AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
August 11-12, 2003

RESOLVED, That the American Bar Association adopts the black letter *ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, dated August 2003.

BLACK LETTER

ABA STANDARDS FOR CRIMINAL JUSTICE (THIRD EDITION)
COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS
(AUGUST 2003)

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, shall 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 require a sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender's overall sentence

(b) The legislature should provide that the court 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 shall 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 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;

(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.

REPORT

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. What they often do not anticipate is that conviction 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.

These collateral consequences of conviction include such familiar penalties as disenfranchisement, deportation, and loss of professional licenses, as well as newer penalties such as felon registration and ineligibility for certain public welfare benefits.[1] 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 often take effect without judicial consideration of their appropriateness in the particular case, without notice at sentencing that the individual's legal status has dramatically changed, and indeed without any requirement that the judge, prosecutor, defense attorney or defendant even be aware of them.

Some collateral consequences serve an important and legitimate public purpose, such as keeping firearms out of the hands of persons convicted of crimes of violence, or barring persons recently convicted of fraud from positions of public trust. Others are more difficult to justify, particularly when applied automatically across the board to whole categories of convicted persons. Perhaps most problematic are laws that limit the exercise of fundamental rights of citizenship, or restrict access to otherwise generally available public benefits and services. The indiscriminate imposition of collateral penalties has serious implications, not only in terms of fairness to the individuals involved, but also in terms of the resulting burdens on the community.

The Criminal Justice Standards currently address the collateral consequences of conviction in three ways. First, the Sentencing Standards

[1] The term "collateral consequences" is used in this document for descriptive purposes only, and refers to the universe of adverse consequences of a criminal conviction other than those imposed by a judge at sentencing. It is intended to comprise both those consequences that occur automatically by operation of law at the time of conviction ("collateral sanctions"), and those that occur as a result of some subsequent intervening event or discretionary decision ("discretionary disqualification"). *See* Part II ("Terminology"), *infra*.

create a comprehensive regime for authorizing, structuring, imposing, and analyzing sanctions that should be understood to extend to statutory penalties and disabilities often considered outside the purview of the sentencing court.[2] Second, the Standards on Pleas of Guilty and the Pretrial Release Standards create certain obligations to advise a defendant of applicable collateral consequences.[3] Finally, the Standards on the Legal Status of Prisoners ("LSOP Standards") establish substantive standards for "Civil Disabilities of Convicted Persons." The 1981 LSOP Standards provide that, with only a few exceptions, collateral penalties and disabilities should not be mandatory, and some should not apply at all.[4]

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[2] In this respect, the Sentencing Standards implicitly reject the "direct/collateral" analysis that some courts have relied on in holding that statutory consequences of a criminal conviction that take effect automatically are not the business of courts. *See* note 13 *infra*. For example, Standard 18-3.13 contemplates that individual offenders may be required to refrain from a number of behaviors (e.g., engaging in certain employment or business, possessing dangerous weapons), as a condition of a compliance program, that are most often found in statutes or rules that are not part of a sentencing code. Thus the Sentencing Standards evidently make no distinction between sanctions traditionally imposed by a judge, and those more commonly imposed by operation of law. Indeed, the Sentencing Standards explicitly refer to some collateral sanctions in the context of organizational sentences. *See* Standards 18-3.16(d)(iii) and 18-5.4(b)(vii). The general applicability of the principles of the Sentencing Standards to collateral sanctions is discussed in greater detail in Part IV of this introductory memorandum.

[3] The Standards on Pleas of Guilty provide: "To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." Standard 14-3.2(f). They also provide that, before accepting a plea, the court "should advise" the defendant that he "may face additional consequences, including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant's immigration status. . . ." Standard 14-1.4(c). The Pretrial Release Standards provide that the court "should advise" a defendant that, if a non-citizen, he "may be adversely affected by collateral consequences of the current charge, such as deportation . . . ." Standard 10-4.3(b)(iv).

[4] *See* Part VIII of Chapter 23 (2d ed., 1981). Standard 23-8.1 provides 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 (Standard 23-8.5(b); service as a court-appointed fiduciary during actual confinement (Standard 23-8.5(d); and continuance in elective or appointive office held at the time of conviction (Standard 23-8.8(c)). Except for these few narrow exceptions, civil disabilities may 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

This proposed new Volume 19 would supplant the "civil disabilities" provisions of the LSOP Standards with a more balanced and flexible approach to collateral consequences.[5] The new Standards have two distinct but related objectives: First, they would make clear what is now implicit in the Sentencing Standards, that all legal penalties and disabilities resulting directly and immediately from the fact of conviction are in every meaningful sense "sanctions." It follows that "collateral sanctions" should be accounted for explicitly as part of the sentencing process, and imposed only when the conduct underlying the particular offense unambiguously warrants it. All actors in that process should be aware of them, and a court or administrative body should be empowered to waive or modify them in appropriate cases.

Second, the proposed new Volume 19 would establish a framework for dealing 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, the proposed 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.

I. Background and Goals

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interest." *See* Standard 23-8.3(a). The burden of proof is on the entity seeking to impose the disability. Standard 23-8.3(d). A court retains the authority to provide relief from collateral sanctions that it imposes by way of "reconsideration." Standard 23-8.3(c). Jurisdictions should make provision for expunging convictions, "the effect of which would be to mitigate or avoid collateral disabilities." *See* Standard 23-8.2. The LSOP Standards also prohibit absolutely the imposition of certain collateral penalties and disabilities affecting civil, judicial, property, and domestic rights, *see* Standards 23-8.4 through 8.7, and limit the circumstances in which convicted persons may be denied employment and licensing. *See* Standard 23-8.8. Since its enactment in 1981, Part VIII of the LSOP Standards has for the most part gone unnoticed by courts, commentators, and legislators. The complete black letter is available at http://www.abanet.org/crimjust/standards/prisoners_status.html (last visited June 13, 2002).

[5] The most significant ways in which the new Standards modify the policies embodied in Part VIII of the LSOP Standards are described in Part V of this report, *infra*.

The American legal system has long recognized that certain legal disabilities flow from a criminal conviction in addition to the sentence imposed by the court.[6] But the collateral consequences of conviction have been increasing steadily in variety and severity for the past 20 years, and it has become increasingly difficult to shake off their lingering effects.[7] Moreover, 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. More people convicted inevitably means more people who will ultimately be released from prison or supervision, and who must either successfully reenter society or be at risk of reoffending.[8] If not administered in a sufficiently deliberate manner, a regime of collateral consequences may frustrate the reentry and rehabilitation of this population, and encourage recidivism.[9]

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[6] Conceptually, these collateral legal disabilities are remnants of the ancient Greek concept of "infamy," or the penalty of "outlawry" among the Germanic tribes, both of which implied the permanent exclusion of an offender from the community: "The outlaw's children were considered as orphans and his wife a widow. Besides losing his family rights, he also lost all his possessions and even his right to life (if we can use that expression), for anyone could kill him with impunity." Mirjan Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. Law, Criminology & Police Science 347, 350 (1968).

[7] *See, e.g.*, J. Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in Invisible Punishment: The Social Costs of Mass Imprisonment (M. Chesney-Lind & M. Mauer, eds. 2002); 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.").

[8] Over 600,000 persons were released from state and federal prisons in 2000. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Prison and Jail Inmates at Midyear 2001* (2002).

[9] *See* J. Travis, L. Robinson, & A. Solomon, *Prisoner Reentry: Issues for Practice and Policy*, Criminal Justice Magazine, Spring 2002, 12, 17 ("[A]re we jeopardizing future public safety by making it so much more difficult for these offenders to succeed?"); J. Travis, A. L. Solomon & M. Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, www.urban.org/pdfs/from_prison_to_home.pdf.; J. Travis, *But They all Come Back: Rethinking Prisoner Reentry*, Sentencing and Corrections, Issues for the 21st Century, 7 (National Institute of Justice, 2000); von Hirsch & Wasik, *supra* note 7, 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.").

A typical case illustrates the breadth and impact of collateral consequences. Consider a first offender who pleads guilty to felony possession of marijuana. This offender may be sentenced to a conventional term of probation, community service, and court costs. Unbeknownst to this offender, and perhaps to any other actor in the sentencing process, as a result of his conviction he may be ineligible for many federally-funded health and welfare benefits, food stamps, public housing, and educational assistance. His drivers license may be automatically suspended, he may no longer be eligible for certain employment and professional licenses, and he may be unable to obtain life or automobile insurance. He will be precluded from enlisting in the military, possessing a firearm, or obtaining a security clearance. If the child of an elderly parent, he may be disqualified from serving as a court-appointed guardian, or as executor of his parent's estate. If a citizen, he may no longer have the right to vote and serve on a jury; if not, he will become immediately deportable. In a case like this, the real punishment is imposed through the collateral consequences of the guilty plea that may only gradually become clear, not by the judge at sentencing.[10]

Collateral consequences have accumulated with little coordination in disparate provisions of state and federal codes, making it difficult to determine all of the penalties and disabilities applicable to a particular offense.[11] Judges are ordinarily not required to advise defendants of collateral consequences at plea or sentence,[12] and defense counsel ordinarily need not inform their clients about

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[10] The Supreme Court recognized in *INS v. St. Cyr*, 533 U.S. 289 (2001), that avoiding the collateral consequence of deportation is likely to be "one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead proceed to trial." *Id.* at 323.

[11] *See Civil Disabilities of Convicted Felons: A State-by-State Survey* (Office of the Pardon Attorney, U.S. Dep't of Justice, 1996). The federal law section of this survey was updated in November 2000.

[12] A few courts require that a defendant be advised of particular collateral consequences at plea or sentence. *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). The most significant context where statutes or court rules require advisement of potential collateral consequences is with respect to deportation. *See State v. Yanez*, 2002 WL 31840905, 2002-Ohio-7076 ¶¶ 7-8 (Ohio App. Dec 20, 2002) (noting that 18 states in addition to Ohio require advisement, but that the United States does not) (citing *INS v. St. Cyr, supra*).

collateral consequences when advising about the appropriate course of action.[13] Because judges and defense lawyers need not consider them, there is no compelling reason for prosecutors to educate themselves about them either.

As a result, all those present at a sentencing may later be surprised to learn the full extent of the offender's changed legal status. Indeed, many collateral consequences are under-enforced simply because the convicted person is unaware of them. An offender's failure to appreciate how his legal situation has changed as a result of his conviction may have far-reaching consequences for his own ability to conform his conduct to the law.

One goal of the proposed Standards on Collateral Sanctions is to encourage awareness of the full legal consequences of a criminal conviction, particularly those that are mandatory upon conviction. There is no justification for the legal system to operate in ignorance of the effects of its actions. Prosecutors when deciding how to charge, defendants when deciding how to plead, defense lawyers when advising their clients, and judges when sentencing should be

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[13] In determining whether a defendant is legally entitled to notice of a particular consequence of conviction in the context of a guilty plea, the courts have sometimes distinguished between "direct" consequences (as to which notice is required) and "collateral" consequences (as to which it is not). A consequence is generally held to be "collateral" when it is "contingent upon action taken by an individual or individuals other then the sentencing court." *United States v. Littlejohn*, 224 F.3d 960, 965 (9th Cir. 2000). Examples 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.*, *Littlejohn* (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) (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, consistently been regarded as a collateral rather than a direct consequence of conviction, 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 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* G. Bankier-Plotkin, *Unconscionable Bargains: Why Defendants Who Plead Guilty Must Be Informed of All the Consequences of a Conviction*, unpublished paper on file with the Criminal Justice Standards Committee.

aware, at least, of the legal ramifications of the decisions they are making.

A second goal of the proposed Standards is to focus attention on the impact of collateral consequences on the process by which a convicted person re-enters the free community, and is encouraged and supported in his efforts to become a law-abiding and productive member of society. As our prison population has grown in recent years, the concern for offender reentry has grown correspondingly.[14] At the same time, however, the laws restricting convicted persons in their ordinary life activities have multiplied, discouraging rehabilitation of criminals, and participating in 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 an offender's ability for self-support in the legitimate economy, and perpetuate his alienation from the community.

Some restrictions on persons convicted of serious crimes are obviously necessary, and in some situations protective measures are so obviously appropriate across the board that case-by-case evaluation would be pointless and inefficient. On the other hand, many collateral consequences sweep far more broadly than can be justified in terms of any legitimate goal of the criminal justice system. If an appeal to fairness is not by itself sufficient to encourage attention to this public policy problem, perhaps an added concern for public safety and fiscal responsibility will.

II. Terminology

The term "collateral consequences" as used in this document describes two analytically distinct effects of a criminal conviction: "collateral sanctions" and "discretionary disqualification."[15] "Collateral sanctions" are those statutory penalties and disabilities that automatically become effective upon conviction even if not included in the court's judgment of conviction.[16] The term signifies a

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[14] *See* note 9, *supra*.

[15] There is another definition of collateral consequences. In criminal justice literature, the term "collateral consequences" is sometimes used to refer to the social effects of incarceration. *See* John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in Prisons (Michael Tonry & Joan Petersilia, eds., 1999).

[16] A mandatory sentence is not within the definition of collateral sanction, because it does not take effect unless it is included as part of the sentence imposed by the judge. *See United States v. Moyer*, 282 F.3d 1311 (10th Cir. 2002) (allowing defendant to withdraw

direct and immediate change in an offender's legal status that does not depend upon some subsequent additional occurrence or administrative action, and that would not have occurred in the absence of a conviction. Examples are automatic loss of firearms privileges, per se disqualification from employment or public benefits, and mandatory felon registration. To the extent an offender's immigration status changes as a result of a criminal conviction, so that he becomes automatically deportable without opportunity for discretionary exception or revision, deportation too must be regarded as a "collateral sanction."[17]

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 of this is 20 U.S.C. § 1091(r)(1), 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 disqualification is immediate and unqualified, and does not require any further discretionary action to come into play. It is in every sense just as "direct" a consequence of

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guilty plea where mandatory minimum sentence not imposed by trial court); *Hurley v. Bureau of Prisons*, 1995 WL 631149 (1st Cir. Oct 24, 1995) ("the Bureau [of Prisons] had no obligation -- indeed no right -- to disregard the [illegal] sentence until the sentencing court or the court of appeals corrected it"). In addition, a defendant must by law generally be informed of the applicable mandatory minimum sentence before pleading guilty. *See United States v. Fernandez*, 205 F.3d 1020 (7th Cir. 2000); *United States v. Hernandez-Wilson*, 186 F.3d 1 (1st Cir. 1999); *State v. Miller*, 756 P.2d 122 (Wash. 1988).

[17] As previously noted, the courts have generally 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 his guilty plea. *See* note 13, *supra*. At the same time, Professors Chin and Holmes point out that a growing number of state jurisdictions are requiring courts to ensure that aliens are advised about the deportation consequences of a conviction, by statute or court rule. *See* Chin & Holmes, *supra* note 13, at 708, n. 119; *State v. Yanez*, 2002 WL 31840905, 2002-Ohio-7076 ¶ 7 (Ohio App. Dec 20, 2002). Moreover, the federal statute which until 1990 authorized state and federal judges to issue a binding Judicial Recommendation Against Deportation ("JRAD") at sentencing was held to impose a higher duty of care on attorneys to warn their clients of the possibility of deportation. Chin & Holmes, *supra*, at 708, nn. 120, 121; *see also* note 30, *infra* (discussing JRAD's). Finally, misadvice about deportation or other collateral consequences is generally treated differently by the courts than mere non-advice. Chin & Holmes, *supra*, at n. 121.

conviction as a penalty imposed by the judge. *See United States v. Littlejohn*, *supra* note 13.

"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. The proposed Standards deal with this more attenuated effect of conviction under the rubric of "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. *See* 24 C.F.R. § 966.4(l)(5)(i)(B). This provision states that a person may be evicted from 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." 24 C.F.R. § 966.4(l)(5)(iii)(A). Accordingly, drug law violators may be evicted even if they were never convicted. *See, e.g.*, *Edgecomb v. Housing Auth. of the Town of Vernon*, 824 F. Supp. 312 (D. Conn. 1993). 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 as a practical matter 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. Note also that in our example the penalty of eviction is discretionary (a person "may" be evicted), and thus distinguishable from the automatic ineligibility for student financial aid discussed in the preceding paragraph.

We recognize that the line between a mandatory collateral sanction and discretionary disqualification is not always a bright one. And, de facto distinctions that rely on a conviction to establish conduct may as a practical matter be just as burdensome and discouraging as distinctions based on rigid legal categories. But because they tend to be more subtle, they are correspondingly more difficult to get a handle on. For example, reasonable people might disagree about how to characterize the situation where membership in a disfavored category (e.g., drug traffickers) is established administratively by the fact of a (drug trafficking) conviction alone. If convicted persons are as a practical matter the *only* people disqualified under such a protocol, and if *all* convicted persons are disqualified without consideration of the equitable merits of their case, then this may look more like a mandatory "sanction" based on the fact of conviction, than a discretionary disqualification based on the conduct underlying the conviction. We have gone as far as we can in drawing a distinction between the two categories. We expect that further refinements will come only with experience.

III. Structure of the Standards

The proposed new Volume 19 is divided into three parts. Part I defines key terms, and sets out the objectives of the substantive provisions of the following parts. Collateral consequences of any kind should be strictly limited, and in any event closely related to the offense conduct involved. The defendant should be fully informed about collateral sanctions before pleading guilty and at sentencing, and the court should take them into account in determining the appropriate sentence. Discretionary disqualification should not discourage reentry of offenders into law-abiding society. Relief from collateral sanctions or discretionary disqualification should be readily available from the sentencing judge or an appropriate administrative agency.

Part II regulates the means by which collateral sanctions are imposed, sets out some substantive limits, and provides that relief from collateral sanctions should be readily available. 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. Standard 19-2.3 requires a sentencing judge, before accepting a plea of guilty, to see that the defendant has been informed of all applicable collateral sanctions.[18] Standard 19-2.4 authorizes a sentencing court to take into account applicable collateral sanctions in determining an offender's overall sentence, and to confirm that the offender has been made aware of them.[19]

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

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[18] Except as otherwise provided by statute or applicable rules of court procedure, this requirement may be satisfied by confirming on the record that defense counsel's duty of advisement under the Pleas of Guilty Standards has been discharged. 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. *See* note 3, *supra*. If information on applicable collateral sanctions is properly collected and made available to defense counsel pursuant to Standard 19-2.1, the contingent nature of this defense counsel duty should be eliminated. Note that a failure to notify a defendant under this Standard does not mean that the collateral sanction is ineffective or cast doubt on the validity of the plea, though the existence of a statute or court rule requiring such notification might. *See, e.g., Skok v. State*, 724 A.2d 558 (Del. 1999); *Barkley v. State*, 760 A.2d 647 (Md. 2000).

[19] Collateral sanctions may but need not be included in the terms of the sentence imposed in open court, as required for a court-imposed sentence by the Sentencing Standards. *See* Standards 18-5.19, 18-5.20, 18-5.21. *See* Part V(1), *infra*.

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 determinations contemplated by the Sentencing Standards.[20]

Standard 19-2.4(a) authorizes a sentencing court to take into account applicable collateral sanctions in fashioning a package of sanctions at sentencing.[21] Although not stated in black letter, the sentencing judge's task will be facilitated if the legislature factors collateral sanctions into the statutory framework for sentencing, and takes them into consideration in determining the appropriate sanctions for each offense;[22] and, if the agency performing the intermediate function includes collateral sanctions in its guidance for sentencing courts, and when it collects, evaluates and disseminates information about sentences imposed in the jurisdiction.[23]

Standard 19-2.5 provides that collateral sanctions should be subject to waiver, modification, or "timely and effective relief" from a court or a specified administrative agency.[24] Standard 19-2.5(a) contemplates a process for obtaining relief from particular collateral sanctions, and Standard 19-2.5(c)

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[20] In recognizing the possibility that some collateral sanctions will be so clearly appropriate given the nature of the offense that the costs of making a discretionary case-by-case decision at the time of sentencing may not be justifiable, these Standards create a narrowly tailored exception to the individualized approach of the LSOP Standards, and of the Sentencing Standards themselves. *See* Part V(1)(a), *infra*.

[21] 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 undue disparity. *See* Standards 18-6.1, 18-6.2. It follows from the principle that collateral sanctions are brought directly into the sentencing process that they should not be enhanced or enforced except in accordance with the same principles that apply to the more conventional elements of a criminal sentence. Retroactive application of collateral sanctions presents particularly sensitive and difficult issues.

[22] *See* Standards 18-1.2, 18-2.1, 18-2.2, 18-2.4, 18-2.5, 18-3.11.

[23] *See* Standards 18-3.1, 18-3.12, 18-4.1, 18-5.1. It would also be helpful for presentence reports to include collateral sanctions in their descriptions of authorized sentences and sentence recommendations. Standard 18-5.4.

[24] 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. *See infra*.

provides for a judicial process that can lead to an order providing general relief from all collateral sanctions imposed by the law of that jurisdiction. The broad scope of paragraph (c) is further distinguishable from the more narrowly focused paragraph (a) in that it may serve as a vehicle for recognizing and rewarding rehabilitation. Accordingly, an order obtained pursuant to Standard 19-2.5(c) may not only accomplish general relief from legal disabilities imposed as a result of the conviction, it may also serve as evidence of a convicted person's good character. *See* Part V(2) and notes 33 and 34, *infra*. 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.

Finally, Standard 19-2.6 provides that collateral sanctions depriving individuals of certain civil, judicial, and domestic rights should never be categorically imposed, carrying forward parts of the existing LSOP Standards.[25] In addition, a convicted person should not be denied eligibility 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. Continuing the policy of the LSOP Standards, it leaves open the question whether states may deny persons the right to vote "during actual confinement."[26] The issue of prisoner voting remains subject to the general test in Standard 19-2.2. *See* note 25, *supra.*

Part III of the proposed Standards deals with unreasonable barriers to reentry posed by discretionary disqualification from benefits and opportunities on grounds related to a person's criminal conviction. It incorporates the substance of those provisions of the LSOP Standards not included in Part II, including those dealing with unreasonable denial of insurance, employment, licensing, and public housing.

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[25] The LSOP Standards explicitly exempt the right to sit on a jury during actual confinement of (as well as, surprisingly, while on probation and parole), and the right to serve as a court-appointed fiduciary. *See* Standard 23-8.5(b) and (d). The Standards Committee proposal makes no change in the current ABA policy on jury service, but does not specifically prohibit a bar against convicted persons serving as a court-appointed fiduciaries. This subject, like prisoner jury service and prisoner voting, *see infra*, should be dealt with under the general provisions of Standards 19-2.2 and 19-2.5(a).

[26] The black letter of LSOP Standard 23-8.4 provides that prison inmates should vote at their place of residence, as opposed to their place of confinement. However, the commentary states: "The standard takes no position with respect to whether prisoners should be denied the right to vote while actually incarcerated."

Standard 19-3.1 deals with "discretionary disqualification," defined as a penalty that a non-judicial government agency or official is authorized but not required to impose on grounds "related to" a person's conviction. *See* proposed Standard 19-1.1(b). Recognizing that criminal misconduct may in some circumstances be relevant to the awarding of particular benefits or opportunities, this Standard permits discretionary disqualification if a finding that the person had engaged in the offense conduct would provide "a substantial basis for imposing the disqualification even if the person had not been so convicted." Even if a collateral sanction had 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 could still take action based on the conduct underlying the conviction, pursuant to Standard 19-3.1. *See* note 24, *supra*. Standard 19-3.2 provides for the establishment of a process for obtaining review of, and relief from, any discretionary disqualification.

Recognizing that the issue of private employment is a particularly sensitive one, though clearly important in the context of offender reentry, Standard 19-3.3 calls upon jurisdictions to encourage the employment of convicted persons by legislative and executive mandate, through financial incentives and otherwise. This section also provides for the adoption of legislation prohibiting the denial of insurance, or a private professional or occupational license, permit or certification, on grounds related to conviction "unless the conduct underlying the conviction would provide a substantial basis for denial even if the person had not been convicted."

IV. Impact on Sentencing Practice

The requirement that collateral sanctions be brought directly into the sentencing process would result in three central changes to current sentencing practice:

1. *Codification*. Because collateral sanctions are often difficult to find, mandatory sanctions applicable to a particular offense or category of offense should be consolidated and collected in a single section of a jurisdiction's code. The difficulty in locating all of the widely dispersed statutes imposing collateral penalties undermines the fundamental purpose of notice and fairness behind criminal codes, and indeed, written law of any kind. A prosecutor, defense lawyer, judge or private citizen should be able to determine the full legal consequences of violation of a particular provision of the criminal code simply by reading it.

2. *Notice*. Before an offender pleads guilty or is sentenced, he or she should be informed of the full range of mandatory consequences of the conviction. This will provide notice of what an offender's actual legal liability is in the particular case.

3. *Consideration at sentencing.* Sentencing judges should be required to take into account collateral sanctions as part of the discretionary function of shaping a sentence. The reasons supporting this approach are set forth in detail below, but the central ideas are these: The Sentencing Standards are designed to be comprehensive, and coordinate in a single proceeding sanctions for all of an individual's crimes regardless of time or jurisdiction. Breaking down the strict civil-criminal dichotomy, they seek to achieve purposes beyond traditional punishment, including restitution and remediation. They extend to a variety of forms of sanction, including those traditionally regarded as collateral, such as felon registration. The Sentencing Standards are also designed to ensure that overall sanctions in a particular case are not excessive, and that they are consistent with those imposed in other similar cases. It would be inconsistent with the spirit of these Standards to have some penalties imposed in a carefully constructed and considered sentencing proceeding, while leaving other penalties, unknown in kind or amount, to be imposed without consideration by the sentencing judge.

A. Collateral Sanctions Are Imposed For The Same Purposes As Those Identified in The Sentencing Standards

Collateral sanctions should be considered at sentencing because they are generally imposed to achieve the societal purposes of sentencing identified by the Sentencing Standards: promotion of respect for law, deterrence, incapacitation, punishment, restitution or rehabilitation. Standard 18-2.1. Classic examples include deportation, disenfranchisement, registration, ineligibility for public benefits, ineligibility for a license, and ineligibility for public employment. Disbarment, deportation and disenfranchisement are sometimes justified as methods of selective incapacitation, in that they remove the individual from a position where they might do harm. Obviously, all of these also might also serve to deter individuals from committing crimes or serve as punishment. It is hard to think of a collateral consequence not motivated by one or more of these purposes. Because collateral sanctions are animated by the same purposes as other sanctions, there is no reason they should not be treated as related to the sentence.

B. Collateral Sanctions Are Impliedly Authorized by the Sentencing Standards

The Sentencing Standards authorize three kinds of non-incarceration sanctions: compliance programs, economic sanctions, and acknowledgment sanctions. Standard 18-2.2. In form, statutory collateral sanctions typically fall within one or more of these categories. In effect, the Sentencing Standards implicitly reject the "direct/collateral" analysis that some courts have relied on in holding that statutory disabilities and penalties are not the business of courts. *See* note 2 *supra*. Some sanctions typically considered collateral to the

sentencing process are explicitly within the contemplation of the Sentencing Standards, such as felon registration, asset forfeiture, habitual offender sentence enhancement, and prohibition on "engaging in specified business, employment or professional activities," which is akin to disbarment or other license termination. *See* Standard 18-3.13(d)(vii) (allowing prohibition on business pursuits); Standard 18-3.16, Commentary (forfeiture is a type of fine); Standard 18-3.5 (criminal history and recidivist sentencing); Standard 18-3.18, Commentary (registration is a type of acknowledgment sanction). Disbarment, deportation, disenfranchisement and disqualification for licenses or benefits are compliance programs in the sense that they are designed to ensure that the individual is not in a position to violate the law again. They are economic sanctions because they deprive the individual of valuable benefits. They are also potentially acknowledgment sanctions.

In addition, the Sentencing Standards explicitly encourage the legislature to "be receptive to the development and use of new sanctions not set forth in these standards." Standard 18-2.2(b). This suggests that all sanctions are within the general contemplation of the Sentencing Standards. (The Pleas of Guilty Standards support the idea that collateral sanctions are part of sentencing in that they hold defense counsel responsible for advising the defendant of collateral sanctions when pleading guilty. Standard 14-3.2(f).)

The Standards emphasize the importance of tailoring the array of sanctions to the facts of the case and the characteristics of the offender. *See* Standard 18-6.2(a). Excluding a significant category of sanctions from judicial purview would be inconsistent with the flexibility and discretion contemplated by the Standards. For example, a judge might impose a sanction without realizing that it was duplicated by a collateral sanction. Or, a judge might conclude that a different sanction would be preferable to a particular collateral sanction but would be unable to impose it.

The Sentencing Standards explicitly refer to some collateral sanctions in the context of organizational sentences. The Standards provide that "[s]entencing courts, in imposing fines upon organizations, should not duplicate sanctions imposed under statutory provisions, such as antitrust or securities laws, for government or private civil actions for equitable relief, money damages, or civil penalties that have the same deterrent or remedial purpose as the sanctions of the criminal law." Standard 18-3.16(d)(iii). The Commentary explains that "[w]hen overlapping laws serve overlapping purposes, their combined effect should be integrated rather than cumulated." Another reference states that presentence reports may include "[a]n assessment of the impact of possible sanctions and collateral consequences upon an organizational offender." Standard 18-5.4(b)(vii). Accounting for collateral sanctions in the organizational context while omitting any mention with respect to individual sentences does not reflect a decision that collateral sanctions are irrelevant to sentences of natural persons. Rather, the distinction arises because many

collateral sanctions affecting individuals occur by operation of law upon conviction without the necessity for an independent civil action. The collateral sanctions contemplated by the organizational sentencing standards occur by independent civil action.

C. Collateral Sanctions Must be Considered in Assessing Overall Severity of a Sentence

The Sentencing Standards reflect a concern that the overall package of sanctions not be overly severe.

> In shaping a sentence that is a composite of different types of sanctions, a sentencing court should determine the level of severity for each type of sanction so that the composite sentence is no more severe than necessary to achieve the societal purposes for which it is imposed and does not result in unwarranted and inequitable disparities in sentences.

Standard 18-6.2(b). If the sentencing court is unable to take into account collateral sanctions, because it is unaware of them, the overall sentence may be unduly severe. *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."). In addition, persons of equal culpability may receive vastly different punishments if, because of residence or occupation, for example, one is subject to particular collateral sanctions and the other is not. *See* Standard 18-2.5(b) (emphasizing the importance of eliminating "unwarranted and inequitable disparities in sentences.").

D. Consolidated Sentencing

The Sentencing Standards emphasize consolidated dispositions. The Standards provide that the sentence should account for conviction of multiple offenses (Standards 18-3.7 (a-d), 18-6.5(a-f)), unexpired sentences from prior convictions (Standards 18-3.7(e), 18-6.5(g)), pending charges (Standards 18-5.16), and sentences in different jurisdictions (Standards 18-3.8). The Standards even provide that "[t]he legislature should enact appropriate provisions to integrate the criminal sanction of restitution or reparation with a victim's right of civil action against an offender." Standard 18-3.15(d). The evident philosophy is that the sentencing proceeding should be comprehensive, wrapping up, to the extent possible, the individual's legal situation. There is no reason that collateral sanctions should not be considered in that proceeding.

E. Clarity In Sentencing; Generation and Evaluation Of Information

The Standards value clarity in sentencing, both in the basic structure and in individual sentences. Thus, the Standards suggest that "[f]or each offense, the legislature should specify a maximum authorized severity level for each type of sanction." Standard 18-3.11. The presentence report may describe "the authorized types of sanctions and the ranges of severity." Standard 18-5.4(b)(vi). The sentencing court "should state with care the precise terms of the sentence imposed, and should state the reasons for selection of the type of sanction and the level of severity of the sanction in the sentence." Standard 18-5.19. *See also id*., Commentary ("Terms of sentences should be described with sufficient clarity that persons being sentenced can comprehend them."); Standard 18-4.4(c) (legislature should require that "apart from credit for good time, the sentences imposed will determine the length of sentences served."); *cf*. Model Penal Code, § 1.02 ("The general purposes of the provisions governing the sentencing and treatment of offenders are: . . . (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment; (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense"). If a substantial portion of the actual set of sanctions is imposed apart from the sentencing, the goals of understanding the costs of conviction is undermined.

This is particularly true because the Standards contemplate ongoing collection and evaluation of information to determine the efficacy, severity and fairness of particular sanctions. *See, e.g.,* Standard 18-2.7. If many sanctions are imposed off-budget, this goal cannot be achieved.

V. Proposed Changes in ABA Policy

The Standards Committee decided not to accept several significant recommendations of the Task Force that developed the initial draft of the new Volume 19, each of which involved reaffirmation in whole or in part of specific provisions of the LSOP Standards. Those recommendations are summarized below, along with the Standards Committee's disposition of each one, to explain how the proposed new Standards would modify existing ABA policy.[27]

1. Mandatory v. Case-by-Case Approach

The most fundamental difference between the Task Force draft and the Standards Committee proposal involves the mandatory nature of collateral sanctions. This difference manifests itself in several ways.

a. Applicability of the Sentencing Standards

[27] The provisions of Part VIII of the LSOP Standards are described in note 4, *supra.*

The Task Force recommended that the case-by-case approach of the LSOP Standards be carried forward, reinforced by the analytical framework of the Sentencing Standards.[28] Thus, the Task Force recommended that the black letter make clear that collateral sanctions are an integral part of the sentence imposed by a court, and therefore fully subject to the provisions of the Sentencing Standards, including in particular their requirement of individualization.

The Standards Committee agreed with the Task Force that automatic collateral penalties are in every respect "sanctions" as that term in used in the Sentencing Standards. It also agreed that collateral sanctions should be brought into the sentencing process. However, it was unwilling to accept the argument advanced by the Task Force that collateral sanctions are conceptually part of the sentence itself, and thus fully subject to the Sentencing Standards. It underscored its conclusion in this regard by defining a collateral sanction as one that is effective even if not included in the judicially-imposed sentence. *See* Standard 19-1.1(a).

In essence, the Standards Committee concluded that there are certain situations in which a collateral sanction will be so clearly appropriate given the nature of the offense, that the costs of making a discretionary case-by-case decision at the time of sentencing are ordinarily not justifiable. Whereas the LSOP Standards themselves specify the few situations where mandatory disabilities are permissible, *see* note 4 *supra*, the Standards Committee proposal gives this responsibility to the legislature. At the same time, Standard 19-2.2 places a heavy burden of justification on the legislature where automatic collateral penalties are concerned, limiting collateral sanctions to those situations where "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."

b. Role of the Sentencing Court

In the Task Force proposal, the individualization required by the LSOP Standards, and by the Sentencing Standards, would be accomplished by giving the sentencing court authority to waive or modify any or all applicable collateral sanctions at the time of sentencing. The Standards Committee decided not to require that the authority to waive or modify be exercised at the time of sentencing, given the very narrow circumstances in which it will be appropriate to impose a collateral sanction in the first place. In this respect, Standard 19-2.2

[28] Indeed, unlike the LSOP Standards, the Task Force draft did not contemplate <u>any</u> exception to the requirement of individualization. As previously noted, *see* note 4 *supra*, the LSOP Standards permit a few "mandatory civil disabilities" that are "specifically preserved" in the Standards themselves.

could be said to create a narrowly tailored exception to the individualized approach of the Sentencing Standards.

The Standards Committee approached the issue of individualization less directly, through Standards 19-2.4(a) and 19-2.5(a). Standard 19-2.4(a) provides that a sentencing court should be required to take into account, and authorized it to consider, applicable collateral sanctions in determining an offender's overall sentence. Standard 19-2.5(a) provides that there should be a judicial or administrative mechanism for obtaining "timely and effective" relief from collateral sanctions that are or have become inappropriate or unfair in the particular case. The waiver authority could be exercised at the time of sentencing, but it could also be exercised at some later date. Through these two mechanisms, the Standards Committee sought to ensure that collateral penalties and disabilities will be tailored to the circumstances of each individual offender.

The Standards Committee decided against dealing in black letter with issues of severity and proportionality, retroactivity, enhancement and enforcement, as recommended by the Task Force, reasoning that the strict criteria of Standard 19-2.2, together with the relief mechanisms provided by Standards 19-2.4(a) and 19-2.5(a), together provide an adequate safety valve. Recommended approaches to procedural and substantive issues of relief and modification can be discussed in commentary.

c. *Inclusion in the record of the sentence*

The Task Force recommended that all applicable collateral sanctions be set forth in the court's judgment, as required by the Sentencing Standards for a court-imposed sentence: "Imposition of a sentence in open court and the written record thereof should include the type and duration of any collateral sanctions imposed." The Standards Committee agreed that the court should ensure that an offender has been notified of applicable collateral sanctions, either when accepting a guilty plea or at sentencing. However, except where notification by the court itself is otherwise required by law or rules of procedure, the court's obligation may be satisfied by confirming 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. *See* proposed Standards 19-2.3, 19-2.4(b).[29]

d. Recommendation against deportation

[29] Because a collateral sanction by definition takes effect without being included in the sentence, see Standard 19-1.1(a); ordinarily, a failure to notify a defendant of a particular collateral sanction does not provide a basis for challenging the validity of a guilty plea. *See* note 13, *supra*.

The Task Force recommended including a specific provision, similar to the one that until recently existed in federal immigration law, giving sentencing judges (both state and federal) authority to make binding recommendations against an individual's deportation as a result of conviction (the so-called "JRAD").[30] The Standards Committee decided against including a specific provision in black letter addressing the court's authority to grant relief from deportation, in part because such authority must derive in the first instance from federal immigration laws. In this regard, it recognized that Standard 19-2.5(a) directs the legislature in each jurisdiction (including Congress) to make provision for "timely and effective relief from any collateral sanction imposed by the law of that jurisdiction." Current ABA policy provides for broad access to JRAD's,[31] and the issue can be addressed in commentary to Standard 19-2.5(a).

2. Expungement

The LSOP Standards include 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." Standard 23-8.2. The relevant commentary provides that expungement "annuls the fact of conviction and, thus, invalidates adverse actions taken . . . on the basis of the conviction."[32] Thus the LSOP Standards contemplate the broadest scope for expungement,

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[30] 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(a), 66 Stat. 163 (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 Wright, *The Sentencing Judge as Immigration Judge*, 51 Emory L.J. 1131 (2002). The black letter proposed by the Task Force specifically approved the traditional role of the sentencing judge in this context, on the theory that, like other sanctions, deportation should be imposed on a case-by-case basis as part of a criminal sentence.

[31] 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."

[32] The commentary to Standard 23-8.2 notes that the first edition of the Standards endorsed expungement only for probationary sentences, see Standards Relating to Probation § 4.3 (1970). In extending the potential benefits of expungement to those released from prison, the commentary opines that "[a]dditonal punishment is the only end served by withholding an opportunity for expungement from those sentenced to confinement."

and do not provide for any less sweeping means of obtaining relief from collateral disabilities.[33]

The Task Force declined to endorse the broad concept of expungement contained in the LSOP Standards. And, it noted that there is no common understanding of what an "expungement" actually accomplishes, e.g., whether an expunged conviction can serve as a predicate offense, whether an expungement eliminates all collateral sanctions, and whether an individual whose conviction has been expunged may deny the fact of his conviction in response to a direct inquiry.[34] In any event, particularly in light of modern technology and the needs of law enforcement, it seemed to the Task Force both undesirable and

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[33] The commentary to Standard 23-8.2 explains that "in 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." It notes 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."

[34] The Committee recognized that relief by way of expungement or set-aside is available in a number of jurisdictions, either by statute or common law precedent, particularly for cases involving youthful or minor offenses. However, it also recognized that the legal effect of expungement or sealing varies widely from jurisdiction to jurisdiction. *See, e.g.*, Michael D. Mayfield, *Revisiting Expungement: Concealing Information in the Information Age,* 1997 Utah L. Rev. 1057 (1997); James W. Diehm, *Federal Expungement: A Concept in Need of a Definition,* 66 St. John's L. Rev. 73 (1992); Franklin, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 Hofstra L. Rev. 733 (1981). *See also* T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. Mich. J. L. Reform 885 (1996). Indeed, the federal courts have never even been able to agree about what the "set-aside" provision in the Federal Youth Corrections Act actually accomplished. *Compare Doe v. Webster,* 606 F.2d 1226 (D.C. Cir. 1979) (record of YCA conviction that has been set aside must be sealed, and government must response in the negative to all inquiries about the offense) and *United States v. Purgason*, 565 F.2d 1279 (4th Cir. 1977) (defendant with YCA set-aside may lawfully purchase firearms); *with Bear Robe v. Parker*, 270 F.3d 1192 (8th Cir. 2001) (set-aside conviction may nonetheless serve as a basis for termination of employment) and United States *v. McMains*, 540 F.2d 387 (8th Cir. 1976) (YCA set-aside provision does not authorize expungement). *See* Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 Duke L. J. 477 (1981); Note, *Expungement of Criminal Records under the Youth Corrections Act*, 62 Iowa L. Rev. 547 (1976).

impracticable to suggest that the records of a conviction should be actually destroyed. It proposed instead that a process be established whereby conviction records could be sealed from the general public, but remain available to the convicted person and to authorized judicial and law enforcement personnel.

The Standards Committee agreed that expungement understood in the broad annulment sense of the LSOP Standards was impractical and undesirable. Sealing did not seem to the Committee to offer a conceptually distinct alternative. The Committee considered endorsing the approach of the Model Penal Code, which contemplates a judicial process for "vacating" a conviction in order to obtain relief from collateral sanctions, based on evidence that the convicted person has fully satisfied the sentence and led a law-abiding life since release from confinement.[35]

In the end, the Standards Committee decided against including any reference at all to expungement, sealing or set-aside in the black letter. Instead, Standard 19-2.5(c) now provides simply that each jurisdiction should have a provision for obtaining general relief from all applicable collateral sanctions. The black letter's silence about expungement or set-aside is not intended to discourage jurisdictions from adopting such procedures, but simply to recognize that there are a variety of options for implementing Standard 19-2.5(c). These will be discussed in commentary.

3. Temporary suspension from participation in government programs providing necessities of life when such benefits are otherwise being provided.

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[35] Under § 306.6 of the Model Penal Code ("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." Notwithstanding any such order, the conviction may still serve as a predicate offense, and for impeachment purposes. Moreover, even a vacated conviction may 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." 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." It does not appear that the nuanced approach in § 306.6 was widely adopted in the states.

The LSOP Standards provide 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* Standard 23-8.7(b). The commentary notes that where "services [are] provided offenders at no cost through other means, a suspension of benefits may be justified." The example given is 38 U.S.C. § 505 (1976), suspending veterans benefits during a period of incarceration. The Task Force recommended including a provision in black letter that would make plain that a confined person may be temporarily suspended from participation in a government program providing "necessities of life," but only "to the extent that the purposes of the program are satisfied by provision of the correctional institution." The Standards Committee determined that 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." *See* proposed Standard 19-2.6(e). Considering the very narrow circumstances in which a collateral sanction may be authorized in the first place, *see* Standard 19-2.2, and the availability of timely and effective relief under Standard 19-2.5(a), the Committee reasoned that a jurisdiction's ability to suspend a convicted person from a necessity of life program will be limited to cases presenting a clear risk to public safety and/or opportunity for recidivism.[36]

4. Private employment

The LSOP Standards prohibit unreasonable discrimination against convicted person in private as well as public employment opportunities (as well as in credit reports and employment reports). *See* Standard 23-8.8(b). The Task Force recommended that these provisions be carried forward in slightly modified form in proposed Standard 19-3.3. The Standards Committee had reservations about a prescriptive approach to private employment of convicted persons, at least in part because of concerns about how effective such an approach is likely to be. Accordingly, it opted instead for an approach based on incentives (including financial incentives) to create additional employment opportunities for convicted persons in the private sector. The provisions of proposed Standard 19-3.3 governing private employment were subsequently strengthened as a result of recommendations received at the first reading of the proposed Standards in the Criminal Justice Section Council: the obligation to encourage employment of convicted persons was extended to the executive, and a reference to financial incentives was added to the black letter.

[36] 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. Of course particular individuals could always be denied access to public housing if they presented a public safety risk.

Conclusion

The development of the Standards on Collateral Sanctions and Disqualification of Convicted Persons has been an exciting, challenging, and intense project. It has required resolution of novel and difficult analytical and structural issues, many of first impression, in order to justify a place within the traditional framework of sentencing for penalties that have traditionally not been regarded as the business of courts. But the work has taken on some urgency as the number of convicted persons and the variety of collateral penalties have together grown steadily over the past 20 years.

Between March and October of 2001, the drafting Task Force met three times, and forwarded its draft for the new Volume 19 to the Standards Committee in November 2001. Thereafter, the Standards Committee considered the proposed new Standards in four in-person meetings, one lengthy conference call, and many intervening telephone and e-mail communications. At least a dozen different drafts were circulated to the Committee for review during this period. Finally, on May 28, 2002, the Committee approved the black letter principles that are the subject of this report. While the issues were difficult and negotiations sometimes intense, in the end there was little or no disagreement within the Committee on the final product. The Standards Committee's recommendations were given a first reading by the Criminal Justice Section Council in August 2002, and were approved at a second reading in November 2002, in accordance with established Standards Committee procedures.

We hope the proposed new Standards will be regarded as a thoughtful, well-crafted, and balanced set of practice principles, one that will increase awareness of collateral penalties and limit their inappropriate use. In particular, we hope they will make a helpful contribution to the important process now underway of devising programs to facilitate offender reentry.

Respectfully submitted,

Albert Krieger, Chair
Criminal Justice Section

August 2003

ABA LEGAL STATUS OF PRISONERS STANDARDS
PART VIII.
CIVIL DISABILITIES OF CONVICTED PERSONS

Standard 23-8.1. Repeal of mandatory civil disabilities

Laws or regulations which require that convicted persons be subjected to collateral disabilities or penalties, or be deprived of civil rights, should be repealed except for those specifically preserved in part VIII of these standards.

Standard 23-8.2. Expungement of convictions

Each jurisdiction should have a judicial procedure for expunging criminal convictions, the effect of which would be to mitigate or avoid collateral disabilities.

Standard 23-8.3. Procedure for imposing authorized disabilities

(a) When the imposition of collateral disabilities or penalties, or the deprivation of civil rights, is authorized as a consequence of a conviction, a procedure should be established to assure that there is a determination in each individual case that the disability or penalty is necessary to advance an important governmental or public interest.

(b) The procedure established should be comparable to that provided for agency adjudications in the Model State Administrative Procedure Act.

(c) A disability should be imposed for a stated period, after which the person subject to the disability should be entitled to have the appropriateness of the disability reconsidered. Within 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.

(d) The burden of proving the appropriateness of the disability should be on those seeking to impose it, except a convicted person should bear the burden of proving an allegation that the fact of conviction has unfairly affected his or her application for or status in private employment.

Standard 23-8.4. Voting rights

Persons convicted of any offense should not be deprived of the right to vote either by law or by the action or inaction of government officials. Prisoners 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. They should not, however, be authorized to establish voting residence or domicile in the jurisdiction where they are incarcerated solely because of that incarceration.

Standard 23-8.5. Judicial rights

Persons convicted of any offense should be entitled to:

(a) initiate and defend suit in any court in their own names under procedures applicable to the general public;

(b) serve on juries except while actually confined or while on probation or parole;

(c) execute judicially enforceable documents and agreements; and

(d) serve as court-appointed fiduciaries except during actual confinement.

Standard 23-8.6. Domestic rights

(a) The domestic relationships of convicted persons should be governed by rules applicable to the general public. Conviction or confinement alone should be insufficient to deprive a person of any of the following domestic rights:

(i) the right to contract or dissolve a marriage;

(ii) parental rights, including the right to direct the rearing of children;

(iii) the right to grant or withhold consent to the adoption of children; and

(iv) the right to adopt children.

(b) Conviction or confinement alone should not constitute neglect or abandonment of a spouse or child, and persons convicted or confined should be assisted in making appropriate arrangements for their spouse or children during periods of confinement.

Standard 23-8.7. Property and financial rights

(a) Persons convicted of any offense should not be deprived of the right to acquire, inherit, sell, or otherwise dispose of real or personal property consistent with the rule that a person should not profit from his or her own wrong. Persons unable to manage or preserve their property by reason of confinement should be entitled to appoint someone of their own choosing to act on their behalf.

(b) Persons convicted of any offense or confined as a result of a conviction should not, for that reason alone, lose any otherwise vested pension rights or become ineligible to participate in any governmental program providing relief, medical care, and old age pensions.

(c) State departments of insurance should require companies to offer insurance of all kinds to persons who have been convicted of any offense and should ensure that any rate differential based solely on a conviction is justified.

(d) Agencies that compile and report information used to determine a person's suitability for credit or employment should be prohibited from disclosing criminal convictions that from the date of parole or release antedate the report by more than [five] years.

Standard 23-8.8. Employment and licensing

(a) Barriers to employment of convicted persons based solely on a past conviction should be prohibited unless the offense committed bears a substantial relationship to the functions and responsibilities of the employment. Among the factors that should be considered in evaluating the relationship between the offense and the employment are the following:

(i) the likelihood the employment will enhance the opportunity for commission of similar offenses;

(ii) the time elapsed since conviction;

(iii) the person's conduct subsequent to conviction; and

(iv) the circumstances of the offense and of the person that led to the crime and the likelihood that such circumstances will recur.

(b) Each jurisdiction should enact legislation protecting persons convicted of criminal offenses from unreasonable barriers in private employment. Such legislation should govern:

(i) denying employment;

(ii) discharging persons from employment;

(iii) denying fair employment conditions, remuneration, or promotion;

(iv) denying membership in a labor union or other organization affecting employability; and

(v) denying or revoking a license necessary to engage in any occupation, profession, or employment.

Jurisdictions should adopt appropriate mechanisms for the enforcement of prohibitions against barriers to private employment applicable to convicted persons.

(c) Past convictions should not bar a person from running for elected office, although jurisdictions may provide that conviction of specified offenses will result in the automatic forfeiture of elective office held at the time of conviction. A conviction should not bar a person from holding appointive public office, although the appointing entity may require forfeiture of an office held at the time of conviction.

(d) Public employment should be governed by the same standards proposed for private employment.

(e) For purposes of this standard, "appointive public office" includes policy-making positions. "Public employment" includes positions that generally are governed by civil service or personnel systems, or are considered career appointments.

(f) Licensing or other governmental regulations should not automatically exclude persons convicted of any offense from participation in regulated activities. Persons should not be barred from regulated activity on the basis of a conviction unless the offense committed bears a substantial relationship to participation in the activity. In determinations of whether such a relationship exists, the factors listed in paragraph (a) should be considered.

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Criminal Justice Section

Submitted By: Albert Krieger, Criminal Justice Section Chair

1. Summary of Recommendation(s).
   The Criminal Justice Section recommends adoption of *ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, dated August 2003, as an addition to the Third Edition American Bar Association Standards.

2. Approval by Submitting Entity.
   On November 16, 2002, at the second of two Council readings required under the procedures for adoption of ABA Criminal Justice Standards, the Criminal Justice Section Council approved proposed *Standards on Collateral Sanctions and Disqualification of Convicted Persons*. On January 15, 2003, the Council approved several amendments to the proposed Standards to meet a concern of the ABA Steering Committee on the Unmet Legal Needs of Children, and on April 12, 2003, it approved several additional amendments to meet a concern of HOD representatives from the Judicial Division.

3. Has this or a similar recommendation been submitted to the House or Board previously?
   A recommendation to approve *ABA Criminal Justice Standards on Collateral Sanctions and Disqualification of Convicted Persons* was submitted to the House for consideration at the 2003 Midyear Meeting. However, the recommendation was withdrawn in order to provide time to revise the Standards to address a concern expressed by several Judicial

Division representatives just prior to the item's being taken up. (See 2, above.)

In 1981, the House of Delegates approved a chapter of the Second Edition of the *ABA Criminal Justice Standards on the Legal Status of Prisoners* (LSOP). Part VIII of the LSOP Standards addressed "Civil Disabilities of Convicted Persons". While the proposed Standards are significantly broader than Part VIII of the LSOP Standards, if approved, they will supplant the "Civil Disabilities" provisions of the LSOP Standards.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
The Third Edition *ABA Criminal Justice Standards on Sentencing* is particularly relevant to the adoption of the recommendation. Third Edition Standards on *Pleas of Guilty* and *Pretrial Release* are relevant in part. As noted in 3, above, the proposed Standards would supplant Part VIII of the *Legal Status of Prisoners Standards*.

5. What urgency exists which requires action at this meeting of the House?
The American legal system has long recognized that certain legal penalties and disabilities flow from a criminal conviction over and above the sentence imposed by the court. Over the past two decades, the collateral consequences of conviction have been increasing steadily in variety and severity, and it has become increasingly difficult to shake off their lingering effects. Moreover, the dramatic increase in the numbers of persons convicted and imprisoned means that these legal barriers affect a growing proportion of the populace, a portion of which is already being released from prison or supervision. If not administered in a sufficiently deliberate manner, a regime of collateral consequences may frustrate the reentry and rehabilitation of this population, and encourage recidivism. It is therefore urgent that criminal justice practitioners and others have the benefit of these well-considered Standards as soon as possible.

6. Status of Legislation. (If applicable.)
While a number of federal and state statutes imposing additional collateral sanctions have been enacted in recent years, we are aware of no generally applicable pending legislation at this time.

7. Cost to the Association. (Both direct and indirect costs.)

The only direct costs associated with approval of the recommendation will be a modest fee for the Collateral Sanctions Task Force reporter to prepare commentary to the Standards, travel funds for one or two meetings of the Standards Committee to review and approve the commentary, and expenses associated with printing the Standards. Funds for these purposes have been anticipated in the Standards Committee budget. Staff lobbying for the Standards, as for other ABA policies, would continue to be undertaken by existing Governmental Affairs staff, with assistance from existing Criminal Justice Section staff.

8. Disclosure of Interest. (If applicable.)
No known conflict of interest exists.

9. Referrals.
Throughout the drafting process and prior to the 2003 Midyear Meeting, drafts were widely circulated both within and without the ABA. Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the House of Delegates agenda for the 2003 Annual Meeting, the proposed Standards are again being circulated to staff and chairpersons or executive directors of the following:

ABA
Coalition for Justice
Coordinating Committee on Gun Violence
Coordinating Committee on Immigration
Governmental Affairs
Government and Public Sector Lawyers
General Practice, Solo and Small Firm
Individual Rights and Responsibilities
Judicial Division
Litigation Section
National Conference of State Trial Judges
State & Local Government Law
Commission on Domestic Violence
Standing Committee on Legal Aid and Indigent Defendants
Standing Committee on Substance Abuse
Standing Committee on Law and National Security
Standing Committee on Unmet Legal Needs of Children

Other
Conference of Chief Justices
National Association of Attorneys General
National Association of Criminal Defense Lawyers
National Center for State Courts
National District Attorneys Association
National Legal Aid and Defender Association

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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