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ABA COLLATERAL CONSEQUENCES SUMMIT: A FOCUSED DIALOGUE FOR IMPROVEMENT

by Kelly Mitchell

In February 2015, the ABA Criminal Justice Section hosted a National Summit on Collateral Consequences. Collateral consequences can impede the successful reintegration of formerly incarcerated individuals into society. When applied thoughtfully and judiciously, some collateral consequences are appropriate. However, individuals who have convictions must be able to access employment, housing, education benefits, and other opportunities that empower them to succeed after completing their sentences. A successful reentry experience is key to helping individuals avoid recidivating.

The ABA Criminal Justice Section has a long history of engaging in meaningful dialogue with policymakers, practitioners, and other groups regarding the use and impact of collateral consequences. Recognizing the mutual responsibility of those in the criminal justice community to close the opportunity gap created by collateral consequences, the ABA Criminal Justice Section brought together the collective minds of the leadership of a myriad of distinguished organizations. Their purpose was to examine and debate potential solutions, to further the dialogue on systemic reform, and to find new ways to collaborate with one another on the local, state, and national levels.

Additionally, the Summit served as an opportunity to highlight the ABA National Inventory of the Collateral Consequences of Conviction (NICCC). The NICCC is an online database, available at abacollateralconsequences.org, that catalogues each jurisdiction's laws and

rules imposing collateral consequences. Available to the public free of charge, this resource for the first time makes it possible for criminal and civil lawyers and the public to determine the collateral consequences that are triggered by particular categories of offenses. It allows individuals to understand the limits collateral consequences impose on their rights, benefits, and opportunities. It also allows lawmakers and policy advocates to understand the full measure of a jurisdiction's collateral sanctions and disqualifications. The NICCC was funded through a grant from the National Institute of Justice (NIJ). The success of the NICCC is due to the strong leadership and support by George Washington Law School Professor Steven A. Saltzburg, who served as Chair of the NICCC's Advisory Board, and Johnathan Gitlen, former Director of the NICCC project.

The topic of collateral consequences was covered from multiple angles during four plenary sessions. The Summit opened with a panel, entitled *Collateral Consequences as a Barrier to Reentry, A Dialogue with Stakeholders*, during which panelists discussed the scope of collateral consequences including the effects on adults convicted of crime. For example, former Deputy U.S. Attorney General James Cole discussed efforts by the Department of Justice to focus on the establishment of effective reentry programs and to encourage its attorneys to seek sentences that are proportionate to the crime. Other panelists discussed such topics as the importance of effective and knowledgeable representation and the importance of having success-



ful reentrants serve as the voice of this issue.

The second panel, entitled *Real Life Collateral Consequences: Stories from the Field*, drew upon the panelists' own experiences and focused on the real-world impacts of collateral consequences. For example, April Frazier-Camara, with the Shelby County Public Defender in Memphis, Tennessee, impressed upon the audience the importance of discussing collateral consequences in the context of poverty and race. Additionally, Runa Rajagopal, a Civil Action Attorney with the Bronx Defenders in New York, commented that multiple collateral consequences are often triggered by arrest, requiring the individual to defend on multiple

state regulatory structures governing the use of criminal records data for employment, education, and housing. Sharon Dietrich, Litigation Director of Community Legal Services in Philadelphia, remarked that criminal records are the single most common reason people come to her agency for employment help. She highlighted research demonstrating that even low-level convictions can interfere with employment prospects.¹ Juxtaposed against this, Gregg Leslie, Legal Defense Director for the Reporters Committee for Freedom of the Press, stressed the importance of public access to information and suggested that the focus should instead be on addressing the improper use of information.



fronts at once (e.g., housing eviction, child protection services, job licensure, etc.). Other panelists discussed the power of prosecutorial intervention at the front end of the case and barriers to reentry, such as convincing employers to hire individuals with a criminal record.

The third panel, entitled *Criminal Records in the Digital Age*, focused on how the rise of the digital age substantially alters what it means to have a criminal record in this country. This panel explored the impact of a wide range of digitized criminal records information and also addressed the efficacy of federal and

During the fourth panel, entitled *Judges on Justice: A Discussion of Sentencing Considerations & Collateral Consequences*, four judges drawn from the Federal District Court and Superior Court of the District of Columbia discussed the role that judges play with regard to collateral consequences. Panelists commented that there is very little judges can do to directly

¹ Christopher Uggen, Mike Vuolo, Sarah Lageson, Ebony Ruhland, and Hilary Whitham, "The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment." Forthcoming in *Criminology*, (2014) available at [http://onlinelibrary.wiley.com/journal/10.1111/\(ISSN\)1745-9125](http://onlinelibrary.wiley.com/journal/10.1111/(ISSN)1745-9125).



impact collateral consequences, except make sure the offender has been made aware of the consequences and has had an opportunity to talk with counsel before taking a plea. But they noted that it is often difficult to know what the consequences are, and remarked that the NICCC should help with that problem. When asked specifically if they would like to have the power and authority to relieve some collateral consequences at sentencing, the judges were cautious. They suggested that there would need to be some type of standard to guide their decision making and to avoid questions of unfairness in cases in which they did not grant relief.

The rich and varied discussions that occurred throughout the day yielded numerous ideas about ways to mitigate or change the impact of collateral consequences. The following are some of the key ideas that emerged from the discussions. These ideas were not agreed upon as a formal set of recommendations, but rather, are simply a representation of the many ideas that emerged as the conversation progressed.

Collateral Consequences in General

Participants in the summit repeatedly emphasized the need for society to welcome incarcerated individual back into the community and provide services to encourage them to become law abiding citizens. They expressed a need to examine the root causes as to why individuals are in the criminal justice system and to make sure there are programs and supports for reentry. Additionally, panelists suggested:

- Each collateral consequence should be closely scrutinized and should be required to defend itself. Those consequences that are unduly harsh and unrelated or disproportionate to the crime should be eliminated, such as the requirement to register as a sex offender for a public urination conviction. Only those consequences that further the goals of public safety should be retained. State and local bars should be engaged in this effort.

- Judges should be given legislative authority to relieve individuals of specific collateral consequences, and the decision should be guided by a legal standard such as that being suggested in the proposed revisions to the Model Penal Code that call for balancing the burden on the individual's ability to reintegrate into society against public safety.

- Locations across the country should use the holistic defense representation model pioneered by the Bronx Defenders in New York, which assigns to the defendant a team comprised of an investigator, civil and criminal attorney, social worker, and immigration attorney, if needed, to assist the defendant in addressing not only the criminal case but also other consequences that are triggered by arrest such as eviction, child protection proceedings, job licensing revocation, and deportation.

Criminal Records

Another recurring theme throughout the day was the prevalence and persistence of criminal records in the digital age. Panelists asserted that we need a multi-pronged approach to get a handle on criminal records and that any proposal for policy intervention needs to take into account the main systems of collection and retrieval of criminal record information. No clear solutions to the prevalence of criminal records on the Internet emerged. Some panelists urged that the focus should be on penalizing the improper use of information rather than limiting it in the first place. Others suggested that the records should be sealed altogether or that we should at least put some impediments to access in place such that only those who would use the information responsibly could access it.

Employment

A few specific suggestions for employment consequences emerged:

- Efforts should be made to encourage



employers to hire individuals with criminal records. This should include discussing with employers their fears and determining what can be done to mitigate risk.

- The system should encourage the enactment of fair hiring laws like that in Cincinnati, which delays the question about criminal record until later in the hiring process and then requires the employer to delve deeper into the individual's situation by asking what the offense was, how long ago it occurred, whether it relates to the job the individual is seeking, and what rehabilitation efforts have been made.

Expungement

There was also a great deal of discussion about the use of expungement as a means of mitigating the collateral consequences of conviction. Speakers observed that expungement laws in thirty states have recently been enacted or expanded. Panelists were encouraged by this work, but had additional suggestions:

- Expungement should be available earlier so that it can assist individuals when they most need it in the furtherance of success.
- Legislators should consider enacting the clean slate proposal in which a conviction would be automatically removed from the individual's criminal record without the need for court action if the individual is able to remain crime-free for a period of years (e.g., seven to nine years).

The ABA Criminal Justice Section will soon be publishing a complete report detailing the individuals and organizations that participated in the Summit and providing a fuller report about the discussions that occurred during the day.



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About the AUTHOR
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Kelly Lyn Mitchell is the Executive Director of the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota Law School. Ms. Mitchell was the Executive Director of the Minnesota Sentencing Guidelines Commission from 2011 to 2014, and has also served on the Executive Committee of the National Association of Sentencing Commissions (NASC) since the fall of 2011. She was elected President of NASC in 2014. From 2001 to 2011 she worked at the Minnesota Judicial Branch

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