GUIDE TO ETHICS & BEST PRACTICES FOR INNOCENCE PROJECT PRACTITIONERS
STATEMENT OF PURPOSE

This Guide is meant for practitioners whose practice involves aiding persons with wrongful convictions claims.

The Guide does not attempt to address every likely issue that may confront the practitioner – only those that tend to arise with some frequency, as well as several that may not arise as frequently but that are unique to, and pose particular problems for, practitioners in this area.

Network Requirements: Although all of the ethics rules and best practices set forth in the Guide are strongly encouraged, a number of them are requirements for Network membership. These requirements are highlighted at the top of the sections of the Guide in which they are discussed. In the event that other professional obligations or guidelines contradict or are incompatible with these requirements, the Network requirements must still be implemented for membership, unless the affected organization seeks and receives an exception from the Network’s Membership Committee.

The Guide is not meant to substitute for practitioners’ state or local rules of professional responsibility, nor is it meant to be an exhaustive treatise on the issues that it does address. Virtually all of the issues discussed below are significantly more complex than the Guide can adequately address. Practitioners and others should consult their local rules or other treatises to address whatever ethical or best practice issues they may face. Note, too, that, although the Network’s Ethics and Best Practices Committee updates the Guide from time to time, the quotations from and citations to sources referenced herein (e.g., the Model Rules of Professional Conduct) may be out of date and should be separately checked before relying on them.

The Guide should be treated as its name implies – as a guide to begin thinking about these areas of practice in order to prevent future problems, or, in the event that problems do arise, as the beginning of a conversation about how to resolve them professionally. The goal of the Guide is to create a community of innocence practitioners who are not only engaged in important and critical work, but also engaged in it at a consistently professional level.

The Guide is also cognizant of the diversity of innocence organizations and the ways in which the rules may or may not apply to each. As a general matter, it speaks to three different types of organizations: (1) “No Representation” organizations, where none of the staff are attorneys; (2) “Limited Representation” organizations, which limit their representation to clients who have actual claims of innocence; and (3) “Full Representation” organizations, which represent clients whether or not their innocence claims continue to have merit during the course of the representation.
That said, the ethical concerns and best practice goals of the Guide, though they may be enforceable as a professional matter only as to lawyers, are nevertheless relevant for all members of the Network. Application of the principles and recommended policies and procedures herein to all Network members will protect the interests of the people we serve, whose claims of innocence are ultimately pursued in court, as well as the reputation and credibility of the Network.

Thus, for example, even though a journalism-based innocence organization might not create an attorney-client relationship in the same way that lawyers do, such organizations must have procedures in place that provide the client the same basic guarantees of confidentiality, loyalty, and diligence afforded by the attorney-client relationship. Likewise, attorney-based organizations that collaborate with journalism organizations must between them ensure that typical client protections are not compromised as a result of the collaboration. Such procedures specifically protecting the client’s interest and adhering to best practices for innocence organizations should be implemented above and beyond other professional guidelines, policies and procedures. In addition, journalism and other non-law school innocence organizations should consult with lawyers who have expertise on issues that may affect the subsequent litigation of a case. Such organizations should also develop relationships with lawyers who are willing and able to conduct the actual litigation of cases. In addition, non-law school, university-based innocence organizations are encouraged to speak with university Institutional review Boards (IRB) for clarification of their status with regard to “research and human subjects” and become familiar with IRB language guiding the ethical conduct of students and faculty who are engaged in clinical work. We also recommend that such organizations speak with university legal counsel to determine the extent to which the investigative and administrative activities of students, faculty, and staff are protected by university and state Board of regent’s policies guiding research activities.

NOTE

The Innocence Network extends particular appreciation to two practitioners and writers in this area: Dean Ellen Suni of the University of Missouri-Kansas City, and Clinical Professor Keith Findley of the University of Wisconsin. Both have provided excellent guidance in these areas over the years. This guide borrows heavily from their work, and their work is a good starting point for broader and more in-depth consideration of the issues addressed below, as well as many others. See, e.g., Ellen Suni, Ethical Issues for Innocence Projects: An Initial Primer, 70 U. Missouri-Kansas City L. Rev. 921 (Summer 2002); Keith Findley, The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education, 13 Clinical L. Rev. 231 (Fall 2006).


CHAPTER 1
THE ATTORNEY CLIENT RELATIONSHIP

§ 1.01 The creation of the attorney-client relationship

Network Requirements for This Section:

Clarifying the Attorney-Client Relationship: Network members must develop a policy and related series of letters – ranging from solicitation and intake letters to retainer agreements and termination letters – that articulate the relationship your organization has with the person seeking assistance. Each letter should include but not be limited to clarifying what relationship your organization does/does not have with the person at that stage and what services your organization will/will not provide.

Tracking and Counting Cases: Network members must develop a system for tracking and counting cases, including initial requests for assistance, and the system should clearly identify the various stages of investigation and/or representation.

• Some organizations devoted to aiding the wrongfully imprisoned have no attorneys on staff. By definition these organizations cannot create attorney-client relationships. They are guided, if at all, by professional codes of conduct separate from the codes and rules of professional conduct that guide attorneys.

Organizations that involve attorneys – whether those attorneys are within the organization or brought on from elsewhere – need to be aware of precisely when a fiduciary relationship – the “attorney-client relationship” – is formed, as the existence of the relationship carries with it certain professional obligations.

As a general matter, the relationship forms when a person communicates in whatever fashion to a lawyer, or to a non-lawyer associated with that lawyer, the person’s intent that the lawyer provide legal services for the person and (a) the lawyer communicates to the person the consent to provide legal services, or (b) the lawyer fails to communicate the lack of consent, and the lawyer reasonably should know that the person is reasonably relying on the lawyer to provide the services.

Organizations involved in innocence work must be mindful that, given the character of this work, there is ample opportunity for an attorney-client relationship to be created inadvertently. Once created, lawyers are obligated to abide by their fiduciary duty to the client.

• Many innocence organizations solicit, either directly or indirectly, requests for assistance from inmates seeking help with their innocence claims. Once requests are received, the organizations often screen them and then, if merited, begin work on the claims. Often this initial work can be quite intensive – both in time and effort – and can involve several different individuals from one or even several organizations over time. These activities, in part or in whole, alone can raise an expectation in an individual that an attorney client relationship has been formed, even if that was not the intent of the project. No formal representation agreement or retainer is required.
Attorneys and their support staff should be made aware of this possibility and conform their contact with potential clients accordingly. It is advisable to use disclaimers in initial written communications with such individuals informing them of the precise nature of the relationship going forward. Any early in-person meetings should also include such disclaimers, which are then memorialized in follow-up written communications.

These disclaimers should make clear that information gathered, work undertaken, and communication engaged in is for a limited purpose – screening the case, for example – and should not be considered as consummation of an attorney-client relationship. Once a decision has been made to accept the case and an attorney-client relationship is imminent, innocence organizations are encouraged to reduce the agreement in writing in a retainer agreement.

- Most innocence organizations are underfunded, understaffed, and overworked. As a result, pending applications for aid or cases in the screening stage can sometimes linger for long periods of time. Innocence organizations should be aware of the unintended consequences that can result: namely, the applicant's belief that the passage of time is an implicit sign that the organization has decided that the case is meritorious and that an attorney-client relationship has been formed. The organizations should continually reevaluate the time it takes to screen pending applications and include language in initial communications with applicants about the expected time period for processing applications or screening a case. The language should state explicitly that the passage of time is not a signal that the organization is working on the case, believes that the case has merit, or has accepted the case for representation. If the screening period is lengthy, it may also be advisable to send additional, intermittent disclaimers.

- In some cases, it becomes necessary to draft pleadings or other legal material for a person before a decision has been made to represent him or her. This might occur because a deadline is approaching and a potential client’s claim must be preserved, or because it is necessary to continue the screening and investigation of the claim. Some innocence organizations prepare and file the documents as the petitioner, without making a formal appearance in the case – a practice known as “ghostwriting.”

Questions arise about the propriety of this practice, but the various rules of ethics do not yet speak conclusively to this issue – though there is rapid change in this area and organizations should check the status of the rule in their own jurisdictions before acting. Generally, though, staff should recognize that the propriety of “ghostwriting” remains unclear and that engaging in the practice requires careful thought and rigorous justification. Though there is a trend to “unbundle” legal services – to allow clients to take advantage of discrete legal services without either lawyer or client committing themselves to the complete set of obligations that flow from a typical attorney-client relationship – the rules and law remain unsettled on this approach. This guide recommends consulting John C. Rothermich, “Ethical and Procedural Implications of ‘Ghostwriting’ for Pro Se Litigants: Toward Increased Access to Civil Justice,” 67 Fordham L. Rev. 2687 (1999); Jona Goldschmidt, “In Defense of Ghostwriting,” 29 Fordham Urban L. J. 1145 (2002).
• Because innocence organizations are uniquely situated, it is often the case that such organizations continue in a “relationship” of some sort even when the initial representation has concluded. The most recognizable example occurs when a client is exonerated and the legal representation has concluded. Though the exoneree may not be a client any longer, the organization may often utilize the case as an example to further awareness, advance policy initiatives, or even other litigation. Organizations should remain sensitive to the ongoing duty of confidentiality owed to the former client as articulated in Rule 1.9. Confidential information about the former representation must not be disclosed unless the former client consents pursuant to Rule 1.6(a).

§ 1.02 Duty of confidentiality

Confidentiality: Network members must develop a policy and associated documents related to the confidentiality of information learned while assisting a person in his/her claim of innocence, whether or not that person has been formally accepted as a client. The policy should consider various means of disclosure, including in-person communication, email, blogs, more traditional media, etc. At a minimum, the documents must include the following: (1) A Release Form to be signed by the person seeking assistance to clarify, as a general matter, with whom your organization may share information — supplemental releases may be required as the investigation and litigation of a case progresses; and (2) confidentiality agreements for all staff, students, volunteers, board members, and others associated with your organization who are privy to confidential information — such agreements should be signed and kept on file.

• The duty of confidentiality prohibits attorneys or those working on the attorney's behalf from disclosing client information or using that information to the disadvantage of the client. Information gained during the course of the attorney-client relationship is naturally protected.

Innocence practitioners, though, face a somewhat unique problem in that it may be the case that even though an attorney-client relationship has not been formed, the attorney still owes a duty of confidentiality to the person. In fact, virtually any information gained during the screening or initial investigatory phase of a case is likely to fall within the ambit of Rule 1.6 (see below). Thus, even though the innocence organization may have been explicit about the nature of the work being performed during the screening stage and explicit about its work not being construed as forming an attorney-client relationship, a duty of confidentiality may arise.

• Often lawyers and their staff must contact others outside the organization to discuss a case. It is advisable therefore to obtain from the person a release of information that grants permission to share otherwise confidential information to advance the person’s goals. Special considerations arise when information is shared with prosecutors and law enforcement. Such communications are no longer confidential, but they are often necessary to advance the person’s goals. Although Rule 1.6 allows implied authorization when it is necessary to further a client’s goals, that authorization should be considered limited. The decision to share otherwise confidential information should be ratified by the putative client or client and ideally reduced to writing.
• Individual lawyers and staff involved in innocence work frequently resort to e-mail in order to gather helpful information about a particular case. Care should be taken not to disclose confidential information about a case in an e-mail or other communication soliciting help or advice. Additionally, it may be helpful to include in the release of information agreement a section that discusses the possible need to use e-mail groups – like the Innocence Network listserv – to discuss issues surrounding an individual’s case. This section may necessarily have to be general in the agreement, but to the extent that an e-mail or some other form of communication falls outside the general written agreement, additional permission should be gained.

• Lastly, it is frequently the case that lawyers or other staff need to communicate about aspects of a case with non-lawyers outside of the office. Most of these communications – with forensic testing personnel, for example – are in furtherance of the aims of the potential litigation and are therefore impliedly authorized, but they should nonetheless be referenced in the written agreement about sharing certain information. It is also advisable to seek additional consent that is more explicit about the nature of the proposed communication when such circumstances present themselves.

§ 1.03 The Duty of Loyalty – Avoiding Conflicts of Interest

Network Requirements for This Section:

Conflicts of Interest: Network members must develop policies and procedures for identifying, guarding against, and responding to potential and actual conflicts of interest. The policies and procedures should address, among other things, (1) conflicts between clients, (2) the issues related to representing co-defendants, and, for member organizations with advisory boards and the like, (3) the limitations on board members’ representation of clients and former clients in, e.g., compensation claims and other matters that may raise conflicts of interest between the board member and the organization and/or between the organization’s clients.

• In contrast to confidentiality, the duty of loyalty arises only when an attorney-client relationship has been formed. Strictly construed, then, this means that innocence organizations that are engaged in screening or investigating a case where no attorney-client relationship has been formed owe no duty of loyalty to that person. This therefore would technically allow organizations to screen and investigate cases where a potential conflict may arise – e.g., multiple defendant cases – but pursuing this course of action involves certain risks.

• If, for example, during the course of screening and investigation of a case, a project determines that two defendants have equally viable claims of innocence, then it is theoretically possible for the project to represent both defendants without violating the duty of loyalty owed to each – in other words, without a conflict of interest arising. In almost every case, however, the innocence claims will not be of equal merit and will in some way intersect, requiring the election of one client’s interests over the other’s. In such a scenario, continued representation of both defendants is not possible, and withdrawal from one case may not cure the problem. This scenario arises with some frequency. The urge, of course, is to remain in the stronger case and withdraw from the other. However, once enough information is ascertained to discern which is stronger, too much information may have
been obtained from the other defendant that disclosure or use of that information – helpful to one person and damaging to the other – is prohibited. See Model Rule 1.9(c) (duties to former clients). Therefore, the organization would likely be disqualified from representing either person, and the fact that “actual” representation never occurred – i.e., an attorney client relationship was never formed – is immaterial.

The policy basis of Rules 1.6 and 1.9 anticipate this scenario and prohibit it. These scenarios can also arise between organizations, especially when they work in multiple or overlapping jurisdictions. Defendants frequently apply for aid at more than one place, or a witness in one organization’s case may be a client at another one. It is advisable to engage in due diligence with the organizations working in your jurisdiction, though care should be taken not to breach any confidences when making these inquiries.

§ 1.04 The Duty of Zealous Representation: Competence, Diligence, Communication and Advancing the Client's Legitimate Interests

Network Requirements for This Section:

Student assistance/representation: Network organizations that work with students and non-lawyer volunteers must clearly define the scope of the students’ and non-lawyer volunteers’ involvement in the work of the organization. This definition should be written and disseminated to the relevant person/groups, and training should be provided that reflects the definition. Where applicable, the student practice rule governing student participation should be understood and followed.

• Attorneys engaged in innocence work have the same duties of zealous representation, diligence and communication attendant to any attorney. In full representation innocence organizations, the decision to represent a client in achieving his or her exoneration carries with it all of the above duties, regardless of the ultimate viability of the client’s claim of innocence. In limited representation organizations, however, the purposes of representation may be more limited – to represent a client, for example, only insofar as it is possible to establish that client's claim of innocence. Model Rule 1.2(c) allows for a limited representation agreement as long as the agreement is ethically appropriate. What this means as a basic matter is that the terms of the limitation must be reasonable, and the client must give his or her informed consent.

• Because innocence work involves screening cases in a fashion unlike virtually any other type of practice, this period of time raises particular concerns about the duties owed to the person. Put more simply: what duty of zealous representation is owed during the screening or investigative stage of the process? The relevant Model Rules and the Restatement presuppose an attorney-client relationship; thus, arguably, no duty arises until that point. That said, even with no attorney client relationship, attorneys owe potential clients a reasonable duty of care. Beyond that, though, inasmuch as the possibility exists that the person may actually become a project client, it is advisable to render a duty of care consistent with the duty required by the attorney-client relationship. Such an effort can only serve to foster a more efficacious relationship in the future.
• Innocence organizations that use law students must also consider what effect that has on the scope of representation. Most clients are pleased to have someone – anyone – working on their cases and paying attention to their claims. That attitude should not be taken as an explicit understanding or agreement that law students may work on the case. Anyone involved in clinical legal education will recognize that student-lawyers are some of the more energetic and talented of lawyers. But that recognition also does not substitute for an implicit agreement by the client to allow students to work on the case. It is advisable to inform clients that students will be working on the case, explain what role the students will play, and the supervision that will be provided by clinic attorneys. It may be helpful to view this as limiting the scope of representation, and limitations require informed consent from the client.

§ 1.05 Closing, or in Some Other Way Limiting, the Work of an Innocence Organization

• It is often the case that, with the passage of time, innocence organizations expand and contract, and even close. Sometimes these eventualities are foreseeable – the end of a grant cycle, for example – and sometimes they are not. Regardless, the organization likely owes some duty of care to its clients or applicants with whom it has established some fiduciary relationship. The following is a non-exhaustive list of considerations and solutions in the event of significant change: the organization (1) must communicate with its clients and applicants to make them aware of the development and its ramifications for services; (2) engage in efforts to transfer files; (3) return client materials; (4) engage in efforts to locate other client service options; and (5) withdraw from the cases and/or representation.

AUTHORITIES FOR THIS CHAPTER:

Restatement Section 14:
An attorney client relationship arises when (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person, and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the layer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.

Annotated Rules, Preamble: A Lawyer's Responsibilities
Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Model Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer
(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Model Rule 1.3
A lawyer shall act with reasonable diligence and promptness in representing a client.

Model Rule 1.4
a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Model Rule 1.6
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (6) to comply with other law or a court order.

Model Rule 1.7
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Model Rule 1.8
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Model Rule 1.9
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.
CHAPTER 2
DEALING WITH REPRESENTED AND UNREPRESENTED PARTIES

§ 2.01 Communication with represented parties

• Model Rule 4.2 prohibits communicating with parties known to be represented by a lawyer about the subject matter of that representation. As discussed above, there is a legitimate question about when and under what circumstances a potential client becomes a client such that it can said that the lawyer is acting in a representative capacity – as opposed to continuing to screen or assess the case. Those issues should be considered in conjunction with this rule and section.

• Many incarcerated individuals have pending litigation matters, in which they are represented by other lawyers. In serious cases, those matters may take years to resolve, and, if they involve the matter that a project is investigating, project attorneys and staff may be prohibited from speaking to them about the matter without authorization from the other person’s lawyers to make that contact. It is advisable to engage in due diligence prior to engaging in any communication, and, if authorization is required, that it be in writing.

§ 2.02 Communication with unrepresented parties

Network Requirements for This Section:

Witness Interviews: Network members must develop policies and procedures for planning and conducting witness interviews, including the special considerations that arise with represented and unrepresented individuals, and requests for legal advice from witnesses (e.g., when a recanting witness asks if s/he will be libel for perjury).

• Model Rule 4.32 provides clear guidance about dealing with unrepresented persons “on behalf of a client.” In those cases, lawyers must not “state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”

• Chapter 1 of this Guide makes clear, however, that, for the period of time that a project is screening or investigating a case, there may be no formal attorney-client relationship formed. Strictly construed, then, when speaking to a witness during this stage, the lawyer is not yet acting “on behalf of a client” as contemplated by the Model Rules. Nevertheless, there are both ethical and practical concerns to consider before concluding that it is not necessary to follow the strictures of Rule 4.3. To begin, lawyers must be mindful of Rule 8.4, which prohibits conduct involving deceit or misrepresentation. In certain circumstances an omission of accurate identification may run afoul of that prohibition. Secondly, in many
instances, any information gathered without proper identification and care to abide by Rule 4.3 will be of questionable value if ever used for any formal purpose. The circumstances under which information is obtained will either inure to the credibility, or lack of it, of the information itself. Additionally, witnesses may be more difficult to contact and speak with, or less inclined to cooperate if they feel they have been the target of some deception, even if permitted under the rules.

- Innocence organizations should develop a protocol and training for communicating with unrepresented persons, and among the considerations ought to be a disclosure about who the attorney is, who he or she works for, and on whose behalf he or she is appearing.

§ 2.03 Witness’s or others’ requests for legal advice

- Not infrequently, witnesses in a case will ask for legal advice. One of the more common scenarios arises when witnesses want to recant an earlier statement made in court or to law enforcement and ask whether the recantation could get them in trouble. Answering this type of query with any type of legal advice is prohibited because it would likely create a conflict of interest. Given that, staff should be prepared to field the question without running afoul of any prohibition. There are methods to answering these types of questions that are both ethical and that can inure to the benefit of your client, but those practice tips are beyond the scope of this guide. Staff should familiarize themselves with the appropriate methods before conducting an interview where these issues may arise.

§ 2.04 Use of Deceit

- The Network strongly cautions against the use of deception to advance the interests of a client. As discussed above (§ 2.02), the caution is rooted in the significant risk that any information gathered through deceptive means may later be of questionable or limited value if needed for any formal purpose. Using deception may also threaten the likelihood that witnesses, officials, and others will cooperate in your organization’s efforts on behalf of the client. That said, prosecutors and law enforcement have long been allowed to engage in such practices in the advancement of criminal investigations and prosecutions, and, in recognition of that, some jurisdictions are beginning to relax the rules governing the conduct of defense lawyers to allow more symmetrical conduct. See Kevin C. McMunigal, Investigative Deceit, 62 Hastings L. J. 1377 (2011), available at SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1901263

- At this point, however, those jurisdictions are in the minority. See, e.g., Oregon Rule of Professional Conduct 8.4; Comment to Ohio Rule of Professional Conduct 8.4(c); Wisconsin Rule of Professional Conduct 4.1(c). Most jurisdictions still prohibit attorneys from making false statements of fact or law or engaging in dishonesty, fraud, deceit, or misrepresentation. In many jurisdictions, the governing rules may also make attorneys vicariously liable for third parties’ acts of deceit or dishonesty – e.g., other attorneys or investigators who engage in these practices at the direction of an attorney.

- Therefore, given the very serious risks of engaging in deception, Network members should, as a starting point, consult their jurisdiction’s rules of ethics and professionalism before...
engaging in any deception in furtherance of their clients’ interests. Even if deception is technically permitted, however, they should consider the issue very carefully, including rigorously assessing any available alternatives not involving deception to acquire the information sought, and, in any event, such a course of action cannot alter the quality or credibility of the information or evidence sought to be gained.

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AUTHORITIES FOR THIS CHAPTER:

Model Rule 4.1 Truthfulness in Statements to Others
In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Model Rule 4.2 Communication with Person Represented By Counsel
In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Model Rule 4.3 Dealing with Unrepresented Person
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Model Rule 8.4 Misconduct
It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Model Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved . . .

Model Rule 8.4 Misconduct
It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
CHAPTER 3
MULTI-JURISDICTIONAL ISSUES

§3.01 Multi-jurisdiction practice issues

- Innocence work often requires that lawyers and staff travel to or perform work in jurisdictions in which they are not licensed to practice. Though they may not be appearing in courts in that jurisdiction, visiting jails and prisons, speaking with witnesses, and performing investigation may well be considered the practice of law. This may also apply to telephone conversations with these same people even when the attorney or staff person working with the attorney has not left the jurisdiction in which the lawyer is licensed to practice. For the last ten years, the law in this area has been unsettled. Project lawyers should familiarize themselves with it before engaging in multi-jurisdictional contacts that might result in the unauthorized practice of law. One of the leading cases – Birbrower et al v. Superior Court of Santa Clara County, 949 P.2d 1 (Cal. 1998) – is often cited in local decisions dealing with the unauthorized practice of law.

AUTHORITIES FOR THIS CHAPTER:

Model Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law
(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so; (b) A lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
CHAPTER 4
MEDIA

Network Requirements for This Section:

Media Request: Network members must develop policies and procedures for responding to media requests, including requests for information about individual cases, access to the person requesting assistance/the client, and access to the lawyer(s) working on the cases.

§ 4.01 General Media Issues

• A person's First Amendment right to freedom of speech may never be as important as it is when a person can finally proclaim his or her innocence to the world. This public rebuttal for exonerated persons is not simply a right, but a hard-earned one – but with it come several considerations. The first is not an ethical consideration per se, though ethical concerns flow from it. As a general matter, exonerees are not equipped to deal with the media and have many other concerns during the exoneration phase to deal with besides crafting press releases. Allowing an exoneree to confront the media alone can be damaging to the exoneree, as well as to many other people involved in the case.

• Therefore, during an exoneration, innocence organizations should, through consultation with the client, craft the approach to media.

§ 4.02 The Substance of the Message

• Consideration should be given to the substance of the statements being made. Leaving aside the factual recitation that led to the wrongful conviction and exoneration, the substance and tone, among other things, raise issues regarding libel, defamation, and slander. Model Rule 3.6 has two built-in “safe harbors” – the exceptions listed in (b)(2) and (c) (see below) - but the harbors are directed at statements affecting an adjudicative matter and are not as relevant in the exoneration context. That said, most exonerees have borne the brunt of negative publicity at trial and, therefore, by logical (and, one hopes, defensible) extension of the Rule's exception, have every right to respond in kind upon his or her exoneration. Additionally, through the normal course of litigation in these cases, project attorneys will almost always have filed lengthy substantive pleadings about the case, and that information, as well as the prosecution’s response to it, are part of the public record and may, in accordance with the Rule, be commented upon. Whether or not these statements are libelous is an entirely different question, though the above discussion should help guide project thinking.

§ 4.03 The Scope of the Message

• An additional issue concerns the point at which statements about an exoneree’s case and the surrounding circumstances change from an effort to clear the client’s name and restore his or her reputation to an effort to advance larger issues surrounding wrongful convictions? Or, to put it more plainly, at what point do the statements inure to the benefit of the project as opposed to the client – and, in some cases, actually harm the client by prolonging his or her
ordeal? Rule 1.8 addresses conflicts between lawyers and their clients, but is ultimately unhelpful as regards the experience faced by most innocence organizations. The better course might be to evaluate the use of media as it relates to the fiduciary duty owed by attorneys to their clients. From that perspective, Rule 1.4 is informative. Under that rule, attorneys are obligated to inform their clients about the opportunity to make public statements and the benefits and liabilities of that decision. Many clients are enthusiastic about expanding those pronouncements to increase awareness of innocence issues and, perhaps, aid others similarly situated. But clients do not share this feeling universally, and attorneys should not only explain the ramifications but continue to check with the client on the continued use of his/her case in the media.

- Innocence organizations also face the opposite side of the same coin: dealing with publicity about a case that turns out not to be viable, or DNA test results that are confirmatory of guilt. In essence, the lawyer's role does not change. The lawyer still owes a duty of loyalty to the client, as well as a duty of confidentiality. In most cases, this would mean that the lawyer should not and cannot publicize the results of any test or outcome that incriminates a client. There are isolated anecdotal reports of prosecutors insisting that as a prerequisite to DNA testing that the results of the DNA tests, if inculpatory, be made public. Consenting to that condition would require an informed waiver by the client, which should be in writing.

§ 4.04 Public or Other Comments on Past Cases

- Sometimes months or years after a case has ended, innocence organizations wish to make additional public statements about a case in order to advance policy initiatives. Arguably, a blanket or general consent to engaging in publicity has a reasonable time limit attached, even if only implicit. If an innocence organization believes that additional publicity about a case is warranted for whatever reason, and that publicity takes place at a certain distance in time from the exoneration itself, it is advisable to re-contact the client to gain additional consent after explaining the need for and the extent of the new publicity efforts.

§ 4.05 Public or Other Comments from Exonerees

- Often, particularly at conferences or public events, including the annual Network conference, exonerees will be approached by media for comment. Many exonerees will have pending matters about which they should not offer such comment, and others may have pending indictments or face the risk of ongoing criminal liability. Organizations should thus counsel these clients and individuals about the risks of speaking to the media.

§ 4.06 Social Media

- Social media has become a standard part of general legal practice. Many jurisdictions require lawyers to be generally conversant with the role of social media as a basic requirement of competence. (See Model Rule 1.1 cmt. 8.) In innocence practice, use of social media generally arises in two contexts: investigation and publicity. As such, practitioners should be aware that social media communications may reach persons who have an interest in the matter being publicized and/or litigated. Some of these persons may be represented, others not, but, in any event, to the extent that the lawyer is engaged in
communication with them, then Model Rules 4.1 and 4.2 apply, among others. Even if the lawyer herself is not creating, authoring or posting the communication, the lawyer is nonetheless responsible for the acts of her agent according to Rules 5.1 and 5.3. The issues that are implicated, even in these limited contexts, are far beyond the scope of this document. Practitioners must therefore make themselves aware of potential ethical obligations prior to using social media to advance their client’s case, policy or public awareness initiatives, among others.

AUTHORITIES FOR THIS CHAPTER:

MODEL RULE 1.4
(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

MODEL RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES
(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

MODEL RULE 3.6 TRIAL PUBLICITY
A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. (b) Notwithstanding paragraph (a), a lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in a criminal case, in addition to subparagraphs (1) through (6): (i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation. (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity. (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).
CHAPTER 5
SPECIAL CONSIDERATIONS

§ 5.01 Negotiating plea agreements for “innocent” clients - or parole board
“acknowledgment of guilt” statements

- On occasion innocence organizations are faced with a dilemma that defense attorneys face not infrequently when offering pre-trial advice to criminal defendants: whether to plead guilty or make some sort of acknowledgment of guilt – in front of a parole board, for example – in order to gain the benefit of the bargain, often release from prison. To begin, it is necessary to understand that the decision about whether to plead guilty or to offer an acknowledgment of guilt is the client's decision alone. Lawyers should offer advice and persuasion, as necessary. The question in such cases tends to center around how much persuasion is acceptable.

§ 5.02 Staff, Volunteer, and Student Safety Concerns

Network Requirements for This Section:

Malpractice and Other Insurance: Network members much acquire and maintain malpractice and/or other insurance as necessary.

This is a best practice issue and an important one. Almost all clients of innocence organizations are indigent and require the need of free or reduced cost legal services. In turn, the legal service providers themselves are usually undercompensated and rely on volunteer or reduced-fee help in order to manage the work. It is imperative that innocence organizations do what they can to create the best possible work environment for these employees. Among the concerns that are paramount is insuring the good health and safety of these staff members.

- Health and Safety Guidelines: Many innocence organizations require staff to spend a great deal of time in the field. Some of that work requires visits to jails and prisons as well as to areas that the staff member may be unfamiliar with, including high-crime areas. Staff must be made aware of potential risks, but it is also important that staff be made aware of the project’s commitment both to performing the work in spite of certain risks and to understanding and abiding by safety guidelines and the procedures for reporting and managing any incident that might occur. Given the possible risks, it is advisable for innocence organizations to provide instruction in safety and conflict resolution. In assessing whether or not to do this type of work, staff should be urged to consider the potential risks and decide about the appropriateness of their placement. Staff are also expected to discuss the project work with parents, guardians, spouses or anyone else who may have an interest. Staff are expected to provide emergency contact information and to keep all relevant persons informed of their location and work assignment areas during the time spent with the project.
• **Malpractice Insurance:** Innocence organizations must maintain adequate malpractice insurance to protect their clients and themselves. They should also maintain other insurance consistent with the special considerations that follow.

• **Health Insurance:** Innocence organizations should be knowledgeable about whether staff are covered by the organization’s health plan, if there is one. Most students participating in legal clinics by virtue of their enrollment are eligible to enroll in the school’s student plan. It may be advisable for organizations to require staff who are not covered by the organization’s plan to have proof of coverage before beginning work. In addition to providing verification of insurance, each staff should also determine to what extent his/her insurance makes provisions for medical services outside the jurisdiction in which the plan was issued.

• **Automobile/Vehicle Insurance:** Staff whose position requires access to a car should either be covered under the organization’s policy or be prepared to present proof of automobile insurance.

§ 5.03 Issues surrounding referrals for legal aid in securing compensation claims or other necessary legal services

**Network Requirements for This Section:**

*Client’s Compensation Claims:* Network members must develop policies and procedures for retaining or referring clients to lawyers for potential compensation claims and other legal matters. These policies should be reviewed with outside counsel to ensure that ethical obligations are met and that the non-profit status of the organization, if applicable, is carefully considered and adequately protected.

• Ethics rules apply to these situations, but the Innocence Network believes that the rules do not speak adequately to the unique situations faced by many innocence organizations when it comes to issues of exoneree compensation. Improper handling of these issues can not only mean that the organization runs afoul of various ethical rules, but that lasting damage may be done to the organization and to whatever innocence work and awareness the organization may have accomplished. As a general matter, the Network takes the position that innocence organizations, and their lawyers, should enter representation in these cases very cautiously and only after thoughtful deliberation. On the other hand, innocence practitioners have, on several occasions, witnessed their former clients being overcharged or otherwise taken advantage of by unscrupulous attorneys in situations where the innocence practitioners took too much of a “hands off” approach to their client’s compensation claims. Because of this inherent tension of needing to avoid the appearance of impropriety, while simultaneously needing to protect our clients’ interests in their compensation cases, the following are the Network’s best practice guidelines for navigating these areas.

• **Project Representation:** Although Network members may, in accord with all applicable ethical and professional rules of conduct, as well as the guidelines that follow, represent exonerees in securing compensation for wrongful convictions, the Network generally urges innocence organizations to avoid engaging in this type of representation because of the inherent risks of professional conflicts. The Network recognizes, however, that, at times, an
organization’s direct involvement and legal representation in a compensation claim may be in a client's best interest. Organizations should therefore use their best ethical and legal judgment in these types of cases and seek third-party counsel as the situation warrants.

• **Referral:** As a general rule, Network members may refer exonerees to other attorneys as long as the project has no expectation of monetary or other direct benefit. If an exoneree requests a referral for representation in connection with a compensation claim, Network member staff should immediately notify the member organization’s chief executive officer, so that he or she can properly address the request consistent with local rules and this Guide.

It may be advisable to direct all compensation queries to an independent third party for an attorney referral. The third party could create a “referral list” from which the exoneree could select an attorney. The Network member should not attempt to influence the third party’s list, other than to satisfy itself as to the competence and good standing of the included attorneys. In order to avoid any appearance of impropriety, in the event that a third party includes in its referral list an attorney who has a financial, fiduciary, or any other professional relationship with the Network member organization, the referral list also should include at least two other attorneys for exonerees to choose from.

Network members should provide staff a sample script to use in advising exonerees who might be entitled to compensation in situations where either an exoneree asks about the subject or seems unaware of the potential for compensation. Among other things (and where applicable), the script should explain that (1) compensation might be available to the exoneree; (2) time may be of the essence in securing such compensation; (3) the exoneree may wish to retain representation for that purpose; (4) the Network member is a non-profit entity that does not represent exonerees in such a capacity, or, if it does, only in certain circumstances; and (5) the Network member’s referral method is set up according to the foregoing best practices. The Network member organization should also send a letter to the exoneree memorializing the information provided in the script.

Should an attorney engaged by the exoneree for compensation claims request access to an exoneree’s files or confidential information relating to the exoneree, consent of the exoneree must be received in writing prior to any such access being granted. Network members should not permit any other organization to use its intellectual property, including its name, in connection with the attorney’s for-profit legal work, and should endeavor to prevent such attorneys from publicizing their connections to the member organization in soliciting such work.

§ 5.04 Issues related to the use of certain forensic disciplines, including some DNA testing techniques

Sometimes in pursuing a client’s innocence claim, attorneys may be faced with a decision about whether to use, or not, forensic disciplines or DNA testing techniques that may be considered “not validated,” “invalid,” or “suspect.” The choice may be especially stark when in other cases – or even in the same case – the organization and its lawyers have been litigating the use of unsound science or scientific techniques as part of the client’s innocence claim. These can be difficult decisions, made all the more difficult when the prosecution
announces that it intends to re-use “unsound” techniques and the court does not preclude such use. Organizations should, as a general matter, refer to prevailing norms to help guide the decision – to the CODIS requirements, for example, that dictate whether or not a DNA testing technique is “acceptable” for CODIS uploading – or to specialists, several of whom are themselves members of the Network and who are conversant on the rapidly changing landscape in these areas.

**AUTHORITIES FOR THIS CHAPTER:**

**MODEL RULE 1. FEES**

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent;

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client;

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or (2) a contingent fee for representing a defendant in a criminal case;

(e) A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.