



QUATTRONE CENTER

for the Fair Administration of Justice

Developing a Conflict of Interest Statement for Conviction Integrity Units

Personal Conflicts

Personal conflicts are the easiest to handle. Having a trial or appellate prosecutor who handled the underlying conviction work of be part of a post-conviction review is problematic. The prosecutor has taken multiple stances to affirm the conviction, which only serves to cement the “correctness” of the conviction in her mind. The trial prosecutor, especially, may have developed a relationship with the victim or the victim’s family and be invested in protecting them and their sensibilities in a post-conviction review.

Basic requirement: A strong Conflict of Interest Statement excludes any prosecutor who participated in the underlying conviction or helped to preserve it on appeal from participating in a post-conviction innocence claim review. These are sample statements:

- Prior prosecutors who worked to secure or preserve the conviction of a case under review may be consulted as fact witnesses insofar as they are the ones most familiar with the case and its dynamics, but they will not have any role in deciding whether relief should be granted.
- Information regarding an investigation will not be shared with prior prosecutors and they will not have access to the CIU file as the case is being reviewed.

More robust provisions:

- A written policy detailing when/how prior prosecutors will be consulted in the review process
- A written policy explaining how prior prosecutors will be notified of the outcome of a given review

Handling Professional Responsibility Issues

In reviewing old prosecutions, there may arise cases where a CIU uncovers instances of prosecutorial misconduct by fellow attorneys. This situation is fraught with conflict – both personal and professional. CIUs should have a stated policy of how such allegations will be handled. CIUs should not take on the responsibility of handling these professional conflicts themselves but should have a policy in place that dictates how the office will address them.

The CIU should establish a clear written policy on when and how to refer to appropriate authorities any credible allegations of official misconduct by prosecutors or law enforcement personnel identified in the course of a case review. Here are sample basic and robust statements:

- Prosecutorial misconduct can affect the outcome of a trial in varied ways: presenting witnesses with untruthful testimony, pressuring witnesses to cooperate without disclosing the full information, improper witness examination, failing to provide information required under *Brady v Maryland*, or improper closing arguments.
- If the CIU uncovers information demonstrating credible claims of prosecutorial misconduct at any level, the CIU will provide information about that misconduct directly to the Elected DA or the office's Ethics Counsel if there is one.
- The office will refer the matter to the state attorney disciplinary board where the believed misconduct appears to have affected the outcome of the trial or if there was a violation of Rule 3.8 or other applicable Rules of Professional Responsibility.
- *More Robust Statement:* The CIU and the prosecutor office will engage an Ethics Counsel to field questions of alleged prosecutorial misconduct. That attorney will be tasked with reviewing allegations of misconduct no matter when the misconduct occurred or whether the attorney is still with the office. Should the Ethics Counsel determine the allegation violates Rule 3.8 or any other applicable Rule of Professional Responsibility, counsel will refer the matter to the state Attorney Disciplinary Board.

The CIU should not take on the additional work of investigating particular cases of alleged misconduct itself but may – in warranted cases – take on review of other cases related to the same prosecutor if it appears to have been a pattern of misconduct.

The ethical rules do not have a statute of limitations for misconduct; the position of the prosecutor's office should never be that an infraction was too far in the past to warrant investigation.

Office-wide Conflicts

Risk of civil liability: As a principal matter, the risk of civil liability or professional discipline has no part in a CIU's consideration of whether to investigate a claim or its resolution.

CIUs should consider how they will deal with conflicts which impact the entire office, its finances, or its general reputation. Exonerations and reversals of convictions by their nature call into question the ethical and moral work of the office that achieved and enforced the conviction. Moreover, many offices may be concerned with potential widespread civil liability for cases of endemic misconduct by prosecutors or law enforcement.

To the extent that revealing the error to free the first defendant may open the door to challenges against all convictions occurring during the period, the prosecutor is freighted with the state's conflicting interests. Finally, as heads of prosecutor offices are elected officials, there may be lingering concerns of what the political fallout will be should relief be granted on a particular case – a situation amplified by a high-profile, notorious, or otherwise difficult conviction and/or where the victim or the victim's family does not support the outcome.

Offices should begin developing policies that include a separation of CIU work from issues related to potential civil liability in the event of a successful exoneration. That would include agreements to provide full and open discovery, not communicating with other governmental offices that litigate post-exoneration claims before relief is agreed to, and never conditioning an agreement to relief from conviction on a waiver of civil claims arising out of that decision.

When the prosecutor comes into unique possession of information that might provide the basis for a motion, but defendant has no access to that information, there is no process that can substitute for action on the prosecutor's part.