May 3, 2021

Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
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Re: Grievance Complaint Regarding Attorney Kenneth Appelbaum, State Bar No. 2047603.

To the Grievance Committee,

Kenneth Appelbaum,[1] Deputy Bureau Chief in the Queens District Attorney's Office,[2] committed misconduct as a prosecutor in two separate cases. In *People v. Moustakis* and related cases, Appelbaum withheld exculpatory impeachment evidence, constituting a *Rosario* violation, causing the Queens Supreme Court to vacate convictions, a ruling that was affirmed by the Second Department Appellate Division on appeal.[3] In *People v. Gallagher*, the Second Department Appellate Division dismissed the Indictment because Appelbaum prejudiced Gallagher through irrelevant and denigrating cross-examination in the grand jury, leading a grand juror to seek judicial intervention.[4]

Because of Appelbaum's high-ranking position in the Queens District Attorney's Office ("QDAO"), his earlier professional misconduct is of extreme gravity and importance to the public. Appelbaum's misconduct in Queens was far from unique; serious misconduct at the Queens District Attorney's Office (QDAO) has been regularly reported for years. For example, beginning in 2007, Queens prosecutors utilized interviewing practices that undermined suspects' *Miranda* rights, according to the Appellate Division and the Court of Appeals.[5] Another QDAO

[1] Kenneth Appelbaum, State Bar No. 2047603, Queens County District Attorney's Office, 12501 Queens Blvd., Kew Gardens, New York 11415. Phone: (718) 286-6527. Appelbaum's registration page on the Unified Court System does not list an email. We do not have personal knowledge of any of the facts or circumstances of Appelbaum or the cases mentioned; this grievance is based entirely on the court opinions, briefs and other documents cited herein.

[2] A February 3, 2021 QDAO press release names Appelbaum as a Deputy Bureau Chief https://queensda.org/queens-man-sentenced-to-17-years-in-prison-after-pleading-guilty-to-manslaughter-in-stabbing-death.

[3] Exhibit A, *People v. Moustakis*, 226 A.D.2d 401 (2d Dep't 1996); Exhibit B, Respondent Brief, *People v. Rescigno*, Ind. No 1992-2275, 1997 WL 34479663 (2d Dep't November 23, 1997); Exhibit C, Respondent Brief, *People v. Moustakis*, Ind. No. 1995-2711, 1995 WL 17830155 (2d Dep't November 30, 1995). Rescigno was alleged to be part of the burglary ring that committed the burglary, ostensibly connected to Moustakis. The prosecution brief from Recigno's appeal is used here since it references the case; the prosecution's brief for Moustakis's case was unavailable online.

[4] Exhibit D, *People v. Gallagher*, 18 Misc.3d 1135(A) (Queens Sup. Ct. 2008).

[5] *People v. Dunbar*, 104 A.D.3d 198 (2d Dep't 2013), *aff'd*, 24 N.Y.3d 304 (2014). *See also People v. Perez*, 37 Misc. 3d 272 (Queens Sup. Ct. 2012) (deeming QDAO's *Miranda* interview practice an ethical violation of Rule 8.4(c)); Russ Buettner, *Script Read to Suspects Is Leading to New Trials*, New York

policy established a wall between different units in the office, leading to trial prosecutors failing to disclose exculpatory material in the hands of another unit.[6] The Appellate Division has repeatedly criticized Queens prosecutors' improper summation conduct and advised that the Office provide better training for its trial prosecutors.[7] There are numerous court decisions finding that QDAO prosecutors acted improperly—a recent civil lawsuit contains a list of 117 published decisions involving prosecutorial misconduct in Queens cases.[8] Appelbaum's misconduct appears to fall within this appalling, unprecedented, and largely-unaddressed pattern of improper conduct.

Just as prosecutors hold individuals accountable for crimes, so should prosecutors be held accountable for their misconduct. And yet, Appelbaum appears to have suffered no disciplinary or professional repercussions for his violation of constitutional, state and professional rules. Despite the findings of misconduct noted in this grievance, as of the writing of this grievance, the New York Attorney Detail Report lists "Disciplinary History: No record of public discipline" for Appelbaum.[9]

The Grievance Committee should disbar Appelbaum.

Times (January 30, 2013) https://www.nytimes.com/2013/01/31/nyregion/appellate-panel-overturns-3-queens-convictions-based-on-rights-preamble.html.

[6] Sarah Maslin Nir, *Murder Conviction Tossed Out in Queens*, New York Times (March 18, 2013) https://www.nytimes.com/2013/03/19/nyregion/murder-conviction-reversed-over-withheld-information.html. *See also People v. Petros Bedi*, Ind. No. 4107/96, NYLJ 1202592836531 (Queens Sup. Ct. March 13, 2013) (Witness Security Program documents, which were not made part of prosecutor's file "as matter of custom," were *Rosario* and *Brady* materials; failure to disclose required vacating murder conviction).

[7] *See, e.g.*, *People v. Velez*, 2014-09698, Oral Argument, Appellate Division, 48:30-50:15 (March 16, 2018) http://wowza.nycourts.gov/vod/vod.php?source=ad2&video=VGA.1521208616.External_(PubliP).mp4 or http://wowza.nycourts.gov/vod/wowzaplayer.php?source=ad2&video=VGA.1521208616.External_(Public).mp4; *People v. Cherry,* 2014-10909*,* Oral Argument, Appellate Division, 26:34-29:31 (March 13, 2018) http://wowza.nycourts.gov/vod/vod.php?source=ad2&video=VGA.1520949280.External_(Public).mp4 or http://wowza.nycourts.gov/vod/wowzaplayer.php?source=ad2&video=VGA.1520949280.External_(Public).mp4.

[8] Amended Complaint, *Julio Negron v. The City of New York et al.*, No.18-cv-6645 (DG) (RLM) (filed March 10, 2021).

[9] *See Attorney Detail Report*, Attorney Online Services -- Search, New York Unified Court System, available at https://iapps.courts.state.ny.us/attorneyservices

1. The Grievance Committee has a Unique Duty to Protect the Public by Holding Prosecutors Accountable for Misconduct.

A. Prosecutorial Misconduct is Pervasive and Unchecked.

Our legal system holds prosecutors to the highest standards of all attorneys.[10] When any attorney missteps, it can cause harm, typically to an individual client. But a prosecutor's misconduct can destroy a person's life—and that of their family. Moreover, a prosecutor's misconduct negatively affects both law and society. A single prosecutor's misconduct can damage "the reputation and public confidence placed" in all prosecutors and the justice system itself.[11]

As the United States Supreme Court and the New York Court of Appeals have stated, a prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones. *It is as much* his duty to refrain from improper methods calculated to produce a wrongful conviction *as it is* to use every legitimate means to bring about a just one."[12] Hal Lieberman, former Chief Counsel for the Departmental Disciplinary Committee in New York's First Department, has noted how unchecked prosecutorial misconduct "undermines the integrity of the entire system."[13]

But misconduct by prosecutors remains widespread and unchecked in the New York criminal legal system. A 2013 analysis of ten years of state and federal decisions revealed more than two dozen instances in which judges reversed convictions explicitly because of prosecutorial misconduct.[14] Yet these appellate courts "did not routinely refer prosecutors for investigation by the state disciplinary committees," and the disciplinary committees "almost never took serious action against prosecutors."[15] In the 30 cases where judges overturned convictions based on prosecutorial misconduct, only one prosecutor was publicly disciplined by a New York disciplinary committee. None of the other implicated prosecutors were disbarred, suspended or publicly censured and, according to personnel records gathered by ProPublica, several prosecutors were promoted and given raises soon after courts cited them for abuses.[16]

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[10] *Matter of Rain*, 162 A.D.3d 1458, 1462 (3d Dep't 2018) ("prosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice"); *see also* 2017 ABA Prosecution Function Standards, Standard 3-1.4(a) ("In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations.").

[11] *Rain*, 162 A.D.3d at 1462.

[12] *Berger v. United States,* 295 U.S. 78, 88 (1935) (emphasis added); *People v. Jones*, 44 N.Y.2d 76, 80 (1978) (quoting *Berger*, 295 U.S. at 88). *See also People v. Calabria*, 94 N.Y.2d 519, 523 (2000) ("Evenhanded justice and respect for the fundamentals of a fair trial mandate the presentation of legal evidence unimpaired by intemperate conduct aimed at sidetracking the jury from its ultimate responsibility--determining facts relevant to guilt or innocence.") (citation omitted); *People v. Levan*, 295 N.Y. 26, 36 (1945).

[13] Joaquin Sapien and Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody,* ProPublica (April 3, 2013), https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody.

[14] *Id.*

[15] *Id.*

[16] *Id.*

As the *New York Times* Editorial Board wrote in 2018, "there's no reliable system for holding prosecutors accountable for their misconduct, and they certainly can't be entrusted with policing themselves."[17]

B. The *Brady* Rule and State Discovery Laws are Fundamental to the Constitutional Rights to a Fair Trial and Due Process, Yet Prosecutors Often Fail to Provide Favorable Evidence to the Defense.

One of the most damaging forms of prosecutorial misconduct is the *Brady* violation—when a prosecutor suppresses exculpatory or impeachment evidence.[18] A prosecutor's duty to disclose *Brady* evidence is indispensable to the rights to due process and a fair trial.[19] In our legal system, *Brady* disclosures permit the defense to investigate and litigate different leads and to protect the defendant from wrongful convictions. It is unsurprising, then, that suppression of favorable evidence has played a role in over 30% of known wrongful convictions and 44% of known wrongful convictions for murder.[20]

A prosecutor has an affirmative duty to search for favorable material in their own records and those of related agencies—and to turn these over to the defense.[21]

The New York legislature and the New York judiciary have emphasized the importance of the *Brady* rule by codifying it in statutes and court orders. Even before the 2020 discovery reform, New York State's discovery statute required prosecutors to disclose all evidence that must be disclosed per the United States and New York constitutions—including any *Brady* evidence.[22] Other New York criminal procedure law sections obligated the prosecutor to disclose types of evidence that commonly contain *Brady* information.[23] The 2020 discovery reform preserved the statutory codification of *Brady* and further expanded a prosecutor's discovery obligations.[24] Additionally, under federal law, a prosecutor who commits an intentional *Brady* violation can be charged with a felony.[25]

Indeed, the *Brady* rule is of such import that it has been codified into its own subsection in New York Rule of Professional Conduct 3.8(b):

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[17] New York Times Editorial Board, *Prosecutors Need a Watchdog*, N.Y. Times, (August 14, 2018), https://www.nytimes.com/2018/08/14/opinion/new-york-prosecutors-cuomo-district-attorneys-watchdog.html.

[18] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

[19] *Brady*, 373 U.S. at 87.

[20] *Government Misconduct and Convicting the Innocent*, National Registry of Exonerations (September 1, 2020): https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

[21] *Kyles v. Whitley*, 514 U.S. 419, 432 (1995); *Strickler v. Green,* 527 U.S. 263, 280-81 (1999).

[22] C.P.L. § 240.20(1)(h) (McKinney) (repealed); *Doorley v. Castro*, 160 A.D.3d 1381, 1383 (4th Dep't 2018).

[23] C.P.L. § 240.20 (McKinney) (repealed).

[24] C.P.L. § 245.20(1)(k).

[25] 18 U.S.C. § 242.

> A prosecutor…shall make timely disclosure…of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence….[26]

Rule 3.8 makes clear that the professional rule is broader than the *Brady* obligation: all evidence that tends to exculpate the defendant must be turned over, rather than just *materially* exculpatory evidence. As a consequence, more conduct will violate Rule 3.8 than the constitutional rule.

Despite the significance of the *Brady* rule in the criminal legal system, New York prosecutors often violate it. The New York State Bar has acknowledged that "New York *Brady* violations occur at all phases of the criminal justice process and are often not discovered until after conviction."[27] The New York State Justice Task Force has pointed to "[d]ocumented instances of inconsistent application by prosecutors of the requirement for disclosure of exculpatory evidence."[28]

C. Prosecutors Have a Duty to Present Evidence Honestly.

Prosecutors may not mislead the court or jury and many prohibitions on prosecutorial conduct relate to dishonesty. For example, it violates due process for a prosecutor to knowingly present perjured testimony.[29] If a prosecutor knows that a witness intends to lie on the stand, she must encourage the witness not to do so or else refuse to call the witness to testify. If a prosecutor later learns that a witness fabricated testimony, she is required to take remedial steps.[30] Prosecutors possess a "special duty" not to mislead a judge, jury, or defense counsel.[31]

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[26] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b). This Rule was previously codified in New York's Code of Professional Responsibility DR 7-103, 22 NYCRR § 1200.34 (repealed).

[27] N.Y. State Bar Ass'n, *Report of the Task Force on Criminal Discovery*, at 52 (Jan. 30, 2015) https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Criminal%20Discovery%20Final%20Report.pdf.

[28] N.Y. State Justice Task Force, *Report of the New York State Justice Task Force of Its Recommendations Regarding Criminal Discovery Reform*, at 2 (July 2014), http://www.nyjusticetaskforce.com/pdfs/Criminal-Discovery.pdf.

[29] See, e.g., *Miller v. Pate*, 386 U.S. 1 (1967).

[30] See *People v. Waters*, 35 Misc.3d 855 (Bronx Cty 2012) (violation of due process when prosecutor "although not soliciting false evidence, allows it to go uncorrected when it appears") (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (prosecutor failed to correct witness's false testimony that he had not received any promise in return for his testimony)

[31] See, e.g., Daniel S. Medwed, *Prosecution Complex: America's Race to Convict and its Impact on the Innocent*, 80-81 (2012); *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011). See also Bennett L. Gershman, The Prosecutor's Duty to Truth, 14 Geo. J. Legal Ethics 309, 316 (2001) http://digitalcommons.pace.edu/lawfaculty/128/ ("The courts have recognized that, as a minister of justice, a prosecutor has a special duty not to impede the truth.")

D. The Grievance Committee, as the Only Body Entrusted with Checking Prosecutorial Misconduct, has an Important Duty to Hold Prosecutors Accountable.

The Grievance Committee is in a unique position to hold New York prosecutors accountable for misconduct. While other attorneys and law enforcement officers are liable to civil lawsuits when they neglect their duties, the absolute immunity doctrine shields prosecutors from civil accountability.[32] In 1976, the U.S. Supreme Court partly justified absolute immunity for prosecutors because it believed that prosecutorial misconduct would be regulated by the "checks" of "professional discipline" by state bar organizations.[33]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions "would provide an antidote to prosecutorial misconduct"[34]—has not been borne out. A 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct between 1963 and 2013. Of those, only 63 prosecutors—less than 2 percent—were ever publicly sanctioned.[35]

In their 2016 article, "Prosecutorial Accountability 2.0," ethics experts Professors Ellen Yaroshefsky and Bruce Green pointed out that prosecutors "were rarely disciplined for misconduct, and if so, not very seriously." Indeed, "neither judges nor defense lawyers ordinarily alerted disciplinary agencies when prosecutors acted wrongly … [D]isciplinary agencies and the courts overseeing them largely gave prosecutors a pass, perhaps hoping that prosecutors' offices would clean up their own messes."[36] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to *ProPublica*. "Prosecutors engage in misconduct because they know they can get away with it."[37]

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[32] *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); *Shmueli v. City of New York*, 424 F.3d 231, 237 (2d Cir. 2005) (noting that prosecutors have "absolute immunity" for the "conduct of a prosecution"); *Dann v. Auburn Police Dep't*, 138 A.D.3d 1468, 1469 (4th Dep't 2016) ("The law provides absolute immunity for conduct of prosecutors that was intimately associated with the judicial phase of the criminal process.") (internal quotation marks omitted); *see also Ryan v. State*, 56 N.Y.2d 561, 562 (1982) (holding that "the doctrine of prosecutorial immunity" precludes "recovery against the State" for "acts of prosecutorial misconduct").

[33] *Imbler,* 424 U.S. at 429; *see also Matter of Malone*, 105 A.D.2d 455, 459 (3d Dep't 1984) (rejecting public official's claim to prosecutorial immunity in a professional ethics proceeding).

[34] Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under Imbler: Providing A Compromise Approach to Claims of Prosecutorial Misconduct*, 48 Gonz. L. Rev. 219, 242–43 (2012).

[35] Center for Prosecutor Integrity, *White Paper: An Epidemic of Prosecutor Misconduct* (December 2013) www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf; *see also Proj. On Gov't Oversight*, Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards (Mar. 12, 2014), http://pogoarchives.org/m/ga/opr-report-20140312.pdf; Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 Washburn L.J. 59, 81 (2012) (citing "the small number of sanctions against prosecutors, relative to lawyers as a whole"); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. Rev. 721, 725 (2001) (describing the "rarity of discipline" of prosecutors).

[36] Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L. Rev. 51, 65 (2017) (internal citations omitted); *see also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 697 (1987).

[37] *ProPublica Investigates Prosecutorial Misconduct in New York,* Innocence Project (April 3, 2013) https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody.

In 2018, the Appellate Division suspended New York prosecutor Mary Rain's law license for two years for a variety of misconduct, including summation misconduct.[38] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[39] But even a short suspension like that received by Rain and Kurtzrock[40]—indeed, public discipline of any kind—remains rare.

Prosecutors, the public officials tasked with holding the public accountable, are not held accountable themselves. Absent strong, public discipline by the Grievance Committee, misconduct like that of Appelbaum will continue unabated and undeterred.

2. The Appellate Division Found that Appelbaum Violated the *Rosario* Rule in Prosecuting *Moustakis* and Related Cases.

In *People v. Moustakis*, the Appellate Division found that Appelbaum violated the *Rosario* rule.[41]

According to appellate briefs, prosecutors alleged in 1990 that a group consisting of Moustakis and several other men committed a series of burglaries.[42] In May 1990, several of these individuals—but not Moustakis—burglarized the Nahan Art Gallery.[43] Among them was Schrader, who was acting as a confidential informant for the police, and who was facing both state and federal charges.[44] Two days later, Schrader met with Moustakis, when Moustakis allegedly threatened Schrader not to testify against the burglars and offered him money to leave the state.[45] Subsequently, prosecutors indicted the men who burglarized the Nahan gallery, while indicting Moustakis for his alleged threats and attempted bribery of Schrader.[46]

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[38] *Rain*, 162 A.D.3d at 1462.

[39] *In the Matter of Glenn Kurtzrock*, 192 A.D.3d 197 (2d Dep't, Dec. 30, 2020). http://courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D65317.pdf

[40] In the context of the apparently rampant and egregious misconduct by Rain and Kurtzrock, the court's sanction was surprisingly light. *See, e.g.*, Bennett L. Gershman, *The Most Dangerous Prosecutor In New York State, HuffPost (September 20, 2017)*, https://www.huffpost.com/entry/the-most-dangerous-prosec_b_12085240; Bennett L. Gershman, *A Most Dangerous Prosecutor: A Sequel*, HuffPost (October 1, 2016), https://www.huffpost.com/entry/a-most-dangerous-prosecutor-a-sequel_b_57effb8fe4b095bd896a0fba; Nina Morrison, "What Happens When Prosecutors Break the Law?" *New York Times*, June 18, 2018 https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html (see also Morrison's twitter thread following the *Kurtzrock* decision, https://twitter.com/Nina_R_Morr/status/1344413003903602688.)

[41] Exh. A, *Moustakis*, 226 A.D.2d 401.

[42] Exh. B, Respondent Brief at 2. Rescigno was part of the burglary ring that committed the Nahan burglary, to which Moustakis was allegedly connected. The brief from his case is used here since it is the prosecution's brief. The prosecution's brief for Moustakis's case was unavailable online.

[43] *Id.* at 3. *See also* Exh. C, Respondent Brief at 4.

[44] *Id.* at 7. *See also* Exh. C, Respondent Brief at 2.

[45] *Id.* at 3-4. *See also* Exh. C, Respondent Brief at 4.

[46] *Id.* at 4.

Before trial, Appelbaum disclosed Schrader's cooperation agreement with the Queens District Attorney's Office, Schrader's arrest and conviction record, and a list of seventeen crimes that Schrader had admitted to committing.[47] Importantly, Appelbaum only disclosed "redacted portions of notes of a debriefing that had occurred between Schrader and [federal prosecutors],"[48] who were also investigating the burglarizing group. The redacted portions amounted to one page out of 17 pages of debriefing materials.[49]

At his state trial, Moustakis's attorney questioned Schrader about his past crimes to undermine his credibility.[50] Schrader, however, "claimed to have forgotten the details of many of his other past crimes,"[51] even though he had told the federal prosecutors about them in his debriefing session. Appelbaum did not bring this to the attention of the court.[52] Because the defense did not have these documents, it could not impeach Schrader on the many crimes he had "forgotten."[53] Moustakis was convicted at the state trial in 1992,[54] but later acquitted of charges relating to the burglary group in a federal trial.[55]

Critically, before the federal trial but after the state trial, Moustakis received from the federal prosecutors the information that Appelbaum had suppressed—the full 17 pages of Schrader's debriefing.[56] Under the *Rosario* rule, prosecutors are under an obligation to disclose before the start of the trial any pretrial recorded statements by a witness which relate to the subject matter of the witness's testimony.[57] By the time of Appelbaum's violation, the legislature had already codified this common law rule under C.P.L. § 240.45(1)(a).[58] The law was thus clear: Appelbaum should have turned over the complete debriefing notes to Moustakis, since Schrader was a witness in that trial and his testimony related to his past crimes—those that he had suddenly forgotten about. Based on Appelbaum's failure to turn over these complete copies, Moustakis moved to vacate his conviction in the Queens Supreme Court.[59]

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[47] Exh. B, Respondent Brief at 6.

[48] *Id. See also* Exh. C, Respondent Brief at 5.

[49] Exh. A at 401-02; Exh. C, Respondent Brief at 5. *See also* Exh. B, Respondent Brief at 6.

[50] Exh. A at 402. *See also* Exh. C, Respondent Brief at 6.

[51] *Id. See also* Exh. C, Respondent Brief at 7.

[52] Exh. C, Respondent Brief at 7.

[53] Exh. A at 401, 402.

[54] Exh. B, Respondent Brief at 6; *See also* Exh. C, Respondent Brief at 7.

[55] Exh. C, Respondent Brief at 8.

[56] Exh. B, Respondent Brief at 6; *See also* Exh. C, Respondent Brief at 5, 7.

[57] *See People v. Rosario*, 9 N.Y.2d 286, 289 (1961).

[58] C.P.L. § 240.45 (McKinney) (repealed) ("After the jury has been sworn and before the prosecutor's opening address…the prosecutor shall…make available to the defendant: [a]ny written or recorded statement, including any testimony before a grand jury and an examination videotaped…made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony."). The legislature recently repealed C.P.L. § 240.45 as part of a progressive overhaul of the discovery rules in New York. Yet the statutory codification of the *Rosario* rule lives on—subject to more demanding requirements of the prosecution—in C.P.L. § 245.20(e).

[59] Exh. B, Respondent Brief at 7; *see also* Exh. C, Respondent Brief at 8.

A. Appelbaum Violated *Rosario* and *Brady* and Permitted Perjured Testimony.

After holding a hearing, the Queens Supreme Court vacated Moustakis's conviction.[60] It concluded that Appelbaum was "aware" before Moustakis's trial of a "possible [federal] prosecution" and that Appelbaum knew that Schrader had been debriefed by the federal prosecutors.[61] The court reasoned that Appelbaum had deprived Moustakis of the entirety of the federal debriefing notes in violation of the *Rosario* rule.[62] The Queens Supreme Court also held that Appelbaum violated *Brady* when he failed to disclose Schrader's cooperation agreement with the federal prosecutors; he was aware, or should have been aware, of this agreement, based on his interaction with the federal prosecutors and the police liaison working both state and federal cases.[63]

According to the prosecution's appellate brief in the related *Rescigno* case, the Queens Supreme Court vacated the conviction of two other individuals (Burns and Ronald Rescigno, the brother of the Rescigno from Exhibit B) involved in the Nahan burglaries for the same reason—Appelbaum's *Rosario* violation.[64]

The Appellate Division affirmed the Queens Supreme Court's order vacating Moustakis's conviction.[65] It reasoned that "it is clear that had the defense had access to the debriefing notes, it may have impeached [Schrader] with his former statements."[66] But because Appelbaum had withheld almost all 17 note pages, he violated *Rosario* and C.P.L. §240.45.[67] The Appellate Division did not rule or address whether Appelbaum violated *Brady*.

B. Appelbaum Appears to Also Have Made False Representations to the Court.

Moustakis's appellate brief discusses in detail further instances of Appelbaum's conduct in handling the *Moustakis* and related cases. The discussion below is based on Moustakis's appellate brief, which cites to the hearing that took place in the Queens Supreme Court discussed above. We have not reviewed the transcripts, as they are not publicly available online, but urge the Grievance Committee to review them as part of its investigation.

Appelbaum prosecuted the defendants involved in the Nahan burglary at the Queens Supreme Court before Moustakis's state trial took place.[68] On the first day of Schrader's testimony, the defense made a direct request for *Rosario* materials and asked whether Schrader was cooperating with federal authorities.[69] In response, Appelbaum represented that no such

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[60] Exh. B, Respondent Brief at 11; Exh. A.

[61] Exh. B, Respondent Brief at 11-12; *See also* Exh. C, Respondent Brief at 14.

[62] Exh. C, Respondent Brief at 14-15; *See also* Exh. B, Respondent Brief at 12.

[63] *Id.*

[64] Exh. B, Respondent Brief at 1 n.1, 22.

[65] Exh. A.

[66] Exh. A at 402.

[67] Exh. A.

[68] Exh. C, Respondent Brief at 4-6.

[69] *Id*. at 5.

evidence existed.[70] On that same day, it was brought to the court's attention that observers in the Nahan trial audience might be FBI agents and prosecutors from the United States Attorney's Office.[71] When asked by the judge, Appelbaum declined to identify the observers, and instead responded, "It's nobody involved in this case or potential witnesses and I don't think it's correct for the People to identify people in the audience."[72] Much later, in the hearing to vacate Moustakis's conviction, Appelbaum testified that "one of the federal prosecutors who was observing the State trial 'was the same prosecutor who gave me the handwritten notes.'"[73] Appelbaum added, "I knew they had debriefed [Schrader], that they had debriefed him with a view towards using him as a witness, and I assumed they just wanted to see how he was going to do in Court."[74]

The Grievance Committee should investigate Appelbaum's conduct in regard to this apparently misleading statement to the court.

3. The Queens Supreme Court Dismissed the Indictment in *Gallagher* because Appelbaum Prejudiced the Grand Jury Process.

Appelbaum's serious misconduct continued in 2007, when he was a Deputy Bureau chief.[75] The defendant, a public official, was charged with sexual assault and related charges.[76] The Queens Supreme Court dismissed the indictment at the motions stage due to Appelbaum's misconduct in presenting the case to the grand jury:

> After reviewing the cross-examination of the defendant by [Appelbaum], this court finds that the prosecutor exceeded the limits of cross-examination in *many instances and breached his duty as a quasi-judicial officer*. The nature of the prosecutor's cross-examination of the defendant, in addition to his *refusal to seek a judicial ruling when requested* by defense counsel, and continuing *refusal to seek judicial guidance when specifically requested* by a Grand Juror, as well as his improper responses to concerns voiced by the Grand Jurors, resulted in a *significant impairment of the integrity* of the Grand Jury proceedings and created prejudice in the minds of the Grand Jurors. Moreover, this court finds that the cross-examination of the defendant by the prosecutor created more than just a substantial risk of prejudice to the defendant, it *created actual prejudice.*[77]

The Queens Supreme Court then delved into a detailed discussion of how Appelbaum had "attempted to instill his influence and bias into the case."[78]

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[70] *Id*. at 5, 3-14 (emphasis removed).

[71] *Id.* at 11.

[72] *Id*.

[73] *Id*. at 12 (emphasis removed).

[74] *Id*.

[75] Exh. D, *Gallagher*, 18 Misc.3d 1135(A) at 1-2.

[76] *Id*. at *2.

[77] *Id*. at *2-3 (emphasis added).

[78] *Id*. at *13.

The court first discussed Appelbaum's improper cross-examination of Gallagher. It noted that a "prosecutor serves a dual role as advocate and public officer. He is charged with the duty not only to seek convictions but also to see that justice is done."[79] Yet "many instances of questioning" by Appelbaum of Gallagher "lacked any relationship" to the incident.[80] Instead, the cross-examination "was an attempt to create improper inferences in the minds of the Grand Jurors."[81] Specifically, Appelbaum "improper[ly]" tried to incorporate an "elevated responsibility" standard to Gallagher because of his public office, even though the law required no such elevated standard.[82] The Queens Supreme Court found that while a prosecutor can cross-examine a defendant and even impeach him in the grand jury, Appelbaum went too far by denigrating Gallagher and subjecting him to an elevated standard.[83]

The court next focused on Appelbaum's refusal to seek a judicial ruling. Upon the completion of Appelbaum's "elevated responsibility" cross-examination, defense counsel requested a ruling from a judge about its appropriateness, but Appelbaum refused.[84] By refusing this request, Appelbaum violated "[f]undamental fairness and due process of law," which "dictate[d]" that Appelbaum should have agreed to seek a judicial ruling.[85]

Next, the court criticized Appelbaum for a "score of questions" regarding Gallagher's marital situation.[86] This did not serve to test Gallagher's credibility but to "demean him," as evident by a "Grand Juror's query asking [Appelbaum] what the questions regarding defendant's marital situation had to do with the case."[87]

The Queens Supreme Court similarly took note of Appelbaum's repeated vouching for his witnesses. Appelbaum repeatedly asked Gallagher why the complainant and the other witnesses would "falsely accuse," that is, lie, about the allegations.[88] The repeated nature of these questions, the court found, served to improperly "bolster complainant's" testimony.[89]

Perhaps the best demonstration of Appelbaum's blatant misconduct came when a grand juror directly questioned his behavior:

> Juror: I have a question, procedural question. In regards to certain questioning, how can we get a Judge in here? What's the procedure and how do we do it and what time?
>
> Appelbaum: To get a Judge? For what purpose?

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[79] *Id*. at *4 (citing *People v. Pelchat*, 62 N.Y.2d 97, 105 (1984)).

[80] *Id*. at *2.

[81] *Id*.

[82] *Id*. at *4.

[83] *Id*. at *5.

[84] *Id*. at *5-6.

[85] *Id*. at *5.

[86] *Id*. at *6.

[87] *Id*.

[88] *Id*. at *7.

[89] *Id*.

> Juror: I believe from your questioning, I could be wrong, that there was an attempt to make him look foolish. You brought up subjects that, like public speaking. So far, I don't know.
>
> Appelbaum: Specifically, what are your questions about? Tell me specific areas.
>
> Juror: I can't say, his speaking about, over and over disparaging questions, over and over, posed as a fool or incompetent.
>
> Appelbaum: I just want to know how you have it written.
>
> Juror: As a role model — is he considered a role model? I don't know what that has to do with this case. I honestly don't. His relationship with his wife? Can he afford to separate? What does this have to do with this case?
>
> Appelbaum: To the Grand Juror that has questions, I have a response to your questions as follows, that those questions are legally permissible in the areas of cross-examination. They are to be considered by you as they pertain to his credibility and when you go over the accounts of the events of that night.
>
> Juror: Okay. So we can use this, the fact that you asked these questions.
>
> Appelbaum: I'm telling you they are legally permissible, okay?
>
> Juror: Okay.[90]

And later again later in the grand jury session:

> Juror: In regards to the other questions, what does it take to get a Judge here?
>
> Appelbaum: I'm going to respond to when you came to me. Relating to those issues, I have determined, made certain determinations, as to the questions that you brought to our attention. Any further questions in any areas beyond that, they can be addressed by a Judge and defense attorney at a later time. That is your answer, okay?
>
> Juror: Okay.[91]

Based on this conversation, the court found that Appelbaum's conduct had "alarmed" and "frustrat[ed]" the grand jury, who could sense that something was off in Appelbaum's questioning of Gallagher—but were not given access to a judge.[92]

Based solely on Appelbaum's misconduct, the court dismissed the indictment against Gallagher.[93]

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[90] *Id*. at *8-9.

[91] *Id*. at *9.

[92] *Id*.

[93] *Id*. at *11.

4. The Grievance Committee Must Discipline Appelbaum for the Serious Professional Misconduct That Occurred Here.

As noted by one Grievance Committee, "[t]he legal profession expects all lawyers to conduct themselves in an honest and ethical manner in accordance with the Rules of Professional Conduct."[94] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[95] Grievance Committees are "committed to … recommending discipline for lawyers who do not meet the high ethical standards of the profession."[96]

Our laws and profession hold prosecutors to an even higher standard. Prosecutors wield immense power—the power to punish on behalf of the state. Such immense power, when left unchecked, can cause indelible harm. The United States Supreme Court has stated unequivocally that prosecutors "have a special duty to seek justice, not merely to convict."[97]

In handing ex-prosecutor Glenn Kurtzrock a two-year suspension for his past prosecutorial misconduct, the Appellate Division reminded us, "Prosecutors, in their role as advocates and public officers, are charged with seeing that justice is done—to act impartially, to have fair dealing with the accused, to be candid with the courts, and to safeguard the rights of all."[98]

Therefore, a prosecutor is not merely an advocate for a victim, a complainant, or society as a whole. Instead, a prosecutor is a "minister of justice," responsible to guarantee "procedural justice and that guilt is decided upon the basis of sufficient evidence."[99] Similarly, the professional guidelines promulgated by the American Bar Association make clear that a prosecutor's job goes well beyond achieving the maximum number of convictions.[100] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[101] Indeed, as agents of the state and ministers of justice, prosecutors play a highly public role. Failing to acknowledge their misconduct, or hold them accountable for it, tarnishes the legitimacy of the criminal system, the bar as a whole, and the rule of law itself.

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[94] *How to File a Complaint*, Attorney Grievance Committee — First Department (July 30, 2020), https://www.nycourts.gov/courts/ad1/Committees&Programs/DDC/How%20to%20File%20a%20Complaint%2007.30.2020.pdf.

[95] 22 N.Y.C.R.R. Part 1240.

[96] *How to File a Complaint*, Attorney Grievance Committee — First Department.

[97] *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) (quotation marks omitted).

[98] *Kurtzrock*, 192 A.D.3d 197, http://courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D65317.pdf.

[99] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

[100] 2017 ABA Functions and Duties of the Prosecutor, Standard 3-1.2 ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

[101] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b).

A. Appelbaum's Conduct in *Moustakis* Violated Rules of the Code of Professional Responsibility.

The standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence—not a higher standard, such as clear and convincing or beyond a reasonable doubt.[102] The Court of Appeals explained, "[T]he privilege to practice law is *not a personal or liberty interest, but 'is more nearly to be classified as a property interest, as to which the higher standard of proof has not been required.*'"[103]

Appelbaum committed multiple violations of multiple Rules of the Code of Professional Responsibility, the set of laws governing legal professional conduct in 1992.

Appelbaum withheld evidence in violation of several Rules. Rule DR 7-103(b) required Appelbaum to "make timely disclosure…of the existence of evidence, known to [him] or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment."[104] Under Rule DR 7-102(a)(3), Appelbaum was not to "[c]onceal or knowingly fail to disclose that which [he was] required by law to reveal."[105] Finally, Rule DR 7-109(a) instructed Appelbaum not to "suppress any evidence [he had] a legal obligation to reveal or produce."[106]

Appelbaum knowingly withheld a cooperating witness' debriefing notes from Moustakis and two other defendants.[107] Both the Queens Supreme Court and the Appellate Division held this to be a *Rosario* violation. Moreover, Appelbaum—at least in Moustakis's case but possibly in the cases of the other two individuals—violated *Brady*, another violation of these Rules. The Queens Supreme Court found that Appelbaum either knew or should have known that Schrader had a cooperation agreement with the federal prosecutors, but never told that to the defense. If the Grievance Committee credits Appelbaum's dubious ignorance of the agreement, his actions appear to parallel the "deliberate pattern of avoidance, or willful blindness" to exculpatory evidence for which the Second Department Appellate Division disciplined ex-prosecutor Glenn Kurtzrock.[108] Appelbaum should not evade professional repercussions if he intentionally chose ignorance, that is, decided not to find out about *Brady* evidence. Therefore, Appelbaum also violated these Rules by suppressing Schrader's federal cooperation agreement.[109]

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[102] *See, e.g., Matter of Capoccia*, 59 N.Y.2d 549, 453 N.E.2d 497 (1983).

[103] *Matter of Scudieri*, 174 A.D.3d 168, 173 (2019) (emphasis added, quoting *Matter of Seiffert,* 65 N.Y.2d 278, 280 [1985], quoting *Matter of Capoccia,* 59 N.Y.2d 549, 553 [1983]).

[104] Code of Prof.Resp., DR 7-103(b) McK.Consol.Laws, Book 29 App.

[105] Code of Prof.Resp., DR 7-102(a)(3) McK.Consol.Laws, Book 29 App.

[106] Code of Prof.Resp., DR 7-109(a) McK.Consol.Laws, Book 29 App.

[107] As indicated by the prosecution's appellate brief in a related case, discussed above.

[108] *Kurtzrock*, 192 A.D.3d 197 (deliberate pattern of avoidance or willful blindness constitutes knowledge under Rule 3.8(b), the modern equivalent of Rule DR 7-103(b)).

[109] *See also Rain*, 162 A.D.3d at 1460-61 (upholding disciplinary referee's finding that a prosecutor's violation of *Brady* violated Rule 3.8(b) of the Rules of Professional Conduct, the modern equivalent of Rule DR 7-103(b)).

The Grievance Committee should investigate Appelbaum's statements to the court, which seem to include two false statements by Appelbaum and a failure to correct false testimony by a witness. Under Rule DR 7-102(a)(5), Appelbaum was not to "[k]nowingly make a false statement of law or fact."[110] Rule DR 7-102(a)(4) barred Appelbaum from "[k]nowingly us[ing] perjured testimony or false evidence."[111] Rule DR 1-102(a)(4) prohibited Appelbaum from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation."[112]

First, in the Nahan trial, Appelbaum appears to have represented that all *Rosario* and *Brady* material had been turned over while withholding evidence, and knew or should have known about Schrader's cooperation agreement with the federal prosecutors. Second, Appelbaum appears to have declined to identify the federal agents sitting in trial, telling the court they were not involved in the case. But Appelbaum later testified that he recognized at least one of them as the agent who had earlier given him Schrader's debriefing notes.[113] Finally, in Moustakis's trial, Appelbaum appears to have permitted Schrader to testify without contradiction that he did not remember details of his prior bad acts. Yet Appelbaum knew that Schrader had told the federal agents all about these bad acts, but apparently permitted Schrader's perjured testimony to stand. Appelbaum's conduct, on multiple occasions, seems to have violated the above Rules.[114]

The above misconduct prejudiced the legal process and was not befitting of a licensed lawyer. Rule DR 1-102(a)(5) required that Appelbaum abstain from "conduct that is prejudicial to the administration of justice," while Rule DR 1-102(a)(7) required that he abstain from "any other conduct that adversely reflects on [his] fitness to practice law."[115] Appelbaum prejudiced the legal process, and thus the administration of justice, when he committed the misconduct discussed above.[116] His serious misconduct is not befitting of a lawyer, a further violation of the Rules.

B. Appelbaum's Conduct in *Gallagher* Violated Rules of the Code of Professional Responsibility.

Appelbaum violated multiple Rules of the Code of Professional Responsibility in 2007 when he indicted Gallagher. Rule DR 1-102(a)(5) required that Appelbaum abstain from "conduct that is prejudicial to the administration of justice," while Rule DR 1-102(a)(7) required that he

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[110] Code of Prof.Resp., DR 7-102(a)(5) McK.Consol.Laws, Book 29 App.

[111] *Id*.

[112] *Id*.

[113] The Grievance Committee should investigate whether Appelbaum declined to identify the federal agents in the audience because that would have revealed Schrader's cooperation agreement and the existence of extensive notes, thereby both undermining Appelbaum's case and demonstrating his false representation regarding *Rosario* and *Brady*.

[114] *See also In re Muscatello*, 87 A.D.3d 156, 158-59 (2d Dep't 2011) (prosecutor who misrepresented the content of an evidentiary document before a grand jury had violated Rule 8.4(c) of the Rules of Professional Conduct, the modern equivalent of Rule DR 1-102(a)(4)).

[115] Code of Prof.Resp., DR 1-102(a)(5), (7) McK.Consol.Laws, Book 29 App. (2005).

[116] *Rain*, 162 A.D.3d at 1460-61 (upholding disciplinary referee's finding that a prosecutor's *Brady* suppression violated Rules 8.4(d) and 8.4(h), the modern equivalents of DR 1-102(a)(5) and DR 1-102(a)(7)).

abstain from "any other conduct that adversely reflects on [his] fitness as a lawyer."[117] Appelbaum's misconduct created "actual prejudice" when he "breached his duty as a quasi-judicial officer," refused to seek judicial guidance when asked by defense counsel and a grand juror, and asked irrelevant and denigrating questions of Gallagher.[118] Such abuse of power is not befitting a lawyer. Appelbaum violated these Rules.

C. For His Misconduct, Appelbaum Should be Disbarred.

Though the misconduct discussed here occurred years ago, New York does not have a statute of limitation barring disciplinary action against an attorney—and rightfully so. As explained by the American Bar Association, "Statutes of limitation are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice."[119] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[120]

"The purpose of a sanction in a disciplinary proceeding is not to punish but to protect the public, to deter similar conduct, and to preserve the reputation of the Bar."[121] Prosecutorial misconduct that violates the U.S. and New York constitutions has a devastating impact on due process. It is a long-standing, largely unaddressed problem in the court system that is only rarely discovered and even more rarely corrected.

Appelbaum was not an uninformed novice but a seasoned prosecutor when he committed the misconduct outlined above. Appelbaum began his prosecutorial career in 1985 and it has yet to end. At the time Appelbaum committed blatant misconduct in *Moustakis*, he had been practicing for 7 years. Experience, however, did not dissuade Appelbaum from problematic behavior. His misconduct in *Gallagher* took place in 2007, 22 years into his prosecutorial career.

The Grievance Committee must publicly and severely sanction Appelbaum for his serious misconduct. Failure to do so would be especially problematic here, because of the various supervisory roles Appelbaum has held. In a February 2021 press release from the QDAO, Appelbaum was listed as a Deputy Bureau Chief, seemingly in the Homicide Bureau, where he surely supervises the work of prosecutors and oversees the some of the most serious prosecutions in the office. Appelbaum has served as a role model for dozens, if not hundreds, of prosecutors.

If the Committee failed to publicly and severely sanction Appelbaum for his serious misconduct, the attorneys who worked under him and looked up to him will neither avoid nor fear making similar violations. Without other mechanisms to hold prosecutors accountable, a failure to discipline a senior prosecutor such as Appelbaum will demonstrate to prosecutors that they are above the law; that they need not fear accountability; that they can get away with breaking the law.

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[117] Code of Prof.Resp., DR 1-102(a)(5), (7), (22 NYCRR § 1200.3) McK.Consol.Laws, Book 29 App.

[118] Exh D at *2-3.

[119] 2020 Model Rules for Lawyer Disciplinary Enforcement, Rule 32 and Commentary, https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_32/.

[120] *Id.*

[121] *Matter of Malone*, 105 A.D.2d 455, 460 (3d Dep't 1984).

We believe disbarment is the appropriate sanction for the misconduct described in this grievance. As prosecutorial misconduct becomes increasingly identified as a stain on our legal system's promise of justice and fairness, some state courts have taken decisive action, disbarring prosecutors for egregious misconduct. While several states have disbarred prosecutors on-the-job misconduct, including Texas, Minnesota, Pennsylvania, North Carolina, and Arizona, we have not found a single such occurrence in New York, despite the state's large court system and the many criminal cases that pass through New York courts every year.

If disbarment is *never* applied as a sanction for prosecutorial misconduct—if it is *de facto* taken off the table—prosecutors can rest assured that, even if they are caught committing the most severe misconduct, they will face at most a short suspension of their law license. Career advancement by developing a reputation for winning cases at all costs is an obvious incentive for prosecutors to bend and break rules. If the Grievance Committee and courts do not apply an actual—rather than theoretical—disincentive, prosecutorial misconduct will continue unabated.

Conclusion

Appelbaum suppressed evidence and committed other forms of serious misconduct. In doing so, he violated several Rules of the Code of Professional Responsibility. To our knowledge, Appelbaum remains unsanctioned publicly or privately for his serious misconduct. Disbarment is the most appropriate sanction for his suppression of exculpatory evidence and other ethical violations.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[122] To that end, "the grievance process exists to protect the public... By bringing a complaint to a committee's attention, the public helps the legal profession achieve its goal."[123]

The judicial finding identified in this grievance provides far more evidence than necessary to meet the "fair preponderance of the evidence" standard to discipline the prosecutor at issue, but we call upon the Grievance Committee to go further and investigate far beyond the court finding identified in this grievance. For the legitimacy of and public trust in the criminal system, and the bar, the investigation should be public at every stage possible.

Below are some essential aspects of such an investigation:

1. The Committee should begin by investigating the many other cases prosecuted by Appelbaum. As the comment to Rule 8.3 of the New York Rules of Professional Conduct reminds us, "An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover."[124] Using its power to investigate, including to issue subpoenas and interview witnesses, the Committee can and should obtain a list of all cases that this prosecutor worked on and contact the attorneys, witnesses, and accused persons (while protecting the accused's rights to privacy and counsel) in those cases. The Committee should also identify all of Appelbaum's other cases where the issue of misconduct was raised in the courts

[122] NYSBA Committee on Professional Discipline, Guide to Attorney Discipline, available at: https://nysba.org/public-resources/guide-to-attorney-discipline/

[123] *Id.*

[124] Rule 8.3, Comment [1].

before trial, at trial, or on appeal, or was the subject of other ethical grievances, mentioned in the media, or identified in any other source.

2. The Committee should promptly investigate whether any supervising attorney at the Queens District Attorney's Office (QDAO) is also culpable for the ethics violation cited in this grievance under Rule 5.1(d) of the New York Rules of Professional Conduct, which provides direct culpability for supervising attorneys under various circumstances, including when a supervisor knowingly ratifies improper conduct or knows of the conduct when it could be prevented but fails to take remedial action.[125]

3. The Grievance Committee should investigate whether the Queens District Attorney's Office (QDAO) and its managing attorneys complied with its duties under Rule 5.1 of the New York Rules of Professional Conduct, requiring that law firms as a whole, and managing attorneys in particular, make efforts to ensure that all lawyers in the firm conform to the New York Rules of Professional Conduct.

4. The Committee should identify any prosecutors trained and/or supervised by Appelbaum and determine whether instances of prosecutorial misconduct can also be found in their work as prosecutors.

[125] Rule 5.1 (d). A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

We recognize that bar discipline provides a uniquely individual remedy that will not, on its own, remedy the systemic problems identified above in this letter. For this reason, we also call for the implementation of an independent public commission empowered to investigate all cases handled by this prosecutor and vacate convictions where appropriate. To be clear, we do not mean a closed-door, cloaked process at the Queens District Attorney's Office, but rather a commission that operates transparently and includes members of the public, including members of impacted communities of color, public defenders and other criminal defense attorneys, civil rights attorneys, and people who have been incarcerated and their loved ones.

Thank you for your careful consideration of this matter.

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