Litigation to Vindicate Civil Rights Era Cold Cases:
Ethical and Lawyering Challenges

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In 1967, Martin Luther King, Jr. said, “[m]any of the ugly pages of American history have been obscured and forgotten . . . America owes a debt of justice which it has only begun to pay. If it loses the will to finish or slackens in its determination, history will recall its crimes and the country that would be great will lack the most indispensable element of greatness – justice.”¹ Dr. King’s words continue to resonate even today. At present, well over a hundred killings committed during the civil rights era² and alleged to have been racially-motivated remain unsolved. In many of these cases, perpetrators alleged to have taken lives may, in effect, have been able to get away with murder.

Today there are varied efforts underway to attain some accountability for these civil rights era killings and other racially motivated wrongdoing. There are also a number of efforts to address the lingering effects of these crimes on families and communities throughout the United States. For decades these cases lay dormant until investigative journalists, like Jerry Mitchell³ of the Clarion Ledger, began to ask questions as to why these killings had occurred, what investigations had been done, and why alleged perpetrators had not been pursued.⁴ The journalists’ findings and writings alerted authorities to the whereabouts of alleged perpetrators and the existence of evidence that eventually led to prosecutions in a number of civil rights era cold cases.⁵ Their work has also supported the efforts undertaken by victims’ families to seek justice and dignity for their loved ones.⁶

For decades many victims’ families sought answers on their own or with the assistance of organizations such as the National Association for the Advancement of Colored People, the
Southern Poverty Law Center, the Urban League, or local victims’ associations. But, in recent years, a small number of organizations – such as the Civil Rights & Restorative Justice Project\(^7\), based at Northeastern University School of Law – have emerged with missions focused on researching the nature and extent of anti-civil rights violence and seeking reconciliation or remedy on behalf of victims and their families.\(^8\)

This article will first discuss, as background, the ongoing review by the Department of Justice (DOJ) of unsolved homicides from the civil rights era that are alleged to have been racially-motivated. It will then focus on the growing efforts of victims’ families and others to pursue civil litigation in lieu of or in conjunction with criminal prosecution and other forms of redress. The main body of the discussion will focus on some of the challenges and related ethical dilemmas faced by lawyers engaged in civil litigation in the civil rights era cold case arena. What challenges emerge in the management of these case and what goals or interests should guide the decision-making? What sort of outreach or solicitation to potential clients is permitted and what role should an attorney play in dealing with these cases? Should attorneys representing families seeking civil and other remedies work to encourage authorities to pursue criminal prosecution?

**Resurgence of law enforcement activity in civil rights era cold cases**

Since 2006, the Department of Justice (DOJ), under the auspices of its Civil Rights Era Cold Case Initiative (DOJ Initiative), has been reviewing 109 incidents of unsolved homicides from the civil rights era that are alleged to have been racially-motivated.\(^9\) Soon after the DOJ Initiative was launched, Congress passed the Emmett Till Unsolved Civil Rights Crime Act of 2007 (Till Act).\(^10\) The Till Act provides a legislative mandate for continued DOJ efforts, authorizes funding through 2017, encourages collaboration among federal and state law enforcement authorities, and requires the Attorney General (AG) to report annually to Congress on the DOJ’s activities under this law.\(^11\)
The DOJ Initiative review does not guarantee a full-scale investigation will be undertaken into each and every case. Once a case is deemed to fit the Till Act parameters (a homicide from the civil rights era that may have been racially motivated), it is assigned to the local office of the Federal Bureau of Investigation (FBI) where the incident occurred. At the local FBI office, an initial review is conducted and, if it appears that fuller consideration is warranted, a field investigation may be undertaken. The findings are considered by the FBI’s Cold Case Unit and the Criminal Section of the DOJ’s Civil Rights Division to determine if the murder was racially-motivated and, if the federal government may exercise jurisdiction, whether a prosecution may be warranted and still possible. The DOJ may also share the findings of the investigation with local authorities to encourage further investigation or prosecution. This potential for collaboration is particularly important in cases where there does not appear to be any federal jurisdiction.

With so many decades having passed since these murders, the DOJ may be the only remaining body of law enforcement with the commitment and resources necessary to pursue accountability in these cases. In a recent public statement, Attorney General Eric Holder (AG) spoke of the significance of this work and emphasized the DOJ’s commitment to this effort.

Perhaps none of our work is more meaningful, or more timely, than the Department’s efforts to pursue justice for families and communities still suffering from the worst scars of the civil rights era – and to help promote healing and closure. Through our Civil rights era Cold Case Initiative, we’re reviewing unsolved, racially motivated murders from decades past. In many of these cases, we face obstacles to obtaining convictions. As you can imagine, there are significant jurisdictional and evidentiary challenges. Nevertheless, we are working with United States Attorneys’ offices, the FBI, and state and local law enforcement officials to review these cases, and prosecute those we can. . .

In his Second Annual Report to Congress under the Till Act, the AG again emphasized that although the DOJ “believes that racially motivated murders from the civil rights era constitute some of the greatest blemishes upon our history,” the federal government faces severe obstacles – legal and otherwise – in pursuing prosecution in these cases. Many of these crimes were not thoroughly investigated when they occurred, and, as a result, there may be little to no original investigative material from which to carry out a present-day review. Some of the killings were investigated but the alleged perpetrators were never prosecuted. In still other cases, the
investigations or prosecutions that were undertaken have since been deemed insufficient or constitutionally improper due to the manner in which they were carried out.\textsuperscript{18}

The DOJ may now provide some long overdue relief to victims’ families by undertaking thorough investigations – if not prosecutions – into these homicides and making their findings available to next of kin. In fact, the DOJ has vowed to review these cases and investigate, as warranted, but if the federal government will not or cannot prosecute, the AG has pledged to provide victims’ next of kin with a letter detailing the FBI’s findings and explaining the decision to not prosecute.\textsuperscript{19} The DOJ has also provided technical, investigative, and prosecutorial support to aid states in prosecuting these cases and has made clear that it will continue to do so, as appropriate and possible.\textsuperscript{20} Victims and their families are entitled to at least the thorough review and response that has been promised them by the DOJ. Without continued investigative efforts and focused leadership from the DOJ, state and local law enforcement authorities may persist in declining to act to seek justice for these long neglected killings.

Well before the resurgence of law enforcement action in these unsolved homicides, committed individuals were privately investigating incidents of racial violence from the civil rights era. In fact, it was the determined efforts of victims’ family members, investigative journalists, lawyers, advocates, students and academics that catalyzed law enforcement’s renewed interest in these long dormant cases. Over the past years, private actors have engaged in research and investigations in a number of these cold cases. A key question pursued by those searching for information is whether any of the alleged perpetrators remain alive. If so, it may still be possible to prosecute them and attain some measure of accountability or justice. With the resurgence of law enforcement attention to these cases, it is hoped that those ever-more-rare matters in which alleged perpetrators are still alive may be prioritized for investigation so that any remaining potential for prosecution is not lost.
With the mandate of the Till Act, the DOJ is now in a unique position to ensure that civil rights era unsolved homicides that are alleged to have been racially motivated are duly investigated by the government to make certain that their potential for prosecution is carefully assessed and their findings documented. Law enforcement authorities cannot do this alone and should find ways to engage and collaborate with victims’ families and others seeking accountability and redress to ensure that the historical record for this seminal period of US history is not purposefully silent on the sufferings and harms endured to achieve equal rights.

**Civil actions in civil rights era cold cases - viable alternative?**

While the importance of law enforcement investigations and criminal prosecutions cannot be underestimated, civil litigation may provide an alternative avenue in some of these cases. A small cadre of lawyers has been focused on pursuing potential civil claims for victims’ families. The challenges to criminal prosecution in the civil rights era cold cases – particularly at the federal level – are immense, but the difficulties of civil litigation to redress these long dormant homicides are perhaps even more acute. Unfortunately, the lack of criminal prosecution is likely to render any potential civil action impossible in most of these cases. However, in a few of them, civil action may be not only possible, but preferred. Civil litigation, if possible on its own or in conjunction with criminal prosecution, may provide a fuller accounting of the crimes committed and some understanding of why these cases have been neglected for so many decades.

In a few cases, circumstances may converge to allow criminal prosecution of alleged perpetrators, as well as civil action by family members of the deceased. The criminal prosecution of James Ford Seale for the killings of Henry Hezekiah Dee and Charles Eddie Moore is a powerful example of one such case. In 2005, the US Attorney for the Southern District of Mississippi, Dunn Lampton, responded to a request from Thomas Moore, the brother of Charles Eddie Moore, to reopen the investigation into these murders after it was determined that Seale and
an alleged co-conspirator, Charles Marcus Edwards, were both still alive and residing in Franklin County, Mississippi. Lampton reopened the inquiry and determined that the federal government might have jurisdiction over the killings as the young men were kidnapped and transported across state lines while still alive, and during the commission of the crimes. As a result, although in 1965 state authorities had refused to bring charges against the two Klansmen accused in the killings, the federal government was able to exercise jurisdiction over Seale and Edwards.

Nearly forty three years after the commission of these crimes, on January 24, 2007, a federal grand jury returned an indictment against Seale charging him with two counts of kidnapping and one count of conspiracy in the deaths of Dee and Moore. On July 25, 2006, a federal court granted Edwards immunity from prosecution. Edwards became a cooperating witness and provided crucial testimony against Seale. Seale was convicted on both charges and sentenced to three consecutive life terms.

Edwards’ information and testimony did more than just detail Seale’s involvement in the kidnapping and murders of Dee and Moore. Edwards also provided an account of the involvement of others, including then-Sheriff of Franklin County, Wayne Hutto. This information led to the Sheriff being identified by federal authorities in the indictment against Seale. The suggestion of the Sheriff’s involvement provided the families of Dee and Moore a starting point to inquire about the sheriff’s involvement and potential state complicity in the racial violence perpetrated by the White Knights of the Ku Klux Klan in Franklin County in 1964. CRRJ, on behalf of the Dee and Moore families, filed a civil action in August 2008, alleging that county law enforcement officials “aided and abetted the Ku Klux Klan in the kidnapping, torture and murder” of the two young men in 1964. The parties reached settlement in the matter in June 2010.

The Dee and Moore case was unique in its convergence of facts and circumstances. The killings were first documented in the summer of 1964 and national attention was drawn to the discovery of the young men’s remains as they were first thought to have been the bodies of the
three civil rights workers – James Chaney, Andrew Goodman and Michael Schwerner – who had disappeared in Neshoba County, Mississippi, earlier that summer. The search for the three missing civil rights workers drew national attention and brought a flood of federal agents to Mississippi. These agents carried out the initial investigation into the murders of Dee and Moore. Their records survived and the 2005 investigation and 2007 prosecution of Seale were based in large part on the records from the thorough inquiry carried out by the FBI in the 1960s.

The FBI records were particularly helpful to the plaintiffs in the civil action brought by the families of Dee and Moore against Franklin County. They detailed the numerous interviews the FBI had with Sheriff Hutto and his deputies. But neither the Sheriff nor his deputies ever revealed to the FBI the extent of their knowledge of the events surrounding the kidnapping, torture, and murders of Dee and Moore. In June 2009, the US District Court for the Southern District of Mississippi considered the Sheriff’s conduct and agreed with the plaintiffs that the applicable three year statute of limitations should not bar this action, and that the families should be able to proceed with their claims against Franklin County, as related to the deaths of Dee and Moore.

The court’s decision was based on the plaintiffs’ allegations that due to the fraudulent concealment of relevant and material information by Sheriff Hutto the plaintiffs could not have discovered the information necessary to proceed with a civil action any earlier than 2007, when Seale’s criminal trial made available the information that had been fraudulently concealed. Thus, the court found that the accrual of the statute of limitations began in 2007 and not in 1964, as the defense had argued. The court also determined that as a result of the fraudulent concealment by Sheriff Hutto the civil statute of limitation may be tolled to allow the plaintiffs’ claims to go forward.

This was a tremendous victory for the Dee and Moore families and encouraged parties to reach an eventual settlement of the civil lawsuit. It is unlikely that such a convergence of facts will occur again in another matter, but the high profile of the case against Seale and the Dee and
Moore families’ civil action against Franklin County has raised awareness and, likely, expectations among the families of other victims of racially-motivated civil rights era homicides.

In light of the publicity associated with the criminal prosecution of Seale and the raised expectations in the aftermath of the settlement in the Dee and Moore civil case, it is worth considering the practical difficulties and ethical challenges facing attorneys engaged with this work. Many of these issues are now being fully explored for the first time. Three particularly challenging issues will be discussed here. First, what challenges emerge in the management of these cases and what goals or interests should guide the decision-making? Second, what sort of outreach or solicitation to potential clients is permitted and what role should an attorney play in dealing with these cases? Third, should attorneys representing families work to encourage authorities to pursue criminal prosecution while seeking civil relief?

**Challenges faced by lawyers working on civil rights era cold cases**

**Challenges in case management**

Lawyers representing victims’ family members in lawsuits involving civil rights era cold cases face extraordinary case management challenges. A prolonged adversarial trial and appeal process may generate a great deal of documentation and public accounting, but it may also pose severe difficulties for family members. On the other hand, there is much to be gained and lost in settling lawsuits based on civil rights era homicides. It is important for lawyers to carefully manage the legal and ethical complications that may arise in this practice.

In going beyond the research and documentation of a case to pursue a civil claim, a victim’s family members may be seeking the three key things to which they are entitled: the truth about what happened as determined by some official entity or body of authority; justice or some method of holding accountable those who perpetrated the wrongs against them; and, some form of reparation or redress, which should be proportionate to the harm suffered. A defining
characteristic of the civil rights era cold cases is that family members of victims have waited decades for the opportunity to seek accountability and justice.

Civil action, if possible, would allow victims’ family members, as plaintiffs, to gain a level of control in seeking redress that might not otherwise be possible. A plaintiff in a civil action may identify the wrongs committed and seek the remedies necessary to make them whole. Additionally, any discovery carried out in the course of the lawsuit may allow the plaintiffs to engage in an unprecedented opportunity to seek information and perhaps vindicate their suspicions about what happened to their loved ones and why no accountability – criminal or otherwise – has yet been possible. In cases where there has been no criminal prosecution and no other form of redress, a civil action may be a family’s only means of obtaining a response from those who may have been responsible for the death of their loved one. Finally, only through a civil action may a victim’s family members seek damages – monetary or otherwise – that they feel are warranted for the loss suffered. Plaintiffs may not always be successful, but even pleading their case by articulating what was done to them, what they lost, and how they could be made whole may be powerful means for them to obtain some accountability, redress, and closure.

Much of the civil litigation work in the context of the civil rights era cold cases is being driven by organizations with missions or primary objectives to document as fully as may be possible the violence that occurred during this period of American history, and to seek redress or reconciliation for those harmed by these crimes and other law enforcement wrongdoing from the era. A civil trial, allowing truth-seeking and documentation through discovery, and redress through a judgment and potential damages, is a powerful approach for these organizations, much as it is an important mechanism of redress for victims’ families.

Many of the lawyers working in this field are driven by these goals of accountability, documentation and redress towards reconciliation. Their work is in many ways a classic example of what has been termed “cause lawyering”. In essence, “cause lawyering” is legal practice
carried out in the service of social action. Austin Sarat and Stuart Scheingold provide a useful definition of the term from a functional perspective, “[t]he objective of the attorneys we characterize as cause lawyers is to deploy their legal skills to challenge prevailing distributions of political, social, economic, and/or legal values and resources.” Sarat and Scheingold go on to note that “[c]ause lawyers choose clients and cases *in order to* pursue their own ideological and redistributive projects. And they do so, not as a matter of technical competence, but as a matter of personal engagement.”

Another proposed definition by Lisa Hajjar illustrates the challenges inherent in cause lawyering, which may pose tensions in the context of civil litigation in civil rights era cold cases. Hajjar asserts that what distinguishes cause lawyers from “conventional lawyers” is that the former apply their professional skills in the service of a cause other than – or greater than – the interests of the client in order to transform some aspect of the status quo, whereas the latter tailor their practices to accommodate or benefit the client within the prevailing arrangements of power.

Ethical difficulties may arise for a cause lawyer when their primary obligation as an attorney to zealously represent the interests of their client is placed at odds with their organizational objective to seek collective redress or accounting. This may be just the sort of conflict faced when a settlement offer is presented in a civil action based on a civil rights era cold case. While an attorney’s first obligation is to zealously represent the interests of their client, the lawyer-client relationship requires a sharing of the decision-making powers. Ethical norms dictate that the lawyer is responsible for tactical decisions while the client is to make all material decisions related to the case. To tactically promote the client’s best interests the lawyer must have a clear understanding of the goals driving the legal action.

The client’s interests alone must shape the overall strategic approach and maneuvering of the case. However, in the civil rights era cold case arena, the necessary balance of decision-making between clients and lawyers may present some tensions. These tensions may be the result
of the similar but slightly nuanced objectives which have brought clients and their lawyers together in this context. This sort of tension may become most apparent when a settlement offer is presented. The question of whether to accept a settlement offer is quite simple. It is entirely the client’s decision. If the client decides that the settlement offer meets his goals and objectives and he wishes to settle, the attorney must settle the case in accordance with the client’s wishes. But such a simple response to the matter of settlement belies the tensions and complex objectives and expectations that clients and their lawyers may bring to civil litigation involving civil rights era cold cases. The lawyer may be torn between organizational goals of public accountability and collective redress while the client may be drawn to certain closure and financial compensation.

A somewhat similar conflict between organizational ideals and individual interests was present during the school desegregation cases. The complexities of the tensions between attorney ideals and client interests in that context were carefully considered by Derrick Bell in the seminal article, *Serving Two Masters*. Bell’s article asserted that for the “cause lawyer” practicing in the school desegregation cases there was an inherent tension between serving the individual clients (the school children and parents) and serving the cause at issue (integration of public schools).

Bell discusses this in the context of **NAACP v. Button**, a case in which the Supreme Court addressed the tensions posed by cause lawyering in the civil rights context. In *Button*, the Court considered the practices of the NAACP, its affiliates and legal staff to reach out to prospective litigants and advise them to seek the assistance of particular attorneys to join class action lawsuits aimed at desegregating public schools. The state courts had deemed this form of solicitation unlawful under Virginia law. In an opinion by Justice Brennan, the Supreme Court held the NAACP’s practices to be modes of political expression protected by the First and Fourteenth Amendments.

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.
Thus, in *Button*, the Court deemed the Virginia statute an unlawful exercise of the state’s power to regulate the legal profession.\(^4^4\) The Court also noted that the NAACP was serving a public interest and emphasized “there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor.”\(^4^5\) In his article, Bell points out that Justice Brennan considered institutional representation in the school desegregation cases and reasoned that the malicious intent that was, in essence, the target of the Virginia common law offenses was absent in the NAACP’s efforts.\(^4^6\)

The school desegregation cases, large class actions that took many years to resolve, may be distinguished from civil litigation related to civil rights era cold cases. However, what the *Button* decision and dissent illustrated and what Bell’s article made clear still holds true for lawsuits based on civil rights era cold cases. The existing rules governing legal ethics rely on an illusory sense of confidence in the allegiance of public interest attorneys to always act in the clear best interests of their client and to always know without doubt what those best interests are for the client. The rules do not provide sufficient guidance to lawyers facing the inherent challenges of the civil rights era cold case context, which may pit more immediate individual interests – likely financial – against long-term collective benefits – for instance, the setting of precedent which is beneficial to the public at large. More guidance and clarity is needed to ensure ethical lawyering in the context of the complex civil rights era cold cases, where at times, the public interest must be weighed against that of the individual.

These concerns are amplified by the very nature of these cases. For a number of reasons, plaintiffs in civil rights era cold cases may be more likely to accept settlement offers than in other wrongful death claims. They may have already endured or may still be in the process of a criminal prosecution and related appeals. The adversarial legal process is difficult and exhausting and may leave victims’ family members weary of taking on additional legal pursuits. Proceeding through a civil lawsuit and potential appeals may take many additional years and require the
victim’s family members to cope with a great deal more scrutiny, emotional turmoil, and financial expense than they either desire or can tolerate, especially if an alternative approach – a settlement – is offered. Also, family members who directly experienced the loss of the victim are now much older, may be ill, and may want to see a certain and final resolution in the matter in their lifetimes. For many victims’ family members accepting a settlement may be a better and more certain resolution than a jury trial, due to the uncertainty of when – if ever – a final resolution may be achieved through the trial and appeal process.

In this context the question of what remedy to seek may be an issue from the start of litigation. However, when a civil action has reached a critical point – such as when a settlement offer is presented – a choice must be made as to whether to proceed to trial or accept the offer. While a judgment may be the only means for a plaintiff to obtain all remedies sought, a settlement offer is likely to require a selection among the potential remedies. In essence, selection from among the remedies sought may be the cost borne by plaintiffs who accept a settlement to attain a final resolution. Therefore, once a settlement offer is presented the lawyer and client face a key point in the litigation where the interests of the client must be clear and must be primary.

As a matter progresses and circumstances change it is a lawyer’s duty to ensure that the client has all of the relevant and material information necessary to make key decisions about the case as it develops. The lawyer must also ensure the client is aware of the implications of their decision, particularly that seeking measures of common redress (information, acknowledgment, and/or accountability) through settlement may require sacrifice of individual remedies, such as financial compensation, or vice versa. It is also important to advise the client of the risks involved in declining a settlement offer.

It may be difficult – if not impossible – to decline a settlement offer, proceed towards litigation, and then seek eventual reconciliation where collective and individual remedies are achieved. While theoretically a settlement may be reached between the parties at any point in the
litigation, once a public, adversarial accounting has begun in open court, any potential for a settlement, especially one which includes some form of common or public redress, is likely to wither away. In most cases, these remedies present divergent paths and once settlement negotiations have failed or an offer has been declined it is unlikely that plaintiffs will succeed in obtaining a more favorable package of remedies through later settlement. Thus, once a settlement offer has been declined, a favorable judgment by the court or a jury may be the only means of obtaining all remedies sought.

The implications of settlement have been made more severe by the past decades’ amendments to the rules governing discovery. These reforms were undertaken in response to the need to encourage parties to negotiate a discovery plan and schedule so that they may be more inclined to reach settlement. Another factor was the need to absolve courthouses from record storage obligations at a time when filings were overwhelming the capacity of the courts to maintain case files. As a result of discovery reforms, much less information is now provided to the court as part of the filings that comprise the publicly available court record on a matter.

[T]he secrecy that results as a by-product of discovery reform creates problems closely analogous to those of secret settlements. The informal processes dictated by the Rules amendments facilitate courts’ unexamined approval of confidentiality orders, shield discovery disputes from consideration in open court, and substantially reduce the number of written opinions, thus inhibiting the creation of precedent.

As less and less information is submitted to the court as part of the record, the greater the secrecy that is maintained surrounding a particular matter at issue.

Moreover, reforms designed to promote early settlement have also increased the leverage available to defendants in the settlement context. The implications plaintiffs face in declining a reasonable settlement offer – such as the loss of attorneys’ fees, where applicable, or a ceiling on any potential recovery – provide defendants greater influence to negotiate lower settlements while also seeking broader non-disclosure agreements. In essence, these factors come together to create a veil of secrecy around settlements. As a result, less information is accessible to the general public now than ever before. This is a particularly severe concern in matters of historical
significance, such as the civil rights era cold cases. The secrecy implications of the discovery reforms again emphasize the lingering tensions between collective gain and individual benefit.

In light of the increased secrecy surrounding settlements, the truth-seeking and documentation objectives of a lawsuit based on a civil rights era cold case may be better realized through trial in an open court. Lawyers practicing in the civil rights era cold case arena may be well aware of this and, thus, may be more inclined towards a trial rather than a settlement. While there may be some public acceptance of a settlement as a form of common redress, the value gained from a settlement is likely to be focused primarily on the plaintiffs – the family members of the victim. The general public, even the community that was likely severely affected by the killing, may not ever receive any measure of redress through a settlement in a lawsuit based on a civil rights era cold case. It may be argued that community redress is more important in these cases than most others as such redress could lead to racial reconciliation that otherwise is unlikely to be achieved. Accordingly, it is important for lawyers and their clients in the civil rights era cold case arena to consider the need for and value of collective remedies in weighing settlement offers.

While certainty and some closure may be gained through a settlement, much may also be lost in making the decision to settle a lawsuit in a civil rights era cold case. Without a trial and a court or jury determination of the plaintiffs’ allegations, those claims will forever remain mere allegations and will never attain the authority of facts as established by a court of law. The very fact that a settlement was reached will certainly add to the historical record on the matter but it is unlikely to meet the potential of the public awareness, education and acknowledgment that may have been achieved through trial in an open court.

Preparing a client for the implications of a settlement decision is important not only for the client’s short term confidence in the decision but also for their future perspective on and defense of the decision to others who may also have been affected by the violence or be similarly situated. Thus, when presented a settlement offer, it is important for the lawyer and client to discuss the
merits and opportunity costs of accepting the settlement or proceeding to trial. It is important for an attorney to advise the client on what may be gained and lost through either course so that a fully informed decision may be reached.\textsuperscript{51} This advising and weighing of options may certainly expose competing interests among the lawyer and client, but it is critically important to fully consider and discuss the options so that the client may make an informed decision. Ultimately it must be the client’s decision that governs the decision on whether or not to accept a settlement and the lawyer should be careful to accept and honor that decision.

\textbf{Client solicitation and the role of lawyers in the civil rights era cold case arena}

A key question faced by practitioners in the civil rights era cold case arena is what role an attorney should play in these cases. As is well known, violence was endemic to the civil rights era, and the desire to document the cruel response to the movement for equal rights is at the core of the research and investigative efforts focused on civil rights era cold cases. These efforts have focused on establishing a fuller historical record of the violence that was a reaction to the growing momentum of the civil rights movement, particularly (although not exclusively) in the American South. In many of these cases, decades have passed with little to no investigative efforts by law enforcement. Thus, private research efforts by individuals and organizations may be a crucial and complementary means of gaining an understanding of both what occurred and why so little was done to seek accountability and redress for these crimes. Although the task of researching crimes – particularly murders where the victim is not available to provide any information on the incident – four or five decades after they occurred is complex beyond measure, these matters should nevertheless be thoroughly investigated to promote justice and reconciliation as well as to establish a more accurate historical record of the harms and violence endured to achieve equal rights.\textsuperscript{52}
Research into these matters has most often been undertaken by investigative journalists, academic or social justice organizations, or legal actors motivated by institutional objectives to examine this period of history and these crimes. Lawyers practicing in the civil rights era cold case context may render a valuable service by conducting their research and investigations into these cases with an eye towards restorative justice, where even though traditional channels of legal recourse may not be attainable, other potential remedies towards racial reconciliation are considered. However, research may reveal potential civil claims that the families of victims may still pursue. But, unlike most legal cases, these civil claims are not usually brought to a lawyer by one who feels he was wronged. These matters are most often taken up by attorneys or organizations drawn to the cause of establishing a fuller historical record or some form of collective accountability for these killings, rather than to pursue an individual’s legal recourse.

In short, civil litigation is rarely a primary motivation for those researching these civil rights era cold cases. Moreover, although civil remedies against perpetrators of crime may be an important measure of justice for victims and their families, such redress may be elusive in many of these cases. For attorneys and law students combing through the facts of these cases, a sort of “triage” is required to assess the potential for civil claims. As few criminal prosecutions are likely to result in these cases, a decision by attorneys not to pursue a civil action in a particular matter may effectively mean that accountability for the killing will never be achieved through the legal system.

In those rare matters where research reveals that there may be viable civil claims for the victim’s family to pursue, should an attorney reach out to inform them of the findings and the potential for legal action? This is an interesting issue as attorneys are not permitted to solicit clients “when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain”.\textsuperscript{53} Commercial or pecuniary gain is unlikely to be a significant motive for lawyers working on civil rights era cold cases, but there are also restrictions on how an attorney may reach out to a potential
The rules and relevant body of case law regarding solicitation of legal business focus particularly on in-person solicitation to protect the public from false, coercive or deceptive commercial purposes. However, in a concurring opinion in *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978), one of the seminal cases regarding solicitation of legal business by attorneys, Justice Marshall suggested commercial solicitation that is “benign” would be permitted.

[Benign commercial solicitation is] solicitation by advice and information that is truthful and that is presented in a noncoercive, nondeceitful, and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous.

The nature of the interests involved also help to determine what sort of outreach towards potential clients is permitted. The Supreme Court in *In Re Primus*, the companion case to *Ohralik*, made clear that non-profit organizations that litigate as a form of political expression are permitted to engage in face-to-face meetings to solicit potential clients and this conduct may only be proscribed by the state if actual harm – misleading conduct, fraud, or overreaching – is shown in the particular case.

Thus, non-profit organizations focused on civil rights era cold cases, like CRRJ, may solicit potential clients in face-to-face meetings, as long as their significant motive is not pecuniary gain but political expression. However, in an abundance of caution, lawyers engaged in this work would be wise to first approach victims’ family members over the phone, via written communications, or through appropriate intermediaries or victims’ rights associations to allow them ample distance and opportunity to reflect upon and consider the potential claims that may be available to them. These contacts should not be treated simply as meetings to solicit prospective clients but as opportunities to educate victims’ families about the lawyers’ research findings, their legal implications, and the public interest nature of this work.

As legal training may be beneficial to efforts to obtain information about the murder and any ensuing investigation, attorneys working in the civil rights era cold case arena may begin a relationship with victims’ family members with an offer to proceed with research on behalf of the
family. Of course, this research may or may not lead to an eventual lawsuit and this should be made clear to the family. It is imperative that in informing the family about research findings and potential claims the lawyer not exert undue influence to coerce action but instead make clear the benefits and challenges of proceeding on the various courses available in the matter. Lawyers should also advise victims’ family members, who are not lawyers, to take their time to consider their options and consult with independent counsel, as they feel necessary, before making any decisions regarding potential civil litigation.

When the effort shifts from general research and documentation to client representation, questions emerge as to what services should be provided or what role an attorney should play. In most of these cases, the core services clients seek are quite simple – they want answers and they want the suffering they have experienced to be recognized. Many victims’ families have waited decades for some explanation of what happened to their loved ones and, equally importantly, to know why there has been no justice for their loss. A first task for lawyers is to unearth the information that may have already been collected about the killing in the course of any earlier investigations. This may include review of local and federal law enforcement records, media coverage from the time of the incident, and court records. This initial research may provide a tremendous cache of information on what may have happened, the geographic and temporal context in which the crime occurred, the theories that were developed to explain why the victim may have been targeted, and perhaps even why the case remains unsolved. Consolidating this information and providing victims’ family members with documentation of the findings and a potential narrative of the incident is a significant component of the services that can be provided to them by lawyers practicing in the field of civil rights era cold cases.

Unfortunately, as a result of delayed investigations and limited resources, in a great many of the civil rights era cold cases it may not be possible to achieve much more. In such a case, it is important for the lawyer to ensure that all possible sources of information have been identified,
accessed, and thoroughly investigated. When all reasonable efforts have been expended to gather information and prepare a narrative documentation of the facts in the case, it is important to share the case write-up with the victims’ family. It is also important to make the information available to the general public in some form with the consent of the family, as appropriate. Thus, lawyers’ efforts undertaken on behalf of a victim’s family members may also serve the public by providing a comprehensive accounting of these incidents of racial violence.

Aiding criminal investigations in civil rights era cold cases

The search for information is at the core of the legal service rendered by lawyers practicing in the context of civil rights era cold cases. Freedom of Information Act\textsuperscript{61} and analogous state-level\textsuperscript{62} requests have yielded heavily redacted investigative files on a number of the civil rights era cold cases. Careful review of these files coupled with independent research may reveal relevant and material information that was not known or made available to law enforcement authorities. This is not particularly surprising as there was often severe mistrust and fear of law enforcement in the communities most affected by anti-civil rights violence. This lack of trust likely kept witnesses from coming forward to report what they may have seen, heard or known. For myriad reasons, law enforcement authorities may also have lacked the motivation or commitment necessary to seek out this information. If any “new” relevant and material information is uncovered during the course of private investigations, should it be shared with law enforcement? More specifically, should attorneys focused on potential civil litigation or other forms of redress assist in the pursuit of criminal prosecution? What may be gained by doing so?

Research on these cases, at the individual and organizational level, is more often than not fueled by some hope of engaging (or re-engaging) law enforcement on the case at issue. Any investigation into these matters focuses primarily on who may have carried out these heinous acts and why. Law enforcement has a far greater ability than any private researcher to investigate by
encouraging people to speak up about what they know. Such agencies can also offer rewards for information as further enticement for those with information to come forward. However, this advantage may be counterbalanced by any lingering fear or mistrust of law enforcement in the affected communities. Law enforcement authorities can also obtain information or investigative files from colleague agencies; access databases with information on similar crimes, and criminal histories of alleged perpetrators; and deploy experts with specialized investigative techniques. Private researchers’ investigative reach simply cannot measure up to that of law enforcement. However, law enforcement authorities may lack the motivation or commitment that often drives civilian efforts to seek answers in these cases. Also, after so many decades of inaction by law enforcement authorities at both the federal and state levels, civilian researchers may face less resistance from those with information.

There are a number of ethical concerns associated with sharing information with law enforcement authorities, especially when the attorney’s primary objective is civil litigation or an alternative form of redress than criminal prosecution. First, if the lawyer’s objective in researching the matter was to create a fuller historical record, there may be a danger that sharing the information with law enforcement may result in an investigation by the authorities which could make potential sources or witnesses fearful, hesitant, or emotionally exhausted and unwilling to provide any more information to private researchers. There are also issues of consent and confidentiality. Was the source informed that what he or she shared with the lawyer might be revealed to the authorities? Were there any assurances of confidentiality made by the lawyer in seeking the information? These concerns frequently emerge where those with information are hesitant to discuss the incident, because they may still be fearful of retaliation, or mistrusting of law enforcement. In communities where there may still be fear or mistrust of law enforcement, sharing information with the authorities without properly communicating with the source could be severely detrimental to any further communication.
If the mistrust or fear of law enforcement is determined by the attorney undertaking the investigation to be a reasonable and well-placed fear, then it is critically important for the lawyers involved to consider if the information may safely be shared with any other body of authority and if there may be some way to safeguard the source and the information. This certainly poses an ethical dilemma but if there is any credence to the fear of law enforcement, an attorney should err on the side of caution. Due to the rarity of witnesses still available and willing to come forward in these civil rights era cold cases, relationships must be carefully managed and trust must be retained. Most importantly, the safety and security of informants and/or sources must be scrupulously maintained.

This issue is further complicated by the urgency of documenting information in these cases. With so many decades having already passed since these killings, there is not much time left to obtain first-hand information. Those who were contemporaries of the victims may be quite elderly, their memories may be fading, and they may not be available for many more years to share what they know. There is an urgent need to document information that may still be obtained from first-hand sources. The risk of information being lost is always at issue in any investigation, but with over four decades having already passed, these cases present a unique urgency to reach out to any and all persons who may have relevant and material information. While in some ways this urgency may be better responded to by law enforcement with their authority, access, and available resources, the many decades of inaction do not portend speedy investigations on their part or the trust of law enforcement that is necessary on the part of the witnesses.

A concerted criminal investigation and prosecution may be the best opportunity for a thorough accounting in these cases. Criminal investigation and prosecution may also make available alternative avenues of redress that would not otherwise be possible for the victims’ family members to pursue, as occurred in the Dee and Moore case.
Civil actions based on civil rights era cold cases and their reliance on criminal prosecutions

Most civil litigation involving civil rights era cold cases are likely to be barred by short civil statutes of limitations. Although there is no statute of limitations for first degree or premeditated murder, civil statutes of limitations vary by state and type of claim. For most civil actions the statutory period begins to run when the plaintiff acquires possession (or could have acquired possession) of two essential facts: one, that an injury has occurred; and, two, the identity of the person who inflicted the injury.

Short statutes of limitations may bar civil proceedings in many of these cases. But, if it is determined that plaintiffs did not and could not have known of the claims(s) or the identity or involvement of the defendant before a certain time, then the term of limitations would begin to accrue from the time when the plaintiffs could have learned of this information. Thus, plaintiffs may be able to get past short civil statutes of limitations if they are able to establish that they could not have known of or obtained the information necessary to act any earlier and that since learning of the information they have acted within the term permitted. While private research efforts may yield previously unobtainable information, a more likely means of obtaining new information on these old murders is through law enforcement investigation and criminal prosecution.

Therefore, criminal investigations and prosecutions may have tremendous significance in potential civil actions involving civil rights era cold cases. They may unearth and reveal information to the public for the first time that was not and could not otherwise have been known by potential civil claimants. The state may use its subpoena powers to compel disclosure of information and testimony that may otherwise never have been uncovered or disclosed. The state may also provide rewards as well as guarantees of immunity or protection to encourage witnesses to come forward. Any such “new and previously unobtainable” information made public through court proceedings may alert individuals with standing, such as victims’ family members, to potential civil claims that they were not and could not have been previously aware of but which
they may still be entitled to assert. It was through just such a process that new information emerged in the Dee and Moore criminal case which then allowed a civil action to be sustained despite defense arguments that the term of limitations had run on the wrongful death claim asserted by the victims’ families.

With such a distinctive reliance on criminal prosecution, is it appropriate for lawyers representing victims’ families to encourage criminal action? Should they work to gather and provide information towards criminal prosecution if their primary motivation is civil litigation? Does this sort of encouragement or collaboration with law enforcement violate duties of zealous representation or confidentiality owed to clients? Are there any conflicts of interest for the lawyer in providing information to law enforcement? What if it is done to attempt to bypass the statute of limitations in a civil action which seeks damages from which the lawyer would accrue a direct financial benefit? Of course, sharing information with law enforcement would not automatically eliminate the statute of limitations issues likely to be faced in a civil action based on a civil rights era homicide. However, providing information to law enforcement to encourage their further involvement may lead to a more thorough investigation which could potentially uncover information that could eventually be used to get past the statute of limitations issue.

Providing relevant and material information to law enforcement may be permissible as zealous representation of the clients’ interests, if the client seeks the full complement of measures of justice to which they are entitled, understands the implications of sharing the information, and provides their consent for this strategic approach and the release of any confidential information. The families of victims are no less entitled to criminal accountability for the murder of their loved one because they are also seeking civil remedies. But when a long-delayed criminal prosecution may provide the means for an otherwise impermissible civil action the decision to share information with law enforcement will inevitably be seen by some as self-serving rather than an
effort to obtain the full complement of accountability – criminal and civil – to which these victims may be entitled.

It is important to note that the sharing of any relevant and material information with law enforcement by a civilian researcher does not guarantee reciprocity on the part of the authorities. In fact, as it is the policy of law enforcement authorities to not comment on any open investigations, there may be a significant risk in sharing the information that law enforcement will absorb the information, conduct their own investigation, make their own determinations about the case’s potential merit for prosecution and share little to none of their findings or decisions with those who provided them the information or those who may be most affected by their findings and decisions – the family members of the victims of civil rights era cold cases. In considering whether and when to share information with law enforcement authorities, clients must be prepared for this lack of reciprocity.

As discussed earlier, the DOJ has said that when it determines as part of its review of civil rights era cold cases that a federal prosecution will not be pursued in a particular case, a letter detailing the findings in the matter and explaining the decision not to prosecute will be provided to the victim’s next of kin. However, it remains unclear how much of the details of any review or investigation will actually be conveyed in these letters. If the letters do provide unredacted information there is the potential that the information conveyed may aid in civil litigation, especially if the information could not otherwise have been obtained by the victims’ family members. Regardless of their usefulness in litigation, it is hoped that the letters will provide a thorough accounting of the crimes as documented through a concerted law enforcement investigation. This alone may provide some of the victims’ families with the acknowledgement and documentation they have been seeking.

It is unlikely that any attorney could know prior to sharing information with law enforcement authorities that what they have to share could lead to prosecution and that the
prosecution could reveal information sufficient to overcome the relevant civil statute of limitations. One can certainly hope, but it is not ethically wrong to hope for a revelation that may advance a client’s civil litigation aims. Such wishful thinking also does not violate any of the rules of legal professional conduct.

This conduct would be a violation of legal ethics if the attorney did not consult with the client and obtain permission before sharing confidential information or provided information to authorities against the wishes or best interests of the client. There is no ethical violation in the attorney providing the information to law enforcement if the client does want to encourage criminal prosecution as well as a civil resolution, is fully counseled of the risks and benefits of such collaboration, and makes an informed decision to share the information.

In an abundance of caution against even the perception of an ethical violation, lawyers pursuing civil litigation may choose not to share any information with law enforcement authorities regardless of the effect on any potential investigation and criminal prosecution. However, this would be a very hard line to take when there are already so many obstacles to seeking any form of accountability or redress in these cases.

Conclusion

Lawyers practicing in the civil rights era cold case arena face numerous challenges and have little guidance to help chart their course. But, once a lawyer-client relationship is established, an attorney may not side-step the ethical duties owed to victims' family members as clients. Instead they must take care to prepare their clients for the difficulties and challenging decisions that will inevitably emerge throughout the litigation process. Lawyers must fulfill their role as counselor, acting always to promote the best interests of their clients. To do so effectively, an attorney must build a close relationship with the clients so as to have a thorough understanding of their goals and objectives in this unique and complex area of practice. Lawyers working in the
civil rights era cold case context must also educate their clients and provide frank counsel as to the benefits and opportunity costs of accepting a settlement or proceeding to trial in a civil action based on a civil rights era cold case. An attorney’s personal ideals and organizational goals must not displace the client’s best interests and wishes, particularly as to case management decisions. Although there is a great deal of accountability to be sought for the historical record or for the public at large, for victims’ family members who have waited decades for some answers or some remedy for their loss, the individual benefits – however small or secret they may be – may have value beyond measure. It is important for lawyers practicing in this context to appreciate this and to act, within the bounds of ethical practice, to promote the best interests of their clients and honor their decisions.
For the purposes of this discussion, the term “civil rights era” refers to the period from 1950 until 1970.

Jerry Mitchell, Investigative Reporter and MacArthur “Genius” Award Recipient, Clarion Ledger, Jackson, Mississippi. Mitchell’s work has been a significant driving force leading to the reexaminations and prosecutions in a number of civil rights era cold cases. His writings raised awareness of the wrongs that had been committed and the silence and inaction that have allowed so many to evade justice. Jerry Mitchell’s Entry and Biography, http://www.clarionledger.com/article/99999999/SPECIAL17/60416008/Jerry-Mitchell-s-entry-and-biography (last visited December 23, 2010).


Mitchell’s work led to prosecutions of a number of Klansmen. Byron De La Beckwith was convicted in 1994 for the June 1963 assassination of Medgar Evers, the Mississippi Field Secretary for the National Association for the Advancement of Colored People (NAACP). The Ku Klux Klan’s Imperial Wizard, Sam Bowers, was convicted in 1998 for ordering the 1966 killing of Vernon Dahmer, a civil rights leader and president of the Forrest County chapter of the NAACP, in Hattiesburg, Mississippi. Mitchell’s investigative research also helped bring to justice Bobby Frank Cherry, in 2002, for the bombing of the 16th Street Baptist Church bombing in 1963. The bombing killed four young African-American girls - Addie Mae Collins, Denise McNair, Carole Robertson, and Cynthia Wesley - and injured more than twenty other people. Edgar Ray Killen’s 2005 conviction on three counts of manslaughter for the June 1964 killings of Michael Schwerner, James Chaney and Andrew Goodman was also a result of Mitchell’s determined investigative journalism. Mitchell continues to investigate and report on others who are still alive and alleged to have been involved in the killings of the three civil rights workers but who have not been brought to justice. More recently, David Ridgen, an award-winning Canadian documentary filmmaker, based at the Canadian Broadcasting Corporation as a documentary producer, helped lead the effort to convict James Ford Seale for kidnapping and conspiracy in the June 1964 murders of Henry Hezekiah Dee and Charles Eddie Moore. See Journey to Justice, http://blogs.clarionledger.com/jmitchell/ (last visited December 23, 2010).

Ridgen worked alongside Thomas Moore, the brother of Charles Eddie Moore, in researching James Ford Seale’s involvement in the June 1964 killings. Their efforts were documented by Ridgen in the feature documentary, Mississippi Cold Case (2007).

The Civil Rights & Restorative Justice Project, based at Northeastern University School of Law, carries out private investigations of reported killings and other law enforcement wrongdoing from the civil rights era and seeks reconciliation through legal proceedings, law reform, and various policy approaches. See Civil Rights & Restorative Justice (CRRJ), Northeastern University School of Law, www.northeastern.edu/crrj (last visited December 23, 2010).

The Cold Case Justice Initiative, based at Syracuse University College of Law, seeks justice for racially motivated murders during the Civil Rights era on behalf of the victims, their families, local communities, and society at large. See The Cold Case Justice Initiative, Syracuse University College of Law, www.syr.edu/coldcaselaw/ (last visited December 23, 2010). The Civil Rights Cold Case Project brings together the power of investigative reporting, narrative writing, documentary filmmaking and interactive multimedia production to investigative and reveal the long-neglected truths behind scores of race-motivated murders, and to facilitate reconciliation and healing. See Civil Rights Cold Case Project, http://coldcases.org/ (last visited December 23, 2010).


Till Act §3(c)(2) and §6.

Id. at §2(1) and §3(b)(1).

Constitutional protections and a convoluted statutory framework make federal prosecution of homicides from the civil rights era difficult. The Constitution’s Ex Post Facto Clause prohibits prosecution for conduct that was not deemed criminal at the time the act was conducted. U.S. CONST. art. 1, §9. Also, until 1994, federal criminal
violations of civil rights were subject to a five year statute of limitations. Amendments in 1994 rendered violations of civil rights committed under color of law (18 USC §242 - Civil Rights Violations Committed Under Color of Law) and interference with federally protected activities (18 USC §245 - Interference with Federally Protected Activities) capital offenses when they resulted in death. Capital offenses are not subject to any statute of limitations. Therefore, from 1994 onwards violation of these federal statutes and leading to the victim’s death would no longer be subject to their respective statute of limitations. Unless there is a federal statute of limitations specific to the statute at issue, state law is applied to determine the statute of limitations. This is the case for §1983 claims. Also, state tolling principles are applied if circumstances suggest the appropriate circumstances for their application were present. Since the 1994 amendments only apply to violations of civil rights committed under color of law (18 USC §242 - Civil Rights Violations Committed Under Color of Law) and interference with federally protected activities (18 USC §245 - Interference with Federally Protected Activities) that occurred after the amendments came into effect, homicides from the civil rights era still face the five year federal statute of limitations or the applicable state statute of limitations. Therefore, unless there were circumstances to toll the statutes, alleged perpetrators could not be prosecuted today by federal authorities under 18 United States Code §242 and 18 United States Code §245. Additionally, two critically important federal statutes that may otherwise be applied to prosecute racially motivated crimes, 18 United States Code §245 (Federally Protected Activities) and 42 United States Code §3631 (Interference with Housing Rights), cannot be retroactively applied towards civil rights era homicides that occurred before 1968, when these statutes were first enacted. See US ATTORNEY GENERAL, ATTORNEY GENERAL’S SECOND ANNUAL REPORT TO CONGRESS PURSUANT TO THE EMMETT TILL UNSOLVED CIVIL RIGHTS CRIME ACT OF 2007 3 (US Department of Justice, May 13, 2010). Available at http://www.northeastern.edu/crrj/resources/emmitt_till_unsolved/documents/DOJ_Civil_Rights_Cold_Case_Report_2010.pdf (last visited December 23, 2010) [hereinafter AG’S SECOND ANNUAL REPORT].

10 AG’S SECOND ANNUAL REPORT 6 – 7.
11 Eric Holder, Attorney General, U.S. Dep’t of Justice, Keynote Address at the University of Alabama: Remarks at Event to Commemorate the 50th Anniversary of To Kill a Mockingbird (Sept. 21, 2010). Available at http://www.northeastern.edu/crrj/news/documents/September_21_Main_Justice.pdf (last visited December 23, 2010).
12 AG’S SECOND ANNUAL REPORT 3.
13 In addition to the constitutional protections and statutory barriers prohibiting the federal government’s exercise of jurisdiction in many of these cases, the DOJ must also contend with the practical difficulties of investigating long dormant homicides from the civil rights era. Four to five decades have passed since these killings, many witnesses have since died or dispersed, and any evidence collected or records of any investigation undertaken at the time of the killing may have been lost, destroyed or become otherwise inaccessible.
14 Law enforcement wrongdoing, including but not limited to fraudulent concealment, jury tampering, and allowing jury bias to permeate the proceedings, have been documented in relation to civil rights era homicides that did proceed to trial.
15 AG’S SECOND ANNUAL REPORT 12.
16 Id. at 7.
18 On September 9, 2008, the Fifth Circuit Court of Appeals vacated Seale’s conviction and rendered a judgment of acquittal. The court held that the defendant's prosecution for kidnapping was time barred as the 42 year delay between the commission of the alleged offense and the indictment exceeded the applicable statute of limitations for 18 U.S.C.S. § 3282. The federal statute in effect in 1964 had rendered kidnapping a capital offense when death had resulted from the act. Capital offenses had an unlimited statute of limitations. However, the federal kidnapping statute was amended in 1972 to eliminate the death penalty as a punishment. Thus, kidnapping was no longer a capital offense for statute of limitations purposes. Applying the presumption that amendments setting new limitations periods had retroactive effect, the Fifth Circuit Court of Appeals held that the applicable limitations period for a charge of federal kidnapping resulting in death for an incident that occurred in 1964 was five years. Thus, the 1972 amendment applied a five-year limitations period to the 1964 kidnapping of victims Dee and Moore. Even though the indictment against Seale was issued in 2007, the Court of Appeals for the Fifth Circuit determined that the 42-year delay exceeded the limitations period. United States v. Seale, 542 F.3d 1033 (5th Cir.2008). The government petitioned the Fifth Circuit for an en banc rehearing and the petition was granted. United States v. Seale, 550 F.3d 377 (5th Cir.2008). The en banc panel’s grant of a rehearing reversed the earlier Fifth Circuit decision and reinstated the original district court conviction. United States v. Seale, 570 F.3d 650 (5th Cir.2009). The US Supreme Court declined certiorari on a petition from Seale on December 2, 2009, and again on another petition on October 4, 2010. Seale, now 75 years old, is serving three life sentences at the Federal Correctional Institution in Terre Haute, Indiana.


24 The civil case sought remedy for the deaths for Henry Hezekiah Dee and Charles Eddie Moore, both 19 years of age at the time of their deaths in 1964. Dee and Moore were kidnapped by the members of White Knights of the Ku Klux Klan (WKKK) on May 2, 1964, while the two young men were hitchhiking on the main thoroughfare in Meadville, in Franklin County, Mississippi. They were lured into a truck and driven to the Homochitto National Forest by the WKKK. They were questioned and severely beaten for hours. They were then carried into Louisiana in the back of a Klan member’s car and – still alive – thrown into the Old Mississippi River to drown. The remains of Dee and Moore were found months later. A federal investigation was begun into the killings but no prosecution resulted, as it was not known at the time if the federal government had any ground to exercise jurisdiction. The investigation was reopened by the Department of Justice (DOJ) in 2005 and, after a federal grand jury indictment, Klansman James Ford Seale was convicted in June 2007. Thomas Moore, a retired Command Sergeant Major with the US Army and the brother of Charles Eddie Moore, encouraged the DOJ to reopen the case. Seale is now serving three life sentences for kidnapping and conspiracy. It was during the course of Seale’s criminal trial that information surfaced that formed the basis for the civil case filed by the Dee and Moore families against Franklin County, Mississippi. For more information on the Dee and Moore case, see the Dee and Moore Case, http://nuweb9.neu.edu/civilrights/?page_id=50 (last visited December 23, 2010).

25 The Dee and Moore civil complaint contained five claims against defendant Franklin County, Mississippi. First, the complaint alleged that the policies, practices and omissions of the County deprived Dee and Moore of the equal benefits of the law in violation of 42 U.S.C. § 1981(a). Second, it alleged that Sheriff Hutto’s unconstitutional policies and practices of protecting the Klan from criminal investigation and prosecution constituted the official policy, custom, and practice of Franklin County, all in violation of 42 U.S.C. § 1983. The complaint further alleged that Franklin County officials were: protecting the Klan from criminal prosecution for their violent acts; depriving African-Americans of public protection in cases of racial violence perpetrated by whites; failing to train law enforcement officers in how to enforce the law equally; and covering up crimes of racial violence from other police agencies. Third, the complaint alleged that Franklin County conspired with the Klan to deprive Dee and Moore of their constitutionally protected rights in violation of 42 U.S.C. § 1985(3). Finally, the complaint alleged that the actions of Franklin County deprived the plaintiffs of their constitutional right to access the courts. Complaint at 25 – 8, Moore v. Franklin County, 3:07cr9HTWJCS. (S.D. Miss. 2007). Available at http://www.northeastern.edu/crrj/documents/Dee_Moore_Statement_62110.pdf (last visited December 23, 2010). See also, Franklin County Board of Supervisors, Resolution Providing Consent to Settle Litigation in Civil Action No. 3:09cv236TSL-FKB, June 21, 2010. Available at http://www.northeastern.edu/crrj/documents/Franklin_County_Board_of_Supervisors_Resolution_Deep_Moore_62110.pdf (last visited December 23, 2010).


27 See, Moore v. Franklin County, 3:09CV236TSL-JCS, 6 - 7 (S.D. Miss. 2009).

28 Id. at 10 – 1.

29 Id.

30 Victims are entitled to the truth about the crime perpetrated against them as determined by some official entity or body of authority. They are also entitled to justice or some method of holding accountable those who perpetrated the wrongs against them. Finally, victims are entitled to adequate, effective and prompt reparation (restitution, compensation and/or rehabilitation), or some form or redress which should be proportional to the gravity of the violations and the harm suffered. Victims also have the right to be treated with humanity and respect for their dignity, and they have the right to appropriate measures to protect their safety, and physical and mental well-being.

31 See supra notes 6 – 7 (discussing the work of CRRJ, based at Northeastern University School of Law, and the Cold Case Justice Initiative, based at Syracuse University College of Law).

32 Scholars considering how legal practice should be carried out responsibly when done in the service of social action have faced difficulty in establishing a working definition for the term “cause lawyering.” Austin Sarat and Stuart Scheingold have led a collective effort to better understand what is encompassed by this subfield of legal ethics. In, Cause Lawyers and Social Movements, Sarat and Scheingold define “cause lawyering” from a functional perspective. Austin SARAT AND STUART SCHEINGOLD, CAUSE LAWYERS AND SOCIAL MOVEMENTS (Stanford Law and Politics 2006). Thomas M. Hilbink makes clear that “[d]efining cause lawyering is a massive challenge,” and that these definitions provide fertile ground for further discussions on the meaning of the term. Thomas M. Hilbink, You Know
the Type...: Categories of Cause Lawyering, LAW & SOC. INQUIRY, 657, 660 (July 2004). In the context of discussing the civil rights cold cases work, the cause lawyering typology offered by Hilbink is instructive.


34 Id.

35 See Thomas M. Hilbink, You Know the Type...: Categories of Cause Lawyering, LAW & SOC. INQUIRY, 657, 660 (July 2004) (discussing Hajjar’s proposed definition of “cause lawyering”).

36 Id.


38 MODEL RULES OF PROF’L CONDUCT R. 1.2(A) (2004).

39 Derrick A. Bell, Jr., Serving Two Masters, LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE, 128 (Susan D. Carle ed., 2005).

40 The case of NAACP v. Button, 371 U.S. 415 (1963) began when the NAACP sought a declaration that certain Virginia statutes regulating attorney conduct, particularly with respect to client solicitation, were unconstitutional. The Circuit Court for the City of Richmond issued a decree adverse to the NAACP and the organization appealed to the Virginia Supreme Court of Appeals. When the decree was affirmed in part the NAACP sought and was granted certiorari. NAACP v. Button, 371 U.S. 415 (1963).

41 Id. at 428-9.

42 Id. at 429.

43 Id. at 428-9.

44 Id. at 443.

45 Derrick A. Bell, Jr., Serving Two Masters, LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE, 128, 130 (Susan D. Carle ed., 2005).


47 Id. at 428-9.

48 Id. at 429.

49 Id. at 428-9.

50 Id. at 443.

51 Derrick A. Bell, Jr., Serving Two Masters, LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE, 128, 130 (Susan D. Carle ed., 2005).


60 CRRJ is a project based at Northeastern University School of Law. Northeastern University is a 501(c)(3) organization.


62 Id.


For more information on accessing information from state agencies, please reference the state’s relevant Sunshine Laws. State Sunshine Laws are the laws in each state that govern public access to governmental records. These laws are sometimes known as open records laws or public records laws, and are also collectively referred to as FOIA laws, after the federal Freedom of Information Act. The Sunshine Review serves as a clearinghouse for information on public access to state governmental records. Sunshine Review, http://sunshinereview.org/index.php/Main_Page (last visited December 23, 2010).

For example, see Federal Bureau of Investigation, Seeking Information: Civil Rights Era Cold Case Initiative (October 9, 2009), available at http://www.fbi.gov/wanted/seeking-info/cold-case-initiative (last visited December 23, 2010).

While no state has a statute of limitations on first degree murder, there may be term limitations for other types of murder. These vary by state.

See Moore v. Franklin County, 3:09CV236TSL-JCS, 6 - 7 (Miss. 2009), for discussion of applicable statute of limitations period and calculation of term accrual. The full text of the Memorandum Opinion and Order of the US District Court for the Southern District of Mississippi, Jackson Division, available at http://nuweb9.neu.edu/civilrights/?page_id=50 (last visited December 23, 2010).

Id.

Model Rules of Prof’l Conduct R. 1.6 (2004).

AG’S SECOND ANNUAL REPORT 12.

Thus far CRRJ has reviewed one letter sent from the DOJ’s Cold Case Unit to the family members of a civil rights era cold case victim. The letter reiterated much of the publicly available information on the case. However, this case was unusual in that there had been a prosecution in the matter and as a result there was a large body of available material for the review by the FBI. Little to no new investigation was done in this case and no new information was revealed in the letter.