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## **DEFENDER TOOLKIT: USING KNOWLEDGE OF COLLATERAL CONSEQUENCES TO GET BETTER RESULTS IN THE CRIMINAL CASE\***

*On June 7, 2006, Penal Law § 1.05(6) was amended to add a new goal, “the promotion of [the convicted person’s] successful and productive reentry and reintegration into society,” to the four traditional sentencing goals of deterrence, rehabilitation, retribution and incapacitation.  
(Chapter 98 of the Laws of 2006.)*

*Use this amendment to re-frame your criminal case advocacy,  
from bail arguments to plea negotiation to sentencing.*

From the moment of arrest, people are in danger of losing hard-earned jobs, stable housing, basic public benefits, and even their right to live in this country. Recently, this landscape has changed drastically for the worse. The steady accumulation of collateral sanctions has combined with the exponential increase in the availability of criminal history data to create a “perfect storm.”

Recognizing this landscape, we must redefine “reentry” as a process that begins at arrest and continues through community reintegration. This shift in the paradigm of reentry and collateral consequences highlights the substantial role that criminal defense attorneys can play in the process and expands the focus beyond incarceration, so that it encompasses the consequences of criminalization faced by individuals from the moment they come in contact with the criminal justice system.

**✦ The Bronx Defenders’ experience proves that knowledge of these collateral consequences is a critical direct advocacy tool for the defense in criminal cases.**

### **I. IMPROVED CRIMINAL DISPOSITIONS**

- Experience has taught that defenders can be successful at leveraging more favorable bail, plea, and sentencing results – or even outright dismissals – when they are able to educate prosecutors and judges on the draconian consequences for the clients and their families.
- In our experience, prosecutors and judges respond best to consequences that affect their basic sense of fairness – consequences that are absurd, disproportionate, or affect innocent family members.

*A clearinghouse of materials on reentry and the consequences of criminal proceedings.*

[www.reentry.net/ny](http://www.reentry.net/ny)

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These four areas of impact should guide your strategy and your intake interviews:

- (1) **Immigration**
- (2) **Housing**
  - Loss of public housing or Section 8 as the result of a plea
- (3) **Employment**
  - Loss of a job or employment license, particularly for a breadwinner
- (4) **Student Loans**

**Improved Dispositions - Using Collateral Consequences in Practice**

- Juan R. was charged with a drug crime, and the prosecutor refused any plea below a misdemeanor. Juan, however, was disabled and lived in public housing, and a misdemeanor would result in his eviction. The defense attorney used this knowledge to convince the prosecutor to offer a non-criminal disposition, and Juan kept his home.
- Joanne F. had worked hard to get a steady job as a security guard. In a domestic incident with her boyfriend, she was charged with Assault and Harassment. The initial plea offer would have resulted in the loss of her security guard license and her job. The defense attorney used this knowledge to convince the DA to offer an adjournment in contemplation of dismissal. Joanne kept her job.
- This summer, Max S. was 18 years old and charged with possession of a marijuana cigarette. The prosecutor would only offer a plea to a marijuana violation, defined by New York law as a non-criminal offense. Max, however, was enrolled in college and was receiving student loans. Under draconian federal law, even a non-criminal plea to a drug offense would render Max ineligible for student loans and thus unable to attend college. Using her knowledge of this sanction, the defense attorney persuaded the DA to offer an adjournment in contemplation of dismissal. Max remains in college pursuing his degree.

## **II. RISK MANAGEMENT**

- Knowledge of collateral consequences is a key risk management tool for defenders. Subsidized housing, family issues, public employment or licenses – these are all situations where the client is likely to have an ancillary civil or administrative proceeding pending at the same time as the criminal case.
- Clients will often testify or give written statements as part of these ancillary proceedings (they are penalized for invoking their right to remain silent) about the underlying facts, with or without their defense attorney.
- Defense attorneys have to be familiar with the collateral consequences so that they can anticipate these situations.

### III. DISCOVERY

- As a result of being prepared for these ancillary proceedings, defense attorneys can use them for additional discovery not available in the criminal case.
- Eviction cases, employment licensing proceedings, DMV hearings, school suspension hearings – these are all venues where an administrative or lower court judge is likely to have subpoena power.

### IV. CLIENT BENEFITS

- Look beyond your client: the collateral damage of being arrested often falls most heavily on family members and children, and your client will often consider that more important.
- Particularly with misdemeanor charges, many clients would rationally choose even a short term of incarceration to avoid these harsh “collateral” consequences.
- Help your client think about these long-term hidden effects of a plea before he accepts it.

#### **GENERAL PRACTICE TIPS**

- **Always advise your clients to attend a relevant treatment program - immediately. Such “evidence of rehabilitation” will prove invaluable for obtaining or keeping a job, housing, or immigration status.**
- **Always apply for a Certificate of Relief from Disabilities at sentencing if your client has one or fewer felony convictions.**
- **Talk to your clients. There is a good chance that they are making statements on the record about relevant facts in ancillary civil proceedings.**
- **Broaden your strategy: Consider using these ancillary civil proceedings as a way of getting discovery for the criminal case.**

✦ For an extensive New York practice guide, see

***The Consequences of Criminal Proceedings in New York State:  
A Guide for Criminal Defense Attorneys and Other Advocates for Persons  
with Criminal Records  
(The Bronx Defenders, January 2007)  
(<http://www.reentry.net/link.cfm?5446>)***

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\* Adapted from McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments As An Advocacy Strategy*, 36 U. TOL. L. REV. 479 (2005) ([www.reentry.net/link.cfm?5373](http://www.reentry.net/link.cfm?5373)).