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Ethical Issues for Innocence Projects: An Initial Primer

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ETHICAL ISSUES FOR INNOCENCE PROJECTS: AN INITIAL PRIMER

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I. INTRODUCTION

The hundredth DNA[1] exoneration in the United States was announced in January 2002,[2] and the hundredth death row exoneration recently occurred.[3] While new scientific advances have made such exonerations possible,[4] few of them would have become a reality without the establishment of innocence projects around the country that have undertaken the often difficult work of exoner-

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[1] DNA is short for deoxyribonucleic acid. *See* U.S. DEP'T OF JUSTICE, THE FUTURE OF FORENSIC DNA TESTING: PREDICTIONS OF THE RESEARCH & DEVELOPMENT WORKING GROUP 1 (2000). For a description of the science and history of DNA technology, see *id.* at 8-19; for a brief on-line explanation of DNA technology, *see* Donald E. Riley, Ph.D., *DNA Testing: An Introduction For Non-Scientists: An Illustrated Explanation*, Scientific Testimony: An Online Journal (1998), *at* http://www.scientific.org/tutorials/articles/riley/riley.html (last visited June 1, 2002); *see generally* ANDRE A. MOENSSENS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 871-963 (4th ed. 1995) (discussing the history and use of DNA testing).

[2] *See* National Association of Criminal Defense Lawyers, *NACDL Second Vice President Scheck Plays Key Role* (Jan. 18, 2002), *at* http://www.criminaljustice.org/public.nsf/newsreleases/2002mn002?opendocument (last visited May 30, 2002). The hundredth exoneree was Larry Mayes, who served 21 years of an 80-year prison term for rape in Indiana before DNA tests finally set him free on Dec. 21, 2001. *See* California Western School of Law, *New York Innocence Project to Announce Exoneration Milestone at National Conference in San Diego*, *at* http://www.californiawestern.edu/news/100pressrelease.htm (last visited May 30, 2002). There have now been 108 DNA exonerations. *See* The Innocence Project at the Benjamin N. Cardozo School of Law, *Case Profiles*, *at* http://www.innocenceproject.org/case/display_cases.php?sort=year_exoneration (last visited May 30, 2002).

[3] Information from the Death Penalty Information Center indicates that there have been 100 death row exonerations in the United States since 1973. The 100th exoneration, that of Ray Krone, occurred in 2002. *See* Death Penalty Information Center, *Innocence: Freed from Death Row*, *at* http://www.deathpenaltyinfo.org/Innocentlist.html (last visited June 1, 2002).

[4] For a compelling examination of the role of DNA in the exoneration of the wrongfully convicted, see generally EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996).

ating the wrongfully convicted.[5] More than thirty projects are now in operation, with several more in the planning stages.[6]

As these projects have developed, issues have emerged regarding the professional responsibility obligations of attorneys and others engaged in this post-conviction work.[7] These issues were the subject of discussion at both the national innocence conferences in 2000[8] and in 2002,[9] but that discussion, while helpful, left many issues unresolved. Because of the importance to projects of insuring compliance with ethical requirements, both to maintain the integrity of the projects' work and to model proper practices for the many aspiring lawyers who work with our programs,[10] this article focuses on some basic professional

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[5] Innocence Projects have been instrumental in obtaining exonerations and keeping concerns regarding the problem of innocent incarcerated individuals on the public's radar screen. *See* National Association of Criminal Defenses Lawyers, *NACDL Second Vice President Scheck Plays Key Role* (Jan. 18, 2002), *at* http://www.criminaljustice.org/public.nsf/newsreleases/2002mn002?opendocument (last visited May 30, 2002) ("'The work of innocence projects has been instrumental in bringing the flaws in our system to the attention of the public,' said Lawrence Goldman, president-elect of NACDL . . . . Without the work of Barry [Scheck] and Peter [Neufeld.], this movement wouldn't be where it is today.")

[6] *See* The Innocence Project at the Benjamin N. Cardozo School of Law, *Other Projects by State, at* http://www.innocenceproject.org/about/other_projects.php (last visited May 30, 2002) (listing more than 30 projects in thirty states and Australia). There are also projects in Canada. *See* York University, *Conference at Osgoode Hall Law School Focuses on Miscarriages of Justice* (Mar. 14, 2002), *at* http://www.yorku.ca/ycom/release/archive/031402.htm (last visited June 1, 2002).

[7] Although innocence projects are developed and structured in several different ways, *see infra* pp.926-930, as a general matter, their work involves the investigation of alleged cases of wrongful conviction. This article will discuss the operation of innocence projects and, while there will occasionally be citations to support statements about how innocence projects work, much of the information provided is a result of the author's work as Vice Chair of the Midwestern Innocence Project, including attendance at innocence conferences and networking with other project attorneys. In such cases, no citations will be provided. The conclusions and suggestions in this article are those of the author personally and should not necessarily be read to reflect the policy of the Midwestern Innocence Project.

[8] The conference, held in December 2000 in Chicago, was co-sponsored by the Innocence Project at Cardozo Law School and the Center on Wrongful Convictions at Northwestern Law School. The conference brought together those engaged in innocence work nationally and those interested in starting innocence projects. *See* Bluhm Legal Clinic, Northwestern University School of Law, *News and Notes 2001*, *at* http://www.law.northwestern.edu/depts/communicate/newspages/fall2001/clinicnews.htm (last visited June 1, 2002). Although not directly on the agenda, this topic was the subject of discussion in a session on the "nuts and bolts" of operating an innocence project.

[9] The 2002 National Innocence Projects Conference was held at the California Western School of Law and was sponsored by the School's Innocence Project. *See* California Western School of Law, *California Western School of Law Hosts National Innocence Projects Conference* (Jan. 4, 2002), *at* http://www.cwsl.edu/news/conference-release.htm (last visited June 1, 2002). There was a specific program on ethical issues at this conference. *See* California Western School of Law, *Ethics Discussed at Third Day of National Innocence Projects Conference* (Jan. 20, 2002), *at* http://www.cwsl.edu/news/NIPCSunday.htm (last visited June 1, 2002).

[10] *See, e.g.*, James E. Moliterno, *In-House Live-Client Clinical Programs: Some Ethical Issues*, 67 FORDHAM L. REV. 2377, 2381-86 (1999) (discussing the role of clinics in "effective modeling of lawyer behaviors"); *Report of the Working Group on Representation Within Law School Settings*, 67 FORDHAM L. REV. 1861, 1863 (1999) (discussing the "importance of 'model lawyering' in clinics" in order to demonstrate and teach "excellence in lawyering" and "sensitivity to ethical and social issues").

responsibility issues confronting innocence projects today. While on-going discussion and refinement will be important as these programs develop, this article provides some introductory thoughts for those establishing and operating such projects.[11]

II. WHY DO INNOCENCE PROJECTS NEED SPECIALIZED PROFESSIONAL RESPONSIBILITY ANALYSIS?

An initial question might be raised in light of the title of this article: Why is there a need for special consideration of professional responsibility issues for innocence projects? Don't the rules of professional conduct apply equally to all types of practice? While the simple answer to this question is "yes," in reality, there are common features of innocence projects and the nature of the work they do that present unique issues requiring separate analysis. Additionally, there are differences in the way innocence projects nationally are structured and operate that make analysis of these issues more complex. In fact, one theme of this article is that the resolution of professional responsibility issues for and by innocence projects must take into account and "mesh" with the particular structure of those projects. Additionally, for projects in the formative stages, consideration of the professional obligations created by different models should be a factor in how a project is structured. Attorneys and others involved in the formation of projects should be aware of the obligations certain choices of structure may entail and must be prepared to see that, once a structure is chosen, vehicles are in place to insure that these professional obligations are met.

To better understand why a specialized analysis of ethical issues for innocence projects is appropriate, it is necessary to have a brief understanding of the nature of such projects. Innocence projects are designed to identify and seek the release of individuals who have been wrongfully convicted.[12] The cases undertaken typically involve individuals who have already been convicted and, in most instances, have already been through the initial stages of appellate and post-conviction review.[13] Some projects engage in actual representation of those be-

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[11] This article will focus on general principles of law governing attorney conduct. *See generally* MODEL RULES OF PROF'L CONDUCT (1983) (adopted in some form by most jurisdictions); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) [hereinafter RESTATEMENT]; AMERICAN BAR ASSOC.,ANNOTATED MODEL RULES OF PROF'L CONDUCT (4th ed. 1999) [hereinafter ANNOTATED MODEL RULES]; and similar sources of general applicability. In discussing the Model Rules, references are generally to the Rules as adopted in 1983 and amended through 2001, since these are both more familiar and available, and most jurisdictions have based their state rules on this version. The changes adopted in February 2000 are referred to as "Ethics 2000" proposals. *See generally infra* at n. 80 (explaining the Ethics 2000 Commission process). If confronted with one of the issues raised in this article, the reader is cautioned to consult the specific law or rules in the jurisdiction involved before taking any action.

[12] Many projects also have additional goals and functions related to education and law reform. *See, e.g.*,The Innocence Project at the Benjamin N. Cardozo School of Law, *Mission Statement, at* http://www.innocenceproject.org/about/mission.php (last visited May 30, 2002).

[13] *See, e.g.,Thomas M. Cooley Law School Innocence Project, at* http://www.cooleylaw.edu/innocence/home.htm (last visited June 1, 2002) (indicating that the Cooley Law School Innocence Project will screen post-conviction cases); The Innocence Project at the Benjamin N. Cardozo School of

lieved to be wrongfully convicted, while others engage only in preliminary investigation and then refer the case to an independent attorney for appropriate legal action.[14] All projects are heavily engaged in the screening of cases, a time-consuming but necessary task to attempt to separate the most compelling claims of actual innocence from the many claims that are made. This screening is an essential function for projects given the limited resources available for investigating and litigating actual innocence claims. While investigation and litigation of claims appear to involve fairly typical lawyering activity, it is the context in which these claims arise that presents the fairly unique issues that face attorneys working in this area.[15]

Initially, innocence project work is different from traditional lawyering in that it is virtually all post-conviction work. Additionally, all the individuals seeking assistance from these projects are currently incarcerated, making access to the clients or potential clients limited.[16] Virtually all work performed by inno-

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Law, *About This Innocence Project, at* http://www.innocenceproject.org/about/index.php (last visited June 1, 2002) ("Most of the clients of the Innocence Project at Cardozo Law School have used up all of their legal avenues for relief"); University of Wisconsin Law School, Wisconsin Innocence Project, *About the Wisconsin Innocence Project, at* http://www.law.wisc.edu/FJR/innocence/index.htm (last visited June 1, 2002) (stating that the Wisconsin Innocence Project takes cases only after a person has been convicted and all direct appeals have ended or the time for filing a direct appeal has passed).

[14] While this ordinarily will involve attempts at judicial remedies (e.g., state post-conviction motions, state habeas, federal habeas, etc.), such remedies may no longer be available due to the passage of time or the previous use of similar legal actions. While there may be means by which to avoid such time limits or procedural bars, *see generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (4th ed. 2001), at times, the only available remedy may be non-judicial (e.g., clemency). *Cf.* Herrerra v. Collins, 506 U.S. 390, 411-17 (1993) (stating convicted prisoner's claim of "actual innocence" did not entitle him to federal habeas relief, but prisoner still had a forum to request relief under Texas' executive clemency law as the "traditional 'fail-safe'").

[15] The extensive use of this screening function reflects that innocence projects, much like many other types of legal services practice, operate on a model of scarcity. *See* Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1103 (1990). As a result, such projects spend much time on a gate keeping function, which acts as the means of rationing available legal services. *Id.* at 1110-16. While many believe that any differences in how a lawyer interacts with a legal services client based on scarcity considerations ends once representation is undertaken, Tremblay challenges that notion. *Id.* at 1110-11. He sees scarcity impacting the actual representation of legal services clients in a variety of ways. *Id.* at 1117-29. This scarcity impacts innocence projects on a daily basis and is exacerbated by some of the other unique aspects of innocence project operations. *See infra* at pp. 926-930.

[16] Those seeking the assistance of innocence projects are often incarcerated in remotely located institutions. Projects often serve large geographical areas (states or regions) and long-distance travel is often necessary to meet face-to-face with clients. Additionally, institutional rules on visitation may affect access. *See, e.g.*, CAL. CODE REGS. tit. 15, § 3175 (2002) (discussing limitations on inmates' access to attorneys). Moreover, telephone access may be limited as well, since calls from inmates are often limited by institutional rules and practical considerations (e.g., in many cases, calls must be made collect) and calls into the institution often require logistical maneuvering. *See, e.g.*, CAL. CODE REGS. tit. 15, § 3282(g)(1)(2) (2002); FLA. ADMIN. CODE ANN. R. 33-602.205 (2002); *see also* Massey v. Wheeler, 221 F.3d 1030, 1033 (7th Cir. 2000) (discussing limits on telephone calls); Cacicio v. Secretary of Public Safety, 665 N.E.2d 85, 88

cence projects is pro bono work, done at no cost to the incarcerated individual.[17] As a result, there are few incentives on the part of incarcerated individuals not to seek the assistance of such projects.[18] Yet, the work needed to prove a case of actual innocence is time-consuming and expensive.[19] This combination of lack of disincentives to seeking assistance coupled with the magnitude of work, the high cost of proceeding on a case of alleged innocence and the limited resources for doing so makes the screening function for innocence projects an essential part of their work. This means that a large amount of work will often be done on cases at the screening stage, before any actual representation has been undertaken. This extensive period of pre-representation screening is atypical of most legal representation and is the basis for most of the complex and difficult issues innocence projects face.[20]

Additionally, innocence projects differ in the types of cases they will handle, but many are not "full service" operations even within the context of criminal defense.[21] Thus, they may be willing to undertake representation of an incarcer-

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(Mass. 1996) (same). As a result, much of the communication is done via the mail, with considerably less opportunity for what we might think of as traditional attorney-client consultation.

[17] Some projects charge for testing, but most do not charge for investigative services and legal representation.

[18] *But see* McKune v. Lile, 122 S. Ct. 2017 (2002) (allowing institutional incentives only for sexual offenders who admit their crimes and rejecting a Fifth Amendment challenge to the incentive plan). There is some evidence that a significant number of those claiming innocence are not, in fact, innocent. *See, e.g.*, The Innocence Project at the Benjamin N. Cardozo School of Law, *The Innocence Project News*, *at* http://www.innocenceproject.org/dnanews/index.php (last visited June 1, 2002) ("Not every prisoner is exonerated by post-conviction DNA testing"). In fact, one lab reports that about 60% of post-conviction DNA samples they test further implicate, rather than exonerate, convicted defendants. *Id.*

[19] Where DNA evidence is thought to be involved, there are expenses associated with identifying whether biological material is available for testing, obtaining approval to have the testing done, and costs of testing itself. While some jurisdictions bear those costs eventually, in many, the incarcerated individual must often "front" the costs for the tests or have counsel do so. Heidi C. Schmitt, Note, *Post-Conviction Remedies Involving the Use of DNA Evidence to Exonerate Wrongfully Convicted Prisoners: Various Approaches Under Federal and State Law*, 70 UMKC L. REV. 1001, 1017 (2002). Note that, since this is an "expense of litigation," doing so does not run afoul of Model Rule 1.8(e). *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (1983) (prohibiting provision of "financial assistance to a client in connection with pending or contemplated litigation" except for advancing court costs and expenses of litigation). Where DNA evidence is not available, the cost of obtaining exoneration is likely to be considerably higher, since counsel must rely on intensive, time-consuming investigation, conducted many years after the offense, in order to obtain the evidence necessary to meet very demanding standards of proof.

[20] In most attorney-client representation situations, the attorney undertakes representation after an initial consultation and conflict check. This is generally the case because the existence of an attorney-client relationship is normally a precursor to collecting fees.

[21] In this respect, they may provide a form of limited legal assistance. The issues created by provision of limited legal assistance have just begun to be discussed and debated. *See, e.g., Report of the Working Group on Limited Legal Assistance*, 67 FORDHAM L. REV. 1819 (1999). While innocence projects generally come closer to full service representation than some of the models discussed by the Working Group, they raise some of the same concerns raised by that Group. For example, "one challenge" is "determining whether or not an attorney-client relationship exists in the limited legal assistance context, and if so, when it begins and ends." *Id.* at 1820-21. *Cf. infra*

ated individual only if they believe a case can be made for that individual's actual innocence. Some projects are set up so as to handle only claims of absolute innocence - cases where it is alleged the incarcerated individual is both factually and legally innocent.[22] Other projects will handle all claims on behalf of an individual making a claim of innocence and will continue representation even if it is determined that the defendant is not factually innocent. These differences in structure may present different ethical obligations on the part of attorneys involved in these cases and may well require differences in analysis.

Finally, many innocence projects operate in conjunction with law schools or journalism schools as clinical programs. In such cases, particular issues with regard to extensive use of nonlawyers and supervision of law students may be present and may need to be separately resolved.[23] Thus, there are many issues of professional responsibility that arise from the particular structure and needs of innocence projects.

III. INNOCENCE PROJECT MODELS AND STRUCTURES

As the previous section indicated, different innocent project structures may dictate different professional responsibility analysis. It is therefore critical to identify the different structures innocence projects take and the reasons why a particular structure may be chosen by a project.

There are essentially three different models used by innocence projects around the country. Although the details of a model may vary, the essential features are fairly consistent across projects of that type. The three types will be referred to as the "no representation" model, the "full representation" model, and the "limited representation model." Each model presents its own unique professional responsibility issues. The choice of model, however, is often a function of how the project developed, who was involved, and the source of its funding. Thus, the model selected is not generally chosen specifically to broaden or limit professional obligations, though the choice often has that effect.

A. The "No Representation" Model

The "no representation" model project generally adopts that format because the primary people behind creation of the project are not attorneys. A prime ex-

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pp. 930-934 (discussing that whether and when an attorney-client relationship is created is an important issue for innocence projects).

[22] These projects will not accept cases where an incarcerated individual is making only a claim of legal, or technical, innocence. If representation is undertaken under these circumstances, it is limited, rather than full-service, representation. Rules with regard to undertaking such limited representation must be followed, *see* MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1983), and caution is necessary to insure that the client's interests are not unduly impaired in the event the actual innocence claim is no longer viable. *See infra* pp. 961-962.

[23] *See, e.g.*, Moliterno, *supra* note 10, at 2390-95 (discussing particular ethical issues raised by in-house, live-client clinical programs); *Report of the Working Group on Representation Within Law School Settings*, 67 FORDHAM L. REV. 1861, 1861-62 (1999) (identifying several potential tensions between the role of supervisory lawyers as primarily providers of legal services to clients and as teachers); *see infra* pp. 933-934; 940-941 and especially 961, n. 266.

ample of this model is Centurion Ministries, the first of the innocence projects.[24] James McCloskey, a lay minister, founded Centurion Ministries in 1983. Lay individuals[25] who determine whether a case meets the project's criteria[26] operate the project. After extensive investigation,[27] these individuals select a small number of cases to be pursued. In those cases, Centurion Ministries hires an attorney to represent the incarcerated individual and pays for that representation.[28] The project itself never establishes an attorney-client relationship with the incarcerated individual. Rather, Centurion Ministries engages in intensive investigation and then is, in effect, a third-party payer for the eventual legal services. As such, its dealings with the potential exoneree are not governed by the rules governing attorney conduct.[29]

Projects affiliated primarily with journalists, rather than lawyers,[30] are the other significant example of "no relationship" model projects. These projects

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[24] *See* Truth in Justice, *Innocence Projects, at* http://truthinjustice.org/ips.htm (last visited June 1, 2002).

[25] Centurion stresses that its staff are not lawyers. *See, e.g.*, Centurion Ministries, *General Procedure Followed by Centurion Ministries, at* http://www.centurionministries.org/criteria.html (last visited June 1, 2002) ("It is important to reiterate a few major points: we are not lawyers").

[26] These include, among other requirements, that the individual have been convicted of rape or murder, have received a sentence of death or life, "must be absolutely 100% innocent . . . and have had absolutely no involvement whatsoever with the crime," and be indigent and have "largely exhausted their appeals." *See* Centurion Ministries, *General Procedure Followed by Centurion Ministries, at* http://www.centurionministries.org/criteria.html (last visited June 1, 2002). Centurion Ministries "is a last resort for cases which would otherwise not be heard." *See* Truth in Justice, *Innocence Projects, at* http://truthinjustice.org/ips.htm (last visited June 1, 2002); *see also* CENTURION MINISTRIES, SEEKING FREEDOM FOR THE IMPRISONED INNOCENT (1998) [hereinafter CENTURION PROGRAM BROCHURE] (explaining the functions of the project and introducing staff).

[27] The investigation may be conducted "[o]ver the course of several years" and involves study of the entire written record and extensive communication with the incarcerated individual. This leads to developing an "extensive knowledge of the case, culminating in an in-depth interview with the inmate." It is only after such an intensive investigation is complete that Centurion undertakes to obtain representation for the incarcerated individual. CENTURION PROGRAM BROCHURE, *supra* note 26; *see also* Centurion Ministries, *General Procedure Followed by Centurion Ministries, at* http://www.centurionministries.org/criteria.html (last visited June 1, 2002) (detailing the various stages for screening and selection of cases).

[28] Centurion states that, once it commits to a case and its investigation produces significant new evidence of innocence, "we retain an attorney on behalf of the inmate." Centurion Ministries, *General Procedure Followed by Centurion Ministries, at* http://www.centurionministries.org/criteria.html (last visited June 1, 2002).

[29] This statement is not completely accurate. While it is true that Centurion, not being a lawyer, is not directly governed by the Rules, it is clear that the attorneys hired by Centurion are so governed. Thus, the attorneys paid by Centurion must comply with Model Rule 1.8(f) and can only accept compensation from Centurion to represent a potential exoneree if "(1) the client [potential exoneree] consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of [the] client is protected as required by Rule 1.6." MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (1983).

[30] Primary examples of this model are The Medill Innocence Project, directed by Professor David Protess at the Medill School of Journalism, Northwestern University, *see* Medill School of Journalism, Northwest University, *Innocence Project Gets $500k Grant,* Aug. 24, 2001, *at* http://www.medill.northwestern.edu/inside/2001/innocence.html (last visited June 1, 2002), and the

involve journalism students who, usually in conjunction with a course, get involved in the investigation of an alleged wrongful conviction. The students act in their roles as journalists, gathering information to determine whether an injustice has occurred. Because the students are journalists doing an independent investigation, no formal relationship is established between the students and the potential exoneree. If the investigation reveals that the individual involved was likely wrongfully convicted, the students will generally use the power of the media to bring the person's story to the attention of the public[31] and attorneys will be sought to handle the legal aspects of the case. At no time are the journalism students involved in the actual representation of the potential exoneree[32] and their role in the process is largely an objective one.

B. The "Full Representation" Model

The "full representation" model of innocence projects is most commonly found where a law school[33] operates the project as part of an existing clinical program. In this model, an existing defender clinic is converted into an innocence project. Prior to adopting this focus, the clinic usually provided full service representation to indigent criminal defendants. With the new focus, the clinic provides similar services for a smaller class of cases. Prime examples of such projects are The Center on Wrongful Convictions at Northwestern Law School[34] and the California Innocence Project at the California Western School of Law.[35] Once these projects undertake to represent a defendant, they represent that individual in post-conviction proceedings regardless of whether the claim of actual innocence continues to have merit. Thus, once these projects accept a case, they will see it through even if they determine that there is not a credible claim of actual innocence. If there are legal issues that can lead to reversal of the conviction, even if based on technical legal grounds, these projects will continue to pursue the case. While the possibility of actual innocence is a major factor in a case being selected for representation, continued belief in actual innocence is not a prerequisite for continued representation. In this respect, this model of project most closely approaches typical attorney-client representation, although the scope and depth of the investigation undertaken before accepting a client proba-

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newly established Innocence Institute of Western Pennsylvania, directed by investigative journalist and now Professor Bill Moushey. *See* The November Coalition, *Bill Moushey to Launch New Innocence Project,* The Razorwire Newspaper Online, *available at* http://www.november.org/razorwire/july-aug-sept2001/page20.html (last visited June 1, 2002).

[31] *See, e.g.*, John McCormick, *Coming Two Days Shy of Martyrdom*, NEWSWEEK, Feb. 15, 1999, at 35, *available at* 1999 WL 9499424; *Around the State*, CHI. DAILY LAW BULLETIN, Nov. 18, 1996, *available at 11/18/96 CHIDLB 3.*

[32] Of course, to do so would constitute the unauthorized practice of law.

[33] This model is most commonly found in law schools but may also be found in appellate defender offices.

[34] *See* Northwestern Law Center on Wrongful Convictions, *A Constituency for the Innocent, at* http://www.law.northwestern.edu/depts/clinic/wrongful/History.htm (last visited June 3, 2002).

[35] *See* California Western School of Law, *California Innocence Project, at* http://www.cwsl.edu/icda/i_Innocence.html (last visited June 3, 2002).

bly resembles the innocence project model more closely than it does the model of "traditional" representation.

C. The "Limited Representation" Model

The "limited representation" model is fairly typical of innocence projects that have been created independent of existing clinical programs.[36] These projects are often developed with the involvement of non-clinical faculty and students at law schools and are often established as separate not-for-profit entities.[37] At least in part because of limitations relating to fund-raising, these projects will only represent individuals who continue to present viable claims of absolute, factual innocence.[38] As a result, any representation undertaken by these projects will involve limitations on the scope of representation. Whether those limitations are appropriate will be governed, at least in part, by Model Rule 1.2 (c).[39]

Additionally, this model of representation poses a variety of issues that are distinct from those presented by the full representation model. For example, there are serious questions regarding the role of the project prior to undertaking representation. Is the project acting objectively to determine whether a compelling claim of innocence can be made, or is the project acting in an advocacy role? This may not always be clear.[40] Moreover, since withdrawing from representation is generally more difficult than declining representation in the first place,[41] these projects may delay establishing an attorney-client relationship until a high degree of certainty of innocence is obtained. This late entry into actual representation while significant work is being done on the case prior to representation raises many difficult issues of legal ethics. For example, if a project has been known to be actively involved in the investigation of a case, will its failure to pursue that case be construed to reflect a belief that the inmate may not be inno-

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[36] The Midwestern Innocence Project at UMKC is such a project.

[37] This structure is often necessary for fund-raising purposes, since the law school rarely has the resources to invest in such a program when there is no existing clinic involved.

[38] The decision to accept cases only if the incarcerated individual is claiming, and can eventually prove, actual and total innocence is often based on representations made in raising funds for the projects. Many potential donors will contribute to projects that seek exoneration of those who are absolutely innocent but will not support actions on behalf of those who are claiming only legal or technical error.

[39] Model Rule 1.2(c) provides that "a lawyer may limit the objectives of the representation if the client consents after consultation." MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1983). *See also* RESTATEMENT, *supra* note 11, at § 19 (as with Rule 1.2(c), permitting a lawyer and client to agree "to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances"). *See generally infra* pp. 961-962.

[40] This may also be an issue for full representation projects at the preliminary stages, but likely to a lesser extent, since the consequences of entering the case of a person later determined not to be factually innocent are considerably different.

[41] *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.16 (1983) (setting out circumstances under which a lawyer may withdraw from representation). Also, once a case has been filed in court, permission of the court is normally required to withdraw. *See* MODEL RULES OF PROF'L CONDUCT R.1.16(c) (1983) (requiring a lawyer to stay in a case when ordered to do so by a tribunal); *see also* ANNOTATED MODEL RULES, *supra* note 11, at 252-53.

cent? And once a project enters an appearance in court, would the project's attempt to withdraw at a later stage telegraph a similar belief?[42]

As the previous discussion demonstrates, different project models pose a variety of different "ethical" concerns. It should be noted, though, that in deciding upon a model for a project, those organizing the project are generally motivated by financial, personnel, and organizational considerations rather than by the professional obligations inherent in a particular model. Thus, it is possible that those choosing a model are not clear about the possible ethical implications of that selection. One goal of this article is to encourage a systematic consideration of these issues at the formative stages.

IV. ANALYSIS OF PROFESSIONAL RESPONSIBILITY ISSUES[43]

A. Existence and Creation of an Attorney-Client Relationship

The initial question that, to a large extent, defines the professional obligations of those working with innocence projects is whether and when an attorney-client relationship is created. Most of the professional responsibilities of attorneys arise only with regard to representation of clients,[44] and thus the issue of whether such a relationship has been established is a threshold question on which most of the remaining analysis rests.[45]

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[42] And would the fact that the project is no longer convinced of the inmate's innocence be a basis for the project to withdraw? *See* MODEL RULES OF PROF'L CONDUCT R. 1.16 (b) (1983) (providing a list of permissible bases for withdrawal). If the project entered into a limited representation agreement, this change in circumstances should be sufficient. But the disclosures necessary to withdraw on this basis may be problematic, and a court may be disinclined to permit withdrawal absent a compelling basis to do so. These complicated issues are unique to limited representation projects.

[43] As noted, most of the analysis in this article relies on the Model Rules of Professional Conduct as adopted and amended by the American Bar Association prior to Ethics 2000, the Restatement and accepted sources in the field. *See supra* note 11. There is, in part by design, very little jurisdiction-specific citation or discussion. This article is intended to raise the issues that innocence projects may be confronted with, to propose means by which those issues can be analyzed and to provide initial resources for doing so. Any project actually confronting one of these issues is encouraged to refer to the rules and standards adopted in their particular jurisdiction for more specific guidance.

[44] The scope of the duty undertaken by entering into such a relationship is elegantly summed up by Professor Frederick Moss as follows: "Professional representation entails dual obligations of partisan loyalty and a disregard of consequences." Frederick C. Moss, *Is You Is, Or Is You Ain't My [Client]?: A Law Professor's Cautionary Thoughts on Advising Students,* 42 S. TEX. L. REV. 519, 533 (2001). This concise but pointed statement captures the essence of the relationship and the many duties flowing from it.

[45] For example, issues relating to conflict of interest and the duties of competence, diligence and zeal are all impacted by whether an attorney-client relationship exists, and issues of confidentiality and privilege may well be impacted by this as well. *See infra* pp.930-967. While some commentators may downplay the differences in obligations based on the existence *vel non* of the attorney-client relationship, *see* Jett Hanna, *Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk,* 42 S. TEX. L. REV. 421, 430 (2001), there is no question that the creation of that relationship increases the attorney's professional obligations in many ways. *See* GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 2.5, at 2-11 (3d ed.

It seems clear that, with regard to the "no relationship" model, no attorney-client relationship is anticipated or created. This seems obvious given the objective nature of the work undertaken and the absence of attorneys in the initial investigative stages.[46] Thus, the normal obligations that lawyers have vis-à-vis their clients[47] are not present in this model,[48] but the benefits derived from such a relationship are not present either.[49]

The other models present more difficult questions. While it is clear that an attorney-client relationship is created under any model once project attorneys formally agree to undertake representation of an incarcerated individual in order to pursue relief from a wrongful conviction,[50] the more difficult question is whether such a relationship is created at an earlier point. The existence of such a relationship[51] brings with it substantial duties relating to, among other things, confidentiality, exercise of independent professional judgment, competence and diligence.[52] Just when do these duties arise?

The Model Rules of Professional Conduct explicitly disclaim any role in establishing when an attorney-client relationship begins. The Scope Note to the Rules provides that, "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine

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2001) ("If a client-lawyer relationship exists, then the relationship between the parties is governed by that law, and their stance with respect to the rest of the world is immediately transformed").

[46] Even if contacts and requests for information from an innocence project might, without any explanation or disclaimer, cause a reasonable person to believe he or she is being represented, *see infra* pp. 932-933, no such representation can be found to exist since there is no attorney on whom to impose the obligation to represent. Whether potential liability might be found on some other basis is beyond the scope of this article.

[47] This is especially true with regard to the duties of confidentiality and loyalty. *See infra* pp.934-960. Note that journalists and others may have their own unique obligations arising out of their particular professional standards or regulations, *see, e.g.*, Society of Professional Journalists, *Code of Ethics*, *at* http://www.spj.org/ethics_code.asp (last visited June 3, 2002); Committee of Concerned Journalists, *Statement of Concern*, *at* http://www.journalism.org/ccj/about/statement.html (last visited June 3, 2002), but these are beyond the scope of this article. For an interesting discussion of ethical and professional issues in journalism and how they relate to other professions, *see* Robert E. Drechsel, *The Paradox of Professionalism: Journalism and Malpractice*, 23 U. ARK. LITTLE ROCK L. REV. 181 (2000).

[48] At least not until counsel is actually retained or recruited, and by that time, the relationship is likely to be more in the nature of a traditional attorney-client relationship.

[49] For example, mail and visits from attorneys often obtain special, protected treatment within correctional institutions. *See infra* notes 101-102. Projects that do not purport to involve attorney-client relationships do not get the benefit of this special treatment.

[50] *See infra* pp. 930-934 (discussing formation of attorney-client relationship based upon the client's intent and reasonable understanding).

[51] It is normally the presence or absence of this relationship that is crucial. As noted in the Restatement, "[a] fundamental distinction is involved between clients, to whom lawyers owe many duties, and nonclients, to whom lawyers owe few duties. It therefore may be vital to know when someone is a client and when not." RESTATEMENT, *supra* note 10, at Introductory Note to Topic 1.

[52] *See* RESTATEMENT, *supra* note 11, at § 16, defining a lawyer's general duties to a client; *see also* HAZARD & HODES, *supra* note 45, at § 2.3, at 2-6 ("A lawyer's professional responsibilities toward another person . . . depend primarily on whether the other person . . . is or is not a client. If the other person is a client, he or she is entitled to the lawyer's loyalty, confidentiality, and zealous or diligent service").

whether a client-lawyer relationship exists."[53] And, as the Scope Note acknowledges, whether the relationship exists may depend on why the question is being asked.[54]

The Restatement provides more direct guidance on when the attorney-client relationship is created. Section 14 provides, in pertinent part, that the 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 lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.[55]

Thus, an attorney-client relationship can arise with or without the intent or specific assent of the lawyer. The Restatement does require that the "client" manifest the intent that the lawyer provide services for the person and explains that the client's "manifestation of intent that a lawyer provide legal services to the client may be explicit, as when the client requests the lawyer" to take specific legal action.[56]

An incarcerated individual's request[57] for representation will generally meet the client intent standard. Additionally, "[t]he client's intent may be manifest from surrounding facts and circumstances, as when the client discusses the possibility of representation with the lawyer and then sends the lawyer relevant papers or a retainer requested by the lawyer."[58] Moreover, a lawyer may "manifest consent . . . in many ways. The lawyer may explicitly agree to represent the client or may indicate consent by action, for example by performing services requested by the client."[59] And, "[e]ven when a lawyer has not communicated willingness to represent a person, a client-lawyer relationship arises when the person reasonably relies on the lawyer to provide services, and the lawyer, who reasonably should know of this reliance, does not inform the person that the law-

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[53] MODEL RULES OF PROF'L CONDUCT, Scope Note ¶15 (1983). The Note goes on to say that, "[w]hether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." *Id.*

[54] *Id.* For example, it is generally understood that the relationship may be created for purposes of confidentiality in situations where a court would not find such a relationship for the purpose of imposing a continuing duty of loyalty or zeal. *See also* RESTATEMENT, *supra* note 11, at § 14 cmt a (2000).

[55] RESTATEMENT, *supra* note 11, at § 14. The Restatement refers to the relationship as the "client-lawyer relationship."

[56] *Id.* at § 14 cmt. c.

[57] This request will generally come in the form of a letter claiming innocence and a request for assistance. At times, a friend or relative of the incarcerated individual may seek assistance on the inmate's behalf, but most projects will encourage that the inmate make the request directly.

[58] RESTATEMENT, *supra* note 11, at § 14 cmt. c.

[59] *Id.* at § 14 cmt. e.

yer will not do so."[60] The question of whether an attorney-client relationship has been established thus turns on the intentions and actions of both the client and the attorney. It is here where difficulties regarding whether representation has been undertaken often begin.

Given these standards, innocence projects must take care to prevent against the inadvertent creation of an attorney-client relationship. As previously noted, projects will generally engage in extensive screening prior to deciding whether to take a case. This screening will often involve multiple contacts with an incarcerated individual. After the initial contact, the inmate will usually be asked for extensive information about his or her case, and will often be sent a questionnaire to be completed and returned. In some cases, the inmate will be requested to provide copies of transcripts, documents and other records that are in that person's possession or consent to have those documents provided by others. Additionally, attorneys or students may follow up on this information with telephone conferences or personal visits to obtain more information.[61] If projects are not careful, these activities could begin to raise a reasonable expectation of representation on the part of the incarcerated individual[62] and may lead to potential discipline[63] or liability[64] if the obligations flowing from that representation are not adequately met.

In light of this possibility, all lawyers, students[65] and support staff should be made aware of these rules and be adequately supervised[66] in their contacts with

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[60] *Id.*

[61] Note also that "[a]n agent for the lawyer may communicate consent." RESTATEMENT, *supra* note 11, at § 14 cmt. e. Thus, a student working on behalf of the project, if acting with "express, implied or apparent authority" may, through conduct, be deemed to have committed the project to representation. *Id.*

[62] *See* cases discussed in ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT § 31:104 (1989) [hereinafter ABA/BNA MANUAL].

[63] Lawyers with supervisory responsibilities in the project may be liable for discipline for actions taken by subordinate lawyers or nonlawyer assistants. *See generally* MODEL RULES OF PROF'L CONDUCT R. 5.1 & R. 5.3 (1983); RESTATEMENT, *supra* note 11, at § 11 & cmts. (2000) (addressing the responsibilities of lawyers with regard to subordinate lawyers and nonlawyer assistants).

[64] A project may have civil liability for injuries caused by wrongful acts or omissions of "any principal or employee . . . acting in the ordinary course" of the project's operations or "with actual or apparent authority." RESTATEMENT, *supra* note 11, at § 58(1). The Restatement primarily addresses vicarious liability of law firms and their principals, *id.* at § 58 & cmts. b & c (2000), but acknowledges that non-firm legal departments may require special consideration. *Id.* at § 58 cmt. c. The precise contours of such liability are beyond the scope of this article.

[65] Although students enrolled in an innocence project clinic or working as volunteers may not technically be "employees," it is likely that, if they have actual or apparent authority to act on behalf of the project and are engaged in the ordinary course of the projects' operations, the project will be deemed responsible for their conduct. *See* RESTATEMENT, *supra* note 11, at § 14 cmt. e (2000) (a person with "express, implied or apparent authority to act" for a lawyer or firm may bind the lawyer to representation). Thus, training and supervision of law students involved in the project regarding their professional obligations is essential.

[66] Model Rules 5.1 and 5.3, which require that partners and supervising attorneys make reasonable efforts to ensure that the conduct of all lawyers and non-lawyer personnel is "compatible with the professional obligations of the lawyer," require this. *See* MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3 (1983). Lawyers should give non-lawyers working with them "appropriate instruction and

incarcerated individuals. Representatives of the project must be clear with regard to the project's role vis-à-vis each of the inmates with whom it is communicating and must act consistently with that role. Care must be taken during the screening stage to avoid use of words or actions that could cause an inmate to believe representation has been undertaken.[67]

Additionally, projects should use disclaimers in their pre-representation communications with incarcerated individuals. These disclaimers should clearly state that any information being collected is for screening purposes only and does not indicate that representation has been undertaken.[68] Inmates should be reminded each time a contact is made or information sought that no representation has yet been undertaken, and that there is a strong possibility that no representation may ever occur. Additionally, it is desirable to encourage those whose cases are being screened not to discontinue on-going efforts for relief currently being pursued.[69] Doing so may help to impress on the inmate that no legal action will be taken on his or her behalf unless and until a formal agreement to provide representation has been entered into.[70]

B. The Duty of Confidentiality and Attorney-Client Privilege

Confidentiality is one of the primary duties of an attorney and is reflected in Model Rule 1.6.[71] That Rule prohibits an attorney from revealing information relating to the representation of a client unless the client consents,[72] the disclo-

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supervision concerning the ethical aspects of their employment." MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. (1983).

[67] This may be particularly crucial given the desire of students to be helpful and to be part of an exoneration, which can be exciting and satisfying work. But these desires should not be permitted to override the important need to avoid prematurely undertaking representation.

[68] This needs to be presented in language understandable to the reader. It is arguable that the relevant standard for determining whether an attorney-client relationship has been created is a reasonable inmate standard.

[69] This could be problematic if the inmate fails to continue pursuit of claims that could be time barred in the expectation that the project will handle the matter, but where the project has not yet decided to proceed. Either time limits may be missed or the project might be forced into action at the eleventh hour, perhaps providing less than competent representation and inefficiently using valuable resources that might be better utilized for more compelling or appropriate cases.

[70] There is no doubt tension between a project's desire to assist inmates, allowing them to feel the project cares about them and wants to assist them and the use of effective disclaimers that are designed to create the clear impression that a project is not providing real assistance until it clearly and unambiguously states that it will. Unfortunately, experience at the Midwestern Innocence Project shows that inmates are often so desirous of assistance that they read past even repeated disclaimers and begin to assume they are being represented well before the Project intends for this to occur. Given that, in light of the superior knowledge of the attorney, the standard focuses on the reasonable person in the potential client's situation, RESTATEMENT, *supra* note 11, at § 14 cmt. e (2000), steps must be taken to be clear and forceful in such disclaimers despite the desire to be helpful and supportive.

[71] MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

[72] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983). The consent must be "after consultation," *id.*, which is defined in the Terminology section as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Id.*

sure is "impliedly authorized in order to carry out the representation,"[73] or one of two limited exceptions apply.[74] The duty to preserve client information is broadly protected by Rule 1.6[75] and by the companion common law doctrine of attorney-client privilege.[76]

An initial question regarding confidentiality is when the duty arises. In a "no representation" project, no attorney-client relationship is created nor is one anticipated, and thus no duty of confidentiality exists. As a result, any information imparted to persons working on behalf of the project can be disclosed, and must be disclosed if requested pursuant to a subpoena or other legal directive.[77] Because no protection is afforded to such information, it is recommended that, in order to avoid misunderstandings or unmet expectations, those working for such projects explicitly advise the incarcerated individual of the lack of protection prior to receiving any information.

Issues relating to protection of information in full or limited representation settings can be more complex. Once actual representation is undertaken, the duty of confidentiality applies and must be carefully observed. But the duty to protect information, unlike most other duties, arises before actual representation is undertaken. Although neither the text nor the comment to Model Rule 1.6 explic-

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[73] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983). *See generally* ANNOTATED MODEL RULES, *supra* note 11, at 72-73.

[74] Model Rule 1.6(b) sets out two exceptions, neither of which is likely to be applicable in this context. The first involves disclosure of information necessary to prevent a future criminal act by the client that is likely to lead to imminent death or substantial bodily harm, 1.6(b)(1), and the second involves disclosures necessary for attorney "self-defense." MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (1983).

[75] For a discussion of the policies behind the duty of confidentiality and the privilege, see HAZARD & HODES, *supra* note 45, at § 9.3, at 9-8 to 9-12.

[76] "The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client." MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 5 (1983). The Annotated Model Rules distinguish the general duty of confidentiality from the attorney-client privilege as follows:

Although the societal value protected is in all instances the right to a private communication, the scope and applicability of protection differs markedly. The evidentiary attorney-client privilege governs use of information in a court proceeding. It is generally applicable only when the communications were made for the purpose of securing legal advice or assistance. The privilege does not prevent disclosure outside the judicial process, nor does the privilege protect information received from sources other than the client. ANNOTATED MODEL RULES, *supra* note 11, at 69; *see also* ABA/BNA MANUAL, *supra* note 62, at 55:108 (stating that "the ethical duty of confidentiality is broader than the evidentiary privilege for attorney-client communications in two important ways" and explaining that the privilege protects only attorney-client communications while the duty of confidentiality protects "all information 'relating to the representation;' and that the "duty of confidentiality applies in all contexts, not just those in which a lawyer is a witness in a proceeding"). *See generally* ABA/BNA MANUAL, *supra* note 62, at 55:303-304 (comparing the "privilege and ethical duty"). For further discussion of the privilege, see *infra* pp. 934-945.

[77] In the absence of privilege, every person has a duty to respond to subpoena or other legal command to provide information. *See, e.g.,* United States v. Nixon, 418 U.S. 683, 709 (1974) (recognizing "the ancient proposition of law" that "'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege" (quoting United States v. Bryan, 339 U.S. 323, 331 (1949)). Whether some other privilege might attach by virtue of a different sort of relationship is beyond the scope of this article.

itly states that the obligation arises prior to the actual formation of the relationship, the Scope Note does suggest this.[78] And, while the current Model Rules do not directly address confidentiality of information imparted prior to the actual formation of the relationship, the ABA has concluded that Model Rule 1.6 applies "to protect information imparted by a would-be client seeking to engage the lawyer's services . . . ."[79] Additionally, the changes proposed by the Ethics 2000[80] Commission to the Model Rules would make this protection more explicit. Proposed Model Rule 1.18(b) provides that "a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation."[81] The Reporter's Notes explain that this obligation is "well-settled" and that the fact that the rules do not "technically cover these communications is an omission that this proposal corrects."[82] Thus, it seems clear that information imparted for the purpose of seeking to establish an attorney-client

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[78] *See* ABA MODEL RULES OF PROF'L CONDUCT, Scope Note [15] (1983) ("there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established").

[79] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-358 (1990). This is consistent with the position taken by the Restatement, which provides that information acquired before or during representation is confidential so long as it is not generally known. This includes information that "might be acquired by the lawyer in considering whether to undertake a representation." RESTATEMENT, *supra* note 11, at § 59 cmt. c (2000).

[80] Ethics 2000 is the name used to refer to the Commission on the Evaluation of the Rules of Professional Conduct created by the American Bar Association. The Commission was charged with:

> 1) conducting a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession; 2) examining and evaluating the ABA Model Rules of Professional Conduct and the rules governing professional conduct in the state and federal jurisdictions; 3) conducting original research, surveys and hearings; and 4) formulating recommendations for action.

ABA Center for Professional Responsibility, *Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct Mission Statement*, *at* http://www.abanet.org/cpr/e2k-mission_statement.html (last visited June 3, 2002). The Commission was made up of thirteen members, including judges, law professors, government lawyers, corporate counsel, civil and criminal practitioners and a nonlawyer chosen to reflect the diversity of the bar. The Commission began its activities in August 1997 and the House of Delegates recently approved most of what was proposed in their Report. *See* ABA Center for Professional Responsibility, *Ethics 2000 – February 2002 Report*, *at* http://www.abanet.org/cpr/e2k-202report_summ.html (last visited June 3, 2002).

[81] This is true "[e]ven where no client-lawyer relationship ensues," and disclosure is only permitted when otherwise authorized by the Rules. ABA Center for Professional Responsibility, *Proposed Rule 1.18: Reporter's Explanation of Changes*, *at* http://www.abanet.org/cpr/rule118memo.html (last visited June 3, 2002).

[82] ABA Center for Professional Responsibility, *Proposed Rule 1.18: Reporter's Explanation of Changes* ¶ (b), *at* http://www.abanet.org/cpr/rule118memo.html (last visited June 3, 2002). Again, this is consistent with the Restatement's provision on duties to prospective clients, which provides for protection of information imparted by a prospective client. *See* RESTATEMENT, *supra* note 11, at § 15. While this provision relates only to communications where the lawyer does not subsequently undertake representation, it would surely apply equally to situations where such representation eventually ensues. In this respect, then, the inmate whose case is being screened may be viewed as a prospective client.

relationship is protected from disclosure[83] and projects have a duty to protect such information.

Likewise, projects must take into account the attorney-client privilege with regard to prospective clients. The privilege attaches to communications between a prospective client and an attorney for the purposes of determining whether to undertake representation. It is now a "venerable rule emanating from the privilege" that "communications made in the course of preliminary discussions with a view to employing the lawyer are privileged" whether or not representation ultimately is undertaken.[84] This is quite clearly stated in the Restatement[85] and is generally recognized by courts[86] and commentators.[87]

The duty of confidentiality prohibits attorneys, or those acting on their behalf,[88] from disclosing client information[89] or using such information to the disadvantage of the client.[90] As noted, the coverage of Rule 1.6 is broad and protects any information obtained in the attorney-client relationship.[91] The prohibition includes information in public records even if generally known.[92] The Restatement formulation is not quite so broad, defining "confidential client infor-

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[83] That such protection exists prior to the formal creation of an attorney-client relationship is now almost universally accepted. *See, e.g.,* HAZARD & HODES, *supra* note 45, at § 2.3; *see also* ABA/BNA MANUAL, *supra* note 62, at 55:305-306 (collecting authorities and noting that "[d]iscussion preliminary to an actual employment agreement can give rise to obligations of confidentiality" and that obligations may arise with regard to a potential client "even if the lawyer provides no legal work for the client and declines the representation").

[84] In re Auclair, 961 F.2d 65, 69 (5th Cir. 1992).

[85] The text of the Restatement provides that, among persons covered by privilege are "the client (including a prospective client)", and a comment specifically states that "[t]he privilege protects prospective clients -- persons who communicate with a lawyer in an initial consultation but whom the lawyer does not thereafter represent -- as well as persons with whom a client-lawyer relationship is established" RESTATEMENT, *supra* note 11, at § 70 cmt. c. Moreover, the Restatement includes a "prospective client" who consults an attorney "for the purpose of obtaining legal assistance" within the contours of the privilege. *Id.* at § 72.

[86] *See* cases collected at RESTATEMENT, *supra* note 11, at § 72, cmt. d (reporter's note).

[87] *See, e.g.* MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE ¶ 503.2 (5th ed. 2001) ("disclosures made during negotiations for retaining an attorney are within the privilege although no employment of the attorney results"); MCCORMICK ON EVIDENCE, ¶ 88 (Strong 5th ed. 1999) (cases collected in note 3); 3 WEINSTEIN'S FEDERAL EVIDENCE ¶ 503 App. 01[2](2d ed. 2002).

[88] *See infra* at note 115.

[89] Model Rule 1.6(a) states: "A lawyer shall not reveal information relating to representation of a client." MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983).

[90] Model Rule 1.8(b) provides: "A lawyer shall not use information relating to the representation of a client to the disadvantage of the client." MODEL RULES OF PROF'L CONDUCT R. 1.8(b) (1983).

[91] *See supra* note 76; *see also* HAZARD & HODES, *supra* note 45, at § 9.15 at 9-52 to 9-53; ANNOTATED MODEL RULES, *supra* note 11, at 69.

[92] There is no exception in Rules 1.6 or 1.8 for information that is generally known. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 & 1.8 (1983). The only mention of such information in the Rules appears in Rule 1.9(c), which provides that information of a former client cannot be used to the disadvantage of that former client unless it has become "generally known." MODEL RULES OF PROF'L CONDUCT R. 1.9(c) (1983). This inclusion of the "generally known" language in 1.9, and its omission from 1.6 and 1.8, have been taken to lend support for the conclusion that even generally known information is protected under 1.6 and 1.8. *See* HAZARD & HODES, *supra* note 45, at § 9.5 at 9-14 to 9-15; § 9.15 at 9-53.

mation as "information relating to representation of a client, other than information that is generally known."[93] Regardless of which formulation is followed, it is clear that this duty precludes disclosure or use of most client information unless one of the exceptions applies. It is thus incumbent upon innocence projects to protect such information.

The privilege is more limited than the ethical duty of confidentiality. It extends only to confidential[94] communications between a lawyer[95] and a client or prospective client for the purpose of obtaining legal assistance.[96] To be covered by privilege, the communication must be within the scope of the attorney-client relationship. Those communications that are within the privilege are protected against compelled disclosure in judicial and quasi-judicial proceedings.[97] Moreover, attorneys have an affirmative duty on behalf of their clients to protect privileged information.[98]

Virtually any information obtained by attorneys and other innocence project staff in the course of investigating an incarcerated individual's case is likely to fall within the broad definition of confidentiality under Rule 1.6. This includes information in police, attorney and court files as well as material provided by the inmate and discovered from witnesses and documents. This information can only be disclosed with consent, if impliedly authorized or if another exception exists.[99]

The privilege only covers communications from the inmate or communication by the attorney to the inmate.[100] Documents are covered only to the extent they manifest protected communications. Information contained in the questionnaires and requests for assistance provided by the inmate would be subject to privilege, while the underlying documents and records in the case would not. It is particularly important for innocence projects to protect strategy-related information imparted by the inmate.

Initially, issues arise regarding the need to protect communications with incarcerated individuals coming to and from correctional facilities. It is common practice for such institutions to open and read prisoner mail, which may put protected information at risk. To avoid improper disclosure of information to and from attorneys, institutions have developed a category of "legal mail." While particular institutions have specific regulations for handling legal mail,[101] it is

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[93] RESTATEMENT, *supra* note 11, at § 59. This includes information known to others as long as it is not "generally known." *Id.* at cmt. b.

[94] The communication must be made in confidence, meaning with a reasonable belief that no one will learn of its contents except a privileged person. RESTATEMENT, *supra* note 11, at § 71; *see also* MCCORMICK ON EVIDENCE, *supra* note 87, at ¶ 91 (emphasizing requirement of confidentiality).

[95] The Restatement extends protection of the privilege to communications not only between the client or prospective client and the lawyer, but to agents of either the client or the lawyer who facilitate communication and agents of the lawyer who facilitate representation. *See* RESTATEMENT, *supra* note 11, at § 70; *see also* GRAHAM, *supra* note 87, at ¶ 503.2.

[96] RESTATEMENT, *supra* note 11, at § 72.

[97] *See* MCCORMICK, *supra* note 87, at ¶ 92; WEINSTEIN, *supra* note 87, at ¶ 501.02[4].

[98] *See* RESTATEMENT, *supra* note 11, at § 63 cmt. b & § 86 cmt. c.

[99] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) & (b) (1983).

[100] Or an agent working on either's behalf. *See supra* note 95.

[101] *See, e.g.*, 28 C.F.R.§ 540.19 (2000) (procedures for dealing with legal correspondence).

common for such mail to by-pass the normal processing requirements. Such mail will typically only be opened in the presence of the inmate and will not be read by institutional staff.[102]

It is important for effective representation that communications with inmates be treated as legal mail. Doing so is helpful in preserving the privilege[103] and preventing possible disclosure of strategic information.[104] It is unlikely that institutions will afford protected status to mail from "no representation" projects,[105] but such mail from either limited or full representation projects should be fully protected, regardless of when in the screening process a decision regarding actual representation occurs, since communication prior to that point should be protected as communication with a prospective client. As long as a licensed attorney working with the project is identified as the ultimate recipient or sender of the communications they should receive full protection as legal mail.[106]

Confidentiality issues also arise due to the need to discuss the inmate's case with other attorneys.[107] Initially, it is often necessary to contact previous counsel to obtain information. This may include trial, appellate or post-conviction lawyers who worked on the various stages of the case. It is strongly suggested that, before contacting previous counsel, innocence project staff obtain authorization and consent from the inmate.

Confidentiality duties continue after conclusion of the representation.[108] Thus, the prior attorney cannot disclose information to the project unless there is

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[102] *Id.*; *see e.g.*, CAL. ADMIN. CODE, tit. 15, § 3144 (2001); *see also* Wolff v. McDonnell, 418 U.S. 539, 577 (1974) (upholding constitutionality of provision allowing the opening of legal mail in the presence of the inmate).

[103] For a discussion of the varying views regarding waiver of the privilege, see HAZARD & HODES, *supra* note 45, at § 9.9, at 9-32 to 9-34; *see also* MCCORMICK, *supra* note 87, at ¶ 93.

[104] It is also important that inmates perceive that their information will be protected. While some incarcerated individuals claiming innocence will provide information they believe will be helpful to them regardless of confidentiality concerns, many inmates have fears and distrust the institution to protect their interests. Unless they believe information they provide to a project will be safe from disclosure, they may not communicate fully. Given the limited resources of most projects, the difficulty of visits in remote locations and limited access by inmates to phones, use of the mail is a crucial means for communication with clients and prospective clients.

[105] Whether other bases exist for limiting institutional access to some other categories of inmate mail is beyond the scope of this article.

[106] This may require discussions with the institutions to resolve. For example, the Midwestern Innocence Project discovered that one Missouri correctional institution was not treating mail from the project as legal mail. This was impairing the willingness of inmates to correspond with the Project. Once the name of a responsible attorney was included on the Project's labels, the legal mail designation was respected.

[107] Additional issues may be raised with regard to discussing the client's case with or receiving information from other individuals (e.g., clergy, physicians or therapists, spouses) with whom the client may have a privileged relationship. Projects should take care to determine whether action is needed to preserve such privileges if information is disclosed to the project and to take such action as necessary. Additionally, if disclosure of information may put such privileges at risk, notice to the client and consent after consultation are likely to be required before any such information is requested.

[108] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 21 (1983) ("The duty of confidentiality continues after the client-lawyer relationship has terminated"); *see also* MODEL RULES OF PROF'L

consent or the disclosure is impliedly authorized.[109] Since there is no longer any on-going representation, it is difficult to suggest that such disclosures are "impliedly authorized in order to carry out the representation."[110] Thus, in order to provide information to the project, prior counsel will most likely require client consent. This consent may be obtained from the incarcerated individual in the form of an authorization that can be provided to prior counsel on request.[111]

In addition to consultation with prior counsel, innocence project attorneys and students have a need to discuss pending cases with others working in the project and frequently with persons outside of it. With regard to discussion of cases among attorneys and students involved in the project, this should pose no problems. It is clear that attorneys within a firm may share information unless the client specifically requests that such sharing not occur.[112] The project should be considered a firm for these purposes,[113] and therefore discussion of cases between and among attorneys, students and staff working in the project is appropriate.[114]

CONDUCT R. 1.9(c) (1983) (prohibiting use or revelation of information of a former client); RESTATEMENT § 60 cmt. e; *see also* ANNOTATED MODEL RULES, *supra* note 11, at 70.

[109] MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983). The exceptions under 1.6(b) would normally be inapplicable in this situation. Note that the project might be impliedly authorized to *seek* such information, but, as discussed, the project should obtain consent from the inmate in any event.

[110] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983).

[111] While this should ordinarily be sufficient, prior counsel may choose to obtain his or her own consent from the previously represented inmate in order to determine that the consent is sufficiently informed, and this option should be respected.

[112] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 8 (1983); RESTATEMENT, *supra* note 11, at § 60 cmt. g ("disclosure is permitted to other lawyers in the same firm and to employees and agents . . . in the lawyer's firm"). It is incumbent on project attorneys to insure that confidential information obtained by students working in the project is adequately protected. Students must be cautioned not to discuss their cases outside of the project. This is particularly important because "[s]tudents who form short-term relationships with clients may be less protective of client confidences." Moliterno, *supra* note 10, at 2394. Thus, project attorneys should take special care to see that students are aware of their confidentiality obligations and meet them.

[113] *See* MODEL RULES, terminology ("Firm . . . denotes . . . lawyers employed in a legal services organization"). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.10 cmt. 1 (1983) ("For purposes of the Rules of Professional Conduct, the term 'firm' includes lawyers . . . in a legal services organization"); ANNOTATED MODEL RULES, *supra* note 11, at 162 ("[w]hether a legal services office comes within the definition of a firm may depend on the structure of the organization" and likely involves whether information flows freely within the office and whether attorneys in the office assume supervisory responsibilities). Because most innocence projects will meet these criteria, they will likely be considered a firm for purposes of the Model Rules. While this is beneficial as far as facilitating internal communication, it may have consequences regarding future representation. *See infra* pp. 954-955. Where a law school has multiple clinics, there may be questions regarding whether each clinic is a separate entity (firm) for these purposes. Significant factors in this determination will be whether these clinics share office space, facilities, equipment and faculty supervisors and whether client information is exchanged among those working in the different clinical programs. *See* Moliterno, *supra* note 10, at 2391, 2392-93.

[114] In light of the fact that students are engaged in much of the work of innocence projects, it is particularly appropriate and important that regular, on-going consultation about cases occur. For projects that permit students enrolled in a wrongful convictions class to do preliminary work on cases in a non-clinical setting, special care to protect information may be required. Special care

Additional issues are presented with regard to disclosure of information to persons outside of the project. This may involve disclosure to investigators, forensic examiners and others who may be retained to assist in the investigation, evaluation or development of the case. As long as these individuals are retained as agents of the project, information provided to them will be covered by privilege and disclosure to them should not be deemed a waiver of privilege.[115] With regard to the duty of confidentiality, disclosures to such individuals may be permitted as "impliedly authorized" by the representation,[116] at least where use of such an individual's services was clearly foreseeable.[117] The better course, however, is to seek client consent for such disclosures.[118] Finally, supervisory attorneys at the project have a duty to ensure that any individuals to whom protected information is disclosed are aware of and understand the confidentiality obligations of the project and comply with those obligations.[119]

Innocence cases often pose complex issues regarding both fact investigation and availability of appropriate procedural mechanisms by which to obtain legal relief for a person who has been wrongfully convicted.[120] Consultation with attorneys experienced in handling these types of cases may well be of assistance. In fact, a proposal to facilitate such consultation by means of teleconferencing of cases is being developed by the Innocence Network.[121] To what extent is sharing of confidential information in order to engage in such consultation permitted?

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may also be needed if outsiders are permitted to enroll in seminar components of clinical courses to avoid disclosure outside the "firm." *See* Moliterno, *supra* note 10, at 2394-95.

[115] *See* RESTATEMENT, *supra* note 11, at § 70 cmt. g ("The privilege also extends to communications to and from the client that are disclosed to independent contractors retained by a lawyer . . . to assist in providing legal services to the client and not for the purpose of testifying"). Additionally, information from these individuals should be considered confidential and privileged so long as they are consulted as agents and not as experts. *Id.; see also id.* at § 70 cmt. g (reporter's notes); GRAHAM, *supra* note 87, at ¶ 502.2

[116] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983).

[117] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 89-1530 (1989). The standard for foreseeability may be quite high, however, and may require a conclusion that the very act of retaining the lawyer constitutes implied authorization to make the disclosures.

[118] Such consent may be included as part of a general authorization obtained prior to proceeding with the investigation. For a detailed discussion of the consultation necessary for valid consent, see *infra* at 943-944.

[119] *See* MODEL RULES OF PROF'L CONDUCT R. 5.3(a) & cmt. 1 (1983); RESTATEMENT § 60(1)(b) & cmt. d ("A lawyer must take reasonable steps so that law-office personnel and other agents such as independent investigators properly handle confidential client information. That includes devising and enforcing appropriate policies and practices concerning confidentiality and supervising such personnel in performing those duties."); *see also supra* notes 66 (regarding establishment of attorney-client relationship) and 112 (relating to special confidentiality needs regarding students).

[120] These cases often require conducting complex investigations long after a crime was committed, which includes strategies for identifying, locating and obtaining relevant evidence for possible testing. Additionally, the law relating to procedural bars to relief is frequently quite complex and requires creative lawyering.

[121] Initial announcement of the teleconferencing plan was made at the 2002 Conference and additional information was provided via an e-mail communication (on file with the author). Barry Scheck and others created the Innocence Network to help create innocence projects around the country and to support and coordinate the work of innocence projects. *See* National Association of Criminal Defense Lawyers, *Innocence Project, at* http://www.criminaljustice.org/public.nsf/Free

The issue of lawyer-to-lawyer consultation has posed difficulties for attorneys and commentators in recent years. In 1998, the ABA issued Formal Opinion 98-411, which discussed "the ethical issues raised when one lawyer consults about a client matter with another lawyer who is neither a member of the consulting lawyer's firm nor otherwise associated with the matter, and where there is no intent to engage the consulted lawyer's services."[122] Looking primarily to the "impliedly authorized" language of the rule, Opinion 98-411 interpreted Model Rule 1.6(a)[123] to "allow disclosure of client information to lawyers outside the firm when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer's experience or expertise for the benefit of the consulting lawyer's client."[124] The opinion further recognizes, however, that this implied authority might be limited.[125]

The opinion went on to counsel that lawyers consulting with other attorneys should, where possible, do so anonymously or in the form of hypothetical facts. It recognized, however, that lawyers cannot assume that use of hypotheticals will necessarily prevent disclosure of client information, and cautioned attorneys to be careful in this regard. The opinion continued by noting that disclosure of identifiable, privileged information without client consent would violate Rule 1.6. Thus, if a lawyer could "reasonably foresee" that consultation would lead to disclosure of information that would prejudice the client or that the client would not want disclosed, the lawyer must obtain consent prior to the consultation.[126] Finally, the opinion suggests that consulting lawyers should seek to obtain agreements from consulted lawyers to maintain confidentiality of information disclosed in the consultation.[127]

While Opinion 98-411 arguably suggests resolution of the issues relating to attorney consultation in a practical, common sense way, the opinion has been criticized as having "fabricated [its conclusions] out of whole cloth."[128] For example, the opinion seems to indicate that lawyers may be impliedly authorized to disclose information to a consulting lawyer when that information is public or generally known. As Moss and Bridge point out, however, there is no "publicly known" exception to the duty of confidentiality under Rule 1.6. While perhaps, as they note, the sensitivity of the information and how widely that information is known might sensibly be considered in determining whether disclosure is im-

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form/CardozoLawSchool?OpenDocument (last visited June 3, 2002) ("The Innocence Network is currently expanding efforts to establish satellite Innocence Projects at law schools across the country. These projects will handle cases in which factual innocence can be proven through means other than DNA").

[122] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 98-411 (1998).

[123] The Opinion interpreted the Rule as elaborated by Comment [7] to Rule 1.6.

[124] Formal Op. 98-411.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] Frederick C. Moss & William J. Bridge, *Can We Talk?: A "Steele-y" Analysis of ABA Opinion 411*, 64 J. AIR. L. & COM. 633, 641 (1999). The article notes that "[t]he Opinion cites no rules, opinions, case law, or commentary to support its conclusions." *Id.*

pliedly authorized, they further note that no support for that distinction appears in the Rules.[129]

In addition to concerns regarding the general duty of confidentiality, lawyer-to-lawyer consultations arguably can put the attorney-client privilege at risk. While consultation with another attorney who is retained for that purpose would render information imparted to that attorney confidential and within the scope of privilege, where no engagement is contemplated or undertaken, the result is considerably less clear.[130] While an agreement to preserve confidentiality might assist in this regard, it is by no means clear that it would protect against waiver of the privilege in all circumstances.[131]

Given the current uncertainty regarding lawyer-to-lawyer consultation, it is suggested that projects should not rely on implied authority to share information regarding a case with unaffiliated lawyers.[132] Rather, projects desiring to consult with other lawyers or to present cases within the Innocence Network should obtain client consent to do so. As noted, client consent under Model Rule 1.6 requires "consent after consultation,"[133] which is defined as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."[134] This requirement "ensures that the client is reasonably informed"[135] and has the opportunity to make an informed judgment regarding the costs and benefits of disclosure. The Restatement would permit a lawyer to disclose or use confidential information "when the client consents after being adequately informed concerning the use or disclosure."[136]

The "client's consent is effective only if given on the basis of information and consultation reasonably appropriate in the circumstances."[137] Such disclosure should involve at least discussion of the "nature of the information sought [to be disclosed] as well as the relevant legal and non-legal consequences of the

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[129] *Id.* at 641-42.

[130] Moss & Bridge, *supra* note 128, at 646-47. Such consultations may also pose problems for the consulted lawyer regarding potential conflicts, but the Opinion attempted to avoid this by concluding that there is no implied representation, thereby limiting the likelihood of disqualification. Formal Op. 98-411.

[131] *See supra* note 103.

[132] It seems clear that the Innocence Network, which contains projects who consult with one another on particular cases, should not be viewed as an entity. Although such projects are loosely affiliated through the Network, it would be too risky to treat the Network as an entity for information sharing purposes. This would create too great a risk of conflict and would be a virtual impossibility for conflict checking purposes. Rather, such consultations, and the affiliation itself, should be viewed as undertaken on a case-by-case basis, thus avoiding the full imputation of conflicts. *See* RESTATEMENT, *supra* note 11, at § 123 cmt. c(iii).

[133] *Id.* The Ethics 2000 proposals change this to "informed consent." See Proposed Rule 1.0, which is designed for clarification and not to make any substantive change. *See* ABA Center for Professional Responsibility, *Model Rule 1.0: Reporter's Explanation of Changes*, *at* http://www.abanet.org/cpr/e2k-rule10rem.html (last visited June 3, 2002).

[134] MODEL RULES OF PROF'L CONDUCT, terminology (1983).

[135] ANNOTATED MODEL RULES, *supra* note 11, at 113.

[136] RESTATEMENT, *supra* note 11, at § 62.

[137] *Id.* at § 62 cmt. c.

client's decision."[138] In obtaining consent, the "lawyer must evaluate the reasonably foreseeable adverse consequences of disclosure and inform the client of the adverse effects that may result, including communicating with the client about the consequences of not consenting to disclosure . . . ."[139]

Where the attorney believes the risks of harm to the client are minimal and the benefits of consultation are significant, the option of such consultation should be presented to the client along with a discussion of the relative costs and benefits.[140] If, after having these costs and benefits explained in understandable terms, the client chooses to have the attorney proceed with the consultation, consent should be obtained in writing and should be included in the inmate's file.[141] Because the interests at stake here relate primarily to confidentiality, the analysis of these issues should be the same for full and limited representation projects since the duties of confidentiality are implicated in anticipation of representation. "No representation" projects that do not have duties of confidentiality are, of course, free to consult with outsiders regarding the case without the need for consent.

A related issue regarding sharing of information among projects is raised by the need to reduce duplication of effort as the increasing number of projects deals with an increasing number of requests for assistance each year. The Innocence Network has proposed creating a case intake database that would allow projects to determine whether an inmate's case is under consideration or has been accepted by another project. This database could be helpful to efficiently use the scarce resources available for assistance in identifying and remedying wrongful convictions. Participation in the database, however, poses confidentiality issues.[142] Entry of a client or potential client's name into a shared[143] database should not be done without consent from that individual.[144] While the risks of

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[138] ABA Committee on Prof'l Responsibility, Formal Op. 01-421 (2001).

[139] *Id.*

[140] Here again, the particular nature of innocence project representation creates an additional challenge. Ordinarily, attorneys present these costs and benefits to clients verbally in the course of discussing possible consent. Any questions or concerns can be addressed at that time. Attorneys then often follow up this discussion in writing. As previously noted, because the "clients" a project is dealing with are all incarcerated, often at remote locations, the opportunities for face-to-face discussion, especially at the early stages, may be limited. Additionally, phone contact with inmates may also be more limited than with most clients. *See supra* note 16. Accordingly, the reality in some projects is that this consultation with inmates may more often be in standard written form with less opportunity for discussion.

[141] *See* ABA Committee on Prof'l Responsibility, Formal Op. 93-372 (1993) (advising that consent should be in writing); *see also infra* at note 210.

[142] The memorandum to project directors from the Innocence Network recognized these issues. Email from Nina Morrison, Innocence Project Executive Director to Prof. Ellen Suni, Professor of Law, University of Missouri-Kansas City School of Law (May 12, 2002) (on file with author).

[143] By shared, this means shared with those outside the project itself but not shared beyond the Network. *See generally supra* p. 940-941 (discussing sharing of information within and outside projects).

[144] Since the disclosure in this instance is relatively limited and poses few real risks to the "client," a form consent should generally suffice. This can be part of the initial authorization and consent obtained from the inmate. Sample language is available from the author.

harm to the individual are minimal,[145] Rule 1.6 protects even the fact of inquiry[146] and no exceptions would ordinarily apply. This consent may be included as part of the standard intake form.

C. The Duty of Loyalty and Independent Professional Judgment - Avoiding Conflicts of Interest

"Loyalty to clients is one of the core values of the legal profession."[147] As a result, lawyers must exercise independent professional judgment[148] and avoid both conflicts of interest[149] and the appearance of such conflicts.[150] Unlike the duty of confidentiality, however, the duty of loyalty arises only where representation has been undertaken.[151] Thus, the unique way in which innocence projects

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[145] Unless, of course, they are trying to inappropriately take advantage of the services of more than one project without disclosure.

[146] The fact that the inmate has sought the services of the project is information obtained in the course of the representation and would be protected by Rule 1.6. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983). It would not be covered by the privilege because the identity of the client is generally not viewed as privileged. *See generally* HAZARD & HODES § 9.11 at 9-37 ("as a general matter, the privilege does not attach to the fact that a client-lawyer relationship exists or to the identity of the client").

[147] HAZARD & HODES, *supra* note 45, at § 10.1 at 10-3.

[148] MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983). Independent professional judgment was the focus of conflict of interest analysis under the Code. *See* MODEL CODE OF PROF'L RESPONSIBILITY Canon 5 (1980).

[149] Conflict of interest is defined and various forms of conflict are discussed in the Restatement. *See* RESTATEMENT, *supra* note 11, at § 121 & ch. 8. The Model Rules address conflict of interest primarily in Rules 1.7 through 1.12, although other rules address specific conflict situations. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 2.2 (1983) (lawyer as intermediary); Model Rule 3.7 (lawyer as witness). In addressing a conflict of interest, four questions generally must be addressed: (i) What kind of effect is prohibited? (ii) How significant must the effect be? (iii) What probability must there be that the effect will occur? (iv) From whose perspective are conflicts of interest to be determined? RESTATEMENT, *supra* note 11, at § 121 cmt. c. The Restatement "casts the answer to each question in terms of factual predicates and practical consequences that are reasonably susceptible of objective assessment by lawyers subject to the rules, by clients whom the rules affect, and by tribunals. *Id.*

[150] There are both instrumental and intrinsic values manifested in the rules relating to conflict of interest. *See* HAZARD & HODES, *supra* note 45, at § 10.2 at 10-6.

[151] Unlike the duty of confidentiality, which arises before representation actually ensues, the duty of loyalty depends on the existence of an attorney-client relationship. *See supra* p. 935 and note 45; *cf.* RESTATEMENT, *supra* note 11, at § 121 cmt. d ("The prohibition of conflicts of interest ordinarily restricts a lawyer's activities *only where those activities materially and adversely affect the lawyer's ability to represent a client*") (emphasis added). Hazard and Hodes nicely explain the distinction between conflicts of interest we all face as ordinary citizens and conflicts of interest faced by lawyers. They then note that the lawyer has a particular duty to avoid conflicts because, with lawyers, "there is almost always a client in the picture, and the client will have already made a choice to entrust his or her affairs to the lawyer, so that any betrayal will be felt all the more keenly. HAZARD & HODES, *supra* note 45, at § 10.2 at 10-5.

operate[152] poses particular difficulty in applying the rules relating to conflict of interest to the work of these organizations.[153]

Initially, conflicts can arise where more than one co-defendant[154] convicted of a particular offense seeks assistance from the same project.[155] While representation of multiple co-defendants at the trial stage of criminal cases is strongly discouraged,[156] it is less clear whether multiple representation is more appropriate when seeking post-conviction exoneration. The Sixth Amendment constitutional considerations, which are "paramount"[157] at the trial stage, are non-existent or significantly diminished at this point,[158] but this arguably cuts both ways. Because a defendant at trial has a constitutional right to effective assistance of unconflicted counsel,[159] the same lawyer normally should avoid representing multiple defendants unless there is very little risk of adverse effect and both clients consent.[160] On the other hand, because the Sixth Amendment includes a right to counsel of choice,[161] courts are loath to interfere where defendants have truly made an informed choice to proceed with a common attorney.[162] In the post-conviction context, the absence of Sixth Amendment applicability renders these concerns less weighty. Considerations arising out of the duty of loyalty and the need to exercise independent professional judgment, however, remain.

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[152] *See supra* p. 924 (noting that, among other things, extended periods of pre-representation screening distinguish the work of innocence projects from typical attorney representation).

[153] Conflict of interest issues implicate both the possibility of discipline as well as the risk of disqualification. While the standards for discipline and disqualification are not identical, courts frequently use the discipline standards as rules or guides in disqualification cases. *See* RESTATEMENT, *supra* note 11, at § 1 cmt. b; ANNOTATED MODEL RULES, *supra* note 11, at xix. While generally no distinction will be made in this section between discipline and disqualification, readers should be aware that subtle differences may exist and should proceed in any actual conflict situation with that in mind.

[154] For ease of discussion, the terms defendant and inmate will be used interchangeably throughout this analysis.

[155] Given the geographic limitations of many of the projects, this is likely to be a common occurrence.

[156] MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. (1983) ("The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co defendant.") Potential conflicts in dual representation can arise in a variety of ways, including placing limitations on the ability to plea bargain, to argue varying degrees of culpability and to urge for leniency in sentencing.

[157] ANNOTATED MODEL RULES, *supra* note 11, at 105.

[158] The Sixth Amendment right to counsel applies from the commencement of adversary judicial proceedings through the judgment in the criminal case. Thus, for cases at the post-conviction stage, there is no active Sixth Amendment right nor, in fact, is there any constitutional right to counsel based on due process or equal protection. *See* Ross v. Moffitt, 417 U.S. 600 (1974); Pennsylvania v. Finley, 481 U.S. 551 (1987); Murray v. Giarratano, 492 U.S. 1 (1989).

[159] Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978).

[160] See MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983); RESTATEMENT, *supra* note 11, at § 221.

[161] Wheat v. United States, 486 U.S. 153 (1988).

[162] *Id.; see generally* Bruce A. Green, *"Through A Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201 (1989) (discussing disqualification of criminal defense lawyers for conflict of interest).

While the rules regarding multiple representation are fairly clear, their applicability to innocence project work is less settled. Pursuant to Model Rule 1.7, a lawyer shall not represent a client if that representation will be "directly adverse" to another client or if it will be "materially limited" by the lawyer's responsibility to another client.[163] Such potentially conflicted representation is only permitted where all clients consent after consultation[164] and the lawyer reasonably believes such representation can be undertaken without adverse effect.[165]

In general, representation of more than one co-defendant in a case presents a conflict situation. According to the Restatement, conflict exists "if there is a substantial risk that the lawyer's representation of a client would be materially and adversely affected by the lawyer's . . . duties to another current client."[166] "'Adverse' effect relates to the quality of the representation, not necessarily the quality of the result obtained in a given case."[167] "'[S]ubstantial risk' means that in the circumstances, the risk is significant and plausible, even if it is not certain or even probable that it will occur."[168] "The standard requires more than a mere possibility of adverse effect."[169] Where more than one inmate is to be represented, there is always the possibility that one individual is innocent and the other is not. This possibility would normally trigger the need for obtaining consent to the representation.[170]

In innocence project representation, however, by the time actual representation is undertaken,[171] there may well no longer be any significant risk. This risk is eliminated because, in most projects, the decision to undertake representation does not occur until after extensive screening has occurred.[172] By that point, most of the facts in the case have been developed and the consistency of the client's innocence claims will have been determined. Because no investigation is infallible, however, a cautious project should still obtain consent from all clients to the multiple representation.[173]

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[163] MODEL RULES OF PROF'L CONDUCT R. 1.7(a) & (b) (1983). Although the organization and wording of the rule will change in light of recent ABA action based on Ethics 2000 recommendations, the essential requirements of this section have not been changed, except to require consent in writing. *See supra* note 141.

[164] MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) & (b)(1) (1983). Under Ethics 2000, the language is "informed consent." *See supra* note 133.

[165] MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) & (b)(2) (1983).

[166] RESTATEMENT, *supra* note 11, at § 121.

[167] *Id.* at cmt. (c)(i).

[168] *Id.* at § 121 cmt. (c)(iii).

[169] *Id.*

[170] *See* RESTATEMENT, *supra* note 11, at § 122 (allowing conflicted representation with informed consent).

[171] This is especially true for limited representation projects, which are unlikely to enter into a case until convinced of the innocence of the inmate. Full representation projects may enter a case at an earlier stage, but generally will not do so without a strong case of innocence having already been developed. *See supra* pp. 928-929.

[172] *See supra* p. 924.

[173] It is possible that, despite the factual similarities of the cases and their consistency with regard to innocence, the cases, because of different representation at trial or different levels of error

The very screening that is likely to prevent conflict problems at the representation stage, however, presents potential conflict of interest issues at the pre-representation stage. To what extent do the conflict of interest rules limit a project's ability to investigate on behalf of more than one inmate in a related case? It would seem that, because the duty to avoid conflicts arises only where representation is actually undertaken,[174] the conflict rules should not be read to prohibit or even limit screening on behalf of multiple defendants. Clearly this is the case with regard to "no representation" projects, which never undertake actual representation and therefore never assume duties of loyalty that would be breached by conflicted representation.[175] These projects are thus free to act on behalf of multiple defendants. While full and limited representation projects may eventually undertake representation, with the concomitant duties of loyalty and independent professional judgment, that representation will not occur, if ever, until some time later in the process. Thus, it seems fair to say that, since Rule 1.7 apparently does not apply to activities engaged in prior to undertaking actual representation, as long as projects inform inmates fully of the role they play during the screening stage and do not cross the line into de facto representation, investigating cases on behalf of multiple defendants in the same case should not violate this rule.[176] However, because there are future risks that can arise from such investigations, they should not be undertaken lightly. Obtaining consent to the dual investigation is the preferred practice and is recommended in all cases.[177]

It may be helpful to look at some possible scenarios to better understand the issues that may arise. A project might undertake to investigate claims of innocence on behalf of two inmates who were convicted in the same case. Both may initially present colorable claims of innocence that appear consistent and worth pursuing, and the project may undertake to investigate further on behalf of both individuals. If that investigation confirms that both individuals are likely innocent, the project may decide to undertake representation of both. This dual representation should be permissible as long as no significant risk of conflict is

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preservation, may have different legal issues, but these are unlikely to present real conflicts between the clients.

[174] *See supra* note 151.

[175] At least not duties arising from an attorney-client relationship. Any loyalty to the incarcerated individual would have to arise from another source. In journalism-based projects, the overriding duty to objectivity would likely preclude any such duty of loyalty. Because loyalty uniquely relates to cases in which an attorney-client relationship exists, that interest does not arise absent actual representation. In fact, courts are loath to require loyalty when the attorney has not consented to enter into such a relationship.

[176] Since loyalty is an essential feature of conflict of interest, and the duty of loyalty does not arise until representation is undertaken, this conclusion appears sound. Additionally, another significant conflict of interest concern, the need to "enhance the effectiveness of legal representation," RESTATEMENT, *supra* note 11, at § 121 cmt. b, similarly does not arise until actual representation is undertaken and is not implicated in pre-representation screening.

[177] This consent can parallel the type of consent sought for dual representation but can be adapted to the unique nature of the screening function. *See* RESTATEMENT, *supra* note 11, at § 122 cmt. c(i) (discussing the requirements of informed consent).

likely[178] and both clients consent.[179] If, during the course of representation, continued investigation confirms that both clients are innocent, no problems are likely to ensue.[180] But if continued investigation begins to show that one inmate may be guilty while the other is innocent, continued representation of both individuals will not be possible.[181] Moreover, withdrawal merely from the less-favored client may not cure the problem.

While the project will likely want to remain in the case of the innocent inmate and pursue the innocence claim on his or her behalf, its pre-representation involvement with the other inmate may prevent that from happening. First, project attorneys working with the "guilty" inmate are likely to have obtained information from that individual which might be helpful in their pursuit of the "innocent" inmate's claim. Model Rule 1.9(c), however, prevents use of such information to the disadvantage of the other ("guilty") client,[182] and Model Rule 1.6 prevents disclosure of such information. Having that information and not being able to use it may materially limit the lawyer's future representation and preclude further involvement in the case.[183]

Moreover, the "guilty" inmate would likely be treated as a former client[184] for disqualification purposes since his/her information is potentially at risk.[185]

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[178] *See supra* p. 947. Where there is no significant conflict, it is likely the lawyer can reasonably believe adequate representation is possible. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1) (1983).

[179] *See supra* p. 943. The consultation must include the risks and benefits of joint representation. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(2) (1983); *see also* RESTATEMENT, *supra* note 11, at § 122 & cmt. c(i).

[180] This assumes, as is likely, that there are consistent, or at least compatible, legal theories available to both inmates with regard to pursuing their innocence claims in court. If that were not the case, the project might be required to withdraw from one or both cases. For discussion of positional conflicts (where the conflict relates to the issues and not the facts), *see* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993); HAZARD & HODES, *supra* note 45, at § 10.10; RESTATEMENT, *supra* note 11, at § 128 cmt. f.

[181] It is likely that, if a limited representation project is involved, withdrawal from the case of the guilty inmate would be attempted in any event, since such a project will stay in a case only to the extent there remains a colorable claim of innocence.

[182] Here the prospective client, whose confidentiality interests were protected even prior to any representation.

[183] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-358 (1990). This is because the lawyer in possession of information that cannot be used might be more cautious than an unconflicted attorney and might use less than appropriate zeal for fear of disclosing or misusing the protected information. Moreover, even were the remaining client to be inclined to consent to cure this conflict, it is likely impossible to obtain such consent, because to do so would reveal the very information sought to be protected. *Id.*

[184] Even though not formally represented. See MODEL RULES OF PROF'L CONDUCT R. 1.18 (2002), RESTATEMENT, *supra* note 11, at § 15 (prospective clients). Note that newly enacted Model Rule 6.5, which limits disqualifications for nonprofit limited legal services programs, is likely not applicable to the innocence project screening stage because the extended period of screening likely goes beyond the limited contacts posited by the rule. *See* MODEL RULES OF PROF'L CONDUCT R. 6.5 (2002).

[185] The information obtained from the investigation that leads to the conclusion of guilt is information obtained in the course either of representation or in determining whether to undertake representation. In either event, it is covered by confidentiality under Model Rule 1.6 and may not

Because continued representation of the "innocent" inmate would be materially adverse to the "guilty" inmate,[186] the project attorneys may well be disqualified under Rule 1.9.[187] On its face, Rule 1.9 seems to apply only to a "representation," and thus seems inapplicable to conduct taken at the pre-representation stage.[188] But the policy underpinnings of this rule relate largely to confidentiality. For this reason, courts have extended protection to prospective clients who provide information to lawyers for the purpose of seeking representation.[189] Thus, the fact that actual representation did not occur during the screening stage would not likely preclude disqualification.

The potential need to disqualify counsel based on pre-representation consultation is also recognized by the Restatement, which provides that, where a lawyer has received information from a prospective client, that lawyer "may not represent a client whose interests are materially adverse to those of a former prospective client in the same or a substantially related matter when the lawyer . . . has received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter."[190] Such representation is only permissible where (a) the lawyer either has taken "reasonable steps to avoid exposure to confidential information other than information appropriate to determine whether to represent the prospective client and the lawyer actually possessing the information is screened from participation in the case"[191] or (b) if both the affected client and the prospective client consent.[192] In the scenario posited, the Restatement would require disqualification.

First, for the potential conflict to even exist, it is obvious that project staff have obtained significant harmful information in the course of their investigation, since that information is sufficient to seriously question the innocence of the "guilty" inmate. Additionally, while a weak claim could be made that the project

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be disclosed or used adversely unless the inmate consents or another exception exists. *See generally supra* pp. 937-938.

[186] Since it would likely be of help to the first inmate's claim of innocence to show the second inmate's culpability.

[187] In addition to being materially adverse, since blame is being shifted to the former client, the matters are substantially related since they involve the same crime. *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 (1983).

[188] The drafters of Ethics 2000 proposed Model Rule 1.18, which addresses prospective clients, recognized this. The Reporter's Explanation of Changes states that, "for the most part, the present Model Rules do not address the pre-representation period." *See* ABA Center for Professional Responsibility, *Proposed Rule 1.18: Reporter's Explanation of Changes, at* http://www.abanet.org/cpr/rule118memo.html (last visited June 3, 2002). Additionally, at a meeting to discuss the proposed rule, "The Reporter indicated that there is no current rule on the subject." ABA Center for Professional Responsibility, Commission on Evaluation of the Rules of Professional Conduct, *Minutes, May 7 and 8, 1999, at* http://www.abanet.org/cpr/050799mtg.html (last visited May 30, 2002).

[189] See discussion and cases collected at ANNOTATED MODEL RULES, *supra* note 11, at 141; *see also* RESTATEMENT, *supra* note 11, at § 15 (Reporter's Notes) for collected cases.

[190] RESTATEMENT, *supra* note 11, at § 15(2). The disqualification applies not only to the attorney, but also to others to whom the attorney's disqualification is imputed. *Id.*

[191] *Id.* at § 15 (2)(a).

[192] RESTATEMENT, *supra* note 11, at § 15(2)(b).

was only exposed to the confidential information necessary to determine whether to undertake representation, it is difficult to suggest that this is what the drafters of the Restatement had in mind. The information innocence projects obtain in the screening phase is a far cry from the limited pre-representation information obtained in other contexts, and it is inconceivable that the exception from disqualification provided by the Restatement would apply to this extent in the innocence project setting.

The Restatement provision was designed to recognize the different levels of information that are normally obtained in actual representation as opposed to prospective consultation. The Comment to this section notes "a lawyer's discussions with a prospective client often are limited in time and depth of exploration"[193] and "do not reflect full consideration of the prospective client's problems."[194] The reality of innocence project screening does not fit the Restatement formulation. The screening stage of innocence project work is likely to produce considerably more protected information than the normal consultation for the purpose of determining whether to undertake representation. Unlike typical pre-representation consultations, which are limited both in number and scope, innocence project pre-representation consultations may span months or even years and involve review of voluminous documents and other materials.[195] In many cases, there will be extensive contact between project staff[196] and the inmate, either by letters, phone conversations or personal visits.[197] These differences almost certainly take innocence project screening outside the scope of the Restatement's prospective client disqualification exception.[198] And, while this result can be avoided by consent, it is unlikely that the "guilty" inmate will be willing to give consent at this point.[199]

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[193] *Id.* at § 15 cmt. b, rationale.

[194] *Id.* As a result, the Restatement concludes that " prospective clients should receive some but not all of the protection afforded clients." *Id.*

[195] This analysis applies only to cases that are being actively screened. Initial letters from inmates that do not lead to receipt of significant information should be treated differently for purposes of this analysis.

[196] Often that "staff" will be students working under supervision of project attorneys.

[197] The nature and extent of contacts will depend heavily on the nature of the project and its operations.

[198] The result will likely be the same under the newly adopted Model Rule 1.18 (proposed by the Ethics 2000 Commission and adopted by the House of Delegates in February 2002). *See* MODEL RULES OF PROF'L CONDUCT R. 1.18 (2002). This Rule is very similar in language and effect to the Restatement, which is not surprising, since the drafters of the proposed rule indicated that it was "informed by the analysis" of the Restatement. ABA Center for Professional Responsibility, *Proposed Rule 1.18 – Reporter's Explanation of Changes* (Nov. 15, 1999), *at* http://www.abanet.org/cpr/rule118memo.html (last visited June 3, 2002).

[199] Note that even if consent had been initially obtained to the joint screening of cases, *see supra* note 177, it will not be effective with regard to this later conflict unless specifically addressed therein. *See* RESTATEMENT, *supra* note 11, at § 122 cmt. c(i) ("A client's informed consent to simultaneous representation of another client in the same matter despite a conflict of interest does not consent to the lawyer's later representation of the other client in a manner that would violate the former-client conflict rule").

Although consent may not be obtainable once the conflict has arisen, continued representation may be possible if a prospective, or advance, waiver[200] of confidentiality and conflict had properly been obtained prior to undertaking representation. The conflict rules relating to both current and former clients have provisions that permit some conflicted representation with client consent.[201] While generally consent, or a "waiver of objection to a possible future representation presenting a conflict of interest,"[202] is obtained with regard to a "contemporaneous conflict of interest,"[203] it is possible to obtain consent to a prospective conflict.[204]

In Formal Opinion 93-372, the ABA suggested that prospective waivers are permissible in certain circumstances. The Opinion indicates that, for a waiver of future conflict to be effective, "it must contemplate the particular conflict with sufficient clarity so the client's consent can reasonably be viewed as having been fully informed when it was given."[205] The more likely the nature of a particular future conflict is identified, the more likely the consent will be deemed valid as to that conflict.[206]

In the context of innocence project representation, the nature of many of the potential conflicts can be identified in advance, and thus may be deemed closer to contemporaneous rather than future conflicts. Accordingly, because they can be anticipated and articulated with some specificity, they meet the initial requirement for prospective waiver. Other factors, however, might cut against an effective waiver in these circumstances. First, the sophistication of the client (or prospective client) may be a factor in whether a prospective waiver will be recognized,[207] and incarcerated inmates seeking scarce innocence project resources are likely to be viewed as unsophisticated.[208] Additionally, the fact that the inmate is

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[200] Note that the ABA and courts tend to use the terms consent and waiver interchangeably in this context. Although these words frequently have very different meanings with different implications, *see, e.g.* Schenckloth v. Bustamonte, 412 U.S. 218, 246 (1973), this is apparently not the case here.

[201] See MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) & (b)(2) and 1.9(a) (1983); *see also* RESTATEMENT, *supra* note 11, at § 122.

[202] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-372 (1993).

[203] *Id.*

[204] A clear line between advance consent to a contemporaneous conflict and waiver of prospective conflicts may be hard to draw. HAZARD & HODES, *supra* note 45, at § 10.9, at 10-23. This is because all consent "will involve an assessment of the future risk attending the proposed representation . . . and might be said to be consent 'in advance.'" *Id.* A true prospective waiver is one in which the attorney attempts to obtain consent to "conflicts in which the nature of the conflict of interest and the identity of the other party may not yet be known." *Id.*

[205] *Id.*

[206] Of course, the more clearly the conflict can be articulated, the less likely it will be deemed "prospective." *See supra* note 204.

[207] *See id.*

[208] Moreover, some level of coercion may be found in such circumstances since the resources available to assist those claiming wrongful convictions are so limited and inmates may be unlikely to refuse consent if the alternative is that no attorney will be available to look at their case. *Cf. Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 FORDHAM L. REV. 1751, 1783 (1999) (recognizing, in the context of third party interference, that

being asked to waive potential use of confidential information adverse to that inmate's interests also cuts against a finding of waiver.[209]

Innocence projects that want to rely on prospective waivers should develop forms that articulate specifically the future conflicts that may arise and precisely what the inmate is being asked to agree to. In addition to the written explanation of potential conflicts, the form should be clear regarding possible disclosure or use of information obtained during the course of the representation or prospective representation.[210] An opportunity, either in person or on the phone, should be afforded to further explain the consent being requested and to answer any questions the inmate may have. Finally, the consent should be obtained in writing.[211] While carefully following all of these steps cannot guarantee that the consent thereby obtained will be effective, doing so makes it much more likely that the client's waiver will be taken seriously and will permit the innocence project to continue representing the inmate with the compelling innocence claim.[212]

Conflicts may also arise in cases that do not involve multiple defendants. For example, it is possible that an inmate whose case is under review may be involved as a suspect or a witness in another case being handled by a project. While the varieties of potential conflicts are virtually endless, failure to account for such conflicts can potentially lead to disqualification and discipline.[213] For these reasons, it is important to have a conflict checking mechanism in place and for all attorneys and students involved with intake and investigation to use the

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"[a] client's limited access to a lawyer is a coercive influence that compromises a client's ability to consent" to conflict of interest and disclosure of information.)

[209] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-372 (1993). The Opinion specifically notes that, where confidential information (as opposed to simply adverse representation) is involved, the waiver will not be assumed to extend to adverse use of such information "unless such disclosure or use is explicitly agreed to." *Id.*

[210] In the dual representation situation, this disclosure should explain that any evidence relevant to the case, even if it might be inculpatory, might be used to pursue the claim of innocence on behalf of another defendant involved in that case.

[211] Although written consent to conflicts or disclosure of client information was not required under the Rules, "[b]ecause of the importance of informed consent and the difficulty of later proving oral consent, disclosure to the client and the client's consent to the representation is best done in writing." RESTATEMENT, *supra* note 11, at § 122 cmt. (c)(i) (reporter's note). The changes to the Model Rules proposed by Ethics 2000 and recently adopted by the ABA would require that consent pursuant to Rule 1.7 be "confirmed in writing." MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002). As defined in newly adopted Rule 1.0(b), "[c]onfirmed in writing" . . . denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter." MODEL RULES OF PROF'L CONDUCT R. 1.0(b) (2002).

[212] It seems more likely that continued representation of the innocent inmate will be permitted where a limited representation project is involved since the project will have explained from the outset that it will only represent or continue to represent the inmate so long as there is a strong claim of innocence. If a clear prospective waiver of future conflict that includes the use of confidential information was obtained, it should be effective given the limited representation undertaken.

[213] While advance waivers may be obtainable here as well, the fact that the nature of the conflict is more difficult to anticipate and articulate renders the possibility of prospective waiver less likely.

system on a regular basis. As a matter of standard practice, the names of all defendants, co-defendants and key witnesses should be entered into the conflict-checking system as early as possible.[214] As new key players in the case are identified, they should be added to the conflict-checking system as well. This will help prevent conflicts that can lead to disqualification later on.

Much of the analysis to this point has assumed that the project as an entity is engaging in the investigation and undertaking the representation.[215] In this respect, the project is treated as a firm and all those working at the project are treated as one for purposes of conflict of interest analysis.[216] This treatment seems appropriate. Most innocence projects have a small number of attorneys who share information and may be jointly involved in supervision of students. The projects hold themselves out as entities, and it is reasonable to treat them as such for purposes of applying the Model Rules. Thus, it should not matter who at the project actually works on a matter since, when lawyers are associated in what constitutes a firm, none of them may represent a client when any one of them, practicing alone, would be disqualified.[217]

Conflict issues may arise as well with regard to the staff of the project. In many cases, supervisory attorneys may have served as prosecutors or defense attorneys prior to commencing work at the project.[218] In some circumstances, that prior representation may cause a particular attorney to be conflicted out of representation.[219] A potentially more serious and far-reaching issue arises as to whether that conflict extends to the project as a whole.[220]

Where the project attorney has previously served as a defense lawyer for the incarcerated individual seeking exoneration, conflict is possible.[221] Whether an

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[214] Generally, this should be done initially when a contact is made, and again when a screening questionnaire with additional information is received.

[215] For a discussion of possible problems with this approach where the entity is established as a charitable corporation, see *infra* notes 315-321 and accompanying text.

[216] *See* MODEL RULES OF PROF'L CONDUCT R. 1.10 cmt. & terminology (1983) (definition of "firm"); *see generally supra* note 113 and accompanying text.

[217] MODEL RULES OF PROF'L CONDUCT R. 1.10 (1983). This includes disqualification under Model Rule 1.7 and 1.9, which are the rules most relevant to innocence project representation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 & 1.9 (1983).

[218] Such conflicts are most likely to arise in geographically limited projects that rely on local attorneys to serve as staff and supervisory attorneys.

[219] Although Model Rule 1.7 prohibits "represent[ation],"and thus technically does not apply to pre-representation screening, the potential limitations on the attorney's ability to adequately serve the inmate's interests exist at this stage as well. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983). The former prosecutor or defense attorney's desire not to have his or her prior work second-guessed may affect that attorney's work at the screening stage, which may involve some of the most important decisions, including whether to invest the project's limited resources to proceed on the case. Thus, even if the rules might technically permit such involvement by the former prosecutor or attorney, it is suggested that projects have a policy precluding such involvement.

[220] As noted, Model Rule 1.10 imputes most conflicts to other members of a firm and may well extend the former prosecutor or defense attorney's personal conflict to other attorneys in the project. MODEL RULES OF PROF'L CONDUCT R. 1.10 (1983).

[221] Model Rule 1.7(a)(2) would likely address this potential conflict, since the attorney might be "materially limited" by the personal interest in vindicating his or her prior work. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (1983).

actual conflict exists likely depends on the nature of the substantive claims being made. If the investigation demonstrates that a colorable claim of innocence can be made, and that the defendant may have been convicted as a result of ineffective assistance of trial counsel,[222] an obvious conflict exists. In such circumstances, the project cannot represent the inmate and another project or other attorneys must handle the case. Even were the client willing to consent, it is unlikely that the project could reasonably believe it could adequately represent the inmate where one of its own lawyer's prior actions are being challenged as ineffective.[223] Where, however, the substantive claims do not implicate trial counsel's conduct,[224] continued representation should pose less of a problem.[225] Unfortunately, often the nature of the substantive claims will not be known in advance, and it may be best to suggest that, even at the investigative stage, the case not be handled by the project in which trial counsel is employed.[226]

Where the current innocence project staff attorney was formerly a prosecutor, it is clear that, if the prosecutor actually worked on the matter, that attorney should not engage in representation of the inmate while at the project. Model Rule 1.11 provides that, where a lawyer participated personally and substantially in a matter as a public employee, that lawyer should not thereafter represent a private client in the same matter absent government consent.[227] This Rule appears to preclude representation by the former prosecutor.[228] The Rule would

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[222] Ineffective assistance of trial counsel is a significant contributor to wrongful convictions. A study of seventy-four DNA exonerations showed that 32% of the cases involved "bad lawyering." BARRY SCHECK ET AL., ACTUAL INNOCENCE 361 (2001).

[223] In such a situation, it is hard to believe that the representation might not be materially limited by the attorney's desire to downplay the seriousness of his or her alleged ineffectiveness.

[224] For example, where prosecutorial or police misconduct prevented disclosure of exculpatory evidence despite defense counsel's diligent representation. Such misconduct has been found in more than 50% of the DNA exonerations studied by Scheck and Neufeld. SHECK ET AL., *supra* note 222, at 361.

[225] Because the potentiality for conflict still exists, it is desirable to obtain consent after consultation in this situation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(2) (1983).

[226] Where the attorney currently working for the project was merely employed in the office in which another lawyer who represented the inmate also worked, there should not be a serious conflict problem. No material limitation is likely in that situation, and thus representation by the project should be permissible. Since there is always some chance that the prior relationship between the current project attorney and the prior counsel could pose potential limitations on the representation, the better course would be to obtain consent after consultation before undertaking this representation, although it is not clear that such consent is required under the Rules.

[227] MODEL RULES OF PROF'L CONDUCT R. 1.11(a) (1983). Although the Rule prohibits "represent[ation],"and thus technically does not apply to pre-representation screening, the considerations that support disqualification likely apply at this stage as well. As with prior private representation, since many of the most important decisions, including whether to proceed on the case and thereby invest the project's scarce resources on behalf of this particular inmate, occur at this stage, it would seem that, even if disqualification is not mandated, as a minimum, projects should have a policy precluding such representation.

[228] Even if the government consented, which would be unlikely, it appears problematic for the former prosecutor to be involved in challenging his or her own prosecution. Because a prosecutor has a duty to see justice done, Berger v. United States, 295 U.S. 78, 88 (1935), *see also* AMERICAN BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION § 3-1.2(c) (3d ed. 1993), and not merely to win, it is arguable that the former prosecutor should have a primary

not necessarily disqualify the entire project, however, since it provides that, even where the individual lawyer would be disqualified, a lawyer in a firm in which that lawyer is associated may undertake or continue representation if the disqualified lawyer is screened and written notice is given to the appropriate government agency.[229] Since most innocence projects are relatively small operations, it is questionable whether screening can be effective.[230] Additionally, as a matter of policy, it might be desirable to refer such cases to another project to avoid any appearance of impropriety.[231]

Finally, the fact that students are heavily involved in the activities of innocence projects may present particular conflict issues. While working in the project, students are under the supervision of staff attorneys, and although the students themselves are not normally subject to the disciplinary rules of the jurisdiction,[232] they must follow those rules in order to avoid subjecting their supervising attorneys to disciplinary liability.[233] Additionally, disqualification can be based on the actions of non-lawyer personnel.[234]

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interest in seeing that the right result is achieved. However, this is not always the case. Although a prosecutor working for an innocence project might be more inclined to hold this view, it is unlikely that the inmate, and even the public, will share this belief. While "appearance of impropriety," which was part of the rule and one of its major policy underpinnings under the Code of Professional Responsibility, *see* MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1980), is no longer explicitly part of the prohibition on representation by former government lawyers, many jurisdictions continue to look to appearance of impropriety in assessing government lawyer conflicts. *See* RESTATEMENT, *supra* note 11, at § 133 cmt. b (reporter's notes). On balance, this consideration appears to indicate that any project involvement in a case involving a former prosecutor now employed by the project be avoided.

[229] MODEL RULES OF PROF'L CONDUCT R. 1.11(a)(1) & (2) (1983). Note that the government agency must receive notice but need not give consent.

[230] *See* ANNOTATED MODEL RULES, *supra* note 11, at 170 (discussing factors relevant to effective screening and collecting authorities considering the size and structure of the firms involved).

[231] It might be difficult for the inmate or the public to accept that the project will impartially investigate and ultimately act zealously on behalf of an inmate when the very prosecutor who secured that inmate's conviction is working for the project doing the investigation. Perhaps another project that does not have strict geographical or other limits on its services could agree to screening conflict cases is such situations.

[232] Since they are non-lawyers, the rules would not normally apply to them, although in some jurisdictions, where students work in a clinic under that jurisdiction's student practice rule, they are explicitly covered by those rules. *See* Adrienne Thomas McCoy, *Law Student Advocates and Conflicts of Interest*, 73 WASH. L. REV. 731, 732, 756 (1998) (collecting student practice rules from all jurisdictions).

[233] MODEL RULES OF PROF'L CONDUCT R. 5.3 (1983). Rule 5.3(b) requires supervising attorneys to "make reasonable efforts to ensure that the . . . conduct [of nonlawyers they supervise] is compatible with the professional obligations of the lawyer." *Id.* Additionally, Rule 5.3(c) makes the supervisory lawyer responsible for the conduct of the subordinate where the supervisor (1) "orders or, with the knowledge of the specific conduct, ratifies the conduct involved," or (2) "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." *Id.*

[234] *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 88-1526 (1988); HAZARD & HODES, *supra* note 45, at § 14.11 at 14-28 to 14-30; ANNOTATED MODEL RULES, *supra* note 11, at 164-65.

Conflict of interest issues may arise in a variety of ways. In some projects, students do initial screening work on cases as part of the introductory wrongful convictions class, allowing them to get "hands on" experience so they can better understand and appreciate the issues involved. When done in conjunction with a course rather than a clinic, this screening is often very preliminary, using only the inmate's questionnaire and either briefs in the prior stages of litigation or, in some cases, partial transcripts and other case materials. This kind of class screening, which can be very valuable from an educational and efficiency standpoint,[235] can pose conflict of interest issues. Because such screening may deal with larger numbers of students than traditional clinical settings, and because the screening is conducted as part of a class rather than a more intensive, personal clinical setting, there is a greater likelihood that students in the class might be clerking for a prosecutor's office or the Attorney General while enrolled. Although such dual enrollment could be precluded,[236] this would prevent those entering prosecution from taking a course that could be very meaningful for their future professional development.[237] Thus, it is necessary to assess whether it is permissible for students employed in a prosecutor's office to participate in a quasi-clinical wrongful convictions class.

The mere fact that a student is working as an intern in a prosecutor's office should not preclude participation in a wrongful convictions class with a quasi-clinical component. Although there is some authority that prosecutors should not engage in any simultaneous defense work,[238] this view is not universally accepted[239] and should not be applicable in these circumstances. Since such classes tend to involve the student in the very preliminary stages of screening, the student is not actually representing any inmate.[240] Additionally, the fact that a student, and not a lawyer, is involved is relevant as well, since conflict analysis is generally applied less stringently to non-lawyer personnel.[241]

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[235] Since enrollment in such classes is likely to be higher than clinical enrollment, a larger number of students can be involved in the screening activity. Class size should be limited, however, and classes should be conducted in a somewhat controlled environment in order to avoid inadvertent disclosure of protected information. *See* Moliterno, *supra* note 10, at 2394.

[236] Or the quasi-clinical component removed, but this would likely decrease both student interest and the educational effectiveness of the class.

[237] There is perhaps an even greater need for future prosecutors to obtain exposure to these issues, given prosecutors' often greater involvement in and control of the types of activities that lead to wrongful convictions. *See* SCHECK ET AL., *supra* note 222, at 361 (chart showing how use of informants, false witness testimony, defective science, mistaken identifications and police and prosecutorial misconduct significantly contribute to wrongful convictions). This is especially true if the wrongful convictions class that has the screening component is the introductory course in this area.

[238] *See* Tenn. Formal Ethics Op. 2002-F-146, 2002 WL 440846 (Tenn. Bd. Prof. Resp.) at 1-3 (citing ABA Formal Ops. 30 (1931) and 35 (1935) as well as cases and opinions from other jurisdictions).

[239] Tenn. Formal Ethics Op. 2002-F-146, *available at* 2002 WL 440846 at 2, 4 (discussing ABA Informal Op. 1285, permitting municipal prosecutors to defend state criminal defendants).

[240] *See supra* pp. 930-934 (discussing creation of an attorney-client relationship with inmates).

[241] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-1526 (1988), although that opinion addresses successive, and not simultaneous, representation.

While a student employed in a prosecutor's office should be allowed to participate in a wrongful convictions class with a quasi-clinical component,[242] the student should not be given a case in the same jurisdiction in which the student is employed. This will help avoid potential conflicts that might arise from having a working relationship with the prosecutor involved in the case[243] or from having possession of significant protected information if the case were eventually to become active in the prosecutor's office.[244]

Issues may arise, however, if other students in the class have cases from that office and the class is involved in sharing of information.[245] Such sharing enhances the educational opportunities for students and provides additional input into their work on their assigned cases.[246] It also may put the student working in the prosecutor's office in possession of protected information, which could cause a potential conflict. One solution might be to have the students share information with names redacted and to limit identifying information from the cases, but this can be very difficult to accomplish[247] and also may diminish the value of the educational experience.[248] Similarly, sharing only public information in the cases is

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[242] Prior to enrolling in the class, students working for a prosecutor's office should be encouraged to notify their employer about their enrollment in order to determine whether the office has any policy prohibiting or limiting such enrollment and to give the office an opportunity to minimize any risks from such enrollment.

[243] A working relationship with the prosecutor's office might materially limit the student's ability to work objectively on the case. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (1983). Although the student is not technically involved in representation at this stage, important decisions may be made as a result of even this preliminary screening given the limited number of cases projects can take.

[244] Although even if the student did have protected information, it would not necessarily lead to disqualification of the entire prosecutor's office. *See* MODEL RULES OF PROF'L CONDUCT R. 1.11(c)(1) (1983); *see also* HAZARD & HODES, *supra* note 45, at § 15.2 at 15-6, § 15.9 at 15-26 to 15-27 (noting the "strictly personal" nature of disqualification of a former private lawyer now engaged in government service but recommending screening in any event); ANNOTATED MODEL RULES, *supra* note 11, at 182-83. The Annotated Model Rules also notes the personal nature of the disqualification but indicates that some jurisdictions extend it to the whole prosecutor's office at least in some cases. This is most likely where the former defense lawyer has significant information and the prosecutor's office is one where screening is likely to be ineffective. *Id.* at 183. The Restatement would also permit screening, where it can be effective, to prevent disqualification of the entire prosecutor's office. *See* RESTATEMENT, *supra* note 11, at § 123 cmt. (d)(iii). This is especially true since the person possessing the protected information is a student and not a lawyer, although perhaps that is less relevant where moving from private to government employment. On the other hand, the Rule explicitly refers to prior "private practice or nongovernmental employment" and might therefore explicitly extend to non-lawyer employees. Of course, clinical students are not technically employees, but this likely does not affect the analysis since they are serving in an essentially similar role. *See supra* note 65.

[245] Such sharing should be permissible if members of the class are treated as an entity. *See supra* note 113.

[246] Moliterno, *supra* note 10, at 2393.

[247] Lisa G. Lerman, *Professional and Ethical Issues in Legal Externships: Fostering Commitment to Public Service*, 67 FORDHAM L. REV. 2295, 2310 (1999).

[248] Limiting the information that can be shared may unrealistically limit the discussion of cases and interfere with the students' educational experience. *Id.* at 2313; *cf.* Moliterno, *supra* note 10, at 2394-95 (noting that use of fictitious names and altered facts is an ineffective "fix" for

not likely to be effective to serve educational goals or to prevent ethical problems.[249]

Ultimately, the educational advantages of student's reporting on and consulting with other members of the class regarding cases they are screening seem to outweigh future risks of disqualification. Because successive employment will be with a government entity, the personal disqualification of the student possessing protected information[250] should not be imputed to the entire office.[251] As noted, this is particularly appropriate, from a functional perspective,[252] because the student was not an attorney at the time of screening and the degree of protected information was likely very limited. While the risk of future consequences is thus fairly small, obtaining consent in advance from inmates whose cases are to be screened can reduce some of this risk.[253] In any event, students should be made aware of the possible risks before enrolling in the course.

Because students engaged in an innocence project clinic are generally more personally and intensely involved in their cases and may well be working on these cases at later stages of the screening process,[254] students should not be permitted to simultaneously work in an innocence project and for a prosecutor's office.[255] As their work on cases gets closer to true representation,[256] the balance

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confidentiality problems because it diminishes educational value and renders the student experience less useful).

[249] In order for students to do meaningful work on a case, they must candidly address and discuss the strategies proposed by the inmate for proving innocence and, where appropriate, propose alternative strategies. This is precisely the kind of information that needs sharing in class, yet it poses the most risk to confidentiality concerns. Moreover, because the Model Rules' confidentiality restrictions on disclosure do not have an exception for public or generally known information, a limitation along these lines will not prevent disclosure problems under the Rules. *See supra* at note 92.

[250] Possession of protected information would prevent that student from working on the case for the government. MODEL RULES OF PROF'L CONDUCT R. 1.11(c) (1983).

[251] *See supra* note 244.

[252] The ABA Committee on Ethics and Professional Responsibility frequently uses a functional analysis when looking at issues of confidentiality and conflict that are not explicitly covered by the rules. *See, e.g.,* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988) (temporary lawyers); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 88-1526 (1988) (imputed disqualification arising from change in employment by nonlawyer employee).

[253] For a discussion of consent after consultation, or "informed consent," see *supra* pp. 943-944.

[254] At this point, the screening may involve field investigation, including contact with the inmate and others to obtain additional information not initially developed at trial.

[255] Note that issues may arise as well where a clinic student negotiates for a job with the prosecutor's office while working in the clinic. Although the Model Rules do not directly address negotiation for government employment, *compare* Model Rule 1.11(c)(2), the ABA has recognized the need to address these issues realistically and has set out some guidelines where negotiations are to occur. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-400 (1996) (job negotiations with adverse firm or party). Students should be advised to check with their supervising attorney if they find themselves about to engage in negotiations with any employer that may pose a conflict, and supervising attorneys should assist in determining at what point, if ever, inmates must be told and specifically consent to the negotiations. *Id.*

[256] Generally, the student is not directly engaged in representation, but is acting as a non-lawyer assistant. In some cases, however, the student may be working under a student practice rule. *See generally* McCoy, *supra* note 233, at 1 (discussing the implications of such practice).

of risks and benefits begins to tip in favor of precluding dual involvement. In any event, faculty and innocence project staff should develop policies regarding such employment and should make them known to students prior to enrollment.[257]

D. The Duty of Zealous Representation:[258] Competence, Diligence, Communication and Advancing the Client's Legitimate Interests

Innocence project attorneys representing inmates[259] have the normal duties associated with such representation: duties of diligence,[260] competence[261] and communication.[262] These duties generally require that the client have primary decision-making authority regarding the representation[263] and be provided with information to facilitate that decision-making.[264] Additionally, the lawyer is required to carry through with actions that are reasonably necessary to advance the client's legitimate interests in a timely and competent fashion.[265] In this respect, the duties of the attorney working for an innocence project are no different from the duties of any attorney.[266]

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[257] The foregoing discussion assumed one model of offering and sequencing courses taught in conjunction with an innocence project. Of course, there are other models, and projects using a different type and sequence of courses will need to adapt this analysis to fit their own course offerings. In doing so, they should also look to local rules, cases and ethics opinions.

[258] The Model Rules do not explicitly require zealous representation, as did the Model Code. *See* MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 & EC 7-1 (1980). The preamble to the Model Rules speaks of zealous representation, but limits that requirement to the litigation context. This change in focus away from zeal and toward diligence was designed to prevent interpretation of the rules as requiring lawyers to be "zealots" and to make clear that a lawyer has a duty of "professional commitment" but not of "personal emotional involvement." HAZARD & HODES, *supra* note 45, at § 6.2, at 6-3 to 6-4.

[259] Or those retained by projects to do so. Where a project does not provide representation itself, but brings in other attorneys to do so (either on a paid or volunteer basis), those attorneys have a duty to exercise independent judgment and not allow third party influence to control the representation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (1983).

[260] MODEL RULES OF PROF'L CONDUCT R. 1.3 (1983).

[261] MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

[262] The additional duties of confidentiality, loyalty and independent judgment have already been discussed. *See supra* pp. 934-960.

[263] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983); *see also* RESTATEMENT, *supra* note 11, at § 22, HAZARD & HODES, *supra* note 45, at§ 5.5.

[264] MODEL RULES OF PROF'L CONDUCT R. 1.4 (1983), *see also* RESTATEMENT, *supra* note 11, at § 20, HAZARD & HODES, *supra* note 45, at §§ 7.2-7.4.

[265] "The responsibilities entailed in promoting the objectives of the client may be broadly classified as duties of loyalty, but their fulfillment also requires skill in gathering and analyzing information and acting appropriately. In general, they prohibit the lawyer from harming the client." RESTATEMENT, *supra* note 11, at § 16 cmt. e. These duties are limited by obligations the lawyer has to other persons and to courts and the legal system. *See id.*at § 23; *see also id.* at § 16 cmt. c.

[266] One sense in which the innocence project attorney may have duties that are somewhat different than the typical attorney is that, at the representation stage, the project attorney is often involved in serving as a clinical instructor and supervisor of students. As a consequence of that role, the project attorney has both obligations to the client as well as obligations to enhance the educational experience of students in the clinic. At times these obligations may conflict. When this occurs,

These duties are, however, defined by the scope of the representation.[267] In a full representation project, once the project has undertaken to represent an inmate, the scope of that representation would normally extend to any action that could reasonably be taken to assist in freeing the inmate from wrongful incarceration.[268] This would extend to raising any factual and legal issues that could lead to reversal of the conviction for which the inmate is incarcerated,[269] regardless of whether those issues prove the inmate's actual innocence. In this respect, the project's representation of the inmate is no different from any attorney who would have undertaken to represent the inmate, and the project attorney's "ethical" obligations are no different either.

More difficult issues arise in limited representation projects, however. Such projects will undertake to represent an inmate only for the purpose of helping to establish that inmate's actual innocence of the crime for which he or she is incarcerated. Is this limitation on the scope of the representation ethically appropriate? Model Rule 1.2(c) provides that "[a] lawyer may limit the objectives of the representation if the client consents after consultation."[270] The Comment indicates that the objective or scope of services may be limited "by the terms under which the lawyer's services are made available to the client."[271] Any limit on the scope of the lawyer's services must accord with the rules of professional conduct and other law.[272]

The Restatement also recognizes the rights of clients and lawyers, in reasonable ways, to limit the scope of the representation by agreement of the parties.[273] Such agreement, in effect, constitutes "a definition of the services to be per-

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resolution of the conflict may be difficult. For a thorough discussion of these issues, see the authorities collected in *supra* note 23.

[267] *See* RESTATEMENT, *supra* note 11, at § 16(1) (defining the lawyer's duties to a client relative to "matters within the scope of the representation").

[268] Of course, the duties are limited to the extent they are consistent with the lawyer's other legal duties. *Id.*

[269] This may also include seeking sentence reduction where that might be an appropriate remedy in the circumstances.

[270] MODEL RULES OF PROF'L CONDUCT R. 1.2(c). The client "must be informed of any significant problems a limitation might entail, and the client must consent." RESTATEMENT, *supra* note 11, at § 19 cmt. c. Because of the superior position of the attorney in the relationship, the lawyer will bear the consequences of any misunderstandings, HAZARD & HODES, *supra* note 45, § 5.10 at 5-30, and thus project attorneys must be clear in setting out the risks, including the risk of possible adverse inferences of guilt from future withdrawal. *See supra* pp. 929-930. While limited representation projects will not undertake the representation without consent to the limitation is scope, the inmate must have a choice to proceed or not based on complete information. The fact that the offer of limited representation may be presented as a "'take it or leave it' proposition" and that "the client will have difficulty obtaining other counsel" do not render the limited representation improper so long as the client understands the options. *See* HAZARD & HODES, *supra* note 45, at § 5.11, illus. 5.9, at 5-33. For a discussion of informed consent generally, see *supra* note 211. Many of the considerations raised in that discussion are applicable here as well.

[271] MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (1983). The comment makes specific reference to Legal Aid and limitations imposed by the types of cases such offices handle. *Id.*

[272] *Id.;see also* ANNOTATED MODEL RULES, *supra* note 11, at 21.

[273] *See* RESTATEMENT, *supra* note 11, at § 19.

formed."[274] However, in order to avoid harm to the client, two key requirements exist for such limitations to be valid. First, the client must be adequately informed of the limitation and must consent thereto,[275] and second, "the terms of the limitation [must be] reasonable in the circumstances."[276]

In light of these provisions, the limits on the scope of representation imposed by limited representation projects are probably permissible as long as the inmate gives informed consent. As the Restatement recognizes, limits are reasonable if, in addition to informed consent, "the benefit supposedly obtained" by the limited representation "could reasonably be considered to outweigh the potential risk posed . . . ."[277] In determining reasonableness, it is "relevant whether there were special circumstances warranting the limitation"[278] and whether there was "choice available" to the client.[279] Given the extremely limited resources for representation of those who allege they have been wrongfully convicted and the constraints on funding for projects who provide such representation, there is likely nothing unreasonable about projects limiting the kinds of cases they will take or continue to pursue. Especially since, in the absence of these limitations, such projects may well not have funding to proceed at all,[280] the limits appear reasonable as long as the potential consequences are clearly understood. This seems particularly appropriate since the facts that might trigger adverse consequences from the limited representation are uniquely in the possession of the client.[281]

While project attorneys' duties relating to zealous representation are relatively clear once representation has been undertaken, more difficult questions of professional responsibility may arise again with regard to pre-representation screening. As noted, such screening presents a hybrid: the project is not yet representing the inmate, but is engaging in significant activity on that inmate's behalf.[282] To what extent does the project attorney have duties of competence, diligence and communication with regard to inmates whose cases are at the screening stage?

In discussing the attorney's general duties to "proceed in a manner reasonably calculated to advance the client's lawful objectives, as defined by the client

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[274] *Id.* at § 19 cmt. c.
[275] *Id.* at § 19(1)(a).
[276] *Id.* at § 19(1)(b).
[277] RESTATEMENT, *supra* note 11, at § 19 cmt. c.
[278] *Id.*
[279] *Id.* The "extent to which alternatives are constrained by circumstances might bear on reasonableness, *id.*, and ultimately, reasonableness must be determined from the perspective of a reasonable client in the circumstances. *Id.; see also id.* at § 18(2).
[280] *See supra* notes 37-38 and accompanying text.
[281] The inmate uniquely knows if he or she is factually guilty, and therefore is in the best position to assess the risks as long as those risks are adequately explained.
[282] As previously noted, it is not clear that the project is actually working "on behalf" of the inmate at this stage, since the function at the screening stage is more appropriately to determine whether the inmate has a colorable claim of innocence rather than to advocate for such a claim. *See supra* p. 929. It could certainly appear to the inmate and to third parties, however, that the action being taken is on the inmate's behalf.

after consultation"[283] and to "act with reasonable competence and diligence,"[284] the Restatement notes that the relevant section "presupposes that a client-lawyer relationship has come into existence."[285] This is consistent with the basic nature of the relationship, which is one of agency.[286] Moreover, the language of the Model Rules seems to presuppose the existence of a "client"[287] and the fact of "representation."[288] Ultimately, with respect to duties such as diligence, "'clienthood' will largely determine whether a person is entitled to a lawyer's loyalty and dedicated commitment."[289]

Thus, while attorneys generally have significant duties to clients to act with competence and diligence in advancing their legitimate interests and to keep them adequately informed, arguably these duties do not extend to inmates at the pre-representation stage. This is not to imply, however, that project attorneys can disregard these duties altogether. As noted, the inmate whose case is subject to screening may best be viewed as a prospective client.[290] While the attorney does not yet have many of the affirmative duties inherent in an attorney-client relationship, the attorney does have the duty to "use reasonable care to the extent the lawyer provides the [inmate] legal services."[291] According to the Comment, when the lawyer provides advice or comment on matters relevant to the inmate's claim, the lawyer must use reasonable care in rendering such advice where the individual might rely on it.[292] Additionally, the "lawyer must also not harm a prospective client through unreasonable delay after indicating that the lawyer might undertake representation. What care is reasonable depends on the circumstances."[293]

Applying these rules to the innocence project screening stage, it again seems clear that no-representation projects assume no duties under the rules of professional responsibility since no lawyer is providing legal services to any individual. In full and limited representation projects, it would appear that attorneys are free to pursue the investigation of an inmate's claim of innocence as the attorney be-

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[283] RESTATEMENT, *supra* note 11, at § 16(1).
[284] *Id.* at § 16(2).
[285] *Id.* at § 16 cmt. a.
[286] *See* HAZARD & HODES, *supra* note 45, at § 5.2 at 5-5; *see also* ANNOTATED MODEL RULES, *supra* note 11, at 13 ("One general framework within which to discuss the scope of the relationship between lawyer and client is that of agency law"); RESTATEMENT, *supra* note 11, at § 16 cmt. c ("the lawyer's efforts *in a representation* must be for the benefit of the client," citing RESTATEMENT (SECOND) AGENCY § 387) (emphasis added).
[287] The term "client" is repeated thirteen times in Rule 1.2 and is used as well in both Rule 1.3 (diligence) and Rule 1.4 (communication).
[288] Some version of the term "representation" is found in each of Rules 1.1 through 1.4.
[289] HAZARD & HODES, *supra* note 45, at § 6.5, at 6-10 (quoting Ted Schneyer, *Searching for New 'Particles' in the Law of Lawyering: Recent Developments in the Attribution of Clienthood*, 1 J. INST. STUDY LEGAL ETHICS 79 (1996)).
[290] *See supra* note 82.
[291] RESTATEMENT, *supra* note 11, at § 15(1)(c); *see also* HAZARD & HODES, *supra* note 45, at § 2.3, at 2-9.
[292] RESTATEMENT, *supra* note 11, at § 15 cmt. e.
[293] *Id.*

lieves most appropriate, since the duty to consult with the client[294] has not yet come into play.[295] Similarly, while project attorneys should not unduly delay the investigation, they do not have the duty to proceed with diligence unless the inmate has been led to discontinue other sources of possible relief in reliance on timely screening.[296] Where, however, information is provided to the inmate or advice given, a duty to do so competently may exist.[297]

While innocence project attorneys may not have the same affirmative ethical obligations when acting on behalf of inmates at the pre-representation screening stage that they would with regard to actual clients, this is not to suggest that projects should not take the duties of competence and diligence seriously at this stage. The credibility of the project depends on inmates recognizing its good-faith effort to adequately investigate their claims. In addition, the students involved in the pre-representational activity may well base their standards of practice and acceptable lawyer conduct on practices they see in the project. Thus, modeling of good lawyering behavior is especially important in innocence projects.[298] While legitimate differences in role and function justify different degrees of diligence and zeal at the screening stage, project lawyers should be sure that both inmates and students understand the nature of the activity being undertaken and the professional obligations those activities require. This will help to avoid later misunderstandings and facilitate appropriate training for clinical students.

E. Additional Issues Created by the Extended Period of Pre-Representation Screening

As previously noted, the extensive pre-representation screening of inmate cases raises interesting and potentially troubling issues. This screening involves the staff of the project in extensive activity on behalf of the inmate at a time when no actual attorney-client relationship exists. Although the confidentiality, conflict of interest and zeal issues inherent in this arrangement have already been discussed,[299] other issues emerge from this "quasi-representation" and will be

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[294] Which is a function of the existence of an attorney-client relationship and representation.

[295] Given the volume of requests received by many projects, such communication might well be difficult. Many projects have backlogs and often do not have resources for frequent follow up during the early stages of screening. However, to the extent possible, consulting with the inmate is desirable.

[296] Again, given the limited resources of many projects and the large number of requests, the degree of diligence required in actual representation would often be impossible at the screening stage.

[297] In addition to the duty outlined in Restatement § 15, some jurisdictions may recognize a duty to avoid negligent misrepresentation. *See, e.g.*, Celeste Polak, *Note, Negligent Misrepresentation: Liability for Texas Attorneys–McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 51 BAYLOR L. REV. 1035 (1999); Gary Lawson & Tamara Mattison, *A Tale of Two Professions: the Third-Party Liability of Accountants and Attorneys for Negligent Misrepresentation*, 52 OHIO ST. L. REV. 1309, 1322-26 (1991).

[298] *See supra* note 10.

[299] *See supra* pp. 934-964.

addressed in this section. This article does not purport to resolve these issues, but merely to raise them and suggest some means for beginning to analyze them.[300]

Initially, questions emerge regarding the scope of the attorney's authority during the pre-representation screening stage. For example, to what extent can the attorney speak on the inmate's behalf to prosecutors, witnesses and others? Does the attorney have the power to make admissions on behalf of or bind the inmate during this period? Because this type of quasi-representation is fairly unique, there is little guidance on these issues. The Restatement addresses the authority of the lawyer,[301] but it is unclear how these sections apply to the screening stage.

A related issue is whether either the lawyer or the inmate is subject to the restrictions of Rule 4.2.[302] That rule prohibits an attorney, "in representing a client," from "communicat[ing] about the subject of the representation with a [person] the lawyer knows to be represented . . . by another lawyer in the matter" without consent of that lawyer.[303] Is the project attorney[304] "representing a client" for these purposes by engaging in this extensive screening such that the attorney cannot communicate with represented persons regarding the subject matter of the case? Is the inmate a "person known to be represented" so that he or she cannot be approached without consent?[305] Since the rule speaks to representation, it would appear that, during pre-representation screening, neither the attorney nor the client is literally within the coverage of the rule. Is this the appropriate resolution?[306]

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[300] Because this article is designed to be an introductory look at ethical issues relating to innocence projects, and because it has already grown beyond its intended scope, only a very preliminary attempt will be made to address these issues, which themselves could form the basis for another article. As previously noted, additional work will be needed in this area as new issues emerge, *see supra* note 11 and accompanying text, and others are encouraged to share their experience and expertise in helping to find appropriate solutions to these difficult questions. The emerging Innocence Network, *see supra* note 121, may well be a good place for this discussion to continue.

[301] *See* RESTATEMENT, *supra* note 11, at §§ 26 and 27 (addressing actual and apparent authority). More extensive analysis of these issues is necessary and should include not only the Restatement but also the law of agency within the particular jurisdiction. The Restatement relies heavily on the law of agency, including the Restatement (Second) of Agency, in addressing these issues. *See* RESTATEMENT, *supra* note 11, at §§ 26 and 27 cmts. to .

[302] MODEL RULES OF PROF'L CONDUCT R. 4.2 (1983).

[303] *Id.; see also* RESTATEMENT, *supra* note 11, at §§ 99 & 100. This rule is designed to "protect against overreaching and deception of nonclients," to protect "the relationship between the protected nonclient and that person's lawyer," and to assure "the confidentiality of the nonclient's communications with the lawyer." RESTATEMENT, *supra* note 11, at § 99 cmt. b; *see also* ANNOTATED MODEL RULES, *supra* note 11, at 398 (explaining that the "anticontact" rule "exists to prevent lawyers from taking advantage of uncounseled laypersons and to preserve the integrity of the lawyer-client relationship").

[304] Or those working under his or her supervision.

[305] MODEL RULES OF PROF'L CONDUCT R. 4.2 (1983).

[306] This issue might be resolved differently depending on whether the project staff is approaching others or the inmate is being approached. In the former situation, application of these rules might be more appropriate, since the attorney seeking information from others who may be represented may pose the same type of threat that an actually retained attorney would. But treating the inmate as a represented person when the project has made significant efforts to distance itself from

Another significant issue at this stage relates to whether it is appropriate for project attorneys to draft pleadings and other litigation materials[307] for an inmate whose case has not yet been taken by the project and what problems, if any, are created by doing so?[308] Such action will often be necessary to preserve issues and claims in the face of strict time limitations on most forms of post-conviction review. Can an attorney "ghostwrite" pleadings, petitions and motions on behalf of an inmate?[309] What, if any, restrictions exist on this practice? Courts are currently split on the propriety of such conduct.[310]

In large part, the difficulty of these issues in the pre-representation screening context arises from the "all or nothing" approach generally taken to representation and the duties of the attorney.[311] The movement toward unbundled legal services,[312] which would allow clients to purchase legal services "a la carte,"[313] is

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representation might well be inappropriate and unwieldy. As noted, these issues require further analysis. Similar issues may arise regarding how the project attorneys and other staff should present themselves when speaking to others "on behalf" of the inmate. Both the Model Rules and the Restatement require that lawyers not mislead nonclients regarding the "identity and interests of the person the lawyer represents." MODEL RULES OF PROF'L CONDUCT R. 4.3 (1983); RESTATEMENT, *supra* note 11, at § 103. Additionally, they require that, when the lawyer knows the person misunderstands the lawyer's role, the lawyer has a duty to correct that misunderstanding. It would appear that these rules might require project staff to be clear with potential witnesses and others regarding the role that the project attorney is playing vis-à-vis both that person and the inmate. Even if these rules do not apply directly to project staff, caution is suggested in light of the general duty not to mislead. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (1983).

[307] This might include federal and state motions for post-conviction relief as well as motions under state DNA statutes. *See* Schmitt, supra note 19.

[308] One potential problem arises from the fact that the attorney's name is not included on the pleading, and thus the attorney will not receive service of responses from the other side. This means the attorney will have to get copies of any responsive filings directly from the inmate, which can cause delay when time is of the essence.

[309] "Ghostwriting" is the term given to "the drafting of pleadings and other court documents by lawyers for clients who go on to represent themselves pro se." John C. Rothermich, *Note, Ethical and Procedural Implications of 'Ghostwriting' For Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2689 (1999).

[310] For a comprehensive discussion of the issues involved in ghostwriting and the responses by courts in the form of opinions and court rules, *see* Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145 (2002); *see also* Rothermich, *supra* note 309.

[311] *See* Goldschmidt, *supra* note 310, at 1175 (As far as many courts are concerned, there are "only two choices for litigants: they [can] represent themselves in all matters or have an attorney represent them in all matters. There [is] no middle ground for defining an attorney-client relationship.") (footnotes omitted). There is some indication that this "all or nothing" approach is beginning to change. Ethics 2000 proposed Rule 1.18 recognizes rights and responsibilities relating to prospective clients. *See* ABA Center for Professional Responsibility, *Proposed Rule 1.18: Reporter's Explanation of Changes*, *at* http://www.abanet.org/cpr/rule118memo.html (last visited June 3, 2002).

[312] Unbundled legal services, "also known as discrete task representation or alternatives to full-time representation," Forrest S. Mosten, *Unbundling Legal Services*, 57-JAN. OR. ST. BAR BULL. 9 (Jan. 1997), is the term given to allowing clients to select from discrete, affordable legal tasks rather than purchasing full representation. It is believed that broad use of such services will reduce legal costs and help meet the vast unmet need for legal services in the United States. *Id.*

[313] Dianne Molvig, *Unbundling Legal Services*, 70 WIS. LAW. 9 (Sept. 1997), *available at* http://www.wisbar.org/wislawmag/1997/09/bundle.html (last visited June 3, 2002). Molvig uses

beginning to question the appropriateness of this "all or nothing" approach, and hopefully, the ethical rules will eventually adapt to this growing method of practice.[314] Until then, project attorneys will often find themselves having to be creative in resolving ethical issues and may find it helpful to seek guidance in the form of formal or informal ethics opinions.[315]

F. Innocence Project Practice Issues

In addition to the professional responsibility issues already addressed that relate primarily to differences in the nature of the relationship between the innocence project attorney and the inmate on whose case the attorney is working, differences in the way many innocence projects are structured also create potential issues. First, many projects are established as non-profit entities or operate within such entities and many of these entities have corporate structures.[316] This can pose problems in some jurisdictions, which prohibit the corporate practice of law.[317] Attorneys engaging in work for such projects that includes direct representation of clients might be viewed as engaging in the unauthorized practice of law.

While a series of United States Supreme Court cases[318] may provide constitutional protection for such representation, the scope of these cases and their ap-

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the term "a la carte" as distinguished from providing the full panoply of services, which she terms "the traditional full-service menu." *Id.*

[314] The potential importance of unbundled legal services to achieving representation for people of low and moderate incomes is reflected in the creation by the ABA of an entire website devoted to this issue, *see* ABA Standing Committee on the Delivery of Legal Services, *Pro Se/Unbundling Resource Center, at* http://www.abanet.org/legalservices/delivery/delunbund.html (last visited June 3, 2002). In addition, unbundled legal services has been a topic at many recent conferences, *see* Goldschmidt, *supra* note 310, at 1183-90; *Report of the Working Group on Limited Legal Assistance, supra* note 21, and state courts have begun to develop court rules to facilitate use of such services. Goldschmidt, *supra* note 310, at 1191-92 and Appendix (analyzing the relatively new court rules permitting limited appearances adopted in Colorado and Maine). *See id.* at 1190-91 nn. 232 & 233.

[315] Such opinions, which provide guidance but are generally not binding, are available from the American Bar Association and often from state bars or disciplinary authorities. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.6 (1986).

[316] For example, the Midwestern Innocence Project is chartered as a non-profit corporation and has non-profit tax status under 26 U.S.C. § 501(c)(3) (1994).

[317] Many jurisdictions have statutes or case law that explicitly prohibit corporations from practicing law. *See* Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 172-74 and statutes collected in n.94 (2000). A "literal reading" of these authorities would indicate that they extend to practice by non-profit corporations. *Id.* at 194; *see also* Wayne Moore, *Are Organizations that Provide Free Legal Services Engaged in the Unauthorized Practice of Law?*, 67 FORDHAM L. REV. 2397, 2398 (1999). There are exceptions to this prohibition in jurisdictions that permit attorneys to practice in limited liability companies that are otherwise authorized by statute. Giesel, 65 MO. L. REV., at 192-93.

[318] *See* NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Assoc., 389 U.S. 217 (1967); United Transportation Union v. State Bar, 401 U.S. 576 (1971); *In re* Primus, 436 U.S. 412 (1978).

plication to innocence projects are uncertain.[319] Project directors should check their jurisdiction's corporate practice statutes and cases to determine whether the structure of the project is appropriate given these authorities.

Similarly, projects that operate with boards that include lay members must ensure that those boards do not interfere with the project lawyers' exercise of independent professional judgment[320] Additionally, projects receiving external funding, whether from the government, private foundations or individuals, must ensure that requirements imposed by those funders do not adversely affect the lawyer's professional obligations.[321] Two recent articles fully explore these issues and should be consulted by project directors confronting such concerns.[322]

A final issue that may affect projects that do not have restrictive jurisdictional limitations on the cases they will accept also relates to the unauthorized practice of law. The Model Rules provide that an attorney shall not "practice law in a jurisdiction where doing so violates the regulation of the legal profession

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[319] These cases have been viewed as establishing that "it is now well settled, as a matter of constitutional law, that non-profit organizations may employ staff attorneys to provide legal representation to appropriate categories of third persons." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-374 (1993). What constitutes such appropriate categories is, however, not completely clear. *See, e.g.,* Moore, *supra* note 282, at 2399-2400, 2404 (1999) (suggesting that the corporate practice doctrine may apply to traditional legal services organizations as well as AIDS clinics, agencies serving the homeless, women's crisis shelters and law school clinics but noting that the Supreme Court decisions might apply only to serving individuals whose associational rights arise from their membership in the organizations providing representation); Robert Hill and Thomas Calvocoressi, *The Corporate Counsel and Pro Bono Service*, 42 BUS. LAW. 675, 693 (1987) (acknowledging cases and recognizing they exempt legal services provided on a nonprofit basis in some circumstances).

[320] *See generally* MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983) (requiring the "professional independence" of a lawyer); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974) (decided under the Model Code) (governing board of legal services agency must set policies regarding priorities for case selection and allocation of resources but must not interfere in cases once they have been assigned); *see also* Moore, *supra* note 299, at 2402-03 (discussing *In re* Education Law Center, Inc., 429 A.2d 1051 (N.J. 1981), which found that the Center was not improperly engaged in the unauthorized practice of law in part because the board of directors, which included lay members, "only set overall program priorities and did not make decisions about individual cases." 67 FORDHAM L. REV. at 2402. This issue was addressed as well in EC 5-24 of the Model Code: "Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves." In light of the potential problems created by practicing in such a setting, the ethical consideration suggested that,"[w]here a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstandings as to their respective roles." MODEL CODE OF PROF'L RESPONSIBILITY RESPONSIBILITY EC 5-24 (1981).

[321] *See generally* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1394 (1977) (decided under the Model Code) (discussing disclosure of information to external funding sources).

[322] *See* Samuel J. Levine, *Legal Services Lawyers and the Influence of Third Parties on The Lawyer-Client Relationship: Some Thoughts From Scholars, Practitioners, and Courts*, 67 FORDHAM L. REV. 2319 (1999); Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187, 2198-2240 (1999).

in that jurisdiction,"[323] yet lawyers and students may well engage in investigative activities in the jurisdiction of conviction, a jurisdiction in which no project lawyer may be admitted to practice. Does this activity constitute the unauthorized practice of law? Similarly, attorneys and students under their supervision may provide legal advice and assistance to inmates in remote jurisdictions in which they are not licensed to practice. To what extent does this activity implicate unauthorized practice prohibitions? While prior to *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*,[324] most lawyers were not seriously concerned about these issues, this case sent shock waves through the legal profession.[325] While the American Bar Association Commission on Multijurisdictional Practice has proposed more liberal rules that will make cross-jurisdictional practice easier, these rules will not be effective in any jurisdiction until adopted by the relevant state authority. Thus, directors of projects in which lawyers engage in activities that might constitute representation in remote jurisdictions in which they are not licensed to practice should consult the existing rules as well as one of the many resources discussing and defining unauthorized practice[326] before proceeding too far.

V. CONCLUSION

Innocence projects play an important role in uncovering and remedying wrongful convictions, in increasing public awareness of the risks of wrongful conviction, and in training the next generation of lawyers to avoid conviction of the innocent. While attorneys in these projects must comply with the rules of professional conduct, often those rules are not well suited to the way these projects operate. Project directors, lawyers and faculty must take extra care to identify the relevant standards and to adapt the project's activities to comply with these rules. If they do so appropriately, the work of innocence projects will not only make a significant contribution to justice, but will also serve as a model for professionally responsible practice.

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[323] MODEL RULES OF PROF'L CONDUCT R. 5.5 (1983).

[324] 949 P.2d 1 (Cal. 1998). *Birbrower* "held that lawyers not licensed to practice law in California violated California's misdemeanor UPL provision when they assisted a California corporate client in connection with an impending California arbitration under California law, and were therefore barred from recovering fees under a written fee agreement for services rendered in California." American Bar Assoc., *Interim Report of the Commission on Multijurisdictional Practice* 11 (Nov. 2001), *at* http://www.abanet.org/cpr/mjp-final_interim_report.pdf (last visited June 3, 2002).

[325] The Interim Report further notes that concern regarding multijurisdictional practice "was sharpened" by the *Birbrower* case. *Id.*

[326] *See, e.g.*, William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501 (2001); La Tanya James & Siyeon Lee, *Current Developments, Adapting the Unauthorized Practice of Law Provisions to Modern Legal Practice*, 14 GEO. J. LEGAL ETHICS 1135 (2001); *see also Final Report of the Commission on Multijurisdictional Practice, at* http://www.abanet.org/cpr/mjp/final_mjp_rpt_6-5.doc (discussing the issues and the need for change and containing recommendations and a proposed revised Rule 5.5 that would clarify what kinds of activities are and are not permissible for attorneys engaging in multijurisdictional practice).