INTRODUCTION

In Padilla v. Kentucky, the Supreme Court held by a seven-to-two vote that “counsel must inform her client whether [the] plea carries a risk of deportation.” Although this holding alone makes the case a landmark, the decision suggests that it applies beyond the specific context of deportation. Padilla’s clear implication is that defense
attorneys should warn clients about other serious consequences—the "collateral consequences"—that flow automatically from a criminal conviction, even if they are not technically denominated criminal punishment.3 Because of their importance and their automatic application after certain criminal convictions, strong candidates for Sixth Amendment coverage include sex offender registration and incarceration, losing the ability to earn a living, and losing the ability to have or gain custody of a relative or foster child. Other collateral consequences may loom large with respect to particular clients based on their particular circumstances.

In recent years, imposing collateral consequences has become an increasingly significant function of the criminal justice system. This is, in part, because more people are being convicted of crimes.4 In addition, criminal records are increasingly available to public and private actors.5 Finally, more collateral consequences are being added to state and federal statutory and administrative codes, while few are being removed.6 Accordingly, asking counsel to advise about collateral consequences is no more or less than asking them to recognize and account for a core function of the criminal justice system.

Although occasionally guilty pleas will be invalidated for failure to comply with Padilla, the standards governing ineffective assistance of counsel suggest that withdrawn pleas will be few in number. A defendant must show that counsel's conduct was below the level to be expected of an ordinarily fallible attorney.7 Thus, failure to advise about a rare or obscure collateral consequence will not lead to relief, nor will an attorney be expected to offer advice based on facts or cir-

---


cumstances that, after reasonable diligence, remained unknown to the attorney.\(^8\) In addition, the client must show prejudice, in the sense that but for the incompetence advice, the defendant would have declined the plea on the table and gone to trial or sought a different bargain.\(^9\)

As the Court noted in Padilla, the fact that a successful ineffective assistance of counsel claim results in undoing the plea bargain and reinstating the original charges imposes an intrinsic disincentive to seeking plea withdrawal—taking back the plea means giving up the benefit of the bargain and facing the original charges once again.\(^10\) Accordingly, successful Padilla challenges are most likely to occur in cases involving pleas without a substantial discount from the probable sentence after trial, or relatively low absolute sentence risks, or both. That is, many more people would risk rolling the dice (and therefore knowing about a collateral consequence could have been determinative) if the plea was to an offense that would likely lead to probation or a short sentence even after trial, or to a sentence of roughly the same magnitude as the plea. For these reasons, in most cases, if defense attorneys do not give appropriate advice at and before the plea itself, it is likely that the plea will never be reviewed\(^11\) or that any challenge will be unsuccessful. Padilla’s import, therefore, will likely be primarily about the training, practices, and norms of defense attorneys rather than about litigating failure to comply with it.\(^12\)

This Essay examines two significant objections to the idea that defense counsel should systematically advise their clients about collateral consequences.\(^13\) The first objection, discussed in Part I, is that

---

11. The Supreme Court has held that there is no right to counsel in post-conviction proceedings. See Murray v. Giarratano, 492 U.S. 1 (1989); see generally Daniel Givelber, The Right to Counsel in Collateral, Post-Conviction Proceedings, 58 Md. L. Rev. 1393 (1999) (discussing right to counsel); Emily Garcia Uhrig, A Case for a Constitutional Right to Counsel in Habeas Corpus, 60 Hastings L.J. 541 (2009) (same). Accordingly, even individuals who have both legal grounds to challenge their guilty pleas and little sentencing risk in so doing may well not be able to afford counsel to seek plea withdrawal.
12. For an expression of the idea that a key part of improving indigent criminal defense is changing the attitudes and norms of criminal defense attorneys, see Jonathan A. Rapping, You Can’t Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring, 3 Harv. L. & Pol’y Rev. 161 (2009).
13. This Essay uses the terminology used by several important sources, including the ABA Criminal Justice Standards, the Uniform Collateral Consequences of Conviction Act (“UCCCA”) and Section 510 of the Court Security Improvement Act of 2007, Pub. L. No. 110-177 (2007). It breaks collateral consequences into two categories. Collateral sanctions apply automatically be-
advising about collateral consequences is an unreasonable demand on defense counsels’ time. Most criminal defendants in the United States are represented by public defenders or other appointed counsel.\textsuperscript{14} It was widely recognized before \textit{Padilla} that public defenders were overburdened; it is certain that lawyers struggling to do basic investigations and legal research may not be eager to have novel duties imposed upon them. While these considerations are real, this Essay proposes that they should not stand in the way of recognizing constitutional rights of defendants, including being made aware of the serious consequences they will face after conviction. Part I also discusses how consideration of collateral consequences could actually make defense counsels’ jobs easier.

The second objection, addressed in Part II, is that satisfaction of the duty, even by defense counsel with a reasonable amount of time to do so, is nearly impossible, because collateral consequences are a black box, difficult to find. In most states, the various collateral consequences have not been compiled, officially or unofficially, in such a way that they are accessible to lawyers, judges, or others who want to understand the consequences of particular criminal convictions on particular individuals. It is pointless to impose a duty on defense counsel that cannot be satisfied, either because it expects herculean research efforts, or because it will accept superficial advice based on moderate research. For \textit{Padilla} to be implemented across the range of collateral consequences, lawyers must be able to give reasonably accurate advice at a reasonable cost in time and effort. Part II proposes that that we are on the verge of making that possible.

Part III discusses some practicalities about the conversations defense counsel should have with clients about collateral consequences, to find out which ones may be applicable and how they might fit into the case.

\section{\textit{Padilla} and the Indigent Defense Crisis}

Defense lawyers are busy, so busy that in many cases they do not have time to perform essential legal tasks; indeed, some indigent defense systems have been subject to lawsuits alleging that they system-
attractively violate the Sixth Amendment. The literature is replete with accounts of attorneys who “meet ‘em and plead ‘em,” i.e., advise their clients to plead guilty minutes after first meeting them in lock-up. Some claim that the plea bargaining process systematically induces guilty pleas from innocent people. Not every public defender agency or appointed private counsel system works like this, of course, but there are enough overburdened, under-funded entities to raise a serious question of whether it is realistic or sensible to ask them to do more. This section advances several reasons that imposing an additional burden on counsel to explain the collateral consequences of criminal conviction is appropriate.

A. The Aspirational Nature of the Standard of Competence

The Supreme Court has described the role of defense counsel in noble terms. So too have the ABA Criminal Justice Standards, which are given some evidentiary weight in Sixth Amendment juris-


18. Thus, in Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2556 (2009), Justice Kennedy, joined in dissent by Chief Justice Roberts and Justices Breyer and Alito, referred to defense counsel’s duty to be a zealous advocate for every client. This Court has recognized the bedrock principle that a competent criminal defense lawyer must put the prosecution to its proof: [T]he adversarial process protected by the Sixth Amendment requires that the accused have “counsel acting in the role of an advocate.” The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted . . . the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

United States v. Cronic, 466 U.S. 648, 656-57 (1984) (internal citations omitted). See also MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1 (1980), in COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS (2008) (“The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . .” (internal citations omitted)).

19. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 4-1.2(b) (3d ed. 1993), available at http://www.ojp.usdoj.gov/BJA/topics/Plenary4/Workshops/Workshop4E/R_Maher3-CriminalJusticeSecStandards.pdf (“The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation.”).

2011] 679
Neither the Court nor the ABA describes the duties of counsel as ideals; they take seriously such considerations as cost and efficiency, and recognize that professional judgments will differ. However, they do assume and require vigorous action on the part of defense lawyers.

At the same time, it is clear that professional standards are not always met in the area of criminal defense. They are unmet not because the standards are so difficult or demanding that they are intrinsically out of reach of ordinary attorneys, but because the workloads of many attorneys do not give them the time to prepare cases as carefully as the standards require. These workloads, in turn, are a product of financial decisions. That is, states, counties and cities sometimes elect to finance indigent defense at levels that require attorneys to handle so many cases that they perform sub-standard work, and even work that is below the constitutional minimum. In many instances, defense attorneys are unable to perform basic work associated with representing a client, such as interviewing witnesses, seeking discovery from the prosecution, or studying the caselaw surrounding the charge.

The legal system can respond to the mismatch between law on the books and law in action in several ways. It could reduce the constitutional standard to meet the willingness of political bodies to satisfy it; that is, if it appears that only a sub-minimal level of criminal defense is politically feasible, then that and only that will be demanded by the Constitution. Alternatively, the legal system could continue to develop standards for criminal defense, recognizing that they will not always be immediately satisfied, in the hope that the standards will be met over time. In this context, as with all other laws, laws are not meaningless simply because they are not universally followed.

Compromising the Constitution based on governments’ willingness to comply with it seems unwise. As a policy matter, it would

22. See supra notes 15-17 and accompanying text.
likely lead to a race to the bottom. As Robert F. Kennedy observed as Attorney General, “[t]he poor man charged with crime has no lobby.”23 It seems unlikely that the political process will lead to fair outcomes for indigent defendants. Indigent defendants may be the classic discrete and insular minorities for whom judicial review was designed to protect from majoritarian politics.

Allowing the political branches of state governments to determine for themselves what the Constitution means also seems inconsistent with the nature of the constitutional guarantees surrounding the criminal process. The framers of the Bill of Rights and of the Fourteenth Amendment evidently believed that legal process should operate with care and deliberation before a free person lost his liberty.24

The legal system should not jettison basic aspects of legal representation simply because they are not always adequately funded. Accordingly, there is no absolute reason that reasonable duties promising to benefit clients should not be imposed on defense counsel. Realists recognize that some lawyers perform below the minimum professional level now and will do so in the future. However, the solution is to strive to meet the constitutional standard, rather than to admit that the Constitution cannot be followed.

B. The Developing Nature of the Standard of Competence

The content of adequate representation by criminal defense attorneys changes over time. Therefore, there is no reason to reject a new duty merely because it is new. Substantive law and constitutional criminal procedure changes; defense attorneys are, of course, expected to be able to make arguments based on the law as it develops. In addition, the techniques and tasks of legal representation change over time. For example, as DNA and other scientific evidence comes into general use, defense attorneys can be expected to keep current. As new sources of public records and private databases become available, defense attorneys must draw on them if there may be benefits to their clients from so doing. As techniques were developed for generating and presenting certain kinds of mitigation evidence in the penalty phases of capital trials, defense attorneys can be expected to keep up.

23. ANTHONY LEWIS, GIDEON’S TRUMPET 222 (1964).
24. It is notable that of the Bill of Rights, at least the Fourth, Fifth, Sixth, and Eighth Amendments address the criminal process, although of course, others, such as the First and Second, also limit the criminal authority of government.
Collateral consequences are, in many cases, of deep interest to defendants, more important than the traditional components of sentencing like fines or imprisonment. This is particularly true when the traditional forms of criminal punishment associated with the conviction are relatively minimal. But the mere fact that something is of great interest to a client does not mean that it is within the lawyer’s duty or capacity to engage; clients may be concerned about social stigma or non-legal aspects of family relationships, such as, say, whether a criminal conviction will lead a spouse to choose to initiate a divorce, or future business partners to shy away from investing. Even the most expansive view of counsel’s duty would not include advice about these things or allow withdrawal of a plea if the lawyer’s social evaluation turned out to be wrong.

Collateral consequences are different for two reasons. First, they are legal consequences imposed by the state because of criminal conviction. They are part of the legal response to crime. Thus, they differ from discretionary actions of private citizens because of their legal nature. There is a state interest in warning defendants of the consequences so that they can be enforced, which does not exist in the context of private responses to criminal conviction. There is also an element of unfairness in the state tying legal consequences to a criminal conviction, but then declaring that the state will provide no mechanism for individuals to learn about them as part of the criminal case.

Second, collateral consequences have direct connections to the criminal case, in the sense that they can affect the substance of plea bargaining or the nature of the sentence imposed. Given that plea bargaining and sentencing are duties of counsel, there is no professional reason for defense counsel to ignore legal grounds that may be used to obtain a better outcome for their client.

Padilla itself makes clear that collateral consequences can be legitimate considerations for the prosecutor and the court to consider at plea and sentence. As Justice Stevens wrote for the Court:

26. This is particularly so in that in many instances there is no opportunity to obtain relief. See Margaret Colgate Love, Paying Their Debt to Society: An Assessment of the Relief Provisions of the Uniform Collateral Consequences of Conviction Act, 54 How. L.J. 753, 757-58 (2011).
27. See Carissa Byrne Hessick, Ineffective Assistance at Sentencing, 50 B.C. L. Rev. 1069, 1069 (2009) (“The U.S. Supreme Court has said that the Sixth Amendment right to counsel includes a right to counsel at sentencing.”).
[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. . . . Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation. . . . At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.28

Other authorities support the idea that collateral sanctions are appropriately considered at plea and sentence. For example, the ABA Standards for Criminal Justice on Collateral Sanctions and Discretionary Disqualification of Convicted Persons provides that “[t]he legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender’s overall sentence.”29 The commentary explains that “[i]n accordance with the generally applicable principles of the Sentencing Standards, the sentencing court should ensure that the totality of the penalty is not unduly severe and that it does not give rise to undue disparity.”30

At least as a practical matter, it might be said that collateral consequences are a new, or at least newly recognized, part of criminal sentencing. Just as with DNA evidence, or the bias of a witness, collateral consequences will sometimes be crucial and in other cases be irrelevant.31 In a particular case, understanding collateral consequences may be meaningful to the disposition of the case, and, in another, it will be irrelevant.

From the perspective of law enforcement, bringing collateral consequences into the criminal case makes it more likely that the consequence will be carried out; a client who is actually warned that she may not possess a firearm, for example, may well comply. Similarly, applicable collateral consequences might be made part of probation

30. Id. cmt. 22.
31. That is, DNA evidence might be irrelevant if the defendant does not dispute that she is the source of the biological sample; the bias of a witness might be irrelevant if their testimony is duplicative or undisputed.
conditions. In some cases, a plea bargain can be reached that will avoid a particular collateral consequence. It is possible that bringing collateral consequences into the case will remind a client to seek an available form of relief. The possibility or certainty of severe collateral consequences will sometimes induce some clients to go to trial when they otherwise would have taken a plea.

In addition, awareness of collateral consequences is important for reentry. Almost all people convicted of crimes, even those sentenced to prison, will ultimately be released into free society. Not only the individual involved—but also society as a whole—has a strong interest in those convicted of crimes living law-abiding lives and not returning to crime. Accordingly, prosecutors and courts share with defense attorneys an interest in being aware of what restrictions a convicted individual will face, and in considering whether the collateral consequences as well as the traditional punishment are sensible as a whole. While prosecutors, judges and defense attorneys may disagree about what the proper sentence is in particular cases, they agree in principle that people should not be unjustly over-punished and that sanctions that unnecessarily prevent a person who could do so from living a law-abiding life should be avoided.\footnote{32. NAT’L Dist. ATTORNEYS ASS’N, POLICY POSITIONS ON PRISONER REENTRY ISSUES § 4(a) (adopted July 17, 2005), available at http://www.ndaa.org/pdf/policy_position_prisoner_reentry_july_17_05.pdf (recognizing that “the lack of employment, housing, transportation, medical services and education for ex-offenders creates barriers to successful reintegration and must be addressed as part of the reentry discussion’’); see also Robert M.A. Johnson, Message from the President: Collateral Consequences, THE PROSECUTOR, May-June 2001.}

There will be cases where knowledge of collateral consequences makes no formal difference in the outcome of the case; the client takes the same plea to the same charge and suffers the full brunt of whatever collateral consequences exist. \textit{Padilla} is not a waste of effort even then. One of the most important measures of the perceived justice of judicial proceedings is the perceived fairness of the proceedings.\footnote{33. Frederick Schauer, When and How (If at All) Does Law Constrain Official Action?, 44 GA. L. REV. 769, 780 n.57 (2010) (discussing the work of Tom Tyler).} Thus, even in such cases, it is worth it to advise the client of the consequences of conviction.

\section*{II. MAKING INFORMATION ABOUT COLLATERAL CONSEQUENCES ACCESSIBLE}

An additional practical objection to imposing a broad duty of advice under \textit{Padilla} is that at the moment in many jurisdictions the task
would be herculean. In most jurisdictions, there is no readily available official or unofficial source documenting collateral consequences. Accordingly, comprehensive advice about collateral consequences in any individual case would require massive amounts of research, which would be an unjustifiable expectation in a typical misdemeanor or even felony case. Lawyers can be expected to master particular discrete bodies of law, like a state’s criminal code or rules of evidence, but it is unreasonable to expect ordinary attorneys to make themselves familiar with the details of an entire state code addressing scores of discrete areas of law.

The solution to this problem is collective action. It is unreasonable to expect each attorney to do an immense amount of research for one case. However, it is perfectly reasonable to anticipate that the legal system, somehow, will see to it that research is done that can be shared with all participants in the criminal justice system and that will improve the quality of justice in many of the cases going through the system. The trick is learning how to generate and maintain lists of collateral consequences for each jurisdiction.

Fortunately, this problem is in the process of being solved. The issue was addressed analytically by the *ABA Criminal Justice Standards*, which instructs the states to maintain a current list of collateral consequences. This idea was also carried forward in the 2009 Uniform Collateral Consequences of Conviction Act promulgated by the Uniform Law Commission. In the Court Security Improvements Act of 2007, Congress directed the National Institute of Justice to carry out a fifty-state survey of collateral consequences created by state law. The contract for the project was awarded to the American Bar Association, which is in the process of connecting and categorizing the collateral consequences of the states and under federal law. Accordingly, in the near future, criminal defense lawyers and others will have access to a comprehensive database of collateral consequences applicable under the laws of the state.

34. ABA Standards on Collateral Sanctions & Discretionary Disqualification of Convicted Persons § 19-2.1 (2003) (“The legislature should collect, set out or reference all collateral sanctions in a single chapter or section of the jurisdiction’s criminal code. The chapter or section should identify with particularity the type, severity and duration of collateral sanctions applicable to each offense, or to a group of offenses specifically identified by name, section number, severity level, or other easily determinable means.”)


As it happens, it is likely that there will be several hundred collateral consequences in each state; in some jurisdictions, there will be more. For each state, then, there will be a massive amount of data. This raw data must be converted into digestible form. In addition, the ABA research project will create a snapshot, a collection of collateral consequences on the books as of a particular moment. It is essential that the data be kept up to date as new laws are passed and existing laws amended.

A. Putting Collateral Consequence Data in Usable Form

There is, to some extent, a trade-off between completeness of information and usability; the more complete a dataset is, the less understandable, and hence useful, it will be, and vice versa. Nevertheless, there is a tradition of simplification in this context that may help provide accurate and useful information. In many jurisdictions, bodies of legal data needed by attorneys and judges are digested into readily usable form. For example, some states have sentencing charts outlining the basics of the possible prison terms for convictions for particular offenses. This same approach could be used to convey information about collateral consequences.

One fact that makes it somewhat easier to convey information about collateral consequences is that some crimes are charged much more frequently than others. Accordingly, detailed information for a handful of criminal offenses will provide most information necessary in most cases. Thus, a useful summary could fit on a few pages. The cheat sheet for a particular state might contain the following lists:

- The immigration consequences of the twenty-five most common offenses of conviction.
- Other major collateral consequences of the twenty-five most common offenses of conviction.
- Crimes leading to loss of public benefits.
- Crimes leading to loss of parental or other family rights.
- Crimes leading to sex offender registration, notification, and incarceration.
- Crimes leading to the loss of the right to vote, serve on a jury, hold office or possess a firearm.

• Any available methods under state law for relieving collateral consequences.

Some of these crimes will be described categorically; for example, “felonies” might lead to the loss of the right to serve on a jury or possess a firearm. While this digest will not cover all of the possible consequences of all possible convictions, it will provide enough information for lawyers to give accurate advice in most situations. Further, it will be much more useful than presenting attorneys or clients with an undifferentiated list of hundreds or thousands of collateral consequences.

B. Maintaining Collateral Consequence Data

The snapshot of collateral consequences being created by the ABA will be an extremely useful data source. However, unless it is maintained, it will become increasingly obsolete and unreliable. Over time, there will be new collateral consequences created and old ones amended. Ultimately, it will be usable only as the basis for preliminary research, rather than as an active resource for reliable information. The success of the project will require some institution in the legal system to regularly update and republish the compilation.

The ABA Standards and the Uniform Act both contemplate that the states will enact legislation requiring some arm or branch of government to maintain and update the compilation of collateral consequences.38 However, neither has the force of law; states are not required to follow either unless they choose to do so through positive legislation. Accordingly, in states not following this guidance, the responsibility may fall to some other institution that chooses to take it up, such as the attorney general’s office, the state affiliate of the National Association of Criminal Defense Attorneys, or the state bar association.39

39. One important example of this is the Collateral Consequence Assessment Tool (“C-Cat”), being developed jointly by the North Carolina Office of Indigent Defense and the University of North Carolina School of Government. The project is funded by a grant from the Z. Smith Reynolds Foundation of Greensboro, North Carolina. Daryl Atkinson and Whitney Fairbanks are co-managers of the project, which built on the research done by the American Bar Association Criminal Justice Section. The aim of the project is to create a database that will allow attorneys (and others) to identify the collateral consequences associated with particular North Carolina crimes.
III. WHAT AND HOW SHOULD COUNSEL ADVISE?

Defense attorneys face an inherent tension in advising clients about collateral consequences. On the one hand, a single ordinary conviction may have, in principle, thousands of consequences. A single conviction under the law of any given state will trigger all of the applicable consequences in that state. It will also trigger federal consequences. In addition, should the person move to any other state, it is probable that the conviction would be treated as a conviction in that second state as well. Accordingly, literal advice about every consequence—reading, consequence by consequence, every bad thing that will happen—would take hours or days. In addition, it would not provide much useful information, because no individual will suffer more than a small fraction of the consequences because the consequences cover a wide range of behavior. That is, if a particular state denies a range of occupational licenses or permits to those convicted of felonies, no one individual is, for example, an accountant, and a barber, and a chiropractor, and a doctor of medicine. The challenge is to determine the handful of collateral consequences that are now or may in the future be of interest to the particular client.

On the other hand, there are enough serious consequences that it is problematic simply to identify a few major consequences that will be covered while ignoring the rest. That, as is suggested by the opinions in Padilla, would be misleading. All nine Justices in Padilla rejected a distinction, which had been prominent in lower courts, which treated misadvice differently from non-advice. Lower courts held that even as to an issue, such as deportation, which defense counsel had no duty to affirmatively advise, a guilty plea could be invalidated if a lawyer gave explicit misadvice. Thus, under these decisions, failing to warn of deportation was not a constitutional violation, but explicitly informing a client that she would not be deported could warrant withdrawal of a plea.

No member of the Padilla Court was impressed with this distinction. They found no meaningful difference between failing to address an important issue at all and addressing it wrongly, and their reasoning is powerful. It is based on the idea that “[a] fiduciary’s silence is

41. Id. (“There is no relevant difference ‘between an act of commission and an act of omission’ in this context.” (internal citation omitted)); Id. at 1487 (Alito, J., concurring in the judgment) (“An attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences

688 [vol. 54:675]
the same as a stranger’s lie.”42 Laypeople are entitled to expect that experts will raise all important considerations. Therefore, there is no meaningful difference between a lawyer’s, say, failure to mention that under applicable law the client might have to pay the opponent’s attorney’s fees if the case does not prevail, and affirmatively misadvising that “you will not have to pay the other side’s attorney’s fees even if we lose the case.” Clients expect counsel to raise all significant considerations; if an issue is not raised, the client is entitled to assume that the consideration does not exist. Accordingly, to raise some collateral consequences is an implicit representation that there are no others. If there are no others, or no other important ones, that is wonderful, but partial advice invites misunderstanding. The only stable principle is that counsel must strive to advise about all important and applicable collateral consequences.

The advice must then be both comprehensive and specific; it must focus on the important consequences without failing to warn about all of them—it must simultaneously be thick and thin. Attorneys can achieve this at reasonable cost by offering general information about collateral consequences and engaging the client in a conversation about what collateral consequences might be important to her in particular.

The general advice could be roughly based on what the Uniform Collateral Consequences of Conviction Act asks courts to do as part of the guilty plea colloquy. The script is as follows:

**NOTICE OF ADDITIONAL LEGAL CONSEQUENCES**

If you plead guilty or are convicted of an offense, you may suffer additional legal consequences beyond jail or prison, [probation] [insert jurisdiction’s alternative term for probation], periods of [insert term for post-incarceration supervision], and fines. These consequences may include:

- being unable to get or keep some licenses, permits, or jobs;
- being unable to get or keep benefits such as public housing or education;
- receiving a harsher sentence if you are convicted of another offense in the future;
- having the government take your property; and

---

being unable to vote or possess a firearm.

If you are not a United States citizen, a guilty plea or conviction may also result in your deportation, removal, exclusion from admission to the United States, or denial of citizenship. The law may provide ways to obtain some relief from these consequences. By providing this information, an attorney will have conveyed the general contours of possible collateral consequences that might be applicable to the client.

The lawyer should also ask questions to help determine the existence of additional important consequences. The lawyer can discern many of the potential collateral consequences by asking:

- whether the client is a citizen of the United States;
- how the client is employed;
- whether the client owns firearms;
- whether the client receives any public benefits;
- whether the client holds any licenses, permits, or government contracts; and
- whether the client has any questions based on the categorical advisement.

The nature of the charge will determine how the attorney proceeds. If the charge is a serious felony to which alternative dispositions are unlikely, such as a murder or armed robbery, the attorney’s task may merely be advisory; the attorney should advise the client of consequences of the plea, such as deportation and loss of the right to vote or possess firearms.

However, if the charge is less serious, and there are possible alternatives, counsel should explore whether there are any important consequences that would warrant a plea to a different offense that would not carry the consequence, or whether the consequences are so serious that diversion or some other outcome would be appropriate. Identification and articulation of collateral consequences may also persuade the court and prosecutor that a particular sentence is justified.

CONCLUSION

Padilla v. Kentucky represents both a blessing and a burden for defense counsel. It is a burden because it requires them to do more work on top of an already demanding set of responsibilities. But there

---

43. Uniform Collateral Consequences of Conviction Act § 5 (final draft 2010).
are ways to simplify and institutionalize this work by taking advantage of the ABA’s collection of collateral consequences in each state, organizing them into usable form, keeping them updated, and making them available to counsel and others who can make use of them.

The benefit to the system is clear. Bringing collateral consequences into defense counsel’s strategy and planning in criminal cases may help defendants avoid some serious collateral consequences by seeking plea bargains that do not carry them. In addition, persons convicted of crimes are more likely to comply with any collateral consequences applicable to them if they know about them. Moreover, clients may well feel they have been treated more fairly and respectfully by the system if serious legal consequences they face do not come as complete surprises.