

# The PROSECUTOR

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## Statewide Best Practices Committees for Prosecutors: *Leveraging Experience and New Evidence to Benefit the Criminal Justice System*

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TECHNOLOGY AND SCIENCE are evolving and improving at an accelerated and overwhelming pace, changing every sector of our society. The criminal justice system is one of the beneficiaries of this trend. DNA testing is now routinely used to help law enforcement identify the guilty party and exclude the innocent. Surveillance cameras, GPS devices and smart phones—carried by witnesses and suspects alike—provide powerful evidence during an investigation. Forensic science is evolving and improving, as increasingly rigorous standards are producing reliable and timely results. Even searching the Internet is now a routine investigative tool because of the vast amount of information available at an investigator's fingertips.

Most of this evidence did not exist 20 years ago.

The explosion of information and evidence has significantly enhanced law enforcement's ability to properly investigate and prosecute a criminal offender. However, this new evidence, particularly DNA, has revealed that some convictions, mostly from decades ago, were wrongfully obtained. This is a tragedy for all concerned—for the inno-

cent person who has suffered by being convicted of a crime he did not commit, for the victim who loses a sense of closure about the crime, and for society at large because the true perpetrator remained free and able to commit more crimes. The criminal justice system must strive in every way to prevent such an unjust outcome.



Prosecutors have an obligation to learn from the mistakes of the past and to work diligently to minimize the risk of future wrongful convictions. Prosecutors must undertake this introspection while being mindful of their mission to protect public safety and to respect the rights of the accused. The best way for a prosecutor to prevent a wrongful conviction is to thoroughly investigate a case, to do so ethically, and to get the prosecution right in the first instance.

Forming a statewide Best Practice Committee for pros-

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ecutors has proven to be an excellent way for prosecutors to be proactive about assessing and implementing enhanced procedures, sharing information about new types of evidence, reviewing ethical issues and learning from wrongful convictions. A Best Practices Committee for prosecutors can be a brain trust for criminal justice innovations and enhancements that inure to the benefit of all.

This article will discuss New York's Best Practices Committee for prosecutors, similar committees that are developing around the country and support for this work that is provided by a grant from the Department of Justice/Bureau of Justice Assistance.

### **Best Practices Committee in New York<sup>1</sup>**

In 2009, the District Attorneys Association of the State of New York (DAASNY) created the Fair and Ethical Administration of Justice Committee, with subcommittees devoted to Best Practices, Ethics and Mutual Assistance. The concept was the brainchild of William Fitzpatrick,<sup>2</sup> the district attorney of Onondaga County (Syracuse), New York. Elected district attorneys from around the state were appointed to the overarching committee to oversee the three subcommittees. The mission of the Best Practices Committee is to explore ways to improve the investigation and prosecution of criminal cases and to respond to issues arising from wrongful convictions. The Ethics Committee analyzes ethical issues and generates updates for the district attorneys association on cases and rules that affect the ethical obligations of prosecutors. The Mutual Assistance Committee provides support to prosecution offices that request assistance in re-investigating a case where a wrongful conviction claim has been lodged.

The members of the Best Practices and Ethics Committees are district attorneys and senior assistant district attorneys, all with significant experience in the criminal justice system. They come from every part of New York State and represent every type of jurisdiction—rural, suburban, and urban. The committee meets once a month, alternately in New York City and in Albany, the capital of the state.

*Early Meetings:* From the first meetings of the Best Practices Committee, the members quickly learned that, though criminal statutes applied statewide, the practices around the state differed significantly. In some instances, the



*Derek Champagne, 2010 President of the NY DA's Association and District Attorney of Franklin County N.Y., leads the December 14, 2010 press conference where New York's state and local law enforcement announced their endorsement of the video recording of custodial interrogations.*

differences addressed regional needs; in others, they followed traditions arising over time. We understood that as we worked to analyze and improve our work, any recommendations would have to take regional differences into account.

We began our meetings by reviewing some of the state's wrongful convictions using a number of different approaches. For example, a prosecutor from a county with a wrongful conviction would present the case to the group, explaining the issues that had arisen and the lessons learned. At one very moving meeting, Jeffrey Deskovic, a man exonerated of rape and murder after DNA revealed the true culprit, spoke to the committee about his experience and the causes for his wrongful conviction. We also read various reports, articles, and commentaries from around the state and country that provided insights into the causes of wrongful convictions. It was clear from these presentations and our research, as well as from our own experience, that while wrongful convictions arise from many causes, identification procedures and the taking of suspect statements were critical issues for the committee to evaluate first.

### **Identification Procedures**

Since our committee represented all parts of the state, we were able to quickly determine that there were no statewide identification procedures, few written procedures of any kind and little training on how to best conduct an

identification procedure. So as a first step, we focused on the development of statewide procedures. To do so, we examined the social science, looked at procedures in other states, and evaluated how the procedures could be practically implemented throughout the state. Over the course of a few months the Best Practices Committee wrote its first draft of new procedures designed to make identifications fair, neutral, and reliable.

The next step was to bring the draft to our police partners. We needed the benefit of their practical experience in the field and we wanted to make sure that we took into account the diversity of our law enforcement agencies. New York State has over 550 police departments. They range in size from the giant New York City Police Department (NYPD) with 35,000 officers, to small rural departments with fewer than 10 officers. We had many meetings with representatives from police departments

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large and small, from every region of the state, to review the draft and include their input. Gradually, through our collaborative work, law enforcement reached a statewide consensus on identification procedures that provided a fair and neutral process by which a witness has the opportunity to determine if he or she can recognize and identify the perpetrator of the crime. A form was also created to guide the officer through the new procedures step-by step.

One observation we heard from the social scientists, as well as from practitioners around the country, is that there are significant benefits to voluntary, self-generated protocols

over an inflexible statutory mandate. First, the procedures are capable of being reviewed and amended, leaving room for updates and improvements. This is particularly important, since there is still much to be learned about eyewitness identification. Legislated or mandated procedures do not allow for experimentation, improvement or comparative study. Secondly, law enforcement's commitment to, and understanding of, the procedures are far greater when they have participated in their development and implementation.

The details of the identification procedures exceed the scope of this article. However, the salient points of the procedures are that a witness must be given a series of instructions; photo arrays and live line-ups are done simultaneously, not sequentially; the procedures must be conducted in a way that shields the witness from any inadvertent cues an officer may give; and the witness's statements regarding the identification must be contemporaneously memorialized. A pre-made Identification Form walks the officer through these phases of the procedure with instructions and the ability to record the relevant information

On May 19, 2010, at a press conference led by Police Commissioner Ray Kelly of the New York City Police Department and Kate Hogan, district attorney of Warren County and the 2009 president of DAASNY, the statewide adoption of the identification procedure guidelines was announced. In attendance were representatives from police departments, sheriffs' departments and district attorneys from around the state. The head of the NY state Division of Criminal Justice Services (DCJS) and the chair of the Municipal Police Training Council were also at the press conference to pledge support for statewide training on the new procedures.<sup>3</sup>

*Training and Implementation:* After the NYS Identification Procedures were announced, the Best Practices Committee, in partnership with DCJS, embarked on an ambitious training program throughout the state. Day-long trainings were held, a CD of the training was available to requesting police departments and, most recently, online training was developed so the officers could do the training at their desks. District attorneys' offices have also conducted follow-up trainings for their assistant district attorneys and for their police departments. The New York City Police Department and the New York State Police have adopted the NYS ID

Procedures. Police departments in urban, suburban, and rural areas around the state have incorporated them into their protocols.

### **Video Recording of Custodial Statements**

The Best Practices Committee then moved on to review the issue of whether to record interrogations of suspects in custody. We learned that over the last two decades, the video recording of interrogations had already been adopted by a few progressive district attorneys and police departments in various parts of New York State. This practice was further encouraged by funding from DCJS and the New York State Bar Association. After hearing from prosecutors who had experience with using recorded statements in their cases, we saw that video recording of custodial interrogations benefited the police as well as the accused. When the entire police interrogation is recorded, no words are forgotten, no nuances are lost, and the conduct of the questioner and the questioned can be fully evaluated.

The committee turned to creating statewide protocols for the recording of interrogations. We reviewed the protocols used in various parts of the state. We took the best of each and worked to enhance them. As with the identification procedures, the draft protocols were shared with our police partners. Discussions were had about practical considerations, funding issues, and the legal rights of defendants when being interrogated. Following much consideration, protocols emerged with input from the NYPD, the New York State Police, the chiefs, and the sheriffs. Some police, who were initially reluctant to endorse this technology, began to see its advantages. In addition to having a full record of the suspect's statement, allegations of false confessions could be rebutted, and the recording could be used for training purposes. Through this process, New York's law enforcement agreed that the video recording of interrogations was a worthy goal.

On December 14, 2010, at a press conference led by Derek Champagne, district attorney of Franklin County and the 2010 president of the DAASNY, the state's district attorneys and the state's police agencies endorsed the Best Practices protocols and committed to moving forward with video recording of interrogations.<sup>4</sup> To date, DCJS had devoted over three million dollars of funding for police departments to buy and install video recording equipment.

Around the state there are over three hundred and eighty recording facilities either in police facilities or in prosecutors' offices. The NYPD initially started with a pilot program, building one video recording facility in each of New York City's five boroughs. Now, with the help of private funding, video recording facilities have been installed in the majority of police precincts in Queens and the Bronx.

More funding is needed to build additional sites and to cover large ancillary costs. These costs include copying, storing, redacting, and transcribing of recordings, as well as creating capacity in courtrooms and grand juries to display the recordings for all parties to see. As the use of recordings increases over time, administrative staff will be needed to keep track of the recordings and maintain the equipment.

### **Ethics**

*Ethics Handbook for Prosecutors:* From an examination of the wrongful convictions, it became clear that there were instances where exculpatory material had not been turned over to the defense. Our analysis revealed that materials were rarely withheld as part of an intentional effort to convict an innocent man, but were rather withheld in error when the rules requiring disclosure were not properly understood by either the prosecutor or the police. The committee decided that one important way to prevent wrongful convictions is to be sure that those in law enforcement fully understand their ethical obligations to the defendant. We knew that training on ethical issues has been ongoing around the state by both individual district attorney offices and the New York Prosecutors' Training Institute. To supplement and enhance these trainings, the Best Practices Committee, along with the Ethics Committee, believed it would be important to create a statewide expression of prosecutors' commitment to the ethical principles by which they are governed. That expression came in the form of a handbook called *The Right Thing: Ethical Guidelines for Prosecutors*.<sup>5</sup>

The handbook outlines a prosecutor's ethical obligations in a short, easy-to-read format, and included guidelines about how to deal with the many ethical issues arising out of complex *Brady* and *Giglio* considerations. It describes the obligations in a way that speaks directly to the reader through chapters entitled: "Unethical Conduct:

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Consequences for Others,” “Unethical Conduct: Consequences for You,” and “Rules of Fairness and Ethical Conduct.” The handbook has been distributed to every district attorney and assistant district attorney in New York State. We have made the handbook available to prosecutors around the country, Bar associations, national criminal justice groups, and academics. It has been very well received.

*Conviction Integrity Units:* Cyrus R. Vance, Jr., district attorney of New York County, created a Conviction Integrity Program when he took office in January 2010. Its chief is a member of the Best Practices Committee and she has made several presentations to the committee about the work of the program. This has inspired other offices around the state to create similar programs, or to develop a system for handling post-conviction claims of innocence. However, some offices are too small to have a program devoted solely to conviction integrity. To provide some assistance on this issue, the Best Practices Committee offered sample questions to help assistant district attorneys and their supervisors so that they can identify and investigate any potential problems before the conclusion of a case. These questions were based on work developed by the New York County Conviction Integrity Program. In addition, DAASNY created a Mutual Assistance Committee, which provides a framework for district attorneys to request help from their colleagues in reviewing a claim of innocence.

*Discovery Training for Police:* The committee also addressed the obligation of the police to provide the prosecutor with the information that must be divulged to the defense. Needless to say, a prosecutor cannot turn over information that he or she does not know exists. We knew that it would be productive to work again with our police partners on this issue. The committee developed training for the police that outlines their various obligations to provide information to the prosecutor. Using a now familiar process, we met with representatives of all the police groups in the state and decided to work together on this training. Our collaboration on this project has taken different forms: some departments have taken the training and incorporated it into their own training, while others, such as the NYPD, have invited assistant district attorneys to conduct the training within their department. We have made presentations on this topic to police trainers from around the state and discussed the

importance of this training with the state’s Municipal Police Training Council. DCJS has created online training that allows officers to view it from their desktop and receive a certificate upon completion.

### **Forensics**

Forensic evidence is becoming an increasingly important part of the proof in a criminal case. Since it is a critical component of criminal cases, it is essential for prosecutors, as well as judges and defense attorneys, to have a good working knowledge of the science and methodologies underlying this evidence. Prosecutors must also be vigilant about the integrity of the laboratories conducting the scientific testing, making sure that the underlying science is valid and that proper protocols are followed. Over the past few years, irregularities have been uncovered in some of New York state’s laboratories. Cases have ranged from sloppy work by individual criminalists to a laboratory that was forcibly closed due to its sub-standard practices.

Our committee has worked on two aspects of this issue. The first was to share information about our obligations to respond to these problems, including how to deal with the laboratory, how to notify the defense and implications for individual cases. The second topic we addressed is the creation of a Customer Working Group with the local forensic laboratory. Such a group consists of liaisons from agencies that submit evidence to the laboratory and agencies that request results from a laboratory—typically police and prosecutors. Though prosecutors and police routinely deal with the laboratory on individual cases, they often do not have a mechanism for dealing with the global issues facing a lab, such as accreditation, proper standards, backlog and the like. A Customer Working Group provides a framework for police and prosecutors to have regular contact with the laboratory’s leadership. Such a group facilitates a deeper understanding between the laboratory and law enforcement which can anticipate and prevent problems, and open lines of communication that allow for a swift and appropriate response if there is a problem at the laboratory.

### **Digital Evidence**

Technological advances are benefiting law enforcement at every turn. However, this new evidence raises many evidentiary and ethical issues that are new to all of us. The Best

Practices Committee has looked at this issue in three ways. First, how can digital information enhance investigations and be used as evidence? Secondly, when and how should the Internet be used for background checks? Thirdly, what policies should be created for staff members of a prosecutor's office regarding the use of the Internet and social media? The law in this area, as well as the technology itself, is evolving and changing every day. The three issues are all huge topics that involve not only an understanding of the technology, but also an analysis of a variety of new ethical issues. For example, how should digital evidence be collected, how can prosecutors interact with the public, and what are the boundaries of privacy. More issues will surely emerge. Our committee serves as a place where these issues can be freely discussed and protocols and ideas can be exchanged. Confronting and understanding these questions is critical for a prosecutor in this digital age.

### **Benefits of New York's Best Practices Committee**

The Best Practices Committee has become an important voice in setting criminal justice policy in New York State and is an effective mechanism for taking practical and cost effective steps to enhance the criminal justice system. It is a forum for discussing policy issues collectively, so that prosecutors from all jurisdictions can contribute and enhance their understanding of an issue. We have formed close partnerships with the state's police agencies and laboratories on topics of mutual interest and work with them on a regular basis. Since the committee meets monthly, we can respond quickly to issues as they arise by tapping into the extensive criminal justice experience of the committee's members. Added benefits are the friendships that have developed between prosecutors around the state and the assistance we can provide each other on individual cases.

### **Bureau of Justice Assistance Support and Prosecutor's Encyclopedia**

The Department of Justice, through the Bureau of Justice Assistance (BJA), is supporting statewide Best Practices Committees for prosecutors in a number of ways. Denise O'Donnell, director of the Bureau of Justice Assistance, said:

We are committed to helping prosecutors improve the criminal justice system by devel-

oping best practices that enhance public safety and respect the rights of the accused. State and local prosecutors are an essential part of the criminal justice system and play an important leadership role in the national discussion on how to protect the public in a fair and balanced way.

In furtherance of this commitment, BJA established a Visiting Fellow position at the Bureau of Justice Assistance devoted to assisting with the creation, development and implementation of such committees around the country. That assistance includes presentations to prosecutors around the county, materials, and ideas for agenda topics. Secondly, the Bureau of Justice Assistance has provided funding to enhance the Prosecutor's Encyclopedia (PE), an online wiki for prosecutors. Currently available to prosecutors throughout the nation, PE will be the platform for creating a National Resource Center to assist and support prosecutors who have created statewide Best Practices Committees. In addition to each state having its own Best Practices page on PE, information sharing between states will also be

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### **NOTE TO LIBRARIANS**

You have undoubtedly noticed that *The Prosecutor* magazine has not been printed for about a year. The last issue printed was volume 46, #1, January/February/March 2012. This issue, volume 47, #1, October/November/December will be the only issue to print in 2013. We will resume our regular printing schedule of four issues per year in 2014. We apologize for the disruption in publication.

Jean Hemphill  
*Editor*

enhanced by easy access through PE. Finally, funding is available for regional staffing of Best Practices Committees to provide more direct assistance in the running of such a committee.

### **Creating a Best Practices Committee**

Prosecutors from all parts of the country, whether from large jurisdictions or small, have a great deal in common. It is essential to share good ideas that improve and enhance the work of a prosecutor, so that they can fulfill their mission of protecting public safety, while respecting the rights of the accused.

In September 2013, Missouri prosecutors announced the formation of a Best Practices Committee.<sup>6</sup> Eric Zahnd, 2013 president of the Missouri Association of Prosecuting Attorneys and Platte County prosecuting attorney, said, “As prosecutors, we don’t just try to win cases. We embrace a higher calling to do justice, which means both convicting the guilty and protecting the innocent. Studying and implementing the best practices for law enforcement and prosecution will help us to fulfill our duty to obtain just convictions against only those who are guilty of victimizing law-abiding citizens.”

A video featuring several of Missouri’s prosecutors reinforcing their commitment to doing the right thing accompanied the announcement.<sup>7</sup> Several other states are in the planning stages of creating a statewide Best Practices Committee as well.

Once a decision is made to start a Best Practices Committee, the most crucial step is to find a non-partisan leader who can move the committee forward by including the input of prosecutors from all parts of the state. From the work being done around the country it is clear that this leader can come from a number of places: a large office that has the resources to allow a senior prosecutor to lead the group, a retired prosecutor who has the respect of his peers, or a member of the attorney general’s office. In some states the prosecutor coordinator can also provide assistance.<sup>8</sup>

A Best Practices Committee requires little expense. In New York, the cost of travelling to the meetings is borne by the member’s office and the office hosting the meeting provides lunch. Members who cannot join the meetings in person, either because of time or cost constraints, join the meetings by conference call. Materials are distributed elec-

tronically through PE in advance of the meetings, so that the members can print out their own copies or download them to their computers, tablets or phones. In between meetings, the subcommittees do their work through conference calls and the Internet. The goal is to meet and work together to discuss ideas of general interest to senior prosecutors and to benefit from each other’s experience. It quickly becomes apparent that the sum of such a committee is greater than its individual parts.

### **Conclusion**

The formation of a statewide Best Practices Committee for prosecutors is a powerful tool that will enhance the criminal justice system. Through such a committee prosecutors can proactively recommend improvements, learn about new evidence, and brainstorm difficult issues, all with the goal of getting it right in the first instance. The seeds of ideas that are born in a Best Practices Committee meeting often are brought back to individual offices, where—with more work and thought—they bear fruit. The results are then brought back to the committee, where all can benefit from the findings. The experience of prosecutors, their direct access to investigations and case files, along with an intimate understanding of the criminal justice system, puts them in an ideal position to understand the real issues and be leaders in criminal justice innovations. Groups such as the Innocence Project have been working hard to analyze and understand wrongful convictions and to recommend reforms. Prosecutors need to do the same. Your voice needs to be heard.

For more information on setting up a Best Practices Committee in your state please feel free to send me an e-mail at: [khamann@bestpracticesforjustice.org](mailto:khamann@bestpracticesforjustice.org)

<sup>1</sup> This article is an update of “New York Law Enforcement Creates Best Practices to Prevent Wrongful Convictions,” by Kristine Hamann, ABA Criminal Justice Journal, October 2012.

<sup>2</sup> D.A. Fitzpatrick is a member of NDAA’s Executive Committee and Assistant Treasurer/Secretary of the NDAA Board of Directors.

<sup>3</sup> The New York State Identification Procedures and the related forms can be seen in their entirety on the DAASNY website at [www.daasny.org](http://www.daasny.org).

<sup>4</sup> See the DAASNY website, [www.daasny.org](http://www.daasny.org), for a copy of the protocols for the video recording of custodial interrogations.

<sup>5</sup> See DAASNY website, [www.daasny.org](http://www.daasny.org), for a copy of the Ethics Handbook.

<sup>6</sup> <http://www.koamtv.com/story/23350330/missouri-prosecutors-pursue-best-practices-for-criminal-justice>

<sup>7</sup> See: <http://mops.mo.gov/Videos/MAPA%20Best%20Practices.wmv>

<sup>8</sup> See: <http://www.napc.us> for information about your state’s prosecutor coordinator.