

Guidelines for Collaboration and Engagement: Prosecutors and Defense Counsel Working Together in Joint Post-Conviction Investigations

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INTRODUCTION

Since 1989, there have been over 3,000 documented exonerations.¹ Increasingly, conviction integrity or post-conviction justice units within prosecutors' offices have been leading or assisting those efforts. What makes those efforts successful – whether that be an exoneration or other agreed-upon relief – is a collaborative review process involving both prosecutors and defense counsel.

Conducting collaborative work between traditional courtroom adversaries is steering through uncharted waters. In a typical criminal prosecution, the prosecutors provide information to the defense and the defense does an independent investigation before trial. The thought of interviewing a witness together or jointly speaking with an expert regarding forensic testing is, if not foreign, certainly unprecedented. What does a joint collaboration look like? What are the rules? How can traditional courtroom adversaries work in a way that both feel part of the process and trust each other?

To try to provide some guidance to professionals engaged in collaborative post-conviction investigations the Quattrone Center gathered over 100 practitioners together through four days of online meetings to produce working guidelines. We met with defense counsel first, and prosecutors second. We decided to hold separate meetings to provide space where participants could raise issues they felt could not be comfortably raised in the presence of others. Defense lawyers were able to frankly discuss their frustrations with prosecutors and provide information they felt prosecutors need to know. Prosecutors discussed their feelings of frustration and even betrayed trust over past investigations that started out well but turned sour.

What emerged was a comprehensive set of Guidelines for Collaboration and Engagement. Those who attended the meetings were quick to point out that there is only so far a nationally-aimed project like this can go; so much of post-conviction investigation and litigation is driven by local and state statutory or even ethics limitations. While in some states, prosecutors can subpoena witnesses and conduct depositions without pending active litigation, that remains a pipe dream in others. Some states offer those convicted of crimes they claim to have not committed generous latitude to file petitions in court based upon new evidence of innocence while others restrict the ability to a single post-conviction petition. And, perhaps most important for innocence/conviction integrity work, some states allow prosecutors to file affirmative motions seeking to reverse a conviction or request a fairer sentence, but the great majority require the defendant to open the matter. Because of this diversity in state approaches, the next phase of this project will be to conduct similar gatherings at the state level – to offer states the opportunity to devise their own guidelines consistent with their unique criminal legal system.

There was strong agreement among participants on most of the principles outlined here. Where there were disagreements, we have noted them and provided perspectives from both prosecutors and defense lawyers.

Of course, the principles presented here are not mandates; they are guidelines – considerations for both prosecutors and defense counsel as they navigate the extra-judicial process of conviction integrity and post-conviction justice work.

1 National Registry of Exonerations -<https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (visited 3/15/2022).

1 – DECIDING WHETHER TO COLLABORATE ON A CASE

Why Collaborate on Investigations?

Conviction integrity units (“CIUs”) exist to provide an extra-judicial process to investigate or review cases involving a wide range of challenges. Initially these units focused solely on cases where the convicted individual claimed they were not the perpetrator of the crime – that they were factually innocent. In conducting investigations involving actual innocence claims, prosecutors soon realized many cases cannot be so clearly decided: that most post-conviction investigations may yield some quantum of evidence that the person convicted is not the actual perpetrator, another individual committed the crime, or the process that led to the conviction was so unfair or unjust the conviction has no integrity but still falls short of proving “innocence.”

In recognition of the prosecutor’s role in ensuring justice, newer conviction integrity units do not necessarily limit their scope to reviewing only claims of actual innocence. Most will now review claims of “wrongful conviction” even if the convicted individual is not asserting they were uninvolved. Some have begun to address considerations of reducing mass incarceration through sentence reductions for those who received excessively long sentences or were convicted of a more serious crime than appropriate. Still other units are looking at categories of cases involving particular bad actors or bad procedures and trying to address those systemic failures and multitudes of cases at once.²

The common thread is that these units perform outside the traditional adversarial system, gathering information or evidence that could support (or defeat) a claim of a wrongful or unjust conviction. When that evidence is found or developed, the prosecutors in the unit support the convicted individual’s quest for justice rather than opposing relief on procedural, statutory, or other grounds.

Working with a CIU can offer hope and potential freedom for convicted individuals who would otherwise have no access to courts, much less chance for relief due to procedural barriers. In addition, working with a CIU can provide the applicant and their counsel access to government documents which may have been thought lost or are otherwise inaccessible. Most CIUs will also agree to forensic testing without relying on procedural or statutory defenses.

Collaborative post-conviction investigations are an exercise in mutual trust; both prosecutors and defense counsel must be able to trust that the other is following the highest level of professionalism. This is, perhaps, the most challenging aspect of CIUs: building trust between traditional adversaries.

Conducting post-conviction investigations are an extra-judicial and non-adversarial endeavor. Prosecutors’ offices with a CIU or other effort directed to identifying those who have been wrongly convicted in their jurisdiction report that conducting investigations alongside defense counsel improves their ability to review a case and determine whether relief is appropriate. Joint collaboration between CIUs and defense counsel, when possible, maximizes resources, increases efficiency, and helps to ensure a smoother review process.

² Counsel should, of course, be aware of a given unit’s scope. Where a unit engages in reviews other than wrongful conviction claims, such as inequitable sentences, counsel may need to consider the appropriate approach on behalf of a given client.

FOR DEFENSE COUNSEL

How to Evaluate a CIU

Before advising a client on whether to engage with a conviction integrity unit, defense counsel must understand what the unit does, and how the unit operates.³ A well-functioning CIU will make its mission, policies, procedures, and other documents publicly available, usually on a website. Counsel should review those policies before engaging to understand various issues such as:

- Does the CIU condition case review on waiver of privilege? If so, this should be a *major* red flag.

There are certainly discrete instances in which work product can be shared, but the expectation should *not* be that the CIU has blanket access to the defense/post-conviction/innocence organization's file.

- Waiver of privilege implicates not just the CIU's access to the materials provided, but potentially access by other entities or actors within the state (e.g. Attorney General/ Parole Board/ Department of Health Services).
- What types of cases does the CIU accept?
 - Do they review wrongful convictions only, or also other categories of injustice (e.g., unjust sentences, sentences which would not be mandatory now, police/prosecutorial misconduct, convictions tainted by racial discrimination)?
 - If a CIU considers unjust sentences, what is the scope of information that they will review to consider agreeing to relief (e.g., prison record, criminal convictions)?
 - Does the CIU review guilty pleas or misdemeanors?
 - Does the CIU have any "no go" issues (e.g., no cases involving certain categories of criminal act or particular evidence such as confessions)?

- Will the CIU provide full access to all discovery including their own work product such as notes from interviews or jury selection? If so, does the CIU require that counsel provide certain information before obtaining that discovery?
 - For example, what does the defense lawyer/client have to show, initially, to become eligible for obtaining file access/voluntary discovery, when working with a CIU?
- What are the parameters for getting the CIU's agreement to forensic testing?
- If testing is agreed upon will the CIU allow defense experts to observe or otherwise have a role?
- Does the CIU consider factors other than the current conviction when pursuing a case (convicted individual's prior record, disciplinary matters in prison)?
- Will the client be forced to choose between pursuing relief in court or having the CIU investigate?
 - If a petition is filed during a review based on information derived from the investigation will the prosecutor agree to stay the proceedings?
 - If a petition is filed that cannot be stayed how does the office handle it — is it defended by the appellate unit or the CIU?
- Does the CIU rely on any types of forensic analysis that lack scientific validity?

If the CIU does not have written protocols or policies, defense counsel should reach out to the unit director before approaching with a case to inquire about the above matters. **Without the knowledge of how the unit operates, counsel cannot properly advise a client about the risks or benefits involved.**

There are many structural issues that can indicate whether a unit will be able to conduct a full and objective investigation. If the unit is not **independent of the trial or**

³ Under the Rules of Professional Conduct, an attorney cannot move forward with a strategy without the informed consent of their client. ABA Model R.P.C. 1.4 (b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). The rules define "informed consent" as the "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." ABA Model R.P.C. 1.0 (e).

appellate divisions, that raises a concern as to whether the unit is properly oriented toward looking beyond procedural defenses to a conviction. To head off internal obstacles, the **unit's director should report directly to the elected prosecutor** and be outside and separate from the trial or appeals structure of the office. (Even reporting to a high-level staff member such as a General Counsel or Chief of Staff can give the impression the unit is not a substantive aspect of the office's work.) Additionally, the **original prosecutors (trial and appellate counsel) should take no role** in the selection of cases for review, the investigation of cases (other than providing requested information), or the decision of whether to recommend relief.

Counsel should also be aware of the unit's history and what types of cases have resulted in relief for the convicted individual. While exonerations alone should not be the sole measure of success for a CIU, if the unit has been in existence for several years but has not had any exonerations or supported other types of judicial relief, counsel can be skeptical of the process.

One of the biggest concerns counsel should have is **how the CIU handles requests for waiver of attorney-client privilege**. While some level of waiver is required to do a complete post-conviction review — notably to determine whether exculpatory evidence was provided to prior counsel to determine the viability of a *Brady* claim — the unit should not make review contingent upon a blanket waiver of all privileges. Waiver requests should be discreet and limited to particular issues. Whenever a waiver is requested, counsel must ensure the client is fully informed of the parameters of the waiver before proceeding consistent with requirements of the rules of professional conduct. Moreover, any waiver should be memorialized to ensure protection of the client's ongoing confidentiality.

Another matter for counsel to consider before submitting a case to a CIU is **to what degree the unit will engage in a collaborative investigation**. If the unit's approach is to conduct a fully independent investigation with neither input nor support from defense counsel, that is a factor to be considered. The better approach is to engage fully with defense counsel to craft an investigative plan including the joint interview of key witnesses unless circumstances dictate otherwise.

The unit should have a **clear process for providing access to all levels of information without interference**.

Defense counsel should ask the unit whether they have succeeded in obtaining files and materials from other agencies (or even from within the prosecutor's office). Some CIUs have MOUs with other agencies in place to ensure they will be given access to closed files.

Similarly, counsel should inquire **to what extent the CIU will keep counsel apprised of developments or difficulties in an investigation**: Are the other agencies balking at providing their files? Are witnesses particularly difficult to locate? Has the evidence to be tested disappeared or been destroyed? The CIU should agree to provide counsel with updates on the investigation and communicate openly with counsel as long as the investigation continues.

If a case will need the involvement of experts, counsel should discuss the matter openly with the CIU before beginning work. (Even if a case does not initially appear to require expert review, counsel should raise the question with the CIU to alleviate surprises later.) Will the unit **allow defense experts to participate in, observe, or at least be a part of the planning for forensic testing**? If possible, will the unit agree to have physical evidence retested by defense experts (at defense expense, of course)?

Advising the Client

Clients must have a full understanding of both the benefits and risks to working with a CIU before they can give informed consent to move forward. The client cannot give informed consent to the strategy if they do not know what the CIU's process is and the risks involved.

While the potential benefits of working with a CIU are great, there are numerous potential risks involved, as well. To ensure a client can give informed consent to the process, it is incumbent on counsel to **fully explain the advantages and potential downsides to working with a CIU**. Managing the client's expectations is a key part of ensuring they can give informed consent. Many clients will believe that once a CIU takes on a case, relief will be forthcoming and quick but the reality is quite different.

For example, clients should be aware:

- Protected materials shared for the purpose of the investigation could be used by the prosecutor if the case goes to litigation or provided to other governmental agencies;
- Even if the investigation causes the prosecutor to agree to relief, the court may not accept it;
- Investigations can take longer than if a case is pursued in court;
- It is possible the prosecutors will uncover information conclusive of the client's guilt or involvement in this case, or that even implicates them in other crimes for which they were not prosecuted or could be prosecuted; and
- It is possible the CIU could stop their investigation at any time, or the process could turn adversarial.

In particular, clients must know to what extent they will have to waive otherwise protected privileges and confidences, whether they will be interviewed by the CIU, whether their family members or friends could be interviewed, how the case will be handled if relief is not agreed upon, how information which has been shared by defense counsel might be used by the prosecutors if there is not an agreed-upon resolution, and a myriad of other issues.⁴

Defense counsel who anticipate working with CIUs regularly should consider developing standard communications to use with clients to advise them of working with CIUs.

Case Presentations

When approaching a CIU with a potential case, defense counsel should do so in as open and forthright a manner as possible. Because the unit will engage in an independent analysis and review, hiding or minimizing harmful information will not benefit the client. Rather, counsel should take the opportunity to present all known information, albeit in a light most favorable to the client.

Sometimes defense counsel will not share why they are approaching a CIU or even conditionally withhold information (i.e., "I won't tell you the basis of my claims until I get a hearing"). These approaches are ineffective

as the process of working with a CIU is an extra-judicial endeavor built on mutual trust. Where there could be reasons for not fully explaining the defense position or theory on a case, counsel should be clear about those reasons with the CIU.

Pre-presentation Investigation

A major question that arose during the discussions is whether defense counsel should interview a witness before bringing a case to the CIU. There is a tension between wanting to bring cases to a CIU when there is some level of certainty the applicant has been wrongly convicted and wanting to engage in joint and collaborative investigations. If defense counsel has already interviewed witnesses, counsel should consider sharing all memoranda (including recordings) from the interview with the CIU. An understaffed CIU may prioritize cases that have already been worked up and investigated by defense counsel.

Real-Life Caution

One CIU reported starting a collaborative investigation. When it came time to reach out to a witness, the CIU learned the defense lawyer spoke to the witness before approaching the CIU and the information was detrimental to the applicant. The CIU lost faith in the collaborative relationship because the defense attorney had not shared this information at the beginning of the process and chose to stop sharing information moving forward.

⁴ A checklist of issues for counsel to consider and points to discuss with a client can be found in the Appendix.



Even an experienced CIU appreciates when defense counsel has done investigation before bringing the case to the unit, especially if there is an existing relationship of trust between the unit and the defense lawyer.

Particularly where the case hinges on a single witness – a child sexual assault victim, an eyewitness – careful consideration should be given before the witness is interviewed. Prosecutors may have valid concerns about the way a witness was interviewed, especially where a fragile witness and delicate memories are concerned. If there is a level of trust with the CIU, counsel should consider waiting to interview the witness with the prosecutors to minimize distrust of the interview.

Limited Requests to the CIU

Sometimes defense counsel wants information they have been unable to obtain on their own, such as police reports or investigation logs. Other times, they may just be seeking forensic testing outside the judicial process. In these cases, counsel needs to understand the CIU's processes and policies before requesting this type of assistance.

Counsel should be aware of their state's open records/freedom of information laws before requesting discovery from a CIU. Under some jurisdictions, requests for discovery and information via an open records request can be faster than relying on a CIU to provide discovery. In addition, requesting materials via an open records law can minimize the burden on a CIU which often has limited resources.

An issue to consider is that the CIU may continue to investigate a case even beyond the requested involvement. In addition, counsel must make sure the client understands the limited nature of the request. This often will require a limited retainer agreement with the client.

ISSUES FOR CIU CONSIDERATION

The prosecutors who participated in the discussion groups had a common concern about working with defense counsel: that some counsel they had worked with in the past were not honest partners in the process. Some participants shared tales of promises broken, counsel acting disingenuously, lack of mutual communication, and even misrepresentations about evidence. While past is not prologue, many prosecutors admitted to feeling jaded by the process.

Nonetheless, prosecutors should not judge every defense counsel by a single bad interaction. Many more participants in the discussion groups reported having had terrific experiences working collaboratively with defense counsel and, in particular, lawyers with innocence organizations.

To the extent prosecutors have concerns about working with a particular defense counsel, those concerns should be shared openly before work on a case begins. Having a Cooperation Agreement that lays out the expectations both prosecutors and defense counsel have and the mutual understanding of how the investigation will proceed is helpful to allay concerns about mutual responsibility.⁵

If the head of a CIU or other staff member is conflicted out of an investigation, the CIU should be clear about who will be handling the investigation or what steps the office will take to minimize the impact of the conflict. Applicants should not be penalized because of a professional conflict.

⁵ There is a larger discussion of Cooperation Agreements in the next section. In addition, a sample Cooperative Agreement and best practices considerations for Cooperative Agreements are attached in the Appendix.

2 - NAVIGATING THE COOPERATIVE RELATIONSHIP – ISSUES WITH DISCOVERY AND SHARING INFORMATION

For the discussion participants, CIUs working collaboratively with defense counsel is the expected norm. CIUs should be open to working with defense counsel on every aspect of the investigation and should keep defense counsel informed of every development or obstacle as the investigation progresses. But that ideal still requires some management to work. Clear communication and setting mutual expectations before the investigation begins is critical to protecting the relationship between prosecutors and defense counsel.

Cooperation Agreements

Before embarking on a collaborative investigation, counsel should create a Cooperation Agreement that will guide the work. While it is not possible to anticipate every possible twist and turn of an investigation, planning for expected issues will help keep communication open and the collaborative relationship moving forward. Many discussion participants lamented not having had a written agreement before beginning work on a case together as it would have made handling issues that arose during the process much easier to navigate.

Any Cooperation Agreement should be approached as a joint discussion. While standard agreements are helpful, CIUs should be open to defense counsel modifying or adding to the agreement to meet the particular situation. Agreements should also account for the ethical obligations on defense counsel to protect communications with their clients and other privileged information which, under most circumstances, cannot be shared.

At the most basic level, agreements should identify

- who is covered by the agreement, including the prosecutor's office and the defense counsel or innocence organization;
- the purpose of the agreement, e.g., to investigate a claim of actual innocence by a named applicant;
- the case for which the agreement is made; and
- the duration of the agreement.

Above the basics, CIUs and counsel should consider a number of additional areas to include in a written agreement.

CIUs may want to be assured the applicant has agreed to the Cooperation Agreement and understands the terms fully. Counsel should be prepared to share retainer agreements or other verification that the client has been fully informed of the collaborative investigation process.

Agreements should include the **parameters of discovery to be provided by the CIU** to defense counsel, **what documents defense counsel will share** with the CIU and under what circumstances, with whom information may be shared, approach to media, how the prosecutor's office will handle a case that does not result in agreed-upon relief, mandating pre-investigation meetings, and other matters.

Agreements should also include how **communications will be handled** between the CIU and counsel. A shared complaint from defense counsel who have worked with CIUs on what was intended to be a collaborative investigation was the lack of communication from prosecutors as the investigation proceeded. While there may be instances where information cannot be shared, the default should be open and frequent communication and that decision should be discussed with defense counsel directly.

Agreements **should concern a single case**; open-ended agreements are not encouraged, as they tend to complicate the relationship between a prosecutor and someone outside the office. Prosecutors have unique duties and reporting requirements (such as financial

disclosure laws) which could subject an outside reviewer or investigator to the same disclosure requirement. Moreover, if someone outside the office is viewed as being an arm of the government, that person's otherwise protected communications may be subject to disclosure under freedom of information laws.

As part of the creation of a Cooperation Agreement, counsel may seek to include **"limited use" or "use immunity" language**: that neither the convicted individual's interview nor information provided may be used against them directly or indirectly in the case under investigation or any other criminal case except for perjury or other obstruction of justice charges.⁶

Whether limited by time, the length of an investigation and/or litigation, or a party's termination of the agreement upon notice, agreements should not be open-ended.

Finally, written Cooperation Agreements should include **a termination clause**. If either party violates the Cooperation Agreement or part of it, the termination clause should explain the consequences.

Limited Agreements or MOUs

There may be situations where counsel has approached a CIU for information or something less than a full collaborative investigation (such as access to discovery, a resentencing, or forensic testing). Some written agreement should still be drafted, but it will need to be tailored to the situation. In one jurisdiction, counsel alone signs an agreement not to disseminate the information obtained or provide it to anyone outside the trial team for the applicant; a full investigation requires adoption by the lawyer, the client, and the CIU.

Particularly if the applicant's counsel does not live up to the Agreement, the CIU should explain they may no longer include applicant's counsel in the investigation or provide regular updates.

Awareness of Brady and Post-Conviction Filing Obligations

Where a prosecutor's office has decided to establish a unit that investigates claims of wrongful conviction, the duty to provide exculpatory information (i.e. *Brady* obligations) should be considered ongoing. Many jurisdictions have adopted Model Rule of Professional Conduct 3.8 (g) and (h),⁷ which specifically require prosecutors to act on exonerating information developed post-conviction. Even in jurisdictions where such a rule has not been formally adopted, CIUs should consider the obligation to be continuing and have in place mechanisms to share information with the applicant or defense counsel quickly.

In addition, prosecutors must understand that in many jurisdictions where a convicted individual learns of new evidence which could affect their conviction, they have a limited amount of time to file a petition in court seeking vacatur. This amplifies the need to share information as quickly as possible with the defense lawyer. At a minimum, the information may have ramifications for others; to the extent possible the CIU should notify others affected (i.e., co-defendants) where they can be identified.

Further, where an applicant files a petition for post-conviction relief in court, prosecutors should not view that as an aggressive or antagonistic move: failure to file a timely petition often means the applicant can never raise the issue again, so to protect the rights of the applicant defense counsel has no choice but to file a petition when required. Of course, defense counsel should notify the CIU before filing a new petition so it does not come as a surprise and jeopardize the trust relationship.

⁶ The Justice Manual maintained by the Department of Justice includes this language in Section 9-27, Principles of Federal Prosecution. See 9-27.600 – Entering into Non-Prosecution Agreements in Return for Cooperation — Generally.

⁷ ABA Model Rule 3.8(g) requires prosecutors who learn of "credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted" to act on that information to "promptly disclose" that information to authorities, and to "undertake further investigation . . . to determine whether the defendant was convicted of an offense that the defendant did not commit." Subsection 'h' of Rule 3.8 mandates that prosecutors who know of "clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit" work to remedy that wrongful conviction.

Interviews with the Applicant

Even in a collaborative relationship, CIUs and defense counsel maintain their traditional roles. The CIU does not — at any point, or in any way — represent the convicted individual. The attorney-client relationship, then, lies only between the applicant and their counsel. **The CIU may not have direct communications with the represented convicted individual without the full knowledge and agreement of defense counsel.** Any interview of the applicant must be discussed between the CIU and counsel in terms of the boundaries of the discussion, whether there are topics that are off-limits, who will conduct the interview, and whether the interview itself will be limited to only the case under review.

Under no circumstances should counsel allow a client to be interviewed by a CIU without proper preparation.

Counsel must take the time to meet with the client and explain the purpose and process of the interview. CIU staff should ask defense counsel whether they have met with the applicant and explained the process before proceeding with an interview.

Sometimes counsel will want the CIU to meet with the applicant, but the CIU resists. Counsel should explain the reasons why the interview would help the CIU and assure the prosecutors that counsel will be present to alleviate any concerns about speaking with a criminal defendant.

Mutual Sharing of Information

The default position in any joint and collaborative investigation should be that information is shared as openly as possible. Given some constraints, particularly with respect to matters of safety or the defense lawyer's ethical obligations to their client, there may be restrictions on that ideal. For example, some states prohibit victim information from being shared and prosecutors must redact discovery before it is provided to the applicant's counsel. Similarly, defense counsel may take the position that they will not provide direct communications with their client. An understanding of these limitations should be part of initial discussions between parties.

8 In a forthcoming survey of CIUs around the country, 31 out of 50 units surveyed indicated they provide full open file discovery to the applicant's counsel.

9 The Working Group's final report, *Conviction Integrity Programs: A Guide to Best Practices for Prosecutorial Offices*, can be found at <https://www.massbar.org/docs/default-source/mba-reports/mciwg-guide-to-best-practices.pdf>.

10 See *Conviction Integrity Programs Guide, id.*, at p. 8.

File Sharing by CIU

CIUs should have a default position of providing open access to all investigative materials gathered as part of the criminal investigation unless prohibited by statute or other authority;⁸ this should be part of the Cooperation Agreement. An open file provision is a consistent recommendation in various best practice guides for CIUs. For example, in Massachusetts, the Bar Association sponsored a statewide, multi-stakeholder Conviction Integrity Working Group to examine best practices for the formation, structure, and operation that CIUs within the commonwealth should follow.⁹ The Working Group interviewed several CIU directors around the country, as well as experts in ethics and other areas. Ensuring open file discovery (materials within prosecution and law enforcement files) is a key recommendation from their final report, with the allowance of "compelling cause" to not produce information such as where disclosure is barred by statute or court order. Even so, the recommendation includes producing what would normally be considered "work product" in recognition of the non-adversarial nature of the relationship between a CIU and defense counsel.¹⁰

Providing open file discovery would include making available complete and unredacted files from the prosecutors' office, all police agencies, outside interview agencies, forensics, medical examiner and any other

Defense counsel should be aware of state Open Records/Right to Know laws. If the state allows for prosecution and police files to be disclosed, counsel should consider using the laws before going to a CIU. Often the response will be faster and it will save the CIU's limited resources.

agency or individual involved in the conviction, appeal, or previous post-conviction petitions. Defense counsel should be willing to enter into appropriate non-disclosure agreements to ensure the protection of the information provided including agreeing to not provide copies to anyone outside the attorney relationship. In addition, the CIU should discuss with defense counsel which agency files should be sought and the process for obtaining them.

A Note on CIU Work Product

Because a post-conviction investigation is an extra-judicial undertaking, discovery limitation rules or statutes are not applicable. While each state may have a different definition of what work product is, generally work product only includes legal research and notes of opinions, conclusions, and theories prepared in anticipation of litigation. In most states, work product does not cover notes taken during interviews or investigations.

Notwithstanding available work product protection, in recognition of the non-adversarial nature of the investigation, CIUs should provide all information in their possession including mental impressions of witnesses and investigations that can be provided under state law.

Some CIUs try to limit defense counsel's use of discovery provided in post-conviction investigations to the matter under consideration. However, counsel may represent other individuals for whom information provided may be directly related. Because counsel has clear ethical obligations to all clients for zealous representation, counsel should not accept conditions that limit the ability to represent other clients. Compromises such as filing under seal should be discussed with the CIU before any limited use agreement is made.

If a CIU cannot share particular materials, the documents or other materials should be identified in a privilege or redaction log. Other options, such as protective orders or *in camera* review can also be considered. At the minimum, defense counsel should be made aware generally what the material is and the reason it cannot be shared (i.e., privacy or victims' rights laws, live suspect investigation, or other constraints).

File Sharing by Defense

Most CIUs expect some level of mutual information-sharing; many prosecutors expressed the opinion that if the applicant is truly innocent there should be no reason to "hide" information. While collaborative sharing is ideal, there are very real limitations on defense counsel which may prohibit or at least limit a full file sharing.

Defense lawyers are duty-bound to protect information they have gathered as part of their representation of the convicted individual. That includes information which may be obtained by others or is contained within public filings.¹¹ **Any request by a CIU to gain full and unfettered access to defense counsel files should be denied.** At the same time, counsel should consider — and fully discuss with their client — the advantages of sharing information they are able to consistent with their ethical responsibilities and under protection of a limited waiver of attorney-client privilege and confidentiality. If information is to be withheld, counsel might consider providing privilege logs or submitting to a judge for *in camera* review before material can be turned over to the prosecutor.

¹¹ Prosecutors should be aware defense counsel are under two separate obligations to protect client information and communication. First, under the Rules of Professional Conduct, defense counsel "shall not reveal information relating to the representation of a client unless the client gives informed consent." ABA Model Rule 1.6(a). Information includes any materials gathered as part of the representation, even those otherwise publicly available. ABA Rule 1.6 Comment, [3]. This obligation is broader than the judicial restraints against revealing "privileged" information as protected by the attorney-client or work product doctrines.

Many CIUs consider a defense counsel's willingness to share otherwise confidential or protected information as a significant show of trust and may increase the likelihood of full and open discovery being provided to counsel.

What happens to files shared by defense counsel?

Counsel should understand that by providing information to a prosecutor's office, they may not be able to control how the information is used by the prosecutor going forward. At a minimum, **defense counsel should ask of the CIU's responsibility to share or disclose information to other units in the office where investigations yield new information.** Does the CIU share investigative results with the rest of the office? Will the CIU files be kept independent from the remainder of the prosecutor's office if the investigation does not result in an agreed-upon resolution?

In addition, a prosecutor's office may not have the technological capabilities of separating information in a way that would protect information shared. In any case, file sharing should be memorialized in terms of the extent that privilege or confidentiality is being waived; changes in administration may affect the information which was shared under an agreement. If not in writing, the agreement will be harder to enforce.

In some jurisdictions, even if there is such an agreement, a prosecution file might be subject to a public records disclosure – that would include any documents provided by the defense to the CIU. In addition, counsel and CIUs must consider that information they collect and intend for only their review or use could be subpoenaed by another agency — other prosecution offices, DHS, Parole Boards — and then used against the applicant. Counsel should be aware of these situations and consider the ramifications of open sharing information as well as alternative sharing arrangements that would not trigger an open file or other request.

Considerations for CIUs in Requesting Information from Defense Counsel

When requesting privileged information from applicant's counsel, CIUs should keep in mind the test set forth by the Department of Justice for requests for privileged information in corporate investigations from the 2006 McNulty Memo.¹² That guideline provides that there must be a "legitimate need" for the information requested. "Legitimate need" doesn't mean "desirable" or "convenient" and can depend on the likelihood and degree to which the privileged information will benefit the government's investigation and whether the specific information sought can be obtained using alternative means that don't require waiver.

Along those lines, prosecutors should engage in a progressive process for requesting privileged information starting with "purely factual information," and only requesting privileged communications or work product if there is still "an incomplete basis to conduct a thorough investigation."¹³ In other words, **requests for waiver should be specific and limited to information the CIU can't get on its own.**

Finally, aside from respecting the boundaries of these ethical obligations by limiting requests for waiver, CIUs should not seek to break privilege with counsel (including prior counsel who may be interviewed as part of an investigation, as addressed below), who are not as vigilant as others.

As with many recommendations, each situation must be evaluated on a case-by-case basis.

¹² This memo was written to walk back a previous guideline that, when working with corporations facing criminal charges, Assistant US Attorneys were encouraged to require the entity to fully waive attorney-client privilege as a showing of good faith before the Department would engage in plea negotiations. In 2006, Deputy Attorney General Paul McNulty issued a memorandum rescinding that recommendation following heavy criticism across the legal landscape.

¹³ McNulty Memo, December, 2006, pp. 8 – 10 (available at https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf).

Timeliness Considerations

All parties to a file sharing agreement must be aware of the local deadlines for filing post-conviction relief petitions after discovering new information; federal habeas, for example, requires petitioners to file within one year of uncovering new evidence that could support a habeas claim. This is particularly important when the applicant is unrepresented (or underrepresented). **Accordingly, where new evidence is uncovered — witness statements, forensic testing results, etc. — that information must be disclosed promptly, even if defense counsel was involved in gathering the information or the CIU believes it is not sufficient to support a post-conviction petition.**

Files should be shared at no cost to defense counsel; if there are costs involved that issue should be worked out between the parties. Whether files are made available to defense counsel or otherwise provided, defense counsel should be able to see everything allowed by law and copy and/or scan materials freely. Sometimes this is made easier by allowing defense counsel to bring a mobile scanner or engage an outside agency to scan materials.

Investigation Coordination

Before actual case investigation begins, counsel and the CIU should meet to discuss how the investigation will proceed, who will be involved in interviewing witnesses, and how interviews will be conducted. Requiring a pre-investigation meeting can be included as part of a Cooperation Agreement. Where forensic testing is anticipated, and as addressed more thoroughly in [Use of Experts](#), the CIU should conduct a search for evidence, involving defense counsel where possible.¹⁴ Moreover, counsel should have input in which lab will be used, and defense experts should be included in the process.

Witness Interviews

Interviews should be conducted following open-ended cognitive interviewing techniques rather than use of leading or guilt-presumptive questioning. Recanting witnesses should be approached with a non-retributive

Live Suspect Investigations

Where there is a live suspect being investigated as part of the applicant's innocence claim, it is often not possible for the CIU or relevant trial/investigative unit to directly involve defense counsel in witness interviews. The CIU should still, when possible, advise the applicant's counsel of developments and especially of any new evidence that may trigger the need for a post-conviction petition being filed.

focus; if the witness requires counsel for potential Fifth Amendment or immunity concerns, CIU and defense counsel should both be aware of the situation.

Different witnesses may require different approaches and even different interviewers. Counsel and the CIU should discuss the advantages of having state or private investigators conduct each interview. In cases of fragile witnesses — juveniles, rape survivors, etc. — consideration should be given to bringing in an interviewer with experience working with that population. In addition, if the interviews will not be recorded all parties should agree who will attend the interview. Information derived from witness interviews including credibility considerations should be shared as quickly as feasible with anyone who was not present. In addition, defense counsel may have investigators on staff or with whom they regularly work. Thought should be given by all parties to who the best investigator for a given witness might be so as not to have too many people involved in any given interview.

If the CIU has reason to keep information confidential — such as in the case of a live suspect investigation — defense counsel should be notified and debriefed to the highest extent possible.

¹⁴ Defense lawyers have been helpful in digging through or even finding evidence thought to be lost. For example, Innocence Project lawyer Nina Morrison found evidence in an old evidence box that contained biological evidence sufficient to get DNA testing that led to the exonerations of Dennis Halstead, John Restivo, and John Kogut. See <https://www.newyorker.com/magazine/2015/04/13/the-price-of-a-life>.

Where a witness has already been interviewed

As a practice, many CIUs prefer to have the first “crack” at a witness without defense counsel’s involvement. However, many times an applicant’s attorney will have interviewed a key witness before coming to the CIU. This may have been necessary for the attorney to evaluate whether there is a strong claim for relief from conviction.

Where counsel has already interviewed a witness before approaching a CIU, **counsel should be prepared to share all witness memoranda and their honest impressions of the witness with the CIU.** (If the witness was not helpful, counsel should make sure they have informed their client that they will have to share that information with the CIU as part of the collaborative investigation.)

Once a CIU has begun looking at a case, defense counsel should consider pausing further active investigations so the CIU can be a part of interviewing additional witnesses or at least part of planning for investigations.

Meeting with prior defense counsel or prosecutors

Coordination of witness interviews extends to meetings with prior trial or appellate counsel. Consistent with rules of professional conduct, CIUs cannot discuss any strategic matters with the applicant’s prior trial or appellate counsel absent an explicit waiver from the applicant.¹⁵ As a general matter, and in keeping with the open goals of collaborative investigations, CIU staff should not talk to trial counsel without first checking with current post-conviction counsel. In addition, a CIU should not condition review of an application on speaking with prior counsel. Rather, such an interview should be considered under similar conditions to speaking with an applicant.

In addition, **the CIU should not involve trial or appellate prosecutors in the review beyond as factual witnesses.**

Prior prosecutors cannot have a role in the review itself. As with any other witness, if defense counsel is not included in the interview of other prosecutors the CIU should inform defense counsel of the outcome of the interview as soon as possible and share any memos from the interviews.

Concerns for defense counsel

Active **investigations can create conflict situations** for defense counsel, particularly where co-defendants are concerned. Among other issues of which counsel should be aware, conflicts include:

- » Investigation may implicate another client of the applicant’s counsel or an attorney in the firm;
- » Investigation may implicate one co-applicant but exonerate another;
- » Conflict of interest with the CIU with regard to a particular witness or issue – such as when the office has taken an adversarial position in the past;
- » Conflicts of the elected prosecutor on a case, either through incendiary comments during trial or even representation of applicant as defense counsel before being elected; or
- » Conflicts on agreed disclosures as they could impact future clients of the applicant’s counsel.

Finally, during an investigation, information which is not helpful – or even damaging – to a convicted individual’s case can come to light. Counsel must be aware of the possibility and have a plan for sharing that information with the client and addressing it with the CIU.

¹⁵ This is true even if the applicant previously raised claims of counsel ineffectiveness. Should the applicant file a post-conviction petition raising ineffectiveness of prior counsel, the allegations amount to an implied waiver of attorney-client privilege but only insofar as the issues raised by the petition. See e.g. *Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974) (“A client has a privilege to keep his conversations with his attorney confidential, but that privilege is waived when a client attacks his attorney’s competence in giving legal advice, puts in issue that advice and ascribes a course of action to his attorney that raises the specter of ineffectiveness or incompetence.”). The better practice is still to obtain an explicit waiver from the applicant.

3 - NAVIGATING THE COOPERATIVE RELATIONSHIP – BROADER DECISIONS

Handling Media

Media attention to a case can be a benefit to the convicted individual and can encourage people with information who have never come forward to do so. At the same time, the media spotlight can scare off a witness willing to come forward for fear of retaliation or even prosecution. In addition, many judges resent undue pressure when trying to rule on issues in the presence of media glare. Neither the applicant's counsel nor the CIU should look to the media for their own publicity purposes or to further an agenda other than for the good of the collaborative investigation.

How media is handled should be openly discussed between counsel and the CIU and should be incorporated into a Cooperation Agreement. As a general rule, both sides should agree that while the CIU review is pending the parties will refrain from discussing the case in the media unless everyone consents. If either party is approached by a reporter or other media outlet for comment on the case, they should refrain from doing so and let the other party know about the request. The CIU should ensure that their press office is aware of any media agreements made as part of a collaborative investigation.

If the CIU and counsel agree that media outreach would be helpful, any press release should be reviewed by both parties before it is sent out. The parties should be aware the public will make assumptions about the applicant's

guilt or innocence based on whether the applicant is exonerated, resentenced, or enters a reduced plea. Because those perceptions can have long-lasting impacts on the applicant as well as the victim or surviving family members the parties should craft language sensitive to those concerns.

There may be circumstances where no media attention is desirable – out of respect to the victim or surviving family members or even to protect the applicant's safety. Where an investigation will result in an exoneration or other favorable outcome both the CIU and the applicant's attorney should work together to plan a media outreach strategy.

Where media contact is part of a Cooperation Agreement it should include language about consequences for approaching the media without the partner.

Use of Experts

Counsel should consider a specific Memorandum of Understanding that memorializes the process for working with experts and forensic testing. Defense counsel should not be dissuaded from engaging an independent expert to review the testing procedures and participate in creating the testing plan.

When a case requires expert forensic analysis, defense experts should be included in the process. **Discussions with experts should not be conducted without notice to cooperating counsel, and all analyses and reports should be made available to all parties at the same time.**

As a fundamental proposition, forensic techniques with reliability concerns from either party should not be used. As an example, if counsel has concerns regarding the use of fingerprint examination the parties should discuss the use of the technique before experts are engaged.

Real World Caution:

A CIU reported that a defense counsel did a media interview in violation of the Cooperation Agreement. The CIU exercised a termination clause and no longer updated the attorney on the investigation. The applicant dropped the attorney and engaged another to continue the collaborative investigation.

If the Investigation Does Not Lead to Exoneration

In many collaborative investigations evidence will be developed during investigation that does not support innocence but could nonetheless provide a basis for relief. Where a CIU's focus is on "actual innocence," the CIU may determine its involvement is no longer necessary. The convicted individual, however, will likely still wish to pursue a post-conviction petition. Special consideration should be given as to how that petition is handled going forward, and the representations made to a court or the public on the investigation.

Considerations for the CIU

If the CIU is focused on "actual innocence" and determines the investigation did not yield sufficient information to agree to vacate a conviction the prosecutor's office must decide how the case will be handled. If the convicted individual has filed a post-conviction petition based on information developed during the investigation the prosecutor's office should consider whether that information causes the office to re-evaluate the conviction on other grounds.

If the petition will be opposed by the office, it should not be litigated by the CIU or its staff attorneys. Once a unit determines not to pursue relief, if the unit staff appear in court opposing relief it is a potential signal to the court the petition has no merit. To maintain the unit's legitimacy in conducting non-biased and objective reviews, defending against the petition should be handled by the appellate unit or other attorneys in the office.

Similarly, the prosecutor's office should be careful how they advise witnesses or victims about cooperating with the defense. Of course, CIU attorneys may wish to be present for interviews or meetings, but prosecutors should not convey to witnesses their presence is necessary.

If there was a mutual discovery provision in place where the CIU agreed not to use or share information provided by the defense, the CIU must take steps to protect the information.

Considerations for defense counsel

In cases that do not result in exoneration, counsel should be aware that they may have other clients whose cases are under review or could be reviewed by a CIU. Since successful wrongful conviction investigations require mutual trust, **counsel should refrain from taking any steps that could impact other clients** such as speaking disparagingly of the CIU in the media or with judges.

What CIUs Want Defense Counsel to Know

If a lawyer violates a collaboration agreement or withholds information that is later discovered, it makes it more difficult to trust that lawyer in a future case. Prosecutors will be wary of engaging in a collaborative investigation in the future.

Working with Victims and Victims' Families

Crime victims are the first to get hurt in these cases but often the last to be remembered.

Ensuring crime survivors and murder victim family members (hereinafter “victims”) are treated with equity, respect, and sensitivity during post-conviction review of innocence claims has a widespread impact on how a case develops, is perceived in the media, and how both victims and exonerees can move forward.

While victims do not play a role in determining whether a case will lead to an exoneration or other relief for the applicant, care must be given to how they are notified of or involved in the process. Victims say that the greatest harm they experience during the conviction review process is either being informed right before the exoneration occurs, or not being informed at all. Both practices can be re-traumatizing. Whether to notify a victim should not be a question. CIUs need to be cognizant of how they **notify** victims when a case is being reviewed, and whether and how to **interview** them as part of an investigation.

Conviction Integrity Units – Victim Notification

The timing of reaching out to victims may differ from case to case. Many applications will not yield information or evidence sufficient to take court action on a conviction; because of this, it is not advisable to reach out to victims for every application to a CIU.¹⁶

Instead, it is best to reach out to victims once the case has progressed to the point of taking some outside action such as beginning a full-blown investigation or agreeing to forensic testing. Providing notification at this time will allow victims to prepare for any potential outcome, reducing the chance of re-traumatization if an exoneration occurs. When notification is put off too long, victims may experience new trauma or feel revictimized and may even become obstructionist to the point of advocating against an exoneration. Providing notification at the time of reinvestigation will also increase victims’ trust in the CIU and the case review process, and avoids having third parties, such as the media, be the main source of information.

¹⁶ Several CIUs have the policy of notifying the victims once a case has made it to the point where other agencies will be contacted for information.

¹⁷ The Office of Victims of Crime awarded Healing Justice a grant to improve post-conviction services to crime survivors and murder victims’ families. The result of that work can be found at <https://www.survivorservices.org/>.

Following guidelines created by [Healing Justice](#) – a national nonprofit providing post-conviction support and recovery to victims – CIUs can prioritize victim contact to make the process less traumatizing and ultimately easier for those conducting the investigation.¹⁷ Here are some key steps to prepare for notification:

- Make every effort to locate victims, including looking in case files collected as part of the conviction review process and asking other state and local agencies about past or ongoing contact with victims;
- In homicide cases, identify all possible family members that should be contacted and, if possible, determine whether they would prefer information to be delivered individually or as a group;
- Create a list of available victim services and resources that can be easily shared, including support for members of diverse communities; and
- Determine whether an interpreter will be needed for providing notification.

When reaching out to victims to provide notification of a pending or ongoing investigation, procedures should include:

- Contacting victims by letter or phone to schedule an in-person meeting at a private location of the victim’s choice, if possible;
- On the phone and in person, include both a CIU attorney to answer legal questions and a trained victim advocate to offer support;
- Inviting victims to choose whether, how, and when they want to receive continuing case updates, and explaining any limitations on what details can be shared during the case review;
- Providing information about the conviction review process and possible outcomes including whether forensic testing will be sought, whether a forensic sample will be needed from the victim, and whether the victim will need to be interviewed;

- Ensuring that all communication and interactions are truthful, neutral, and clear, both to build trust and manage expectations; and
- Advising about potential media coverage and strategies for them to manage it.

The attorney should make clear to the victim they do not have a role in deciding the outcome of the investigation; whether to agree to or oppose post-conviction relief is the sole responsibility of the CIU and the elected prosecutor. The attorney should also emphasize that the investigation does not imply any wrongdoing by the victim. The advocate should assess the victim's needs and offer available resources and support.

The notification approach developed should consider the level of victim engagement and family dynamics. While next of kin notifications will differ from victims themselves, it is better to be more inclusive of family members rather than less inclusive. Understanding your jurisdiction's definition of victim, as well as the victims' rights that apply post-conviction, will be important. Healing Justice also recommends contacting other agencies that may have had post-conviction contact with victims to help determine who should be notified and how notification should occur.

Victim notification and contact should be part of a CIU's written policies and made available to the public.

Interviewing Victims

Most investigations do not require interviewing victims. However, if the reinvestigation will require that victims be interviewed, or that they submit samples for forensic testing, particular care should be taken in planning how and when the interview will take place, including coordinating with the CIU. Given the ramifications of interviewing or working with a victim, thought should be given to hiring a professional trained with a background in trauma-centered interviewing.

Tips for conducting victim interviews:

- » Explain that an important part of reviewing the case involves interviewing the victim, and that you want to provide the victim with an opportunity to be heard as part of the review.

- » Arrange for the interview to take place in a location where the victim feels most comfortable, at a time that is convenient for them, and in a way that protects their privacy.
- » Include a trained victim advocate to provide support.
- » Explain that the victim is not responsible for the original conviction or mistakes that may have occurred in the criminal justice process, including any mistaken eyewitness identification.

Advising When Exoneration or Release is Imminent

Finally, victims should be advised about an exoneration or release from prison as early as possible. When providing that news, CIUs should:

- Provide the expected exoneration and release dates if known, including court dates;
- Provide information about possible media coverage and strategies for managing it;
- Explain any obstacles to reopening the case to find the actual perpetrator and whether future prosecution may be prevented by a statute of limitations; and
- Create a plan for continuing support, such as coordinating with victim advocates in the Department of Corrections, Attorney General's Office, or other agencies to help around release, and engaging prosecution-based advocates if the case is retried or police-based advocates if the case is now "cold."

Innocence Organizations or Defense Counsel

Some states have stringent statutes that control how victims may be contacted, including dictating that defense counsel may not reach out to victims post-conviction. Even in states where contact is allowed, careful thought should be given to how a victim is approached, to ensure the approach is respectful and sensitive and, thereby, encourages trust and participation in the reinvestigation. If an innocence organization or other attorney plans to interview a victim as part of their investigation, the following should be considered:



- » Given the duties innocence organizations have to clients, care should be taken around any contact with victims. Victims should be made aware of these duties, and of limitations on innocence organizations' ability to provide victim-centered information and support.
- » If a CIU is already involved, coordinate with the CIU to ensure that any contact with the victim includes a trained victim advocate who can provide support and a CIU attorney who can answer questions victims may have about the conviction review process.
- » Ensure that any communication you have with victims is truthful, neutral, and clear to avoid causing confusion or harm. Acknowledge what victims may be experiencing during the case review and explain that it is not your intention to cause them further pain.
- » Take affirmative efforts to ensure victims are treated respectfully and sensitively by the media, and that language used by your organization is also respectful and sensitive. Avoid language that places blame on victims for wrongful convictions; instead, explain that system errors — and actual perpetrators — are to blame.

If an innocence organization or other attorney of the applicant has already reached out to or had contact with a victim, they should let the CIU know about this contact and what it involved.

Handling Claims of Official Misconduct

During the course of a post-conviction investigation, evidence can come to light that suggests official misconduct by police and/or prosecutors. CIUs and prosecutors should not erect false objections to relief for a convicted individual where (or simply because) official misconduct has been alleged.

CIUs should ensure their office develops and maintains a *Giglio/Brady* list that tracks the names of police or prosecutors who have engaged in misconduct.¹⁸ The level of misconduct necessary to be placed on this list should be determined by the CIU or elected prosecutor.

The CIU — or counsel — may become concerned with particular prosecutors or police and see or look for a pattern of withholding exculpatory information or other misconduct. The CIU should consider the possibility of doing a broader audit of cases involving repeat personnel, where the misconduct is consistent across multiple cases.

Maintaining lists of prosecutors or police who have engaged in misconduct goes beyond a *Brady* or *Giglio* issue and is more about DA or office action, accountability, and correction.

~ *Fair and Just Prosecution*

Where misconduct involving a prosecutor comes to light, all counsel should consult their jurisdiction's rules of professional conduct to determine whether the instance needs to be reported. If the prosecutor's office does not have a process to report suspected misconduct, counsel should discuss whether the incident will be reported to the state's disciplinary board.

Conducting an Audit When Misconduct is Found

Many CIUs want to try to identify all cases involving a particular prosecutor or detective when evidence of misconduct is discovered. Famously, the Conviction Integrity Unit in King County (Brooklyn), New York took on an audit of cases involving disgraced homicide detective Louis Scarcella when reporters revealed a pattern of misconduct. The Unit reviewed at least 90 cases involving the detective, and has overturned 15 convictions to date.¹⁹

In 2021, the Suffolk County (NY) District Attorney's Conviction Integrity Bureau (CIB) released a report of an audit they conducted with assistance from the New York Law School Post-Conviction Innocence Clinic (PCIC) in which they reviewed all cases handled by a homicide prosecutor found to have committed *Brady* violations by an appellate court. The CIB found multiple instances of additional misconduct and supported a reversal in one case where his "practices had a devastating effect on the fairness of the proceedings."²⁰ The PCIC reviewed the draft report and made recommendations to the SCDAO to prevent the errors from recurring.

¹⁸ The Institute for Innovation in Prosecution has an excellent guide for Tracking Police Misconduct available at <https://www.prosecution.org/tracking-police-misconduct>.

¹⁹ <https://pix11.com/news/local-news/brooklyn/key-witness-in-conviction-of-brooklyn-drug-lord-says-his-testimony-was-coerced-by-disgraced-former-detective/>

²⁰ SCDAO Conviction Review Bureau, *A Review of Disclosure Practices of Former Assistant District Attorney Glenn Kurtzrock*, released 11/23/2021, available at <https://suffolkcountynyny.gov/Portals/6/DA/PDFs/SCDAO%20Kurtzrock%20Report%20Final.pdf?ver=2021-11-23-131052-470>.

Conclusion

Collaboration on post-conviction work between traditional adversaries – unheard of 20 years ago -- is still a fairly novel concept. As the number of conviction integrity units within prosecutors' offices continues to grow, so, too, will the need for prosecutors and defense attorneys to work together to ensure the administration of justice.

The principles detailed here are a starting point for prosecutors and defense counsel to keep in mind as they embark on collaborative post-conviction work. We hope these Guidelines support smooth and trusting working relationships among professionals to more efficiently investigate claims of wrongful conviction, provide high-quality post-conviction representation for applicants, and protect the consistent application of due process for all.



APPENDIX

Guidelines for Drafting Cooperation Agreements

Discovery and Cooperation Agreement Template

Checklists for Defense Counsel

Participants in Discussions

GUIDELINES FOR DRAFTING COOPERATION AGREEMENTS BETWEEN CONVICTION REVIEW UNITS AND DEFENSE COUNSEL OR INNOCENCE ORGANIZATIONS

1. **General:** Agreements should clearly lay out the purpose of the agreement, who is covered by the agreement, and how long the agreement will last.
 - a. Agreements should clearly identify (i) who is covered by the agreement, including the Prosecutor's Office and the defense counsel or innocence organization; (ii) the purpose of the agreement, e.g., to investigate a claim of actual innocence by a named applicant, and (iii) the case for which the agreement is made. Agreements beyond a single case are not encouraged, as they tend to complicate the relationship between a prosecutor and someone outside the office. Prosecutors have unique duties and reporting requirements (such as financial disclosure laws) which could subject an outside reviewer or investigator to the same disclosure requirement. Moreover, if someone outside the office is viewed as being an arm of the government, that person's otherwise protected communications may be subject to disclosure under freedom of information law.
 - b. Whether limited by time, the length of an investigation and/or litigation, or a party's termination of the agreement upon notice, agreements should not be open-ended.
2. **Cooperative investigations:** Cooperative investigations should be the norm in a conviction review program. Cooperative investigations promote transparency and ensure that all parties receive the same information and receive it at the same time. Indeed, often defense counsel or agents acting on behalf of the convicted individual are in a superior position to find witnesses or gain trust with potential witnesses. Agreements should consider including the following provisions:
 - a. Prosecutors will agree to provide all relevant information – original documents, recordings, memoranda, notes, lab results, or information regarding physical evidence – within their possession or within possession of other state agencies (police, forensics, medical examiners, etc.) including otherwise protected work product as part of the cooperative agreement and subject to the above confidentiality provisions;
 - b. If prosecutors determine that some of the information or evidence they would provide should be produced under a protective order or otherwise withheld (such as to avoid jeopardizing the safety of a witness or any ongoing investigation), they will notify defense counsel and take what measures are necessary to enable them to provide the information if at all possible;
 - c. All parties to the Agreement agree to be fully cooperative in the investigation.
 - d. To coordinate, when feasible, the scheduling of witness interviews and other investigatory assignments to prevent potential interference with the CIU investigation and ensure the safety of witnesses and victims and the integrity of the post-conviction investigation.
3. **Protection of confidentiality and privacy:** Prosecutors are sharing sensitive and sometimes legally protected information with counsel. All parties to the agreement must be aware of and comply with any state or federal laws that restrict disclosure of such information (e.g., redacting information such as address, telephone number, driver's license number, social security number, date of birth, and bank account information) and be bound by those same disclosure obligations. Agreements should consider the following confidentiality issues:
 - a. Everyone associated with the parties — contractors, experts, investigators, students — must understand and comply with the provisions of the agreement, including protecting confidentiality by securing written compliance with the provisions;

- b. Other professionals associated with the parties – staff, contractors, experts, investigators, co-counsel, students – must protect documents from accidental disclosure to others by, for example, saving electronic documents in a password-protected program;
 - c. Parties must make no distinction between copies and originals in terms of protecting confidentiality or preserving their form;
 - d. Any redactions will be strictly limited to those deemed necessary to protect victim or witness safety or privacy;
 - e. If the prosecutor provides documents containing information which should have been redacted, counsel agrees to notify the prosecutor and redact the information before sharing the document(s);
 - f. Counsel may be required to agree that the information provided by the prosecutor can be shown to others (e.g., a client, witness, or prospective witness) but that others will not be given copies of the information for themselves (except for their own statements);
 - g. Before showing information to a client, witness, or prospective witness, counsel or their agents (experts, investigators, co-counsel, students) will ensure that the documents are properly redacted;
 - h. Parties should be aware of public laws concerning when information must be filed under seal or when other protections must be undertaken, and those restrictions should be written into the agreement.
4. **No requirement of unfettered privilege waiver:** The unit should not condition review of a case or providing discovery on any reciprocal commitment on the part of the applicant to waive any aspect of the attorney-client or work-product privilege or waive such privileges generally.
- a. Where otherwise privileged information may be necessary for the unit to fully investigate and consider an applicant's claims for relief – for example, to speak with the applicant's trial counsel or review portions of the trial file to determine if certain *Brady* information was or was not timely disclosed – the unit should limit its waiver requests to only those necessary to investigate the claim or issue.
 - b. Similarly, where the unit seeks to interview the applicant or the applicant's prior counsel, the unit should afford the applicant's current counsel the opportunity to be present (or waive counsel's presence) at the interview.
 - c. If defense counsel will be asked to share investigative materials, reports, recordings or communications or other materials relevant to the investigation a written protection of privilege should be considered providing that (i) the prosecutor's office will keep the materials confidential and not share them with third parties; (ii) disclosure to the prosecutor's office is not a waiver of attorney-client privilege or work product protection; and (iii) the materials will not be used by the prosecutor's office in any proceeding without the applicant's consent.
5. **Agreement limiting use of Applicant's interview/information:** Some offices use something akin to a proffer agreement to limit use of information provided by the applicant or counsel. The following language is taken from a standard DOJ proffer agreement.
- a. If prosecutors seek to interview the applicant or receive information from the applicant or counsel for the applicant, the prosecutors will agree to limit the use of such information as follows:
 - i. No statements made by applicant or counsel for the applicant, or other information provided by applicant will be used directly against the applicant in any criminal case.
 - ii. The prosecutor may make derivative use of, and may pursue investigative leads suggested by, statements made or information provided by applicant or applicant's counsel.
 - iii. If the applicant is a witness or party at any trial or other legal proceedings and testifies or makes representations through counsel materially different from statements made or information provided to prosecutors reviewing an innocence application, the prosecutors may cross-examine the applicant, introduce rebuttal evidence and make representations based on statements made or information provided during the applicant's interview.

6. **Brady material:** Prosecutors should agree they will make timely and appropriate disclosures of any exculpatory, impeachment or mitigating information they discover in their ongoing review. Often prosecutors uncover or develop information in cases seemingly unrelated to the case under review – e.g., a pattern of evidence withholding or police or prosecutor misconduct – which may bear on a legal claim for the defendant in the case at issue. Prosecutors should agree to provide information that could support a claim of a reasonable likelihood that the applicant did not commit the offense charged even if it does not bear on actual innocence.
7. **Other considerations:** There are myriad other issues that can arise under a cooperative post-conviction review or investigation. Not every circumstance can be covered by one agreement, but these areas should also be considered:
 - a. **Forensic testing:** Where forensic testing of any kind will be conducted, both sides should agree on the testing protocol including the experts who will conduct the testing. Failing agreement, which should not be withheld unreasonably, each party may retain its own expert. The prosecutor should arrange to release forensic evidence for examination by forensic experts and all parties should have equal access to the experts, test results, and all underlying documentation.
 - b. **Media blackout:** Both parties should agree that while the review or investigation is pending they will refrain from discussing the case in the media unless the other party consents. Sometimes media attention can be helpful, such as in encouraging reluctant witnesses to come forward. But media attention and use should be discussed among the parties to the agreement before any outreach is done or before any independent media inquiries are answered.
 - c. **Communication of prosecutor decision:** If the prosecutor determines a case is not appropriate for action by the conviction review unit, that decision should be communicated as quickly as possible to the defense; the Agreement should include a statement that the conviction review unit will (may) refer the case over to the prosecutor's appellate or habeas unit for further response. If the prosecutor determines a case is appropriate for relief, all parties should discuss how the matter will be addressed in court, including how any evidentiary hearings will be conducted.
 - d. **If joint review is unsuccessful:** Both parties should have an understanding of what happens if the joint investigation does not result in the prosecutor's belief that relief is warranted. Particularly, the prosecution should consider what position they will take in court vis-a-vis any post-conviction motion that is filed, including whether prosecutors will seek to use any otherwise confidential material that was shared with them during the investigation. While this does not need to be a part of a written agreement, prosecutors should think through these issues for consistent positions within their office.
8. **Right to Terminate:** Consider including a clause allowing the prosecutor to terminate the review and refer the matter to the habeas or appellate division for further proceedings if the Agreement is violated or broken by defense counsel.

DISCOVERY AND COOPERATION AGREEMENT TEMPLATE*

(Developed by Quattrone Center with defense counsel, CIU, and ethics expert input)

The parties enter into a discovery and cooperation agreement relating to the Conviction Integrity Unit (CIU) review of all actual innocence claims and/or post-conviction wrongful conviction claims which may arise during the CIU review in:

Case No(s): _____

Applicant _____

Parties covered by this Agreement:

This Agreement is between the Defendant's counsel, _____, ("Counsel") and the CIU of the [PROSECUTOR'S OFFICE] ("Prosecutor's Office"). CIU enters this Agreement on behalf of the Elected Prosecutor ("Prosecutor").

Purpose and time limit:

The parties enter into a discovery and cooperation agreement relating to CIU review and potential investigation of a claim of actual innocence by the above Applicant. This Agreement will remain in effect for the duration of CIU's investigation and/or resolution of the case, or a party's termination of the agreement upon notice.

Cooperative investigations: The parties agree to conduct a cooperative investigation into the Applicant's claim of actual innocence whenever possible.

- a. CIU agrees to provide all relevant information – original documents, recordings, memoranda, notes, lab results, or information regarding physical evidence – within their possession or within possession of other state agencies (police, forensics, medical examiners, etc.) including otherwise protected work product as part of the cooperative agreement and subject to the below confidentiality provisions;
- b. If CIU determines that some of the information or evidence they would provide should be produced under a protective order or otherwise withheld (such as to avoid jeopardizing the safety of a witness or any ongoing investigation), they will notify Counsel and take necessary measures to enable them to provide the information if at all possible;
- c. All parties to the Agreement agree to be fully cooperative in the investigation;
- d. Parties agree to coordinate, when feasible, the scheduling of witness interviews and other investigatory assignments to prevent potential interference with the CIU investigation and ensure the safety of witnesses and victims and the integrity of the post-conviction investigation.

Protection of confidentiality and privacy: CIU is sharing sensitive and sometimes legally protected information with Counsel. All are aware of and agree to comply with [ANY STATE OR FEDERAL LAWS] that restrict disclosure of such information (e.g., redacting information such as address, telephone number, driver's license number, social security number, date of birth, and bank account information) and be bound by those same disclosure obligations. All Parties agree that:

- a. Everyone associated with the Parties — contractors, experts, investigators, students — understand and agree to comply with the provisions of the Agreement, including protecting confidentiality by securing written compliance with the provisions;

* An editable copy of this questionnaire can be accessed through the Quattrone Center's online Conviction Review/Integrity Units Resource Center at convictionreview.net.

- b. Other professionals associated with the Parties – staff, contractors, experts, investigators, co-counsel, students – agree to protect documents from accidental disclosure to others by, for example, saving electronic documents in a password-protected program;
- c. Parties make no distinction between copies and originals in terms of protecting confidentiality or preserving their form;
- d. Any redactions will be strictly limited to those deemed necessary to protect victim or witness safety or privacy;
- e. If CIU provides documents containing information which should have been redacted, Counsel agrees to notify the prosecutor and redact the information before sharing the document(s);
- f. Counsel agrees that the information provided by CIU can be shown to others (e.g., a client, witness, or prospective witness) but that others will not be given copies of the information for themselves (except for their own statements);
- g. Before showing information to a client, witness, or prospective witness, Counsel or their agents (experts, investigators, co-counsel, students) will ensure documents are properly redacted;
- h. [ANY LAWS REQUIRING INFORMATION TO BE FILED UNDER SEAL OR WHEN OTHER PROTECTIONS MUST BE UNDERTAKEN SHOULD BE INCLUDED HERE]

Defense provision of materials: The CIU agrees Counsel is not required to provide blanket reciprocal discovery to have the case reviewed and investigated, nor is the Applicant expected to provide broad waiver of the attorney-client or work-product privileges. However, to complete a full and objective investigation all Parties understand certain material may be necessary for the CIU to review. To best accomplish the goal of a full and fair investigation, the following apply:

- a. Where otherwise privileged information may be necessary for CIU to fully investigate and consider Applicant's claims for relief – for example, to speak with the Applicant's trial counsel or review portions of the trial file to determine if certain information was or was not timely disclosed – the CIU will limit its waiver requests to only those necessary to investigate the claim or issue.
- b. CIU may wish to interview Applicant or Applicant's prior counsel; if so, CIU will afford Counsel the opportunity to be present or waive Counsel's presence at the interview.
- c. If Counsel will be asked to share investigative materials, reports, recordings or communications or other materials relevant to the investigation CIU will provide a written protection of privilege including that (i) the Prosecutor's Office will keep the materials confidential and not share them with third parties, and (ii) disclosure to CIU is not a waiver of attorney-client privilege or work product protection.

Agreement limiting use of Applicant's interview/information: Should CIU seek to interview Applicant or receive information from Applicant or Counsel, CIU agrees to limit the use of such information as follows:

- a. No statements made by Applicant or Counsel or other information provided by Applicant will be used directly against the Applicant in any criminal case.
- b. CIU and Prosecutor's Office may make derivative use of, and may pursue investigative leads suggested by, statements made or information provided by Applicant or Counsel.
- c. If Applicant is a witness or party at any trial or other legal proceedings and testifies or makes representations through counsel materially different from statements made or information provided to CIU reviewing this case, the prosecutors may cross-examine Applicant, introduce rebuttal evidence and make representations based on statements made or information provided during Applicant's interview.



Brady material: CIU agrees to make timely and appropriate disclosures of any exculpatory, impeachment, or mitigating information discovered in the ongoing CIU review. CIU agrees to provide information that could support a claim of a reasonable likelihood that Applicant did not commit the offense charged even if it does not bear on actual innocence.

Other considerations: There are myriad other issues that can arise under a cooperative post-conviction review or investigation. Not every circumstance can be covered by one agreement, but these areas should also be considered:

Forensic testing: Where forensic testing of any kind will be conducted, CIU agrees it will not withhold agreement to testing unreasonably. Where testing will be conducted, Parties agree they will work to create a testing protocol including the experts who will conduct the testing. Failing agreement, which will not be withheld unreasonably, each Party may retain its own expert. CIU will arrange to release forensic evidence for examination by forensic experts and Parties will have equal access to the experts, test results, and all underlying documentation.

Media blackout: Both Parties agree that while the review or investigation is pending, they will refrain from discussing the case in the media unless the other Party consents. Use of media will be discussed among the Parties before any outreach is done or before any independent media inquiries are answered.

Communication of prosecutor decision: If the Prosecutor determines a case is appropriate for relief, Parties will discuss how the matter will be addressed in court, including how any evidentiary hearings will be conducted. If CIU or Prosecutor determine a case is not appropriate for action by the CIU, that decision will be communicated as quickly as possible to Counsel. Counsel acknowledges that the Prosecutor may determine relief is unwarranted. In such a circumstance, Counsel acknowledges Prosecutor may refer the case to the [APPROPRIATE PROSECUTOR DIVISION] or take other action deemed appropriate.

Right to Terminate: If this agreement is violated the CIU reserves the right to terminate the review and refer the matter to the [APPROPRIATE PROSECUTOR DIVISION] for further proceedings. Similarly, Counsel may terminate this Agreement at any time upon notice to CIU. Counsel understands by terminating this Agreement, Prosecutor's Office may continue to review the case if it deems appropriate.

By signing below, both parties agree to be bound by all terms of this Agreement until the termination of the CIU review and post-conviction proceedings resulting from that review or termination upon notice to the other Party.

Attorney Signature

CIU Signature

Date

Date

Checklists for Defense Counsel

Matters for defense counsel to consider when deciding whether to work with a CIU

Structural Concerns to Consider Before Working with a CIU¹

- Are the policies of the CIU public and available?
- Is the CIU an independent unit within the DA's office outside the trial, appeals, or habeas units?
- Does the CIU report directly to the Elected DA?
- Are the original trial or appellate prosecutors kept out of case selection or investigation?
- Will the CIU engage in collaborative and cooperative investigations when possible?
- Does the CIU provide full open file discovery to non-sensitive information from all prosecutorial agencies?
- Will the CIU support all available remedies including dismissal, advocating for early parole, sentence reduction, or clemency/pardon support?

Suggested Questions to Ask of a CIU Before Submitting a Case

- Does the CIU condition review upon full waiver of privilege?
- What types of cases does the CIU accept: actual innocence, wrongful conviction, resentencing, special considerations?
- What is the scope of review for unjust sentences — will the CIU review the applicant's prison record and/or other materials?
- Does the CIU review guilty pleas or misdemeanors?
- Will the CIU provide full access to all discovery?
 - Does the CIU require some level of proof before giving access to discovery?
- Will the client be forced to choose between CIU review and pursuing post-conviction relief in court?
- Does the CIU rely on any forensic analysis that lacks scientific validity?
- Does the CIU readily agree to DNA testing where a colorable nexus exists between the item and the crime?
- Will the CIU agree to other forensic testing? What are the parameters to testing?
- If there will be any testing, will the CIU allow defense experts to be involved?
- Has the CIU experienced any difficulty in obtaining files from other agencies or within its own office?
- How will materials provided by defense counsel to the CIU be used by the prosecutor's office?
- Will materials provided by defense counsel be subject to a freedom of information act or similar open record request?
- Will the CIU require an interview with the client?
- Will the CIU engage in open communication during the review? Will they keep counsel apprised of developments or difficulties in the investigation in a timely manner?
- What form of Cooperation Agreement does the CIU use?
- How does the CIU propose working with counsel during the investigation?

¹ These recommendations are consistent with recommendations from Fair and Just Prosecution. A link to their Conviction Integrity Statement of Principles can be found at <https://www.fairandjustprosecution.org/staging/wp-content/uploads/2019/08/Conviction-Integrity-Statement-of-Principles.pdf>.

Minimum Information to Review With the Applicant/Client

- The CIU attorneys are prosecutors and do not represent the client.
- Otherwise protected material from the defense file may have to be shared with the CIU, which could mean a waiver of attorney-client privilege or other protected information.
- Materials shared with the CIU may be used if the case goes to litigation, shared with other agencies, or be subject to an open records request.
- Working with a CIU can take longer than litigation.
- Even if the applicant decides to withdraw the request to review the case, the CIU could continue its investigation on their own.
- It is possible investigation could lead to information confirming the client's guilt or even implicate them in additional criminal activity.
- The CIU could interview and potentially investigate the client's family members or friends to see whether they were involved in the crime.
- The CIU can stop its investigation or the process could turn adversarial.
- An unsuccessful CIU review could impact the client's parole or probation situation.
- Even if the CIU agrees to relief the court may not accept it.
- If relief is not agreed upon, or not accepted by the court, explain how the case will be handled or proceed.

Participants in Discussions

Prosecution Discussion Leaders

Nancy	Adduci	Cook County (Chicago), IL
Bryce	Benjet	Queens County, NY
Jessica	Cicchini	Marion County (Indianapolis), IN
Patricia	Cummings	Philadelphia, PA
Arielle	Demby	Tampa, FL
Sara	DeSimone	Somerset County, MA
Sunny	Eaton	Davidson County (Nashville), TN
Cynthia	Garza	Dallas, TX
Mark	Hale	King County (Brooklyn), NY
Alissa	Heydari	Institute for Innovation in Prosecution
Matt	Howard	Bexar County, TX
Lisa	Lazzari-Strassier	Pennsylvania – statewide
David	Lewis	Suffolk County (Boston), MA
Lauren	Lipscomb	Baltimore City, MD
Howard	Master	Suffolk County, NY
Carolyn	Murray	New Jersey – statewide
Valerie	Newman	Wayne County, MI

Prosecutor Discussion Participants

David	Angel	Santa Clara County, CA
Kelly	Bauder	Marion County (Indianapolis), IN
Martha	Carillo	Los Angeles, CA
Alexis	Fisher-Rizk	Henrico County, VA
Robyn	Frankel	Michigan – statewide
Teresa	Hall	1st Judicial Circuit (Tampa), FL
Anastasia	Heeger	Westchester County, NY
Arcelia	Hurtado	San Francisco, CA
Jennifer	Kilpatrick	Jefferson County, CO
Charles	King	Manhattan, NY
Brenda	Lopez Romero	Gwinnett County, XX
Craig	McElwee	Suffolk County, NY
Robert	Mestman	Orange County, CA



Rachel	Mitchell	Maricopa County (Phoenix), AZ
Becky	Michaels	Northwestern DA's Office, MA
Michelle	Monteiro	Ramsey County, MN
Rachel	Nash	Kings County, NY
Corey	Nicholson	Henrico County, VA
Doyle	Niemann	Prince George's County, MD
Victor	Olds	Columbia Law School
Anna	Rossi Anderson	Salt Lake County, UT
Eric	Sonnenschein	Kings County, NY
Diana	Teran	Los Angeles, CA
Shelley	Thibodeau	4th Judicial Circuit (Jacksonville), FL
David	Voigt	Minnesota - statewide
Frances	Walters	Washtenaw County, MI
Jennifer	Zalnasky	Berkshire County, MA

Defense Discussion Leaders

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Sharon	Beckman	Boston College Innocence Program
Adele	Bernhard	New York Law School
Alissa	Bjerkhoel	California Innocence Project
Lindsay	Herf	Arizona Justice Project
Lisa	Kavanaugh	Committee for Public Counsel Services
Jenny	Merrigan	Phillips Black
James	Meyer	Great North Innocence Project
Seth	Miller	Innocence Project of Florida
Nina	Morrison	Innocence Project
Laura	Nirider	Center for Wrongful Convictions
Megan	Richardson	Michigan Innocence Clinic
Tricia	Rojo Bushnell	Midwest Innocence Project
Nilam	Sanghvi	Pennsylvania Innocence Project
Mike	Semanchik	California Innocence Project
Tara	Thompson	Exoneration Project
Mike	Ware	Innocence Project of Texas
Charlotte	Whitmore	Boston College Innocence Program



Defense Counsel Participants

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Jennifer	Bergeron	Ohio Innocence Project
Rebecca	Brackman	Costra Costa County PD
Tiffany	Bush	Georgia Innocence Project
Caiti	Carpenter	Montana Innocence Project
Gaynor	Cunningham	Post-Conviction Clinic, New York Law School
Richard	Davis	Innocence Project of New Orleans
Hope	deLap	Arizona Justice Project
Dara	Gell	Innocence Project
Ruth	Greenberg	BU Law School
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Kia	Hayes	Innocence Project New Orleans
Libby	Hugetz	Committee for Public Counsel Services
Paige	Keneb	Northern California Innocence Project
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Stacie	Lieberman	Capital Area Private Defender Service Forensic Project
Jason	Mooney	Capital Habeas Unit (FL)
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Ken	Murray	Attorney
Karen	Newirth	Exoneration Project
Jee	Park	Innocence Project New Orleans
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Joanna	Sanchez	Ohio Public Defender
Nisha	Shah	Habeas Corpus Resource Center
T.C.	Tanski	Capital Habeas Unit (OH)
Jill	Tessier	Committee for Public Counsel Services
Adina	Thompson	Innocence Project of Florida
Greg	Wiercioch	Clinical Prof.; Univ. of Wisconsin



Ethics and Professional Consultants

R. Michael	Cassidy	Professor and Dean's Distinguished Scholar - Boston College Law School
Barry	Scheck	Professor – Benjamin N. Cardozo School of Law; Co-Founder and Special Counsel - Innocence Project
Ellen	Yaroshevsky	Director-Monroe Freedman Institute for the Study of Legal Ethics - Maurice A. Deane School of Law Hofstra University