



QUATTRONE CENTER

for the Fair Administration of Justice

GUIDELINES FOR 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 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 by 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 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.