

February 2016

Evolving Standards of Reasonableness: The ABA Standards and the Right to Counsel in Plea Negotiations

Margaret Colgate Love

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Criminal Law Commons](#), [Immigration Law Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Margaret Colgate Love, *Evolving Standards of Reasonableness: The ABA Standards and the Right to Counsel in Plea Negotiations*, 39 Fordham Urb. L.J. 147 (2012).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol39/iss1/5>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

EVOLVING STANDARDS OF REASONABLENESS: THE ABA STANDARDS AND THE RIGHT TO COUNSEL IN PLEA NEGOTIATIONS

*Margaret Colgate Love**

ABSTRACT

The ABA Criminal Justice Standards have been recognized by the Supreme Court as one of the most important sources for determining lawyer competence in right to counsel cases. Because the constitutional test under the Sixth Amendment is whether defense counsel's performance was "reasonable" under "prevailing professional norms," the standard of competence is necessarily an evolving one. The Supreme Court's decision in Padilla v. Kentucky underscores the defense bar's stake in participating in the ABA standard-setting process to guide the development of defense counsel's obligations in plea negotiations. In addition, to the extent the courts give the ABA Standards credence in judging ineffective assistance claims, they can be powerful catalysts for changing the behavior of other actors in the plea process, as well as system norms. The Standards can also be leveraged to help the defense bar gain access to the additional resources necessary to comply with the constitutional obligations of defense lawyers post-Padilla. Two developments give this problem particular urgency: One is the proliferation of status-generated "collateral" penalties affecting every activity of daily life, penalties that are frequently more severe than any sentence potentially imposed by the court. The other is the broad applicability of these collateral penalties to misdemeanants and other minor offenders who in the past would have been spared the reduced legal status and stigma reserved for convicted felons. Part I of this Article analyzes the Supreme Court's treatment of

* Law Office of Margaret Love. Ms. Love has chaired two drafting task forces of the ABA Standards Committee (Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, 2001–2004, and Standards on the Treatment of Prisoners, 2005–2010). Since 2009 she has served as liaison to the Standards Committee from the National Legal Aid & Defender Association.

the ABA Standards in Sixth Amendment cases, and Part II discusses the manner in which the Standards are developed and approved as ABA policy. Part III describes the provisions of the Standards that govern plea negotiations, and proposes their expansion in light of the new mandate given defense lawyers by Padilla. It concludes by urging greater defender participation in the Standards process to shape how the Sixth Amendment standard evolves, and to maximize Padilla's systemic effect.

TABLE OF CONTENTS

Abstract	147
Introduction	148
I. The ABA Standards in the Supreme Court	149
II. The ABA Standards Process	153
III. Evolving Standards of Reasonableness	158
A. Current ABA Standards Relating to Representation in Plea Negotiations	158
B. The Need for Revisions to the Standards Post- <i>Padilla</i>	162
Conclusion.....	167

INTRODUCTION

In cases applying the Sixth Amendment right to counsel, the Supreme Court has given credence (if not quite deference) to what the bar thinks a lawyer's duty to the client ought to be. As the leading organization of legal professionals in the United States, the American Bar Association (ABA) has been a constant source of received wisdom on the topic of lawyer competence. Through its ethics rules and standards, the ABA exerts a powerful influence over how American lawyers behave, largely because the courts are their willing enforcers. Accordingly, the defense community has an important stake in participating in the ABA standard-setting process if it is to have some control over defender obligations under the Constitution. This Article argues that defense lawyers, particularly public defenders, should participate in a more sustained way in the process of developing ABA Criminal Justice Standards.

Part I analyzes the Supreme Court's treatment of the ABA Standards in Sixth Amendment right to counsel cases. Part II discusses the manner in which the Standards are developed and approved as ABA policy. Part III describes the provisions of the Standards that govern plea negotiations and proposes their expansion in light of the new

mandate given criminal defense lawyers by *Padilla v. Kentucky*.¹ This Article concludes by proposing that defender organizations should seize the opportunity presented by *Padilla* to guide how the Sixth Amendment standard evolves and to maximize *Padilla*'s systemic effect.

I. THE ABA STANDARDS IN THE SUPREME COURT

In *Padilla v. Kentucky*, the Supreme Court reaffirmed that the Sixth Amendment right to effective assistance of counsel applies to the guilty plea stage of a criminal case.² Until *Padilla*, however, the Court had not said much about the extent of counsel's constitutional duty to the client in plea negotiations. Indeed, the Court had even suggested that counsel need only advise about rights that the client would forego by entering a plea³ and of the "direct" or court-imposed consequences that conviction would have.⁴

The *Padilla* Court recognized that counsel's Sixth Amendment duty to advise the client about the consequences of pleading guilty is frequently broader and more subtle, holding that "constitutionally competent counsel would have advised [the client] that his conviction for drug distribution made him subject to automatic deportation."⁵ The Court thus ventured farther than any lower federal court in extending the right to counsel to the substance of a guilty plea, and to the consequences of conviction that are not part of the court-imposed sentence. The concurring Justices, noting the "longstanding and

1. 130 S. Ct. 1473 (2010).

2. *Id.* at 1486 ("[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." (citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985))); see also *McMann v. Richardson*, 397 U.S. 759, 770–71 (1970).

3. *McMann*, 397 U.S. at 769–71; see also *Libretti v. United States*, 516 U.S. 29, 50–51 (1995) ("Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo."). In *Hill*, 474 U.S. at 52–53, the Court did not reach the question whether counsel's failure to explain the terms of parole eligibility was constitutionally deficient, since *Hill* had not claimed that he was prejudiced thereby.

4. *Padilla*, 130 S. Ct. at 1488 (Alito, J., concurring) ("Virtually all jurisdictions'—including 'eleven federal circuits, more than thirty states, and the District of Columbia'—'hold that defense counsel need not discuss with their clients the collateral consequences of a conviction,' including deportation" (quoting Gabriel J. Chin & Richard Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002))).

5. *Id.* at 1478.

unanimous position of the federal courts” that lawyers need not inform their clients about this “collateral” consequence of conviction, called the Court’s decision “a major upheaval in Sixth Amendment law” that “will lead to much confusion and needless litigation.”⁶ The dissenters warned that the logic—and thus the reach—of the Court’s decision could not be limited to deportation consequences “except by judicial caprice.”⁷

While the Court’s substantive holding in *Padilla* was unexpected, its constitutional analysis was familiar. The Court examined whether defense counsel’s representation “[fell] below an objective standard of reasonableness,” and whether there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁸ The first part of this test—first applied by *Strickland v. Washington*⁹ in 1984 to trials and by *Hill v. Lockhart*¹⁰ in 1985 to pleas—is “necessarily linked to the practice and expectations of the legal community: “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”¹¹ The *Strickland* Court referred to “American Bar Association standards and the like,” as “guides to determining what is reasonable”¹²

Given the *Strickland* Court’s apparent stamp of approval, it was predictable that lower courts would rely upon ABA standards and ethics rules relating to guilty pleas to test the effectiveness of attorney performance in a variety of plea-related contexts.¹³ Still, the courts

6. *Id.* at 1487, 1491, 1487 (Alito, J., joined by Roberts, C.J., concurring).

7. *Id.* at 1496 (Scalia, J., dissenting).

8. *Id.* at 1481 (quoting *Strickland*, 466 U.S. at 688, 694 (1984)).

9. 466 U.S. 668 (1984).

10. 474 U.S. 52 (1985).

11. *Padilla*, 130 S. Ct. at 1481 (quoting *Strickland*, 466 U.S. at 688).

12. *Strickland*, 466 U.S. at 688. In the years after *Strickland*, the Court repeatedly cited the ABA Standards in measuring effective attorney performance under *Strickland*’s first prong. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (“[W]e long have referred [to these ABA Standards] as ‘guides to determining what is reasonable.’”); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (“[ABA]standards to which we long have referred as ‘guides to determining what is reasonable’”).

13. *See, e.g.*, *United States v. Blaylock*, 20 F.3d 1458, 1466 (9th Cir. 1994) (“Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.” (citing ABA Pleas of Guilty Standards)); *Johnson v. Duckworth*, 793 F.2d 898, 901 (7th Cir. 1986) (“The Code of Professional Responsibility and the American Bar Association Standards for Criminal Justice likewise indicate that a defendant should be informed about and participate in the plea bargaining process.”); *Jiminez v. State*, 144 P.3d 903, 906 (Okla. Crim. App. 2006) (“Competent representation under prevailing professional norms

stopped short of finding an affirmative obligation to advise the client about collateral consequences.¹⁴ In *Padilla*, the Court took the plunge that the lower courts had worked hard to avoid, holding that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client [considering a guilty plea] regarding the risk of deportation.”¹⁵ In the process, the Court reaffirmed and extended *Strickland’s* reliance on the ABA Standards as “valuable measures of the prevailing professional norms of effective representation,”¹⁶ citing two separate volumes of the Standards in addition to a variety of practice guides and treatises.¹⁷

The fact that the constitutional test of effective representation is “necessarily linked to the practice and expectations of the legal community”¹⁸ has two important and related results. One is that the test is continually evolving. The other is that the legal community has a degree of control over what the Constitution means. The *Padilla* Court suggested as much when it noted, in support of its holding, how much emphasis the defense bar has placed on standard-setting and training in immigration law issues.¹⁹

includes, at a bare minimum, *communicating with the client* concerning offers to settle a case” (citing Oklahoma ethics rules and ABA Standards)); *Davie v. State*, 381 S.C. 601, 609 (2009) (failure to communicate with client about a plea offer “constitutes unreasonable performance under the prevailing professional standards established by the American Bar Association or state-specific ethical rules of conduct”); *State v. James*, 739 P.2d 1161, 1167 (Wash. Ct. App. 1987) (counsel’s duty under ethics rules and ABA Standards includes “not only communicating actual offers, but discussion of tentative plea negotiations and the strengths and weaknesses of defendants’ case so that the defendants know what to expect and can make an informed judgment whether or not to plead guilty”).

14. See *Padilla*, 130 S. Ct. at 1488 (Alito, J., concurring). See generally Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 Iowa L. Rev. 119, 131–139 (2009) (analyzing the “affirmative misadvice” rule as a “flawed exception to the flawed collateral consequences rule”).

15. *Padilla*, 130 S. Ct. at 1482.

16. *Id.*

17. *Padilla*, 130 S. Ct. at 1482–83. The Court cited the ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 4–5.1(a) (3d ed. 1993) [hereinafter DEFENSE FUNCTION STANDARDS or PROSECUTION FUNCTION STANDARDS, depending upon the section cited] and the STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 14–3.2(f) (3d ed. 1999) [hereinafter PLEAS OF GUILTY STANDARDS], as well as the National Legal Aid and Defender Association, Performance Guidelines for Criminal Representation § 6.2 (1995), a Justice Department compendium of standards for indigent defense systems, and a variety of academic treatises and law review articles.

18. *Id.* at 1482.

19. *Id.*

As might be expected, at least some of the Justices are not entirely comfortable with ceding even a limited degree of control over the constitutional test to private membership organizations. Thus, some professional codes and practice guides are accorded greater deference than others. For example, in *Bobby v. Van Hook*, the Court disapproved in a per curiam opinion of the lower court's reliance on a detailed set of ABA Guidelines enacted in 2003 long after the defendant's trial.²⁰ The Court distinguished the 2003 Guidelines from more general ABA standards in effect at the trial.²¹ In doing so, the Court pointed out that the 131-page 2003 Guidelines "expanded what had been (in the 1980 [Criminal Justice] Standards) a broad outline of defense counsel's duties in all criminal cases into detailed prescriptions for legal representation of capital defendants."²² The Court objected to treating the more detailed standards as "inexorable commands," as opposed to "'only guides' to what reasonableness means," reserving the possibility that it might "accept the legitimacy" of guidelines that did not "interfere with the constitutionally-protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."²³ Justice Alito concurred separately to underscore his objection to according any "special relevance" to the 2003 ABA Guidelines, noting that the "venerable" ABA "is, after all, a private group with limited membership."²⁴ Justice Alito further noted that "[t]he views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003

20. See *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009) (holding that the 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases were "quite different" from the Standards for Criminal Justice that the Court had approved in *Strickland* as an appropriate guide to what is reasonable performance under the Sixth Amendment).

21. *Id.*

22. *Id.* More specifically, the 2003 Guidelines

discuss the duty to investigate mitigating evidence in exhaustive detail, specifying what attorneys should look for, where to look, and when to begin. See ABA Guidelines 10.7, comment., at 80–85. They include, for example, the requirement that counsel's investigation cover every period of the defendant's life from "the moment of conception," *id.* at 81, and that counsel contact 'virtually everyone . . . who knew [the defendant] and his family' and obtain records 'concerning not only the client, but also his parents, grandparents, siblings, and children,' *id.* at 83. Judging counsel's conduct in the 1980s on the basis of these 2003 Guidelines—without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial—was error.

Id.

23. *Id.* at 17 n.1.

24. *Id.* at 20.

Guidelines, do not necessarily reflect the views of the American bar as a whole.”²⁵

II. THE ABA STANDARDS PROCESS

The two most respected sources of criminal defense lawyers’ professional duties to the client are the ABA Model Rules of Professional Conduct and the ABA Standards for Criminal Justice. The Model Rules are generally made directly enforceable against the lawyers who violate them by incorporating state codes of lawyer ethics. That way, the model rules are literally part of the “prevailing professional norms” to which lawyers in a given jurisdiction are bound. A lawyer who violates some specific ethical duty owed to the client under applicable rules is almost by definition guilty of deficient performance. (Of course, such deficient performance may or may not prejudice the client so as to violate the Sixth Amendment.)

The ABA Standards for Criminal Justice likewise spell out a lawyer’s duty to his or her client. Because, however, the Standards are generally not incorporated into enforceable codes of lawyer conduct, they are less clearly a necessary measure of constitutionally deficient performance. Over the years, the Standards have earned their place as a measure of “prevailing professional norms” for purposes of the Sixth Amendment because the process by which they are developed is a thorough and balanced one.

The Standards are a multi-volume collection of best practices covering almost every aspect of the criminal process, ranging from familiar areas like pre-trial release, sentencing, and post-conviction remedies, to more contemporary issues involving technological means of surveillance and DNA evidence.²⁶ When the Standards project began

25. *Id.* The 2003 Guidelines were a joint project of the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation. See *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 914 (2003). The long list of acknowledgments introducing the Guidelines does not appear to include any prosecutors or government representatives, or any official liaisons to the project from national organizations representing prosecutors or attorneys general. See *id.* Nor do any sitting judges appear to have participated in the project. See *id.* By contrast, as described in the following section, the process for developing the Criminal Justice Standards has from the beginning of the project in the 1960s been regarded as reflecting the views of all segments of the profession. See Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14–15 (2009).

26. A complete set of the Standards, which are divided into volumes by topical area, and a history of their development, are available at

in 1964 under the aegis of then-ABA President (and later Justice) Lewis Powell, such standards were “a novel concept.”²⁷ When he introduced the first edition of the Standards in 1974, Warren Burger (who had been chair of the Standards project until his appointment as Chief Justice in 1969) described the project as “the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history” and recommended that “[e]veryone connected with criminal justice . . . become totally familiar with their substantive content.”²⁸ Since that time, the seventeen original volumes of the Standards have been revised, in some cases several times, and new topics have been added to address newly-developed technology and newly important topics.²⁹ The Standards have proved a valuable resource for the courts,³⁰ for practitioners,³¹ and for the academy.³²

http://www.americanbar.org/groups/criminal_justice/policy/standards.html. The history of the Standards, their use by courts, and the process by which they are developed, are usefully elaborated in Marcus, *supra* note 25, at 14–15. At the time his article was published, Judge Marcus was particularly well-qualified to comment on the Standards process, having been involved in it for a number of years as chair of several drafting task forces, as a member of the Committee, and as the Committee’s chair. See also Rory K. Little, *The Role of Reporter to a Law Project*, 38 HASTINGS CONST. L.Q. 747 (2011) (describing the process of revising the Criminal Justice Standards for the Prosecution and Defense Function, by the reporter to that project).

27. B.J. George, Jr., *Symposium on the American Bar Association’s Mental Health Standards: An Overview*, 53 GEO. WASH. L. REV. 338, 388–39 (1985).

28. Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251 (1974).

29. Among volumes recently approved for the Third Edition are Special Functions of the Trial Judge (2000); Electronic Surveillance of Private Communications (2002); Collateral Sanctions and Discretionary Disqualification of Convicted Persons (2004); Speedy Trial and Timely Resolution of Criminal Cases (2006), and Treatment of Prisoners (2010). The black letter of Standards on Prosecutorial Investigations has been approved, with publication forthcoming. The on-going revisions of the Prosecution and Defense Function Standards will be the first volumes in the Fourth Edition.

30. Marcus reports that “[a] recent Westlaw search indicates that more than 120 Supreme Court opinions quote from or cite to the Standards and/or their accompanying commentary,” and “[o]ver the past 40 years, the federal circuit courts have cited to the Standards in some 700 opinions, beginning the year the first Standards were published.” Marcus, *supra* note 25, at 11 (citing *Bruce v. U.S.*, 379 F.2d 113, 120 n.19 (D.C. Cir. 1967) (citing Standards Relating to Pleas of Guilty)). In addition, the Standards have “had a major impact on court rules.” *Id.*

31. See Marcus, *supra* note 25, at 12 (citing examples).

32. *A Symposium: The American Bar Association Standards Relating to the Administration of Criminal Justice, Part II*, 12 AM. CRIM. L. REV. 415 (1975); *A Symposium: The American Bar Association Standards Relating to the Administration of Criminal Justice, Part I*, 12 AM. CRIM. L. REV. 251, 251–414 (1974); B.J. George, Jr., *supra* note 26; Marcus, *supra* note 25, at 13 (citing *Symposium on the Collateral Sanctions in Theory and Practice*, 36 U. TOL. L. REV. 441 (2005)). To these might be add-

The process by which the Standards are created underscores their influence. All segments of the criminal justice bar and bench are represented in their development, initially by a drafting task force and subsequently by the Standards Committee, which is a standing committee of the Criminal Justice Section whose nine members are composed of prosecutors, defense attorneys, academics, and judges.³³ Nonvoting liaisons from the major national organizations of prosecutors and defense lawyers, the National Association of Attorneys General and the U.S. Department of Justice, also participate at each stage of the work.³⁴ The balance of interests that these participants reflect has been a key feature of the process of developing the Standards since the inception of the project in the 1960s.³⁵ This balance remains

ed Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011), devoted to the 2010 Treatment of Prisoners Standards, and Justin Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in §2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1 (2011), Lissa Griffin & Stacy Caplow, *Changes to the Culture of Adversaries: Endorsing Candor, Cooperation and Civility in Relationship Between Prosecutors and Defense Counsel*, 38 HASTINGS CONST. L.Q. 845 (2011), devoted to the revisions of the Prosecution Function and Defense Function Standards.

33. *About Criminal Justice Standards*, ABA CRIMINAL JUSTICE SECTION, http://www.americanbar.org/groups/criminal_justice/policy/standards.html (last visited Dec. 29, 2011).

34. See Marcus *supra* note 25, at 14–15. Marcus describes the progress of a draft from task force to Standards Committee to CJS Council as follows:

With the chair presiding over its discussions, a particular task force may meet from four to eight times until a draft is finalized. At each meeting, the discussion focuses on extensive memoranda and preliminary drafts. The task force reporter, usually a law professor, judge, or practitioner, well-schooled and experienced in the subject matter of the Standards—has disseminated well in advance of each meeting. . . . [O]nce a task force draft is completed, it is sent to the Standards Committee. In a series of its own meetings, the committee, aided by the task force chair and reporter, reviews, revises, and approves the draft. Although the Standards Committee recognizes and often defers to the expertise of those specialists who serve on the task force and to the compromises reached in task force meetings, the discussions in the Standards Committee are often spirited and may lead to significant, substantive changes, as well as stylistic ones, in the Standards draft. As in the task forces, though, the goal is persuasion and consensus; close votes on the language of a particular Standard are rare

Id.

35. In 1974, Chief Justice Burger described the ABA committee that developed the first edition of the Standards as comprised of “more than 100 of the nation’s leading jurists, lawyers and legal scholars operating in advisory committees of 10 or 12 each,” with “the participants . . . drawn from every part of the country and includ[ing] state and federal judges, prosecuting attorneys, defense lawyers, public defenders, law professors, penology experts and police officials.” See Burger, *supra* note 28, at 251. This broad range of experience and perspective made the Standards “much

essential to the status accorded the Standards by the courts in the Sixth Amendment context as the measure of “prevailing professional norms of effective representation” against which a criminal defense lawyer’s performance will be tested.³⁶

The draft that emerges from the Standards Committee then undergoes two readings, months apart, in the ABA Criminal Justice Section Council.³⁷ The Council’s membership is also intentionally balanced.³⁸ Along the way, drafts are widely circulated and comments are invited.³⁹ While a Standards project has occasionally become controversial at the Council level, it has never been impossible to achieve consensus. Before the Standards become official ABA policy, they must be approved by vote of the ABA House of Delegates, which is a body

more than a theoretical and idealistic restatement of the law, but rather a synthesis of the experience of a diverse and highly experienced group of professionals.” *Id.*

36. *See, e.g.*, Bobby v. Van Hook, 130 S. Ct. 13, 17 (2009) (contrasting the Standards with the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases); *supra* notes 18–22 and accompanying text. Since the early 1990s, there has been a formal membership quota system intended to keep membership on the Standards Committee balanced between prosecutors and defenders, with academics and judges together constituting a third interest group. However, this system seems to have resulted over the years in a larger representation of prosecutors than of defenders on the Standards Committee — at least if one understands a defender to be someone whose career has been devoted to defense work. It has struck this observer that prosecutors who leave government to engage in defense work rarely become public defenders, frequently do not lose a prosecutorial perspective, and may even return to government midway through their term on the committee. Accordingly, defender representatives on the Standards Committee, as on the Criminal Justice Section Council, may not share a common viewpoint and speak with one voice in the same way that prosecutors do. In recent years, public defenders have been in particularly short supply on both the Standards Committee and the Council, which makes the liaison role of the national defender organizations particularly important.

37. *See* Marcus, *supra* note 25, at 15.

38. *See id.*

39. The procedure after the Standards Committee submits its approved draft of the black letter to the Criminal Justice Section Council is described as follows:

Again with the assistance of the task force chair and reporter, the Council reviews, revises, and approves draft Standards in at least two meetings, in which the Standards receive a first and second “reading.” Before each reading, drafts are circulated widely within and outside the ABA, and comments are solicited, not only from the Section’s own committees, but also from the national organizations represented on the Council and other potentially interested individuals and organizations. As in the Standards Committee, despite the deference owed and given to the expertise and effort that produced the draft before the Council, significant changes may result from the Council’s discussions as the body seeks to achieve a final consensus of opinion.

Id. at 15.

composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions, and members, and the Attorney General of the United States, among others.⁴⁰ Once the House approves the Standards, they become the official policy of the 400,000 member ABA.⁴¹

Many steps must be completed before the Standards are finally adopted as ABA policy, and a broad array of viewpoints are involved in the process. The preparation of commentary, which takes place after ABA House approval, consumes at least another year. It is thus easy to see why the entire process frequently takes more than five years to complete, even just for a revision of an existing volume. But after all is said and done, the ABA can confidently claim that the practical guidance reflected in the Standards is “based on the consensus views of a broad array of professionals involved in the criminal justice system.”⁴² It can also be assured that the Standards will be perceived as “a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of accused individual[s].”⁴³

Before leaving the discussion of the arduous and time-consuming process by which the ABA Standards are hammered out, it bears emphasizing that the defense bar can and should have a significant influence over that process. It must insist on doing so where defense counsel’s performance is at issue because, as the Court emphasized in *Padilla*, the bar’s standard-setting entities have considerable influence over what the Sixth Amendment requires.⁴⁴ To the extent the ABA can be said to speak for the bar (pace Justice Alito⁴⁵), it is in the Standards process more than anywhere else that “prevailing professional norms of effective representation” will emerge. Accordingly, the defense community has an important stake in paying close attention to and participating actively in the Standards process if it is to

40. *See id.*

41. *See id.*

42. *See* Brief for the American Bar Association as Amicus Curiae Supporting Respondents, *Missouri v. Frye* (No. 10-444) and *Lafler v. Cooper* (No. 10-209), 2011 WL 3151278 at *2–*3.

43. Burger, *supra* note 28, at 252.

44. *Padilla*, 130 S. Ct. at 1482–83.

45. *See Bobby v. Van Hook*, 130 S. Ct. 13, 20 (2009) (Alito, J., concurring) (“The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association’s members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole.”).

have some control over how its evolving Sixth Amendment obligations are reflected and codified in the Standards.

III. EVOLVING STANDARDS OF REASONABLENESS

A. Current ABA Standards Relating to Representation in Plea Negotiations

The ABA Standards emphasize a defense lawyer's duty to represent a client competently in the pretrial stages of a criminal case, including in plea negotiations. This means that, at a minimum, counsel must "keep the defendant advised of developments arising out of plea discussions conducted with the prosecuting attorney, and . . . promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney."⁴⁶ Counsel must also "explore the possibility of an early diversion of the case from the criminal process"⁴⁷ and "promptly communicate and explain to the accused all significant plea proposals made by the prosecutor."⁴⁸ The ABA Criminal Justice Standards have contained these requirements for more than thirty years,⁴⁹ and they have been cited by numerous courts both before and after *Strickland* as establishing the norm of effective representation in

46. See PLEAS OF GUILTY STANDARDS, *supra* note 17, Standard 14-3.2(a).

47. See DEFENSE FUNCTION STANDARDS, *supra* note 17, Standard 4-6.1(a); see also PLEAS OF GUILTY STANDARDS, *supra* note 17, Standard 14-3.2(e) ("At the outset of a case and whenever the law, nature and circumstances of the case permit, defense counsel must 'explore the possibility of a diversion of the case from the criminal process.'").

48. See DEFENSE FUNCTION STANDARDS, *supra* note 17, Standard 4-6.2(b). The commentary to Standard 4-6.2 explains:

Because plea discussions are usually held without the accused being present, the lawyer has the duty to communicate fully to the client the substance of the discussions. . . . It is important that the accused be informed . . . of proposals made by the prosecutor; the accused, not the lawyer, has the right to decide . . . [on] prosecution proposal[s], even when a proposal is one that the lawyer would not approve. If the accused's choice on the question of a guilty plea is to be an informed one, the accused must act with full awareness of the alternatives, including any that arise from proposals made by the prosecutor.

Id.

49. See DEFENSE FUNCTION STANDARDS, *supra* note 17, Standard 4-6.2(a); PLEAS OF GUILTY STANDARDS, *supra* note 17, Standard 14-3.2(a), (b). The ethical duty to convey and advise about a plea offer was also contained in the 1969 Model Code of Professional Responsibility that antedated the Model Rules. See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1980) ("A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.").

the guilty plea context.⁵⁰ They reflect the judgment that the decision to plead guilty is so vital that it is specifically identified in the Model Rules of Professional Conduct as one of the very few that cannot be made by the lawyer alone.⁵¹ Thus, the decision whether to plead and what plea agreement to accept are “ultimately for the accused . . . after full consultation with counsel.”⁵² The Standards also require that a lawyer must fully explain and advise about the choices available to a client considering a plea offer, after conducting an appropriate investigation and analysis of all pertinent issues of fact and law:

[T]o aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.⁵³

The commentary to this Standard explains that “[t]his is a critical standard because the system relies, at heart, on defense counsel to en-

50. See cases cited *supra* note 13; see also *State v. Donald*, 10 P.3d 1193, 1198 (Ariz. Ct. App. 2000); *People v. Perry*, 68 P.3d 472, 477 (Colo. App. 2002); *Cottle v. State*, 733 So. 2d 963, 966 (Fla. 1999); *Lloyd v. State*, 373 S.E.2d 1, 2–3 (Ga. 1988); *People v. Ferguson*, 413 N.E.2d 135, 138 (Ill. App. Ct. 1980); *Lyles v. State*, 382 N.E.2d 991, 993–94 (Ind. Ct. App. 1978); *People v. Alexander*, 518 N.Y.S.2d 872, 879 (N.Y. 1987); *State v. Simmons*, 309 S.E.2d 493, 497 (N.C. Ct. App. 1983); *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994); *Hanzelka v. State*, 682 S.W.2d 385, 387 (Tex. Ct. App. 1984); *Becton v. Hun*, 516 S.E.2d 762, 766 (W. Va. 1999).

51. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (a lawyer “must abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify”); *id.* R. 1.4(a)(1) (a lawyer must “promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required by these rules”); *id.* R. 1.4(b) (a lawyer must “explain a matter to the extent reasonably necessary to permit the client to make informed decisions”). The first example in the commentary to Rule 1.4 of this duty to inform the client is that “a lawyer who receives from opposing counsel . . . a proffered plea bargain in a criminal case must promptly inform the client of its substance.” *Id.* R. 1.4 cmt. 2 (matters are “fundamental” or “substantive” because they are highly personal or derive from constitutional guarantees).

52. See DEFENSE FUNCTION STANDARDS, *supra* note 17, Standard 4-5.2(a). The commentary to Standard 4-5.2 explains that “because of the fundamental nature of decisions such as these, so crucial to the accused’s fate, the accused must make the decisions himself or herself.” *Id.*

53. See PLEAS OF GUILTY STANDARDS, *supra* note 17, Standard 14-3.2(b); see also DEFENSE FUNCTION STANDARDS, *supra* note 17, Standard 4-6.1(b) (“Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including analysis of controlling law and the evidence likely to be introduced.”).

sure that a defendant's guilty plea is truly knowing and voluntary and is entered in his or her best interests."⁵⁴

The Standards caution courts not to accept a plea "where it appears the defendant has not had the effective assistance of counsel."⁵⁵ At the same time, the standards envision a comparatively modest role for the court in apprising a defendant about the consequences of a plea:

Although the court must inquire into the defendant's understanding of the possible consequences at the time the plea is received . . . this inquiry is not, of course, any substitute for advice by counsel. The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations that may not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial.⁵⁶

The Standards currently say very little about the prosecutor's role in ensuring that a defendant understands the consequences of pleading guilty, except to say that prosecutors should not misrepresent facts or law in plea negotiations⁵⁷ or lead an unrepresented person to believe that the prosecutor is "on [his or her] side."⁵⁸

Until 1999, the Standards did not specifically refer to "collateral consequences"⁵⁹ in the context of plea negotiations.⁶⁰ In the third edi-

54. See PLEAS OF GUILTY STANDARDS, *supra* note 17, Standard 14-3.2(b).

55. See *id.* Standard 14-1.4(c) ("The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea."). The commentary to this Standard notes that a similar provision was contained in the Uniform Rules of Criminal Procedure, promulgated in 1987. See UNIF. R. CRIM. P. 444(b)(2) (1987) (court "may not accept the plea if it appears that the defendant has not had the effective assistance of counsel").

56. PLEAS OF GUILTY STANDARDS, *supra* note 17, Standard 14-3.2 cmt.

57. See PROSECUTION FUNCTION STANDARDS, *supra* note 17, Standard 3-4.1(c).

58. *Id.*, cmt.

59. The term "collateral consequences" has become a familiar term describing the legal penalties and disabilities to which people are exposed when they plead guilty to a crime, though the term "status-generated penalties" might be more apt and legally precise. See *Parker v. Ellis*, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting) ("Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities."). The *Padilla* Court cast doubt on the usefulness of the term "collateral" to describe these penalties for purposes of the Sixth Amendment. See 130 S. Ct. at 1481 ("We . . . have never applied a distinction between direct and collateral consequences to define the scope of consti-

tion revision of the Pleas of Guilty Standards, Standard 14-3.2(f) asks defense counsel, “[t]o the extent possible,” to “determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”⁶¹ The commentary to this Standard urges counsel to “interview the client to determine what collateral consequences are likely to be important to a client given the client’s particular personal circumstances and the charges the client faces,” and to “be active rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant.”⁶² It also notes that since the second edition of the Standards was published in 1980, “the number and significance of potential collateral consequences had grown to such an extent that it [was] important to have a separate standard to address this obligation.”⁶³ The “separate standard,” however, consists of a single sentence, and the obligation it imposes is modestly hedged by the introductory phrase “to the extent possible.”⁶⁴

The Pleas of Guilty Standards contemplate that the court will participate in alerting a defendant considering a guilty plea about possible collateral consequences.⁶⁵ Since, however, “only defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case,”⁶⁶ in the absence of

tionally ‘reasonable professional assistance.’”). Thus, the term is used in this Article for descriptive purposes only, or because it is used in existing ABA Standards.

60. The 1981 Criminal Justice Standards on the Legal Status of Prisoners contained a section on “Civil Disabilities of Convicted Persons.” See *Legal Status of Prisoners*, ABA CRIMINAL JUSTICE SECTION, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_prisoners_status.html (last visited Dec. 29, 2011). Because, however, those Standards contemplated that such “disabilities” would be imposed on a case-by-case basis, as opposed to automatically upon conviction, there was no connection with guilty pleas or sentencing. Twenty years before, the drafters of the Model Penal Code had been more prescient in seeing that link. See Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *FORDHAM URB. L.J.* 1705, 1711–13 (2003) (describing § 306.6 of the 1962 Model Penal Code).

61. See PLEAS OF GUILTY STANDARDS, *supra* note 17, Standard 14-3.2(f).

62. *Id.*, cmt.

63. *Id.*

64. *Id.*

65. See PLEAS OF GUILTY STANDARDS, *supra* note 17, Standard 14-1.4(c) (“The court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to . . . if the defendant is not a United States citizen, a change in the defendant’s immigration status.”).

66. *Id.* Standard 14-3.2 cmt.

a court rule, the court's admonishment is primarily a means of confirming that counsel's duty of advisement has been carried out.⁶⁷

In summary, the current Standards give effect to an accused individual's paramount right to make a fully informed decision as to whether or not to plead guilty, a decision that is "fundamental" or "substantive" because it is highly personal and derives from constitutional guarantees.⁶⁸ The Standards emphasize that defense counsel plays a pivotal role in advising the accused individual at this critical stage of the case. If counsel fails to fully and accurately explain the choices that a client faces, the client will be effectively deprived of the right to knowingly and intelligently make a decision that will predictably have a dramatic effect on his or her future. While the Standards acknowledge a role for the court in admonishing the defendant about the range of status-generated "collateral consequences" that flow from a guilty plea, they also emphasize that "only defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case."⁶⁹ The Standards recognized well before the courts that defense counsel's advisement role under the Sixth Amendment is very different from that of the court under the Due Process Clause.⁷⁰

B. The Need for Revisions to the Standards Post-*Padilla*

The ABA Standards provide an adequate framework for delineating defense counsel's role in counseling clients in plea negotiations. In many respects, that framework is an excellent one. But *Padilla* confirms the need not only for additional practical guidance, but also for an expansion of the legal profession's expectation of how competent defense counsel should perform. Two developments give this

67. See ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 19-2.3(f) (3d ed. 2004) (the court should "ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense . . . by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged").

68. See *supra* note 51; see also *Jones v. Barnes*, 463 U.S. 745, 745, 751 (1983) (recognizing that decisions about fundamental matters, including decision to plead guilty, are reserved for the defendant).

69. See PLEAS OF GUILTY STANDARDS, *supra* note 17, Standard 14-3.2 cmt.

70. See Margaret Colgate Love, *Collateral Consequences after Padilla v. Kentucky: From Punishment to Regulation*, 30 ST. LOUIS U. PUB. L. REV. (forthcoming 2012) [hereinafter Love, *Punishment to Regulation*] (criticizing the collateral consequences doctrine as applied by the courts before *Padilla*, based on a failure to differentiate the institutional advisement roles of court and counsel).

problem a degree of urgency. One is the proliferation of status-generated penalties affecting every activity of daily life—penalties that are frequently more severe than any sentence that a court may potentially impose.⁷¹ The other is the broad applicability of these collateral penalties to misdemeanants and other minor offenders who in the past would have been spared the reduced legal status and stigma reserved for convicted felons.⁷²

Cases decided since *Padilla* suggest that competent counsel will be required, as a matter of constitutional law, to warn a client considering a guilty plea about the consequences of conviction that are severe, certain, and of predictable importance to the client, and whether these consequences arise from statute, regulation, or contract.⁷³ To catch up to this fast-moving judicial train, the ABA Standards should be expanded to include a checklist of duties in connection with plea negotiation to elaborate the general competence requirements in the existing Standards, including how defense counsel should relate to other actors in the process where collateral penalties are concerned. Such a checklist⁷⁴ should include, at a minimum:

71. The trend noted in the 1999 Pleas of Guilty Standards has accelerated in the years since the terrorist attacks of 9/11. *See supra* note 62. *See generally* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 *How. L.J.* 753, 770–74 (2011) (describing expanded scope and severity of collateral penalties in federal and state law in past two decades). In a NIJ-funded compilation of collateral consequences in every U.S. jurisdiction, the American Bar Association has tentatively identified thousands of laws and regulations imposing penalties based on conviction. *See* Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 *How. L. Rev.* 675, 686–86 (2011).

72. *See generally* Jenny Roberts, *Why Misdemeanors Matter*, 45 *U.C. DAVIS L. REV.* (2012) (forthcoming 2012) (describing how “minor criminal convictions lead to major collateral consequences”). In the past, in some jurisdictions misdemeanants were ineligible to apply for executive clemency on the theory that they had no need for this relief. Today, in recognition of the change in this situation, many state clemency dockets include a large proportion of applications from misdemeanants. *See generally* MARGARET COLGATE LOVE, *RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE* (2008), available at http://www.sentencingproject.org/detail/publication.cfm?publication_id=115 (providing state-by-state data on the frequency of clemency grants).

73. *See* Love, *Punishment to Regulation*, *supra* note 70.

74. In functioning as a “checklist,” the Standards must steer a course between “broad outline” and “detailed prescriptions” that “interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.” *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984); *see* *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009). Too little detail makes the Standards unhelpful as practice guidance, and too much detail makes them unenforceable by courts. A revision of the Defense Function Standards underway at the time of this writing would seem to present an opportune vehicle for development of such a check-

- Identifying and advising the client about all consequences of conviction that are likely to be important to the client, in time to enable the client to consider this information in deciding whether to pursue trial, plea, or other dispositions;⁷⁵
- Seeking dispositions and sentences that avoid or minimize applicable collateral penalties in accordance with the client's goals;⁷⁶
- Considering collateral penalties in negotiations with the prosecutor over particular dispositions (including dispositions that avoid conviction),⁷⁷ and in communications with

list. The general desirability of checklists to help professionals navigate complex situations is described in ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2009).

75. PLEAS OF GUILTY STANDARDS, *supra* note 17, Standard 14-3.2(f) requires identification and advisement about collateral consequences “[t]o the extent possible.” The Collateral Sanctions Standards require that jurisdictions should “collect, set out or reference all collateral sanctions in a single chapter of the jurisdiction’s criminal code.” Collateral Sanctions Standard 19-2.1; *see also* Collateral Sanctions Standard 19-2.3(a) (providing that the court should “ensure, before accepting a plea of guilty that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law.”). The commentary to Collateral Sanctions Standard 19-2.3 provides that “[c]ollection of applicable collateral sanctions pursuant to Standard 19-2.1 will make it possible for lawyers to give full advice in all cases. Thus, the contingency in Standard 14-3.2(f) that qualifies defense counsel’s duty would no longer pertain.” The inventory required by Standard 19-2.1 will be confined to statutory and regulatory consequences, so that defense counsel must question a client closely about sanctions that may be imposed by private contract.

76. For example, PLEAS OF GUILTY STANDARDS, *supra* note 17, Standard 14-3.2(e) requires that “[a]t the outset of a case and whenever the law, nature and circumstances of the case permit, defense counsel should ‘explore the possibility’ of a diversion of the case from the criminal process.” A similar requirement is contained in Defense Function Standards, *supra* note 17, Standard 4-6.1(a). *See* PLEAS OF GUILTY STANDARDS, *supra* note 17, Standard 14-4.1 (providing that diversion may be appropriate based on “special characteristics or difficulties of the offender”) (citing National District Attorneys Association, National Prosecution Standards, § 44.4(b) (2d ed. 1991)). There are other dispositions that may avoid conviction and thus collateral consequences. *See* Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT. RPT. 6 (2009). Certain convictions or sentences may avoid particular collateral consequences. *Id.*

77. *See supra* note 74; *see also* National District Attorneys Association, National Prosecution Standards 4-1.3 (3d ed. 2009) (providing that “undue hardship . . . to the accused” can be a basis not to charge or to agree to a particular plea); U.S. Attorney’s Manual 9-28.1000(A) (1997) (stating that with corporate defendants, “[p]rosecutors may consider the collateral consequences” in determining “whether to charge” and “how to resolve” the case).

the court or court officers regarding the appropriate sentence or conditions to be imposed;⁷⁸ and

- Advising the client about applicable procedures for obtaining relief from collateral sanctions, including expungement or sealing of records of conviction and arrest, certificates of relief from disabilities, and pardon.⁷⁹

The availability of a full inventory of collateral consequences is obviously necessary to make practicable the duty of advisement described above.⁸⁰ While the situation of clients who are not citizens may have a particular urgency in light of the almost-irremediable consequence of deportation, there are many other kinds of consequences that impose significant and lasting burdens on clients that must be

78. For example, Collateral Sanctions Standard 19-2.4 (“Consideration of collateral sanctions at sentencing” provides that a “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.”).

79. The Collateral Sanctions Standards provide several opportunities to avoid or mitigate collateral sanctions. Standard 19-2.4 provides that a court at sentencing should be authorized to take them into account in determining the overall sentence. Standard 19-2.5 provides that a court (or administrative agency) should be authorized “to enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction.” There will be occasions when “timely and effective” relief can only be granted at sentencing itself, as where a defendant sentenced to probation will otherwise lose his job or home or retirement income. The availability of relief from collateral sanctions in post-conviction proceedings has been held relevant in constitutional challenges to their imposition in the first instance. *See State v. Letalien*, 985 A.2d 4, 26 (Me. 2009) (“The retroactive application of the lifetime registration requirement and quarterly in-person verification procedures of SORNA of 1999 to offenders originally sentenced subject to SORNA of 1991 and SORNA of 1995, without, at a minimum, affording those offenders any opportunity to ever be relieved of the duty as was permitted under those laws, is, by the clearest proof, punitive, and violates the Maine and United States Constitutions’ prohibitions against ex post facto laws.”); *Doe v. Sex Offender Registration Bd.*, 882 N.E.2d 298, 309 (Mass. 2008) (“[T]he retroactive imposition of the registration requirement without an opportunity to overcome the conclusive presumption of dangerousness that flows solely from Doe’s conviction, violates his right to due process under the Massachusetts Constitution.”).

80. *See Chin*, *supra* note 71, at 678 (“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.”). In 2008, Congress directed the Department of Justice to carry out a nationwide survey of collateral consequences, a project now underway under the auspices of the American Bar Association. *See supra* note 71. It is expected that the ABA research project will create a comprehensive database of collateral consequences, though it will remain for particular jurisdictions to put this data into usable form, and it will have to be updated as new laws are passed and existing laws are amended.

addressed in the earliest stages of plea discussions.⁸¹ An inventory of collateral consequences will not only make it more practicable for defense counsel to discharge their duty of advisement, but it will also facilitate the court's responsibility to ensure that a defendant pleading guilty has been appropriately advised,⁸² and the government's responsibility to reassure the public that a case has been dealt with in a just manner, consistent with public safety.⁸³

The second development that gives urgency to the project of elaborating performance standards for defense counsel relating to collateral consequences is the disproportionate severity of collateral penalties attaching to even the most minor offenses, which has raised the stakes on early pleas where counsel has not had time to adequately investigate the client's situation. More generally, it has raised anew issues of whether and when persons who are not exposed to a prison sentence should be entitled to counsel before they give up their right to contest their guilt.⁸⁴ The facts of life in busy misdemeanor courts

81. See, e.g., *Calvert v. State*, 342 S.W.3d 477, 491-92 (Tenn. 2011) (ineffective assistance in failure to warn client pleading guilty to sex offense about lifetime supervision requirement); *State v. Fonville*, 2011 Mich. App. LEXIS 140 (Mich. Ct. App. 2011) (same, concluding constitutionally defective performance when defense counsel failed to inform Fonville of the same sex offender registration requirement when pleading guilty to child enticement); *Com. v. Abraham*, 996 A.2d 1090 (Pa. Super. Ct. 2010), *appeal granted*, 9 A.3d 1133 (Pa. Nov. 30, 2010) (same, forfeiture of pension as a result of misdemeanor sex offense conviction); *In re C.P.H.*, No. FJ-03-1313-02, 2010 WL 2926541 (N.J. Super. Ct. App. Div. Jul. 23, 2010) (same, lifetime supervision for juvenile who pled to sex offense). See generally *Punishment to Regulation*, *supra* note 70 (describing cases extending *Padilla*'s holding to collateral consequences other than deportation).

82. See *supra* notes 67-69; see also Love, *Punishment to Regulation*, *supra* note 70 (describing post-*Padilla* developments in due process case law).

83. In April 2011, the Attorney General of the United States wrote to the attorneys general of all fifty states "encourag[ing]" them "to evaluate the collateral consequences in [their] state[s]—and to determine whether those that impose burdens on people convicted of crime without increasing public safety should be eliminated." See, e.g., Letter from Attorney General Eric H. Holder, Jr. to Vermont Attorney General William H. Sorrell (Apr. 18, 2011), available at <http://onlawyering.com/wp-content/uploads/2011/05/VT-Attorney-General-Sorrell.0001-1.pdf> ("[G]ainful employment and stable housing are key factors that enable people with criminal convictions to avoid future arrest and incarceration."). The letter indicated that the Justice Department "intend[s] to conduct a similar review of federal collateral consequences identified in the American Bar Association study." *Id.*

84. If *Padilla* requires competent counsel in connection with any guilty plea that triggers the penalty of deportation, it would extend the holding of *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) ("A suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged." (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 40 (2006))).

make a mockery of the current ABA Standard warning that defense counsel should “under no circumstances . . . recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.”⁸⁵ At the same time, the severity of the penalties to which even misdemeanants are now exposed lends constitutional force to policy arguments that clients charged with minor crimes should not be compelled to plead as a condition of release. If “prevailing professional norms” forbid a lawyer to advise a client to plead at first appearance before adequate investigation and counseling can take place, any such plea would be entered in the absence of genuine defense representation, and would thus be vulnerable to constitutional challenge.⁸⁶ It is safe to predict that an insistence on a genuine opportunity for counseling in light of the severity of potential collateral consequences will result either in fewer pleas or, in time, fewer consequences.⁸⁷

CONCLUSION

The ABA Criminal Justice Standards have been recognized by the Supreme Court as one of the most important sources for determining defense counsel competence under the Sixth Amendment. Because the constitutional test is whether defense counsel’s performance was “reasonable” under “prevailing professional norms,” it is necessarily an evolving one. Accordingly, it behooves defender organizations to take an active role in the ABA Standards process to guide the devel-

85. See DEFENSE FUNCTION STANDARDS, *supra* note 17, Standard 4-6.1(b). See generally Roberts, *supra* note 72 (describing lack of misdemeanor representation guidance in standards for defense representation).

86. In certain limited circumstances it may be in the client’s interest to enter a plea at arraignment, as for example where detention may result in deportation without regard to conviction. In such a case, the record during the guilty plea colloquy should reflect that counsel has had an opportunity to fully investigate. Counsel should attempt to ensure that the plea is not to charges that necessarily result in deportation.

87. See Love, *Punishment to Regulation*, *supra* note 70, at 36 (“Because the parties to plea negotiations must be able to deal with the immediate issues presented by the criminal case without the distractions represented by a defendant’s concerns over status-generated penalties, *Padilla* will in time lead away from the punitive model illustrated by the pension forfeiture in *Abraham* toward an administrative law model, where penalties are reasonably related to the criminal conduct, and more flexibly applied. When prosecutors find it harder to craft acceptable plea offers because of collateral sanctions, when defendants are willing to risk going to trial to avoid them, and when judges are moved to set pleas aside because the agreed-upon deal later seems unfair, the system of collateral consequences that traps so many in a degraded social status must change.”).

opment of defender obligations under the Sixth Amendment. In addition, to the extent the courts give the Standards credence in judging ineffective assistance claims, they can be powerful catalysts for changing the behavior of other actors in the process, as well as system norms. Finally, the Standards can be leveraged to help defense attorneys gain access to the additional resources necessary to comply with their constitutional obligations post-*Padilla*. In a word, the Standards can and should be used as a sword and a shield by defenders who are determined not to let the crisis moment the *Padilla* decision presents go unimproved.