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Avoiding or Minimizing the Consequences of a Criminal Conviction

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I. Introduction

§1.1 As attorneys who defend clients charged with criminal offenses, we rightly focus heavily on the question at the top of almost every client's mind: "How much time am I facing?" Much of our efforts are spent trying to ensure that our clients spend as little time away from their families and communities as possible. The direct consequences of a criminal conviction—jail or prison time, fines, or supervision—are incredibly important issues for our clients and deserve our staunch efforts to advocate on behalf of clients in plea negotiations and in the courtroom.

Although important, however, the amount of time that the client will serve in custody is only the beginning of the inquiry. Unless your client is one of the less than 10 percent of Michigan prisoners serving a sentence of life without parole, he or she will return to a community one day where the consequences of the conviction will reverberate long after the release from custody. The issues that your client will face on return are often given little attention on the front end; they are simply overshadowed by immediate concerns of incarceration. However, if we take some time while the criminal case is pending to think about the collateral consequences of the conviction—those not directly related to sentencing—we can take some steps toward making our clients' eventual transitions home a little easier.

This issue has been in the spotlight over the last 15 years, in part because the thousands of people incarcerated during the 1980s and 1990s are coming home. Between 1980 and 2003, the prison population in Michigan more than tripled. Amy L. Solomon et al., *Prisoner Reentry in Michigan* 4 (2004). In addition, the number of inmates released increased significantly in the 2000s. *Id.* at 1. In 2003, the majority of inmates released by the Michigan Department of Corrections were male. Over half of those released had one or more dependents, and a significant number of those released returned to areas that face greater social and economic disadvantages than others. *Id.* at 13. The effect of the return of incarcerated individuals to already overburdened communities has led to the focused study of issues facing offenders and their communities on their return.

This dynamic has important implications for individual clients as well as their families and communities. For example, in the groundbreaking book *The New Jim Crow: Mass Incarceration in the Age of Color* (2012), Michelle Alexander discusses how mass incarceration and labeling of African Americans as criminals has negatively affected black communities, almost on the scale of slavery and Jim Crow eras. She argues that “[once] a person is labeled a felon, he or she is ushered into a parallel universe of in which discrimination, stigma, and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits.” *Id.* at 94. She notes that it does not matter whether a person has actually spent time in prison; the label sticks. *Id.* You may not be concerned with such broad policy implications in any individual case, but it is important to appreciate the significance of your client’s conviction beyond the time served and know that even a plea agreement that involves little to no jail time could create impediments to your client’s livelihood.

The wealth of data and literature that has flowed from these inquiries provides us with an array of resources to help our clients think through collateral issues even before they serve their sentences. Although it may seem burdensome to add another layer of advocacy to a busy caseload, our duty to counsel clients about collateral consequences flows directly from our duty to advocate generally, and, in some cases, the failure to do so is considered ineffective assistance of counsel. *See Padilla v Kentucky*, 559 US 356 (2010) (failure to advise client about immigration consequences of guilty plea constitutes deficient performance on part of attorney). *Padilla* is discussed in more detail in §6.5.

Being well versed on these issues makes one a better attorney for several reasons. Certainly, attorneys engaged in holistic representation serve clients and their communities better. Knowledge about collateral consequences also increases our stature with clients, who are more and more inclined to ask these questions. Our ability to effectively negotiate with the prosecutor is also enhanced when we can ensure that the parties consider the broadest range of possible consequences of a conviction.

II. What is a Collateral Consequence?

§1.2 Although the term *collateral consequence* has become common parlance in the criminal justice field, it is worth a few sentences of explanation. In

simple terms, collateral consequences are those ramifications over and above the statutory sentence and fines imposed as the result of a particular conviction. For example, the statutory sentence for third-degree criminal sexual conduct (CSC) is imprisonment for not more than 15 years. MCL 750.520d(2). Thus, if a client asks you about the possible consequences of a conviction, or as you evaluate a plea agreement, you will naturally reference the statute and tell him or her the statutory sentencing range. You would then run the statutory sentencing guidelines that consider the client's prior record and the circumstances of the crime. The result of this exercise is a determination of the direct consequences for that conviction.

The collateral consequences of a CSC conviction are those that are not found in the statute defining the crime and that are over and above the direct consequences of the crime. Some collateral consequences are statutory. For example, in addition to serving his or her prison sentence, a client convicted of third-degree CSC is a tier III offender under the Sex Offenders Registration Act, MCL 28.722(w)(iv), who must register with the state for life, MCL 28.725(12), and, on release, may not live, work, or loiter within a 1000 foot "student safety zone." MCL 28.734.

Other collateral consequences are not necessarily statutory and can widely vary depending on the circumstances of an individual case. The conviction may lead to a violation of probation or parole in another case, the client may face dire employment consequences, or a child custody or visitation determination could be affected by the outcome of the case. If the client is not a U.S. citizen, there could be immigration consequences.

Providing the best possible representation to a client includes an evaluation of the myriad ways that a conviction may touch his or her life. Although no attorney can accurately assess all of the long-range implications of a criminal conviction, giving good advice concerning the ones that we know about can help a client tremendously through the life-changing process of dealing with a criminal conviction. A great plea to a reduced charge may be appealing in the short term, but keep in mind the long-term effects that any given scenario may have on your client.

Consider these other examples of how collateral consequences affect clients:

- A young man is paroled after serving a prison sentence. He takes the first steps toward putting his life back together, which include finding a job and a place to live. One of the first questions on the employment application asks whether the applicant has been convicted of a felony. If the answer is "yes," the application often goes no further. He goes to the local housing authority to apply for a section 8 voucher to help pay rent until he can find someone to hire him. One of the first questions asked is whether he has a felony record. If the answer is "yes," he does not qualify for the assistance. Already, two necessary components of successful reentry are impeded.
- A young woman pleads to a drug crime and receives a reasonable sentence. Her grandmother, with whom she lives, receives an eviction notice from her public housing unit because someone in the household has been convicted of a drug crime.

- A client pleads guilty to two misdemeanors instead of one felony, thus avoiding prison time. A few years later, hoping to start with a clean slate, he tries to expunge his record only to find that Michigan law allows a conviction to be set aside only when the client has no more than one conviction.
- You obtain a great plea for a client, resulting in only a few years of incarceration when it could have been much worse. There is no motion filed to toll his child support order based on the fact that he will be incarcerated. When he is released, he owes thousands of dollars to the state, when a simple motion filed at the beginning of the case could have avoided that result.

III. When Should I Begin Thinking About This?

§1.3 It may seem premature to begin thinking about how a conviction will affect a client after release considering all of the thought and work that goes into trial and sentencing. None of us knows what the client's world, or the world in general, will look like when the client goes home after years of incarceration. However, there are some issues that are within our control, or at least our influence, from the beginning. It is important from the initial contact with the client to get a sense of what kinds of issues he or she might face because this knowledge may affect plea negotiations and trial tactics.

IV. How Can Knowledge of Potential Collateral Consequences Inform Representation?

A. In General

§1.4 It is unlikely that you will be able to prevent all of the collateral consequences faced by your client. You are restricted by the charges filed, the strength of the case, and the willingness of the prosecutor to bargain. However, you can, at the very least, make sure that your client is aware of all of the potential consequences that may result. These may inform the client's decision to take a plea or go to trial, and it will certainly help the client make adequate plans for himself or herself as well as family members.

Sections 1.5–1.7 discuss some of the most common consequences or issues that flow from being convicted of a crime.

B. Child Support

§1.5 It is always wise to ask your client whether he or she has any child support obligations. Sometimes a client may have more than one order involving several children. This issue, on its face, does not appear to be one of concern in a criminal case. However, the way that it is handled has a drastic affect on a client's ability to rebound after being released from prison. Child support obligations continue throughout incarceration unless the client informs the family court of the impending incarceration. Imagine, then, that your client receives a six-year sentence, during which time he or she is unable to pay child support. If he or she was paying \$300 a month, the client will owe over \$21,000, not including interest and fees, when he or she is released. This is a relatively modest number. I have seen clients coming home owing tens of thousands of dollars. If that money is owed to

the state (as is the case when the custodial parent receives state assistance), a show of mercy from the custodial parent will not help the client. However, if defense counsel takes the relatively easy step of filing a motion to toll child support during incarceration, the client will not be charged. This is an example of a simple step that can potentially keep the client from digging a hole from which he or she is unlikely to escape.

C. Expungement

§1.6 Another common issue that comes up after release is expungement. Because of the various ways in which a conviction hinders daily life, ex-offenders will sometimes inquire about an expungement, or motion to set aside a conviction, as it is technically called. For example, schools have fairly strict guidelines concerning who can come in to volunteer in the classroom. Thus, a parent with an old conviction may be denied the opportunity to participate in school activities. That parent may seek to set aside the conviction to remove that impediment. Michigan law provides an avenue to accomplish that five years after completion of a sentence, probation, or parole, but only if the person filing the motion has only one felony conviction and two misdemeanors or no more than two misdemeanors. MCL 780.621(1) (as amended effective January 12, 2015, and discussed in §8.15). This is important to consider as you negotiate a plea. Sometimes the prosecutor will offer a plea of two misdemeanors in lieu of one felony conviction. That sounds better on the surface, and may save your client a few months of incarceration, but will make him or her ineligible for expungement later if the client already has a misdemeanor conviction. Your client may have good reasons for preferring the misdemeanors nonetheless (i.e., the effect on employment), but let the client's choice be an educated one.

D. Employment

§1.7 Employment consequences are crucial and can determine whether a client successfully reenters the community. It is important to be aware of how any conviction will affect a client's employment license or ability to find a job later. A quick decision to plea to what seems like a penny-ante charge to avoid a trial could create a barrier to employment that is difficult to surmount. Most employment applications ask some version of the question "have you ever been convicted of a felony?" Some go further and ask about misdemeanors and arrests. Particularly in a bad economy, that question acts as a way to weed out applicants. Recently, progressive companies have begun to recognize that (1) a criminal conviction does not make a person unemployable and (2) gainful employment is one of the best indicators of success for an ex-offender. Some companies have joined initiatives to "ban the box," or take the conviction off of the initial application. Others go further and actively recruit ex-offenders and put programs in place to help them succeed. For the majority of ex-offenders, however, employment may be difficult to find with the conviction label, so be mindful of what the client is charged with and how it will affect his or her answer to the conviction question on employment applications.