

CLEACT Recommendations On Reporting Misconduct – James McKim

This document contains my recommendations on reporting misconduct..

- **Recommendation:** Address the lack of a statewide information management system that captures data from all law enforcement agencies for Reporting, Investigating, and Adjudicating Police Officer Misconduct
 - Ensure tracking of complaints, internal investigations, discipline, and resolutions
Determine a way to prioritize funding for such a system.
 - Make sure those who analyze that data to generate reports are trained on data analytics with respect to people of color.

Explanation: Currently there is no state-wide information management system to collect data from all law enforcement agencies for analysis of trends and input for improvements in law enforcement.

As Attorney Gilles Bissonette has said, There are often inherent conflicts with investigations into misconduct being exclusively performed by an officer's own department (meaning their own colleagues). Such conflicts can raise suspicions that internal investigations that have led to "unfounded" or "unsubstantiated" determinations may not have been done with full independence.

As Director Scippa has testified, while some data is required to be captured for FBI purposes, not enough data is captured to be useful for improvement of training, standards, and policies or procedures. In addition, in many cases, municipal law enforcement agencies do not have even a 20th century on-line system which could be used to quickly send information to a central location for analysis. Manual storage and transmission of this information is unacceptable in the 21st century.

- **Recommendation:** Establish an independent community conduct review board similar to what the Attorney General's office recommends to address misconduct.
Explanation: See explanation provided may who have testified – including the Attorney Generals office.
- **Recommendation:** Involve the Public Employee Labor Relations Board in discussions around how to handle misconduct issues.
Explanation: David Auger testified that "the Public Employee Labor Relations Board ultimately makes the final decision on whether a police officer can be fired by the head of a law enforcement agency. This board is heavily tilted towards labor and has ruled against the firing of many police officers with credibility issues. This results in agencies having to reinstate officers that should not be wearing a badge."
- **Recommendation:** Fix the system for maintaining and disclosing officer misconduct.
 - Make all law enforcement employee records public, and retain those records for 20 years.

- Making police disciplinary files categorically public under the Right-to-Know Law.
- Ensure that any entry in the current Exculpatory Evidence List (EEL) (aka “Lauries List”) is included in officer’s official personnel file
- Do away with the EEL
- The NH Attorney General shall issue a directive to all of the NH Police Chiefs and the NH Police Standards and Training Council (NH PSTC) that personnel records, witnesses and all other resources shall be made available to the County Attorney and their investigators, specific to the EES officer investigations.
- The NH Attorney General shall create a policy making it clear that the County Attorney shall determine whether the officer’s conduct rises to the level that they are no longer credible. If the County Attorney determines that further investigation is required, it shall be conducted by the County Attorney’s investigator or an investigator from the NH Attorney General’s Office and not the law enforcement agency of the officer in question.

Explanation: As many have testified that the existing system for maintaining and disclosing potentially exculpatory evidence in an officer’s personnel file threatens and, in many cases violates, the Constitutional rights guaranteed all criminal defendants and contributes to mistrust of law enforcement. Many cases have shown that not having access to this list has led to misconduct and caused innocent people to be imprisoned.

My discussions with County Attorneys has revealed that some, not all, Police Chiefs feel that they should make decisions regarding whether an officer’s are credible witnesses. Apparently, there have been cases where this has caused cases to be lost.

Law enforcement officials are public officials. Thus their records should be maintained following the same best practices as any other public official.

- **Recommendation:** Endorse the findings and recommendations of the PSTC February 2019 Audit
Explanation: The recommendations of the audit address several issues identified in the performance of the PSTC.
- **Recommendation:** Ensure prosecutors have the knowledge and tools to check officer misconduct.
 - Every prosecutor in the NH should receive annual implicit bias training.
 - Every prosecutor in the state should receive annual training on what constitutes racial profiling and the importance of identifying, acknowledging and accounting for it in their decisions. This training should be done in collaboration with trainers from outside the prosecutors’ offices, be it at the municipal, county, or state level.
 - Require prosecutors to report police misconduct to the department chief and police standards and training by adding them to the recently passed legislation requiring police to report certain misconduct by a fellow officer.
 - Recommend to the Supreme Court that they pass a Rule of Professional Conduct that requires a prosecutor to report police misconduct to the appropriate authorities.
 - The NH Attorney General’s office shall develop a policy and procedure for reporting misconduct.

- Prosecutors' offices must develop specific plans for increasing the diversity amongst the prosecutors in their office.
- Comprehensive data collection and release of race/ethnicity data by prosecutors' offices concerning charges; indictments; dismissals and decisions not to charge or indict.

Explanation: As Professor Albert Scherr testified, prosecutors are not currently trained on implicit bias and diversity. This has resulted in cases such as State v. Ernest Jones where prosecutors "failed to recognize racial profiling as is the officers' choice to continue to be suspicious of a Black man legitimately present in a apartment building parking lot with a building resident." This kind of officer misconduct must be checked. I have spoken with County Attorneys who agree with these recommendations.

- **Recommendation:** Develop a system to gather data on race, ethnicity, and gender for the Attorney Disciplinary Board.
Explanation: Chief Edwards and Profession Scherr both indicated that this data would be helpful in truly understanding the scope of discrimination against people of color.
- **Recommendation:** Develop a mechanism to discipline attorneys who behave unethically.
Explanation: Testimony from Brian R. Moushegian – General Counsel, New Hampshire Attorney Discipline Office indicates that the current disciplinary procedures only relate to violation of law. Thus, discriminatory behavior or ignorance of discriminatory behavior which is unethical is not addressed. This reduces the trust of the public and allows misconduct to occur relatively unchecked.
- **Recommendation:** Analyze and modify the rules on Pre-textual Stops so they are not discriminatory.
Explanation: Testimony of Attorneys Gilles Bissonnette and Donna Brown included examples where pre-textual stops were discriminatory. Law enforcement contends they are a tool that can be helpful in catching criminals. Further study is needed to develop a set of rules that will allow the tool to be utilized in a non-discriminatory manor.
- **Recommendation:** Require that Sheriffs be "certified" police officers.
Explanation: As Attorney Bissonnette points out, Sheriffs are law enforcement agents with arresting authority. Yet, they are not held to the same standards as other law enforcement agents with the same authority. Even though they are elected by the people, that does not mean they have the training or skills to properly and ethically perform the job. This is not acceptable.
- **Recommendation:** Provide training and/or a guide for County Attorneys on the "strategy" and best practices for running the County Attorney's office.
Explanation: In addition to prosecutors not having training, Country Attorneys who lead prosecutor offices also do not receive training. Remedial training has been given (as was the case with the Hillsborough County Attorney) but that was only "remedial" and included what needed to be filled out in various forms (i.e. procedures). Strategic/leadership training is needed on policies and how to ensure that misconduct is handled in a manner that is focused on the best interest of the people and not of the criminal justice system.
- **Recommendation:** A uniform statewide system for the reporting, investigation, and punishment of "police misconduct" include any third-party or organization under contract or agreement with a law enforcement agency to assist with law enforcement responsibilities.

Explanation: As Stacey Ober, J.D. testified, “private animal rights organizations may on occasion be contracted or enter into an agreement to assist with law enforcement responsibilities, but without being held accountable to the same policies and practice restrictions.” This leaves the possibility for evidence to be missing that could have a significant impact on a trial.

- **Recommendation:** Recommend a state court action against “official immunity”

Explanation: As Attorneys Rick Van Wickler and Chuck Douglas both testified, this judicially-created law interferes with law enforcement accountability and is unnecessary as law enforcement officers are afforded 4 protections which are adequate given the changes with PRIMEX and other laws since “official immunity” was established.

- **Recommendation:** PSTC should create guidelines for hiring chiefs who understand and embrace the notion that reputation of law enforcement officers are important but should not be second to the reputation of a citizen.

Explanation: Culture starts at the top. Attorney Lawrence Vogleman testified that there are Police chiefs who unconsciously believe that law enforcement is more important than the people they serve. This colors their decisions and allows the entire agency to operate under that philosophy. This causes a culture of protection of law enforcement over protection of the public. Thus, improper reporting occurs that has been identified in testimony from several Attorneys.

- **Recommendation:** Enforce that the County Attorney, not Law Enforcement, has the final say in how a case is tried so that misconduct in an investigation is not minimized.

Explanation: My discussions with County Attorneys has revealed that some, not all, Police Chiefs feel that they should make decisions regarding whether or an investigation is being done properly. Yet they are not lawyers and do not have that responsibility. That responsibility lies with the County Attorneys. To have law enforcement complain to the Attorney General’s office when a County Attorney does not prosecute a case to their liking reduces the public trust and allows misconduct to go unpunished.

- **Recommendation:** Encourage creation of metrics and rewards for de-escalation of situations.

Explanation: The ratio of the amount of time spent training on use of force to the amount of time spent training on de-escalation reinforces the use of force. The same seems to be true of the ratio of discussion in the law enforcement culture. While it is important to spend time on use of force, we know that the less time and emphasis spent on something, the less it will be valued. We need to show we value de-escalation more than we value force.

- **Recommendation:** The Attorney General’s office (or some entity) shall establish regular meetings/gatherings of County Attorney’s and Police Chiefs.

Explanation: County Attorney with whom I have spoken indicate that some (not all) Police Chiefs feel they should have final decisions on how cases should be tried and do not communicate or cooperate with County Attorneys. Reasons for this include that Police Chiefs don’t want to be seen as cooperating because it would reflect badly on their departments or they feel that County Attorney is only there for a 2 year term and cooperating with the current County Attorney might impact the relationship with the next County Attorney. Having regular conversations where cooperation is a primary goal would foster communication and cooperation.

- **Recommendation:** Fully fund the Public Defender’s offices.

Explanation: County Attorneys with whom I have spoken have indicated that they are overworked. This leads to the potential for more errors because of the overbearing workload.

County Attorneys say that if Public Defenders were staffed properly so that the Defense attorneys were not overworked, cases would be better handled and there would even be fewer cases thus reducing the burden of overworked County Attorneys offices. Note that unlike the Public Defenders office, the County Attorneys office cannot hire consultants to balance a workload.

- **Recommendation:** Establish policy that prosecutors not be part of a police department.
Explanation: Several law enforcement agencies are structured such that the prosecutor is part of the police department. As has been testified by many, it is well-known as bad policy to have an investigator report to the head of the department he/she is investigating.
- **Recommendation:** Establish accountability mechanisms for upper admin/Chiefs/higher ranking officers.
Explanation: As Detective Kristyn Bernier said in her testimony, “There is not a truly realistic avenue for a complaint to be lodged against a higher ranking officer, including a Captain, Major, Director, Commander, Chief, etc. Retaliation is unfortunately a reality within some agencies, and those within and the public fear it.”
- **Recommendation:** Require that prior to any promotion; candidates must demonstrate not only their understanding of but also their ability to follow fair and impartial policing practices as well as de-escalation and procedural justice.
Explanation: Currently, there does not seem to be a standard for ensuring that promotion is based on proof of ability to follow fair and impartial policing practices as well as de-escalation and procedural justice or to support officers in doing so. This does not promote the adherence to fair and impartial policing practices. In fact, if officers who are known by their peers to misbehave and get away with such misbehavior are promoted, that sends the wrong signal – a signal that misbehavior will be rewarded rather than not tolerated.