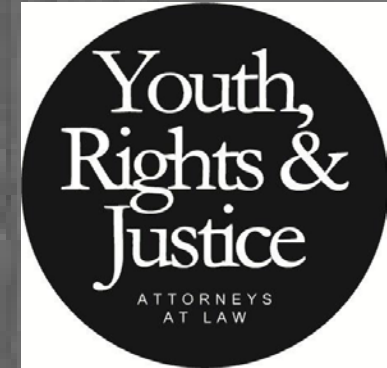




“Understanding, Avoiding, Mitigating and Removing Collateral Consequences”

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Collateral Consequences of Criminal Conduct

- “Collateral consequences” is often used interchangeably with “civil disabilities”, “adverse legal consequences” and “indirect consequences”
- **Collateral**– means not “direct” court-imposed legal penalties and disabilities that flow from criminal conduct. The sentence (jail, prison, probation time, etc.) imposed by the court is the direct consequence.

Three Types of Consequences:

- 1) **collateral sanctions** (automatic legal sanctions based on the person's conviction alone; usually created by statute);
- 2) **discretionary disqualifications** (legal disqualification imposed on a case-by-case basis based on the underlying conduct; imposed by administrative agency, official or a civil court); and

Note: #1 and 2 are status-based legal penalties found in codes and rules.

- 3) **social stigma**– (exclusionary policies and practices not grounded in law that result in reputational consequences)

Criminal Conduct:

- Categories of criminal conduct that can trigger collateral consequences generally are **felonies** and **misdemeanors** but also may include **violations** or **infractions** (**subsets** of criminal conduct more commonly trigger consequences –e.g. drug felonies, fraud or dishonest crimes, violent crimes, weapon crimes, *etc.*)
- A formal conviction or adjudication may not be required to trigger consequences (e.g. arrest may be enough; judgment may not be required)
- *Note:* Conduct by juveniles can trigger collateral consequences

► Examples of “Collateral Consequences” are consequences that limit...

- Employment (ORS 659A.030; see ORS 181.555 and 181.560 re background checks)
- Occupational licensing (ORS 342.143 but see ORS 670.280(2))
- Military service (10 USC 504)
- Firearms possession (18 USC 922)
- Public housing eligibility (42 USC 13662)
- Private housing (ORS 90.303(2)-(3))
- Welfare and retirement benefits (21 USC 862) (ORS 411.119)
- Student aid (FAFSA) (20 USC 1091)
- Eligibility to foster or adopt children (OAR 413-120-0450)
- Health care program eligibility (42 USC 1320a)
- Voting rights (See ORS 137.275 and 137.281)
- Right to run/serve in public office (ORS 137.281)
- Ability to serve in military (10 USC 504)
- Tax credits (26 USC 25A)
- Driving privileges (ORS 339.254, ORS 809.409, 809.412)
- Immigration status (8 USC)
- Education opportunities (ORS 339.250)

Note: citations are not exhaustive, but simply are intended to provide a sample of collateral consequences.
See supplemental materials for collections available online.

- ▶ Traditionally, **NO requirement of NOTICE** of collateral consequences to defendants in the law as courts traditionally have treated such consequences as mere “civil regulation” and not criminal punishment subject to constitutional standards--- until.....

Padilla v. Kentucky, 130 S. Ct. 1473 (2010)

- ▶ Held that a defendant's 6th Amendment right-to-counsel was violated due to his attorney's failure to warn/notify him that a guilty plea would make deportation practically inevitable. The Court applied Strickland and found counsel's failure constituted ineffective assistance of counsel. Court's majority did NOT apply a direct vs. collateral consequence analysis.
- ▶ Strickland v. Washington, 466 US 668 (1984): Held that the 6th Amendment right to counsel is the right to the *effective assistance* of counsel. A claim that counsel was ineffective has two components:
 1. Defendant must show that counsel's performance was "deficient," such that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (Objective reasonableness standard)
 2. Counsel's deficient performance must be so serious as to deprive the defendant of a fair trial. (Prejudiced the defendant)
- ▶ Hill v. Lockhart, 474 US 52 (1985): court extends right to effective assistance of counsel during the plea process
- ▶ In short, Padilla holds that counsel must advise a defendant of potential deportation consequences before the defendant pleads guilty. **Holding suggests counsel may have a 6th amendment obligation to advise a defendant of other collateral consequences (beyond immigration).** That case law is still developing. Note that the opinion does not apply a collateral vs. direct consequences analysis which the dissenting opinions would have used and the lower courts traditionally had applied.

Limited Collateral Consequences Notice Required Under Oregon Law: ORS 135.385

(1) The court shall not accept a plea of guilty or no contest to a felony or other charge on which the defendant appears in person without first addressing the defendant personally and determining that the defendant understands the nature of the charge.

(2) The court shall inform the defendant:

(a) That by a plea of guilty or no contest the defendant waives the right:

(A) To trial by jury;

(B) Of confrontation; and

(C) Against self-incrimination.

(b) Of the maximum possible sentence on the charge, including the maximum possible sentence from consecutive sentences.

(c) When the offense charged is one for which a different or additional penalty is authorized by reason of the fact that the defendant **may be adjudged a dangerous offender**, that this fact may be established after a plea in the present action, thereby **subjecting the defendant to different or additional penalty**.

(d) **That if the defendant is not a citizen of the United States conviction of a crime may result, under the laws of the United States, in deportation, exclusion from admission to the United States or denial of naturalization. [ADDED in 1979 by SB 397]**

(e) That if the defendant is entering a guilty plea pursuant to a plea offer and agreed disposition recommendation under ORS 135.405 (Plea discussions and plea agreements), the court will agree to impose sentence as provided in the agreed disposition recommendation.

(f) That if the defendant enters a plea of guilty or no contest to an **offense involving domestic violence**, as defined in ORS 135.230, and is convicted of the offense, **federal law may prohibit the defendant from possessing, receiving, shipping or transporting any firearm or firearm ammunition** and that the **conviction may negatively affect the defendants ability to serve in the Armed Forces of the United States** as defined in ORS 348.282 (Definitions) **or to be employed in law enforcement. [ADDED in 2007 by SB 81]**

[1973 c.836 §167; 1979 c.118 §1; 2001 c.635 §12; 2007 c.220 §1]

Lyons v. Pearce, 298 Or. 554 (1985)

(applies ORS 135.385)

- ▶ Facts: Petitioner plead guilty to theft of unemployment benefits and had previously been convicted of Assault II. Petitioner was an alien and because of his second conviction faced deportation. Trial judge did not orally tell petitioner of potential immigration consequences but did instruct petitioner to read petition to enter a guilty plea and consult with counsel. The petition held a statement advising defendant that the conviction may result in deportation or denial of naturalization.
- ▶ The Court held that “**ORS 135.385(2) does not require the trial court to address a defendant orally** about the possibility of deportation. It is sufficient if the court satisfies itself that a defendant has been so informed. Petitioner here told the court that he could read and that he had, in fact, read the plea agreement containing the information regarding possible deportation. . .” (Cf. OJD model script for accepting a guilty plea)
- ▶ **Lyons was Pre-Padilla:** The Court found **no violation of federal due process**, reasoning in part that the federal circuit courts had held consistently that the **vulnerability to deportation is a “collateral” rather than a “direct” consequence** of a guilty plea and therefore the trial court had no duty to inform the defendant on constitutional grounds.
- ▶ The Court did find that the **failure of defense counsel to make a noncitizen defendant aware of the possibility of deportation would result in an uninformed plea and thus constitute constitutionally inadequate assistance of counsel.** (14th Amendment and Art. 1, sec. 11 and 12 theories) However, the court held that it was bound by the factual finding by the lower court that counsel did advise the defendant regarding deportation.
- ▶ *Note:* Court did set the sentence aside and remanded due to another inadequate assistance of counsel claim that was successful.

Best Practices and Various Bar Standards—
Expect Notice to Defendants and the Consideration of
ALL Collateral Consequences When Addressing
Criminal Conduct
(Even if not required by law)

▶ Examples:

- American Bar Association
- National District Attorney's Association
- Oregon State Bar Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Commitment Cases

District Attorney Standards...

▶1-1.1 Primary Responsibility

▶The prosecutor is an independent **administrator of justice**. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected. --National District Attorneys Association, *National Prosecution Standards*, Third Edition

▶Growing sentiment: **Without adequate consideration of all penalties, one cannot determine whether a sentence is truly consistent with justice or public safety.** Collateral consequences can be disproportionate to the offense and counterproductive, forming substantial barriers to successful reentry and leading to recidivism. -- See Robert Johnson article

District Attorney Policy. . .

▶ The National District Attorneys Association passed a Resolution and Adopted a Policy Position Paper regarding reentry in 2005.

▶ Resolution:

◦ “Whereas, the National District Attorneys Association believes that **prisoner reentry has become a crucial criminal justice issue**. While the NDAA recognizes that the role of prosecutors in the arena of prison reentry will vary according to individual state law, America’s prosecutors should, where practicable, be participants in addressing the issue in an effort to reduce recidivism and ensure the safety of victims and the community.”

▶ Policy Statement:

◦ 7. The National District Attorneys Association believes that collateral sanctions imposed as a consequence of a conviction are an important element in protecting the public. **Relief from some collateral sanctions may be appropriate if they do not relate to the conduct involved in the offense of conviction.**

(Adopted by the Board of Directors, July 17, 2005, in Portland, Maine)

Defense Lawyer Standards. . .

“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.”

*ABA Standards for Criminal Justice: Pleas of Guilty,
Standard 14.3.2 (f)*

Defense Lawyer Standards Continued. . .

Oregon Specific Standards for Representation in *Criminal* and *Juvenile Delinquency* Cases*

▶STANDARD 2.9

Pretrial Negotiations and Admission Agreements

* * *

A lawyer should be fully aware, and **ensure the client is fully aware**, of:

* * *

(r) **collateral consequences of conviction or juvenile adjudication**, e.g. exclusion, removal or other immigration consequences, sex-offender registration, DNA sampling, AIDS testing, civil disabilities, and enhanced sentences for future convictions; restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license, public benefits, educational, career, employment, vocational, or military opportunities or ability to possess firearms or obtain federal student financial aid. . .

* Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Commitment Cases—
Approved by **Oregon State Bar Board of Governors** in 1996 and as Amended in 2006

Need for law reform to address collateral consequence barriers to successful reentry—

- ▶ The United States has the highest documented incarceration rate in the world (743 per 100,000 population).
- ▶ In 2001, 5.6 million people of the U.S. adult population, or 2.7% of the adult population had been imprisoned.
- ▶ According to a 2003 report of the Department of Justice, nearly 25% of the entire population (some 71 million people) had a criminal record.
- ▶ In 2004, 60% of those convicted of felonies in state courts were NOT sentenced to prison; for those persons, collateral consequences in many instances are what is really at stake.
- ▶ In Oregon, approximately 15,000 people are imprisoned at any given time; 93% will be released.
- ▶ Collateral consequences permeate almost every substantive area of law and are scattered throughout statutes, rules, ordinances, policies, etc., effecting this population in dramatic ways.

Need for law reform continued...

- ▶ Juvenile and adult defendants are generally unaware of—
 - The volume of potential collateral consequences that exist
 - The severity of them
 - The length of time they remain in effect
- ▶ Judges, district attorneys, and defense attorneys are also often unaware of the collateral consequences (they are scattered in statute and rule in state, federal and local law and they are complicated)
- ▶ Few jurisdictions provide a reliable way of avoiding or mitigating categorical restrictions based solely on conviction—even years after the fact
- ▶ Few jurisdictions give decision-makers useful guidance in applying discretionary disqualifications on a case-by-case basis, or a measure of protection against liability
- ▶ Collateral consequences today impose such harsh burdens on convicted persons that persons are unable to reintegrate into society successfully (recidivism problem)

The Uniform Collateral Consequences of Conviction Act was promulgated by the Uniform Law Commission in 2009 and amended in 2010 as a model act for states to implement as is or with modifications to address some of the collateral consequence issues.

The Oregon Law Commission* accepted the Collateral Consequences of Conviction law reform project and is presently forming a Work Group. The Commission hopes to review the uniform act and recommend legislation in 2015 with follow-up recommendations in subsequent Legislative Sessions.

*See ORS 173.338 (Oregon Law Commission to review uniform state laws)

Uniform Act Key Provisions (Overview):

- ▶ Provides for the collection of collateral consequences by the state
- ▶ Requires notification of collateral consequences to a defendant
- ▶ Restricts authorization of additional laws that will impose collateral consequences unless procedures met (See Section 7)
- ▶ Imposes standards for disqualifications based on convictions
- ▶ Addresses overturned and pardoned convictions as well as relief granted by other jurisdictions (See Section 9)
- ▶ Provides 2 types of relief from certain collateral consequences: order of limited relief and certificate of restoration of rights

Uniform Act: Collection of Collateral Consequences

- ▶ All collateral consequences contained in state laws and regulations (e.g. Oregon Constitution, statutes, administrative rules), and provisions for avoiding or mitigating them, must be collected in a single document by an identified government agency (likely Legislative Counsel in Oregon)
 - Must include both collateral sanctions (automatic bars) and disqualifications (discretionary penalties)
 - Shall be regularly updated; shall include disclaimer provision
- ▶ States will be assisted by a federally-financed effort to compile collateral consequences for each jurisdiction: Congress authorized compilation by the Court Security Act of 2007 (Compilation done by National Institute of Justice and the ABA)

See Section 4

Uniform Act: Notification Requirement

- ▶ Defendants must be notified about collateral consequences at important points in a criminal/juvenile case:
 - **At or before formal notification of charges** designated official shall give a form notice
 - **Before accepting guilty plea** or no contest plea, the court shall confirm individual received and understands notice
 - **At sentencing**, an official shall provide notice
 - If imprisoned, a releasing agency shall provide notice **before release**
- ▶ Notice is anticipated to be done by using a **form** with general categories addressed; the notice would also reference a full list of consequences provided on the internet
- ▶ Thus, the UCCCA is intended to help ensure that defendants receive proper notice so that a constitutionally adequate defense is provided.

See Sections 5 and 6

- ▶ Adoption of the Act's notice provision in Oregon would seem to require an expansion of ORS 135.385.

Uniform Act: Standards for Disqualification

- ▶ Act provides guidance to decision-makers on when to impose discretionary disqualifications (the non-automatic collateral consequences in law)
- ▶ Provision requires individual assessment regarding the benefit or opportunity at issue
- ▶ Directs decision-maker to consider the facts and circumstances of the offense but to not consider the conviction itself
- ▶ Directs decision-maker to consider whether the individual has been granted relief (order or certificate)

See Section 8

Uniform Act: Relief from Collateral Consequences

The Act creates two different forms of relief:

1. **Order of Limited Relief** (available at sentencing or after release to facilitate reentry)
2. **Certificate of Restoration of Rights** (available after a period of law-abiding conduct)

Order of Limited Relief

An Order of Limited Relief is an order issued by a court or board/agency lifting an automatic imposition of one or more specified collateral consequences

- ▶ **Procedure:** convicted person PETITIONS court or designated board/agency for relief from one or more specified collateral consequences
- ▶ **When:** petition court at sentencing (as part of plea process or after verdict) or designated board/agency* any time after sentencing
- ▶ **Available for limited specified collateral consequences:** sanction(s) must be related to employment, education, housing, public benefits, or occupational licensing

*likely would be parole board or similar agency

See Section 10; Exclusions: Section 12

▶ **Standard for decision:** After review of evidence, the court or board/agency must find by a preponderance of the evidence that:

1. Granting the petition will materially assist the individual in obtaining or maintaining employment, education, housing, public benefits or occupational licensing;
2. There is a substantial need for relief in order for the person to live a law-abiding life; and
3. Granting the petition would not pose an unreasonable safety risk

▶ **Evidence includes:** petition, criminal history, victim filings, and prosecutor filings

Order of Limited Relief continued...

- ▶ **Coverage:** Collateral consequences imposed by state actors only (excludes private employers)

(Compare Model Sentencing and Corrections Act– unlawful discrimination provision applies to private employers)

- ▶ **Order requirements:** Must specify collateral sanction from which relief is granted and any restriction, condition, or additional requirement

- ▶ **Result of granting relief:** lifts absolute bar of collateral sanction, but...

- ▶ A decision-maker may still consider the CONDUCT underlying a conviction (NOT the conviction itself if an order of limited relief has been issued)
- ▶ The decision-maker shall undertake an **individualized assessment** to determine whether the benefit or opportunity at issue should be denied the individual
- ▶ In short, this provision allows for discretion and flexibility. The goal is for a conviction to not further punish unless the conduct is substantially or directly related. **Turns automatic bars into discretionary disqualifications.**

See Section 10(e) and Section 8

Certificate of Restoration of Rights

- A Certificate of Restoration of Rights is a certificate issued by a board/agency **after a specified time that lifts all automatic collateral consequences** imposed by law (unless an exception is provided by the board/ agency or the collateral consequence is one of the specified exclusions of the Act)
 - Because certificates are issued only after a period of good behavior, a Certificate of Restoration of Rights offers potential public and private employers, landlords and licensing agencies, etc. concrete and objective information about an individual under consideration for an opportunity or benefit, and a degree of assurance about that individual's progress toward rehabilitation. A certificate is intended to facilitate the reintegration of individuals whose behavior demonstrates that they are making efforts to conform their conduct to the law.
- See Section 11; Exclusions: Section 12

- ▶ **Procedure:** Convicted person PETITIONS designated board/agency
- ▶ **When:** Five years after the individual's most recent conviction or five years after release from confinement, whichever is later
- ▶ **Result of granting relief:** issuance of a certificate has a default of lifting absolute bars of ALL collateral consequences (except for the 4 exceptions below). That is, “the holder of a certificate would enjoy the same civil rights and the same opportunity to apply for all benefits and opportunities as someone who had never been convicted of a crime.”
- ▶ **Exceptions* (exclusions)** from relief include:
 1. sex offender registration requirements;
 2. certain motor vehicle restrictions;
 3. restrictions on employment by law enforcement agencies; and
 4. other case by case restrictions imposed by the board/agency

* Exceptions: see Section 12 and 13(a)

- ▶ **Standard for decision:** After review of evidence, the board/agency must find by preponderance of the evidence that:
 - ▶ (1) Individual is engaged in or seeking to engage in a lawful occupation or activity (including employment, training, education or rehab);
 - ▶ (2) Individual is not in violation of the terms of any criminal sentence
 - ▶ (3) A criminal charge is not pending against the individual; and
 - ▶ (4) Granting petition would not pose unreasonable safety riskNote: No required showing of need.
- ▶ **Evidence includes:** petition, criminal history, victim filings, and prosecutor filings
- ▶ **Order requirements:** Must specify collateral sanction from which relief is NOT granted and any restriction, condition, or additional requirement

- ▶ **However**, a decision-maker may still consider the CONDUCT (facts) underlying a conviction (NOT the conviction itself)
- ▶ The decision-maker shall undertake an individualized assessment to determine whether the benefit or opportunity at issue should be denied the individual
- ▶ In short, provision allows for discretion and flexibility. The goal is for a conviction to not further punish unless the conduct is substantially or directly related. This type of relief converts sanctions into discretionary disqualifications.

See Section 11(e) and Section 8

Reliance on Order or Certificate as Evidence of Due Care

- ▶ This section of the Act provides essentially that in a **tort case** 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, licensing, admitting, or otherwise engaging in activity with the individual to whom the order was issued if the person relied on the order or certificate.
- ▶ This section is intended to give some protection and assurance to public and private entities. The provision recognizes that “unless persons with criminal records are to be permanently unemployed and homeless, some businesses must transact with them, yet they take legal risks if they do.” The provision gives objective evidence (a certificate) that businesses can reasonably rely on to **mitigate risk**.

- ▶ See Section 14



Questions?