

## **SJ 3: Study the Board of Pardons and Parole**

### *Certificates of Rehabilitation*

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#### Background

As part of its study of the Board of Pardons and Parole, the Law and Justice Interim Committee (LJIC) requested more information about "certificates of rehabilitation". This paper provides more information about the design and use of certificates of rehabilitation in other states and discusses existing constitutional provisions and statutes in Montana that relate to restoration of certain rights after conviction.

Criminal convictions, especially of felony offenses, often result in lasting effects on an offender's life, even after that person has completed the sentence. A criminal conviction can disqualify a person for certain benefits or privileges or can affect that person's ability to obtain a job, housing, or professional licensing after conviction. These effects are known as "collateral consequences" of a conviction.

A survey of state laws produced by the American Bar Association Commission on Effective Criminal Sanctions (ABA survey)<sup>1</sup> notes that all states have some mechanism to restore or alter the effects of collateral consequences. These mechanisms range from an official pardon by the Governor or other authority to the expungement of the record by a judge. In other states, laws provide presumption of rehabilitation after a set amount of time after conviction and with good behavior. Some states have established an administrative or judicial procedure helping an offender to regain certain rights and to demonstrate to the public and others that the person is rehabilitated.

The ABA survey uses the term certificate of rehabilitation generally and broadly and defines it as "an official recognition that a criminal offender deserves to regain legal rights and status lost as a result of a conviction, and has demonstrated reliability and good character over a period of time."<sup>2</sup> The survey then reviews several administrative or judicial procedures established by states and calls these processes administrative certificates of rehabilitation. This paper reviews only those states identified by the ABA survey as having administrative certificates of rehabilitation.

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<sup>1</sup>Margaret Love and April Fraizer, *Certificates of Rehabilitation and Other Forms of Relief from the Collateral Consequences of Conviction: A Survey of State Laws*, *The American Bar Association*, Oct. 2006, available from: [http://meetings.abanet.org/webupload/commupload/CR203000/otherlinks\\_files/convictionsurvey.pdf](http://meetings.abanet.org/webupload/commupload/CR203000/otherlinks_files/convictionsurvey.pdf), last accessed Dec. 16, 2013. [cited as Love and Fraizer]

<sup>2</sup>Love and Fraizer, p. 2.

## Certificates of Rehabilitation in the States

### *Summary of the ABA Survey*

According to the ABA survey, at least six states offer administrative certificates of rehabilitation: California, Connecticut, Illinois, Nevada, New Jersey, and New York. The process to obtain a certificate and the legal effect of that certificate varies from state to state, as does the survey's judgment of them. New York created two separate certificates, which are termed "unique in scope" by the survey. The California, Nevada, and New Jersey certificates were deemed to have "little operational usefulness".

In California, a court in the offender's county of residence can issue a certificate to an offender upon application if it finds the offender has been rehabilitated. To qualify, the offender must have completed a 7-to-9-year "period of rehabilitation" after the offender's sentence expires and must meet certain statutory qualifications, such being law-abiding, and exhibiting good moral character and good conduct. If the court issues a certificate, the court also forwards the case to the Governor to recommend that the person be pardoned.

In Connecticut, the parole board can offer "provisional pardons" to Connecticut offenders, as well as federal and out-of-state offenders. The provisional pardon is offered in addition to the state's regular pardon process, which can only be applied for after 5 years have passed. When granted, the provisional pardon prevents an employer from denying or terminating employment "solely on the basis of a prior conviction".

In Illinois, two certificates are available to offenders and modeled on the New York certificates. An offender is not eligible for either certificate unless that person has two or fewer nonviolent felony convictions. The certificate of relief from disabilities creates a "presumption of rehabilitation" that licensing boards that govern 27 specific occupations must take into account. The certificate of good conduct gives the offender evidence that the Illinois Prisoner Review Board has found that the offender is law-abiding and is rehabilitated but it does not specify specific relief to which the holder is entitled. However, the ABA study finds that the Illinois certificates are limited in their effectiveness, unlike the New York certificates, because "neither overrides legal disabilities or absolute disqualifications".

In Nevada, a certificate is issued by the State Board of Pardons Commissioners, which is a panel that includes the Governor, state Supreme Court Justices, and the Attorney General. An offender is not eligible for the certificate until 5 years after the offender is released from custody. The ABA study notes that, as of 2006, the Board had not awarded a certificate in years because its effects are nearly the same as a full pardon.

New Jersey's law provides that at least 2 years after being denied an occupational license because of a conviction, an offender may apply for a certificate of rehabilitation from a state probation officer or the federal or state parole board. Once the certificate is granted, the offender's conviction may not be used to disqualify the offender for the

license. The ABA study found that, as of 2006, no one had applied for or received a certificate in New Jersey for 15 years.

In New York, two certificates are available. The certificate of relief from disabilities is awarded to offenders convicted of misdemeanor or first-time felony offenses. The certificate of rehabilitation is awarded by the state parole board to repeat offenders after 1 to 5 years, depending on the offense that resulted in conviction. Both certificates create a "presumption of rehabilitation" that employers and licensing boards must recognize. The certificates can also be awarded to out-of-state offenders who live in New York if certain conditions are met.

### *Model Legislation*

Several organizations, generally those working on offender reentry issues or with employment and other economic issues, offer model legislation for jurisdictions looking to implement a certificate of rehabilitation. The Uniform Law Commission, whose mission is to "[provide] states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law",<sup>3</sup> also offers model legislation on the subject. Called the "Collateral Consequences of Conviction Act" and drafted in 2010, the model addresses a wide range of legal rights or privileges that can or are denied offenders. Among the solutions offered in this model is a "Certificate of Restoration of Rights", which would give employers, licensing boards or agencies, and others "concrete and objective information about an individual under consideration for an opportunity or benefit, and a degree of assurance about that individual's progress toward rehabilitation" to ease the reintegration of offenders into society.<sup>4</sup> Although the model legislation was introduced in several states in 2013, to date, none have adopted it.<sup>5</sup>

### Existing Montana Constitutional and Statutory Provisions

If the LJIC wishes to pursue legislation to create a certificate of rehabilitation, it will need to consider existing Montana law related to the consequences of a criminal conviction. For that purpose, a very short, general overview of Montana law in this area is provided below. Because this type of legislation could be complex and touch many areas of law, however, a more thorough review of the Montana Code Annotated, as well as discussion with key stakeholders, should take place before the committee authorizes any bill drafts.

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<sup>3</sup>"About the ULC," *Uniform Law Commission*, available from: [http://www.uniformlaws.org/Narrative.aspx?title=About the ULC](http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC), last accessed Dec. 16, 2013.

<sup>4</sup>"Collateral Consequences of Conviction Act Summary," *Uniform Law Commission*, available from [http://www.uniformlaws.org/ActSummary.aspx?title=Collateral Consequences of Conviction Act](http://www.uniformlaws.org/ActSummary.aspx?title=Collateral%20Consequences%20of%20Conviction%20Act), last accessed Dec. 16, 2013. [cited as ULC model]

<sup>5</sup>ULC model.

Article II, section 28(2), of the Montana Constitution provides that "[full] rights are restored by termination of state supervision for any offense against the state."

Title 37, chapter 1, part 2, of the Montana Code Annotated, regulates the licensure of criminal offenders. Section 37-1-201, MCA, which provides the part's purpose, notes the competing policy considerations of contributing to the rehabilitation of offenders while also protecting the interests of the public through licensing provisions. Section 37-1-203, MCA, provides that a criminal conviction is not an absolute bar to licensure in Montana and that licensing authorities may not deny a license to a person based solely on the fact of a previous criminal conviction.

However, a licensing agency may deny a license to an applicant on the basis of a criminal offense if the offense relates to the "public health, welfare, and safety as it applies to the occupation for which the license is sought". In those cases, the agency must conduct an investigation and find that the applicant isn't "sufficiently rehabilitated" for the agency to issue the license. If the agency denies a license "wholly or partially" because of a criminal conviction, it must provide a written statement of the reasons for that decision (37-1-204, MCA).

Part 2 also provides that "[completion] of probation or parole supervision without any subsequent criminal conviction is evidence of rehabilitation" (37-1-205, MCA). The law still allows an agency to consider "the facts surrounding the situation that led to the probation or parole supervision" when a person applies for a professional license. It also clarifies that the chapter does not prevent an agency from licensing a person under state supervision if there isn't sufficient evidence after an investigation to keep the agency from granting the license.

An April 2011 job hunting guide written by the Montana Department of Labor and Industry for people with criminal records notes that former offenders often face being denied licensure by boards for "unprofessional" conduct or as a potential threat to public safety.<sup>6</sup> Section 37-1-316, MCA, provides that unprofessional conduct includes "conviction, including conviction following a plea of nolo contendere, of a crime relating to or committed during the course of the person's practice or involving violence, use or sale of drugs, fraud, deceit, or theft, whether or not an appeal is pending".

The public testimony that generated the idea of a certificate of rehabilitation also suggested that a current Montana statute that provides for a parole achievement credit might serve as a guide for what the criteria for a certificate could look like. The Montana Board of Pardons and Parole must consider any of the achievements listed in the statute as significant when it considers whether it should release a parolee from

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<sup>6</sup>"Inside Edition: A Job Hunting Guide for Montanans with Criminal Records," *Montana Department of Labor and Industry*, April 2011, p. 5, available from: <http://www.cor.mt.gov/content/Reentry/jobhunting.pdf>, last accessed Dec. 16, 2013.

supervision before the expiration of the parolee's sentence. As provided in section 46-23-1027, MCA, those achievements are:

- obtaining a high school diploma or general equivalency diploma;
- obtaining a degree from an accredited postsecondary educational institution;
- completion of an approved apprenticeship program;
- completion of an accredited vocational certification program;
- employment of at least 20 scheduled hours a week, for 6 or more months;
- attendance at a faith-based, social service, or rehabilitation activity for 6 or more months; or
- any other achievement designated by a department rule.

### Other Legislative Considerations

If the LJIC considers legislation related to certificates of rehabilitation, the members should:

- be clear about what type of collateral consequences it intends to relieve with the certificate;
- specify what requirements an offender must meet to apply for and be issued a certificate;
- decide who should have the authority to issue a certificate; and
- be clear how the certificate will differ from existing relief options, including pardons or commutations.