

D R A F T  
FOR DISCUSSION ONLY

# UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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For March 17-19, 2006 Drafting Committee Meeting

*WITH PREFATORY NOTE AND COMMENTS*

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February 13, 2006

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# **UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT**

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# UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT

## Prefatory Note

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

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

The growth of the convicted population means that there are literally millions of people being released from incarceration, probation and parole supervision every year. Of course, they must successfully reenter society or be at risk for recidivism. Although no one supports “coddling criminals,” 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 offender could have contributed to the economy.

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

<sup>2</sup> In November, 2004, the Bureau of Justice Statistics reported that the rate of growth of the national prison system had diminished to 2.1%, which was less than the average annual growth rate of 3.4 % since 1995, but still positive. Paige M. Harrison & Allen J. Beck, *Prisoners in 2003*, at 1, Bureau of Justice Statistics Bulletin (Nov. 2004, NCJ 205335).

<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).

As the need for facilitating reentry becomes more pressing, several developments have made it more difficult. First, a major challenge for many people with criminal records is the increasingly burdensome legal effect of those records.<sup>5</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>6</sup> could not possess a firearm,<sup>7</sup> and was barred from service in the military<sup>8</sup> and on juries, state and federal, civil and criminal.<sup>9</sup> If a non-citizen, the convicted person could be deported.<sup>10</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 drug felons under federal law, 1987 legislation made drug offenders ineligible for certain federal health care benefits;<sup>11</sup> a 1991 law required states to revoke some drug offender's driver's licenses or lose federal funding,<sup>12</sup> in 1993, Congress made drug offenders ineligible to participate in the National and Community Service Trust Program.<sup>13</sup> In 1996, Congress provided that persons convicted of drug offenses would automatically be ineligible for certain federal benefits;<sup>14</sup> a year later, Congress rendered them ineligible for the Hope Scholarship Tax Credit.<sup>15</sup> In 1998, persons convicted of drug crimes were made ineligible for federal educational aid<sup>16</sup> and for residence in public housing.<sup>17</sup> In addition, 1988 legislation authorized state and federal sentencing judges to take away eligibility for federal public benefits.<sup>18</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,

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

<sup>6</sup> 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>7</sup> 18 U.S.C. § 922(g).

<sup>8</sup> 10 U.S.C. § 504.

<sup>9</sup> See Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003).

<sup>10</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>11</sup> 42 U.S.C. § 1320a-7(a)(3), added by Pub. L. 100-93, Aug. 18, 1987, 101 Stat. 680.

<sup>12</sup> 23 U.S.C. § 159, added by Pub. L. 102-143, Title III, § 333(a), Oct. 28, 1991, 105 Stat. 944.

<sup>13</sup> 42 U.S.C. § 12602(e), added by Pub. L. 103-82, Sept. 21, 1993, 107 Stat. 785.

<sup>14</sup> 21 U.S.C. § 862a, added by Pub. L. 104-193, Title I, § 115, Aug. 22, 1996, 110 Stat. 2180.

<sup>15</sup> 26 U.S.C. § 25A(b)(2)(D), added by Pub. L. 105-34, Aug. 5, 1997, 111 Stat. 788.

<sup>16</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>17</sup> 42 U.S.C. § 13662, Pub. L. 105-276, Title V, § 577, Oct. 21, 1998, 112 Stat. 2640.

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

Maryland and Ohio show literally hundreds of collateral sanctions on the books in those states.<sup>19</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.

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. 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>20</sup>

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, offenders, most not legally trained, are surprised when they discover statutory obstacles they were never told about. The major exception to the exclusion of collateral sanctions from the guilty plea process is in the area of deportation. About half of American jurisdictions provide by rule, statute or court decision that defendants must be advised of the

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<sup>19</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).

<sup>20</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>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).

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 7 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 7), 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 to offenders.

Section 5 limits the collateral sanctions and disqualifications applicable to employment. 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 6 works in conjunction with Section 5, creating a Certificate of Rehabilitation for persons convicted of crimes who can demonstrate law-abiding behavior consistent with successful reentry and desistance from crime. The Certificate of Rehabilitation would give potential public and private employers, landlords and licensing authorities concrete and objective

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

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



information about an individual under consideration for an opportunity. It could facilitate the reintegration of former offenders whose behavior demonstrates that they are making efforts to conform their conduct to the law.

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 Disqualification Act.

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

6                   (1) “Collateral sanction” means a legal penalty, disability, or disadvantage,  
7 however denominated, that is imposed on a person automatically upon the person’s conviction  
8 for a felony, misdemeanor, or other offense, even if it is not included in the sentence. The term  
9 “collateral sanction” does not include terms of imprisonment, probation, parole, supervised  
10 release, sex offender registration, fines, assessments, or the costs of prosecution imposed by a  
11 judge when sentencing a criminal defendant.

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 an offense on grounds related to the person’s conviction.

15                   (3) “Revisor” means [the official responsible for compiling the official state code  
16 and the official state administrative code].

17                   (4) “State Code” means [the official compilation of statutes of general  
18 applicability].

19                   (5) “State Administrative Code” means [the official compilation of state  
20 administrative regulations].

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, supervised release, or sex  
4 offender registration imposed at sentencing, and the incidents and conditions of those direct  
5 punishments. They are also intended to exclude private conduct, such as the hiring decisions of  
6 private employers. Covered actions generally include such things as denial of government  
7 employment and elective or appointive office, ineligibility for government licenses, permits, or  
8 contracts, disqualification from public benefits, public education, public services, or participation  
9 in public programs, and elimination or impairment of civil rights, such as voting, or serving on  
10 juries.

11  
12 Whether one of these disabilities is a “collateral sanction” or a “disqualification” depends  
13 on how it is applied. If a medical licensing board by law, regulation or policy “must” deny a  
14 license to an applicant with a felony conviction, then it is a collateral sanction, because the effect  
15 is automatic. If a medical licensing board “may” deny a license to those with felony convictions,  
16 then the regulation or policy is a “disqualification.”<sup>27</sup> However, if a criminal court at sentencing  
17 takes away a medical license as punishment,<sup>28</sup> the action is neither a collateral sanction nor a  
18 disqualification. Even if they are enforced by criminal sanctions, restrictions which are not part  
19 of the sentence and apply only to convicted persons constitute collateral sanctions.  
20

### 21 SECTION 3. COLLECTION OF COLLATERAL SANCTIONS AND 22 DISQUALIFICATIONS.

- 23 (a) Within [six months] after the effective date of this [act], the Revisor shall:
- 24 (1) prepare drafts of new titles of the State Code and State Administrative  
25 Code to be called *Collateral Sanctions*;
- 26 (2) identify every statute or regulation then in force imposing collateral  
27 sanctions or disqualifications on offenders; remove them from their location in the State Codes  
28 and transfer them to the title *Collateral Sanctions*;

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<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 (3) organize the provisions of the title *Collateral Sanctions* in an  
2 appropriate manner; and

3 (4) prepare a report describing any technical amendments to any title of the  
4 State Codes necessary or appropriate to make the codes clear and understandable, without  
5 changing its current meaning, including any necessary cross-references from various titles of the  
6 codes to relevant provisions of the title *Collateral Sanctions*.

7 (b) The titles described in subsection (a)(2) shall not include provisions  
8 concerning:

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

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

13 (3) registration requirements imposed on convicted sex offenders by the  
14 court at time of sentence;

15 (4) civil commitment of individuals based on mental illness; and

16 (5) victim's rights that do not directly affect defendants.

17 (c) Unless otherwise directed by statute, after enactment of the titles *Collateral*  
18 *Sanctions* of the state codes, the revisor shall codify any subsequently adopted or enacted  
19 regulation and any statute imposing collateral sanctions or disqualifications on offenders in the  
20 appropriate location of the relevant code.

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

- 1 (1) the title *Collateral Sanctions* from the [State Code];
- 2 (2) the title *Collateral Sanctions* from the [State Administrative Code];
- 3 (3) all provisions of the [insert name of enacting state] Constitution
- 4 imposing collateral sanctions or disqualifications on offenders; and
- 5 (4) all provisions of state law offering relief from collateral sanctions or
- 6 disqualification.
- 7 (e) The document in subsection (d) shall be:
- 8 (1) called the [State] *Compendium of Collateral Sanctions and*
- 9 *Provisions for Relief*;
- 10 (2) in addition to other methods of distribution, made available without
- 11 charge on the Internet;
- 12 (3) published within four months after adoption of the title *Collateral*
- 13 *Sanctions* in the [State Code] or [State Administrative Code], whichever is earlier; and
- 14 (4) updated at least annually.

#### 15 **Comment**

16  
17 In a very real sense, having the status of “felon” is like being a regulated industry. In  
18 effect, each state already has a title of its code called *Collateral Sanctions*, regulating the legal  
19 status of this group in scores or hundreds of ways. But instead of publishing these laws together  
20 in volume “C” of the code, the statutes have been divided up and scattered. The sanctions have  
21 proliferated unsystematically, with a prohibition on felons obtaining one kind of license popping  
22 up in one corner of a state’s code, a prohibition of felons obtaining some other kind of  
23 government employment appearing in an agency’s regulations.

24  
25 While some disabilities may be well-known, such as felon disenfranchisement and the  
26 felon firearms prohibition, in most jurisdictions no judge, prosecutor, defense attorney, legislator  
27 or bureaucrat could identify all of the statutes that would be triggered by violation of the various  
28 offenses in the state’s criminal code. Although the information would be useful to many people,  
29 including judges, prosecutors, defense lawyers and those supervising offenders, as well as

1 legislators and other policymakers, it would be extremely costly for any of them to develop the  
2 information on their own. The dispersion of these laws and regulations defeats the purpose of  
3 having published codes in the first place.  
4

5 This provision proposes to move all of the statutes and regulations imposing collateral  
6 sanctions and disqualifications to single titles or chapters of the state's code and administrative  
7 code. No substantive change in the meaning of the laws is intended. Collecting collateral  
8 sanctions from a state's code and administrative regulations would make the formal written law  
9 knowable to those who use and will be affected by it.  
10

11 Section 3(a) proposes that Revisors of Statutes (or whatever they are called under state  
12 law) will be directed to create new titles of the code and administrative code, and prepare reports  
13 describing the technical changes necessary to make the new title and the existing titles coherent.  
14 For example, if a provision prohibiting people with certain convictions from holding insurance  
15 brokerage licenses is moved from the "Insurance" title to the new title, it may be helpful to have  
16 a reference in "Insurance" to the relevant provision of "Collateral Sanctions."  
17

18 These collections should be enacted as positive law. This would assist in ensuring that  
19 the compilation remains current and complete; if published unofficially, they would quickly go  
20 out of date. Because official codification would ultimately require an act of the legislature,  
21 codification would give legislators an opportunity to examine the state's collateral sanctions as a  
22 collection. At the moment, it is virtually impossible for policymakers and the public to make  
23 informed judgments about whether collateral sanctions are overabundant, just right, or  
24 insufficient. The ABA Standards recommended codification. *See* ABA CRIMINAL JUSTICE  
25 STANDARD 19-2.1.  
26

27 Section 3(c) is designed to ensure that new statutes and regulations containing collateral  
28 sanctions and disqualifications continue to be placed in the new codes. Of course, a legislature  
29 cannot bind future legislatures, but in the absence of contrary legislative direction, new  
30 provisions should be placed in the titles *Collateral Sanctions*.  
31

32 Once the new titles are created, they should be made available widely; this is the goal of  
33 Section 3(d). For each state, the title from the codes and administrative code will present only  
34 part of the picture: also relevant are sanctions imposed by the state Constitution, and any  
35 provisions available for relief. These four categories of information largely cover the area, and  
36 for the benefit of those who do not have ready access to a full set of the state code and  
37 administrative regulations, should be made available as a body. Certainly the compendium  
38 should be viewable and downloadable on the Internet without charge, and if feasible distributed  
39 as a hardcopy booklet.  
40

#### 41 **SECTION 4. ADVISEMENT UPON RELEASE OR AT SENTENCING.** Within 30

1 days before a person convicted of a crime is released from prison or jail or, if the person is not  
2 sentenced to prison or jail, at the time of sentencing, the officer or agency releasing or sentencing  
3 the offender shall provide written notice to the offender that collateral sanctions and  
4 disqualifications may apply to the offender because of the offender's conviction. The notice  
5 must include a copy of, or information on how to obtain, the *[insert name of state] Compendium*  
6 *of Collateral Sanctions and Provisions for Relief* referred to in Section 3(d).

### 7 **Comment**

8 Section 7 of this Act contemplates that persons pleading guilty will get notice of  
9 collateral sanctions at the time of sentencing. Defendants convicted after trial will not have had  
10 Section 7 notice. In addition, many defendants who did plead guilty will have received notice  
11 months or years before release from custody; many will probably have no recollection of what  
12 they were told. Persons in prison, of course, are subject to strict rules which are well known so  
13 there would generally be little value in informing prisoners about the largely theoretical  
14 additional level of regulation. However, once offenders are no longer in the physical custody of  
15 the criminal justice system, they should be informed that their conduct and status is subject to  
16 special restriction. The point is not fairness to the defendant in making the decision how to  
17 plead; the conviction by this stage is a fact. Rather, formal advisement promotes enforcement of  
18 the law. If, for example, persons convicted of felonies do not know they are prohibited from  
19 possessing firearms, they may violate the law out of ignorance when they would have complied  
20 with the law had they known.<sup>29</sup> In *Lambert v. California*,<sup>30</sup> the Court found a due process  
21 violation in convicting a felon of violation of a registration provision of which she had no  
22 knowledge or reason to know.

23  
24 This section also requires notice of provisions of law providing for relief from collateral  
25 sanctions.<sup>31</sup> To the extent that states provide for relief, they have concluded that it is fair to the

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<sup>29</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); *Saadique 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>30</sup> 355 U.S. 225 (1957).

<sup>31</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

1 individual offender and beneficial to society to let at least some former offenders pay their debt  
2 to society and move on. Notification to all offenders will facilitate the participation of deserving  
3 but legally unsophisticated offenders.

4  
5 The notice contemplated by this section is modest. There is no right to counsel upon  
6 being discharged from prison, probation or parole. The note could be a line printed on a form  
7 ordinarily issued in the course of processing an individual, stating:

8  
9 You should be aware that a number of legal restrictions apply to persons  
10 convicted of criminal offenses, including restrictions on their ability to possess  
11 firearms. The list of restrictions imposed by the law of this state, and the  
12 available legal procedures for getting them removed, is available on the internet at  
13 <http://www.doc.gov/collateralsanctions>.  
14

15 **SECTION 5. LIMITATION OF COLLATERAL SANCTIONS AND**  
16 **DISQUALIFICATION RELATED TO EMPLOYMENT, EDUCATION, AND**  
17 **LICENSING TO PREVENT RECIDIVISM AND PROMOTE PUBLIC SAFETY.**

18 (a) This section applies only to acts by the state, its instrumentalities including  
19 municipalities, subdivisions, boards, agencies, commissions and their employees, and  
20 government contractors made subject to this provision by contract, statute or ordinance, which  
21 are directed at individuals who have been convicted of an offense and have completed, or been  
22 paroled or otherwise released from, any term of incarceration imposed as part of the sentence.

23 (b) Notwithstanding any other provision of law, no existing or hereinafter enacted  
24 regulation, ordinance, or policy may impose a collateral sanction unless specifically authorized  
25 by statute. Neither a general grant of authority to make regulations or ordinances, nor a grant of  
26 authority to establish good moral character, admission, or hiring standards shall constitute

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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).



specific authorization, but they may constitute authority to take the facts underlying convictions into account on a case by case basis in accordance with subsection (f). Any regulation, ordinance, or policy imposing collateral sanctions without specific authorization must be construed to impose a discretionary disqualification to be evaluated pursuant to subsection (f).

(c) Notwithstanding any other provision of law, the state, including a state educational institution, solely because of a conviction, may not:

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

(2) refuse to admit, or otherwise discriminate against a person with regard to an educational program; or

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

(d) For purposes of any law of this state imposing a collateral sanction, a conviction shall not include a conviction:

(1) that has been the subject of a pardon;

(2) that has been finally reversed, vacated, expunged, sealed, or otherwise set aside on appeal or in post-conviction proceedings;

(3) if 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

(4) that has been the subject of a certificate of rehabilitation.

(e) Subsections (c) and (d)(4) are not applicable to [police departments, sheriff's

1 departments, the state police, the department of corrections, and other law enforcement  
2 agencies].

3 (f) The state may disqualify a person from employment, education, or licensing if  
4 the decisionmaker determines, based on the relevant facts and circumstances, including any  
5 relevant facts and circumstances of the offense, that the person is presently unfit. In determining  
6 whether the prior conviction renders the person presently unfit for the opportunity at issue, the  
7 following factors must be considered:

8 (1) the policy of this state that former offenders should work, in order to  
9 promote public safety, reduce recidivism, and encourage civic and personal responsibility,  
10 including the obligation to support themselves and their families;

11 (2) the facts and circumstances underlying the crime and their relation, if  
12 any, to the duties or functions of the occupation, profession, or educational endeavor;

13 (3) any increased risk to the safety or welfare of individuals or the public  
14 if the opportunity is granted, including whether it will provides an opportunity for the  
15 commission of similar offenses;

16 (4) the person's rehabilitation and conduct since the offense, including  
17 whether the person has committed other serious offenses since conviction;

18 (5) the age of the person when the offense was committed;

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

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

(g) If conviction of a crime is used as a basis for rejection of an applicant for employment or an educational program or a license, permit, or certificate, the rejection must be in writing and set forth the evidence relied on and the reason for the rejection. A copy of the rejection must be provided to the applicant.

### 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>32</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>33</sup> New York,<sup>34</sup> Pennsylvania<sup>35</sup> and Wisconsin<sup>36</sup> regulate consideration of a conviction in public and private employment and occupational licensure.

Arizona,<sup>37</sup> California,<sup>38</sup> Colorado,<sup>39</sup> Connecticut,<sup>40</sup> Florida,<sup>41</sup> Kentucky,<sup>42</sup> Louisiana,<sup>43</sup> Minnesota,<sup>44</sup> Missouri,<sup>45</sup> New Jersey,<sup>46</sup> New Mexico,<sup>47</sup> and Washington<sup>48</sup> prohibit disqualification from public employment and occupational licensure solely on grounds of conviction, but do not regulate private employment. Kansas<sup>49</sup> prohibits disqualification from public and private employment but does not regulate occupational licensing.

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<sup>32</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>33</sup> HAW. REV. STAT. § 831-3.1.

<sup>34</sup> N.Y. CORRECTIONS L. §§ 750-56.

<sup>35</sup> 18 PA. C.S. ANN. § 9124-25.

<sup>36</sup> WISC. STAT. ANN. § 111.321 & § 111.335.

<sup>37</sup> AZ. REV. STAT. § 13-904(E).

<sup>38</sup> CAL. BUS. & PROF. CODE §§ 490, 493. See also CAL. CODE REGS. Tit. 2, § 7287.4(d)(1)(B).

<sup>39</sup> COLO. REV. STAT. § 24-5-101.

<sup>40</sup> CT. GEN. STAT. ANN. § 46a-80.

<sup>41</sup> FLA. STAT. ANN. § 112.011.

<sup>42</sup> KY. REV. STAT. § 335B.020.

<sup>43</sup> LA. STAT. ANN.-R.S. 37:2950.

<sup>44</sup> MINN. STAT. ANN. § 364.01-.10.

<sup>45</sup> ANN. MISSOURI STAT. §§ 314.200 & 561.016.

<sup>46</sup> N.J. STAT. ANN. §§ 2A:168A-1 & 2C:51-1.

<sup>47</sup> NEW MEX. STAT. ANN. §§ 28-2-1 to 28-2-6.

<sup>48</sup> WASH. REV. CODE ANN. § 9.96A.020.

<sup>49</sup> KAN. STAT. ANN. § 22-4710.

1           Arkansas,<sup>50</sup> Delaware,<sup>51</sup> Indiana,<sup>52</sup> Maine,<sup>53</sup> Michigan,<sup>54</sup> Montana,<sup>55</sup> North Dakota,<sup>56</sup>  
2           Oregon,<sup>57</sup> South Carolina<sup>58</sup> Texas<sup>59</sup> and Virginia<sup>60</sup> regulate occupational licensing but not  
3           employment.  
4

5           Illinois<sup>61</sup> Massachusetts,<sup>62</sup> Ohio,<sup>63</sup> Oklahoma, and West Virginia<sup>64</sup> bar consideration of a  
6           conviction only when rights have otherwise been restored or a conviction vacated or expunged.  
7

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

13          The “substantial” or “direct” relation test is deep in the law. Of the minority of states  
14          without general laws, many nevertheless apply the test in the context of at least one licensing or  
15          regulatory regime. At least 10 states use the test alone,<sup>65</sup> at least 7 others provide that a felon *or* a

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<sup>50</sup> ARK. CODE ANN. § 17-1-103(a).

<sup>51</sup> 75 DEL. LAWS c. 262.

<sup>52</sup> IND. CODE § 25-1-1.1-1.

<sup>53</sup> 5 MAINE REV. STAT. ANN. § 5301.

<sup>54</sup> MICH. COMP. LAWS ANN. § 338.42.

<sup>55</sup> MONT. CODE ANN. § 37-1-201.

<sup>56</sup> N.D. CENT. CODE, 12.1-33-02.1.

<sup>57</sup> OR. REV. STAT. § 670.280.

<sup>58</sup> S. C. CODE § 40-1-140.

<sup>59</sup> TEX. OCCUPATIONS CODE ANN. § 53.021(a).

<sup>60</sup> VA. CODE ANN. § 54.1-204.

<sup>61</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>62</sup> MASS. GEN. LAWS ANN. 127 § 152; *see also* Mass. Gen. Laws Ann. ch. 151B § 4(9).

<sup>63</sup> OHIO REV. CODE § 2953.33(B).

<sup>64</sup> W. VA. CODE, § 5-1-16a.

<sup>65</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 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

1 crime substantially related to the license or occupation is disqualifying.<sup>66</sup> Accordingly, the states  
2 are virtually unanimous in holding that in some instances, criminal convictions should be  
3 considered not as a broad category, but based on their specific facts and circumstances, as they  
4 relate to the license, privilege or employment at issue. Collateral sanctions are meant to protect  
5 public welfare and safety, not inflict arbitrary and needless harms. Accordingly, as reflected by  
6 the laws already on the books, most states agree that it is important whether a conviction  
7 “directly relates” to a fitness to engage in a particular occupation or to obtain a particular license.  
8 Other informed observers agree; for example, the National District Attorneys Association, while  
9 supporting collateral sanctions necessary to protect the public, states that “[r]elief from some  
10 collateral sanctions may be appropriate if they do not relate to the conduct involved in the offense  
11 of conviction.”<sup>67</sup>  
12

13 However, it must be acknowledged that even in states with broad protective legislation,  
14 the principle is honored, to some extent, in the breach. Many statutes and regulations can be  
15 identified, even in these states, which conflict with the non-discrimination provisions by  
16 imposing absolute bars even in the absence of a general or fact-specific determination that the  
17 offense is “directly related” to the sanction.  
18

19 Section 5 is based on the Model Sentencing and Corrections Act, § 4-1005. However,  
20 the provision in this draft does not identify a list of prohibited collateral sanctions, as do the  
21 Model Sentencing and Corrections Act and the ABA Standards. The Model Sentencing and  
22 Corrections Act, § 4-1001(b) provides that a convicted person “retains all rights, political,

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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>66</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>67</sup> See, e.g., NATIONAL DISTRICT ATTORNEY’S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY  
ISSUES § 7, at 10 (Adopted July 17, 2005).

1 personal, civil and otherwise”, including, among others it lists, the right to vote. The ABA  
2 Standards has a list of sanctions which should never be imposed under any circumstances, such  
3 as “deprivation of the right to vote, except during actual confinement.” (ABA CRIMINAL JUSTICE  
4 STANDARD 19-2.6(a)).

5  
6 Section 5(a) differs from the original by limiting its coverage to state actors, excluding  
7 private employers. Regulation of public employment and licensing is less controversial than  
8 would be reaching into the decisions of private businesses. In addition, public employment and  
9 licensing are often done with the public interest in mind (for example, in the context of veteran’s  
10 preferences, or reserved opportunities for the disabled). If any category of employer is going to  
11 take a chance by helping ex-offenders, it is going to be the public sector.

12  
13 However, Section 5(a) contemplates that private corporations performing government  
14 functions or services might, by contract or statute, be made subject to these restrictions. It is far  
15 less intrusive to ask private companies who choose to do business with the state to comply with a  
16 policy like this; if a private company finds it objectionable, they may forego the business.  
17 Further, even if this is not a point upon which uniformity is likely, this section is not meant to  
18 discourage states from deciding on their own that private employers as a group should be  
19 covered; some now do and there is no reason they should not continue if it works for them.

20  
21 A statute like this represents a policy direction, which a legislature might wish to make  
22 permanent. Yet, short of amending a state constitution or the U.S. Constitution, a given  
23 legislature cannot absolutely bind future legislatures. Thus, the approach of the ABA Criminal  
24 Justice Standards, essentially to ban collateral sanctions in most circumstances,<sup>68</sup> cannot be  
25 effectively accomplished through a mere statute—although at any given moment a legislature  
26 might accept it, a future legislature is free to go in a different direction.

27  
28 Nevertheless, a state legislature can enact legislation constraining and channeling the  
29 creation and imposition of collateral sanctions. Section 5(b) represents one possible solution.  
30 This provision is designed to restrict creation of absolute, blanket collateral sanctions to the  
31 legislature. Individual agencies, municipalities and boards may not be equipped or inclined to  
32 consider large policy questions when drafting ordinances and regulations. Accordingly, in order  
33 to, say, simplify their own decisionmaking, or because they did not think deeply about the issue,  
34 a board might impose absolute bans on some or all persons with criminal convictions under  
35 circumstances when the legislature as a whole would find a categorical policy unwarranted. The

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<sup>68</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 idea of Section 5(b) is to require that such determinations be made by the legislature itself, which  
2 considers the welfare of the state as a whole in addition to the concerns of the licensed  
3 occupation or profession, or of the particular locality.  
4

5 Section 5(c) establishes the general principle that blanket collateral sanctions will not be  
6 created with respect to employment, admission to educational institutions and licensing. It  
7 applies both to formal and informal policies, and individual decisions. This provision is similar  
8 to the MSCA in that in effect it contemplates that there will be no categorical, absolute collateral  
9 sanctions in the employment and licensing context. Everything, it appears, will be dealt with on  
10 a case-by-case basis. However, when adopted by a state, inevitably there will be at least a  
11 handful of exceptions; persons with recent armed robbery convictions, for example, will not be  
12 permitted to have pistol permits; pedophiles will not receive licenses to operate day care centers.  
13 Nevertheless, it should serve as a reminder of the principle that blanket collateral sanctions  
14 should be sharply limited to the situations where they are genuinely necessary.  
15

16 Section 5(d) regulates the application of collateral sanctions by defining conviction. It  
17 excludes pardoned convictions (1), convictions which have been reversed or otherwise set aside  
18 (2), convictions which, even if not reversed or set aside were found to have been the result of an  
19 miscarriage of justice by a court or government agency of competent jurisdiction (3). Section  
20 5(d)(4) provides that a conviction covered by a Certificate of Rehabilitation issued pursuant to  
21 Section 6 shall not count as a conviction.  
22

23 Section 5(e) differs from the Model Sentencing and Corrections Act by allowing law  
24 enforcement employers to bar persons based on conviction, rather than on a case by case  
25 analysis. Arizona, Colorado, Florida, Hawaii, Louisiana, New Mexico and New York  
26 specifically exclude law enforcement from the coverage of their statutes, and undoubtedly many  
27 others, not mentioning it specifically, do so in practice. Another collateral sanction which will  
28 undoubtedly be part of state law in the future is limitation of the ability of sex offenders to work  
29 in schools, hospitals and with the elderly.<sup>69</sup>  
30

31 Section 5(f) describes the factors relevant to a case by case analysis of a conviction.  
32 Eleven states have as positive law the policy set forth in (f)(1), sometimes as a preamble to their  
33 statute, sometimes as a licensing factor, as here.<sup>70</sup>

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<sup>69</sup> See, e.g., 5 ME. REV. STAT. ANN. § 5301(2)(E); WASH. REV. CODE § 9.96A.020(3) & (4).

<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; New Mexico 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.

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

4           Factor (d)(7) is designed to determine whether the disqualification is based on conduct or  
5 conviction. If the Plumber's Board grants licenses to those, say, who were fired from a job or  
6 suspended from school for marijuana possession, then it is probably not unreasonably dangerous  
7 or risky to public safety to allow an applicant who was convicted of precisely the same conduct  
8 to have a license to practice. On the other hand, if the agency would deny a position to a school  
9 bus driver applicant who had his child taken away in a civil action based on child abuse, that is  
10 strong evidence that a conviction for child abuse is directly related to fitness for the  
11 employment.<sup>72</sup>  
12

## 13           **SECTION 6. CERTIFICATES OF REHABILITATION FOR FORMER** 14 **OFFENDERS.**

15           (a) A person subject to a collateral sanction in this state because of a criminal  
16 conviction in this state or another jurisdiction may apply to the court of proper jurisdiction in the  
17 county in which the person lives for a certificate of rehabilitation.

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

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

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

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<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.")



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

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

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

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

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

14                  (e) A certificate of rehabilitation does not preclude a decisionmaker from  
15 considering the facts underlying the conviction or that they have been established by the  
16 judgment of conviction. A government decisionmaker shall evaluate the underlying facts using  
17 the factors set forth in Section 5(f).

18                  (f) A certificate of rehabilitation shall be admissible, as evidence of due care,  
19 where a public or private decisionmaker is alleged in an action to have been negligent, or  
20 otherwise at fault, for hiring, retaining, leasing to, admitting to a school or program, or otherwise  
21 transacting with a convicted person who holds a certificate of rehabilitation, provided that the  
22 decisionmaker had knowledge of the certificate at the time of the alleged negligence or other

1 fault.

2 (g) The applicant shall serve a copy of an application issued under this section on  
3 the prosecuting attorney for the county where the applicant resides and, if it is not the same  
4 agency, the prosecutor's office responsible for obtaining the conviction giving rise to the  
5 collateral sanction. Prosecutors served may appear and participate.

### 6 **Comment**

7  
8 All or virtually all states have pardons; about half the states also have expungement,  
9 sealing, set-aside, vacation, or some other mechanism for restoring civil rights or avoiding  
10 collateral sanctions.<sup>73</sup> I am not optimistic that a uniform law in this area would be widely  
11 adopted. This provision is designed to come at the problem a different way, by creating a piece  
12 of credible information that will be useful to decisionmakers.

13  
14 At one level, the "certificate of rehabilitation" is well-recognized in American law. The  
15 Federal Rules of Evidence and the rules of evidence of many states provide that a person cannot  
16 be impeached with a conviction that has been subject to a certificate of rehabilitation.<sup>74</sup> Other  
17 statutes provide that other collateral sanctions will be inapplicable to convictions subject to a  
18 certificate of rehabilitation,<sup>75</sup> or a "certificate of good conduct."<sup>76</sup>

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<sup>73</sup> See LOVE, *supra* note 32, Ch. 2 (pardon); Ch. 3 (expungement, sealing, set aside).

<sup>74</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>75</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>76</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

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>77</sup> Evidently, only California, Illinois,  
3 Mississippi and New York have statutory procedures for their issuance.<sup>78</sup> California  
4 administrative regulations instruct some boards to take them into account in making licensing  
5 determinations.<sup>79</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(d)(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(d)(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 ex-offenders. Many employers and landlords  
15 will be willing to deal with people with criminal records, so long as they are now law-abiding. A  
16 certificate of rehabilitation will give them some assurance that that is the case. Decisionmakers  
17 who rely on a certificate will have some legal protection under Section 6(f): The certificate is  
18 admissible in evidence should a lawsuit occur.

## 19 20 **SECTION 7. ADVISEMENT AT GUILTY PLEA.**

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

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provisions of law to remove a disability under law because of such conviction.”); N.J. STAT. ANN. § 32:23-80 (disqualifying from union activities based on convictions “unless he has been subsequently pardoned therefor . . . or has received a certificate of good conduct or other relief from disabilities arising from the fact of conviction from a board of parole or similar authority.”); N.Y. ALCOHOLIC BEV. CONTROL LAW. § 126 (1) (disqualifying based on convictions, “unless subsequent to such conviction such person shall have received an executive pardon . . . , a certificate of good conduct granted by the board of parole, or a certificate of relief from disabilities granted by the board of parole or a court of this state. . . .”)

<sup>77</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>78</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>79</sup> See 10 CAL. CODE REGS. § 3723(A)(3) (real estate appraiser); 11 CAL. CODE REGS. § 933.3(A)(7) (home health care aide).

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

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

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

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

## 20 **Comment**

21  
22 *The Purpose of Advisement.* It is relatively uncontroversial that it is desirable for persons  
23 pleading guilty to a criminal offense to understand the legal effects of that plea. It is fair to the  
24 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>80</sup> and to the prosecutor in making  
2 charging decisions and arguing for a particular sentence.<sup>81</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>82</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>83</sup> Yet, at least two dozen jurisdictions by court rule or statute require advisement of  
13 potential deportation to those pleading guilty.<sup>84</sup> By court decision, Colorado and Indiana require  
14 advice of possible deportation, at least in some cases.<sup>85</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>86</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>87</sup> Even jurisdictions not requiring advisement of particular collateral consequences

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<sup>80</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>81</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>82</sup> See note 24, *supra*.

<sup>83</sup> See, e.g., *Broomes v. Ashcroft*, 358 F.3d 1251 (10th Cir. 2004); *Commonwealth v. Fuartado*, 2005 WL 2043680 (Ky. 2005).

<sup>84</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>85</sup> See *People v. Pozo*, 746 P.2d 523 (Colo. 1987); *Segura v. State*, 749 N.E.2d 496 (Ind. 2001).

<sup>86</sup> IND. CODE § 35-35-1-2(a)(4).

<sup>87</sup> WY. R. CRIM. P. 11(b)(1).

1 often recognize that it is a good idea.<sup>88</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>89</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>90</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

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<sup>88</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 felons possessing firearms).

<sup>89</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>90</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>91</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>92</sup> and

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<sup>91</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>92</sup> ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.1 (competence).

1 should make a reasonably diligent investigation about relevant facts.<sup>93</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>94</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>95</sup> Others specifically provide for plea  
24 withdrawal if required advice is not given.<sup>96</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>97</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>98</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>99</sup> But what if the defendant can demonstrate a serious

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<sup>93</sup> *Id.*, Rule 1.3 (diligence).

<sup>94</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>95</sup> *See, e.g.*, Az. R. CRIM. P. 17.2(f).

<sup>96</sup> *See, e.g.*, NEB. REV. STAT. § 29-1819.02(2).

<sup>97</sup> N.Y. CRIM. PROC. L. § 220.50(7).

<sup>98</sup> WY. R. CRIM. P. 11(b)(1)(B).

<sup>99</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>100</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>101</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.

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<sup>100</sup> See Amy E. Hirsch, et al., *Every Door Closed: Barriers Facing Parents with Criminal Records* 68-69 (2002).

<sup>101</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.")