To: New Jersey Law Revision Commission
From: Alex Fineberg
Date: May 7, 2012
Re: Collateral consequences of criminal convictions

M E M O R A N D U M

At the Commission's direction, Staff has been engaged in a thorough review of the collateral consequences attendant criminal convictions that are imposed by state law. This comprehensive survey has been aided by the Criminal Justice Section of the American Bar Association, which, in fulfilling the terms of a Congressional grant, compiled 1,051 New Jersey statutes or regulations pertaining to such ancillary sanctions[1]—statutorily imposed or authorized legal disabilities that are not a part of a criminal sentence. Court Security Improvement Act of 2007, *Pub. L. No.* 110-177, 110th Cong. § 510(d) (2008).

To date, Staff has reviewed roughly one quarter of the statutes identified by the ABA and, proceeding in numerical order, is now midway through Title 17. Although it is unlikely that patterns will be entirely consistent across all titles, notable trends have begun to emerge. For instance, of the disqualifications reviewed thus far, 63% pertain to bars imposed on certain types of employment.

Staff identified some prevalent trends as problematic. Only 38% of the statutes reviewed enumerate a limited number of specific, relevant offenses that trigger a disqualification. *See, e.g.*, *N.J.S.* 9:3-40.5 (listing convictions that disqualify an applicant from employment at an adoption agency). And, even among statutes that, without mandating, merely authorize the imposition of a collateral sanction (as when vesting an administrative agency with the discretion to refuse to issue a license), only a few contain any limitation on the remoteness of an offense. *See, e.g, N.J.S.* 17:15A-36 and 48 (providing no such guidance for offenses that disqualify an applicant from receiving a check cashing license). *Cf. N.J.S.* 17:15C-7a(2) (limiting the applicable criminal history of an applicant for a money transmission license to the previous five years).

Rather, collateral consequences are often imposed or authorized on the basis of "moral turpitude" or a lack of "good moral character"—undefined phrases that appear in 42% of the statutes reviewed. *See, e.g.*, *N.J.S.* 5:5-134 (allowing the New Jersey Racing Commission to compel the termination of any off-track betting licensee's employee if convicted of a crime "involving fraud, dishonesty, or moral turpitude" or if unable to establish, in the commission's opinion, "good character, honesty, competency, and integrity" by clear and convincing evidence).

As Staff continues its statutory survey, it will be better equipped to advise the Commission on possible courses of action. Although Staff has identified several statutory schemes that may be suitable for individual treatment, either because they are

[1] http://isrweb.isr.temple.edu/projects/accproject/pages/GetStateRecords.cfm?State=NJ

overly broad, *see, e.g., N.J.S.* 33:1-25 and 26 (requiring the director of the Division of Alcoholic Beverage Control to affirmatively approve any licensee's decision to hire a person convicted of a "crime involving moral turpitude"), or potentially anachronistic, *see, e.g., N.J.S.* 4:12-41.4 (requiring an applicant for a license to test butter fat to "satisfy the director [of the Department of Agriculture] as to his moral character"), the Commission may wish to pursue a broader solution.

The Commission may wish to explore the possibility of crafting uniform definitions for the phrases "good moral character" and "moral turpitude", delineating specific disqualifying offenses. It may find, however, that due to the prevalence of this legislative shorthand, employing entirely consistent definitions across all statutes produces unexpected results. The requisite "good moral character" and "reputable standing" to adopt a child should not necessarily be equivalent to the "reputation for good character, honesty, integrity and responsibility" necessary to obtain a boxing license. *See N.J.S.* 2A:22-2 and *N.J.S.* 5:2A-15. One statute appears to contemplate "the advantage and benefit of the person to be adopted", while the other is concerned that the applicant "has not engaged in activities with or associated with members of organized crime". *See Id.*

For the class of statues that merely authorize, but do not require, a licensing agency to impose a collateral consequence, Staff is investigating whether the Rehabilitated Convicted Offenders Act, *N.J.S.* 2A:168A-1 to 16, provides adequate guidance. Section 2 establishes a procedure for the denial of an application for licensure based on a prior conviction, which is disallowed altogether if the offense does not "relate adversely to the occupation, trade, vocation, profession, or business for which the license or certificate is sought." Among other points, a licensing authority denying an application must consider, in writing, the following factors: the nature and seriousness of the crime, the remoteness of the crime, the age of the applicant at the time of commission, and any evidence of rehabilitation. *Id.* Section 3 "preclude[s] a licensing authority from disqualifying or discriminating against [an] applicant" who produces evidence of a pardon or expungement, or presents a certificate of rehabilitation from the authority overseeing the applicant's probation.

Despite RCOA's laudable goals, and the Legislature's subsequent 2007 articulation of a formalized procedure for obtaining a certificate of rehabilitation (*N.J.S.* 2A:168A-7 to 16), case law has revealed (and created) numerous problems with the 1968 act. When last construed by the Supreme Court in *Maietta v. N.J. Racing Comm'n,* the resultant four to two per curiam opinion held that RCOA was applicable to that agency due to the absence of "'savings' provisions" in its governing statutes, which would have allowed for the removal of a disqualifying conviction from the commission's licensure considerations. 93 *N.J.* 1, 8 (1983). The statutes controlling the Division of Alcoholic Beverage Control, in contrast, allow an applicant to apply to the director for the removal of disabilities arising from a "crime involving moral turpitude"—a clause that "serve[s] the same purpose as the RCOA." *Id.* Of course, for practical purposes, an alcoholic beverage licensee presented with the options available under *N.J.S.* 33:1-25 and 26, *supra*—of either obtaining permission to employ an applicant previously convicted of a

crime that possibly constitutes "moral turpitude", or simply hiring another bartender—will likely choose the latter. As such, the "savings" clauses in that statutory scheme do not approach the remedial effect of RCOA.

Despite the decision's seemingly restrictive effect, *Maietta* actually preserved far more of RCOA's applicable scope than its predecessor, *In re Schmidt*, which arguably excluded from the act's purview any statutory scheme (alongside the alcoholic beverage control laws) that evidences "special treatment" by the Legislature. *See* 79 *N.J.* 344, 354 (1979). That decision also exempted the Division of Alcoholic Beverage Control on the basis of its status as a law enforcement agency, under *N.J.S.* 2A:168A-6, despite the Appellate Division's position, articulated by Judge Pressler, that the exception applied only to the agency's employment of law enforcement officers, not its licensing function. *See Id. In re Schmidt*, 158 *N.J. Super.* 595, 602 (App. Div. 1978) ("If we accepted the Division's view that its excepted law enforcement function immunized it from compliance with the act in respect of its licensing function, there would be few, if any, licensing authorities to which the act would remain applicable.").

Other difficulties in applying RCOA arise from the lack of a statutory standard for weighing a past offense that is immediately relevant to licensure where an applicant presents a certificate of rehabilitation. *See N.J.S.* 2A:168A-3. *Cf. N.J.S.* 2A:168A-2. As a result, courts appropriately wishing to uphold agencies' refusals to issue licenses have been forced to do so based on a holding that undermines the very purpose of a certificate of rehabilitation: only the effect of a conviction is removed by the certificate, while the underlying blemish of inappropriate "conduct" remains. *See Hyland v. Kehayas*, 157 *N.J. Super.* 258, 262 (App. Div. 1978) ("[R]espondent's argument overlooks the fact that the action under review does not involve disqualification or discrimination because of a conviction of crime. The determination by the board consisted of a revocation for misconduct, a standard which does not depend upon a criminal conviction. Hence the provisions of the [RCOA] are inapplicable notwithstanding that the underlying misconduct may have also given rise to a criminal conviction."). *See also Bevacqua v. Renna*, 213 *N.J. Super.* 554, 561-62 (App. Div. 1986) ("A person whose license has been revoked by a licensing authority for violation of its regulations, whether evidenced by a conviction of an offense or established by other means, is not simply a convicted offender. Rather, such a person has violated the trust reposed in him by the licensing authority and thereby demonstrated a lack of the professional responsibility and moral qualities required for continued licensure."). At least one case provides a more commonsense reading of the statute. *See Storcella v. Dep't of Treasury,* 296 *N.J. Super*. 238, 243 (App. Div. 1997) (holding that *N.J.S.* 2A:168A-3 does not preclude a licensing authority from contemplating a past conviction in the event of an executive pardon; it merely prohibits the entity from automatically "disqualifying or discriminating against" an applicant on that basis). However, as construed, the law still provides no guidelines for a licensing agency's decision-making process in such an event.

The Commission may wish to entertain revisions to RCOA that better achieve the Legislature's objectives, as stated in *N.J.S.* 2A:168A-1. Notably, Judge Pressler's reversed Appellate decision in *Schmidt* found the first iteration of the "savings" clause

argument unconvincing, as it contended that RCOA, a broad remedial statute, did not supersede the ABC's prior, narrow means of removing a disqualifying conviction: "We are aware of no canon of statutory construction which would suggest that an earlier piecemeal approach to a subject should take precedence over or constitute an exception to a later and more comprehensively remedial approach." *Schmidt*, 158 *N.J. Super.* at 601. It may be appropriate to develop a new, more intelligible standard for RCOA's scope.