

D R A F T
FOR APPROVAL

UNIFORM ACT ON COLLATERAL CONSEQUENCES OF CONVICTION

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-SEVENTEENTH YEAR
BIG SKY, MONTANA
JULY 18 - JULY 25, 2008

UNIFORM ACT ON COLLATERAL CONSEQUENCES OF CONVICTION

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

Copyright ©2008
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.

DRAFTING COMMITTEE ON UNIFORM ACT ON COLLATERAL CONSEQUENCES OF CONVICTION

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
BRIAN K. FLOWERS, Council of the District of Columbia, 1350 Pennsylvania Ave. NW, Suite 4, Washington, DC 20004
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 85721-0176
H. LANE KNEEDLER, 901 E. Byrd Street, Suite 1700, Richmond, VA 23219
HARRY D. LEINENWEBER, 219 S. Dearborn St., Suite 1946, Chicago, IL 60604
MARIAN P. OPALA, State Capitol, Room 238, Oklahoma City, OK 73105
RAYMOND G. SANCHEZ, P.O. Box 1966, Albuquerque, NM 87103
PAULA TACKETT, Legislative Council Service, State Capitol, Room 411, Santa Fe, NM 87501
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
JACK CHIN, University of Arizona - James E. Rogers College of Law, 1201 Speedway, P.O. Box 210176, Tucson, AZ 85721, *Reporter*

EX OFFICIO

MARTHA LEE WALTERS, Oregon Supreme Court, 1163 State St., Salem, OR 97301-2563, *President*
JACK DAVIES, 1201 Yale Place, Unit #2004, Minneapolis, MN 55403-1961, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

MARGARET COLGATE LOVE, 15 Seventh St. NE, Washington, DC 20002, *ABA Advisor*
RODGER DREW, 1430 F St. NE, Washington, DC 20002, *ABA Section Advisor*
THOMAS EARL PATTON, 1747 Pennsylvania Ave. NW, Suite 300, Washington, DC 20006, *ABA Section Advisor*
CHARLES M. RUCHELMAN, 1 Thomas Circle NW, Suite 1100, Washington, DC 20005-5894, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.nccusl.org

UNIFORM ACT ON COLLATERAL CONSEQUENCES OF CONVICTION

TABLE OF CONTENTS

Prefatory Note	1
SECTION 1. SHORT TITLE	6
SECTION 2. DEFINITIONS	6
SECTION 3. LIMITATION ON SCOPE	7
SECTION 4. IDENTIFICATION, COLLECTION, AND PUBLICATION OF LAWS REGARDING COLLATERAL CONSEQUENCES	8
SECTION 5. NOTICE OF COLLATERAL CONSEQUENCES IN PRETRIAL PROCEEDING	10
SECTION 6. NOTICE OF COLLATERAL CONSEQUENCES AT SENTENCING OR UPON RELEASE	14
SECTION 7. AUTHORIZATION REQUIRED FOR COLLATERAL SANCTION; CONSTRUCTION IN CASE OF AMBIGUITY.	16
SECTION 8. EFFECT OF OVERTURNED OR PARDONED CONVICTION.....	16
SECTION 9. ORDER OF RELIEF FROM COLLATERAL SANCTIONS.	17
SECTION 10. CERTIFICATE OF RESTORATION OF RIGHTS.....	20
SECTION 11. SANCTIONS NOT SUBJECT TO ORDER OF RELIEF FROM COLLATERAL SANCTIONS OR CERTIFICATE OF RESTORATION OF RIGHTS	25
SECTION 12. PROCEDURES APPLICABLE TO ISSUANCE, REVOCATION, AND MODIFICATION OF ORDERS OF RELIEF FROM COLLATERAL SANCTIONS AND CERTIFICATES OF RESTORATION OF RIGHTS; VICTIMS' RIGHTS	26
SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	28
SECTION 14. SAVINGS AND TRANSITIONAL PROVISIONS.....	28
SECTION 15. EFFECTIVE DATE	29

UNIFORM ACT ON COLLATERAL CONSEQUENCES OF CONVICTION

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. In a trend showing little sign of abating, the U.S. prison population has increased dramatically since the early 1970s. Paige M. Harrison & Allen J. Beck, *Prisoners in 2004*, at 1, Bureau of Justice Statistics Bulletin (Oct. 2005, NCJ 210677)). 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 will serve prison time during their lives. 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). 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 four million adults were on probation on December 31, 2006, almost twice as many as the combined number on parole, in jail or in prison. Laura E. Glaze & Thomas P. Bonczar, *Probation and Parole in the United States, 2006*, at 1, Bureau of Justice Statistics Bulletin (Dec. 2006, NCJ 220218). According to the U.S. Department of Justice, there were about 71 million people with a criminal record in the United States as of December 2003, a number approaching 25% of the entire population. *Survey of State Criminal History Information Systems, 2003*, at 2, U.S. Dept. Of Justice, Bureau of Justice Statistics (Feb. 2006, NCJ 21097). Minorities are far more likely than whites to have a criminal record: Almost 17% of adult black males have been incarcerated, compared to 2.6% of white males, and almost half have a criminal record. (Bonczar, *Prevalence of Imprisonment*, *supra*, at 5.)

The growth of the convicted population means that there are literally millions of people being released from incarceration, probation and parole supervision every year. Of course, they must successfully reenter society or be at risk for recidivism. Society has a strong interest in preventing recidivism. An individual who could have successfully reentered society but for avoidable cause reoffends generates the financial and human costs of the new crime, expenditure of law enforcement, judicial and corrections resources, and the loss of the productive work that the individual could have contributed to the economy. Society also has a strong interest in seeing that individuals convicted of crimes can regain the legal status of ordinary citizens to prevent the creation of a permanent class of “internal exiles” who cannot establish themselves as law-abiding and productive members of the community.

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. A second major development is the availability to all arms of government and the general public, via Internet, of aggregations of

public record information, including criminal convictions, about all Americans. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION (Aug. 2001). 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. Corinne A. Carey, *No Second Chance: People With Criminal Records Denied Access To Public Housing*, 36 U. TOLEDO L. REV. 545, 553 (2005); *see generally* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 ST. THOMAS L. REV. 387 (2006).

Apart from impairment of self-esteem and informal social stigma, a criminal conviction negatively affects an individual's legal status. For many years, an individual convicted of, say, a drug felony, lost his right to vote for a period of time or for life. *See* JEFF MANZA & CHRIS UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (Oxford 2006). Convicted individuals may be ineligible to hold public office. *See, e.g.*, *State ex rel. Olson v. Langer*, 256 N.W. 377 (N.D. 1934). Federal law bars persons with convictions from possessing firearms (18 U.S.C. § 922(g)), military service (10 U.S.C. § 504), and on juries, civil and criminal. Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003). If a non-citizen, a person convicted of a crime may be deported. 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 solely because of conviction of a criminal offense. The Act also uses the term "disqualification" to refer to disadvantage or disability that an administrative agency, civil court or other state actor other than a sentencing court is authorized, but not required, to impose based on a conviction. Collectively, collateral sanctions and disqualifications are defined as collateral consequences.

In recent years, collateral sanctions have been increasing. To identify just some of those applicable to individuals with felony drug convictions, 1987 legislation made individuals with drug convictions ineligible for certain federal health care benefits (42 U.S.C. § 1320a-7(a)(3); a 1991 law required states to revoke some driver's licenses upon conviction or lose federal funding (23 U.S.C. § 159), in 1993, Congress made individuals with drug convictions ineligible to participate in the National and Community Service Trust Program. 42 U.S.C. § 12602(e). In 1996, Congress provided that individuals convicted of drug offenses would automatically be ineligible for certain federal benefits. 21 U.S.C. § 862a. A year later, Congress rendered them ineligible for the Hope Scholarship Tax Credit. 26 U.S.C. § 25A(b)(2)(D). In 1998, individuals convicted of drug crimes were made ineligible for federal educational aid (20 U.S.C. § 1091(r)), and for residence in public housing. 42 U.S.C. § 13662. In addition, 1988 legislation authorized state and federal sentencing judges to take away eligibility for federal public benefits. 21 U.S.C. § 862.

Like Congress, state legislatures have also been attracted to regulating convicted individuals. Studies of disabilities imposed by state law or regulation done by law students in

Maryland and Ohio show literally hundreds of collateral sanctions on the books in those states. See 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-exofft.pdf). These laws limit the ability of convicted individuals to work in particular fields, to obtain state licenses or permits, to obtain public benefits such as housing or educational aid, and to participate in civic life.

The legal system has not successfully managed the proliferation of collateral sanctions in several respects. One problem is that collateral sanctions are administered largely outside of the criminal justice system. Court decisions have not treated them as criminal punishment, but mere civil regulation. 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). 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.” 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. 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); Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002)). For example, the Constitution does not require that a defendant pleading guilty to a drug felony with an agreed sentence of probation be told that, even though she may walk out of court that very day, for practical purposes, her life may be over: Military service, higher education, living in public housing, even driving a car, may be out of the question. Inevitably, individuals with convictions, most not legally trained, are surprised when they discover statutory obstacles they were never told about. The major exception to the exclusion of collateral sanctions from the guilty plea process is in the area of deportation. About half of American jurisdictions provide by rule, statute or court decision that defendants must be advised of the possibility of deportation when pleading guilty.

The criminal justice system must pay attention to collateral sanctions. If the number of statutes triggered is a reliable indicator, collateral sanctions in many instances are what is really at stake, the real point of achieving a conviction. In 2002, 59% of those convicted of felonies in state courts were not sentenced to prison; 31% received probation and 28% jail terms. Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2002*, at 2, Bureau of Justice Statistics Bulletin (Dec. 2004, NCJ 206916). In a high percentage of cases, the real work of the legal system is done not by fine or imprisonment, but by changing the legal status of convicted individuals. The legal effects the legislature considers important are in the form of collateral sanctions imposed by dozens of statutes. Yet the defendant as well as the court, prosecutors and defense lawyers involved need know nothing about them. As a recent resolution of the National District Attorney’s Association recognizes, “the lack of employment, housing, transportation, medical services and education for ex-offenders creates barriers to successful reintegration and

must be addressed as part of the reentry discussion.” NATIONAL DISTRICT ATTORNEY’S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY ISSUES §4(a) at 7 (Adopted July 17, 2005).

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 makes clear that neither the provisions of the Act nor non-compliance with them are a basis for invalidating a plea or conviction, making a claim of ineffective assistance of counsel, or suing anyone for money damages.

Section 4 requires collection in a single document of collateral sanctions and disqualifications contained in state statutes or administrative regulations.

Sections 5 and 6 propose to make the existence of collateral consequences known to defendants at important moments: At or before arraignment, so a defendant they can make an informed decision about how to proceed (Section 5), and when leaving the custody of the criminal justice system, so they can conform their conduct to the law (Section 6). Given that collateral sanctions and disqualifications will have been codified, it will not be difficult to make this information available.

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 rule, unless authorized by statute.

Section 8(a) defines the judgments that count as convictions for purposes of imposing collateral sanctions, excluding those that have been reversed, otherwise overturned or pardoned. Some states have forms of relief based on rehabilitation or passage of time, allowing convictions to be expunged, sealed, or set aside; in the case of out of state convictions, 8(b) asks states to make a choice about whether to give effect to grants of such relief by other states.

Sections 9 and 10 create mechanisms for relieving collateral sanctions imposed by law. By definition, collateral sanctions can only be imposed by state actors, so relieving them would have no effect on private persons or businesses, whose dealing with persons with convictions would be regulated, if at all, by law other than this act.

Section 9 creates an Order of Relief from Collateral Sanctions, aimed at an individual in the process of reentering society. It offers relief from one or more collateral sanctions based on a showing of public safety, and that relief would facilitate reentry. The Order of Relief merely lifts the automatic bar of a collateral sanction, leaving a licensing agency or public housing authority, for example, free to consider disqualifying the individual on a case by case basis.

Section 10 creates a Certificate of Restoration of Rights for individuals who can demonstrate a substantial period of law-abiding behavior consistent with successful reentry and

desistence from crime. The Certificate of Restoration of Rights offers potential public and private employers, landlords and licensing authorities concrete and objective information about an individual under consideration for an opportunity, and thereby could facilitate the reintegration of individuals with convictions whose behavior demonstrates that they are making efforts to conform their conduct to the law.

In addition, Section 10 provides some guidance for evaluating whether a person with a Certificate should be disqualified. The factors it uses are a modified version of Section 4-1005 of the Model Sentencing and Correction Act which has been widely adopted in the states.

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 are mentioned.

UNIFORM ACT ON COLLATERAL CONSEQUENCES OF CONVICTION

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Act on Collateral Consequences of Conviction.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Collateral consequence” means a collateral sanction or a disqualification.

(2) “Collateral sanction” means a penalty, disability, or disadvantage, however denominated, imposed on an individual as a result of the individual’s conviction or juvenile adjudication for a felony, misdemeanor, or other offense, that applies by operation of law whether or not it is included in the judgment or sentence. The term does not include imprisonment, probation, parole, supervised release, forfeiture, restitution, fine, assessment, or costs of prosecution.

(3) “Disqualification” means a penalty, disability, or disadvantage, however denominated, that an administrative agency, governmental official, or a court in a civil proceeding is authorized, but not required, to impose on an individual on grounds relating to the individual’s conviction or juvenile adjudication for a felony, misdemeanor, or other offense.

(4) “Felony” means a criminal offense as defined in [insert citation to state criminal code] or a criminal offense in any jurisdiction that would be a felony under the law of this state.

Comment

The definitions in paragraphs (2) and (3) are taken from the ABA Standards. (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 ____”). They are intended to exclude from the definition of collateral sanction or disqualification direct criminal punishment, such as fine, imprisonment, probation, parole, or supervised release, and the incidents and conditions of those direct punishments. They are also intended to exclude private conduct, such as the hiring decisions of

1 private employers. Covered actions generally include such things as denial of government
2 employment and elective or appointive office, ineligibility for government licenses, permits, or
3 contracts, disqualification from public benefits, public education, public services, or participation
4 in public programs, and elimination or impairment of civil rights, such as voting, or jury service.
5

6 Whether one of these disabilities is a “collateral sanction” or a “disqualification” depends
7 on how it is applied. If a medical licensing board by law, regulation or policy “must” deny a
8 license to an applicant with a felony conviction, then it is a collateral sanction, because the effect
9 is automatic. If a medical licensing board “may” deny a license to those with felony convictions,
10 then the regulation or policy is a “disqualification.” (Statutes requiring disclosure of criminal
11 convictions, and allowing the decision-maker to consider them as part of a “good moral
12 character” or general fitness analysis implicitly constitute disqualifications.) However, if a
13 criminal court at sentencing takes away a medical license as punishment the action is neither a
14 collateral sanction nor a disqualification. *See, e.g., United States v. Singh*, 390 F.3d 168 (2d Cir.
15 2004). Even if they are enforced by criminal sanctions, restrictions which are not part of the
16 sentence and apply only to convicted individuals constitute collateral sanctions.
17

18 These definitions and the Act apply to juveniles prosecuted as adults. They also apply to
19 juveniles prosecuted in a family, juvenile or similar courts if the judgments of conviction,
20 however denominated, give rise to collateral sanctions or disqualifications under state law.
21

22 **SECTION 3. LIMITATION ON SCOPE.** This [act] does not:

- 23 (1) provide a basis for invalidating a conviction or plea;
24 (2) affect the duty an individual’s attorney owes to the individual; or
25 (3) create a cause of action for money damages.

26 **Comment**

27 Non-compliance with this Act does not give an individual the ability to attack a plea or
28 conviction. While states adopting this act should comply with it, non-compliance does not
29 necessarily render a conviction or plea illegal or unfair. This is consistent with current law.
30 This section is intended neither to adopt nor reject the decisions stating that while an attorney
31 has no duty to advise defendants of collateral sanctions, affirmatively incorrect or misleading
32 advice may render a plea constitutionally invalid. *See, e.g., Goodall v. United States*, 759
33 A.2d 1077, 1082-83 (D.C. 2000); *People v. Young*, 355 Ill.App.3d 317, 323-24 (2005).
34
35

1 **SECTION 4. IDENTIFICATION, COLLECTION, AND PUBLICATION OF**
2 **LAWS REGARDING COLLATERAL CONSEQUENCES.**

3 (a) The [designated governmental agency or official]:

4 (1) shall identify or cause to be identified any provision in this state's
5 Constitution, statutes, and administrative rules that imposes a collateral sanction or authorizes the
6 imposition of a disqualification, and any provision of law that may afford relief from them;

7 (2) within [insert time] after the effective date of this [act], shall collect or cause
8 to be collected citations to, and the text or short descriptions of, the provisions identified under
9 paragraph (1);

10 (3) in complying with paragraph (1) and (2), may rely on the study of this state's
11 collateral sanctions, disqualifications, and relief provisions prepared by the National Institute of
12 Justice described in Section 510 of the Court Security Improvements Act of 2007; and

13 (4) shall update or cause to be updated the collection within [specify period] after
14 each [regular session] of the [legislature].

15 (b) The [designated governmental agency or official] shall include or cause to be
16 included the following statements in a prominent manner at the beginning of the collection
17 described in subsection (a):

18 (1) This collection has not been enacted into law and does not have the force of
19 law.

20 (2) An error or omission in this collection is not a reason for invalidating a
21 conviction or a plea or for otherwise avoiding a collateral sanction or disqualification.

22 (3) The laws of the United States, other jurisdictions and [insert term for local
23 governments] impose additional collateral sanctions and disqualifications not listed in this

1 collection.

2 (4) This collection does not include any law or other provision regarding a
3 collateral sanction or a disqualification, or relief from them, enacted or adopted after the
4 collection was prepared.

5 (c) The [designated governmental agency or official] shall publish, or cause to be
6 published, the collection, created and updated as required under subsection (a). The collection
7 must be available to the public on the Internet without charge.

8 (d) Noncompliance with this section does not give rise to a cause of action for relief from
9 a collateral consequence.

10 **Comment**

11
12 In a real sense, having the status of “felon” is like being a regulated industry. In effect,
13 each state already has a title of its code called *Collateral Sanctions and Disqualifications*,
14 regulating the legal status of this group in scores or hundreds of ways. But instead of publishing
15 these laws together, the statutes are divided up and scattered. The sanctions have proliferated
16 unsystematically, with a prohibition on individuals with felony convictions obtaining one kind of
17 license popping up in one corner of a state’s code, a prohibition on obtaining some other kind of
18 government employment appearing in an agency’s rules.

19
20 While some disabilities may be well known, such as disenfranchisement and the firearms
21 prohibition, in most jurisdictions no judge, prosecutor, defense attorney, legislator or agency
22 staffer could identify all of the statutes that would be triggered by conviction of the various
23 offenses in the criminal code. Although the information would be useful to many people,
24 including judges, prosecutors, defense lawyers and those supervising individuals with
25 convictions, as well as legislators and other policymakers, it would be extremely costly for any
26 of them to develop the information on their own. The dispersion of these laws and rules defeats
27 the purpose of having published codes in the first place.

28
29 Section 4(a) proposes that an appropriate government official or agency in each state
30 create a collection with citations to and short descriptions of all statutes and administrative rules
31 creating collateral sanctions and disqualifications. Fortunately, this task has been made easier by
32 a recent federal law which mandates the Director of the National Institute of Justice to identify
33 collateral sanctions and disqualifications in the constitutions, codes and administrative rules of
34 the 50 states. Court Security Improvement Act of 2007 § 510, Pub. L. 110-177, 121 Stat. 2534,
35 2544. Accordingly, the federal government is going to do the bulk of the initial work.
36

1 This collection would not be positive law, nor would it substantively change existing law.
2 Yet, collecting collateral sanctions and disqualifications in the state's code and administrative
3 regulations, and describing them in simple, plain language, would make the formal written law
4 knowable to those who use and are affected by it.

5
6 Some states do not have codified regulations. There, the law should require boards,
7 agencies and other promulgators of regulations to notify the agency assigned responsibility for
8 the collection of new regulations creating collateral sanctions or disqualifications.

9
10 The ABA Standards recommended formal codification, i.e., removing such provisions
11 from their current locations and transferring them in toto to a new title. *See* ABA CRIMINAL
12 JUSTICE STANDARD 19-2.1. However, this approach was rejected because it might leave the
13 amended laws confusing and difficult to understand. Most of the benefit of full codification can
14 be achieved by creating the collections described here.

15
16 Once the collections are created, they should be made available widely; this is the goal of
17 Section 4(c). Certainly these documents should be viewable and downloadable on the Internet
18 without charge, and if feasible distributed as a hardcopy booklet.

19
20 **SECTION 5. NOTICE OF COLLATERAL CONSEQUENCES IN PRETRIAL**
21 **PROCEEDING.**

22 (a) At or before arraignment or other judicial proceeding at which an individual is
23 formally advised of the potential sentence for an offense with which the individual is charged,
24 [the designated government agency or official] shall communicate to the individual a notice
25 substantially similar to the following:

26 **NOTICE OF ADDITIONAL LEGAL CONSEQUENCES**

27 If you are convicted of an offense you may suffer additional legal consequences beyond
28 imprisonment, [probation] [insert jurisdiction's alternative term for probation], [insert term for
29 post-incarceration supervision] and fines. These consequences may include:

- 30 • being unable to get certain licenses, permits, or jobs;
- 31 • being unable to get benefits such as public housing or education;
- 32 • a higher sentence if you are convicted of another crime in the future;

- the government taking your property; and
- prohibiting you from voting or possessing a firearm.

Also, if you are not a U.S. citizen, conviction may result in your deportation, removal, exclusion from admission to the United States, or denial of citizenship.

The law may provide ways to obtain some relief from these consequences. Further information about the consequences of conviction is available [on the Internet] [at [list website]].

(b) Noncompliance with this section does not give rise to a cause of action for relief from a collateral consequence.

Comment

The Purpose of Advisement. It is relatively uncontroversial that it is desirable for individuals charged with a criminal offense to understand what is at stake. Collateral sanctions and disqualifications are also important for the court in sentencing. *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). They also may be important to the prosecutor in making charging decisions and arguing for a particular sentence. *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).

However, there is no constitutional requirement that collateral sanctions and disqualifications be brought into the process; most courts hold that under the due process clause of the Constitution, in order to make a guilty plea knowing, voluntary and intelligent, a defendant must be told of the term of imprisonment, fine, and post-release supervision that will result from their convictions. Identification of collateral sanctions beyond direct punishment need not be disclosed in order for a plea to be constitutionally valid.

Even in the absence of constitutional requirements, however, a majority of the states provide for disclosure of some at least some collateral sanctions. The principal context is in the case of deportation of non-citizens. A number of court decisions hold that it is not constitutionally required to inform individuals pleading guilty of the possibility of deportation if they are not citizens of the United States. *Broomes v. Ashcroft*, 358 F.3d 1251 (10th Cir. 2004); *Commonwealth v. Fuartado*, 170 S.W.3d 384, 385-86 (Ky. 2005). Yet, at least two dozen jurisdictions by court rule or statute require advisement of potential deportation to those pleading guilty. *See* U.S. DIST. CT. FOR THE DIST. OF COLO. LOCAL RULES § 3, App. K (form guilty plea notification requiring acknowledgment of possible deportation); AZ. R. CRIM P. 17.2(f); CAL.

PEN. CODE § 1016(5); CT. GEN. STAT. ANN. § 54-1j; D.C. STAT. § 16-713(a); FLA. R. CRIM. P. 3.170(C)(8); GA. CODE ANN. § 17-7-93(c); HAW. REV. STAT. § 802E-1 through E-3; 725 ILL. COMP. STAT. 5/113-8; IOWA R. CRIM. P. 2.8(2)(b)(3); ME. R. CRIM. P. 11(b)(5); MD. R. 4-242(e); MA. GEN. L. ANN. 278 § 29D; MA. R. CRIM. P. 12(c)(3)(C); MINN. R. CRIM. P. 15.01(10)(d); MONT. CODE ANN. § 46-12-210(1)(f); NEB. REV. STAT. § 29-1819.02(1); N.J. Dir. 12-03 (plea form promulgated pursuant to N.J. R. CRIM. P. 3-9); N.Y. CRIM. PROC. L. § 220.50(7); N.C. STAT. § 15A-1022(a)(7); OH. REV. CODE § 2943.031(A); OR. REV. STAT. § 135.385(d); R.I. GEN. L. § 12-12-22; TEX. CODE CRIM. P. ART. 26.13(a)(4); WASH. REV. CODE § 10.40.200(2); WISC. STAT. ANN. § 971.08(1)(c). By court decision, Colorado and Indiana require advice of possible deportation in at least some cases. *People v. Pozo*, 746 P.2d 523 (Colo. 1987); *Segura v. State*, 749 N.E.2d 496 (Ind. 2001).

Other jurisdictions require advisement of other collateral sanctions. Indiana requires that the defendant be informed that they will “lose the right to possess a firearm if the person is convicted of a crime of domestic violence.” IND. CODE § 35-35-1-2(a)(4). Wyoming law requires the court to advise defendants “in controlled substance offenses [of] the potential loss of entitlement to federal benefits.” WY. R. CRIM. P. 11(b)(1). Even jurisdictions not requiring advisement of particular collateral consequences often recognize that it is a good idea. 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.” *See also, e.g.*, *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993). 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).

A majority of United States jurisdictions, then, require advice of at least one collateral sanction, showing broad support for the idea that sound public policy and fairness require advice beyond the constitutional floor. Yet, advising a defendant of some collateral sanctions without addressing all of them may be misleading. It could reasonably be understood to imply that the imprisonment, fine and other direct punishment, plus the collateral sanctions specifically mentioned, represent the totality of the legal effects of the conviction. *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); *United States v. Glaser*, 14 F.3d 1213 (7th Cir. 1994). For example, it would be reasonable but incorrect for a defendant pleading guilty in Wyoming to assume that because the court advised that “federal benefits” might be lost, no state benefits, such as access to public housing, were at risk. For this reason, the provision requires that the court advise defendants about the potential for a broad range of sanctions in several categories. This is the approach of the American Bar Association Criminal Justice Standards, which provides:

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

1 civil rights, disqualification from certain governmental
2 benefits, enhanced punishment if the defendant is convicted
3 of another crime in the future, and, if the defendant is not a
4 United States citizen, a change in the defendant's
5 immigration status. The court should advise the defendant
6 to consult with defense counsel if defendant needs
7 additional information concerning the potential
8 consequences of the plea.
9

10 ABA STANDARDS FOR CRIMINAL JUSTICE: GUILTY PLEAS, Standard 14-1.4(c) (3d ed. 1999).

11
12 One possible objection to advisement about applicable collateral sanctions is that if
13 defendants actually know about the dozens or hundreds of negative legal effects of a criminal
14 conviction, many will refuse to plead guilty. However, because the sanctions typically apply to a
15 conviction by plea or jury verdict, pleading not guilty is not a means for a guilty individual to
16 avoid collateral sanctions. It is reasonable to assume that the largest group of people who will
17 plead not guilty when they otherwise would have pleaded guilty will be those who have a
18 defensible case, but planned to plead guilty under the misapprehension that a criminal conviction
19 would have little effect.
20

21 *The Method and Timing of Advisement.* A defendant could be informed of potential
22 collateral sanctions in several ways. At some early court appearance, the defendant could simply
23 be given a booklet describing all collateral sanctions to figure out on her own, but simply being
24 handed a booklet that is 30 or 40 pages long or longer is unlikely to be particularly informative to
25 a criminal defendant.
26

27 The defendant could be advised and her understanding confirmed by the court during the
28 guilty plea colloquy. Judicial advisement would have the virtue of putting the defendant's
29 receipt and understanding of the advice on the record, but it would take a great deal of time,
30 perhaps hours, for a judge to read all or part of the 30 or 40 page booklet during every guilty plea
31 colloquy. Furthermore, because the waiver of rights and advisement of consequences typically
32 occurs when the defendant is in the process of actually pleading guilty, it is too late for a
33 defendant to begin to consider these issues for the first time at that point. Therefore, this act
34 contemplates that the notification will take place well before any guilty plea.
35

36 The notice will be provided by the court, in writing and in general terms, at arraignment
37 or some other early point in the process. If the arraignment or appearance is by mail, the notice
38 may be given by mail. The notice may be part of another document or form which is given to
39 the defendant at arraignment. This notice will give the defendant an opportunity to ask their
40 attorney about the issue. Some retained or appointed counsel will give advice on collateral
41 sanctions and disqualifications; this is often considered part of the job by competent defense
42 attorneys. *See* INS v. St. Cyr, 533 U.S. 289, 323 n.50 (2001) ("competent defense counsel,
43 following the advice of numerous practice guides, would have advised [defendants] concerning"
44 the possibility of the collateral sanction of deportation based on criminal conviction, and the
45 avenues of relief therefrom); ABA STANDARDS FOR CRIMINAL JUSTICE, GUILTY PLEAS, 14-3.2(f)

1 (3d ed. 1999) (“To the extent possible, defense counsel should determine and advise the
2 defendant, sufficiently in advance of the entry of any plea, as to the possible collateral
3 consequences that might ensue from the entry of the contemplated plea.”) However, if the
4 lawyer in the criminal case does not give advice, the defendant will be alerted to seek other
5 counsel or research the issue on their own.

6
7 Whoever looks into the matter will find their burden eased by the collection of collateral
8 consequences described in Section 4 of this Act. All of the necessary information will be readily
9 at hand.

10
11 *The Effect of Non-Compliance on the Validity of the Plea.* Compliance with this
12 provision should be fast and simple, therefore, the question of the consequences of non-
13 compliance should arise rarely if ever. However, the criminal justice system depends on the
14 finality of judgments. Accordingly, there is strong reason not to upset a plea for a technical
15 deficiency in guilty plea procedure, and this is the prevailing rule. *See, e.g.,* FED. R. CRIM. P.
16 11(h) (“A variance from the requirements of this rule is harmless error if it does not affect
17 substantial rights.”). Sections 3(1) and 5(b) provides that the general rule applies here, so failure
18 to receive notice of collateral sanctions and disqualifications is not a basis for challenging a plea
19 or conviction.

20
21 **SECTION 6. NOTICE OF COLLATERAL CONSEQUENCES AT SENTENCING**
22 **OR UPON RELEASE.**

23 (a) An individual convicted of an offense must be given notice that collateral sanctions
24 and disqualifications may apply because of the conviction, notice that there may be ways to
25 obtain relief from them, and notice of where the collection of relevant laws published under
26 Section 4(c) can be found. Notice substantially similar to the notice set forth in Section 5(a) is
27 sufficient, but it must also include contact information for government or nonprofit agencies,
28 groups, or organizations, if any, that offer assistance to individuals seeking relief from collateral
29 sanctions and disqualifications, and information about when an individual convicted of a crime
30 may vote under this state’s law.

31 (b) The [designated government agency or official] shall give the notice at sentencing if
32 an individual is not sentenced to imprisonment or other incarceration. If the individual is

1 sentenced to imprisonment or other incarceration, the officer or agency releasing the individual
2 shall give the notice not more than [30], and, if practicable, at least [10] days before release.

3 (c) Noncompliance with this section does not give rise to a cause of action for relief from
4 a collateral consequence.

5 **Comment**

6
7 Section 6(b) provides for notice of collateral consequences when a defendant is released
8 from custody, or, if not sentenced to jail or prison, at the time of sentencing. Although Section 5
9 contemplates that these individuals would have gotten general notice of collateral sanctions at
10 the beginning of the criminal proceeding, for many defendants that will have been months or
11 years earlier. The point of notice is not fairness to the defendant in making the decision how to
12 proceed; the conviction by this stage is a fact. Rather, formal advisement promotes enforcement
13 of the law. If, for example, individuals convicted of felonies do not know they are prohibited
14 from possessing firearms, they may violate the law out of ignorance when they would have
15 complied with the law had they known. *See, e.g.,* United States v. Bethurum, 343 F.3d 712 (5th
16 Cir. 2003) (defendant properly convicted of being felon in possession of a firearm,
17 notwithstanding claim that he would not have pleaded guilty had he realized he would not be
18 entitled to possess a firearm); Saadiq v. State, 387 N.W.2d 315 (Iowa) (affirming conviction in
19 spite of defendant's claim that he was not told he could not possess a firearm), *appeal dismissed*,
20 479 U.S. 878 (1986). In *Lambert v. California* (355 U.S. 225 (1957)), the Court found a due
21 process violation in convicting an individual with a felony conviction of violation of a
22 registration provision of which she had no knowledge or reason to know.

23
24 This section also requires notice of provisions of law providing for relief from collateral
25 sanctions. Several states require by statute or court rule that this information be made available,
26 others no doubt make it available by policy or informally. *See, e.g.,* NEB. REV. STAT. § 29-
27 2264(1); AZ. R. CRIM. P. 29.1; 15 CAL. CODE REGS. § 2511(B)(7) R. UNIF. TRIAL COURTS §
28 200.9(a) *cf.* MD. CODE, CRIM PROC. § 6-232(a); MD. RULES, Rule 4-329. States have concluded
29 that it is fair to the individual and beneficial to society to let at least some individuals with
30 convictions pay their debt to society and move on. Notification to all individuals with
31 convictions will facilitate the participation of deserving but legally unsophisticated individuals.
32 However, failure to provide notice as contemplated in Section 6 does not invalidate the
33 applicability of the collateral sanctions, or provide a cause of action for money damages.

34
35 The notice contemplated by this section is modest. There is no right to counsel
36 upon being discharged from prison, probation or parole. The note could be printed on a
37 form issued in the ordinary course of processing an individual for release.
38

**SECTION 7. AUTHORIZATION REQUIRED FOR COLLATERAL SANCTION;
CONSTRUCTION IN CASE OF AMBIGUITY.**

(a) A collateral sanction may be imposed only by statute, ordinance or rule authorized by law and adopted in accordance with [insert citation to State Administrative Procedure Act].

(b) If a law is ambiguous as to whether it imposes a collateral sanction or authorizes a disqualification, it must be construed as authorizing a disqualification.

Comment

Reentry of individuals with criminal convictions is a matter of important state policy. If a program of prisoner reentry fails, then the state as a whole pays the price. Accordingly, Section 7(a) restricts creation of absolute, blanket collateral sanctions to the legislature, and those municipalities or agencies authorized by statute.

Section 7(b) is a rule of construction. In cases of ambiguity, a provision must be construed to impose a disqualification rather than an automatic collateral sanction.

SECTION 8. EFFECT OF OVERTURNED OR PARDONED CONVICTION.

(a) A conviction that has been reversed, vacated, or otherwise overturned by a court of competent jurisdiction, or that has been pardoned, does not give rise to a collateral consequence in this state.

(b) A conviction from another jurisdiction that has been vacated, expunged or set-aside, based on rehabilitation or good behavior, [does not] [does] give rise to a collateral consequence in this state.

Comment

Section 8(a) provides that convictions that have been overturned or pardoned do not give rise to collateral sanctions. If the conviction has been overturned based on legal or factual error, on appeal, motion for a new trial, or collateral review, or has been pardoned, it does not give rise to a collateral consequence in this state. If a state imposes collateral consequences based on convictions in other jurisdictions, this section contemplates that the state will give effect to an overturning in the jurisdiction where the conviction was obtained.

1
2 Some states have forms of relief from collateral consequences based on rehabilitation or
3 good behavior, variously denominated expungement, vacation, set-aside and sealing. In the state
4 where the relief is granted, this Act does not change its legal effect; it has whatever force it has.
5 The drafting committee was unable to come to agreement on the question of the effect of this
6 relief where granted in another state. However, the committee agreed that the issue should be
7 addressed. Accordingly, Section 8(b) contains bracketed options, the first treating a conviction
8 that has been relieved on some legal basis as not giving rise to a collateral consequence, the
9 second treating it like any other conviction.
10

11 **SECTION 9. ORDER OF RELIEF FROM COLLATERAL SANCTIONS.**

12 (a) An individual convicted of an offense may petition for an order of relief from one or
13 more collateral sanctions related to employment, education, housing, public benefits, or
14 occupational licensing, except those listed in Section 11. The petition shall be presented to:

15 (1) the sentencing court at or before sentencing, and shall be heard at the
16 sentencing hearing only if the court does not impose a period of incarceration on the convicted
17 individual, other than for time already served; or

18 (2) the [designated board or agency] at any time after sentencing.

19 (b) Unless the court or [designated board or agency] finds that granting the petition
20 would pose a substantial risk to the safety or welfare of the public or any individual, or that some
21 other substantial reason warrants denial of the petition, the court or the [designated board or
22 agency] shall grant a petition requesting relief, and issue an order of relief, from one or more of
23 the collateral sanctions specified in subsection (a) if, after reviewing the record, including the
24 individual's criminal history, and any filing by a prosecutor or victim, it finds that the individual
25 has established by a preponderance of the evidence that:

26 (1) granting the petition is likely to assist the individual in living a law-abiding
27 life, including obtaining or maintaining employment, or reentering the community; and

1 (2) if less than five years has elapsed since the individual was sentenced for any
2 felony, the individual has substantial need for the relief requested in order to live a law-abiding
3 life.

4 (c) The state acting directly or through its departments, agencies, officers, or
5 instrumentalities, including municipalities, political subdivisions, educational institutions,
6 boards, or commissions, or their employees[, and government contractors, including
7 subcontractors, made subject to this section by contract, law other than this [act], or ordinance,]
8 may not impose a collateral sanction that is the subject of an unrevoked order of relief from
9 collateral sanctions issued [in this state] [in any state], but may in its discretion impose a
10 disqualification based on the conduct underlying the conviction.

11 [(d) An order of relief from collateral sanctions may be introduced in a judicial or
12 administrative proceeding by a decisionmaker as evidence of the decisionmaker's due care in
13 deciding to hire, retain, license, lease to, admit to a school or program, or otherwise transact
14 business or engage in activity with the individual to whom the order was issued, if the
15 decisionmaker had knowledge of the order at the time of the alleged negligence or other fault.]

16 **Comment**

17 The principle that at least some licenses, benefits and employment opportunities should
18 not be arbitrarily denied to people with criminal convictions is well established in state codes.
19 More than 30 states have statutory restrictions on collateral sanctions and disqualifications
20 imposed by state actors. *See* MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL
21 CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE, Ch. 4
22 (William S. Hein & Co. 2006). A core principle of many of these laws is that individuals should
23 be excluded from situations where their conviction presents a risk to public safety, but they
24 should not be excluded if there is no connection between the crime committed and the
25 opportunity sought. *See also* NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, POLICY POSITIONS
26 ON PRISONER REENTRY ISSUES § 7, at 10 (Adopted July 17, 2005) (while supporting collateral
27 sanctions necessary to protect the public, states that "[r]elief from some collateral sanctions may
28 be appropriate if they do not relate to the conduct involved in the offense of conviction.")
29

1 Sections 9 and 10 attempt to harmonize society’s interests in public safety and its interest
2 in reentry and reintegration into society. Sections 9 and 10 create new mechanisms for relief of
3 collateral sanctions under some circumstances. Section 9 is aimed at removing specific legal
4 barriers for individuals first reentering society. It allows an individual to apply for relief from a
5 collateral sanction relating to employment, education, housing, public benefits, or occupational
6 licensing on a showing that the relief will assist in leading a law-abiding life. If a conviction
7 giving rise to the collateral sanction is less than five years old, the applicant must show
8 substantial need for the relief.

9
10 Relief may be granted by the court at sentencing, if the individual is immediately
11 returning to free society. If the individual does not apply for, is denied, or is ineligible for, an
12 order at sentencing, the order can be issued only by the board or agency (in many states it is
13 likely to be the parole board) assigned responsibility for issuing the orders.

14
15 If the enacting state imposes collateral sanctions based on convictions from other
16 jurisdictions, then Sections 9 and 10 can be invoked by individuals with such convictions. Relief
17 is not restricted to individuals with collateral sanctions based on convictions from the enacting
18 state.

19
20 Section 9(c) provides that the state shall not impose a collateral sanction that has been
21 relieved by an Order of Relief. However, issuance of an Order of Relief does not guarantee that
22 an individual will get the benefit or opportunity sought; it merely allows case-by-case
23 determination. For example, a regulation might prohibit individuals with felony convictions
24 from being licensed as a paramedic. An individual may persuade a court or the designated board
25 or agency to issue an Order of Relief from that collateral sanction. That would lift the absolute
26 bar, but would not restrict the licensing board from considering whether a license should issue,
27 based on the conduct underlying the conviction. The decisionmaker is also entitled to consider
28 the conviction conclusive proof that the individual committed every element of the offense of
29 conviction. Unlike Certificates issued under Section 10, this Act does not provide specific
30 principles for guiding decisionmakers in evaluating how much weight, if any, to criminal
31 convictions subject to an Order of Relief; decisionmakers may use any factors that are
32 reasonable.

33
34 Section 9(d), providing that an Order of Relief is admissible as evidence that a
35 decisionmaker was not negligent, applies to private as well as public decisionmakers. Unless
36 persons with criminal records are to be permanently unemployed and homeless, some businesses
37 must transact with them, yet, they take legal risks if they do. Business owners have few sources
38 of objective evidence about the backgrounds of applicants, and an Order of Relief issued by
39 government authority after investigation is reasonably relied upon. Section 9(d) is bracketed not
40 because the drafting committee doubted that an order of relief was admissible as relevant to the
41 issue of due care, but because in some states the rules of evidence are outside the control of the
42 legislature.

43
44 Sections 9 and 10 are based in part on the Model Sentencing and Corrections Act
45 (“MSCA”), § 4-1005. However, this Act does not identify a list of prohibited collateral

1 sanctions, as do the Model Sentencing and Corrections Act and the ABA Standards. The Model
2 Sentencing and Corrections Act, § 4-1001(b) provides that a convicted individual “retains all
3 rights, political, personal, civil and otherwise”, including, among others it lists, the right to vote.
4 The ABA Standards has a list of sanctions which should never be imposed under any
5 circumstances, such as “deprivation of the right to vote, except during actual confinement.” ABA
6 CRIMINAL JUSTICE STANDARD 19-2.6(a).

7
8 Sections 9 and 10 also differ from the MSCA by limiting its coverage to state actors,
9 excluding private employers. Regulation of public employment and licensing is less
10 controversial than would be reaching into the decisions of private businesses. In addition, public
11 employment and licensing are often done with the public interest in mind (for example, in the
12 context of veteran’s preferences, or reserved opportunities for the disabled). If any category of
13 employer is going to take a chance by helping individuals with convictions, it is likely to be the
14 public sector. *See, e.g.,* Editorial, *Cities that Lead the Way*, N.Y. TIMES, Mar. 31, 2006
15 (discussing anti-discrimination policies regarding individuals with conviction for city agencies
16 and city contractors in Boston, Chicago and San Francisco).

17
18 However, Sections 9 and 10 contemplates that enacting states might choose to make
19 private corporations performing government functions or services might, by contract or statute,
20 be made subject to these restrictions. It is far less intrusive to ask private companies who choose
21 to do business with the state to comply with a policy like this; if a private company finds it
22 objectionable, they may forego the business. Further, even if this is not a point upon which
23 uniformity is likely, this section is not meant to discourage states from deciding on their own that
24 private employers as a group should be covered; some now do and there is no reason they should
25 not continue if it works for them. States should examine their laws governing public
26 employment and licensing to ensure that they conform to this policy.

27 28 **SECTION 10. CERTIFICATE OF RESTORATION OF RIGHTS.**

29 (a) An individual convicted of an offense may petition the [designated board or agency]
30 for a certificate of restoration of rights.

31 (b) Unless the [designated board or agency] finds that granting the petition would pose a
32 substantial risk to the safety or welfare of the public or any individual, or that some other
33 substantial reason warrants denial of the petition, the [designated board or agency] shall grant a
34 petition for a certificate of restoration of rights and issue such a certificate, relieving an
35 individual from one or more collateral sanctions including those listed in Section 9(a), or from all
36 collateral sanctions, except those listed in Section 11, if it finds that the individual has

1 established by a preponderance of the evidence that:

2 (1) at least [five] years has elapsed since the date of the individual's most recent
3 conviction of a felony [or misdemeanor] in any jurisdiction;

4 (2) for the [five] years preceding the issuance of the certificate, the individual:

5 (A) has not been confined pursuant to a criminal sentence in [prison]
6 [prison, jail, a half-way house, home detention, or other actual confinement] in any jurisdiction;

7 (B) has been engaged in, or seeking to engage in, a lawful occupation or
8 activity, including employment, training, education, or rehabilitative programs or, if the
9 individual is retired or disabled, that the individual has a lawful source of support; and

10 (C) has not violated the terms of any criminal sentence, or that any failure
11 to comply is justified, involuntary, or insubstantial; and

12 (3) no criminal charges are pending against the individual.

13 (c) The [designated board or agency] may issue a certificate of restoration of rights
14 relieving all collateral sanctions under subsection (b), with specified exceptions in addition to the
15 applicable exceptions listed in Section 11. The text of a certificate shall:

16 (1) list the particular collateral sanctions from which relief has been granted; or

17 (2) state that the certificate grants relief from all collateral sanctions except those
18 collateral sanctions listed in Section 11 that are applicable to the individual, and any other
19 collateral sanctions from which relief has not been granted.

20 (d) The state acting directly or through its departments, agencies, officers, or
21 instrumentalities, including municipalities, political subdivisions, educational institutions,
22 boards, or commissions, or their employees[, and government contractors, including
23 subcontractors, made subject to this section by contract, law other than this [act], or ordinance,]

1 may not impose a collateral sanction that is the subject of an unrevoked certificate of restoration
2 of rights issued [in this state] [in any state].

3 (e) The state acting directly or through its departments, agencies, officers, or
4 instrumentalities, including municipalities, political subdivisions, educational institutions,
5 boards, or commissions, or their employees[, and government contractors, including
6 subcontractors, made subject to this section by contract, law other than this [act], or ordinance,]
7 may not impose a disqualification on an individual to whom an unrevoked certificate of
8 restoration of rights has been issued covering the opportunity at issue unless the decisionmaker
9 determines that granting the opportunity poses an unreasonable risk to the safety or welfare of
10 the public or any individual. The decisionmaker may conduct any investigation it considers
11 necessary, may require that an individual applying for an opportunity furnish copies of court
12 records or other relevant information, and shall consider:

13 (1) the individual's age when the offense was committed;

14 (2) the time since commission of the offense and since release from any custody;

15 (3) the length and consistency of the individual's work history, including whether
16 the individual has a recent record of consistent employment;

17 (4) the individual's education and training;

18 (5) the facts underlying the conviction and their relation, if any, to the duties or
19 functions of the opportunity;

20 (6) the individual's other criminal history, if any, and rehabilitation and conduct
21 since the offense, including the individual's receipt of an order of relief from collateral sanctions,
22 a certificate of restoration of rights, a pardon, or other relief;

23 (7) whether other individuals who engaged in similar prohibited conduct, whether

or not convicted, have been or would be excluded on the ground that they present an unreasonable risk; and

(8) any other relevant factor.

(f) [(1)] If a certificate of restoration of rights is issued and unrevoked at the time of decision, the underlying conviction is inadmissible as evidence that a decisionmaker was negligent or otherwise at fault for hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise transacting business or engaging in activity with the individual to whom the certificate was issued.

[(2) A certificate of restoration of rights may be introduced in a judicial or administrative proceeding by a decisionmaker as evidence of the decisionmaker's due care in deciding to hire, retain, license, lease to, admit to a school or program, or otherwise transact business or engage in activity with the individual to whom the certificate was issued, if the decisionmaker had knowledge of the certificate at the time of the alleged negligence or other fault.]

Comment

Like Section 9, Section 10 allows the designated board or agency to relieve collateral sanctions. Section 10 relief, called a Certificate of Restoration of Rights, is available more broadly; it applies to any collateral sanction, or all collateral sanctions (except those listed in Section 11), and there is no required showing that relief is necessary to lead a law-abiding life. However, the applicant must make a substantial showing of good behavior for a period of years prior to the issuance of the Certificate. (The number of years is to be determined by each state, but the Act brackets five years.) For that period, the individual must have no convictions and no incarceration pursuant to sentence, have been employed, in school, or in rehabilitation, or, if retired or disabled, show a lawful source of income, and have complied with all of the terms of criminal sentences. The Act brackets whether conviction of a misdemeanor will render an individual ineligible, because a state might conclude that some minor traffic or parking offenses and the like should not be disqualifying. However, Section 10(b) allows denial of a petition based on some substantial reason not listed. Thus, even in a state that did not provide for automatic ineligibility based on misdemeanor convictions, a misdemeanor involving violence or dishonesty might well be grounds for denial.

1
2 Any collateral sanction may be relieved under Section 10, except those listed in Section
3 11. A Certificate of Restoration of Rights may be issued to relieve one or more specific
4 collateral sanctions, all collateral sanctions, or all with specified exceptions. For example, the
5 board might believe that an individual has demonstrated good behavior, warranting general relief
6 from the burdens of a felony conviction, yet not want the individual to be around alcohol, or
7 firearms. This is authorized by Section 10(c). In such a case, the Certificate will so state.
8

9 Section 10(d) provides that the state shall not impose a collateral sanction that has been
10 relieved by a Certificate. If the state imposes collateral sanctions based on convictions from
11 other states, the legislature should decide whether to give effect to a Certificate issued by another
12 state.
13

14 A Certificate of Relief also provides relief from disqualifications. Under Section 10(e), a
15 decision-maker may not impose a disqualification on an individual to whom an unrevoked
16 certificate of restoration of rights has been issued covering the opportunity at issue unless the
17 decisionmaker determines that granting the opportunity poses an unreasonable risk to the safety
18 or welfare of the public or any individual. In making this determination, Sections 10(e) (1) and
19 (2) require consideration of a number of factors, including the individual's age and the passage
20 of time since the offense and release. Some jurisdictions have a term of years, after which, if the
21 individual has not been convicted of another crime, rehabilitation is presumed. *See, e.g.*, N.M.
22 Stat. Ann. § 28.2.4(B) (three years after imprisonment or completion of parole and probation);
23 N.D. Cent. Code § 12.1-33-02.1(2)(c) (five years after discharge from parole, probation or
24 imprisonment).
25

26 Section 10(e)(7) is designed to determine whether the disqualification is based on
27 conduct or conviction. If the Plumber's Board grants licenses to those, say, who were fired from
28 a job or suspended from school for marijuana possession, then it is probably not unreasonably
29 dangerous or risky to public safety to allow an applicant who was convicted of precisely the
30 same conduct to have a license to practice. On the other hand, if the agency would deny a
31 position to a school bus driver applicant who had his parental rights terminated in a civil action
32 based on child abuse, that is strong evidence that a conviction for child abuse is directly related
33 to fitness for the employment. (ABA CRIMINAL JUSTICE STANDARD 19-3.1). Nothing in this
34 Section or any other part of the Act authorizes or requires preferences for applicants who have
35 criminal convictions.
36

37 Section 10(e)(8) allows the decisionmaker to consider any other relevant fact or
38 circumstance not listed in (e)(1) through (7).
39

40 Section 10(f)(1) provides protection for public and private entities transacting with
41 holders of Certificates of Restoration of Rights. The first part provides that if a person transacts
42 with an individual holding an unrevoked Certificate, a conviction covered by the Certificate
43 becomes inadmissible. However, if the person transacting with the holder knew, independently
44 of the conviction, of particular facts underlying the conviction, a state's rules of evidence might
45 make that knowledge admissible.

1
2 Section 10(f)(2) is identical to Section 9(d) and is bracketed for the same reasons.
3

4 **SECTION 11. SANCTIONS NOT SUBJECT TO ORDER OF RELIEF FROM**
5 **COLLATERAL SANCTIONS OR CERTIFICATE OF RESTORATION OF RIGHTS.**

6 An order of relief from collateral sanctions or certificate of restoration of rights may not be
7 issued to relieve the following sanctions:

8 (1) requirements imposed by [insert citation to state’s “Megan’s Law” enacted pursuant
9 to 42 U.S.C. § 14071 or its associated regulations];

10 (2) a motor vehicle license suspension, revocation, limitation, or ineligibility pursuant to
11 [insert citation to state DWI laws], or a motor vehicle license suspension, revocation, limitation,
12 or ineligibility pursuant to [insert citation to provision providing for license suspension for traffic
13 offenses], for which restoration or relief is available pursuant to [insert citation to
14 occupational/temporary/restricted licensing provisions] [; or]

15 (3) ineligibility for employment with a law enforcement agency [as defined in [insert
16 reference to other law defining law enforcement agencies] [including the attorney general,
17 prosecutors’ offices, police departments, sheriffs’ departments, the [state police,] and the
18 department of corrections.] [or

19 (4) ineligibility pursuant to [insert references to constitutional provisions removing or
20 suspending officeholders based on criminal charge or conviction].

21 **Comment**

22 Section 11 provides that neither an Order of Relief from Collateral Sanctions issued
23 under Section 9, nor a Certificate of Restoration of Rights issued under Section 10 can relieve
24 certain specified collateral Sanctions. Section 11(1) provides that sex offender registration
25 requirements cannot be relieved. Section 11(2) provides that sanctions related to motor vehicle
26 licensing cannot be relieved. In this particular area, additional methods of relief would be

1 duplicative and perhaps inconsistent with the detailed and elaborate provisions for temporary or
2 restrictive licenses that now exist. Section 11(3) provides that prohibitions on hiring by law
3 enforcement agencies may not be relieved. However, that some states exclude persons with
4 convictions from law enforcement employment does not mean they must or always do. Nothing
5 in this Section prohibits states from permitting law enforcement agencies to consider hiring
6 individuals with criminal records. Section 11(4) provides that sanctions imposed by the state
7 constitution cannot be relieved by statute
8

9 **SECTION 12. PROCEDURES APPLICABLE TO ISSUANCE, REVOCATION,**
10 **AND MODIFICATION OF ORDERS OF RELIEF FROM COLLATERAL SANCTIONS**
11 **AND CERTIFICATES OF RESTORATION OF RIGHTS; VICTIMS' RIGHTS.**

12 (a) The [designated board or agency] shall give notice of the filing of a petition for an
13 order of relief from collateral sanctions under Section 9, or for a certificate of restoration of
14 rights under Section 10, to the office that prosecuted the offense for which the order or certificate
15 is sought, and, if the conviction was not obtained in this state, to [the Office of the Attorney
16 General of this state or an appropriate prosecuting office in this state]. If a petition for an order
17 of relief from collateral sanctions is filed with the sentencing court, such notice shall be governed
18 by the applicable rules of court. Any prosecutor so notified, and any prosecuting agency in this
19 state, may participate in the process by which the court or the [designated board or agency]
20 considers the petition.

21 (b) The court or the [designated board or agency] may order any test, report,
22 investigation, or disclosure by the individual it believes necessary to its decision. Before issuing
23 a certificate of restoration of rights, the [designated board or agency] shall order preparation of a
24 report of the type required before sentencing an individual convicted of a felony. If there are
25 disputed issues of fact or law material to the decision, the [designated board or agency] shall give
26 the individual and the prosecutor the opportunity to submit evidence and argument on those

1 issues before decision.

2 (c) The court or the [designated board or agency] may grant any relief to which the
3 individual is entitled, even if the individual does not request that relief in the petition for an order
4 or a certificate. The [designated board or agency] may enlarge the relief granted under an order
5 of relief from collateral sanctions issued previously by a court or by the [designated board or
6 agency], or under a certificate of restoration of rights issued previously by the [designated board
7 or agency], if the individual petitions for enlargement and satisfies the requirements for the
8 additional requested relief under the applicable provisions of Section 9(b) or Section 10(b).

9 (d) The [designated board or agency] may revoke an order for relief from collateral
10 sanctions issued under Section 9, or a certificate of restoration of rights issued under Section 10,
11 in whole or part, if it finds by a preponderance of the evidence that just cause exists for
12 revocation. Subsequent conviction of the holder for a crime that is or would be a felony in this
13 jurisdiction constitutes just cause. An order of revocation may be entered:

14 (1) sua sponte or by motion of a prosecutor in this state;

15 (2) after notice to the individual to whom the order or certificate was issued and
16 any other prosecutor that has appeared in the matter; and

17 (3) after a hearing pursuant to rules adopted under the [insert reference to the state
18 administrative procedure act] if requested by the individual or the prosecutor who made the
19 motion or any prosecutor that has appeared in the matter.

20 (e) The [designated board or agency] may adopt rules for application, determination,
21 modification, and revocation of orders for relief from collateral sanctions under Section 9 and
22 certificates of restoration of rights under Section 10, in accordance with the provisions of [insert
23 reference to state administrative procedure [act]]. The [designated board or agency] is not bound

1 by the rules of evidence except those on privileges. The [designated board or agency] shall
2 maintain a public record of the application, determination, modification, and revocation of orders
3 of relief from collateral sanctions and certificates of restoration of rights. The [state criminal
4 justice record agency] shall include issuance, modification, and revocation of orders of relief
5 from collateral sanctions and certificates of restoration of rights in its system of records.

6 (f) A victim of the offense that led to the collateral sanction for which the petitioner is
7 seeking relief has the right to receive notice of and participate in proceedings for issuance,
8 modification, or revocation of an order for relief from collateral sanctions or a certificate of
9 restoration of rights pursuant to [insert citation to crime victim's act].

10 (g) With respect to an individual to whom an order of relief from collateral sanctions or
11 certificate of restoration of rights has been issued, this [act] does not eliminate any legal right or
12 remedy, or give rise to a cause of action other than a declaration that a policy imposing a
13 collateral sanction on an individual to whom such an order or certificate has been issued is
14 invalid or, if an individual has shown that an opportunity was denied in violation of this section,
15 for an order that the individual's application be reconsidered in accordance with this section.

16 **SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
17 applying and construing this uniform [act], consideration must be given to the need to promote
18 uniformity of the law with respect to its subject matter among states that enact it.

19 **SECTION 14. SAVINGS AND TRANSITIONAL PROVISIONS.**

20 (a) This [act] applies to collateral consequences whenever enacted or imposed, unless the
21 law creating the collateral consequence expressly states that this [act] does not apply.

22 (b) This [act] does not invalidate the imposition of a collateral sanction on an individual
23 before [the effective date of this [act]], but collateral sanctions validly imposed before [the

1 effective date of this [act]] may be the subject of relief under this [act].

2 **SECTION 15. EFFECTIVE DATE.** This [act] takes effect . . .