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**ABA Standards for Criminal Justice**  
**Third Edition**  
**Collateral Sanctions and**  
**Discretionary Disqualification of**  
**Convicted Persons**

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# Contents—Collateral Sanctions and Discretionary Disqualification of Convicted Persons

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Black Letter	1
Black Letter with Commentary	7

## INTRODUCTION

### PART I. DEFINITIONS AND OBJECTIVES

Standard 19-1.1	Definitions	15
Standard 19-1.2	Objectives	18

### PART II. COLLATERAL SANCTIONS

Standard 19-2.1	Codification of collateral sanctions	21
Standard 19-2.2	Limitation on collateral sanctions	23
Standard 19-2.3	Notification of collateral sanctions before plea of guilty	25
Standard 19-2.4	Consideration of collateral sanctions at sentencing	29
Standard 19-2.5	Waiver, modification, relief	30
Standard 19-2.6	Prohibited collateral sanctions	35

### PART III. DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS

Standard 19-3.1	Prohibited discretionary disqualification	41
Standard 19-3.2	Relief from discretionary disqualification	43
Standard 19-3.3	Unreasonable discrimination	44



# BLACK LETTER

## PART I. DEFINITIONS AND OBJECTIVES

### Standard 19-1.1 Definitions

For purposes of this chapter:

(a) The term “collateral sanction” means a legal penalty, disability or disadvantage, however denominated, that is imposed on a person automatically upon that person’s conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence.

(b) The term “discretionary disqualification” means a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction.

### Standard 19-1.2 Objectives

(a) With respect to collateral sanctions, the objectives of this chapter are to:

(i) limit collateral sanctions imposed upon conviction to those that are specifically warranted by the conduct constituting a particular offense;

(ii) prohibit certain collateral sanctions that, without justification, infringe on fundamental rights, or frustrate a convicted person’s chances of successfully reentering society;

(iii) provide the means by which information concerning the collateral sanctions that are applicable to a particular offense is readily available;

(iv) require that the defendant is fully informed, before pleading guilty and at sentencing, of the collateral sanctions applicable to the offense(s) charged;

(v) include collateral sanctions as a factor in determining the appropriate sentence; and

(vi) provide a judicial or administrative mechanism for obtaining relief from collateral sanctions.

(b) With respect to discretionary disqualification of a convicted person, the objectives of this chapter are to:

(i) facilitate reentry into society, and reduce recidivism, by limiting situations in which a convicted person may be disqualified from otherwise available benefits or opportunities;

(ii) provide that a convicted person not be disqualified from benefits or opportunities because of the conviction unless the basis for disqualification is particularly related to the offense for which the person is convicted; and

(iii) create a mechanism for obtaining review of, and relief from, discretionary disqualification.

## PART II. COLLATERAL SANCTIONS

### Standard 19-2.1 Codification of collateral sanctions

The legislature should collect, set out or reference all collateral sanctions in a single chapter or section of the jurisdiction's criminal code. The chapter or section should identify with particularity the type, severity and duration of collateral sanctions applicable to each offense, or to a group of offenses specifically identified by name, section number, severity level, or other easily determinable means.

### Standard 19-2.2 Limitation on collateral sanctions

The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting that 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.

### Standard 19-2.3 Notification of collateral sanctions before plea of guilty

(a) The rules of procedure should require a court to ensure, before accepting a plea of guilty, that the defendant has been informed of

collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law. Except where notification by the court itself is otherwise required by law or rules of procedure, this requirement may be satisfied by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged.

(b) Failure of the court or counsel to inform the defendant of applicable collateral sanctions should not be a basis for withdrawing the plea of guilty, except where otherwise provided by law or rules of procedure, or where the failure renders the plea constitutionally invalid.

#### **Standard 19-2.4 Consideration of collateral sanctions at sentencing**

(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.

(b) The rules of procedure should require the court to ensure at the time of sentencing that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law. Except where notification by the court itself is otherwise required by law or rules of procedure, this requirement may be satisfied by confirming on the record that defense counsel has so advised the defendant.

(c) Failure of the court or counsel to inform the defendant of applicable collateral sanctions should not be a basis for challenging the sentence, except where otherwise provided by law or rules of procedure.

#### **Standard 19-2.5 Waiver, modification, relief**

(a) The legislature should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction.

(b) Where the collateral sanction is imposed by one jurisdiction based upon a conviction in another jurisdiction, the legislature in

the jurisdiction imposing the collateral sanction should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from the collateral sanction.

(c) The legislature should establish a process by which a convicted person may obtain an order relieving the person of all collateral sanctions imposed by the law of that jurisdiction.

(d) An order entered under this Standard should:

(i) have only prospective operation and not require the restoration of the convicted person to any office, employment or position forfeited or lost because of the conviction;

(ii) be in writing, and a copy provided to the convicted person; and

(iii) be subject to review in the same manner as other orders entered by that court or administrative body.

## Standard 19-2.6 Prohibited collateral sanctions

Jurisdictions should not impose the following collateral sanctions:

(a) deprivation of the right to vote, except during actual confinement;

(b) deprivation of judicial rights, including the rights to:

(i) initiate or defend a suit in any court under one's own name under procedures applicable to the general public;

(ii) be eligible for jury service except during actual confinement or while on probation, parole, or other court supervision; and

(iii) execute judicially enforceable documents and agreements;

(c) deprivation of legally recognized domestic relationships and rights other than in accordance with rules applicable to the general public. Accordingly, conviction or confinement alone:

(i) should be insufficient to deprive a person of the right to contract or dissolve a marriage; parental rights, including the right to direct the rearing of children and to live with children except during actual confinement; the right to grant or withhold consent to the adoption of children; and the right to adopt children; and

(ii) should not constitute neglect or abandonment of a spouse or child, and confined persons should be assisted in making appropriate arrangements for their spouses or children;

(d) deprivation of the right to acquire, inherit, sell or otherwise dispose of real or personal property, except insofar as is necessary to pre-

clude a person from profiting from his or her own wrong; and, for persons unable to manage or preserve their property by reason of confinement, deprivation of the right to appoint someone of their own choosing to act on their behalf;

(e) ineligibility to participate in government programs providing necessities of life, including food, clothing, housing, medical care, disability pay, and Social Security; provided, however, that a person may be suspended from participation in such a program to the extent that the purposes of the program are reasonably being served by an alternative program; and

(f) ineligibility for governmental benefits relevant to successful reentry into society, such as educational and job training programs.

### **PART III. DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS**

#### **Standard 19-3.1 Prohibited discretionary disqualification**

The legislature should prohibit discretionary disqualification of a convicted person from benefits or opportunities, including housing, employment, insurance, and occupational and professional licenses, permits and certifications, 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.

#### **Standard 19-3.2 Relief from discretionary disqualification**

The legislature should establish a process for obtaining review of, and relief from, any discretionary disqualification.

#### **Standard 19-3.3 Unreasonable discrimination**

Each jurisdiction should encourage the employment of convicted persons by legislative and executive mandate, through financial

**incentives and otherwise. In addition, each jurisdiction should enact legislation prohibiting the denial of insurance, or a private professional or occupational license, permit or certification, to a convicted person on grounds related to the conviction, unless engaging in the conduct underlying the conviction would provide a substantial basis for denial even if the person had not been convicted.**

# BLACK LETTER WITH COMMENTARY

## INTRODUCTION

Persons convicted of a crime ordinarily expect to be sentenced to a term of probation or confinement, and perhaps to a fine and court costs. They also understand that they will bear the social stigma of a criminal conviction. But what they often do not appreciate is that their convictions will expose them to numerous additional legal penalties and disabilities, some of which may be far more onerous than the sentence imposed by the judge in open court.<sup>1</sup> These “collateral consequences of conviction”<sup>2</sup> include relatively traditional penalties such as disenfranchisement, loss of professional licenses, and deportation in the case of aliens, as well as newer penalties such as felon registration and ineligibility for certain public welfare benefits. They may apply for a definite period of time, or indefinitely for the convicted person’s lifetime. To the extent they occur outside the sentencing process, they may take effect without judicial consideration of their appropriateness in the particular case, without notice at sentencing that the individual’s legal

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1. From colonial times, the American legal system has recognized that certain legal disabilities flow from a criminal conviction in addition to the sentence imposed by the court. The convicted person’s reduced legal status is derived from the ancient Greek concept of “infamy,” or the penalty of “outlawry” among the Germanic tribes. See Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POL. SCI. 347, 350-51 (1968). The idea that criminals should be separated from the rest of society led to “civil death” in the Middle Ages and to exile by “transportation” during the Enlightenment. The American colonies, and later the United States, followed the European practice of excluding convicted persons from many rights and privileges of citizenship.

2. The term “collateral consequences” does not appear in the black letter of these Standards. It is used in this commentary for descriptive purposes only, and includes both those consequences that occur by operation of law at the time of conviction (“collateral sanctions,” defined in Standard 19-1.1(a)), and those that occur as a result of some subsequent intervening event or discretionary decision (“discretionary disqualification,” defined in Standard 19-1.1(b)). In criminal justice literature, the term “collateral consequences” is also sometimes used to refer to the social effects of incarceration. See *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in *PRISONS* (Michael Tonry & Joan Petersilia eds., 1999).

status has dramatically changed, and indeed without any requirement that the judge, prosecutor, defense attorney or defendant even be aware that they exist.

The collateral consequences of conviction have been increasing steadily in variety and severity for the past 20 years, and their lingering effects have become increasingly difficult to shake off.<sup>3</sup> The dramatic increase in the numbers of persons convicted and imprisoned means that this half-hidden network of legal barriers affects a growing proportion of the populace.<sup>4</sup> More people convicted inevitably means more

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3. See, e.g., Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT*, *supra* note 2; Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 *CAMBRIDGE L.J.* 599, 603 (1997) (“the clear trend in recent years has been for them to increase in number and complexity”). For a period in the mid-20th century, the use of collateral consequences diminished. See, e.g., ABA *STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS*, Former Standard 23-8.2, commentary (2d ed. 1981); Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 *VAND. L. REV.* 929, 1234 (1970).

4. Because of their increasing importance, there is a growing legal literature on collateral consequences. Some deals with collateral consequences associated with particular types of convictions. See, e.g., Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 *J. GENDER RACE & JUST.* 253 (2002); Priscilla Budeiri, Comment, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 *HARV. C.R.-C.L. L. REV.* 157 (1981). Other articles deal with particular types of collateral consequences. See, e.g., Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 *STAN. L. & POL’Y REV.* 153 (1999) (immigration). Studies are being prepared of the collateral consequences applicable in particular state jurisdictions. See, e.g., *BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE: A GUIDE FOR CRIMINAL DEFENSE LAWYERS AND OTHER ADVOCATES FOR PERSONS WITH CRIMINAL RECORDS* (2004); University of Maryland School of Law Reentry of Ex-Offenders Clinic, *A Report on Collateral Consequences of Criminal Convictions in Maryland* (draft Mar. 19, 2004); Nancy Fishman, New Jersey Institute of Social Justice, Briefing Paper: *Legal Barriers to Prisoner Reentry in New Jersey* (Apr. 11, 2003). There is an especially rich literature on disenfranchisement. See, e.g., Nora V. Demleitner, *Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 *MINN. L. REV.* 753 (2000); Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 *WIS. L. REV.* 1045 (2002); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 *UCLA L. REV.* 1895 (1999); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 *STANFORD L. REV.* 1147 (2004); *Developments in the Law, One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 *HARV. L. REV.* 1939 (2002); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 *YALE L.J.* 537 (1993). Some literature deals with collateral consequences and particular categories of defendants, see, e.g., Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings: Part 1*, 15 *CRIM. JUST.* 59 (Summer 2000); Robert E. Shepherd, Jr., *Collateral Conse-*

## Introduction

people who will ultimately be released from prison or supervision, and who must either successfully reenter society or be at risk of reoffending.<sup>5</sup> Given the number of people who have been convicted at one time or another, collateral consequences have become one of the most significant methods of assigning legal status in America.<sup>6</sup>

Collateral consequences may serve an important and legitimate public purpose, such as keeping firearms out of the hands of persons convicted of crimes of violence, protecting children from individuals with histories of abuse, or barring persons convicted of fraud from positions of public trust. Other collateral consequences are more difficult to justify, particularly when applied automatically across the board to whole categories of convicted persons. Perhaps most problematic are limitations on the exercise of fundamental rights of citizenship, and barriers to employment, housing, and otherwise generally available public benefits and services.

The imposition of collateral penalties has serious implications, both in terms of fairness to the individuals affected, and in terms of the

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*quences of Juvenile Proceedings: Part II*, 15 CRIM. JUST. 41 (Fall 2000); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction VII. Collateral Consequences*, 92 HARV. L. REV. 1340 (1979) (collateral consequences for corporations); and some with their relevance to other aspects of the criminal proceeding, *see, e.g.*, G. Andrew Watson, *Mootness—Contingent Collateral Consequences in the Context of Collateral Challenges*, 73 J. CRIM. L. & CRIMINOLOGY 1678 (1982); Gregory N. Racz, Note, *Exploring Collateral Consequences: Koon v. United States, Third Party Harm, and Departures from Federal Sentencing Guidelines*, 72 N.Y.U. L. REV. 1462 (1997); Charles S. Rountree, III, Note, *Criminal Law—Standing Based on Collateral Civil Consequences*, 14 WAKE FOREST L. REV. 231 (1978). Social science research is beginning to focus on the impact of large-scale incarceration on families and communities. *See, e.g.*, PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES (Jeremy Travis & Michelle Waul eds., 2004); INVISIBLE PUNISHMENT, *supra* note 2, *passim*.

5. Over 630,000 persons were released from state and federal prisons in 2002. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2003, AT 7 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf>.

6. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf> (estimating that in 2001, 5.6 million or 2.7% of adult Americans had served a term in prison, more than double the percentage in 1974). Jeremy Travis has reported that "[a]n estimated 13 million Americans are either currently serving a sentence for a felony conviction or have been convicted of a felony in the past." *Invisible Punishment*, *supra* note 3, at 18 (citing Christopher Uggen, Melissa Thompson & Jeff Manza, *Crime Class and Reintegration: The Scope of Social Distribution of America's Criminal Class* (paper presented at the American Society of Criminology meetings in San Francisco, Cal. (Nov. 18, 2000)).

burdens placed on the community. If promulgated and administered indiscriminately, a regime of collateral consequences may frustrate the chance of successful re-entry into the community, and thereby encourage recidivism.<sup>7</sup>

Historically, legal treatment of collateral penalties has been ad hoc and inconsistent. Indeed, there has been no consensus reached about what makes a penalty “collateral,” or about the due process implications of such a label.<sup>8</sup> In a set of distinctions created by constitutional

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7. See Jeremy Travis, Laurie O. Robinson, & Amy L. Solomon, *Prisoner Reentry: Issues for Practice and Policy*, 17 CRIM. JUST. 12, 17 (Spr. 2002) (“[A]re we jeopardizing future public safety by making it so much more difficult for these ex-offenders to succeed?”); von Hirsch & Wasik, *supra* note 3, at 605 (“The more that convicted persons are restricted by law from pursuing legitimate occupations, the fewer opportunities they will have for remaining law abiding.”). See generally JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2003); JEREMY TRAVIS, AMY L. SOLOMON & MICHELLE WAUL, *FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY* (2001), available at [http://www.urban.org/pdfs/from\\_prison\\_to\\_home.pdf](http://www.urban.org/pdfs/from_prison_to_home.pdf); Jeremy Travis, *But They all Come Back: Rethinking Prisoner Reentry*, 7 SENTENCING AND CORRECTIONS ISSUES FOR THE 21ST CENTURY (National Institute of Justice, May 2000).

8. In determining whether a defendant is legally entitled to notice of a particular consequence of conviction in the context of a guilty plea, some courts have drawn a distinction between “direct” consequences (as to which notice is required) and “collateral” consequences (as to which it is not). A consequence may be found to be “collateral” because it is not imposed by the court, or because it is “contingent upon action taken by an individual or individuals other than the sentencing court.” *United States v. Littlejohn*, 224 F.3d 960, 965 (9th Cir. 2000). Examples of the latter are the possibility of subsequent prosecution as a repeat offender, exposure to potential civil liability, and the possibility of parole revocation. *Id.* Recently, however, some courts have held that statutory collateral consequences that are automatic and self-executing are “direct,” even though the court has no role in imposing them. See, e.g., *id.* at 967-69 (drug offender was entitled to notice at plea colloquy that the conviction for the instant offense would render him automatically ineligible for certain federally-funded public welfare benefits; however, failure to provide such notice in the circumstances was harmless error and did not render plea invalid); *Barkley v. State*, 724 A.2d 558 (Del. 1999) (failure to inform defendant that his driver’s license would automatically be revoked upon conviction, as required by applicable court rules, rendered guilty plea invalid). Deportation has, however, generally been regarded as a “collateral” consequence of conviction for purposes of due process analysis, notwithstanding 1996 amendments to the immigration laws that severely curtailed judicial or administrative discretion to grant relief. See, e.g., *United States v. Amador-Leal*, 276 F.3d 511 (9th Cir. 2002) (deportation is not a direct consequence of conviction because alien offender’s actual removal is contingent upon action taken by INS); *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000) (“However ‘automatically’ Gonzalez’s deportation . . . might follow from his conviction, it remains beyond the control and responsibility of the district court in which that conviction was entered and it thus remains a

## Introduction

interpretation and court rule,<sup>9</sup> courts have deemed some legal consequences of conviction to be within the purview of the criminal justice system, while categorizing others as regulatory or civil, and therefore unnecessary to take into account at the time of a guilty plea or at sentencing. Even within a single jurisdiction, some judges, defense lawyers and prosecutors educate themselves about collateral consequences, while others do not.<sup>10</sup> Variation in individual practices and in the treatment of particular consequences has led to inconsistency in application of collateral consequences as a whole.

These Standards proceed from a premise that it is neither fair nor efficient for the criminal justice system to label significant legal disabilities and penalties as “collateral” and thereby give permission to ignore them in the process of criminal sentencing, when in reality those disabilities and penalties can be the most important and permanent results of a criminal conviction.

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collateral consequence thereof.”). The caselaw is reviewed in Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002). See also Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685 (2003). Recently, several state courts have allowed defendants to withdraw guilty pleas where they were given inadequate notice of collateral consequences. See, e.g., *State v. Bellamy*, 835 A.2d 1231 (N.J. 2003) (“fundamental fairness” required notice that sex offender might be subject to indefinite civil commitment, even though this consequence was not “direct or penal” so as to trigger constitutional notice requirement); *Gonzalez v. State*, 83 P.3d 921, 925 (Or. App. 2004) (advice by defense lawyer that conviction “may” result in deportation held insufficient under state constitution, in light of changes to immigration law that make deportation “more likely than not”).

9. Some jurisdictions require that a defendant be advised of particular collateral consequences at plea or sentence, usually when a court rule or statute requires such advisement. See, e.g., *Barkley v. State*, 724 A.2d 558 (Del. 1999) (failure to inform defendant that his driver’s license would automatically be revoked upon conviction, as required by applicable court rules, rendered guilty plea invalid); *Skok v. State*, 760 A.2d 647 (Md. 2000) (noncitizen permitted to challenge guilty plea by writ of coram nobis where he was not advised of immigration consequences as required by court rule); *State v. Leavitt*, 27 P.3d 622 (Wash. App. 2001) (court rule required advisement at sentencing of restriction on firearm possession; failure to do so invalidated subsequent conviction for unlawful firearm possession). See also *State v. Bellamy*, 835 A.2d 1231 (N.J. 2003) (civil commitment); *Gonzalez v. State*, 83 P.3d 921 (Or. App. 2004) (immigration). The most significant context where statutes or court rules require advisement of potential collateral consequences is with respect to deportation. See *State v. Yanez*, 782 N.E.2d 146, 149 (Ohio App. 2002) (noting that 18 states in addition to Ohio require advisement, but that the United States does not) (citing *INS v. St. Cyr*, 533 U.S. 289, 322 (2001)).

10. See Robert M.A. Johnson, *Collateral Consequences*, 16 CRIM. JUST. 32 (Fall 2001).

These Standards supersede the “Civil Disabilities of Convicted Persons” section of the ABA Criminal Justice Standards on the Legal Status of Prisoners (“LSOP Standards”). The LSOP Standards provided that, with only a few exceptions, collateral penalties and disabilities should not be mandatory, and some should be prohibited.<sup>11</sup> But because the LSOP Standards conceived of collateral consequences as “civil” in nature, they made no provision for implementing their principles through the criminal justice system. These new Standards consider penalties and disadvantages triggered exclusively by criminal conviction to be part of the criminal justice process, and not solely civil, administrative or regulatory. These Standards provide the types of implementing provisions that naturally follow from this premise.

These Standards have two distinct but related objectives. First, they aim to integrate all legal consequences of conviction into a single system, through consistent terminology and analytical concepts. They make clear what is now implicit in the ABA Criminal Justice Standards on Sentencing: legal penalties and disabilities resulting directly and immediately from the fact of conviction are in every meaningful sense “sanctions” that should be accounted for explicitly in the context of the sentencing process, and imposed only when the conduct underlying the

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11. See ABA STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS, Former Part VIII (2d ed. 1981) (dealing with “Civil disabilities of convicted persons”). Former Standard 23-8.1 (2d ed. 1981) provided for the repeal of all “mandatory civil disabilities” except those “specifically preserved” in the standards that follow, i.e., jury service while actually confined or while on probation or parole (Former Standard 23-8.5(b) (2d ed. 1981)); service as a court-appointed fiduciary during actual confinement (Former Standard 23-8.5(d) (2d ed. 1981)); and continuance in elective or appointive office held at the time of conviction (Former Standard 23-8.8(c) (2d ed. 1981)). Except for these few narrow exceptions, civil disabilities could be imposed only pursuant to a case-by-case judicial determination “that the disability or penalty is necessary to advance an important governmental or public interest.” See Former Standard 23-8.3(a) (2d ed. 1981). The burden of proof was on the entity seeking to impose the disability. Former Standard 23-8.3(d) (2d ed. 1981). A court retained the authority to provide relief from collateral sanctions that it imposed by way of “reconsideration.” Former Standard 23-8.3(c) (2d ed. 1981). Jurisdictions were to provide for expunging convictions, “the effect of which would be to mitigate or avoid collateral disabilities.” See Former Standard 23-8.2 (2d ed. 1981). The LSOP Standards also prohibited absolutely the imposition of certain collateral penalties and disabilities affecting civil, judicial, property, and domestic rights, see Former Standards 23-8.4 through 8.7 (2d ed. 1981), and limited the circumstances in which convicted persons could be denied employment and licensing. See Former Standard 23-8.8 (2d ed. 1981). Between enactment in 1981 and repeal in 2003, Part VIII of the LSOP Standards had for the most part gone unnoticed by courts, commentators, and legislators.

## *Introduction*

particular offense warrants it. All actors in that process should be aware of these “collateral sanctions,” and a court or administrative body should be empowered to waive or modify them in appropriate cases.

The criminal justice system must also concern itself with unreasonable discrimination against convicted persons. “Discretionary disqualification” from benefits or opportunities on grounds related to conviction, while not a “sanction” that must be considered at sentencing, may just as surely prevent or discourage convicted persons from successfully reentering the free community, and impose on the community the costs of their recidivism. Therefore, these Standards prohibit discretionary administrative or judicial disqualification of a convicted person from eligibility for a benefit or opportunity on grounds related to the conviction, unless there is a substantial relationship between the person’s offense conduct and the specific duties and responsibilities of the particular benefit or opportunity involved.

Second, these Standards are designed to focus attention on the impact of collateral consequences on the process by which convicted persons re-enter the free community, and are encouraged and supported in their efforts to become law-abiding and productive members of society. As our prison population has grown in recent years, the concern for offender reentry has grown correspondingly. At the same time, however, the laws restricting convicted persons in their ordinary life activities have multiplied, discouraging rehabilitation of offenders, and contributing to the creation of a class of people who live permanently at the margin of the law. The criminal justice system aims at avoiding recidivism and promoting rehabilitation, yet collateral sanctions and discretionary barriers to reentry may severely impede offenders’ ability for self-support in the legitimate economy and perpetuate their alienation from the community. This is not only a problem of fairness to offenders, but of public safety and fiscal responsibility as well.



## PART I. DEFINITIONS AND OBJECTIVES

### Standard 19-1.1 Definitions

For purposes of this chapter:

(a) The term “collateral sanction” means a legal penalty, disability or disadvantage, however denominated, that is imposed on a person automatically upon that person’s conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence.

(b) The term “discretionary disqualification” means a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction.

#### *History of Standard*

This Standard is new.

#### *Related Standards*

None.

#### *Commentary*

“Collateral sanctions” are those penalties that automatically become effective upon conviction even though not included in the court’s judgment of conviction or identified on the record.<sup>12</sup> The term signifies a direct and immediate change in an offender’s legal status that does not

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12. A few courts have categorized such automatic statutory consequences as “direct” rather than “collateral” for purposes of determining what rights are due in connection with their imposition. *See, e.g.,* United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000) (drug offender was entitled to notice at plea colloquy that his conviction would render him automatically ineligible for certain federally-funded public welfare benefits); *Barkley v. State*, 724 A.2d 558 (Del. 1999) (automatic revocation of driver’s license a “direct” rather than a “collateral” consequence of conviction because it does not depend upon subsequent administrative action; failure to notify defendant, as required by applicable court rules, rendered guilty plea invalid). These Standards implicitly reject the “direct/collateral” distinction, and include within the definition of “collateral sanction” any penalty that takes effect without the necessity of action by the sentencing judge, even if it is legally automatic and self-executing.

depend upon some subsequent additional occurrence or administrative action, and that would not have occurred in the absence of a conviction. Examples include disenfranchisement, automatic loss of firearms privileges, per se disqualification from employment or public benefits, and mandatory felon registration. To the extent a non-citizen's immigration status changes as a result of a criminal conviction, so that the offender becomes automatically deportable without opportunity for discretionary exception or revision, deportation too must be regarded as a "collateral sanction."<sup>13</sup>

By contrast, where a sentencing court is authorized and acts to suspend a driver's license or impose a registration requirement, this is not a "collateral" sanction, since it takes effect only because it is expressly included as part of the sentence imposed by the judge.

The legal effect of a "collateral sanction" occurs or is authorized because of the conviction, and would not occur based on the underlying conduct alone. An illustration is 20 U.S.C. § 1091(r)(1) (2000), which provides that "[a] student who has been convicted of any offense . . . involving the possession or sale of a controlled substance *shall not be eligible* to receive any grant, loan, or work assistance under this subchapter." (Emphasis supplied.) This statute does not apply to the class of students who are drug users, nor even to those who have violated the drug laws. Instead, it is aimed exclusively at students who have been convicted of drug crimes, and it is self-executing. All convicted drug law violators are in the affected class, and none but convicted drug law violators are in the affected class. Moreover, the legal effect of the exclusion is immediate and unqualified, and does not require any further discretionary action to come into play.<sup>14</sup> It is in every sense just as "direct" a consequence of conviction as a penalty imposed by the judge.

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13. Courts generally have held deportation to be a "collateral" rather than a "direct" consequence of conviction in the context of a defendant's challenge to the validity of a guilty plea. See note 8, *supra*. At the same time, some jurisdictions require their courts to ensure that aliens are advised about the deportation consequences of a conviction, by statute or court rule. See Chin & Holmes, *supra* note 8, at 708 n.119; *State v. Yanez*, 782 N.E.2d 146, 149 (Ohio App. 2002). Moreover, repeal of the federal statute which until 1990 authorized state and federal judges to issue a binding Judicial Recommendation Against Deportation ("JRAD") at sentencing imposes a high duty of care on attorneys to warn their clients of the possibility of deportation. Chin & Holmes, *supra*, at 708, nn. 120, 121; see also Standard 19-2.5, Commentary (discussing JRADs).

14. Even disabilities applicable by operation of law may not be applied to a particular individual because of governmental accident, mistake, or prosecutorial discretion. See, e.g., *United States v. Brady*, 710 F. Supp. 290 (D. Colo. 1989) (acquitting defendant

“Collateral sanctions” are to be distinguished from discretionary penalties or disabilities based on conduct underlying a criminal conviction, which could occur whether or not the person has been convicted. These Standards deal with this more attenuated effect of conviction as a “discretionary disqualification.” The disqualifying conduct might be established by the conviction, but it also might also be established in some other way, such as by a civil action or administrative determination. An example of a discretionary disqualification is the law that excludes persons who engage in “drug-related criminal activity” from federally funded housing benefits.<sup>15</sup> This provision states that a person automatically loses the right to remain in public housing “regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction.”<sup>16</sup> Accordingly, drug law violators may be evicted even if they were never convicted.<sup>17</sup> Although, as a practical matter, many disqualified individuals’ misconduct will be discovered through the criminal process, this is in some sense a coincidence, for the law is not aimed solely at persons convicted of crimes, and conviction has no consequence in and of itself. Individuals who in fact use drugs but are not convicted may be less likely to be penalized than individuals who use drugs and are convicted. But because the law covers conduct rather than conviction, it is not a collateral sanction under these Standards.<sup>18</sup>

The line between a mandatory collateral sanction and discretionary disqualification is not always a bright one. *De facto* distinctions that rely on a conviction to establish conduct may as a practical matter be just as burdensome and hard to avoid as distinctions based on rigid

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in bench trial because, though a felon, he was erroneously informed that he could possess a firearm); *Miller v. Commonwealth*, 492 S.E.2d 482 (Va. App. 1997) (setting aside conviction because defendant erroneously informed that he could possess firearm in spite of felony conviction); *cf. Williams v. Taylor*, 677 F.2d 510 (5th Cir. 1982) (addressing claim of selective enforcement of felon disenfranchisement provision). A generally applicable disability is still a collateral sanction even though it may go unenforced in a particular case.

15. 24 C.F.R. § 966.4(l)(5)(i)(B) (2003).

16. 24 C.F.R. § 966.4(l)(5)(iii)(A) (2003).

17. *See, e.g., Edgcomb v. Housing Auth. of the Town of Vernon*, 824 F. Supp. 312 (D. Conn. 1993).

18. Note that in this example the penalty of eviction is discretionary (a person “may” be evicted), and it is thus distinguishable from the automatic ineligibility for student financial aid discussed as a “collateral sanction” in the preceding paragraph.

legal categories. But because they tend to be more subtle, they are correspondingly more difficult to grasp. Discretionary disqualification should not be imposed simply because an individual has a conviction, and agencies charged with exercising discretion to disqualify should ensure that they are not acting solely because of the conviction. If a rule requiring discretionary case-by-case decisions is in fact administered so as to disqualify all convicted people, and only convicted people, then relief should be available to require the administering entity to exercise its discretion.<sup>19</sup>

## **Standard 19-1.2 Objectives**

**(a) With respect to collateral sanctions, the objectives of this chapter are to:**

**(i) limit collateral sanctions imposed upon conviction to those that are specifically warranted by the conduct constituting a particular offense;**

**(ii) prohibit certain collateral sanctions that, without justification, infringe on fundamental rights, or frustrate a convicted person's chances of successfully reentering society;**

**(iii) provide the means by which information concerning the collateral sanctions that are applicable to a particular offense is readily available;**

**(iv) require that the defendant is fully informed, before pleading guilty and at sentencing, of the collateral sanctions applicable to the offense(s) charged;**

**(v) include collateral sanctions as a factor in determining the appropriate sentence; and**

**(vi) provide a judicial or administrative mechanism for obtaining relief from collateral sanctions.**

**(b) With respect to discretionary disqualification of a convicted person, the objectives of this chapter are to:**

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19. Many state and federal courts hold that “[t]he failure to exercise discretion when its exercise is called for is an abuse of discretion.” *Lattisaw v. State*, 619 A.2d 548, 551 (Md. 1993) (quoting *Johnson v. State*, 601 A.2d 1093, 1097 (Md. 1992)). *Accord, e.g.*, *Evans v. Metropolitan Life Ins. Co.*, 358 F.3d 307, 312 (4th Cir. 2004); *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior*, 255 F.3d 342, 350 (7th Cir. 2001) (Posner J.); *Chism v. People*, 80 P.3d 293, 294 (Colo. 2003); *McCarthy v. Elections Bd.*, 480 N.W.2d 241, 244 (Wis. 1992).

- (i) **facilitate reentry into society, and reduce recidivism, by limiting situations in which a convicted person may be disqualified from otherwise available benefits or opportunities;**
- (ii) **provide that a convicted person not be disqualified from benefits or opportunities because of the conviction unless the basis for disqualification is particularly related to the offense for which the person is convicted; and**
- (iii) **create a mechanism for obtaining review of, and relief from, discretionary disqualification.**

### *History of Standard*

This Standard is new.

### *Related Standards*

The purposes set forth here are implemented by subsequent Standards. The general limitation on collateral sanctions in 19-1.2(a)(i) is expanded upon in Standard 19-2.2. Standard 19-1.2(a)(ii), providing that some sanctions should never be imposed collaterally, is further discussed in Standard 19-2.6. The goal of Standard 19-1.2(a)(iii), that information about applicable collateral sanctions should be readily available, is addressed in Standard 19-2.1, providing for collection and codification of collateral sanctions. The principle of notification of collateral sanctions identified in 19-1.2(a)(iv), appears in more detail in Standards 19-2.3 and 19-2.4(b). The goal of taking collateral sanctions into account in determining the appropriate sentence set forth in 19-1.2(a)(v) is addressed in 19-2.4(a). The various forms of relief from collateral sanctions contemplated by 19-1.2(a)(vi) are described in more detail in 19-2.5.

Standard 19-1.2(b)(i) and Standard 19-1.2(b)(ii), intended to reduce recidivism and facilitate reentry by regulating discretionary disqualification, are described in Standard 19-3.1 and Standard 19-3.3. The principle set forth in Standard 19-1.2(b)(iii), that relief from any discretionary disqualification should be available, is addressed in Standard 19-3.2.

### *Commentary*

Detailed explanations for the particular objectives enumerated in this section are set forth following each implementing Standard.



## PART II.

### COLLATERAL SANCTIONS

#### Standard 19-2.1 Codification of collateral sanctions

The legislature should collect, set out or reference all collateral sanctions in a single chapter or section of the jurisdiction's criminal code. The chapter or section should identify with particularity the type, severity and duration of collateral sanctions applicable to each offense, or to a group of offenses specifically identified by name, section number, severity level, or other easily determinable means.

#### *History of Standard*

This Standard is new.

#### *Related Standards*

ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING, Standard 18-2.2 (3d ed. 1994) provides that the legislature should identify the authorized sentence for each offense.

#### *Commentary*

One of the main difficulties in including collateral sanctions in the sentencing process is that they are not easily identified. Collateral sanctions have been promulgated with little coordination in disparate sections of state and federal codes, making it difficult to determine all of the penalties and disabilities applicable to a particular offense.<sup>20</sup> Standard 19-2.1 provides that collateral sanctions should be collected in a single place in a jurisdiction's criminal code, making it possible for all actors in the system to determine what they are. The current difficulty in locating all of the widely dispersed statutes imposing collateral sanctions undermines the fundamental purpose of notice and fairness behind criminal codes. Some collateral sanctions are not complied with simply because the convicted person is unaware of them. An offender's failure to appreciate the changes in the legal situation resulting from

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20. See OFFICE OF THE PARDON ATTORNEY, U.S. DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION (2000), available at [http://www.usdoj.gov/pardon/collateral\\_consequences.pdf](http://www.usdoj.gov/pardon/collateral_consequences.pdf).

conviction may have far-reaching consequences for the offender's ability to comply with the law.

Prosecutors when deciding how to charge, defendants when deciding how to plead, defense lawyers when advising their clients, and judges when sentencing should be aware, at least, of the legal ramifications of the decisions they are making. The full consequences of violation of a particular provision of the criminal code should be readily determinable.

Collecting complete information about the full legal effect of conviction and transmitting it to participants in the criminal justice system will take time and effort. The substantial investment required will result in a higher quality of justice as participants in the system are aware of the consequences of their actions. The United States Department of Justice has collected the collateral sanctions imposed under federal law.<sup>21</sup> A recent study of Texas laws identifies over 200 laws restricting the rights of persons with a felony conviction, located in 22 different civil codes, ranging from the agriculture code to the water code.<sup>22</sup>

Legislatures cataloging the collateral sanctions applicable under their laws should make clear whether federal convictions and/or convictions from other states will also trigger sanctions.<sup>23</sup> If a state imposes sanctions based on convictions in other jurisdictions, with respect to other states, it should make clear the methodology of determining whether a particular conviction triggers a particular sanction. For federal convictions, state legislatures should identify specifically the federal statutes triggering particular sanctions. The rationale for limiting the scope of codification is the same as it is for the limitation in Standard 19-2.3(a);

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21. *See id.*

22. *See* Friends of the State Law Library, *Statutory Restrictions on Convicted Felons in Texas* (March 2002). Employment and licensing restrictions applicable under Pennsylvania law have also been catalogued. *See* Community Legal Services, *Legal Limitations on the Employment of Ex-Offenders in Pennsylvania* (Oct. 2003). *See also* studies of Maryland, New Jersey and New York collateral consequences cited in note 4, *supra*.

23. Some states apply collateral sanctions only to convictions obtained in that state. *See, e.g.,* *Middleton v. Evers*, 515 So. 2d 940 (Miss. 1987) (disenfranchisement only for Mississippi convictions). Other jurisdictions only apply sanctions based on convictions that meet certain characteristics. *See, e.g.,* *Chu v. Association of the Bar of City of New York*, 369 N.E.2d 1 (N.Y. 1977) (applying N.Y. JUDICIARY LAW § 90(4); out of state felony disqualifying if elements of that offense are essentially similar to the elements of a New York felony); *Stiner v. Musick*, 571 S.W.2d 149 (Tenn. 1978) (denying disqualifying effect to federal conviction when similar state sentence would not have resulted in disqualification).

for each state to catalog the effects of convictions under the codes of all other states would be an enormous undertaking, and one of limited worth since someone with a particular conviction in New Mexico may never move to Maine. However, since federal convictions in each state will cause immediate consequences to a definite and existing group of people, the expenditure is worthwhile.

If legislatures collect the statutes carefully, the burden on courts and counsel will be lightened substantially. The section of the code identifying collateral sanctions applicable to convictions of particular offenses could be reprinted as a freestanding booklet, which would make it easy for participants in the system to identify applicable collateral sanctions before and during plea and sentence proceedings.

## **Standard 19-2.2 Limitation on collateral sanctions**

**The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting that 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.**

### *History of Standard*

This Standard is new. ABA STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS, Former Standard 23-8.1 (2d ed. 1981) provided that convicted persons should not be “subjected to collateral disabilities or penalties, or be deprived of civil rights,” except in accordance with the Standards. Former Standard 23-8.3(a) (2d ed. 1981) provided for a case-by-case determination as to whether a particular collateral penalty or disability was warranted.

### *Related Standards*

None.

### *Commentary*

Some restrictions on persons convicted of serious crimes obviously are necessary and appropriate. However, other collateral sanctions may sweep far more broadly than can be justified in terms of any legitimate goal of the criminal justice system, or of any particular regulatory

system. Accordingly, collateral sanctions should be strictly limited, and closely related to the offense conduct involved. Standard 19-2.2 provides that a collateral sanction should not be imposed on persons convicted of a particular offense unless the legislature determines that “the conduct constituting that 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.” Only such unambiguous circumstances justify dispensing with the case-by-case imposition of sanctions contemplated by the Sentencing Standards.

There are certain situations in which a collateral sanction will be so clearly appropriate given the nature of the offense that case-by-case evaluation at the time of sentencing would be pointless and inefficient. Examples might include exclusion of those convicted of sexual abuse from employment involving close contact with children,<sup>24</sup> loss of public office upon conviction of bribery,<sup>25</sup> denial of licensure where the offense involves the licensed activity,<sup>26</sup> and prohibition of firearms to those convicted of violent crimes.<sup>27</sup>

Examples of collateral sanctions that would not be justified under this Standard are denial of student aid<sup>28</sup> and loss of a driver’s license<sup>29</sup> upon conviction of a drug offense. It might well be appropriate to provide for automatic suspension of a driver’s license where the offense conduct is related to driving or motor vehicles, or to exclude from educational institutions those who sell drugs there. And, it may be appropriate to

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24. *See, e.g.*, N.H. REV. STAT. ANN. 170-E:29(III) (Lexis Nexis 2001) (restricting activity of those convicted of “a violent or sexually-related crime against a child”).

25. *See, e.g.*, COLO. REV. STATS. ANN. § 37-31-123 (West 2004) (providing for forfeiture of office upon conviction of bribery).

26. *See, e.g.*, 12 U.S.C. § 1829 (2000) (prohibiting persons convicted of crimes of dishonesty or breach of trust from owning, controlling, or otherwise participating in the affairs of a federally insured banking institution, subject to waiver by the FDIC; waiver may not be given for 10 years following conviction in the case of certain offenses involving the banking and financial industry); 10 U.S.C. § 2408 (2000) (persons convicted of fraud or felony arising out of defense contract prohibited from working in any capacity for a defense contractor or subcontractor for a period of at least five years).

27. *See, e.g.*, MASS. LAWS ANN. ch. 140 § 129B (1)(i)(c) (Lexis Nexis Supp. 2003) (prohibiting issuance of Firearms Identification Card to any person convicted of a crime of violence).

28. 20 U.S.C. § 1091(r) (2000).

29. 23 U.S.C. § 159 (2000); FLA. STAT. ANN. § 322.055(2) (West 2001) (two year ineligibility for conviction of controlled substance offense.)

revoke a driver's license or exclude from aid on a case-by-case basis, subject to Standard 19-3.1. But it is unreasonable and counterproductive to deny all drug offenders access to the means of rehabilitating themselves and supporting their families, thereby imposing a cost upon the community with no evident corresponding benefit.

Absolute barriers to employment or licensure are problematic, particularly where no time limitation is specified and no waiver or relief mechanism is provided.<sup>30</sup>

In a few situations, a collateral sanction may be warranted by the circumstances of actual confinement. For example, it may be impractical for persons who are incarcerated, and hence lack freedom of movement, to serve on a jury, see Standard 19-2.6(b)(ii), or to live with their children, see Standard 19-2.6(c)(i). In these situations, the fact that a person is incarcerated could justify imposing a collateral sanction that recognizes the special security considerations of administrative problems that would be presented if a person in custody were called for jury duty. This rationale would not apply once an individual has been released to the community, and a bar on jury service while under court supervision or on probation or parole must be tested under the conduct-specific standard set forth in this rule.

When the legislature identifies a close connection between the offense and the collateral sanction, the Standards provide that relief from the sanction should be available if warranted. Standard 19-2.5. Whereas the LSOP Standards specified in black letter the few situations where mandatory disabilities are permissible, these Standards allocate this responsibility to the legislature. At the same time, however, Standard 19-2.2 places a heavy burden of justification on the legislature where automatic collateral penalties are concerned.

### **Standard 19-2.3 Notification of collateral sanctions before plea of guilty**

**(a) The rules of procedure should require a court to ensure, before accepting a plea of guilty, that the defendant has been informed of**

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30. See *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003) (law barring convicted persons from being considered for employment or reemployment in adult extended care facilities held to violate state constitutional guarantee of equal protection; no rational basis for distinguishing convicted persons already employed at the time of the passage of the act from those applying for employment or reemployment after that time).

collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law. Except where notification by the court itself is otherwise required by law or rules of procedure, this requirement may be satisfied by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged.

(b) Failure of the court or counsel to inform the defendant of applicable collateral sanctions should not be a basis for withdrawing the plea of guilty, except where otherwise provided by law or rules of procedure, or where the failure renders the plea constitutionally invalid.

### *History of Standard*

This Standard is new.

### *Related Standards*

ABA STANDARDS FOR CRIMINAL JUSTICE, PRETRIAL RELEASE, Standard 10-4.3(b)(iv) (3d ed. approved 2002) provides that a court, when considering release, should notify a defendant at first appearance before a judicial officer that, if not a citizen, the defendant may face deportation if convicted of the current charge. A number of the provisions of the ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (3d ed. 1999) are relevant. Standard 14-1.4(c) provides that before accepting a plea, the court should advise the defendant of the possibility of various collateral sanctions. Standard 14-2.1 deals with circumstances in which it may be appropriate to permit withdrawal of a plea of guilty. Standard 14-3.2(f) provides that defense counsel should advise the defendant of collateral sanctions before the entry of a plea of guilty "to the extent possible."

### *Commentary*

Standard 19-2.3(a) provides that before pleading guilty, an offender should be informed of the collateral sanctions that will result from the conviction. Court rules or statutes may require notification of particular sanctions in a particular way or by a particular actor.<sup>31</sup> In the absence of such a provision, the court's obligation may be satisfied by confirm-

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31. See, e.g. *State v. Yanez*, 782 N.E.2d 146 (Ohio App. 2002).

ing on the record that defense counsel has advised the defendant of all applicable collateral sanctions under the law of the state where the prosecution is pending, and under federal law. Thus, a defendant convicted in the California Superior Court sitting in Los Angeles, or the U.S. District Court for the Central District of California, would be given the same information, specifically, the collateral sanctions applicable to the offense of conviction under federal and California law.

Although advisement of collateral sanctions by the court accepting the plea would have certain advantages, in particular that it would be on the record, it may also be very time consuming. Moreover, while it is a judicial function to ensure that the plea is knowing, voluntary and intelligent, defense counsel will know the circumstances of the defendant and the issues important to that defendant better than the court. In addition, if the advisement comes from the court at the time of taking the plea, the advice may be too late to be of practical use to an offender deciding whether to plead guilty and, if so, to what charges. On balance, it is permissible for jurisdictions to conclude that notification is ordinarily a function most effectively and efficiently performed by defense counsel. In this regard, Standard 14-3.2(f) provides that defense counsel must, "to the extent possible," determine and advise the defendant of "possible collateral consequences" in advance of the entry of any plea. Collection of applicable collateral sanctions pursuant to Standard 19-2.1 will make it possible for lawyers to give full advice in all cases. Thus, the contingency in Standard 14-3.2(f) that qualifies defense counsel's duty would no longer pertain.<sup>32</sup>

However, the judicial role remains central under this Standard. In cases where it is apparent that there may be significant collateral sanctions (such as in criminal cases involving non-citizens), jurisdictions may conclude that in addition to defense counsel's advice, the court should also advise the defendant directly on the record about some or all applicable collateral sanctions.

Standard 19-2.3(b) deals with the situations in which, for some reason, notice has not been given as contemplated by the Standards. Given the number of collateral sanctions and the importance of the finality of guilty pleas, the Standard reflects the principle that convictions should

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32. The exemplary practitioner's guide prepared by the Bronx Defenders (*The Consequences of Criminal Proceedings in New York State*), see note 4, *supra*, both collects the relevant laws and provides "practice tips" for defense counsel at each stage of the criminal process.

not lightly be set aside for failure to inform a defendant about a particular collateral sanction. However, the Standard is in this respect addressed primarily to courts addressing judicial challenges to individual pleas. Legislatures by statute or courts by rule or other law may choose to make notice of particular sanctions a condition of a valid plea, as some have done with the collateral sanction of deportation for non-citizens convicted of certain crimes.<sup>33</sup> Jurisdictions may also choose to make a substantial failure to comply with the duty of notification a basis for setting aside a plea, just as it might make noncompliance with other rules surrounding a plea a condition of the plea's validity.<sup>34</sup> However, in the absence of a specific provision to the contrary, the failure to advise of a collateral sanction is a ground of withdrawing the plea only if it renders the plea involuntary as a constitutional matter.<sup>35</sup>

33. *See, e.g.*, FLA. R. CRIM. P. RULE 3.172(c)(8) (West 1999) (defendant shall be advised of possibility of immigration consequences before court accepts a guilty plea). When there is an absence of substantial compliance with the rule, and a defendant was prejudiced thereby, a conviction based on a guilty plea must be set aside. *See* *Pikwrah v. State*, 829 So. 2d 402 (Fla. App. 2002); *Chagoya v. State*, 817 So. 2d 1039 (Fla. App. 2002). The court applied Md. Rule 4-242 in *Skok v. State*, 760 A.2d 647 (Md. 2000), to allow defendant to challenge a guilty plea through a writ of coram nobis. *See also* OHIO REV. CODE § 2943.031(a) (Page 2002) (prior to accepting guilty plea, court must advise defendant that deportation may be a consequence; applied in *State v. Yanez*, 782 N.E.2d 146, 153-55 (Ohio App. 2002), setting aside guilty plea when this procedure had not been followed). *But see* N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2002) (“The failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction”).

34. *See, e.g.*, FED. R. CRIM. P. 11(h) (West Supp. 2004) (“A variance from the requirements of this rule is harmless error if it does not affect substantial rights.”)

35. One reason a plea of guilty may be constitutionally invalid is ineffective assistance of counsel. *See* *Hill v. Lockhart*, 474 U.S. 52 (1985). The test for ineffective assistance of counsel in this context is whether “counsel’s representation fell below an objective standard of reasonableness,” and whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 57, 59 (applying *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)). The courts have uniformly held that “counsel’s failure to advise his or her client regarding collateral consequences of a guilty plea cannot rise to the level of constitutionally ineffective assistance of counsel.” *Redeemer v. State*, 979 S.W.2d 565, 572 (Mo. App. 1998). *Accord, e.g.*, *United States v. Sambro*, 454 F.2d 918, 922 (D.C. Cir. 1971) (per curiam); *Santos v. Kolb*, 880 F.2d 941, 944 (7th Cir. 1989) (Kanne, J.); *State v. Ginebra*, 511 So. 2d 960, 960-61 (Fla. 1987). However, most courts treat misadvice or misinformation about the legal consequences of the judgment differently: “[e]rroneous advice about collateral consequences can affect the voluntariness of a guilty plea.” *Savage v. State*, 114 S.W.3d 455, 458 (Mo. App. 2003) (citing *Hao v. State*, 67 S.W.3d 661, 663 (Mo. App. 2002)). *Accord, e.g.*, *United States v. Russell*, 686 F.2d 35, 41 (D.C. Cir. 1982); *Sandoval v.*

## Standard 19-2.4 Consideration of collateral sanctions at sentencing

(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.

(b) The rules of procedure should require the court to ensure at the time of sentencing that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law. Except where notification by the court itself is otherwise required by law or rules of procedure, this requirement may be satisfied by confirming on the record that defense counsel has so advised the defendant.

(c) Failure of the court or counsel to inform the defendant of applicable collateral sanctions should not be a basis for challenging the sentence, except where otherwise provided by law or rules of procedure.

### *History of Standard*

This Standard is new.

### *Related Standards*

ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING, Standards 18-6.1 to 6.5 (3d ed. 1994) address the principles applicable to judicial sentencing.

### *Commentary*

Standard 19-2.4(a) requires a sentencing court to take into account applicable collateral sanctions in fashioning a package of sanctions at sentencing. In accordance with the generally applicable principles of the Sentencing Standards, the sentencing court should ensure that the totality of the penalty is not unduly severe and that it does not give rise to

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INS, 240 F.3d 577, 578-79 (7th Cir. 2001) (Kanne, J.); *In re Resendiz*, 19 P.3d 1171 (Cal. 2001) (misadvice about deportation); *Roberti v. State*, 782 So. 2d 919, 920 (Fla. App. 2001) (misadvice about sex offender commitment: "[a]ffirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea."). Even if a defendant establishes misadvice, it will also be necessary to establish prejudice. *See, e.g., People v. McDonald*, 745 N.Y.S.2d 276, 280-81 (App. Div. 2002), *aff'd*, 802 N.E.2d 131, 134-35 (N.Y. 2003).

undue disparity. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING, Standards 18-6.1, 18-6.2 (3d ed. 1994). *See also* Standard 18-3.12(e) (“The legislature should ensure that levels of severity of composite sentences that combine sanctions of different types are not, in the aggregate, unreasonably severe.”).

Standard 19-2.4(b) requires that an offender be notified of applicable collateral sanctions at the time of sentencing. This will be particularly important for offenders convicted after trial who will not necessarily have been advised of collateral sanctions under Standard 19-2.3(a). The defendant’s understanding of his or her obligations will be enhanced if significant collateral sanctions are mentioned by the judge in open court, and in the report subsequently prepared by the court, as required for the court-imposed components of a sentence.<sup>36</sup>

Standard 19-2.4(c) addresses noncompliance with the duty of notification at sentencing. Generally, failure by the court or counsel to inform a defendant of collateral sanctions at sentencing does not affect the validity of the sentence imposed. This is because, unlike a guilty plea, a sentence imposed after trial does not result from the defendant’s agreement to accept the sentence.

### **Standard 19-2.5 Waiver, modification, relief**

**(a) The legislature should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction.**

**(b) Where the collateral sanction is imposed by one jurisdiction based upon a conviction in another jurisdiction, the legislature in the jurisdiction imposing the collateral sanction should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from the collateral sanction.**

**(c) The legislature should establish a process by which a convicted person may obtain an order relieving the person of all collateral sanctions imposed by the law of that jurisdiction.**

**(d) An order entered under this Standard should:**

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36. *See* Sentencing Standards 18-5.19, 18-5.20, 18-5.21.

- (i) have only prospective operation and not require the restoration of the convicted person to any office, employment or position forfeited or lost because of the conviction;**
- (ii) be in writing, and a copy provided to the convicted person; and**
- (iii) be subject to review in the same manner as other orders entered by that court or administrative body.**

### *History of Standard*

The LSOP Standards provided that any collateral disability should be imposed for a stated period of time, “after which the person subject to the disability should be entitled to have the appropriateness of the disability reconsidered.” ABA STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS, Former Standard 23-8.3(c) (2d ed. 1981). In addition, “[w]ithin the stated period of the disability, if a person can present evidence that the disability imposed no longer effectuates an important governmental interest, the person should be entitled to a reconsideration.” *Id.* The LSOP Standards also included a provision recommending the enactment of a judicial procedure for expungement of a criminal conviction, “the effect of which would be to mitigate or avoid collateral disabilities.” Former Standard 23-8.2 (2d ed. 1981). The relevant commentary explained that “[i]n many states, the problem of collateral consequences has been attacked indirectly by establishing a procedure which in legal effect annuls the fact of conviction and, thus, invalidates adverse actions taken against an offender on the basis of that conviction.”<sup>37</sup> It noted that records of an expunged conviction should remain available to law enforcement agencies, and that there should be no bar to the use of a prior conviction for sentence enhancement. *See* commentary, note 1. Offering a nostalgic snapshot of the times, it goes on to reflect that “[a]s the number of disabilities diminishes and their imposition becomes more rationally based and more restricted in coverage, the need for expungement and nullification statutes decreases.” Thus the LSOP Standards contemplated the broadest scope for expungement.

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37. The commentary to Former Standard 23-8.2 (2d ed. 1981) noted that the first edition of the Standards endorsed expungement only for probationary sentences (citing ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 4.3 (1st ed. 1970)). In extending the potential benefits of expungement to those released from prison, the commentary opined that “[a]dditional punishment is the only end served by withholding an opportunity for expungement from those sentenced to confinement.”

***Related Standards***

Standard 19-3.2 deals with relief from discretionary disqualification. ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING, Standards 18-8.1 to 8.4 (3d ed. 1994) govern appellate review of sentences. *See also* MODEL PENAL CODE § 306.6 (1962) (providing for relief from disabilities and vacation of conviction).

***Commentary***

Standard 19-2.5(a) provides that collateral sanctions should be subject to waiver, modification, or “timely and effective relief” from a court or a specified administrative agency if the sanctions have become inappropriate or unfair based on the facts of the particular case. Jurisdictions could choose to allow the waiver authority to be exercised at the time of sentencing, or only at some later date. Waiver or modification of a collateral sanction under Standard 19-2.5, whether at the time of sentencing or at some later time, would not preclude a court or administrative agency from taking action based on the conduct underlying the conviction, pursuant to Standard 19-3.1.

The case of deportation of non-citizens illustrates the operation of this provision. Current ABA policy<sup>38</sup> provides for broad access to judicial recommendations against deportation (the so-called “JRAD”).<sup>39</sup> Under Standard 19-2.5(a), the legislature in each jurisdiction (including Congress) should provide for “timely and effective relief from any collateral sanction imposed by the law of that jurisdiction.” Accordingly, Congress might conclude: (1) that the trial judge is in the best position to evaluate the appropriateness of deportation, and therefore that the

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38. A 1975 ABA House resolution states that “Relief from deportation upon grant of a pardon or judicial recommendation against deportation, now restricted to convictions for crimes involving moral turpitude, should be made applicable to deportability predicated on any criminal conviction.” 100 ANNUAL REPORTS OF THE AMERICAN BAR ASSOCIATION 663 (1975).

39. In the 1917 statute that made aliens convicted of certain crimes in the United States subject to deportation, Congress authorized state and federal sentencing judges to issue a “judicial recommendation against deportation,” a binding determination that deportation was not warranted on the facts of the case. *See* Act of Feb. 5, 1917, § 19(a), 39 Stat. 874, 889-90; Immigration and Nationality Act of 1952, § 241(b)(2), 66 Stat. 163, 208 (repealed 1990). Sentencing judges had responsibility for making these “JRAD” determinations in most cases for the next 73 years. *See generally* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1143-51 (2002).

JRAD issueable at the time of sentence should be revived; (2) that a new JRAD system should be created, in which application for relief from the trial judge could be made at the termination of the sentence; (3) that the question of an individual's deportability should be allocated to a specialized administrative agency; or (4) that some cases should be handled judicially and others administratively. In any case, the requirement that relief be "timely and effective" would preclude an individual's deportation on grounds related to conviction without some prior opportunity for a waiver of that sanction.

Similarly, if a jurisdiction has elected to bar convicted individuals from certain employment or licensing opportunities, it should also offer individuals affected adversely by this collateral sanction a "timely and effective" opportunity to obtain modification of or relief from the sanction.

Some jurisdictions impose collateral sanctions on offenders convicted by other sovereigns. If a jurisdiction imposes penalties based on foreign convictions, it should ensure that its courts have the authority to grant relief from those penalties. Standard 19-2.5(b) provides that a jurisdiction should make provision for obtaining relief from collateral sanctions based upon a conviction obtained in another jurisdiction. Thus, for example, Congress should provide a mechanism for obtaining relief from federal penalties imposed because of a state criminal conviction. Conversely, states should provide relief for resident federal offenders for sanctions imposed by their law.

Standard 19-2.5(c) differs from 19-2.5(a) and (b) insofar as it contemplates a judicial or administrative process for obtaining relief from *all* collateral sanctions imposed by the law of that jurisdiction. This relief may be accomplished in a number of different ways including, for example, expungement or sealing, but these Standards do not require any specific method to be used.

The Model Penal Code provides for "vacating" a conviction based on evidence that the convicted person has led a law-abiding life for a certain period of time since release from confinement. Under the Model Penal Code approach, a conviction that has been vacated may still be given legal effect in a variety of contexts, and the fact of conviction must still be reported by the offender in response to an inquiry. The Model Penal Code mechanism evidently seeks to accomplish an offender's reintegration into society not by trying to deny the fact of conviction, but by advertising the evidence of rehabilitation. In vacating the conviction, the sentencing court is in effect declaring that the offender has

paid the full price for his crime and has earned the right to return to responsible membership in society.<sup>40</sup>

Standard 19-2.5(c) does not include any reference to specific restoration mechanisms in the black letter. While its use of the word “order” may imply some preference for a judicial procedure, there are a variety of other options for implementing this Standard, and the black letter leaves to each jurisdiction the determination which will work best. For example, in some jurisdictions an offender who has remained law-abiding for a period of time may obtain a “certificate of good conduct” from an administrative agency, usually the parole board.<sup>41</sup> In many

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40. Under § 306.6(1) of the Model Penal Code (1962) (“Loss and Restoration of Rights Incident to Conviction or Imprisonment”), the sentencing court may issue an order relieving collateral consequences after an offender has satisfied his sentence (“so long as the defendant is not convicted of another crime, the judgment shall not thereafter constitute a conviction for the purpose of any disqualification or disability imposed by law because of the conviction of a crime”). After an additional period of law-abiding conduct, the sentencing court may order that a conviction be “vacated.” See § 306.6(2). Orders issued under either section would have only prospective effect, and the conviction could still serve as a predicate offense to enhance a penalty, and to impeach. See § 306.6(3)(a), (c), (e). The conviction may also serve as evidence of the commission of the crime, “whenever the fact of its commission is relevant to the exercise of the discretion of a court, agency or official authorized to pass upon the competency of the defendant to perform a function or to exercise a right or privilege that such court, agency or official is empowered to deny, except that in such case the court, agency or official shall also give due weight to the issuance of the order.” See § 306.6(3)(d); compare Standard 19-3.1. Finally, such an order “does not justify a defendant in stating that he has not been convicted of a crime, unless he also calls attention to the order.” See § 306.6(3)(f). The fact that a vacation order has no greater legal effect than an order relieving disabilities, suggests its intent to relieve the “stigma of conviction.” It does not appear that the nuanced approach in § 306.6 was widely adopted in the states. See Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *FORDHAM URB. L.J.* 1705, 1711-13, 1723-26 (2003).

41. Georgia’s Board of Pardons and Paroles will issue a certificate after five years of law-abiding conduct, restoring basic civil rights and relieving licensing restrictions imposed upon convicted persons under state law. See GA. CODE ANN. § 42-9-54 (Harrison 1998). In Illinois, a convicted person may obtain a certificate of relief from disabilities from either the Prisoner Review Board or a court, and the state may thereafter not deny that person a license on grounds of the conviction alone. See ILL. COMP. STAT. § 5/5-5-5 (2004). In New York, a first offender may obtain a Certificate of Relief from Disabilities from the Board of Parole upon release from prison (or from the sentencing court if no prison term was imposed), and persons with two or more convictions may obtain a Certificate of Good Conduct from the Board of Parole after a certain period of law-abiding conduct. See N.Y. CORRECT. LAW §§ 700-705 (McKinney 2003). See also OFFICE OF

jurisdictions, general forgiveness remains the exclusive province of the governor or an appointed executive board.<sup>42</sup>

## Standard 19-2.6 Prohibited collateral sanctions

Jurisdictions should not impose the following collateral sanctions:

- (a) deprivation of the right to vote, except during actual confinement;
- (b) deprivation of judicial rights, including the rights to:
  - (i) initiate or defend a suit in any court under one's own name under procedures applicable to the general public;
  - (ii) be eligible for jury service except during actual confinement or while on probation, parole, or other court supervision; and
  - (iii) execute judicially enforceable documents and agreements;
- (c) deprivation of legally recognized domestic relationships and rights other than in accordance with rules applicable to the general public. Accordingly, conviction or confinement alone:
  - (i) should be insufficient to deprive a person of the right to contract or dissolve a marriage; parental rights, including the right to direct the rearing of children and to live with children except during actual confinement; the right to grant or withhold consent to the adoption of children; and the right to adopt children; and
  - (ii) should not constitute neglect or abandonment of a spouse or child, and confined persons should be assisted in making appropriate arrangements for their spouses or children;
- (d) deprivation of the right to acquire, inherit, sell or otherwise dispose of real or personal property, except insofar as is necessary to preclude a person from profiting from his or her own wrong; and, for persons unable to manage or preserve their property by reason of confinement, deprivation of the right to appoint someone of their own choosing to act on their behalf;

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PARDON ATTORNEY, *supra* note 20, at 100 ("These certificates, with certain exceptions, preclude reliance on the conviction as an automatic bar or disability, but they do not preclude agencies from considering the conviction as a factor in licensing or other decisions."). A few states, like New York, have laws forbidding discrimination on the basis of a criminal conviction, but it is not clear what effect such laws have on offender opportunities and it is likely that they are difficult to enforce.

42. See Love, *supra* note 40, at 1720-23.

(e) **ineligibility to participate in government programs providing necessities of life, including food, clothing, housing, medical care, disability pay, and Social Security; provided, however, that a person may be suspended from participation in such a program to the extent that the purposes of the program are reasonably being served by an alternative program; and**

(f) **ineligibility for governmental benefits relevant to successful reentry into society, such as educational and job training programs.**

### *History of Standard*

Standard 19-2.6(a) is based on ABA STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS, Former Standard 23-8.4 (2d ed. 1981). Standard 19-2.6(b) is based on Former Standard 23-8.5 (2d ed. 1981). Standard 19-2.6(c) is based on Former Standard 23-8.6 (2d ed. 1981). Standard 19-2.6(d) is based on Former Standard 23-8.7(a) (2d ed. 1981). Standard 19-2.6(e) is based on Former Standard 23-8.7(b) (2d ed. 1981). The LSOP Standards provided that convicted persons should not lose vested pension rights or become ineligible to participate in any governmental program providing “relief, medical care, and old age pensions.” See Former Standard 23-8.7(b) (2d ed. 1981). The commentary notes that where “services [are] provided offenders at no cost through other means, a suspension of benefits may be justified.” Standard 19-2.6(f) is new.

### *Related Standards*

None.

### *Commentary*

Standard 19-2.6 provides that collateral sanctions depriving individuals of certain civil, judicial, and domestic rights should never be categorically imposed, even if the sanction would otherwise satisfy Standard 19-2.2. This carries forward parts of the former LSOP Standards.<sup>43</sup> In addition, a convicted person should not be denied eligibil-

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43. See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS, Former Standard 23-8.5(b) & (d) (2d ed. 1981). (“Persons convicted of any offense should be entitled to: . . . (b) serve on juries except while actually confined or while on probation or parole; . . . and (d) serve as court-appointed fiduciaries except during actual confinement.”). See generally Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003). These Standards make no change in the ABA policy on jury service, but do not specifically prohibit a bar against convicted persons serving as court-appointed

ity for government programs providing necessities of life, including food, clothing, housing, medical care, disability pay, and Social Security benefits, unless the purposes of the program in question are reasonably being served by an alternative program.

Standard 19-2.6(a) bars deprivation of the right to vote as a result of conviction “except during actual confinement.” This section is intended to continue the policy of the former LSOP Standards, which neither endorsed nor prohibited disenfranchisement during actual confinement.<sup>44</sup> In deciding whether to deprive prisoners of the right to vote, jurisdictions should consider whether this sanction meets the test set forth in Standard 19-2.2.<sup>45</sup> Although the Supreme Court has upheld the constitutionality of felon disenfranchisement,<sup>46</sup> a majority of states now allow former prisoners to vote after completion of sentence.<sup>47</sup> The

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fiduciaries. Both jury service while under sentence and service as a court-appointed fiduciary are governed by the general provisions of Standards 19-2.2. As explained in the commentary to that section, in a few situations a collateral sanction may be warranted by the circumstances of actual confinement, as with jury service or the right to live with children. Even if a collateral sanction cannot be justified under Standard 19-2.2, however, a convicted individual may still be deprived of civil, domestic, or judicial rights after a determination pursuant to Standard 19-3.1 that the conduct underlying the conviction constituted grounds for discretionary disqualification.

44. Former Standard 23-8.4 (2d ed. 1981) provided in its black letter that “[p]risoners should be authorized to vote at their last place of residence prior to confinement unless they can establish some other residence in accordance with rules applicable to the general public,” and that prisoners “should not, however, be authorized to establish voting residence or domicile in the jurisdiction where they are incarcerated solely because of that incarceration.” However, the commentary stated: “The standard takes no position with respect to whether prisoners should be denied the right to vote while actually incarcerated.” The MODEL SENTENCING & CORRECTIONS ACT § 4-1003 provides: “A confined person otherwise eligible may vote by absentee ballot. For voting purposes, the residence of a confined person is the last legal residence before confinement.” See also *id.* § 4-112 (also recognizing right of prisoners to vote).

45. See note 43, *supra*. Unlike the LSOP Standards, these Standards take no position on the question of where a prison inmate’s vote should be counted, see note 44, *supra*, noting only that generally applicable criteria would result in many prisoners voting at their place of last residence prior to confinement.

46. See *Richardson v. Ramirez*, 418 U.S. 24 (1974). The issue of felony disenfranchisement figured prominently in the 2000 presidential election. Courts are split on the possibility of Voting Rights Act challenges to such laws based on racially disparate impact. Compare *Johnson v. Bush*, 353 F.3d 1287 (11th Cir. 2003) and *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) (allowing challenge) with *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004) and *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986) (prohibiting challenge). See generally *Karlan*, note 4, *supra*.

47. SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 3 (2004), available at <http://www.sentencingproject.org/pdfs/1046.pdf> (showing that as

National Commission on Federal Election Reform, which counted Presidents Ford and Carter as its honorary co-chairs, and a number of Republican and Democratic luminaries as members, issued a report recommending that states allow restoration of voting rights once a felon has served the sentence imposed.<sup>48</sup> Recent public opinion polls show that 80% of the public favors restoring voting rights to convicted persons at some point.<sup>49</sup>

The general thrust of Standard 19-2.6 (a)-(d) is that convicted persons should not lose the legal rights and privileges of citizenship. This is a matter of positive law in some states. For example, New Hampshire law provides:

Except as otherwise provided by this chapter or by the constitution of this state, a person convicted of a crime does not suffer civil death or corruption of blood or sustain loss of civil rights or forfeiture of estate or property, but retains all of his rights, political, personal, civil, and otherwise, including the right to hold public office or employment, to vote, to hold, receive, and transfer property, to enter into contracts, to sue and be sued, and to hold offices of private trust in accordance with law.<sup>50</sup>

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of 2003 36 states and the District of Columbia permitted all felons to vote after release from prison or completion of the sentence; another seven states permitted some felons to vote after completion of sentence). In the other seven states, the right to vote was restored only through a grant of executive (or, in Mississippi, legislative) clemency. *Id.*

48. See NATIONAL COMMISSION ON FEDERAL ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 44-45 (2001). The highest courts of Canada, South Africa, and the European Union have all struck down provisions limiting prisoner voting rights. See *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519 (Can.); *The Case of Hirst v. The United Kingdom* (No. 2), 38 Eur. H.R. Rep. 40 (Eur. Ct. H.R. 2004); *August v. Electoral Comm'n*, 1999 (3) SALR 1 (CC) (S. Afr.) (noting absence of legislative authorization for disenfranchising prisoners).

49. See Brian Pinaire, Milton Heumann & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1540 (2003); Jeff Manza, Clem Brooks, & Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275 (2004).

50. N.H. REV. STAT. ANN. 607-A:3 (Lexis Nexis 2003). See also CAL. PENAL CODE ANN. § 2601 (West 2000); N.D. Cent. Code § 12.1-33-02 (Michie 1997); MODEL SENTENCING & CORRECTIONS ACT § 4-1001.

In addition, some of the rights described in Standard 19-2.6 (b)-(d) reflect existing constitutional law. Prisoners enjoy the right to marry,<sup>51</sup> to free speech,<sup>52</sup> and to free exercise of religion.<sup>53</sup> Although the Supreme Court has held that the Constitution does not require affording prisoners affirmative assistance in pursuing legal claims unrelated to conditions of confinement or the underlying criminal conviction,<sup>54</sup> the Court has also recognized that, “[l]ike others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts.”<sup>55</sup> The special security and management considerations that may justify restricting some civil rights of prisoners (e.g., ability to serve on a jury) would be inapplicable after discharge from custody.

Standard 19-2.6(e) provides that conviction alone should not render a person ineligible for government programs aimed at supplying basic needs. Denial of benefits to offenders who would otherwise be eligible for them could result in real deprivation and encourage recidivism. However, there is no reason that offenders should be allowed to double-dip; a jurisdiction should be permitted to suspend convicted persons from a “necessity of life” program (including food, clothing, housing, medical care, disability pay, and Social Security) “to the extent that the purposes of the program are reasonably being served by an alternative program.”<sup>56</sup> Considering the very narrow circumstances in which a collateral sanction may be authorized, *see* Standard 19-2.2, and the availability of relief under Standard 19-2.5(a), a jurisdiction’s ability to suspend a convicted person from a necessity of

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51. *Turner v. Safley*, 482 U.S. 78 (1987).

52. *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989).

53. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987).

54. *Lewis v. Casey*, 518 U.S. 343 (1996). The Prison Litigation Reform Act of 1996, Pub. L. 103-322 (PLRA), codified as amended at 18 U.S.C. § 3626 (2000), severely restricted the ability of prisoners to bring lawsuits in federal court challenging prison conditions, and the remedial authority of federal courts in prisoner-initiated litigation. *See* Brian J. Ostrom, Roger A. Hanson & Fred L. Cheesman II, *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525 (2003).

55. *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (citing *Johnson v. Avery*, 393 U.S. 483 (1969)). *See also* *State Bureau of Child Support Services v. Garcia*, 975 P.2d 793 (Idaho App. 1999) (collecting cases).

56. For example, prisoners need not be entitled to food stamps if they are receiving food from the institution. *See also* 38 U.S.C. § 1505 (2000) (suspending veterans benefits during a period of incarceration).

life program should be limited to cases presenting a clear risk to public safety and/or opportunity for recidivism.<sup>57</sup> Standard 19-2.6(f) recognizes the special importance of programs related to reentry of former prisoners into society, such as educational and job-training programs, which in many cases will be essential if the former prisoner is to be employed.

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57. For example, all persons who have been convicted of rape or sexual abuse of a minor could be automatically suspended from participation in a public housing program, but only so long as they have reasonable access to alternative low-cost housing. In the absence of alternative housing, individuals convicted of such crimes could be excluded from public housing upon case-by-case determinations that the conduct underlying their convictions constituted grounds for discretionary disqualification (see Standard 19-3.1).

## PART III.

### DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS

#### Standard 19-3.1 Prohibited discretionary disqualification

The legislature should prohibit discretionary disqualification of a convicted person from benefits or opportunities, including housing, employment, insurance, and occupational and professional licenses, permits and certifications, 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.

#### *History of Standard*

This Standard is a substantial modification of ABA STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS, Former Standard 23-8.8 (2d ed. 1981).

#### *Related Standards*

None.

#### *Commentary*

Standard 19-3.1 deals with “discretionary disqualification,” defined by Standard 19-1.1(b) as a penalty that a government agency or court (other than a criminal court) is “authorized but not required” to impose on grounds “related to” a person’s conviction. Recognizing that criminal misconduct may in some circumstances be relevant to the receipt or deprivation of particular benefits or opportunities, this Standard permits discretionary disqualification if a finding that the person had engaged in the conduct constituting the offense would provide “a substantial basis for disqualification even if the person had not been convicted.”<sup>58</sup> The premise of the approach is that non-criminal regulatory

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58. Cf. MODEL PENAL CODE § 306.6(3)(d) (1962) (order restoring rights “does not preclude proof of the conviction as evidence of the commission of the crime, whenever the fact of its commission is relevant to the exercise of the discretion of a court, agency or official . . .”).

authorities will often have legitimate reasons to consider the prior conduct and behavior of particular individuals. However, if convicted persons are singled out for disadvantage compared to others who have engaged in precisely the same conduct but have not been convicted, then it appears that the conviction, rather than the conduct, is determinative.

For example, under this Standard a public housing authority authorized by law to evict tenants who engage in drug trafficking could properly consider an individual's conviction of drug trafficking as sufficient to establish the conduct warranting eviction. In this case, it is the conduct (engaging in drug trafficking) that may trigger eviction; anyone who engages in drug trafficking is subject to the penalty, not just those who have been convicted of drug trafficking. On the other hand, the penalty is not automatic but discretionary: the housing authority is *authorized* to evict, but is not *required* to evict. Conviction for drug trafficking will generally establish that the conduct took place, but eviction may or may not be imposed as a result. In other words, a criminal conviction for drug trafficking is neither necessary nor sufficient to warrant eviction, and a convicted person whose conduct is established by the judgment is no better off and no worse off than if the same conduct was shown through civil or administrative proceedings or an admission. By contrast, a law that *requires* that persons with drug convictions automatically be evicted and/or disqualified from public housing would properly be tested as a "collateral sanction" under the standard set forth in Standard 19-2.2. *See also* Standard 19-1.1, Commentary.

Other familiar examples in this category are laws authorizing a licensing agency or employing authority to take into account an individual's conviction for particular conduct in making a determination respecting that person's moral character and fitness for the position, and laws authorizing courts to terminate the parental rights of persons who have engaged in child abuse. Again, in many cases a prior history of misconduct warrants denial of privileges and responsibilities. Whether or not prolonged imprisonment will warrant termination of parental rights will also require case-by-case determination.

Even if a collateral sanction has been waived or modified pursuant to Standard 19-2.5 at the time of sentencing, or at some later time, a court or an administrative agency might still take action based on the conduct underlying the conviction, pursuant to Standard 19-3.1. For example, the sentencing court could determine (under proper authority) that an insurance agent convicted of embezzlement should not be subject to

automatic license revocation, but the state licensing board could subsequently determine that the conduct underlying the conviction was such that the individual's license should nonetheless be suspended. This would not be a collateral sanction because it occurs independent and apart from the fact of conviction, based on a discretionary determination by the licensing board.

As discussed in connection with Standard 19-1.1, the line between a mandatory collateral sanction and discretionary disqualification is not always a bright one: Reasonable people might disagree about how to characterize the situation where membership in a particular category (e.g., drug traffickers) is established administratively by the fact of a (drug trafficking) conviction alone. The key distinction is whether disqualification decisions are made on a bona fide case-by-case basis, taking into account the equitable merits of each case. If convicted persons are the *only* people disqualified, and if *all* convicted persons are disqualified without consideration of the merits, then under the principles of administrative law, the failure to exercise discretion might constitute an abuse of discretion that could be remedied on appeal or through judicial review.<sup>59</sup>

### **Standard 19-3.2 Relief from discretionary disqualification**

**The legislature should establish a process for obtaining review of, and relief from, any discretionary disqualification.**

#### *History of Standard*

This Standard is based on ABA STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS, Former Standards 23-8.3(b) & (c) (2d ed. 1981).

#### *Related Standards*

Standard 19-2.5 describes the procedure for obtaining relief from collateral sanctions.

#### *Commentary*

Standard 19-3.2 requires that some mechanism be available for obtaining review of, and relief from, any discretionary disqualification

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59. See cases cited *supra* note 19.

imposed by an administrative agency, civil court or other government official. On review, an individual might seek to argue that engaging in the conduct underlying the conviction is not a substantial basis for imposing the penalty; or that individuals who engage in the conduct but are not convicted are not subject to the same penalty. The procedures for review and the standard of review should be the same as those applied to review of other decisions by the decisionmaker.

### **Standard 19-3.3 Unreasonable discrimination**

**Each jurisdiction should encourage the employment of convicted persons by legislative and executive mandate, through financial incentives and otherwise. In addition, each jurisdiction should enact legislation prohibiting the denial of insurance, or a private professional or occupational license, permit or certification, to a convicted person on grounds related to the conviction, unless engaging in the conduct underlying the conviction would provide a substantial basis for denial even if the person had not been convicted.**

#### *History of Standard*

The LSOP Standards prohibited unreasonable discrimination against convicted persons in private as well as public employment opportunities (as well as in credit reports and employment reports). See Former Standard 23-8.8(a) & (b) (2d ed. 1981). See also MODEL SENTENCING & CORRECTIONS ACT § 4-1005.

#### *Related Standards*

None.

#### *Commentary*

This Standard contemplates various programs aimed at creating jobs for offenders re-entering the community. If offenders are to be self-sustaining, they need gainful employment. Most of the jobs available to them will be in the private sector. Accordingly, if large numbers of private employers impose broad and absolute bars on hiring individuals with criminal records, offenders will have limited opportunities for employment. Indeed, it would seem a reasonable public safety measure for the government to take affirmative steps to help offenders obtain jobs, for there is a high correlation between steady employment and

successful completion of a term of supervision.<sup>60</sup> At the same time, there is a tension between facilitating reentry of convicts and the appearance of rewarding criminality by giving offenders special benefits that are not available to the law-abiding majority.

Recognizing that private employment opportunities are critical to a successful program of offender reentry, Standard 19-3.3 calls upon the legislative and executive branches of government to create additional employment opportunities for convicted persons in the private sector through financial and other incentives. Financial incentives might include salary support, tax incentives such as the Worker Opportunity Tax Credit,<sup>61</sup> or bonding programs.<sup>62</sup> Jurisdictions could consider encouraging private firms holding government contracts to hire persons with criminal records.

This provision also establishes a conduct-based standard for other private benefits. It recommends the adoption of legislation prohibiting the denial of insurance, or private professional or occupational licenses, permits or certifications, on grounds related to conviction “unless engaging in the conduct underlying the conviction would provide a substantial basis for denial even if the person had not been convicted.” This Standard governing denial of private benefits is similar to Standard 19-3.1.

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60. See, e.g., Joan Petersilia, *Parole and Prisoner Reentry* at 519, in *PRISONS*, *supra* note 2 (“Research has consistently shown that if parolees can find decent jobs as soon as possible after release, they are less likely to return to crime and to prison.”).

61. 26 U.S.C.A. § 51(d)(4) (West supp. 2004) (offering tax credits to employers hiring certain categories of workers, including certain felons from low income families).

62. For example, the Federal Bonding Program was created in 1966 by the U.S. Department of Labor to alleviate employers’ concerns that job applicants with criminal records would be untrustworthy workers, by allowing employers to purchase fidelity bonds to indemnify them for loss of money or property sustained through the dishonest acts of their employees. See <http://www.doleta.gov/wtw/documents/fedbonding.cfm> (last visited June 17, 2004).

