

## Collateral Consequences of Conviction

### Issue

Should the State Bar of Michigan support and advocate for state legislation that would implement a collateral consequences of conviction act?

### Synopsis

The Uniform Collateral Consequences of Conviction Act (“UCCCA”) was drafted by the National Conference of Commissioners on Uniform State Laws and was approved and recommended for enactment in all the states at the Uniform Law Commission’s Annual Conference in July 2009.

The UCCCA is an effort to improve public and individual understanding of the civil collateral consequences of a criminal conviction. The UCCCA implements a series of steps designed to inform individuals of their rights and the rights that may be at stake subsequent to a criminal conviction. The UCCCA also aims to mitigate the previously unexamined impact of collateral consequences, which are believed to be increasing.

The State Bar of Michigan recognizes that there are significant obstacles presented by the collateral consequences of criminal convictions. It supports efforts to clarify and minimize the impact of civil collateral consequences for those with criminal records, largely through the work of its Criminal Issues Initiative, which is charged with examining and educating on this subject.

A criminal conviction results in civil consequences outside of any sanction or punishment that are a direct result of the criminal conviction, and, in many instances, these civil consequences may last longer than the criminal penalty. Federal law, for instance, bars many persons with convictions from employment in many fields, including the military, and restricts access to certain professional licensures. Federal law also limits access to public benefits and federal student loans, restricts access to federally-subsidized housing, and prohibits individuals with felonies from serving on juries. Moreover, a non-citizen convicted of a crime may be deported. *See* American Bar Association Commission on Effective Criminal Sanctions and Public Defender Service for the District of Columbia, *Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations* (Jan. 2009) (<http://www.abanet.org/cecs/internalexile.pdf>). Such barriers to rehabilitation and reintegration often serve to increase the potential for recidivism in formerly convicted individuals.

These corollary results after a criminal conviction have been called “collateral consequences,” “civil disabilities,” and “collateral sanctions.” The term “collateral consequences” is used here to mean a legal disability or disqualification that occurs by operation of civil law because of a criminal conviction, but is not part of the sentence for the crime. It is “collateral” because the resulting consequence is not part of the criminal sentence, and applies solely because of conviction of a criminal offense. Collectively, collateral sanctions, disqualifications, and disabilities are defined as collateral consequences.

In recent years, collateral consequences have been increasing in number and severity. Federal law now imposes dozens of them on state and federal offenders. Like Congress, state legislatures have embraced regulation of convicted individuals. A Michigan study of collateral consequences imposed by state law or regulation revealed hundreds of collateral sanctions and disqualifications. See Michigan Reentry Law Wiki, Michigan Poverty Law Program [http://reentry.mplp.org/reentry/index.php/Main\\_Page](http://reentry.mplp.org/reentry/index.php/Main_Page). These laws limit the ability of convicted individuals to work in particular fields, obtain state licenses or permits, obtain public benefits such as housing or educational aid, and participate in civic life.

### **Background**

Given the information already collected on collateral consequences in Michigan, a workgroup of the State Bar of Michigan's Criminal Issues Initiative convened in the fall of 2009 to examine the possible benefits of implementing the UCCCA in this state. The workgroup's review favored Michigan enactment, and a proposal to support and advocate for the enactment of the UCCCA in the state was approved by the membership of the Criminal Issues Initiative and the Committee on Justice Initiatives.

A sample version of legislation that could be adopted is provided subsequent to this proposal. It addresses several aspects of the creation and imposition of collateral consequences. The provisions of the UCCCA are largely procedural, and designed to clarify policies and provisions that are already accepted in many states.

### **Key provisions of the UCCCA:**

#### Collection

All collateral consequences contained in state laws and regulations, and provisions for avoiding or mitigating them, must be collected in a single document. The compilation must include both collateral sanctions (automatic bars) and disqualifications (discretionary penalties). In fulfilling their obligations under the Uniform Act, state jurisdictions will be assisted by the federally-financed effort to compile collateral consequences for each jurisdiction that was authorized by the Court Security Act of 2007.

#### Notification

Defendants must be notified about collateral consequences at important points in a criminal case: at or before formal notification of charges, so a defendant can make an informed decision about how to proceed; at the time of a plea, at sentencing, and when leaving custody, so that a defendant can conform his or her conduct to the law. Given that collateral consequences will be collected in a single document, making this information available will not be difficult.

#### Authorization

Collateral sanctions may not be imposed by ordinance, policy or rule, but must be authorized by statute. An ambiguous law will be considered as authorizing only discretionary case-by-case disqualification.

### Standards for Disqualification

A decision-maker retains the ability to disqualify a person based on a criminal conviction, but only if it is determined, based on an individual assessment, that the essential elements of the person's crime, or the particular facts and circumstances involved, are substantially related to the benefit or opportunity at issue.

### Overtured and Pardoned Convictions; Relief Granted by Other Jurisdictions

Convictions that have been overturned or pardoned, including convictions from other jurisdictions, may not be the basis for imposing collateral consequences. Charges dismissed pursuant to deferred prosecution or diversion programs will not be considered a conviction for purposes of imposing collateral consequences. The Act gives each jurisdiction a choice about whether to give effect to additional types of relief granted by other jurisdictions (such as expungement or setting aside of the conviction) based on rehabilitation or good behavior.

### Relief from Collateral Consequences

The Act creates two different forms of relief, one to be available as early as sentencing to facilitate reentry (Order of Limited Relief) and the other after a period of law-abiding conduct (Certificate of Restoration of Rights).

- An Order of Limited Relief permits a court or agency to lift the automatic bar of a collateral sanction, leaving a licensing agency or public housing authority, for example, free to consider whether to disqualify a particular individual on the merits.
- A Certificate of Restoration of Rights offers potential public and private employers, landlords, and licensing agencies concrete and objective information about an individual under consideration for an opportunity or benefit. Such a Certificate would offer a degree of assurance about the individual's progress toward rehabilitation, and would thereby facilitate the reintegration of individuals whose behavior demonstrates that they are making efforts to conform their conduct to the law.

### Defense to Negligence

In a judicial or administrative proceeding alleging negligence or other fault, an Order of Limited Relief or a Certificate of Restoration of Rights may be introduced as evidence of a person's due care in hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise transacting business or engaging in activity with the individual to whom the order was issued.

### **Important provisions of the proposed Act:**

The proposed Act can be divided into two main parts. The first part contains provisions related to the collection, notification, and authorization of collateral consequences. The second part provides relief from collateral consequences, including those associated with overturned or pardoned convictions, or those which may have been set aside in other jurisdictions. Important sections of the proposed Act include the following:

**Section 3** makes clear that neither the provisions of the Act, nor non-compliance with them, is a basis for invalidating a plea or conviction, making a claim of ineffective assistance of counsel, or suing anyone for money damages.

**Section 4** requires collection of collateral sanctions and disqualifications contained in state law, and provisions for avoiding or mitigating them, in a single document. The purpose is to make the law accessible to judges, lawyers, legislators and defendants who need to make decisions based upon it.

**Sections 5 and 6** propose to make the existence of collateral consequences known to defendants at important moments in a criminal case: at or before formal notification of charges, so a defendant can make an informed decision about how to proceed (Section 5); at the time of a plea; and at sentencing and when leaving incarceration, so they may conform their conduct to the law (Section 6). This information will be available and will have been codified with the assistance of the current ongoing federally-financed effort to compile collateral consequences for each state jurisdiction, as authorized by the Court Security Act of 2007.

**Section 7** is designed to ensure that automatic, blanket collateral sanctions (leaving no room for discretion) are adopted formally, providing that they can be created only by statute, ordinance or formal rule.

**Section 8** offers guidance for imposing discretionary disqualifications based on criminal conviction on a case-by-case basis.

**Section 9** defines the judgments that count as convictions for purposes of imposing collateral consequences. Sections 9(a) and (b) explain how out-of-state convictions and juvenile adjudications will be used to impose collateral consequences in the enacting state. The rest of the section excludes convictions that have been reversed or otherwise overturned (9(c)), pardoned (9(d)), or did not result in a final conviction because of diversion or deferred adjudication (9(f)). Some states have forms of relief based on rehabilitation or passage of time, allowing convictions to be expunged, sealed, or set aside; in the case of out-of-state convictions, 9(e) asks states to make a choice about whether to give effect to grants of such relief by other states.

**Sections 10 and 11** create new mechanisms for relieving collateral sanctions imposed by law. By definition, collateral consequences can only be imposed by state actors, so relieving the sanctions would not impose requirements on private persons or businesses, whose dealing with persons with convictions would be regulated, if at all, by law other than this Act.

**Section 10** creates an Order of Limited Relief, aimed at an individual in the process of reentering society. It offers relief from one or more collateral sanctions based on a showing that relief would facilitate reentry. The Order of Limited Relief merely lifts the automatic bar of a collateral sanction, leaving a licensing agency or public housing authority, for example, free to consider on a case-by-case basis whether it is appropriate to deny the opportunity to an individual.

**Section 11** creates a Certificate of Restoration of Rights for individuals who can demonstrate a substantial period of law-abiding behavior consistent with successful reentry and desistance from crime. The Certificate of Restoration of Rights offers potential public and private employers, landlords and licensing authorities concrete and objective information about an individual under consideration for an opportunity, and thereby could facilitate the reintegration of individuals with convictions whose behavior demonstrates that they are making efforts to conform their conduct to the law.

The Criminal Issues Initiative proposes that the State Bar of Michigan support and advocate for the legislative enactment of a Uniform Collateral Consequences of Conviction Act.

**Opposition**

None known.

**Prior Action by Representative Assembly**

Referred to Special Issues Committee on September 30, 2010. Special Issues Committee supports the concept of introducing legislation that would require a compilation of civil collateral consequences to criminal convictions in Michigan but does not support all of the proposed draft language from the National Commission on Uniform State Law contained in the Uniform Act.

**Fiscal and Staffing Impact on State Bar of Michigan**

Existing staff resources will be allocated for legislative efforts.

**STATE BAR OF MICHIGAN POSITION**

**By vote of the Representative Assembly on April 9, 2011**

Should the State Bar of Michigan support and advocate for state legislation that would implement a collateral consequences of conviction act?

(a) Yes

or

(b) No