



FAIR AND JUST PROSECUTION

Promoting justice through leadership and innovation

ISSUES AT A GLANCE

Promoting Independent Police Accountability Mechanisms

Fair and Just Prosecution (FJP) brings together recently elected district attorneys¹ as part of a network of like-minded leaders committed to change and innovation. FJP hopes to enable a new generation of prosecutive leaders to learn from best practices, respected experts, and innovative approaches aimed at promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. In furtherance of those efforts, FJP's "Issues at a Glance" provide district attorneys with information and insights about a variety of critical and timely topics. These papers give an overview of the issue, key background information, ideas on where and how this issue arises, and specific recommendations to consider. They are intended to be succinct and to provide district attorneys with enough information to evaluate whether they want to pursue further action within their office. For each topic, Fair and Just Prosecution has additional supporting materials, including model policies and guidelines, key academic papers, and other research. If your office wants to learn more about this topic, we encourage you to contact us.

SUMMARY

District attorneys' relationship to local law enforcement, including their response to allegations of officer misconduct, is often an area of profound community concern and increasing public scrutiny. **This FJP "Issues at a Glance" brief addresses how district attorneys can best ensure constitutional and legal policing in their jurisdictions and seek criminal accountability where appropriate for police officers who have violated the law in a manner that supports public safety and builds community trust.**

The briefing paper recommends that prosecuting attorneys focus on implementing reforms in two distinct areas: (1) creating independent and transparent investigatory and charging procedures following police-involved critical incidents, and (2) overhauling or standing up dedicated public integrity or civil rights units. In addition, another critical police accountability measure is revising discovery policies and procedures, including a "feedback loop" to identify police officers who routinely engage in misconduct; those discovery practices will be addressed in a future FJP briefing paper.

¹The term "district attorney" or "DA" is used generally to refer to any chief local prosecutor, including State's Attorneys, prosecuting attorneys, etc.

"Our law applies to every person in Harris County, and our law will be equally applied to all people, including police officers."

— HARRIS COUNTY (HOUSTON, TX) DISTRICT ATTORNEY KIM OGG

BACKGROUND AND DISCUSSION

A prosecuting attorney's approach to police accountability issues will have a major impact on any effort to build and fortify community trust and partnerships. That will be true with regard to the substantive outcome of any particular investigation into a police-involved critical incident, and also with respect to the overall transparency (or lack thereof) of the investigation. A transparent and independent process can maintain community trust even where — and especially where — the community otherwise rejects the outcome.

There is also a direct connection between the practices discussed in this briefing paper and discovery-related policies and obligations. Responding to police-involved incidents with a criminal investigation is a critical accountability measure. It is likely to be an incomplete response, however, unless it is paired with day-to-day practices within the prosecuting attorney's office that are aimed at identifying troublesome police conduct on the front-end via early intervention with problem officers, engaging with law enforcement agencies (LEAs) to improve their underlying policies and practices, and proactively avoiding reliance on officers with credibility and veracity concerns.

Prosecuting attorneys generally have wide authority and discretion to implement their own approaches to handling police accountability issues, and can take action in this area without the need for the approval or cooperation of external governmental entities. That is not to discount, however, structural factors that will impact and should shape an office's approach — for example, how policies might impact the day-to-day working relationship with LEAs. In addition, some of the particular initiatives discussed here, such as referring the criminal prosecution of police officers to a state entity like the Attorney General, would require resources and more direct collaboration with external agencies.

A recent report from the Stanford Criminal Justice Center on "Improving Criminal Investigations of Police Shootings"² surveys the existing landscape and offers some meaningful guideposts with regard to police-involved shooting protocols. (There is also no reason these principles should not be similarly applied to other police-involved incidents, such as a serious use of less-lethal force, in addition to firearm discharge.)

The Stanford study suggests these protocols should aim to strike a balance that maximizes: **(1)** independence, including minimizing real and apparent conflicts of interest; **(2)** accountability and transparency; and **(3)** expertise. These principles should be considered in connection with three different issues:

1. Whether the LEA that employs the officer involved in the incident will be involved in the criminal investigation and to what extent;

² *At Arm's Length: Improving Criminal Investigations of Police Shootings* (Oct. 2016) (accessible at: <https://law.stanford.edu/wp-content/uploads/2016/09/At-Arms-Length-Oct-2016.pdf>).

"I believe people should be held accountable for violating the law, regardless of their occupation or social status."

— ST. LOUIS (MO) CIRCUIT ATTORNEY KIM GARDNER

2. Whether the elected prosecutor who regularly works with and relies upon the LEA will participate in the investigation, charging decision, and/or prosecution; and
3. How much to share publicly, and at what stages.

These principles can often be in tension. For example, a desire to ensure more independence by moving the prosecution outside the prosecuting attorney's office might decrease accountability by putting the prosecution in the hands of someone who does not answer to local community members. Similarly, current prosecuting attorneys have noted that such a move may place the prosecution in the hands of an entity with far less expertise in conducting these complex prosecutions, for example, a District Attorney from a neighboring jurisdiction who is perceived to be more "independent" but may oversee a rural or suburban area where police-involved shooting investigations are rare.

The principles of independence, accountability and expertise have been applied in various ways among different prosecuting attorneys' offices. A prosecuting attorney should aim to take the best elements of these various approaches that are consistent with the local landscape and other constraints. A few examples from prosecuting attorneys' offices are provided below, followed by a list of generally applicable recommendations.

The District Attorney in Santa Clara County (California) has negotiated a comprehensive memorandum of understanding with all sixteen LEAs in the jurisdiction that clearly spells out the responsibilities and limits of the local LEA's role in police-involved shootings. While an MOU that creates reciprocal obligations for the LEA may be ideal, the principle of having clear protocols could still be realized to some extent if the prosecuting attorney has an internal policy regarding its *expectations* and *requests* of any local LEA after a police-involved incident occurs, and the prosecuting attorney puts all LEAs on notice regarding those expectations.

The District Attorney of Manhattan has created a separate "Public Integrity Unit" that investigates and prosecutes some police misconduct issues (although some of these prosecutions still occur in the general trial division), and that is independent of other office functions and reports directly to the DA. Similarly, in Milwaukee, the District Attorney also has a Public Integrity Unit, staffed with a senior prosecutor, and has worked with the FBI in the most serious police-involved shootings to bolster expertise and to augment investigative independence.

Other innovations that should be considered include building a reform component into a Public Integrity Unit, such that the unit has a mandate to recommend policy changes or other systemic reforms that may become apparent during an individual investigation (this is similar to what some of the most advanced "Conviction Integrity Units" are currently doing). A prosecuting attorney could also convene an outside advisory board, including academics and non-prosecutor attorneys

"We need to be transparent and held accountable. I want to give the public the opportunity to hear from me personally why I made the decision not to prosecute the officers [a]nd also give them the opportunity to ask any questions about the reasoning and the basis for the decision."

— DENVER (CO) DISTRICT ATTORNEY BETH MCCANN

(again, similar to what exists for some “Conviction Integrity Units”) that reviews the investigatory file and provides feedback to the prosecuting attorney prior to her making a final charging decision. The advisory board’s perspective could be substantively valuable to the prosecuting attorney and is also another element of building in external feedback that can buttress community trust, assuming the prosecutor’s office is transparent about the board’s recommendation.

With regard to transparency, almost all prosecutors concerned about these issues have made practices or protocols related to police-involved shootings publicly available (on the prosecuting attorney’s website, or otherwise). The results of all investigations should also be made public, including perhaps having a summary of all such investigations and their outcomes presented in an annual report.

Other transparency-focused practices that may be adaptable to a prosecuting attorney’s office, depending on further investigation of state law, include using a “public inquest” model (similar to a “coroner’s inquest”). This is the practice in King County (Seattle), where all police-involved deaths are presented in an open and public proceeding to a 6-member jury, which decides whether to recommend charges. In Portland, Oregon, the District Attorney has grand jury proceedings transcribed in all police-involved death cases (and occasionally in serious non-death cases), and where the grand jury does not vote to indict, the transcript is released to the public.

Finally, a small number of states are also experimenting with bigger changes to police accountability issues. Two of the most notable efforts in this regard involve efforts to site the criminal investigation or prosecution outside of the local LEA and local prosecutor’s office. In New York, an executive order appointed the State Attorney General as a special prosecutor, as opposed to the local District Attorney, for all police-involved deaths where the civilian was unarmed or expected to be unarmed.³ In Wisconsin, legislation requires two independent investigators (i.e., individuals not employed by the same LEA as the employee whose conduct is at issue) to conduct the investigation and present a report to the local prosecuting attorney, who makes the final decision; if a “no file” decision is made, the investigators’ file then becomes public.

RECOMMENDATIONS

1. **Create an internal policy identifying staff responsibilities** in any police-involved critical incident that includes:
 - A post-incident investigatory protocol that preserves the integrity and independence of the investigation and clearly delineates responsibilities between the local LEA and the prosecuting attorney;
 - An independent investigatory team that has no daily contact with, or reliance on, the local LEA under investigation and reports directly to the prosecuting attorney⁴;
 - An investigatory team that is capable, independent, and experienced enough to successfully handle complex police-involved incidents, which may include employing an external investigatory team or involving state or federal law enforcement on the internal investigatory team;
 - An investigatory and charging process that is as transparent as possible.

³ New York Executive Order 147 (July 8, 2015) (accessible at: <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/old-files//EO147.pdf>).

⁴ That may include ensuring any team internal to the prosecuting attorney’s office has a separate office space, both for the purpose of avoiding contact and for the purpose of avoiding perceived conflicts of interest.

2. **Ensure transparency in charging decisions** regarding police-involved incidents by:
 - Using a “public inquest” model for any serious police-involved incidents; and/or
 - Transcribing Grand Jury minutes and release them publicly when there is no indictment; and/or
 - Creating an external advisory board that provides recommendations prior to the final charging decision.
3. **Draft a Memorandum of Understanding between the prosecuting attorney and each local LEA.** Create a strategic plan for rolling out the MOUs and ensuring that high priority LEAs will come to the table, negotiate, and sign.
4. **Create an independent Public Integrity Unit** staffed with senior prosecutors and experienced investigators, who report directly to senior-level staff in the prosecuting attorney’s office, to investigate and prosecute non-shooting cases.
5. **Ensure overall transparency and develop a communications strategy**
 - All policies, protocols, MOUs, etc., regarding police-involved incidents should be publicly available;
 - Report out investigations, prosecutions, and dispositions regarding police-involved incidents in an annual report; and
 - Develop an affirmative and comprehensive communications strategy that closely links post-incident investigations, prosecutions, and dispositions with front-end strategies aimed at reducing police misconduct in the first instance. Consider making a public commitment in the early days of the administration to reducing police misconduct and asking voters to hold the office accountable to that commitment.
6. **Actively support changes to state laws** where necessary to create more independent and effective investigatory and charging processes.

RESOURCES

- At Arm’s Length: Improving Criminal Investigations of Police Shootings, Stanford Criminal Justice Center (October 2016), available at: <https://law.stanford.edu/wp-content/uploads/2016/09/At-Arms-Length-Oct-2016.pdf>.
- State’s Attorney Kim Foxx Announces Special Prosecutor Legislation (April 27, 2017), available at: <https://www.cookcountystatesattorney.org/news/state-s-attorney-foxx-announces-special-prosecutor-legislation>.

FOR MORE INFORMATION: Contact FJP at info@fairandjustprosecution.org

