

USING COLLATERAL CONSEQUENCES FOR BETTER CRIMINAL CASE OUTCOMES: LEGAL OUTLINE¹

CRIMINAL ADVOCACY TRAINING PROGRAM

September 15, 2006

A. WHY SHOULD DEFENDERS CARE ABOUT COLLATERAL CONSEQUENCES?

1. Improved Criminal Dispositions

- a. Defenders can be successful at leveraging **more favorable pleas** – or even outright **dismissals** – when they are able to **educate** prosecutors on the **draconian** consequences for the clients and their families.
- b. **Knowledge** of these consequences and **zealous** defense advocacy can **preserve** many clients' hard-earned **jobs**, **prevent evictions** from subsidized housing, and **prevent deportation**.
- c. Use collateral consequences to a DA's **basic sense of fairness** – focus on consequences that are absurd, disproportionate, or affect innocent family members.
 - i. Deportation
 - ii. Loss of public housing or Section 8 voucher
 - iii. Loss of a job or employment license, particularly for a breadwinner
 - iv. Inability to attend college because barred from student loans

2. Risk Management

- a. Knowledge of collateral consequences is a key **risk management tool** for defenders.
- b. Subsidized housing, family law, 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.
- c. Clients will often **testify** or give written statements about the **underlying facts**, with or without their defense attorney.
- d. If you are **familiar with the collateral consequences**, you can anticipate these situations.

¹ This material was prepared by Miriam Aukerman, Legal Aid of Western Michigan. Disclaimer: Nothing in this outline should be considered legal advice. We have attempted to provide information that is current and topical. Because the law changes rapidly, however, we cannot guarantee that this information will always be up-to-date, or correct.

3. Discovery

- a. As a **result** of being prepared for these ancillary proceedings, you can **exploit** them for **additional discovery** not available in the criminal case.
- b. Eviction cases, employment licensing proceedings, driver's license hearings, school suspension hearings – all **venues** where an administrative or lower court judge is likely to have **subpoena power**.

4. “Collateral” consequences are not collateral in effect

- a. Often collateral sanctions are **much more severe** in their impact than the “direct” criminal punishment.
- b. Even if you can't avoid a collateral consequence, **your client can't choose** between criminal and non-criminal consequences unless **you explain them**.

B. EXPUNGEMENT AND SEALING

1. Why Get Records Expunged or Sealed?

- a. Even very minor criminal records can have severe, life-long consequences.
- b. The best criminal record is no criminal record at all.

2. Standards for Expungement

- a. Separate statutes apply to the expungement of adult convictions and juvenile expungements. (MCL 780.621 *et. seq.* for convictions; MCL 712A. 18e for adjudications)
 - i. The juvenile statute largely tracks the adult statute, but a juvenile must be at least 24 to apply.
- b. An individual can have his or her record expunged if he or she:
 - i. Has only one conviction. Multiple charges or counts in one proceeding count as multiple convictions. (*People v. Blachura*, 176 Mich. App. 7171 (1989)).
 - ii. It has been five years since conviction or release from imprisonment, whichever is later.
 - iii. The sentencing court finds that setting aside the conviction is warranted.
- c. Some convictions cannot be expunged:
 - i. Offenses punishable by life imprisonment (regardless of actual sentence)
 - ii. CSC 1, CSC 2, CSC 3, assault with intent to commit CSC
 - iii. Traffic offenses or non-traffic offenses reportable to the Secretary of State.

3. Other Sealing Provisions

- a. There are a variety of mechanisms which allow records to be sealed. These mechanisms typically involve dismissal of the case upon successful completion of probation.
- b. Sealing mechanisms include:

- i. 7411: first-time drug possession or use (MCL 333.7411)
- ii. Holmes Youthful Trainee Act: youths between the ages of 17-21, or youths over 14 who are waived into adult court (MCL 762.11 et seq.)
- iii. Spousal Abuse Act: first-time assault and battery cases where the victim is spouse, former spouse, individual with whom the defendant has a child, or individual who has a dating relationship with the defendant (MCL 769.4a)
- iv. Drug court: individuals who successfully complete drug court (MCL 600.1068 et seq.)
- v. Minor in Possession: first time offenders (MCL 436.1703)
- vi. Kidnapping by a Parent: first time offenders (MCL 750.350a)
- vii. Practice of Profession by Health Professional Under the Influence: first time offenders (MCL 750.430)

C. HOUSING CONSEQUENCES

1. General considerations

- a. Access to housing is central to the stability of individuals and their communities. But for people with criminal records – and their families – even basic shelter is hard to find.
- b. Criminal records can prevent your clients from living in subsidized housing, and also have consequences in private housing.
- c. Housing sanctions are not limited to convictions, and not limited to felony convictions.
- d. Housing issues create tremendous barriers to family reunification upon reentry from jail or prison.
- e. The fallout of criminal proceedings occurs in the civil or administrative realm, and without the basic constitutional protections afforded at criminal trials, and with much different burdens of proof and evidentiary standards.

2. Private Landlords

- a. Private landlords can evict an individual for criminal activity related to the tenancy. This is particularly common in drug cases.
- b. Private landlords can deny housing because a person has a criminal record.
- c. Private landlords cannot evict an individual who has a valid lease just because the person has a criminal record.

3. Provisions Applicable to All Federally Subsidized Housing

- a. Public Housing Authorities (PHA's) must *publish standards* for denying eligibility and terminating assistance based on criminal activity and substance abuse.

- b. *Admission to Programs*: PHA's have the authority to bar eligibility for a *reasonable period* of time after any criminal activity. (42 USC § 13661(c).)
- c. *Termination from Programs*: PHA's and Landlords generally have the authority to terminate or evict residents for **any new criminal activity**.
 - i. The Supreme Court's decision in *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 136 (2002), permits public housing authorities to evict entire families for criminal activity **even if** the tenant did not know of, could not foresee, or could not control the behavior of other occupants or guests.
 - ii. PHAs and Landlords can require the *exclusion* of an offending household member as a condition of admission or continued benefits.

4. Conventional Public Housing

a. Admission to Programs (24 CFR §§ 960.203 & 960.204)

i. **Mandatory Denial**: The following categories of applicants **WILL** be found ineligible:

- A. *Persons Subject to Lifetime Sex Offender Registration* (42 U.S.C. § 13663(a)). In Michigan those offenses are: CSC 1, CSC 2 with a person under 13, kidnapping or a person under the age of 18; leading away a child under 14, and distribution or production of child sexually abusive materials. In addition, a second conviction for a listed offense leads to lifetime registration, depending on the date of the first offense. (MCL 28.725)
- B. *Persons Convicted of Methamphetamine Production* (42 USC § 1437n(f)).

ii. **Presumptive Denial**: The following categories of applicants **WILL** be found ineligible unless the relevant mitigation provisions are satisfied:

- A. *Persons Evicted in Past for Drug-Related Activity*: if evicted within the immediate past 3 years, PHA must deny admission **UNLESS** the applicant submits evidence to the PHA's satisfaction:
 - 1. That the affected household member has successfully completed a supervised rehabilitation program approved by the PHA; OR
 - 2. That the circumstances leading to the eviction no longer exist.
- B. *Persons Engaging in Illegal Use of a Drug* (42 USC § 13661): PHA will deny admission if:
 - 1. Any family member is *currently engaging in illegal use* of a controlled substance; or
 - 2. There's reasonable cause to believe that a family member's illegal use or *pattern of illegal use* of a controlled substance *may interfere with* the health, safety, or right to peaceful enjoyment of the premises by other residents.

3. *Mitigation Provision*: BUT, in determining whether the applicant MUST be found ineligible based on any of the above grounds, the PHA MAY consider evidence submitted by the applicant that the affected family member is no longer engaging in the activity and:
 - a. participates in, or has successfully completed, a supervised rehabilitation program; *or*
 - b. has otherwise been rehabilitated successfully.
- C. *Persons Abusing Alcohol* (42 USC § 13661)
1. PHA will deny admission if there is reasonable cause to believe that a family member's abuse or pattern of abuse of alcohol may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.
 2. *Mitigation Provision*: BUT, in determining whether the applicant MUST be found ineligible based on any of the above grounds, the PHA MAY consider evidence submitted by the applicant that the affected family member is no longer engaging in the activity and:
 - a. participates in, or has successfully completed, a supervised rehabilitation program; *or*
 - b. has otherwise been rehabilitated successfully.

iii. Discretionary Denial

- A. *Persons Who Engaged in Past Criminal Activity* (42 USC § 13661)
1. For a reasonable amount of time after the criminal activity, the PHA may deny admission if any member of the household engaged in:
 - a. Any drug-related criminal activity; or
 - b. Any violent criminal activity; or
 - c. Any other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or PHA employees.
 - d. NOTE: Fleeing Felons and Parole Violators are not mentioned in the statutes or regulations concerning Public Housing eligibility, but they are subject to termination. See below.

iv. General Mitigation Provision (24 CFR § 960.203): When the PHA receives any unfavorable information about an applicant:

- A. Consideration shall be given to the time, nature, and extent of the applicant's conduct (including the seriousness of the offense);
- B. Consideration may be given to factors that might indicate a reasonable probability of "favorable future conduct," such as:
 1. Evidence of rehabilitation, and

2. Evidence of the applicant family's participation in or willingness to participate in social service or other appropriate counseling service programs and the availability of such programs.
- C. However, if rehabilitation is not an element of the eligibility determination (see above), the PHA may choose not to consider whether the person has been rehabilitated.
- v. **Exclusion of Family Member:** The PHA may require an applicant to exclude a household member who has participated in or been culpable for criminal, alcohol, or drug-related activity (those in 24 CFR § 960.204) that warrant denial.
 - vi. **Continuation of Denial.** The PHA may choose to continue the prohibition of admission past the prescribed period of time for a disqualifying behavior or event. (24 CFR § 960.203(c)(3).)
- b. Termination or Eviction** (42 USC § 1437d(l); 24 CFR § 966.4)
- i. **Mandatory Termination:** The following categories of current public housing residents WILL have their subsidies terminated and be evicted from public housing:
 - b. *Persons Subject to Lifetime Sex Offender Registration:* [see above];
 - c. *Persons Convicted of Methamphetamine Production:* [see above];
 - ii. **Discretionary Termination:** The following categories of residents MAY be terminated:
 - a. *Persons Engaging in Illegal Use of a Drug:* [see above, including specific mitigation provision];
 - b. *Persons Abusing Alcohol:* [see above, including specific mitigation provision];
 - c. *Persons Furnishing False Information:* Any person who furnished false or misleading information concerning illegal drug use, alcohol abuse, or rehabilitation of illegal drug users or alcohol abusers;
 - d. *Persons Engaging in Criminal Activity*
 1. *Drug Crime On or Off the Premises:* if any tenant, member of the tenant's household, or guest engages in any drug-related criminal activity **on or off** the premises, or any other person under the tenant's control engages in any drug-related criminal activity **on** the premises. **Warning:** PHA's have the authority to evict for drug-related activity even if the tenant did not know, could not foresee, or could not control behavior by other occupants or guests. *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125 (2002).
 2. *Crimes Entailing Threat to Other Residents:* if a public housing tenant, any member of the tenant's household, or guest, or any other person under the tenant's control engages in any criminal

activity threatening the health, safety, or right to peaceful enjoyment of the premises by *other tenants*, or by *persons residing in the immediate vicinity* of the premises.

3. *Evidence*: Neither an arrest nor a conviction is necessary, and the standard of proof required for a criminal conviction need not be satisfied. However, the PHA must provide some evidence that the criminal activity has occurred.
- e. *General Mitigation Provision*: for all discretionary terminations, the PHA may consider all relevant circumstances such as:
 1. The seriousness of the offending action;
 2. The extent of participation by the leaseholder in the offending action;
 3. The effects that the eviction would have on family members not involved in the offending activity; and
 4. The extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.
- f. *Exclusion of Family Member*. The PHA has *discretion* to evict only the wrong-doer, but PHAs can and frequently do evict entire families.

5. Section 8 Program

a. Generally

- i. The Section 8 Housing Choice Voucher Program subsidizes tenants to rent apartments from private landlords.
- ii. The local PHA usually administers each Section 8 program.
- iii. The crime-related eligibility and termination standards generally parallel those of Conventional Public Housing.

b. Both the private Landlord and the PHA has ability to evict.

6. Sex Offender Registry: 1000 Feet Exclusion Zone

- a. Individuals who are required to be register on SORA may not reside in a “Student Safety Zone,” which is defined at an area within 1000 feet of school property. (MCL 28.735)
- b. There are exceptions for:
 - i. Individuals who were residing in the Student Safety Zone on January 1, 2006. However, individuals who reside within a Student Safety Zone and are subsequently required to register must change their residence within 90 days. (MCL 28.735)
 - ii. Individuals under 19 attending school who reside with their parents or guardians. (MCL 28.735)
 - iii. Individuals under 26 who are in a special education program and reside with their parents or guardians. (MCL 28.735)

- iv. Certain individuals convicted as juveniles (MCL 28.736)
- v. HYTA offenders who have completed their probationary period (MCL 28.736)
- vi. Individuals convicted of CSC 4 with a person between the ages of 13-16, if the defendant was between the ages of 17-21, and was not more than 5 years older than the victim. (MCL 28.736)

D. EMPLOYMENT CONSEQUENCES

1. General Considerations

- a. Two-thirds of employers will not hire a former offender
- b. Most employers are now doing criminal background checks: 80% of large corporations perform background checks on job applicants; 69% of small businesses do.
- c. People with criminal records are barred by law from many occupations
- d. Employment is closely linked to recidivism: A 10% decrease in wages is associated with a 10-20% increase in criminal activity and likelihood of incarceration.
- e. Occupational restrictions can be difficult to determine, because they are scattered throughout federal and state codes.
 - i. If you are uncertain whether an occupational restriction exists in your client's field, talk to the relevant governmental agency regulating that occupation (see www.michigan.gov), a relevant union, or an attorney who represents people in that industry.
 - ii. *Warning: While this outline contains some of the major statutory barriers based on records, it is by no means all-inclusive.*

2. Law Affecting the Consideration of Criminal Records for Employment Purposes

- a. **Licensing of Former Offenders Act** (MCL 338.41 et. seq.)
 - i. Provides that a criminal conviction shall not be used, in and of itself, as proof of lack of good moral character, but can be used as evidence of lack of good moral character.
 - ii. Licensing agencies may not consider:
 - A. Arrests not followed by conviction.
 - B. Reversed or vacated convictions.
 - C. Records of an arrest or conviction for a misdemeanor or felony unrelated to the person's ability to serve the public in a fair, honest and open manner.
 - D. Records of an arrest or conviction for a misdemeanor for the conviction of which a person may not be incarcerated in jail or prison.

iii. Each licensing agency is supposed to promulgate rules listing offenses that render an individual unlikely to serve the public in a fair, honest and open manner.

b. Prohibition on Requesting Information About Arrests (MCL 37.2205a(1))

i. Employers, other than law enforcement or a “political subdivision of this state” may not, for employment purposes, “request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result.”

ii. Prohibition does not apply to felony arrests.

c. Disparate Impact Claims (EEOC Notice N-915, Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, (Feb. 4, 1987)).

i. Under Title VII disparate impact theory (race discrimination), record-based exclusions which have a disparate impact on people of color are only permissible if they are justified by “business necessity.”

ii. To determine “business necessity,” an employer must consider:

A. The nature and gravity of the offense.

B. The time elapsed since the conviction or completion of sentence.

C. The nature of the job sought.

3. Major Statutory Barriers

a. Aviation (9 U.S.C. § 44935; 49 U.S.C. § 44936)

i. Individuals with a wide range of felony convictions are barred for ten years from most aviation-related occupations.

b. Banking/Financial Services

i. *Federally insured depository institutions* (i.e. most banks and credit unions):

A. Employment prohibited for individuals convicted of offenses involving dishonesty, breach of trust, or money laundering. *See* 12 U.S.C. §1818(e), (g)(1)(C), 1829(a).

B. In some, but not all, cases waivers are available upon the written consent of the Federal Deposit Insurance Corporation. *See* 12 U.S.C. §1829.

C. For extensive information on banking prohibitions and FDIC waivers, *see* *People with Criminal Records Working in Financial Institutions: The Rules on FDIC Waivers*, available at <http://www.hirenetwork.org/FDIC.html>

ii. *Jobs Regulated by the Commodities Futures Trading Commission*: restrictions on those with felonies and certain misdemeanors. *See* 7 U.S.C. § 12a

- iii. *Jobs Regulated by the Securities Exchange Commission*: restrictions on those with felonies and certain misdemeanors. See 15 U.S.C. § 80b-3; 15 U.S.C. §78o(b).
- c. **Daycare**
 - i. *Day Care Providers Receiving Payment Through the Department of Human Services' Child Day Care Program*
 - A. There is an extensive list of crimes, including many misdemeanors and many crimes with no obvious connection to child welfare, which disqualify a person from providing state-paid daycare, regardless of the age of the conviction. See *Department of Human Services Program Eligibility Manual 704* for the list of crimes: <http://www.mfia.state.mi.us/olmweb/ex/pem/704.pdf>
 - B. There is an administrative review process, though it is limited to determining whether the criminal record is accurate.
 - ii. *Licensed Child Care Centers*
 - A. Cannot be licensed if the applicant has been convicted of an offense that is a “listed offense” for the purposes of the Michigan Sex Offender Registry. See MCL 722.115, 722.115c.
 - B. Individuals with other convictions may be denied a license for lack of good moral character. Individuals with records must submit information about their offenses. DHS then determines eligibility to work.
 - C. Employees of Child Care Centers or Day Care Centers cannot have been convicted of an offense that is a “listed offense” for the purposes of the Michigan Sex Offender Registry. See MCL 722. 115d.
 - iii. *Family (In-Home) Daycare and Group Day Care Homes*
 - A. Cannot be registered/licensed if the applicant has been convicted of an offense that is a “listed offense” for the purposes of the Michigan Sex Offender Registry. See MCL 722.115, 722.115c.
 - B. The registration/license will also be denied if a person over the age of 18 residing in the applicant’s home has been convicted of a listed offense.
 - C. Individuals with other convictions may be denied a license/registration for lack of good moral character. Individuals with records must submit information about their offenses. DHS then determines eligibility to work.
- d. **Hazmat Drivers** (49 C.F.R. 1572.103)
 - i. Individuals with commercial drivers licenses who have a hazardous materials endorsement (HME) can have their HME taken if they are convicted of a wide variety of offenses.

- ii. Some offenses are permanently disqualifying, and others result in exclusion for 7 years from conviction or 5 years from release from prison.
 - iii. There is a waiver process through which the worker can appeal.
 - iv. An individual with an HME must notify the Transportation Security Administration within 24 hours if indicted for or convicted of a disqualifying offense.
- e. Governmental Employment and Government Contracts**
- i. There are a wide array of record-based exclusions from government employment. *See, e.g.* MCL 791.205a (barring anyone with felony from working in Department of Corrections)
 - ii. There are a wide array of record-based debarments from government contracting. *See e.g.* 24 C.F.R. § 24.305 (HUD contracts); 10 U.S.C. § 2048(a) (DOD contracts)
 - iii. Contact the relevant governmental agency to determine what exclusions apply
- f. Insurance**
- i. For employees of institution issuing variable life insurance, there is 10-year ban (with possible waiver) for convictions related to embezzlement, misrepresentation, fraudulent conversion, securities, or violation of insurance law. *See Mich. Admin. Code 500.584.*
- j. Labor Organizations and Employee Benefit Plans**
- i. Conviction of certain offenses disqualifies an individual from working in a wide range of capacities relating to a labor organization or employee benefit plan. *See 29 U.S.C. §504, 1111*
 - ii. The disqualification lasts 13 years after conviction or until the end of imprisonment, whichever is later.
 - iii. The disqualification may be removed by a court, for offenses committed before November 1, 1987, and by the United States Parole Commission, for offenses committed thereafter. *See U.S.S.G. §5J1.1; Viverito v. Levi, 395 F.Supp. 47 (N.D. Ill. 1975).*
- k. Licensed Health Professionals**
- i. A health professional's license will be summarily suspended if convicted of:
 - A. A felony
 - B. A misdemeanor punishable by imprisonment for a maximum of 2 years.
 - C. A misdemeanor involving illegal delivery, possession or use of a controlled substance. *See Mich. Admin. Code R. 338.1609.*

- ii. A variety of other convictions can lead to the denial of a license, or the suspension or revocation of a license. *See* MCL 333.16221(b); Mich. Admin. Code R. 338.1609.

l. Licensed/Registered Professions Generally

- i. In general, licensees must demonstrate good moral character.
- ii. Even where a criminal record does not constitute an absolute bar, licensing agencies will almost always consider criminal records in determining whether the applicant has good moral character.
- iii. In many cases, if a license/registration is required, there will be some form of appeal process to dispute whether an applicant's record disqualifies him or her from employment.
- iv. In most cases, under the Licensing of Former Offenders Act, *see* Section D.2.a above, a criminal record is not conclusive proof of poor moral character.

m. Long-Term Care (MCL 333.20173a, 333.21073b, 330.1134a; 42 U.S.C. §1320a-7)

- i. Restrictions apply to jobs for most licensed or certified long term care employers, including certified home health agencies, nursing homes, county medical care facilities, adult foster care homes, homes for the aged, hospices, swing beds in hospitals, and psychiatric hospitals. All jobs that involve direct services to the people needing long-term care services are covered.
- ii. Individuals who worked in long-term care prior to April 1, 2006 are grandfathered in. However, a disqualifying conviction after April 1, 2006 ends their grandfathered status.
- iv. Individuals who are arraigned on or convicted of a series of specified offenses must report that fact to their employers.
- v. Individuals seeking a license/registration for an adult foster care facility are subject to an additional set of disqualifications (MCL 400.713(3)(c), Mich. Admin. Code R. 400.1152.
- vi. The statute sets out a complicated, tiered system prescribing different exclusion periods based on the type of conviction.
 - A. If you have questions about whether a conviction is disqualifying, contact the Michigan Long Term Care Partnership, which administers the background check program: www.miltcpartnership.org
 - B. A chart summarizing the disqualification for employees is set out below.

Length of Time Barred from Working	Types of Conviction
Lifetime Ban	<ul style="list-style-type: none"> • Felonies related to manufacture, distribution, prescription or dispensing of a controlled substance if after August 21, 1996. • Felony or misdemeanor patient abuse • Felony health care fraud • Ever found not guilty by reason of insanity • Ever had a finding of abuse, neglect or misappropriation of property in a nursing facility (non-criminal finding)
Fifteen Years After Completion of Parole or Probation	<ul style="list-style-type: none"> • Felonies involving the use or threat of violence, such as felonious assault • Felonies that result in, or were intended to result in, death or serious injury • Felonies involving cruelty or torture • Felonies involving abuse of vulnerable adults, such as individuals with disabilities • Felony criminal sexual conduct (1st, 2nd or 3rd degree) • Felonies involving abuse or neglect • Felonies involving the use of a firearm or dangerous weapon • Felonies involving the diversion or adulteration of medication
Ten Years After Completion of Parole or Probation	<ul style="list-style-type: none"> • Any other felony
Ten Years From the Date of Conviction	<ul style="list-style-type: none"> • Misdemeanors involving the use or threat of violence • Misdemeanors involving the use of a firearm or dangerous weapon • Misdemeanors involving abuse of vulnerable adults • Misdemeanor criminal sexual conduct (4th degree) • Misdemeanor involving cruelty or torture • Misdemeanor involving abuse or neglect
Five Years From the Date of Conviction	<ul style="list-style-type: none"> • Misdemeanor involving cruelty if committed by an individual under the age of 16 • Misdemeanor home invasion • Misdemeanor embezzlement • Misdemeanor negligent homicide • Most misdemeanor theft offenses • Retail fraud (shoplifting) in the 2d degree • Certain misdemeanor controlled substance offenses • Most misdemeanors involving fraud

Three Years From the Date of Conviction	<ul style="list-style-type: none"> • Most misdemeanor assaults • Retail fraud (shoplifting) in the 3rd degree • Most misdemeanors involving creation, delivery, possession or use of a controlled substance
One Year from the Date of Conviction	<ul style="list-style-type: none"> • Most misdemeanor controlled substance offenses if the conviction occurred before the age of 18 • Misdemeanor larceny or retail fraud in the 2nd and 3rd degree if the conviction occurred before the age of 16

n. Military Service

- i. Individuals convicted of a felony are ineligible to enlist in any service of the armed forces. *See* 10 U.S.C. §504.
- ii. The statute provides that exceptions can be made in meritorious cases.

p. Port Workers (49 U.S.C. §70105, *proposed* 49 CFR 1572.103(b))

- i. Statute disqualifies individuals from working in the secure areas of maritime ports for 7 years after conviction (or 5 years after release from incarceration) for felony offenses the could cause the individual be a terrorism security risk.
- ii. *Proposed* regulations impose sweeping disqualifications, including disqualifications for drug and dishonesty offenses.
- iii. Final regulations have not yet been issued.

p. Private Security/Security Guard/Security Alarm Contractor (MCL 338.1056, 338.1067)

- i. Cannot have a felony conviction, regardless of the age of the conviction or nature of the offense.
- ii. Exception for individuals continuously employed with same employer and hired before March 28, 2001.

q. Schools and School Services (MCL 380.1230 et. seq.)

- i. Applies to anyone who regularly provides instructional, custodial, transportation, counseling, or administrative services in schools, or instructional or auxiliary services to special education students. This includes cafeteria workers, bus drivers, janitors, secretaries, etc.
- ii. Individuals who have *convictions that require registration on the Sex Offender Registry are completely barred from employment*, regardless of the age of the conviction or the nature of the offense.
- iii. Individuals with *felony convictions are barred from employment unless they receive the written approval of both the superintendent and school board*.
- iv. Teachers and other individuals with certification or state board approval may also lose their certification/board approval if convicted of a variety of misdemeanors. (MCL 380.1535a, MCL 380.1539b)

- v. Individuals who are charged with or convicted of felonies or certain misdemeanors must immediately tell the judge, prosecutor, and school district.
- r. **Sex Offender Restrictions** (MCL 28.733, 28.734, 28.736)
 - i. Individuals required to be registered on the sex offender registry are barred for life from working in any job located within 1000 feet of school property.
 - ii. There are exceptions for:
 - A. Individuals who were working in a student safety zone on January 1, 2006. *See* MCL 28.734.
 - B. Individuals whose place of employment is within a student safety zone solely because a school is relocated or is initially established 1,000 feet or less from the individual's place of employment. *See* MCL 28.734.
 - C. Individuals who only intermittently or sporadically enter a student safety zone for the purpose of work. *See* MCL 28.734.
 - D. Certain individuals convicted as juveniles. *See* MCL 28.736.
 - E. Certain statutory rape offenders who are under the age of 21. *See* MCL 28.736.
 - F. Individuals who have successfully completed their HYTA probationary period. *See* MCL 28.736.

E. FAMILY LAW CONSEQUENCES

1. Termination of Parental Rights

- a. The federal Adoption and Safe Families Act (ASFA), **requires** the State to sue to terminate parental rights where:
 - i. A child is in foster care for 15 out of the most recent 22 months, unless a compelling reason exists not to terminate parental rights. *See* 42 U.S.C. §675(5).
 - ii. This time period can expire easily if the parent is incarcerated.
- b. Michigan law **allows** for the termination of parental rights if a child is in foster care or in the care of a guardian or limited guardian. *See* MCL 712A.19b. Among the possible grounds for termination are:
 - i. The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
 - ii. The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the

- parent will be able to provide proper care and custody within a reasonable time considering the child's age.
- iii. The parent has been convicted of first or second degree murder; criminal sexual conduct in any degree; assault with intent to commit criminal sexual conduct; or a violent offense that subjects the defendant to sentencing as a multiple felony offender under MCL 769.10-12.
- c. Reducing the Risk of Termination of Parental Rights
 - i. Parents facing long-term incarceration should:
 - A. Avoid having their children end up in foster care, which starts the clock ticking for parental rights termination.
 - B. Make sure that they have “provided for the child’s proper care and custody” by giving legal authority to the child’s caretaker.

2. Custody and Guardianship

- a. While individuals facing long-term incarceration may be well advised to place their children in a guardianship or grant another party custody, this option may actually be detrimental to parents facing short-term incarceration.
- b. If the individual who has guardianship or custody is unwilling to return the child, it can be extremely difficult for a parent to regain custody.
- c. If a parent is incarcerated and has failed to provide legal authority to the person with whom the child has been placed, the caretaker can obtain a guardianship. *See* MCL 700.5204(2)(b).
- d. **Practice Tip:** To forestall against unnecessary guardianships, a parent facing incarceration of six months or less should sign a “Temporary Authorization for Kinship Care,” or power of attorney. *See* “Temporary Authorization for Kinship Care” hand-out, also available at: http://michiganlegalaid.org/library_client/

3. Child Support

- a. General Considerations
 - i) On average Michigan prisoners owe \$28,000 in back child support.
 - ii) Garnishment for child support arrears is a major financial obstacle for released prisoners.
 - iii) In most cases, it is possible to avoid an incarceration-related arrearage.
- b. As a general rule, incarcerated parents who do not have significant income or assets will be required to pay little or no child support while incarcerated. *See Pierce v. Pierce*, 162 Mich. App. 367 (1987).
- c. However, support can only be modified prospectively. Thu, once support has accrued, the court cannot wipe out back support unless the other party consents. *See McLaughlin v. McLaughlin*, 255 Mich. App. 475 (2003).

- d. It is therefore critical that individuals who owe support file motions to suspend support payments, and all surcharges, as soon as possible after being incarcerated.
- e. **Practice Tip:** Tell every client with a child support order who is facing incarceration to immediately file for a support modification, and give the client a copy of the *in pro per* motion packet, *Will I Leave Prison in Debt: What You Need to Know About Paying Child Support in Michigan if You Are Incarcerated*. (hand out)

4. Ability to Be an Adoptive or Foster Parent (42 U.S.C. §671(20)(A))

- a. Certain serious convictions bar an applicant from ever becoming an adoptive or foster parent.
- b. Certain other felony convictions carry a five-year bar.

F. FEDERAL STUDENT LOANS

1. **Automatic ineligibility** (Title IV funds): 20 U.S.C. § 1091(r)(1) suspends eligibility for any grant, loan, or work assistance for students convicted while receiving student aid of *any offense* under any Federal or State law involving the possession or sale of a *controlled substance*.² Federal law also denies the Hope tax credit to students and their families if the student has a prior felony drug conviction.

- a. *Definition:* the term “controlled substance” is defined in 21 U.S.C. § 802(6), which includes marijuana.
- b. The federal benefits referenced are those under 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.*
- c. The period of suspension begins on the date of the conviction and ends after the following intervals:

Type of Offense	Ineligibility Period for 1 st Offense	Ineligibility Period for 2d Offense	Ineligibility Period for 3d Offense
Possession of a controlled substance	1 year	2 years	Indefinite
Sale of a controlled substance	2 years	Indefinite	

2. **Waiver:** Under § 1091(r)(2), a student may regain eligibility before the above period expires if:

- a. The student satisfactorily completes a drug rehabilitation program that
 - i) Complies with criteria set out by the Secretary of Education,

² On February 8, 2006, this provision was amended to bar student loan eligibility only when the drug conviction occurred during receipt of student loans. See Pub. L. No. 109-171, § 8021, 120 Stat 4 (February 8, 2006).

- A. Be qualified to receive funds from federal, state, or local government, or from a federally- or state-licensed insurance company; **OR**
 - B. Be administered or recognized by a federal, state, or local government agency or court, or a federally- or state-licensed hospital, health clinic, or medical doctor
- AND**
- C. Includes 2 unannounced drug tests.
- b. The conviction is reversed or set aside.

G. PUBLIC BENEFITS

1. Drug-related Felony Convictions

- a. 21 U.S.C. § 862a **permanently bars** anyone with a drug-related felony conviction from receiving federal cash assistance and Food Stamps during his or her **lifetime**.
 - i) **Definitions**
 - (1) *Drug-related felony conviction*: any offense that is classified as a felony by the law of the jurisdiction involved and that has as an element the possession, use, or distribution of a controlled substance.
 - (2) Only applies to convictions for conduct after August 22, 1996.
 - ii) **Benefits Covered by Ban**
 - (1) Temporary Assistance for Needy Families (TANF) (benefits provided under 42 U.S.C. § 601 *et seq.*) (traditional “welfare” benefits; before 1996, was called Aid to Families with Dependent Children (AFDC));
 - (2) Food Stamps (benefits provided under 7 U.S.C.A. § 2011 *et seq.* or § 2012(h))
 - iii) **Benefits Excluded from Ban**
 - (1) Emergency medical services under title XIX of the Social Security Act [42 U.S.C. § 1396 *et seq.*];
 - (2) Short-term, noncash, in-kind emergency disaster relief;
 - (3) The following public health benefits:
 - (a) Public health assistance for immunizations;
 - (b) Public health assistance for testing and treatment of communicable diseases if the Secretary of Health and Human Services determines that it is necessary to prevent the spread of such disease.
 - (4) Prenatal care;
 - (5) Job training programs (including Welfare-to-Work funded services such as supportive services, post-employment services, job readiness, or job placement);
 - (6) Drug treatment programs;
 - (7) Medicaid;

(8) Federal disability benefits under Social Security Disability (SSD) or Supplemental Security Income (SSI).

b. States May Opt Out

i) As of August 2006, **Michigan has opted out of this lifetime ban entirely.**

A. There is a bill pending that would limit public benefits to individuals with felony drug convictions.

ii) As of February 2005 (see

<http://www.lac.org/lac/main.php?view=law&subaction=5#>):

(1) 17 states have the full ban in place

Alabama	Kansas	South Dakota
Alaska	Mississippi	Texas
Arizona	Missouri	Virginia
California	Montana	West Virginia
Delaware	Nebraska	Wyoming
Georgia	North Dakota	
Indiana	Pennsylvania	

(2) 21 states have modified the ban by allowing benefits dependent upon drug treatment, denying benefits only for sales convictions, or placing a time limit on the ban.

Arkansas	Kentucky	North Carolina
Colorado	Louisiana	Rhode Island
Florida	Maryland	South Carolina
Hawaii	Massachusetts	Tennessee
Idaho	Minnesota	Utah
Illinois	Nevada	Washington
Iowa	New Jersey	Wisconsin

(3) 11 states and DC have completely opted out of the ban (including MI)

Connecticut	New Mexico	Oregon
Maine	New York	Vermont
Michigan	Ohio	District of Columbia
New Hampshire	Oklahoma	

c. **Practice Tip:** you should **always** advise your clients of this ban in case they move to another state.

2. Fleeing Felons or Parole Violators Ineligible for Most Benefits

a. **Ineligibility:** (42 U.S.C. § 608(a)(9)(A)) States may not provide TANF, SSI, public and federally-assisted housing, or Food Stamps to individuals who are:

i) Fleeing felons (outstanding felony warrant), or

- ii) Violating a condition of probation or parole, as found by a judicial or administrative determination.
 - b. These persons **remain eligible for Medicaid**.
 - c. **Warning:** because the Fleeing Felon bar applies to TANF and Food Stamps, the Department of Human Services may run a national warrant check on **any** client applying for Public Assistance.
 - d. **Practice Tip:** for extensive resources on restoring benefits in these situations, consult Reentry Net/NY at www.reentry.net/ny.
 - i) **Warning:** Note that for SSI and SSD, a recipient challenging the termination of benefits can receive aid continuing through the ALJ level appeal. If the recipient loses at the hearing, there is no aid continuing through the Hearing Council and federal court appeals.
- 3. Fraud/Intentional Program Violations (7 USC §2015(b))**
- a. Clients can face criminal and/or civil liability for fraud or misrepresentation concerning government benefits.
 - i) Administrative sanctions -- including ineligibility for public assistance -- can be imposed through Intentional Program Violation (IPV) hearings.
 - b. For extensive information on Intentional Program Violations, *see The Civil-Criminal Connection: Civil Consequences of Criminal Convictions for Low-Income Defendants* (handout)
- 4. Incarceration:** Eligibility for public benefits may be affected during periods of incarceration. Tell your client or their family to watch carefully for notices of termination.
- a. *Social Security/Supplemental Security Benefits*
 - i) SSI
 - (1) *Applicants*
 - (a) If client is incarcerated when he *applies* for SSI and is otherwise eligible, he is not eligible for payment of benefits until the first day of the month following the day of release from incarceration. (20 CFR § 416.211.)
 - (2) *Current Recipients*
 - (a) *Incarceration for an entire calendar month or more:* Recipient is ineligible starting with the first entire calendar month in which she is incarcerated (*i.e.*, incarcerated at beginning of month and throughout the month), and payments are suspended effective with such first full month. (20 CFR §§ 416.211 & 416.1325.)
 - (b) *Incarceration for less than a full calendar month:* accordingly, incarceration for less than a month should have no effect on SSI eligibility.

(c) *Incarceration for more than a full calendar month, but less than a year*: SSI benefits are only suspended, and can be reinstated effective the day of release. Benefits will be prorated for that month. (20 CFR §§ 416.211, 416.421, 416.1325.)

(d) *Incarceration for more than twelve months*: SSI benefits are terminated following 12 consecutive calendar months of suspension for any reason, including incarceration. (20 CFR § 416.1335.) Client must reapply for benefits when released.

(e) *Duty to Report*: there is a duty to report ANY period of incarceration. (20 CFR § 416.708(k).)

(i) **Practice Tip**: However, when client will be incarcerated for *less than a full calendar month*, there are probably no repercussions from a failure to report since that period of incarceration has no effect on eligibility. Moreover, if your client reports the incarceration, the SSA could easily make a mistake and suspend benefits.

ii) As long as person is incarcerated, he is not entitled to dependency benefits (20 CFR § 404.468a); there is no exception for children.

iii) These provisions generally apply to any “public institution,” but there are limited exceptions such as some treatment programs, mental institutions, and “community residences.”

b. Other Social Security Benefits

i) For Social Security benefits such as Social Security Disability, however, where an individual is incarcerated upon conviction of a *felony*, he or she is not entitled to benefits for any month or any part thereof during which he or she is incarcerated, regardless of the length of the sentence. 20 C.F.R. § 404.468(a).

H. IMMIGRATION

1. Even minor convictions can lead to deportation of non-citizens. This is true even if the defendant was lawfully in the United States.
2. This outline does not contain detailed material on immigration, as the drafters do not have expertise in this area. However, immigration consequences are critical.
3. **Practice Tip**: Always check your client’s immigration status. Seek to determine if the conviction has immigration consequences, and/or refer the client to an immigration attorney.