

D R A F T

FOR DISCUSSION ONLY

# **UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT**

---

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

---

*WITH PREFATORY NOTE AND COMMENTS*

Copyright ©2006

By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

---

*The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.*

September 18, 2006

## **DRAFTING COMMITTEE ON UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

RICHARD T. CASSIDY, 100 Main St., P.O. Box 1124, Burlington, VT 05402, *Chair*  
ANN WALSH BRADLEY, P.O. Box 1688, Madison, WI 53701-1688  
JOHN M. CARY, 1201 Third Ave., #2812, Seattle, WA 98101  
GREG J. CURTIS, P.O. Box 2084, Sandy, UT 84091  
JESSICA FRENCH, Division of Legislative Services, 910 Capitol St., 2nd Floor, General  
Assembly Building, Richmond, VA 23219  
ROGER C. HENDERSON, University of Arizona-James E. Rogers College of Law, 1201  
Speedway, P.O. Box 210176, Tucson, AZ 85721  
H. LANE KNEEDLER, 901 E. Byrd St., Suite 1700, Richmond, VA 23219  
HARRY D. LEINENWEBER, U.S. District Court, 219 S. Dearborn St., Suite 1946, Chicago, IL  
60604  
MARIAN P. OPALA, Supreme Court, State Capitol, Room 238, Oklahoma City, OK 73105  
RAYMOND G. SANCHEZ, P.O. Box 1966, Albuquerque, NM 87103  
MICHELE L. TIMMONS, Office of the Revisor of Statutes, 700 State Office Bldg., 100 Rev.  
Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155  
GABRIEL J. CHIN, University of Arizona-James E. Rogers College of Law, 1201 Speedway,  
P.O. Box 210176, Tucson, AZ 85721, *Reporter*

## **EX OFFICIO**

HOWARD J. SWIBEL, 120 S. Riverside Plaza, Suite 1200, Chicago, IL 60606, *President*  
JACK DAVIES, 687 Woodridge Dr., Mendota Heights, MN 55118, *Division Chair*

## **AMERICAN BAR ASSOCIATION ADVISOR**

MARGARET COLGATE LOVE, 15 Seventh St. NE, Washington, DC 20002, *ABA Advisor*  
THOMAS EARL PATTON, 1747 Pennsylvania Ave. NW, Suite 300, Washington, DC 20006,  
*ABA Section Advisor*  
CHARLES M. RUCHELMAN, 1 Thomas Circle, Suite 1100, Washington, DC 20005-5894,  
*ABA Section Advisor*

## **EXECUTIVE DIRECTOR**

WILLIAM H. HENNING, University of Alabama School of Law, Box 870382, Tuscaloosa, AL  
35487-0382, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS  
211 E. Ontario Street, Suite 1300  
Chicago, Illinois 60611  
312/915-0195  
[www.nccusl.org](http://www.nccusl.org)

# **UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT**

## **TABLE OF CONTENTS**

Prefatory Note .....	1
SECTION 1. SHORT TITLE .....	6
SECTION 2. DEFINITIONS .....	6
SECTION 3. COLLECTION OF COLLATERAL SANCTIONS AND DISQUALIFICATIONS .....	7
SECTION 4. ADVISEMENT UPON RELEASE OR AT SENTENCING .....	11
SECTION 5. CONVICTIONS AND CHARGES NOT A BASIS FOR COLLATERAL SANCTIONS .....	13
SECTION 6. LIMITATION OF COLLATERAL SANCTIONS AND DISQUALIFICATION RELATED TO EMPLOYMENT, EDUCATION, HOUSING, AND LICENSING TO PREVENT RECIDIVISM AND PROMOTE PUBLIC SAFETY .....	14
SECTION 7. COLLATERAL SANCTIONS TO BE ESTABLISHED ONLY WITH AUTHORIZATION OF LEGISLATURE .....	21
SECTION 8. CERTIFICATES OF REHABILITATION .....	22
SECTION 9. ADVISEMENT AT GUILTY PLEA .....	25
SECTION 10. VOTING RIGHTS .....	31

# 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 person could have contributed to the economy.

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

---

<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 yearend 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, a person 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 person 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 persons with felony drug convictions, 1987 legislation made persons 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 persons with drug convictions ineligible to participate in the National and Community Service Trust Program.<sup>14</sup> In 1996, Congress provided that persons convicted of drug offenses would automatically be ineligible for certain federal benefits;<sup>15</sup> a year later, Congress rendered them

---

<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 persons 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.

ineligible for the Hope Scholarship Tax Credit.<sup>16</sup> In 1998, persons 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 persons. 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 persons 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, persons with convictions, most not legally trained, are surprised when they

---

<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).

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 persons. 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,

---

<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 persons 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 persons with convictions whose behavior demonstrates that they are making efforts to conform their conduct to the law.

Section 10 provides that convicted persons 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.

1                   **UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT**

2  
3                   **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Collateral  
4 Sanctions and Disqualifications Act.

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

6                   (1) “Collateral sanction” means a penalty, disability, or disadvantage, however  
7 denominated, that is imposed on an individual by law, upon the individual’s conviction for a  
8 felony, misdemeanor, or other offense, that is not imposed as part of the sentence. The term  
9 “collateral sanction” does not include terms of imprisonment, probation, parole, supervised  
10 release, fines, assessments, forfeiture, restitution, or the costs of prosecution, imposed by a judge  
11 at sentencing.

12                   (2) “Disqualification” means a penalty, disability, or disadvantage, however  
13 denominated, that a civil court, administrative agency, or official is authorized, but not required  
14 to impose on a person convicted of a felony, misdemeanor or other offense on grounds related to  
15 the person’s conviction.

16                   (3) “State Code” means [the official compilation of statutes of general applicability].

17                   (4) “State Administrative Code” means [the official compilation of state administrative  
18 regulations].

19                   (5) [insert name of bill drafting agency] means [the official responsible for compiling the  
20 official state code and the official state administrative code].

21                   **Comment**

1 The definitions in paragraphs (1) and (2) are taken directly from the ABA Standards.<sup>26</sup>  
2 They are intended to exclude from the definition of collateral sanction or disqualification direct  
3 criminal punishment, such as fine, imprisonment, probation, parole, or supervised release, and  
4 the incidents and conditions of those direct punishments. They are also intended to exclude  
5 private conduct, such as the hiring decisions of private employers. Covered actions generally  
6 include such things as denial of government employment and elective or appointive office,  
7 ineligibility for government licenses, permits, or contracts, disqualification from public benefits,  
8 public education, public services, or participation in public programs, and elimination or  
9 impairment of civil rights, such as voting, or serving on juries.

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

### 20 SECTION 3. COLLECTION OF COLLATERAL SANCTIONS AND 21 DISQUALIFICATIONS.

22 (a) Within [six months] after the effective date of this [act], the Revisor shall:

23 (1) prepare drafts of new titles of the State Code and State Administrative Code  
24 to be called *Collateral Sanctions* containing citations to, and short descriptions of, all statutes or  
25 regulations then in force imposing collateral sanctions or disqualifications;

26 (2) place the new titles in an appropriate location of the published state codes;

27 (3) include cautionary language at the beginning of each new title notifying users

---

<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 \_\_\_\_”).

<sup>27</sup> Statutes requiring disclosure of criminal convictions, and allowing the decisionmaker 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 of the following:

2 (i) that the list of citations and descriptions contained in the chapter is  
3 intended to be comprehensive but is not necessarily complete;

4 (ii) that the inclusion or exclusion of a law or regulation in the title is not  
5 intended to have any substantive legal effect;

6 (iii) that the citations and descriptions used in the title are intended solely  
7 to indicate the contents of the cross-referenced law or regulation and are not part of the  
8 cross-referenced law or regulation;

9 (iv) that the citations and descriptions are not substantive and may not be  
10 used to construe or limit the meaning of any law or regulation; and

11 (v) that users must consult the language of each cross-referenced law or  
12 regulation to fully understand the scope and effect of the collateral sanction or disqualification it  
13 imposes.

14 (b) The titles described in subsection (a)(1) shall not include provisions concerning:

15 (1) sentencing, including imprisonment, jail, fines, financial assessments,  
16 restitution or forfeiture imposed as part of sentencing, probation, parole, or supervised release;

17 (2) custody or administration of persons committed to the [Department of  
18 Corrections];

19 (3) civil commitment of individuals based on mental illness; and

20 (4) victim's rights that do not directly affect defendants.

21 (c) After enactment of the titles *Collateral Sanctions* of the state codes, when any  
22 regulation or statute is adopted that imposes collateral sanctions or disqualifications on persons

1 with criminal convictions, the revisor shall place a short description of, and a citation to, the new  
2 enactment in the appropriate location of the relevant code.

3 (d) The Revisor shall make available in a single document or volume, the full text of:

4 (1) the title *Collateral Sanctions* from the [State Code];

5 (2) the title *Collateral Sanctions* from the [State Administrative Code];

6 (3) all provisions of the [insert name of enacting state] Constitution imposing  
7 collateral sanctions or disqualifications on persons with convictions; and

8 (4) all provisions of state law offering relief from collateral sanctions or  
9 disqualification.

10 (e) The document in subsection (d) shall be:

11 (1) called the [State] *Compendium of Collateral Sanctions and Provisions for*  
12 *Relief*;

13 (2) in addition to other methods of distribution, made available without charge on  
14 the Internet;

15 (3) published within four months after adoption of the title *Collateral Sanctions*  
16 in the [State Code] or [State Administrative Code], whichever is later; and

17 (4) updated at least annually.

## 18 **Comment**

19  
20 In a very real sense, having the status of “felon” is like being a regulated industry. In  
21 effect, each state already has a title of its code called *Collateral Sanctions*, regulating the legal  
22 status of this group in scores or hundreds of ways. But instead of publishing these laws together  
23 in volume “C” of the code, the statutes have been divided up and scattered. The sanctions have  
24 proliferated unsystematically, with a prohibition on persons with felony convictions obtaining  
25 one kind of license popping up in one corner of a state’s code, a prohibition on obtaining some  
26 other kind of government employment appearing in an agency’s regulations.

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

10 Section 3(a) proposes that Revisors of Statutes create new titles of state codes and state  
11 administrative codes, with short descriptions of, and cross-references to, all provisions creating  
12 collateral sanctions and disqualifications. None of the provisions would be moved from their  
13 current locations in the code, but there would be a single place that readers could go to to  
14 understand the state of the law. No substantive change in the meaning of the laws is intended  
15 through this compilation, and the titles would so state. Yet, collecting collateral sanctions from a  
16 state's code and administrative regulations would make the formal written law knowable to those  
17 who use and will be affected by it.  
18

19 Some states do not have codified regulations. In those states, the law should require  
20 boards, agencies and other promulgators of regulations to notify the revisor of statutes of new  
21 regulations creating collateral sanctions or disqualifications.  
22

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

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

37 Section 3(c) is designed to ensure that new statutes and regulations containing collateral  
38 sanctions and disqualifications continue to be placed in the new codes. Of course, a legislature  
39 cannot bind future legislatures, but in the absence of contrary legislative direction, new  
40 provisions should be placed in the titles *Collateral Sanctions*.  
41

---

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

1           Once the new titles are created, they should be made available widely; this is the goal of  
2 Section 3(d). For each state, the title from the codes and administrative code will present only  
3 part of the picture: also relevant are sanctions imposed by the state Constitution, and any  
4 provisions available for relief. These four categories of information largely cover the area, and  
5 for the benefit of those who do not have ready access to a full set of the state code and  
6 administrative regulations, should be made available as a body. Certainly the compendium  
7 should be viewable and downloadable on the Internet without charge, and if feasible distributed  
8 as a hardcopy booklet.  
9

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

11           (a) Within 30 days before an individual is released from imprisonment or other  
12 incarceration based on conviction of a crime, the officer or agency releasing the individual shall  
13 provide written notice that collateral sanctions and disqualifications may apply to the individual  
14 because of the conviction. The notice must include a copy of, or information on how to obtain,  
15 the *Compendium of Collateral Sanctions and Provisions for Relief* referred to in Section 3(d).

16           (b) If an individual convicted of a crime is not sentenced to a term of imprisonment or  
17 other incarceration, the court at the time of sentencing shall provide written notice that collateral  
18 sanctions and disqualifications may apply to the individual because of the conviction. The notice  
19 must include a copy of, or information on how to obtain, the *Compendium of Collateral*  
20 *Sanctions and Provisions for Relief* referred to in Section 3(d).

#### 21           **Comment**

22           [Section 9 of this Act contemplates that persons pleading guilty will get notice of  
23 collateral sanctions at the time of sentencing. Defendants convicted after trial will not have had  
24 Section 9 notice. In addition, many defendants who did plead guilty will have received notice  
25 months or years before release from custody; many will probably have no recollection of what  
26 they were told.] Persons in prison, of course, are subject to strict rules which are well known so  
27 there would generally be little value in informing prisoners about the largely theoretical  
28 additional level of regulation. However, once persons with convictions are no longer in the  
29 physical custody of the criminal justice system, they should be informed that their conduct and  
30 status is subject to special restriction. The point is not fairness to the defendant in making the

1 decision how to plead; the conviction by this stage is a fact. Rather, formal advisement promotes  
2 enforcement of the law. If, for example, persons convicted of felonies do not know they are  
3 prohibited from possessing firearms, they may violate the law out of ignorance when they would  
4 have complied with the law had they known.<sup>30</sup> In *Lambert v. California*,<sup>31</sup> the Court found a due  
5 process violation in convicting a person with a felony conviction of violation of a registration  
6 provision of which she had no knowledge or reason to know.

7  
8 This section also requires notice of provisions of law providing for relief from collateral  
9 sanctions.<sup>32</sup> To the extent that states provide for relief, they have concluded that it is fair to the  
10 individual and beneficial to society to let at least some persons with convictions pay their debt to  
11 society and move on. Notification to all persons with convictions will facilitate the participation  
12 of deserving but legally unsophisticated individuals. Failure to provide notice as contemplated in  
13 Section 4 does not invalidate the applicability of the collateral sanctions, or provide a cause of  
14 action for money damages.

15  
16 The notice contemplated by this section is modest. There is no right to counsel upon  
17 being discharged from prison, probation or parole. The note could be a line printed on a form  
18 ordinarily issued in the course of processing an individual, stating:

19  
20 You should be aware that a number of legal restrictions apply to persons  
21 convicted of criminal offenses, including restrictions on their ability to possess  
22 firearms. The list of restrictions imposed by the law of this state, and the  
23 available legal procedures for getting them removed, is available on the internet at  
24 <http://www.doc.gov/collateralsanctions>.  
25

---

<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); *Saadig 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"); 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).



**SECTION 5. CONVICTIONS AND CHARGES NOT A BASIS FOR  
COLLATERAL SANCTIONS.**

(a) For purposes of any law of this state imposing collateral sanctions, a conviction shall not give rise to a collateral sanction if:

(1) the defendant has been determined by a court or other tribunal of competent jurisdiction established by law to have been innocent of the offense upon which the conviction was based; or

(2) the conviction has been finally reversed, vacated, or otherwise set aside on appeal or in post-conviction proceedings based on legal error or innocence; or

(3) the conviction has been the subject of a pardon; or

[(4) if the conviction has been expunged, vacated, sealed, set aside, or been the subject of a certificate of rehabilitation.]

(b) For purposes of any law of this state imposing collateral sanctions, an arrest, complaint, indictment, information, or other prosecution or accusation not leading to a conviction, shall not constitute a conviction, nor shall it be evidence that any facts alleged are true.

### Comment

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

Section 5(b) makes clear that arrests or charges not leading to conviction cannot be the basis for imposing a collateral sanction, nor can they constitute evidence that the accusation is

1 true. However, nothing prohibits an arrest from being the basis for further inquiry, or the  
2 underlying facts being the basis for disqualification.  
3

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

7 (a) In this section, “state” means:

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

11 (2) government contractors made subject to this provision by contract, statute or  
12 ordinance.

13 (b) The state may not, solely because of an arrest, criminal charge, or conviction for  
14 which a person is not currently incarcerated:

15 (1) refuse to hire, or otherwise discriminate against a person with respect to the  
16 compensation, terms, conditions, or privileges of his employment;

17 (2) refuse to admit, or otherwise discriminate against a person with regard to an  
18 educational opportunity or housing; or

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

21 (c) The state may disqualify an individual from employment, educational opportunities,  
22 housing or licensing on grounds related to a prior conviction if the decisionmaker determines,  
23 based on the relevant facts and circumstances, including any relevant facts and circumstances of

1 the prior conviction, that the person is presently not qualified. In determining whether the prior  
2 conviction renders the person presently unqualified for the opportunity at issue, the following  
3 factors must be considered:

4 (1) whether granting the employment, educational opportunity, housing or license  
5 at issue will facilitate the individual's reintegration into society, and thereby promote public  
6 safety, reduce recidivism, and encourage civic and personal responsibility, including the  
7 obligation of all individuals to support themselves and their families;

8 (2) the facts and circumstances underlying the crime and their relation, if any, to  
9 the duties or functions of the occupation, profession, or educational opportunity;

10 (3) any increased risk to the safety or welfare of individuals or the public if the  
11 opportunity is granted, including whether it will provide an opportunity for the commission of  
12 similar offenses;

13 (4) the person's rehabilitation and conduct since the offense, including whether  
14 the person has committed a felony or serious misdemeanor since conviction [and whether the  
15 individual has received a certificate of rehabilitation];

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

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

18 (7) whether persons other than the applicant who have engaged in the prohibited  
19 conduct underlying the conviction, whether or not convicted, have been or would be disqualified.

20 (d) Subsection (b) is not applicable to law enforcement agencies (including the state  
21 attorney general, prosecutor's offices, police departments, sheriffs' departments, the state police,  
22 and the department of corrections). [However, law enforcement agencies may consider

employment applications from persons with criminal records in their discretion).]

(e) This section does not create a private right of action for money damages on the part of any individual who, based on a criminal conviction, is denied employment, educational opportunity, housing or a license, and does not eliminate any legal rights or remedies in favor of such an individual which might now exist.

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

---

<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.

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

1  
2 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>  
3 Oregon,<sup>58</sup> South Carolina<sup>59</sup> Texas<sup>60</sup> and Virginia<sup>61</sup> regulate occupational licensing but not  
4 employment.

5  
6 Illinois<sup>62</sup> Massachusetts,<sup>63</sup> Ohio,<sup>64</sup> Oklahoma, and West Virginia<sup>65</sup> bar consideration of a  
7 conviction only when rights have otherwise been restored or a conviction vacated or expunged.  
8

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

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

---

<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 person has conviction or charges “that directly relates to the practice of massage therapy or to the ability to practice massage therapy.”); NEB. REV. STAT. § 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

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

---

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

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

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

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

38 Section 6(c) describes the factors relevant to a case by case analysis of a conviction.  
39 Eleven states have as positive law the policy set forth in (f)(1), sometimes as a preamble to their

---

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

1 statute, sometimes as a licensing factor, as here.<sup>70</sup>

2  
3 Section 6(c)(6) uses the passage of time as a factor. Some jurisdictions have a term of  
4 years, after which, if the person has not been convicted of another crime, rehabilitation is  
5 presumed.<sup>71</sup>

6  
7 Factor (c)(7) is designed to determine whether the disqualification is based on conduct or  
8 conviction. If the Plumber's Board grants licenses to those, say, who were fired from a job or  
9 suspended from school for marijuana possession, then it is probably not unreasonably dangerous  
10 or risky to public safety to allow an applicant who was convicted of precisely the same conduct  
11 to have a license to practice. On the other hand, if the agency would deny a position to a school  
12 bus driver applicant who had his child taken away in a civil action based on child abuse, that is  
13 strong evidence that a conviction for child abuse is directly related to fitness for the  
14 employment.<sup>72</sup> Nothing in this section is meant to authorize or require preferences for applicants  
15 who have criminal convictions.

16  
17 Section 6(d) differs from the Model Sentencing and Corrections Act by allowing law  
18 enforcement employers to bar persons based on conviction, rather than on a case by case  
19 analysis. Arizona, Colorado, Florida, Hawaii, Louisiana, [MN?], New Mexico and New York  
20 specifically exclude law enforcement from the coverage of their statutes, and undoubtedly many  
21 others, not mentioning it specifically, do so in practice.<sup>73</sup> Another collateral sanction which will  
22 might well be part of state law in the future is limitation of the ability of sex offenders to work in  
23 schools, hospitals and with the elderly.<sup>74</sup> That agencies are allowed to discriminate because  
24 exempted from the general rules does not mean they do; it is clear that some jurisdictions allow  
25 persons with criminal records to be, for example, law enforcement officers, even though they  
26 may not be required to let them compete for those jobs.

---

<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).



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

**SECTION 7. COLLATERAL SANCTIONS TO BE ESTABLISHED ONLY WITH AUTHORIZATION OF LEGISLATURE.** No regulation, ordinance, or policy may impose a

collateral sanction unless specifically authorized by statute. Neither a general grant of authority to make regulations or ordinances, nor a grant of authority to establish good moral character, admission, or hiring standards constitutes specific authorization, but they may constitute authority to take the facts underlying convictions into account on a case by case basis. Any existing regulation, ordinance, or policy imposing collateral sanctions without specific authorization imposes a discretionary disqualification.

### Comment

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

Nevertheless, a state legislature can enact legislation constraining and channeling the creation and imposition of collateral sanctions. Section 7 represents one possible solution. This provision is designed to restrict creation of absolute, blanket collateral sanctions to the legislature. Individual agencies, municipalities and boards may not be equipped or inclined to

<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 consider large policy questions when drafting ordinances and regulations. Accordingly, in order  
2 to, say, simplify their own decisionmaking, or because they did not think deeply about the issue,  
3 a board might impose absolute bans on some or all persons with criminal convictions under  
4 circumstances when the legislature as a whole would find a categorical policy unwarranted. The  
5 idea of Section 7 is to require that such determinations be made by the legislature itself, which  
6 considers the welfare of the state as a whole in addition to the concerns of the licensed  
7 occupation or profession, or of the particular locality.  
8

## 9 **SECTION 8. CERTIFICATES OF REHABILITATION.**

10 (a) An individual with a criminal conviction in this state or another jurisdiction may  
11 apply for a certificate of rehabilitation in the court of proper jurisdiction in the county where the  
12 individual lives, or where the individual now, or plans to, work, operate a business, or practice a  
13 licensed profession or occupation. The applicant shall serve a copy of the application on the  
14 prosecuting attorney for the county where the application is filed, and, if it is not the same  
15 agency, the prosecutor's office responsible for obtaining the conviction giving rise to the  
16 collateral sanction. Prosecutors served may appear and participate.

17 (b) To obtain a certificate of rehabilitation, the applicant must show that:

18 (1) at least [2] years has elapsed since the most recent conviction of any felony or  
19 serious misdemeanor, and since release from any prison or jail sentence imposed under that  
20 conviction;

21 (2) for the [2] years immediately prior to application, and during the pendency of  
22 the application, the applicant has been engaged in a law-abiding occupation or activity, including  
23 lawful employment, training, education, or rehabilitative programs, and has been free of felony or  
24 serious misdemeanor convictions during that period;

25 (3) there is no unresolved intentional or unjustified failure to comply with the

1 terms of any criminal sentence;

2 (4) there is no unresolved felony or serious misdemeanor criminal charge pending  
3 against the applicant; and

4 (5) if the applicant was convicted of an offense involving drugs or alcohol or, if  
5 the conduct underlying the criminal conviction involved drugs or alcohol, the results of any  
6 urinalysis required by the court is free of evidence of the use of illegal drugs.

7 (c) The court may require any investigation it considers reasonably necessary, including  
8 the preparation of a report of the type prepared prior to sentencing a person convicted of a crime.

9 (d) If the showings required under subsection (b) are made, the court shall grant the  
10 application, and issue a certificate of rehabilitation. The certificate shall identify the offenses of  
11 which the applicant was convicted.

12 [(e) A certificate of rehabilitation relieves collateral sanctions applicable under the law of  
13 this state, but does not preclude a decisionmaker from considering the facts underlying the  
14 conviction or that they have been established by the judgment of conviction. A government  
15 decisionmaker shall evaluate the underlying facts using the factors set forth in Section 6(c).]

16 (f) A certificate of rehabilitation issued in any jurisdiction shall render the underlying  
17 convictions inadmissible in a lawsuit alleging that a public or private decisionmaker was  
18 negligent, or otherwise at fault, for hiring, retaining, licensing, leasing to, admitting to a school or  
19 program, or otherwise transacting with an individual, provided that the decisionmaker had  
20 knowledge of the certificate at the time of the alleged negligence or other fault. A certificate of  
21 rehabilitation issued in any jurisdiction shall be admissible as evidence of due care, by any  
22 person who had knowledge of it, in deciding to hire, retain, license, lease to, admit to a school or

1 program, or otherwise transact with an individual.

2 (g) A certificate of rehabilitation issued in this state shall be revoked if the individual  
3 holding it is convicted of a felony or serious misdemeanor within or without this state.

#### 4 **Comment**

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

10  
11 At one level, the “certificate of rehabilitation” is well-recognized in American law. The  
12 Federal Rules of Evidence and the rules of evidence of many states provide that a person cannot  
13 be impeached with a conviction that has been subject to a certificate of rehabilitation.<sup>77</sup> Other  
14 statutes provide that other collateral sanctions will be inapplicable to convictions subject to a  
15 certificate of rehabilitation,<sup>78</sup> or a “certificate of good conduct.”<sup>79</sup>

---

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

<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

1 Yet, many states referring to certificates of rehabilitation in their laws do not have  
2 common law or statutory procedures for issuing them.<sup>80</sup> Evidently, only California, Illinois,  
3 Mississippi and New York have statutory procedures for their issuance.<sup>81</sup> California  
4 administrative regulations instruct some boards to take them into account in making licensing  
5 determinations.<sup>82</sup> This section establishes a framework for issuance of certificates of  
6 rehabilitation.

7  
8 Certificates of rehabilitation have two consequences. First, under Section 5(a)(4), a  
9 conviction which is subject to a certificate of rehabilitation would not count as a conviction for  
10 purposes of statutes imposing collateral sanctions. Section 5(a)(4) in this respect follows the  
11 approach of the rules of evidence cited in Note 74.

12  
13 A certificate of rehabilitation also provides an objective basis for employers, landlords  
14 and other decisionmakers to differentiate among individuals with convictions. Many employers  
15 and landlords will be willing to deal with people with criminal records, so long as they are now  
16 law-abiding. A certificate of rehabilitation will give them some assurance that that is the case.  
17 Decisionmakers who rely on a certificate will have some legal protection under Section 8(f): The  
18 certificate is admissible in evidence should a lawsuit occur, as evidence of due care, but the  
19 underlying conviction is not.

## 20 21 **[SECTION 9. ADVISEMENT AT GUILTY PLEA.]**

22 (a) Before accepting a plea of guilty or [nolo contendere or no contest] to a criminal  
23 charge, the court shall personally state the following to the defendant:

24 Conviction of this offense may have legal consequences

---

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.

<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).

beyond the [fine / imprisonment / supervision] I have previously explained to you. These additional legal consequences may include, but are not limited to, disqualifying you from obtaining a government license, permit, or employment, making you ineligible for public benefits, such as public housing, forfeiture of property, enhanced punishment if you are convicted of another crime in the future, and limiting your civil rights, such as prohibiting you from voting or possessing a firearm. If you are not a citizen of the United States, you are hereby advised that your plea may result in your deportation, removal, exclusion from admission to the United States, or denial of naturalization.

(b) After giving the advisement in subsection (a), the court shall ask the defendant and defense counsel:

Have you, [defendant], and you, [defense counsel], had a sufficient opportunity to discuss these legal consequences?

(c) The court shall not accept a plea without an affirmative answer to the question in subsection (b) from both the defendant and defense counsel, and shall grant a reasonable amount of time for consultation if requested.]

### **Comment**

*The Purpose of Advisement.* It is relatively uncontroversial that it is desirable for persons pleading guilty to a criminal offense to understand the legal effects of that plea. It is fair to the individual pleading guilty, who is entitled to understand the consequences of the legal

1 proceedings. It is also important for the court in sentencing<sup>83</sup> and to the prosecutor in making  
2 charging decisions and arguing for a particular sentence.<sup>84</sup> Most courts hold that under the due  
3 process clause of the Constitution, in order to make a guilty plea knowing, voluntary and  
4 intelligent, a defendant must be told of the term of imprisonment, fine, and post-release  
5 supervision that will result from their convictions. Identification of collateral sanctions beyond  
6 direct punishment need not be disclosed in order for a plea to be constitutionally valid.<sup>85</sup>

7  
8 Even in the absence of constitutional requirements, however, a majority of the states  
9 provide for disclosure of some collateral sanctions. The principal context is in the case of  
10 deportation of non-citizens. A number of court decisions hold that it is unnecessary to inform  
11 persons pleading guilty of the possibility of deportation if they are not citizens of the United  
12 States.<sup>86</sup> Yet, at least two dozen jurisdictions by court rule or statute require advisement of  
13 potential deportation to those pleading guilty.<sup>87</sup> By court decision, Colorado and Indiana require  
14 advice of possible deportation, at least in some cases.<sup>88</sup>

15  
16 Other jurisdictions require advisement of other collateral sanctions. Indiana requires that  
17 the defendant be informed that they will “lose the right to possess a firearm if the person is  
18 convicted of a crime of domestic violence.”<sup>89</sup> Wyoming law requires the court to advise  
19 defendants “in controlled substance offenses [of] the potential loss of entitlement to federal  
20 benefits.”<sup>90</sup> Even jurisdictions not requiring advisement of particular collateral consequences

---

<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 acknowledgement 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).

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

1 often recognize that it is a good idea.<sup>91</sup>

2  
3 A majority of United States jurisdictions, then, require advice of at least one collateral  
4 sanction, showing broad support for the idea that sound public policy and fairness require advice  
5 beyond the constitutional floor. Yet, advising a defendant of one or more collateral sanctions  
6 without addressing all of them may be misleading. It could reasonably be understood to imply  
7 that the imprisonment, fine and other direct punishment, plus the collateral sanctions specifically  
8 mentioned, represent the totality of the legal effects of the conviction.<sup>92</sup> For example, it would be  
9 reasonable but incorrect for a defendant pleading guilty in Wyoming to assume that because the  
10 court advised that “federal benefits” might be lost, no state benefits, such as access to public  
11 housing, were at risk. For this reason, the provision requires that the court advise defendants  
12 about the potential for a broad range of sanctions in several categories. This is the approach of  
13 the American Bar Association Criminal Justice Standards.<sup>93</sup>

14  
15 One possible objection to advisement about applicable collateral sanctions is that if  
16 defendants actually know about the dozens or hundreds of negative legal effects of a criminal  
17 conviction, many will refuse to plead guilty. However, because the sanctions typically apply to a  
18 conviction by plea or jury verdict, pleading not guilty is not a means for a guilty person to avoid  
19 collateral sanctions. It is reasonable to assume that the largest group of people who will plead  
20 not guilty when they otherwise would have pleaded guilty will be those who have a defensible

---

<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 persons 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 case, but planned to plead guilty under the misapprehension that a criminal conviction was no big  
2 deal.

3  
4 *The Method of Advisement.* A defendant could be informed of potential collateral  
5 sanctions in several ways. At some early court appearance, the defendant could simply be given  
6 a booklet describing all collateral sanctions to figure out on her own, but simply being handed a  
7 booklet that is 30 or 40 pages long or longer is unlikely to be particularly informative to a  
8 criminal defendant.

9  
10 The defendant could be advised and her understanding confirmed by the court during the  
11 guilty plea colloquy. Judicial advisement would have the virtue of putting the defendant's  
12 receipt and understanding of the advice on the record, but it would take a great deal of time,  
13 perhaps hours, for a judge to read all or part of the 30 or 40 page booklet during every guilty plea  
14 colloquy. Furthermore, because the waiver of rights and advisement of consequences typically  
15 occurs when the defendant is in the process of actually pleading guilty, it is too late for a  
16 defendant to begin to consider these issues for the first time at that point.

17  
18 This Act contemplates that the defendant will be advised and counseled by defense  
19 counsel before the guilty plea, and that counsel's satisfaction of this obligation will be briefly  
20 confirmed on the record by the court. The advantage of advisement by defense counsel is that it  
21 would be take less in-court time, and it could be done at a more meaningful stage in the process,  
22 as part of the decision whether to plead guilty rather than as part of the plea itself. Competent  
23 defense lawyers now advise their clients of potential collateral sanctions.<sup>94</sup> Moreover, advice  
24 could be tailored to the circumstances of the particular defendant; that is, if the defendant is a  
25 licensed barber rather than a licensed broker, the lawyer could focus on that and the other  
26 collateral sanctions of concern to the particular defendant as an individual. The judge is not in a  
27 position to do this as effectively, if for no other reason than the judge will not have access to the  
28 client's privileged information. The defendant's receipt and understanding of advice about  
29 collateral sanctions can quickly be put on the record by the judge during the guilty plea colloquy.

30  
31 Counsel's task will be made easier by the compilation of collateral sanctions that is  
32 contemplated by Section 3 of this Act. All of the necessary information will be readily at hand.  
33 However, counsel's advice in this area, as in others, is expected to be competent rather than  
34 perfect. A lawyer should be familiar with the law, including the law of collateral sanctions,<sup>95</sup> and

---

<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.")

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

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

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

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

32 The criminal justice system depends in large part on the finality of guilty pleas.  
33 Accordingly, there is strong reason not to upset a plea for a technical deficiency in guilty plea  
34 procedure, and this is the prevailing rule.<sup>102</sup> But what if the defendant can demonstrate a serious

---

<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).

<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.").

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

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

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

23 **SECTION 10. VOTING RIGHTS.** After release from any term of imprisonment, a  
24 person convicted of an offense shall not be denied the right to vote based on that conviction.

### 25 **Comment**

26  
27 This is derived from Model Sentencing and Corrections Act Section 4-110, which  
28 provides:  
29

30 (a) A person convicted of an offense does not suffer civil death or corruption of blood.  
31 (b) Except as provided by [the Constitution of this State or] this Act, a person convicted  
32 of an offense does not sustain loss of civil rights or forfeiture of estate or property by reason of a  
33 conviction or confinement; he retains all rights, political, personal, civil, and otherwise, including

---

<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 the right to:

2 (1) be a candidate for, be elected or appointed to, or hold public office or  
3 employment;

4 (2) vote in elections;

5 (3) hold, receive, and transfer property;

6 (4) enter into contracts;

7 (5) sue and be sued;

8 (6) hold offices of private trust in accordance with law;

9 (7) execute affidavits and other judicial documents;

10 (8) marry, separate, obtain a dissolution or annulment or marriage, adopt children,  
11 or withhold consent to the adoption of children; and

12 (9) testify in legal proceedings.

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