



Ohio Prosecuting Attorneys Association

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Ohio Prosecuting Attorneys Association Announces Conviction Review Best Practices, Proposes Change to Rules of Professional Conduct

The Executive Committee of the Ohio Prosecuting Attorneys Association voted last week to approve a set of best practices for conviction review and to propose a change to Rule 3.8 of the Ohio Rules of Professional Conduct regarding the special responsibilities of a prosecutor.

The best practices for conviction review are intended as guidance to prosecuting attorneys in Ohio who are asked to review claims of wrongful conviction. They provide guidance on the adoption of specific policies and procedures to govern application, acceptance, investigation, and documentation of claims of wrongful conviction. They were developed by career prosecutors with extensive experience, are based on what Ohio prosecutors have learned from their own conviction review experiences, and include many best practices that are recommended by organizations like the Innocence Project and Fair and Just Prosecution.

The proposed change to Rules of Professional Conduct are based on the American Bar Association's Model Rules of Professional Conduct regarding the special responsibilities of a prosecutor as a minister of justice. The proposal would make clear an ethical obligation that prosecutors already recognize and practices that they already undertake regarding new, credible, and material evidence of a convicted defendant's innocence.

"A lot of attention has been given to Chief Justice O'Connor's creation of the Task Force on Conviction Integrity and Post-Conviction Review. These are issues that Ohio prosecutors have been sensitive to and been studying for much longer" said Executive Director Louis Tobin. While the best practices discuss the creation of "Conviction Review Units," Tobin said that "they can also be used by smaller counties looking for guidance on critical issues to consider when reviewing individual case files."

"Prosecutors take their role as a minister of justice very seriously. These guidelines and recommendations further our recognition that our responsibilities extend to the defendant as well as the state and that we have an obligation to ensure that defendants are accorded justice" added OPAA President, Juergen Waldick.

The Ohio Prosecuting Attorneys Association was founded in 1937, as a private non-profit corporation, for the benefit of the 88 elected prosecutors in Ohio. The organization seeks to increase the efficiency of its members in the

pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted actions on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice. The association presents statewide continuing legal education programs regarding all aspects of the county prosecuting attorney's responsibilities.



Ohio Prosecuting Attorneys Association
for justice, for safety, for our communities

Conviction Review Best Practices

A prosecutor's responsibility for pursuing justice extends beyond the date of conviction. Today, the role of prosecuting attorneys has never been more significant or more meaningful as reports of wrongful convictions and police misconduct erode the public's faith in the criminal justice system. Because Prosecutors have a duty to advance the fair administration of justice, Ohio's Prosecuting Attorneys should, when feasible, establish independent internal Conviction Review Units. With clearly defined procedures and objectives, these independent units have the ability to assess claims, provide additional investigation when warranted, and ensure that concerns regarding the validity of a conviction are addressed and reported. Establishing written procedures for these Units serves to restore and bolster the public's trust in the criminal justice system.

Best Practice: Establish Independent Conviction Review Units

An independent review process requires the involvement of experienced prosecutors and investigators who were not involved with an offender's case at the trial level or on appeal.

The case for an independent unit:

- Because the public may perceive that trial prosecutors have a vested interest in defending a conviction, the prosecutors who were involved with the case at the trial level should not work on the case as a reviewing prosecutor in a Conviction Review Unit. Such a policy promotes public confidence in the integrity of the State's review process.
- Separating the post-conviction review process from the existing procedures governing post-conviction litigation, such as petitions for post-conviction relief and motions for new trial, ensures that questions regarding the validity of a conviction are properly vetted. Post-conviction litigation in appellate units often relies on the Criminal Rules, Ohio post-conviction statutes, and precedent that may present legal bars to evaluating or investigating the merits of post-conviction claims. Additionally, appellate divisions may not have dedicated investigators or other resources needed to fully vet claims in the post-conviction setting.
- The creation of a separate unit dedicates staff to time-intensive historical case review and allows staff to address possible additional forensic analysis and other investigatory steps that may be required to respond to a claimant's concerns.
- Independent review requires the recruitment of experienced prosecutors who have the ability to research and understand new scientific techniques, communicate with leading experts, and evaluate the impact of new or improved technology on a conviction.

- Units must have the authority and autonomy to evaluate claims, thoroughly review cases, and conduct investigations. The director of the Unit should report directly to the elected County Prosecutor.

Written Policies and Procedures:

Each Conviction Review Unit should create specific policies and procedures governing the application process, acceptance criteria, investigatory procedures, and documenting program goals. At a minimum, the policies and procedures should encompass the following:

- Clearly define the purpose of a Conviction Review process; define what qualifies as a wrongful conviction; define the review process; and set standards of review for applications that are accepted for investigation.
- Formalize an application procedure for requesting review by the Unit.
 - ✓ Cases may be referred to the Unit for consideration by external and internal sources, including but not limited to *pro se* defendants, defense attorneys, state or local public defenders, innocence project organizations, legal aid societies, the media, other prosecuting attorneys or assistant prosecutors, judges, court personnel and law enforcement agencies.
 - ✓ In the application, defendants agree to waive attorney client confidentiality to allow defense attorneys to provide defense investigatory material to the Conviction Review Unit for review. Such a requirement shows an offender's good faith in submitting an application for review. The defense file would be considered confidential by the Unit.
 - ✓ Defendants should also agree to additional forensic analysis if their cases are accepted and if scientific analysis is warranted under the facts of the case. (Such a requirement exists for applications for DNA testing under R.C. 2953.72(A)(10))
- Disclose criteria for evaluating cases.
 - ✓ The Unit should not reject applications based exclusively on delay or procedural defaults. If an application is accepted, that delay should be investigated.
 - ✓ The Unit should have written guidelines governing the evaluation of claims and cases. These procedures should be disclosed to applicants.
 - ✓ The rationale for acceptance or rejection of an application must be documented and disclosed to the applicant.
- Victim notification
 - ✓ Victim rights must be acknowledged, and victims should be notified on a case-by-case basis of case referrals to the conviction integrity unit. It may be best to notify victims only when notification is necessary to investigate a claim or when it appears that a defendant may have a legitimate claim that could impact a verdict. Alternatively, victims could be notified when the Unit accepts a case for investigation. Notification should provide information to the victim regarding the review process.

- Identify investigatory procedures following acceptance of an application
 - ✓ Where an offender is represented by counsel, Conviction Review Unit personnel should work cooperatively with defense counsel and the parties should engage in open, reciprocal discovery.
 - ✓ Reviewing prosecutors should identify confidential material and any disclosure of that material, or portions thereof, should be raised and reviewed with the elected Prosecuting Attorney.
 - ✓ Pro se applicants should be notified of the progress of pending investigations.
- Reporting
 - ✓ The Prosecuting Attorney and Director of the Conviction Review Unit should establish program evaluation goals and criteria to document the efforts of the Unit. Reports should be made at least annually.
 - ✓ Quantifiable criteria in a specified time frame may include, but are not limited to: the number of applications received, the number of applications related to convictions following trial or plea; the number of applications where the applicant pursued appellate and post-conviction remedies and/or where those remedies have expired; the average number of claims per application; the number of applications by type of applicant (pro se, defense attorney, innocence project organizations, etc.); the number of applications accepted for additional investigation; the number of and types of claims accepted for review (forensic analysis, newly discovered evidence, etc.); the number of cases where investigation did not or could not support an applicant's claim; the number of cases where additional investigation revealed evidence supporting a conviction; the number of cases where investigation supported a conclusion of wrongful conviction.
 - ✓ Documenting and reporting these criteria quantifies the significant work conducted by Conviction Review Units and promotes faith in the criminal justice system.

These practices can also be used by smaller counties as guidance on critical issues to consider when reviewing individual cases.

Alternative to Best Practice: Establish multi-jurisdictional agreements

Where the creation of an independent unit is not feasible in a specific jurisdiction, the Prosecuting Attorney may enter into an agreement to enlist the aid of an established Conviction Review Unit in a different jurisdiction. The attorneys in the established Units, acting as special prosecutors, could then review applications and perform any additional investigation as is warranted in a specific case.

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall not do any of the following:

(a) pursue or prosecute a charge that the prosecutor knows is not supported by probable cause;

(b) [RESERVED]

(c) [RESERVED]

(d) fail to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, fail to disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by an order of the tribunal;

(e) subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes all of the following apply:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;

(3) there is no other feasible alternative to obtain the information.

(f) fail to do the following when a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the crime for which the defendant was convicted:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant is innocent of the crime.

(g) fail to seek to remedy a conviction, even if all authorized appeals have concluded, when a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction is innocent of the crime for which defendant was prosecuted.