

**INNOVATIONS IN CRIMINAL JUSTICE: THE 2023
QUATTRONE CENTER SPRING SYMPOSIUM
"INNOVATIONS IN CONVICTION INTEGRITY UNITS"**

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MAY 2023



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Retained Surgical Items

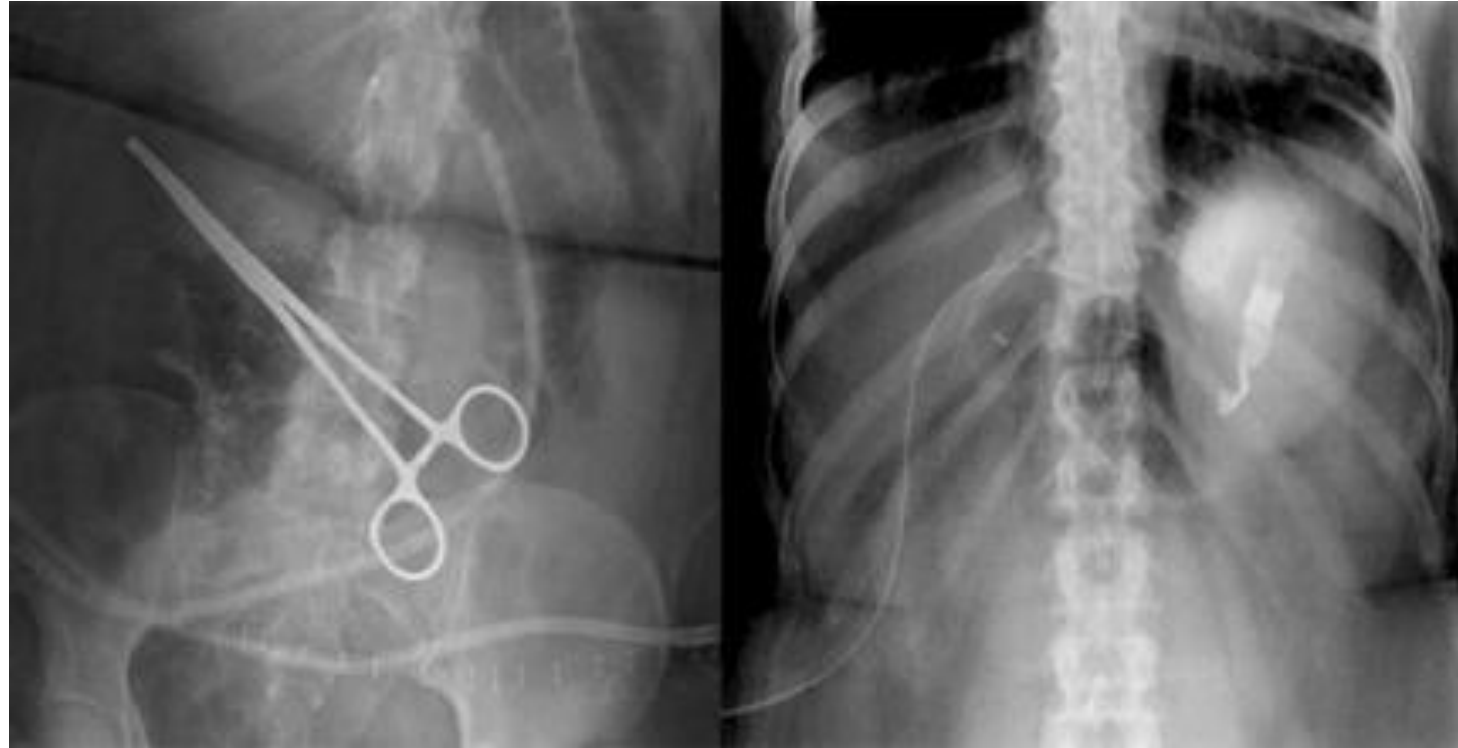


Photo credit: Jack E. James, in *The Health of Populations*, 2016. X-rays showing retained surgical objects of (a) a clamp (Wang et al., 2009) and (b) a laparotomy pad (a type of sponge) (Gibbs, 2011). <https://www.sciencedirect.com/topics/nursing-and-health-professions/surgical-sponge>



"When your surgeon accidentally leaves something inside you"

By [Lenny Bernstein, Washington Post \(2014\)](https://www.washingtonpost.com/news/to-your-health/wp/2014/09/04/when-your-surgeon-accidentally-leaves-something-inside-you/)

Problem:

"While rare, **'retained surgical items'** can cause quite a bit of harm, beyond pain and suffering...even death."

Awareness:

"technology...reduce the number of times this happens, which medical officials already are trying to limit via an awareness campaign."

Costs:

"Not surprisingly, ***each mistake is costly...*** the average price of removing one of these items at \$63,631 per hospital stay..."

Prevention:

"In the past...*x-rays and bar codes* to help detect lost material... *radiofrequency detection systems [are] the best and most cost-effective way to keep track of sponges*"



Convicting an innocent individual represents a failure of our criminal justice system just as a retained surgical item represents a failure of the health care system.

According to the experts, the frequency of retained surgical items occurs, on average, twice per year per hospital, which translates into a rare occurrence.

When a retained surgical item is discovered, the standard remedial action *is not* to ignore the item and hope for the best – it is to remove the item.

While the instances of erroneous conviction are infrequent, any occurrence represents an injustice.

When it is discovered that an individual has been convicted of a crime not committed, we have a responsibility to take action.

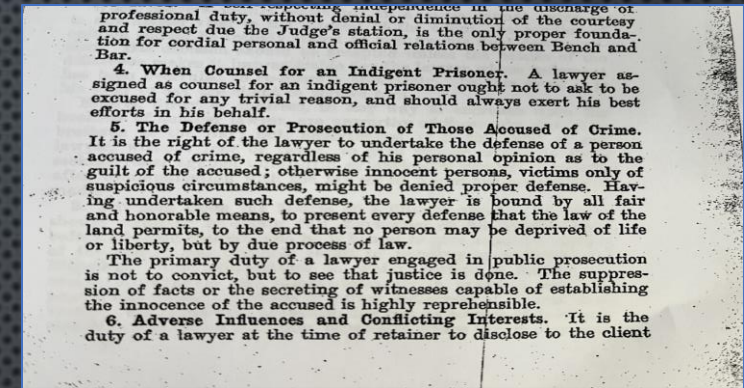
Across all jurisdictions, our collective understanding of the professional and ethical role of prosecutors as ministers of justice has evolved over decades to become more clearly defined at all stages of the criminal justice system.



Evolution of the Present Day ABA Model Rules of Professional Responsibility

1908: Canons of Professional Ethics

"The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." →



1969: Model Code of Professional Responsibility →

"EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."

Present Day: Model Rules of Professional Conduct
Standard 3-1.2 Functions and Duties of the Prosecutor →

"The prosecutor should seek to **protect the innocent** and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants....

...(f) **The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system....**when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action."



What does this prosecution role look like in practice within agencies?

- Development of a specialized unit, such as a conviction integrity unit, with established protocols and procedures when raised in or out of court
- Development of formalized protocols or system designed to structure how claims of factual innocence are processed when raised in or out of court



BCSAO Conviction Integrity Unit

Conviction Integrity Program

Purpose: Review Claims of Factual Innocence

Structure: Staffing: 3 full time staff members

Incoming cases, avg 150 cases/year:

1) Extrajudicial Claims

- Screening
- Initial Review
- Investigation
- Final Review

2) Writ of Actual Innocence Petitions

3) Internal Referrals, i.e. post convictions

4) External Referrals, i.e. other agencies, retired police officers, defense attorneys, victims' families

12 Exonerations



For prosecutors to step outside the role of case-processors and into the role of problem-solvers within the criminal justice system, prosecutors must have the trust and confidence of the community served and among criminal justice stakeholders.



As prosecutors, when we discover an unjust outcome and ask the court to grant relief, we are asking a judge to make a major change: reverse a jury finding.

From the standpoint of a judge:

- Granting relief represents a change from the typical prosecution post-trial position of defending a conviction
- Judge is being asked to rely on a proffer of facts, evidence and relevant law from attorneys, often without an evidentiary hearing
- No visibly quantifiable evidence that an error occurred, i.e. no x-ray of scissors in the patient
- New to the case – trial likely occurred years earlier and before a different judge
- Post-trial law is an entangled complexity which may not be familiar territory (vs. 4th Amendment law, for example, which is invoked daily in criminal court)
- Was not present when the offense occurred



Building Trust and Confidence

Demonstrating due diligence, credibility, and professional responsibility instill trust and confidence in any prosecutorial action.

Due Diligence

Leave no stone unturned. Provide demonstrative evidence that reflects you have undertaken a thorough investigation in which pieces of evidence have been properly corroborated. Accurately and precisely identify key facts and evidence presented to the jury along with results of post-trial investigation.

Credibility

Be candid. Stay on the facts and evidence - skip editorialization. Inform of all relevant inculpatory and exculpatory material.

Professional Responsibility

Highlight the prosecutorial role to ensure just outcomes. Demonstrate compliance with all relevant laws.

Res ipsa loquitur. Demonstrative evidence of having done due diligence, being thorough and candid will speak for itself in drawing a picture as poignant as an x-ray reflecting a pair of scissors inside a patient.



Building Awareness - Conviction Integrity within a Prosecuting Agency

- Formalizing the ABA model rules relating to the special duties of a prosecutor within prosecuting agencies.
- Symposiums such as this deliver messaging and build awareness of the importance of conviction integrity work.
- Similar to homicide units, sex offense units, standardizing conviction integrity within prosecuting agencies by devoting full time staff normalizes the work.
- Targeting agency or bar association training modules to broaden awareness of conviction integrity work and its relationship to the role of a prosecutor.



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