

ABA COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS

The ABA Commission on Effective Criminal Sanctions has developed a series of policy recommendations that it anticipates will provide the basis for a broad reform agenda to remove legal barriers to offender reentry that drive high rates of recidivism. These recommendations, which have received broad support from the National District Attorneys Association, the National Legal Aid and Defender Association and the National Association of Criminal Defense Lawyers, cover six areas:

- Community-based alternatives to incarceration
- Improvements in parole and probation supervision
- Employment and licensing of people with convictions
- Access to and use of criminal history information
- Representation relating to collateral consequences
- Training in the exercise of discretion

The effort by the organized bar that led to the development of these recommendations began more than three years ago, when Supreme Court Justice Anthony Kennedy challenged the legal profession to pay attention to what happens to people after they have been convicted and sent to prison: “When the door is locked against the prisoner, we do not think about what is behind it.” In a speech to the ABA Annual Meeting, Justice Kennedy raised fundamental questions about the fairness and efficacy of a justice system that disproportionately imprisons minorities, and that returns them to their communities in worse shape than they left it. He pointed out that most states now spend more on their prisons than on their schools, and concluded that “our resources are misspent, our punishments too severe, our sentences too long.” He asked the ABA to help start a “new public discussion” about American sentencing and corrections policies and practices. In response to Justice Kennedy’s speech, ABA President Dennis Archer established the Justice Kennedy Commission, whose report to the 2004 Annual Meeting was hailed as providing a blueprint for sentencing and corrections reform.

In 2005 the ABA received a two-year grant from the Open Society Institute to continue the work begun by the Justice Kennedy Commission through the Commission on Effective Criminal Sanctions. The Commission committed itself to continuing the public discussion begun by the Justice Kennedy Commission, and to developing a broad consensus among the prosecutors, defenders, judges, and academics that comprise its members about what can and should be done to reduce reliance on incarceration and to reduce recidivism. The Commission held a series of hearings where it heard from top criminal justice officials from across the country about how the legal system in different jurisdictions supports or discourages diversion and treatment programs, and reentry and reintegration after conviction. Witnesses provided detailed information about programs and policies to steer less serious offenders into community corrections programs rather than prison, to help offenders gain job skills and secure housing, and to neutralize the effect of a criminal record for employment and other purposes. The Commission was

particularly impressed by alternative sanctioning programs developed by prosecutors' offices, and by collaborative efforts among justice stakeholders under the auspices of the courts.

Based upon the information gathered at the hearings and other research, the Commission developed policy recommendations in six issue areas. A summary of the six sets of recommendations, submitted for approval to the ABA House of Delegates in February 2007, is attached.¹ The full black letter text and accompanying reports, as well as minutes of the Commission's hearings, can be found on the Commission's website at <http://www.abanet.org/cecs>.

The Commission's recommendations represent a consensus, no small feat given the diversity of personal and institutional perspectives represented by its members. Even more remarkable, many of the Commission's recommendations were endorsed by the leading national organizations representing prosecutors and defenders.

With support from the national organizations representing both the prosecutor and defender communities, the Commission hopes that its recommendations will shortly become the basis for a reform agenda in jurisdictions across the country that are attempting to come to grips with the problem of recidivism. In the coming year, the Commission will continue to gather information on programs and policies being developed to address this problem, and to provide technical assistance and training to jurisdictions interested in implementing its recommended policies. For example, in March 2007 it will hold a CLE seminar for prosecutors, defenders and judges on how collateral consequences can be factored into decision-making at the front end of the criminal process.

On April 30-May 1, 2007, the Commission will host a national conference in Chicago on the "Overcoming Legal Barriers to Reentry," at which it will explore the problems faced by convicted persons in getting and keeping meaningful employment, recent calls for broader public access to criminal record information, and the political risks and rewards of offender reentry initiatives.

¹ The Commission originally submitted its recommendations to the ABA House in August 2006, but withdrew them for further consideration and discussion with the National District Attorneys Association. As a result of the Commission's discussions with NDAA a number of revisions were made to the recommendations, and the NDAA agreed to co-sponsor four of the six sets of recommendations. The National Legal Aid and Defender Association and the National Association of Criminal Defense Lawyers also renewed its co-sponsorship of the recommendations.

SUMMARY OF RECOMMENDATIONS

I. Alternatives to Incarceration and Conviction for Less Serious Offenders:

- Jurisdictions should develop, with the assistance of prosecutors and others, community supervision programs that allow all but the most serious offenders avoid incarceration and a conviction record.
- Community-based treatment programs ought to be made available for persons whose crimes are related to substance abuse and/or mental illness even if they have more than one conviction or a history of minor violence, provided they meet other qualifications for community supervision.
- Prosecutors, defenders and courts are encouraged to form working groups to review, monitor, and improve systemic alternatives to incarceration and conviction.

II. Improvements in Probation and Parole Supervision:

- Jurisdictions should develop meaningful graduated sanctions for violations of probation or parole (including brief periods of community detention where appropriate)
- Non-criminal violations of supervision conditions should result in imprisonment only when an individual engages in repeated violations and lesser sanctions have not been effective. In such cases, the length of incarceration should be that reasonably necessary to modify the individual's behavior and deter future violations. .
- Jurisdictions should distinguish between offenders who would benefit from community supervision and those who would not, and should reduce probation and parole caseloads to improve the quality and intensity of supervision in appropriate cases.
- In judging the performance of probation and parole officers, consideration should be given to the number of individuals under an officer's supervision who successfully complete supervision, as well as to those who do not.

III. Employment and Licensure of Persons with a Criminal Record:

- Government agencies and licensing boards should develop and enforce policy on the employment of people with convictions, including by the contractors and vendors who do business with the state.
- Ordinarily, a criminal record should be considered disqualifying only if the

offense conduct substantially relates to the particular employment or license, or presents a present threat to public safety.

- Government agencies should inventory applicable employment restrictions and disqualifications; repeal or modify those that are not substantially related to the particular employment or that are not designed to protect the public safety; provide for an exemption process and a statement of reasons in the event a person is turned down for employment because of their criminal record; and, provide judicial or administrative review of a decision to deny employment based upon conviction.
- Jurisdictions should establish a judicial or administrative process for mitigating or relieving collateral penalties and disabilities imposed by law, and standards for determining when an individual is entitled to complete relief from collateral consequences based upon fitness of character.
- Jurisdictions should work with private employer groups to develop job opportunities for people with a criminal record, and hiring incentives.
- Jurisdictions should make evidence of an individual's conviction inadmissible in any action alleging an employer's negligence or wrongful conduct based on hiring as long as the employer relied on a judicial or administrative order relieving disabilities or certifying rehabilitation.

IV. Access to and Use of Criminal History Information for Non-Law Enforcement Purposes:

- Jurisdictions should develop policies that limit access to and use of criminal history records for non-law enforcement purposes, which balance the public's right of access to information against the government's interest in encouraging successful offender reentry and reintegration.
- Jurisdictions should develop standards to maximize reliability and integrity of records in reporting systems, and should allow individuals and the government to challenge the accuracy and completeness of those records.
- Jurisdictions should establish standards for and controls over records reporting systems, and private screening companies should be restricted to the extent legally possible from reporting records that have been sealed or expunged.

V. Legal Representation Relating to Collateral Consequences:

- Jurisdictions should assist defenders in advising their clients of the collateral consequences of conviction.

- Prosecutors should also be informed of collateral consequences that may apply in a particular case.
- Additional funds should be provided to public defender and legal aid offices to enable them to assist offenders in removing or neutralizing the collateral consequences of conviction.
- Prison, probation and parole officials should be required to advise offenders about how they may obtain relief from collateral consequences.

VI. Training in the Exercise of Discretion:

- Prosecutors and all criminal justice professionals who exercise discretion in the justice system – including judges, prosecutors, defense counsel, probation and parole offices, and correctional officials - should participate in training that will give them greater understanding of what elements should be considered in the exercise of their discretion. Such training should be credited towards continuing education program requirements.