup>57</sup> N.D. CENT. CODE, 12.1-33-02.1.

<sup>58</sup> OR. REV. STAT. § 670.280.

<sup>59</sup> S. C. CODE § 40-1-140.

<sup>60</sup> TEX. OCCUPATIONS CODE ANN. § 53.021(a).

<sup>61</sup> VA. CODE ANN. § 54.1-204.

<sup>62</sup> 775 ILL. COMP. STAT. 5/2-103; *see also* 730 ILL. COMP. STAT. 5/5-5-5 (describing certificate of relief from disabilities).

<sup>63</sup> MASS. GEN. LAWS ANN. 127 § 152; *see also* MASS. GEN. LAWS ANN. ch. 151B § 4(9).

<sup>64</sup> OHIO REV. CODE § 2953.33(B).

<sup>65</sup> W. VA. CODE, § 5-1-16a.

<sup>66</sup> *See, e.g.*, ALA. CODE § 34-1A-5 (d)(2)a (“An applicant [for an alarm system installer license] shall not be refused a license solely because of a prior criminal conviction, unless the criminal conviction directly relates to the occupation or profession for which the license is sought.”); IOWA CODE ANN. § 147.3 (health related professions licensing; “A board may consider the past felony record of an applicant only if the felony conviction relates directly to the practice of the profession”); MASS. GEN. LAWS ANN. 112 § 52D (“The board . . . may [discipline] any dentist convicted . . . of a felony related to the practice of dentistry”); MD. R. 4-340(e) (procedures required after sentencing in drug crime cases) (“If the defendant holds a license, but has no such prior conviction, the court shall determine whether, *prima facie*, there is a relationship between the current conviction and the license, including” [then listing factors]); MISS. CODE § 73-67-27(1)(e) (license may be denied or revoked if individual has conviction or charges “that directly relates to the practice of massage therapy or to the ability to practice massage therapy.”); NEB. REV. STAT. §

1 related to the license or occupation is disqualifying.<sup>67</sup> Accordingly, the states are virtually  
2 unanimous in holding that in some instances, criminal convictions should be considered not as a  
3 broad category, but based on their specific facts and circumstances, as they relate to the license,  
4 privilege or employment at issue. Collateral sanctions are meant to protect public welfare and  
5 safety, not inflict arbitrary and needless harms. Accordingly, as reflected by the laws already on  
6 the books, most states agree that it is important whether a conviction relates to fitness to engage  
7 in a particular occupation or to obtain a particular license. Other informed observers agree; for  
8 example, the National District Attorneys Association, while supporting collateral sanctions  
9 necessary to protect the public, states that “[r]elief from some collateral sanctions may be  
10 appropriate if they do not relate to the conduct involved in the offense of conviction.”<sup>68</sup>  
11

12 At one level, these prohibitions are not surprising. Frequently, conditions of parole,  
13 probation, or supervised release require employment or educational training, and stable housing.  
14 Accordingly, the law recognizes that these factors promote rehabilitation and reintegration, and  
15 may be necessary for it. However, it must be acknowledged that even in states with broad  
16 protective legislation, the principle is honored, to some extent, in the breach. Many statutes and  
17 regulations can be identified, even in these states, which conflict with the non-discrimination

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87-404 (franchise termination protections inapplicable when “the alleged grounds are (a) the conviction . . . an indictable offense directly related to the business”); NEV. REV. STAT. § 625.410(4) (discipline permissible based on “Conviction of . . . any crime an essential element of which is dishonesty or which is directly related to the practice of engineering or land surveying”); N.C. GEN. STAT. ANN. § 88A-21(a)(1) (grounds for discipline include “Conviction of [a crime] if any element of the crime directly relates to the practice of electrolysis.”); 59 OK. STAT. ANN. § 1503A(B) (requiring rejection of “an applicant who has a felony conviction which directly relates to the duties and responsibilities of the occupation of pawnbroker.”); VERNON’S TEXAS STAT. & CODES ANN., GOVERNMENT CODE § 52.029(a)(6) (discipline permitted for “a final conviction of a felony or misdemeanor that directly relates to the duties and responsibilities of a certified court reporter”).

<sup>67</sup> See, e.g., ALASKA STAT. § 08.68.270 (“The board may [discipline] a person who . . . (2) has been convicted of a felony or other crime if the felony or other crime is substantially related to the qualifications, functions or duties of the licensee”); IDAHO CODE § 54-2103(23) (“In good standing” means that an applicant: (e) Has not been convicted of a felony . . . ; and (f) Has no criminal conviction record or pending criminal charge relating to an offense the circumstances of which substantially relate to the practice of veterinary medicine.”); 225 ILL. COMP. STAT. ANN. 2/110(a)(2) (discipline permitted against licensed acupuncturist for “Conviction of any crime under the laws of any U.S. jurisdiction that is (I) a felony, (ii) a misdemeanor, an essential element of which is dishonesty, or (iii) directly related to the practice of the profession.”); R.I. STAT. ANN. § 23-16.3-12 (3) (discipline of clinical laboratory scientists authorized for “A conviction . . . which is a felony or which is a misdemeanor, an essential element of which is dishonesty, or of any crime which is directly related to the practice of the profession”); UTAH CODE ANN. § 13-12-3(6)(b) (restricting franchise termination except “Where the alleged grounds are caused by the conviction of the dealer or distributor . . . of a criminal offense directly related to the business”); 26 VT. STAT. ANN. § 2424(e) (“As used in this section, “in good standing” means that the applicant: . . . (5) has not been convicted of a felony; or (6) has no criminal conviction record nor pending criminal charge relating to an offense that relates substantially to the practice of veterinary medicine.”); ANN. CODE W. VA. § 30-3-14(c)(2) (discipline authorized for: “Being found guilty of a crime in any jurisdiction, which offense is a felony, involves moral turpitude or directly relates to the practice of medicine.”)

<sup>68</sup> See, e.g., NATIONAL DISTRICT ATTORNEY’S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY ISSUES § 7, at 10 (Adopted July 17, 2005).

1 provisions by imposing absolute bars even in the absence of a general or fact-specific  
2 determination that the offense is “directly related” to the sanction.  
3

4 Section 6 is based on the Model Sentencing and Corrections Act, § 4-1005. However, the  
5 provision in this draft does not identify a list of prohibited collateral sanctions, as do the Model  
6 Sentencing and Corrections Act and the ABA Standards. The Model Sentencing and Corrections  
7 Act, § 4-1001(b) provides that a convicted individual “retains all rights, political, personal, civil  
8 and otherwise”, including, among others it lists, the right to vote. The ABA Standards has a list  
9 of sanctions which should never be imposed under any circumstances, such as “deprivation of the  
10 right to vote, except during actual confinement.” (ABA CRIMINAL JUSTICE STANDARD 19-2.6(a)).  
11

12 Section 6(a) differs from the original by limiting its coverage to state actors, excluding  
13 private employers. Regulation of public employment and licensing is less controversial than  
14 would be reaching into the decisions of private businesses. In addition, public employment and  
15 licensing are often done with the public interest in mind (for example, in the context of veteran’s  
16 preferences, or reserved opportunities for the disabled). If any category of employer is going to  
17 take a chance by helping individuals with convictions, it is likely to be the public sector.<sup>69</sup>  
18

19 However, Section 6(a) contemplates that private corporations performing government  
20 functions or services might, by contract or statute, be made subject to these restrictions. It is far  
21 less intrusive to ask private companies who choose to do business with the state to comply with a  
22 policy like this; if a private company finds it objectionable, they may forego the business.  
23 Further, even if this is not a point upon which uniformity is likely, this section is not meant to  
24 discourage states from deciding on their own that private employers as a group should be  
25 covered; some now do and there is no reason they should not continue if it works for them.  
26 States should examine their laws governing public employment and licensing to ensure that they  
27 conform to this policy.  
28

29 Section 6(b) establishes the general principle that blanket collateral sanctions will not be  
30 created with respect to employment, admission to educational institutions and licensing. It  
31 applies both to formal and informal policies, and individual decisions. This provision is similar  
32 to the MSCA in that in effect it contemplates that there will be no categorical, absolute collateral  
33 sanctions in the employment and licensing context. Everything, it appears, will be dealt with on  
34 a case-by-case basis. However, when adopted by a state, inevitably there will be at least a  
35 handful of exceptions; individuals with recent armed robbery convictions, for example, will not  
36 be permitted to have pistol permits; pedophiles will not receive licenses to operate day care  
37 centers. Nevertheless, it should serve as a reminder of the principle that blanket collateral  
38 sanctions should be sharply limited to the situations where they are genuinely necessary.  
39

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<sup>69</sup> See, e.g., Editorial, *Cities that Lead the Way*, N.Y. TIMES, Mar. 31, 2006 (discussing anti-discrimination policies regarding individuals with conviction for city agencies and city contractors in Boston, Chicago and San Francisco).

1 Section 6(c) describes the factors relevant to a case by case analysis of a conviction.  
2 Eleven states have as positive law the policy set forth in (f)(1), sometimes as a preamble to their  
3 statute, sometimes as a licensing factor, as here.<sup>70</sup>  
4

5 Section 6(c)(6) uses the passage of time as a factor. Some jurisdictions have a term of  
6 years, after which, if the individual has not been convicted of another crime, rehabilitation is  
7 presumed.<sup>71</sup>  
8

9 Factor (c)(7) is designed to determine whether the disqualification is based on conduct or  
10 conviction. If the Plumber's Board grants licenses to those, say, who were fired from a job or  
11 suspended from school for marijuana possession, then it is probably not unreasonably dangerous  
12 or risky to public safety to allow an applicant who was convicted of precisely the same conduct  
13 to have a license to practice. On the other hand, if the agency would deny a position to a school  
14 bus driver applicant who had his child taken away in a civil action based on child abuse, that is  
15 strong evidence that a conviction for child abuse is directly related to fitness for the  
16 employment.<sup>72</sup> Nothing in this section is meant to authorize or require preferences for applicants  
17 who have criminal convictions.  
18

19 Section 6(d) differs from the Model Sentencing and Corrections Act by allowing law  
20 enforcement employers to bar individuals based on conviction, rather than on a case by case  
21 analysis. Arizona, Colorado, Florida, Hawaii, Louisiana, [MN?], New Mexico and New York  
22 specifically exclude law enforcement from the coverage of their statutes, and undoubtedly many  
23 others, not mentioning it specifically, do so in practice.<sup>73</sup> Another collateral sanction which will  
24 might well be part of state law in the future is limitation of the ability of sex offenders to work in  
25 schools, hospitals and with the elderly.<sup>74</sup> That agencies are allowed to discriminate because  
26 exempted from the general rules does not mean they do; it is clear that some jurisdictions allow  
27 individuals with criminal records to be, for example, law enforcement officers, even though they

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<sup>70</sup> ARK. CODE ANN. § 17-1-103(a) (“(1) It is the policy of the State of Arkansas to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the assumption of the responsibilities of citizenship. (2) The public is best protected when offenders are given the opportunity to secure employment or to engage in a meaningful trade, occupation, or profession.”); COLO. REV. STAT. ANN. § 24-5-101(2); CT. GEN. STAT. ANN. § 46a-79; 730 ILL. COMP. STAT. 5/5-5-5(h) (recognizing “the public policy of this State, as expressed in Article 5.5 of this Chapter, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses”); MINN. STAT. ANN § 364.01; MONT. CODE ANN. § 37-1-201; N.J. STAT. ANN. 2A:168A-1; N. M. STAT. ANN. § 28-2-2; N.Y. CORRECTIONS L. § 753 (factor in evaluating decision); REV. CODE WASH. ANN. § 9.96A.010; WISC. STAT. ANN. § 111.31.

<sup>71</sup> See, e.g., N.M. STAT. ANN. § 28.2.4(B) (three years after imprisonment or completion of parole and probation); N.D. CENT. CODE § 12.1-33-02.1(2)(c) (five years after discharge from parole, probation or imprisonment).

<sup>72</sup> ABA CRIMINAL JUSTICE STANDARD 19-3.1 (“The legislature should prohibit discretionary disqualification of a convicted person from benefits or opportunities . . . on grounds related to the conviction, unless engaging in the conduct underlying the conviction would provide a substantial basis for disqualification even if the person had not been convicted.”)

<sup>74</sup> See, e.g., 5 ME. REV. STAT. ANN. § 5301(2)(E); WASH. REV. CODE § 9.96A.020(3) & (4).

1 may not be required to let them compete for those jobs.  
2

3 It must be considered whether providing for categorical exceptions invites their  
4 proliferation. An alternative might be to require case-by-case consideration across the board,  
5 even for law enforcement jobs, while permitting agencies to apply presumptions that individuals  
6 with specified criminal convictions should not be hired.  
7

8 **SECTION 7. COLLATERAL SANCTIONS TO BE ESTABLISHED ONLY WITH**  
9 **AUTHORIZATION OF LEGISLATURE.** A regulation, ordinance, or policy may not impose  
10 a collateral sanction without specific statutory authorization. A general grant of authority to  
11 make regulations, ordinances or policies, or a grant of authority to establish good moral character  
12 standards or other criteria for hiring, licensing, or admission to educational programs may not be  
13 interpreted as granting the specific authorization required by this section, but may constitute  
14 authority to take the facts underlying a conviction into account on a case by case basis. A  
15 regulation, ordinance, or policy that by its terms imposes a collateral sanction without specific  
16 authorization shall be interpreted as imposing a disqualification.

17 **Comment**

18 A statute like this represents a policy direction, which a legislature might wish to make  
19 permanent. Yet, short of amending a state constitution or the U.S. Constitution, a given  
20 legislature cannot absolutely bind future legislatures. Thus, the approach of the ABA Criminal  
21 Justice Standards, essentially to ban collateral sanctions in most circumstances,<sup>75</sup> cannot be  
22 effectively accomplished through a mere statute—although at any given moment a legislature  
23 might accept it, a future legislature is free to go in a different direction.  
24

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<sup>75</sup> ABA CRIMINAL JUSTICE STANDARD 19-2.2 provides:

The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting the particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified.



1           Nevertheless, a state legislature can enact legislation constraining and channeling the  
2 creation and imposition of collateral sanctions. Section 7 represents one possible solution. This  
3 provision is designed to restrict creation of absolute, blanket collateral sanctions to the  
4 legislature. Individual agencies, municipalities and boards may not be equipped or inclined to  
5 consider large policy questions when drafting ordinances and regulations. Accordingly, in order  
6 to, say, simplify their own decision- making, or because they did not think deeply about the issue,  
7 a board might impose absolute bans on some or all individuals with criminal convictions under  
8 circumstances when the legislature as a whole would find a categorical policy unwarranted. The  
9 idea of Section 7 is to require that such determinations be made by the legislature itself, which  
10 considers the welfare of the state as a whole in addition to the concerns of the licensed  
11 occupation or profession, or of the particular locality.  
12

### 13           **SECTION 8. CERTIFICATE OF RELIEF FROM COLLATERAL SANCTIONS.**

14           (a) On motion of an individual convicted of an offense or on its own motion, a court of  
15 this State which has sentenced an individual may at any time issue to that individual a certificate  
16 of relief from one or more collateral sanctions relating to housing, public benefits, education,  
17 licensing, or employment. The court shall give notice of the pendency of a motion for a  
18 certificate of relief to the [prosecuting authority in this state], which may appear and participate.  
19 The court shall issue a certificate if, after reviewing the record including the individual's criminal  
20 history and any response, the court finds that relief from collateral sanctions is consistent with  
21 public safety, and would assist the individual in maintaining employment, re-entering the  
22 community, and living a law-abiding life.

23           (b) When an individual is subject to a collateral sanction under the law of this state based  
24 on a criminal conviction in another jurisdiction, the [trial court of general jurisdiction in this  
25 state] of the county where the individual lives or works or plans to live or work may, on motion  
26 of the individual, issue a certificate of relief from one or more collateral sanctions relating to  
27 housing, public benefits, education, licensing, or employment. The court shall serve a copy of

1 the application on the [prosecuting authority in this state], which may appear and participate.  
2 The court shall issue the certificate if, after reviewing the record, including the individual's  
3 criminal history, and any response filed, the court finds that relief from collateral sanctions is  
4 consistent with public safety, and would assist the individual in maintaining employment,  
5 reentering the community, and living a law-abiding life.

6 (c) A certificate of relief from collateral sanctions relieves the individual from the  
7 collateral sanctions specified in the certificate but does not preclude a decision-maker from  
8 considering the facts underlying the conviction or that the facts have been established by the  
9 judgment of conviction. A decision-maker who is part of the state as defined in Section 6(a)  
10 shall evaluate the underlying facts using the factors set forth in Section 6(c).

11 (d) On motion, a certificate may be amended to relieve the applicant from additional  
12 collateral sanctions. A certificate of relief from collateral sanctions may be revoked by the  
13 issuing court for cause, and is revoked if the holder is convicted of a felony.

#### 14 **Comment**

15 [Question from the Style Committee: "Does the fact of notice imply an opportunity to be  
16 heard?"]  
17

18 All or virtually all states have pardons; about half the states also have expungement,  
19 sealing, set-aside, vacation, or some other mechanism for restoring civil rights or avoiding  
20 collateral sanctions.<sup>76</sup> It would be difficult to achieve wide adoption of a uniform law in this  
21 area. This provision is designed to come at the problem a different way, by creating a piece of  
22 credible information that will be useful to decision-makers.  
23

24 At one level, the "certificate of rehabilitation" is well-recognized in American law. The  
25 Federal Rules of Evidence and the rules of evidence of many states provide that an individual

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<sup>76</sup> See LOVE, *supra* note 33, Ch. 2 (pardon); Ch. 3 (expungement, sealing, set aside).

1 cannot be impeached with a conviction that has been subject to a certificate of rehabilitation.<sup>77</sup>  
2 Other statutes provide that other collateral sanctions will be inapplicable to convictions subject to  
3 a certificate of rehabilitation,<sup>78</sup> or a “certificate of good conduct.”<sup>79</sup>  
4

5 Yet, many states referring to certificates of rehabilitation in their laws do not have  
6 common law or statutory procedures for issuing them.<sup>80</sup> Evidently, only California, Illinois,  
7 Mississippi and New York have statutory procedures for their issuance.<sup>81</sup> California  
8 administrative regulations instruct some boards to take them into account in making licensing

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<sup>77</sup> See FED. R. EVID. 609(c); ARK. CODE ANN. § 16-41-101, Rule 609(c); D.C. CODE § 14-305(b)(2)(A)(ii); GUAM CODE ANN. § 609(c); IND. R. EVID. 609(c); MAINE R. EVID. 609(c); MICH. R. EVID. R. 609(d); N.H. R. EVID. 609(c); N.M. R. EVID. 11-609(C)(1); OK. STAT. ANN. § 2609(C)(1); S.C. R. EVID. 609(c)(1); S.D. CODE § 19-14-14(1); TEX. R. EVID. 609(c)(1); UTAH R. EVID. 609(c)(1); WASH. R. EVID. 609(c); W. VA. R. EVID. 609(c).

<sup>78</sup> See REV. CODE WASH. ANN. § 9.41.040(3) (firearms prohibition inapplicable if certificate of rehabilitation); N.J.S.A. 2A:168A-3 (“The presentation to a licensing authority of evidence of a pardon or of the expungement of a criminal conviction, pursuant to N.J.S. 2A:164-28, or of a certificate of the Federal or State Parole Board, or of the Chief Probation Officer of a United States District Court or a county who has supervised the applicant’s probation, that the applicant has achieved a degree of rehabilitation indicating that his engaging in the proposed employment would not be incompatible with the welfare of society shall preclude a licensing authority from disqualifying or discriminating against the applicant.”).

<sup>79</sup> See 24 DEL. CODE ANN. § 5213(c) (“If a person convicted of a crime that is substantially related to nursing home administration is subsequently pardoned by the governor of the state where such conviction was had or by the President of the United States or shall receive a certificate of good conduct granted by the Board of Pardons, the Board may at its discretion on application of such person and, on the submission of evidence satisfactory to the Board, restore to such person the nursing home administrator’s license.”); N.Y. PUB. HEALTH L. § 2897(2)(c) (similar); L.S.A.-R.S. § 37: 2511(C) (similar); N.H. REV. STAT. ANN. § 151-A:12 (II) (similar); 63 PA. STATS. PROFESSIONS AND OCCUPATIONS § 1113 (c) (similar); *see also* GA. CODE ANN. § 25-4-8 (b) (conviction does not count for firefighter certification purposes if “the person . . . shall have received a pardon therefor . . . in the jurisdiction where the conviction was had or shall have received a certificate of good conduct granted by the State Board of Pardons and Paroles pursuant to the provisions of law to remove a disability under law because of such conviction.”); N.J. STAT. ANN. § 32:23-80 (disqualifying from union activities based on convictions “unless he has been subsequently pardoned therefor . . . or has received a certificate of good conduct or other relief from disabilities arising from the fact of conviction from a board of parole or similar authority.”); N.Y. ALCOHOLIC BEV. CONTROL LAW. § 126 (1) (disqualifying based on convictions, “unless subsequent to such conviction such person shall have received an executive pardon . . . , a certificate of good conduct granted by the board of parole, or a certificate of relief from disabilities granted by the board of parole or a court of this state. . . .”)

<sup>80</sup> *See, e.g.,* State v. Masangkay, 91 P.3d 140, 145 n.3 (Wash. App. 2004) (although state law referred to “certificates of rehabilitation” those references did not independently authorize courts to issue them) (citing State v. Buonafede, 814 P.2d 1381 (Ariz. 1991)).

<sup>81</sup> *See* CAL. PENAL CODE § 4852.01-.21; 730 ILL. COMP. STAT. ANN. § 5/5-5-5; MISS. CODE ANN. § 97-37-5(3) (“A person who has been convicted of a felony under the laws of this state may apply to the court in which he was convicted for a certificate of rehabilitation. The court may grant such certificate in its discretion upon a showing to the satisfaction of the court that the applicant has been rehabilitated and has led a useful, productive and law-abiding life since the completion of his sentence and upon the finding of the court that he will not be likely to act in a manner dangerous to public safety.”); N.Y. CORRECTIONS L. § 700-706.

determinations.<sup>82</sup> This section establishes a framework for issuance of certificates of rehabilitation.

Certificates of rehabilitation have two consequences. First, under Section 5(a)(4), a conviction which is subject to a certificate of rehabilitation would not count as a conviction for purposes of statutes imposing collateral sanctions. Section 5(b) in this respect follows the approach of the rules of evidence cited in Note 77.

## **SECTION 9. CERTIFICATE OF GOOD CONDUCT.**

(a) An individual convicted of a crime within or without this State who lives or works in this state may apply for a certificate of good conduct from the [trial court of general criminal jurisdiction] in the [county] where the individual lives or works. The court shall give notice of the application to [the prosecuting authority in this state], which may appear and participate. To obtain a certificate of good conduct, the applicant must show that:

(1) at least [five] years have elapsed since the most recent conviction of the applicant of any felony, or of a misdemeanor involving violence or moral turpitude, and since release from imprisonment or other incarceration imposed under that conviction;

(2) for the [five] years prior to issuance of the order the applicant has been engaged in, or seeking to engage in, a lawful occupation or activity, including employment, training, education, or rehabilitative programs or, if the individual is retired or disabled, that the individual has a lawful source of income;

(3) there is no unresolved intentional or unjustified failure to comply with the terms of any criminal sentence;

(4) there is no unresolved criminal charge pending against the applicant; and

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<sup>82</sup> See 10 CAL. CODE REGS. § 3723(A)(3) (real estate appraiser); 11 CAL. CODE REGS. § 933.3(A)(7) (home health care aide).

1           (5) if the applicant was convicted of an offense involving drugs or alcohol or, if  
2 the conduct underlying the criminal conviction involved drugs or alcohol, the result of any test  
3 required under subsection (b) does not show the use of illegal drugs.

4           (b) In connection with an application for a certificate of good conduct, the court may  
5 require any investigation it considers reasonably necessary, including the preparation of a report  
6 of the type prepared prior to sentencing an individual convicted of a crime.

7           (c) If the showings required under subsection (a) are made, the court may grant the  
8 application and issue a certificate of good conduct. The certificate shall identify the offenses of  
9 which the applicant was convicted.

10          (d) A certificate of good conduct removes collateral sanctions applicable under the law  
11 of this state but does not preclude a decision-maker from considering the facts underlying the  
12 conviction or that they are established by the judgment of conviction. A decision-maker who is  
13 part of the state as defined in Section 6(a) shall evaluate the underlying facts using the factors set  
14 forth in Section 6(c).

15          (e) A certificate of good conduct [issued in any jurisdiction] renders the underlying  
16 convictions inadmissible in a lawsuit alleging that a public or private decision-maker was  
17 negligent or otherwise at fault for hiring, retaining, licensing, leasing to, admitting to a school or  
18 program, or otherwise transacting with an individual, if the decision-maker had knowledge of the  
19 certificate at the time of the alleged negligence or other fault. A certificate of good conduct  
20 [issued in any jurisdiction] is admissible as evidence of due care by any person who had  
21 knowledge of it, in deciding to hire, retain, license, lease to, admit to a school or program, or  
22 otherwise interact with an individual.

1 (f) A certificate of good conduct is revoked if the holder is later convicted of a felony.

2 **Comment**

3 A certificate of rehabilitation also provides an objective basis for employers, landlords  
4 and other decision-makers to differentiate among individuals with convictions. Many employers  
5 and landlords will be willing to deal with people with criminal records, so long as they are now  
6 law-abiding. A certificate of rehabilitation will give them some assurance that that is the case.  
7 Decision-makers who rely on a certificate will have some legal protection under Section 9(e):  
8 The certificate is admissible in evidence should a lawsuit occur, as evidence of due care, but the  
9 underlying conviction is not.

10  
11 [To add to comments: tie in certificates with state criminal justice records; criminal  
12 offense to knowingly use revoked certificate?]

13  
14  
15 **SECTION 10. ADVISEMENT AT ARRAIGNMENT.**

16 (a) At the time an individual charged with an offense is arraigned, the court shall  
17 personally state, in substance, the following to the defendant:  
18 Conviction of this offense may have legal consequences beyond whatever imprisonment,  
19 supervision and fine are provided by law. These additional legal consequences may include, but  
20 are not limited to disqualifying you from obtaining a government license, permit, or employment;  
21 making you ineligible for public benefits, such as public housing; forfeiture of property;  
22 enhanced punishment if you are convicted of another crime; and limiting your civil rights, such  
23 as prohibiting you from voting or possessing a firearm. If you are not a citizen of the United  
24 States, conviction may result in your deportation, removal, exclusion from admission to the  
25 United States, or denial of naturalization.

26 (b) If the defendant is not arraigned in person, the notice provided in subsection (a) may  
27 be given in writing.

28 **Comment**

1  
2       *The Purpose of Advisement.* It is relatively uncontroversial that it is desirable for  
3 individuals pleading guilty to a criminal offense to understand the legal effects of that plea. It is  
4 fair to the individual pleading guilty, who is entitled to understand the consequences of the legal  
5 proceedings. It is also important for the court in sentencing<sup>83</sup> and to the prosecutor in making  
6 charging decisions and arguing for a particular sentence.<sup>84</sup> Most courts hold that under the due  
7 process clause of the Constitution, in order to make a guilty plea knowing, voluntary and  
8 intelligent, a defendant must be told of the term of imprisonment, fine, and post-release  
9 supervision that will result from their convictions. Identification of collateral sanctions beyond  
10 direct punishment need not be disclosed in order for a plea to be constitutionally valid.<sup>85</sup>  
11

12       Even in the absence of constitutional requirements, however, a majority of the states  
13 provide for disclosure of some collateral sanctions. The principal context is in the case of  
14 deportation of non-citizens. A number of court decisions hold that it is unnecessary to inform  
15 individuals pleading guilty of the possibility of deportation if they are not citizens of the United  
16 States.<sup>86</sup> Yet, at least two dozen jurisdictions by court rule or statute require advisement of  
17 potential deportation to those pleading guilty.<sup>87</sup> By court decision, Colorado and Indiana require  
18 advice of possible deportation, at least in some cases.<sup>88</sup>  
19

20       Other jurisdictions require advisement of other collateral sanctions. Indiana requires that  
21 the defendant be informed that they will “lose the right to possess a firearm if the person is  
22 convicted of a crime of domestic violence.”<sup>89</sup> Wyoming law requires the court to advise  
23 defendants “in controlled substance offenses [of] the potential loss of entitlement to federal

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<sup>83</sup> See, e.g., *United States v. Pacheco-Soto*, 386 F. Supp.2d 1198 (D.N.M. 2005) (downward departure based on deportable alien status); *State v. Yanez*, 782 N.E.2d 146, 155 (Ohio App. 2002) (noting that deportation may affect sentence); ABA CRIMINAL JUSTICE STANDARD 19-2.4(a) (“The legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender’s overall sentence”).

<sup>84</sup> See Robert M.A. Johnson, *Collateral Consequences, Message from the President of the National District Attorney’s Association*, May-June, 2001 ([http://www.ndaa-apri.org/ndaa/about/president\\_message\\_may\\_june\\_2001.html](http://www.ndaa-apri.org/ndaa/about/president_message_may_june_2001.html))

<sup>85</sup> See note 24, *supra*.

<sup>86</sup> See, e.g., *Broomes v. Ashcroft*, 358 F.3d 1251 (10th Cir. 2004); *Commonwealth v. Fuartado*, 2005 WL 2043680 (Ky. 2005).

<sup>87</sup> See U.S. DIST. CT. FOR THE DIST. OF COLO. LOCAL RULES § 3, App. K (form guilty plea notification requiring acknowledgment of possible deportation); AZ. R. CRIM. P. 17.2(f); CAL. PEN. CODE § 1016(5); CT. GEN. STAT. ANN. § 54-1j; D.C. STAT. § 16-713(a); FLA. R. CRIM. P. 3.170(C)(8); GA. CODE ANN. § 17-7-93(c); HAW. REV. STAT. § 802E-1 through E-3; 725 ILL. COMP. STAT. 5/113-8; IOWA R. CRIM. P. 2.8(2)(b)(3); ME. R. CRIM. P. 11(b)(5); MD. R. 4-242(e); MA. GEN. L. ANN. 278 § 29D; MA. R. CRIM. P. 12(c)(3)(C); MINN. R. CRIM. P. 15.01(10)(d); MONT. CODE ANN. § 46-12-210(1)(f); NEB. REV. STAT. § 29-1819.02(1); N.J. Dir. 12-03 (plea form promulgated pursuant to N.J. R. CRIM. P. 3-9); N.Y. CRIM. PROC. L. § 220.50(7); N.C. STAT. § 15A-1022(a)(7); OH. REV. CODE § 2943.031(A); OR. REV. STAT. § 135.385(d); R.I. GEN. L. § 12-12-22; TEX. CODE CRIM. P. ART. 26.13(a)(4); WASH. REV. CODE § 10.40.200(2); WISC. STAT. ANN. § 971.08(1)(c).

<sup>88</sup> See *People v. Pozo*, 746 P.2d 523 (Colo. 1987); *Segura v. State*, 749 N.E.2d 496 (Ind. 2001).

<sup>89</sup> IND. CODE § 35-35-1-2(a)(4).

1 benefits.”<sup>90</sup> Even jurisdictions not requiring advisement of particular collateral consequences  
2 often recognize that it is a good idea.<sup>91</sup>  
3

4 A majority of United States jurisdictions, then, require advice of at least one collateral  
5 sanction, showing broad support for the idea that sound public policy and fairness require advice  
6 beyond the constitutional floor. Yet, advising a defendant of one or more collateral sanctions  
7 without addressing all of them may be misleading. It could reasonably be understood to imply  
8 that the imprisonment, fine and other direct punishment, plus the collateral sanctions specifically  
9 mentioned, represent the totality of the legal effects of the conviction.<sup>92</sup> For example, it would be  
10 reasonable but incorrect for a defendant pleading guilty in Wyoming to assume that because the  
11 court advised that “federal benefits” might be lost, no state benefits, such as access to public  
12 housing, were at risk. For this reason, the provision requires that the court advise defendants  
13 about the potential for a broad range of sanctions in several categories. This is the approach of  
14 the American Bar Association Criminal Justice Standards.<sup>93</sup>  
15

16 One possible objection to advisement about applicable collateral sanctions is that if  
17 defendants actually know about the dozens or hundreds of negative legal effects of a criminal  
18 conviction, many will refuse to plead guilty. However, because the sanctions typically apply to a  
19 conviction by plea or jury verdict, pleading not guilty is not a means for a guilty individual to

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<sup>90</sup> WY. R. CRIM. P. 11(b)(1).

<sup>91</sup> Thus, Utah rules provide: “Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.” UTAH R. CRIM. P. 11(e). Yet, the comments state that the rule means “the trial court may, but need not, advise defendants concerning the collateral consequences of a guilty plea.” Courts ruling that defendants need not be informed of collateral consequences nevertheless often state that informing them would be a good idea. *See, e.g.,* United States v. Banda, 1 F.3d 354, 356 (5<sup>th</sup> Cir. 1993) (“This is not to say that [counsel] should not advise the client on possible deportation—[counsel] should.”). The facts of reported cases also make clear that courts often advise defendants of collateral sanctions in the absence of a court rule or constitutional obligation. *See, e.g.,* Duffy v. State, 120 P.3d 398 (Mont. 2005) (noting that trial court advised defendant of federal prohibition on possessing firearms by individuals with felony convictions).

<sup>92</sup> *See, e.g.,* Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993) (applying maxim *expressio unius est exclusio alterius*, the statement of one thing is the exclusion of other things). For an example of a misleading disclosure which one court held prevented application of a criminal collateral sanction, see United States v. Glaser, 14 F.3d 1213 (7<sup>th</sup> Cir. 1994).

<sup>93</sup> *See* ABA STANDARDS FOR CRIMINAL JUSTICE: GUILTY PLEAS, Standard 14-1.4(c) (3d ed. 1999):

Before accepting a plea of guilty or nolo contendere, the court should advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant’s immigration status. The court should advise the defendant to consult with defense counsel if defendant needs additional information concerning the potential consequences of the plea.



1 avoid collateral sanctions. It is reasonable to assume that the largest group of people who will  
2 plead not guilty when they otherwise would have pleaded guilty will be those who have a  
3 defensible case, but planned to plead guilty under the misapprehension that a criminal conviction  
4 was no big deal.

5  
6 *The Method of Advisement.* A defendant could be informed of potential collateral  
7 sanctions in several ways. At some early court appearance, the defendant could simply be given  
8 a booklet describing all collateral sanctions to figure out on her own, but simply being handed a  
9 booklet that is 30 or 40 pages long or longer is unlikely to be particularly informative to a  
10 criminal defendant.

11  
12 The defendant could be advised and her understanding confirmed by the court during the  
13 guilty plea colloquy. Judicial advisement would have the virtue of putting the defendant's  
14 receipt and understanding of the advice on the record, but it would take a great deal of time,  
15 perhaps hours, for a judge to read all or part of the 30 or 40 page booklet during every guilty plea  
16 colloquy. Furthermore, because the waiver of rights and advisement of consequences typically  
17 occurs when the defendant is in the process of actually pleading guilty, it is too late for a  
18 defendant to begin to consider these issues for the first time at that point.

19  
20 This Act contemplates that the defendant will be advised and counseled by defense  
21 counsel before the guilty plea, and that counsel's satisfaction of this obligation will be briefly  
22 confirmed on the record by the court. The advantage of advisement by defense counsel is that it  
23 would be take less in-court time, and it could be done at a more meaningful stage in the process,  
24 as part of the decision whether to plead guilty rather than as part of the plea itself. Competent  
25 defense lawyers now advise their clients of potential collateral sanctions.<sup>94</sup> Moreover, advice  
26 could be tailored to the circumstances of the particular defendant; that is, if the defendant is a  
27 licensed barber rather than a licensed broker, the lawyer could focus on that and the other  
28 collateral sanctions of concern to the particular defendant as an individual. The judge is not in a  
29 position to do this as effectively, if for no other reason than the judge will not have access to the  
30 client's privileged information. The defendant's receipt and understanding of advice about  
31 collateral sanctions can quickly be put on the record by the judge during the guilty plea colloquy.

32  
33 Counsel's task will be made easier by the compilation of collateral sanctions that is  
34 contemplated by Section 3 of this Act. All of the necessary information will be readily at hand.  
35 However, counsel's advice in this area, as in others, is expected to be competent rather than

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<sup>94</sup> The Supreme Court recognized this in *INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001), where they explained that "competent defense counsel, following the advice of numerous practice guides, would have advised [defendants] concerning" the possibility of the collateral sanction of deportation based on criminal conviction, and the avenues of relief therefrom. *See also* ABA STANDARDS FOR CRIMINAL JUSTICE, GUILTY PLEAS, 14-3.2(f) (3d ed. 1999) ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from the entry of the contemplated plea.")

1 perfect. A lawyer should be familiar with the law, including the law of collateral sanctions,<sup>95</sup> and  
2 should make a reasonably diligent investigation about relevant facts.<sup>96</sup> But if, in spite of  
3 reasonable efforts, it turns out that the plea had unintended negative consequences, because, say,  
4 a defendant's naturalization was invalid for reasons not known to the lawyer, or a defendant  
5 failed to mention a business association that would be impaired by a conviction, that would not  
6 suggest that a lawyer's representation was inadequate. However, even jurisdictions which, in  
7 general, impose no duty to advise defendants of collateral sanctions, hold that attorneys who give  
8 incorrect, misleading advice may render a plea constitutionally invalid.<sup>97</sup>

9  
10 Although the major statutory change is in the context of the guilty plea colloquy, other  
11 areas of practice and policy will also change. For example, many jurisdictions have written plea  
12 forms, as pleadings or exhibits, which are signed by the defendant and defense counsel and filed  
13 as part of the record of the case. These forms should be amended to include the advisement of  
14 collateral sanctions, and acknowledgment of the opportunity for defense consultation. However,  
15 given the importance of ensuring that the defendant is actually informed and has actually had the  
16 opportunity to consult with counsel, the oral advisement should not be dispensed with. Another  
17 change might be amendment of the terms of government contracts with public defender  
18 organizations or private contract attorneys, to require this advice as part of representation of  
19 defendants.

20  
21 *The Effect of Non-Compliance on the Validity of the Plea.* A difficult question is the  
22 effect of non-compliance with a court rule or statute mandating advice. Existing law requiring  
23 advice of possible deportation deals with this problem in several ways. Some provisions are  
24 silent about the consequences of non-compliance.<sup>98</sup> Others specifically provide for plea  
25 withdrawal if required advice is not given.<sup>99</sup> New York, by contrast, states that the failure to  
26 advise a defendant in accordance with the law "shall not be deemed to affect the voluntariness of  
27 a plea of guilty or the validity of a conviction."<sup>100</sup> Wyoming requires notice of discretionary and  
28 mandatory assessments, and states that a failure to advise does not affect the validity of a plea,  
29 "but assessments, the general nature of which were not disclosed to the defendant, may not be  
30 imposed upon the defendant unless the defendant is afforded an opportunity to withdraw the  
31 guilty plea."<sup>101</sup>

32  
33 The criminal justice system depends in large part on the finality of guilty pleas.  
34 Accordingly, there is strong reason not to upset a plea for a technical deficiency in guilty plea

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<sup>95</sup> ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.1 (competence).

<sup>96</sup> *Id.*, Rule 1.3 (diligence).

<sup>97</sup> *See, e.g.,* Goodall v. United States, 759 A.2d 1077, 1082-83 (D.C. 2000); People v. Young, 355 Ill.App.3d 317, 323-24 (2005).

<sup>98</sup> *See, e.g.,* AZ. R. CRIM. P. 17.2(f).

<sup>99</sup> *See, e.g.,* NEB. REV. STAT. § 29-1819.02(2).

<sup>100</sup> N.Y. CRIM. PROC. L. § 220.50(7).

<sup>101</sup> WY. R. CRIM. P. 11(b)(1)(B).

1 procedure, and this is the prevailing rule.<sup>102</sup> But what if the defendant can demonstrate a serious  
2 and prejudicial violation of a rule requiring defendants to be informed of collateral sanctions?  
3 What if, for example, a defendant who received a probationary sentence shows that: 1) the judge  
4 failed to confirm during the guilty plea colloquy that her defense lawyer had advised her of  
5 collateral sanctions, and she was in fact not informed that her guilty plea to a drug offense meant  
6 that she would be unable to adopt her foster child;<sup>103</sup> 2) that she would not have pleaded guilty if  
7 she had known the legal consequences; and 3) she has a colorable argument that she is not guilty  
8 of the offense?  
9

10 In favor of the conclusion that noncompliance with a rule should never lead to upsetting a  
11 plea is the argument that jurisdictions would be justifiably reluctant to adopt a rule that could  
12 upset the finality of pleas. Under current law there is no requirement that defendant's be advised;  
13 it would be an example of the rule that "no good deed goes unpunished" if a state's effort to offer  
14 more than current law requires resulted in undermining pleas that are by all appearances entirely  
15 valid. On the other side is the idea that a rule stating in text "there are no penalties for failing to  
16 comply with this rule" is unlikely to command respect; it might be systematically ignored.  
17

18 This provision does not address the consequences of non-compliance.<sup>104</sup> The arguments  
19 on both sides are reasonable, but ultimately it is not a point on which uniformity is essential. In  
20 any event, the rule has been drafted in such a way that judges can successfully comply with it,  
21 with minimal burden. Accordingly, the procedure will be followed routinely, and the question of  
22 remedy for non-compliance will be of little practical importance.]  
23

24 **SECTION 11. VOTING RIGHTS.** An individual may not be denied the right to vote  
25 based on conviction except during actual incarceration.

### 26 **Comment**

27

28 This is derived from Model Sentencing and Corrections Act Section 4-110, which  
29 provides:  
30

31 (a) A person convicted of an offense does not suffer civil death or corruption of blood.

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<sup>102</sup> See, e.g., FED. R. CRIM. P. 11(h) ("A variance from the requirements of this rule is harmless error if it does not affect substantial rights.").

<sup>103</sup> See Amy E. Hirsch, et al., *Every Door Closed: Barriers Facing Parents with Criminal Records* 68-69 (2002).

<sup>104</sup> This is essentially the approach of the ABA, which contemplates that jurisdictions will make their own decisions about the consequences of non-compliance. See ABA CRIMINAL JUSTICE STANDARD 19-2.3(b) ("failure of the court or counsel to inform the defendant of applicable collateral sanctions should not be the basis for withdrawing a plea of guilty, except where otherwise provided by law, or where the failure renders the plea constitutionally invalid.")

1 (b) Except as provided by [the Constitution of this State or] this Act, a person convicted  
2 of an offense does not sustain loss of civil rights or forfeiture of estate or property by reason of a  
3 conviction or confinement; he retains all rights, political, personal, civil, and otherwise, including  
4 the right to:

- 5 (1) be a candidate for, be elected or appointed to, or hold public office or  
6 employment;  
7 (2) vote in elections;  
8 (3) hold, receive, and transfer property;  
9 (4) enter into contracts;  
10 (5) sue and be sued;  
11 (6) hold offices of private trust in accordance with law;  
12 (7) execute affidavits and other judicial documents;  
13 (8) marry, separate, obtain a dissolution or annulment or marriage, adopt children,  
14 or withhold consent to the adoption of children; and  
15 (9) testify in legal proceedings.

16 (c) This section does not affect laws governing the right of a person to benefit from the  
17 death of his victim.