May 3, 2021

Grievance Committee for the Second,
Eleventh and Thirteenth Judicial Districts
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RE: Grievance Complaint Regarding Attorney Rosemary Chao, State Bar No. 3988425.

To the Grievance Committee:

We write to complain about the professional misconduct of attorney Rosemary Chao,[1] for her repeated improper summation conduct in four cases that she prosecuted as a Queens assistant district attorney.

In 2008, Chao prosecuted *People v. Scott*. Courts later found that Chao had improperly cross-examined defendant Scott about his silence upon arrest[2] and improperly commented on this silence in her summation.[3] In 2009, Chao prosecuted *People v. Collins*;[4] on appeal, Chao's own colleagues—the prosecutors who litigated *Collins* in the Appellate Division—conceded that she had committed misconduct.[5] In its decision, the Appellate Division did not exonerate Chao's conduct, but rather found any error to be harmless.[6]

[1] Rosemary Chao, State Bar No. 3988425, Office of Court Administration (OCA), 12501 Queens Blvd., Kew Gardens, New York 11415. Phone: (718) 298-1523. Chao did not register an email address with the Attorney Registration page of the New York State Unified Court System website. We do not have personal knowledge of any of the facts or circumstances of Chao or the cases mentioned; this grievance is based entirely on the court opinions, briefs and other documents cited herein.

[2] Exhibit A, *People v. Scott*, 85 A.D.3d 827, 827 (2d Dep't 2011). Available at http://www.nycourts.gov/reporter/3dseries/2011/2011_05107.htm.

[3] Exhibit A1, *Scott v. Sheahan*, 2013 WL 3938501, at *8 (E.D.N.Y. July 30, 2013) ("the prosecutorial misconduct did not end [in cross-examination]; the prosecutor explicitly relied in summation on Scott's post-arrest silence. There is no doubt that the prosecutor violated Scott's constitutional rights when she cross-examined him about his post-arrest silence."); Exhibit A2, Brief for Respondent, *People v. Scott*, 2011 WL 11530419 (2d Dep't February 10, 2011); Trial Transcript, *People v. Scott*, Ind. No. 3057/06 (Queens Sup. Ct. February 5, 2008).

[4] Exhibit B, *People v. Collins*, 109 A.D.3d 482 (2d Dep't 2013). Available at http://www.courts.state.ny.us/reporter/3dseries/2013/2013_05582.htm; Exhibit B1, Brief for Respondent, *People v. Collins*, 2012 WL 13134005 (2d Dep't September 5, 2012); Trial Transcript, *People v. Collins*, Ind. No. 1820-08 (Queens Sup. Ct. August 2009).

[5] Exhibit B1 at *51, *55 ("The prosecutor's improper cross-examination of defendant, and her improper references in summation to defendant's pre-trial silence….the prosecutorial misconduct can safely be said beyond a reasonable doubt not to have affected the verdict."))

[6] Ex. B.

Chao was apparently undeterred by these findings of misconduct. In her 2013 prosecution of *People v. Davis*, Chao again "improper[ly]" commented on the defendant's silence in her summation, according to the Appellate Division.[7] That same year, in prosecuting *People v. Brisco*, Chao escalated her misconduct, running the gamut of improper summation remarks.[8] Chao denigrated Brisco and the defense, referenced facts not in evidence, misstated "critical" testimony by a defense witness, and appealed to the jury's sympathies, among other ethical violations.[9] The Appellate Division found Chao's misconduct to have such a "cumulative effect" that it deprived Brisco of his constitutional right to a fair trial, requiring reversal of the conviction.[10]

Chao's misconduct in four separate cases is especially troubling—and therefore particularly worthy of professional discipline—because of her current job. Despite her repeated, proven misconduct, Chao was the Principal Law Clerk for Judge Ira Margulis of the Queens Supreme Court before his recent retirement.[11] Though Chao was apparently unable to follow constitutional and state laws as a prosecutor, she was given a powerful position in the judicial branch, overseeing the research and writing of legal decisions, possibly including cases prosecuted by her former friends and colleagues from the Queens District Attorney's Office ("QDAO").

Chao'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.[12] Another QDAO 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.[13] The Appellate Division has

[7] Exhibit C, *People v. Davis*, 147 A.D.3d 1077, 1079 (2d Dep't 2017). Available at http://www.nycourts.gov/reporter/3dseries/2017/2017_01381.htm; Trial Transcript, *People v. Davis*, Ind. No. 2915-2010 (Queens Sup. Ct. June 2013).

[8] Exhibit D, *People v. Brisco*, 145 A.D.3d 1028, 1029-30 (2d Dep't 2016). Available at http://www.nycourts.gov/reporter/3dseries/2016/2016_08878.htm; Trial Transcript, *People v. Brisco*, Ind. No. 1727/10 (Queens Sup. Ct. December 2013); Brief for Appellant, *People v. Brisco* (2d Dep't).

[9] *Id.* at 1029-30.

[10] *Id.* at 1030.

[11] Christian Nolan, *Lawyers, Judge in Only Queens Criminal Jury Trial Since March Discuss Trying a Case During COVID-19*, NYSBA (January 20, 2021), https://nysba.org/lawyers-judge-in-only-queens-criminal-jury-trial-since-march-discuss-trying-a-case-during-covid-19/. Chao appears to still be employed by the Office of Court Administration.

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

[13] 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

repeatedly criticized Queens prosecutors' improper summation conduct and advised that the Office provide better training for its trial prosecutors.[14] 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.[15] Chao'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. 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 Chao.[16]

Chao's improper cross-examination and summation conduct in *Scott*, *Collins*, *Davis,* and *Brisco* constitutes professional misconduct. Specifically, Chao violated Rule 8.4 of the New York Rules of Professional Conduct. For her professional misconduct, Chao should be disbarred.

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.[17] 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

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conviction).

[14] *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\.

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

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

[17] *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.").

damage "the reputation and public confidence placed" in all prosecutors and the justice system itself.[18]

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."[19] 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."[20]

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.[21] 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."[22] 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.[23]

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."[24]

B. Summation Misconduct is Pernicious and Widespread.

In closing arguments ("summation"), the prosecutor's task is to explain how evidence introduced at trial applies to the legal elements of the charged offenses. Thus, prosecutors "must

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

[19] *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).

[20] 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.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] 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.

stay within the four corners of the evidence"[25] and are not permitted to make arguments that rely on facts that are not in evidence.[26] Prosecutors are not permitted to engage in prejudicial or misleading argumentation that are sometimes referred to as "cardinal sins."[27] These missteps include making "irrelevant and inflammatory comments;"[28] expressing "personal belief or opinion as to the truth or falsity of any testimony or evidence,"[29] also known as vouching; appealing to the jurors' sympathies or fears;[30] shifting the burden from the prosecution to the defense;[31] and denigrating the defense, defense counsel or the defendant.[32] Engaging in these forms of arguments is prejudicial and improper and can violate the accused's constitutional right to a fair trial.[33]

As far back as 1899, the New York Court of Appeals cautioned prosecutors against appealing to "prejudice" or seeking conviction "through the aid of passion, sympathy or resentment."[34] In 1906, the Court of Appeals reversed a criminal conviction because of the prosecutor's improper comments to the jury and expressed its frustration with the frequency of such misconduct:

> We have repeatedly laid down the rule governing prosecuting officers in addressing the jury… We have repeatedly admonished [prosecutors] at times with severity… not to depart from that rule, but our admonitions have not always been regarded, although they were followed by a reversal of the judgment involved, founded solely on the improper remarks of the prosecuting officer… *Why should court and counsel violate the law in order to enforce it?* What a pernicious example is presented when such officers, intrusted [sic] with the most important duties, in attempting to punish the guilty, are themselves guilty of departing from the law.[35]

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[25] *People v. Mehmood*, 112 A.D.3d 850, 853 (2d Dep't 2013) (internal quotation marks and citation omitted).

[26] *People v. Ashwal*, 39 N.Y.2d 105, 109-10 (1976). *See also People v. Wright*, 25 N.Y.3d 769, 779-780 (2015); *People v. Singh*, 128 A.D.3d 860, 863 (2d Dep't 2015).

[27] *See, e.g.,* Daniel S. Medwed, *Prosecution Complex: America's Race to Convict and Its Impact on the Innocent*, 103-118 (2012).

[28] *Mehmood*, 112 A.D.3d at 853.

[29] *People v. Bailey,* 58 N.Y.2d 272, 277 (1983) (citation omitted).

[30] *See, e.g., Ashwal,* 39 N.Y.2d at 110; *People v. Lindo*, 85 A.D.2d 643, 644 (2d Dep't 1981); *People v. Fernandez*, 82 A.D.2d 922, 923 (2d Dep't 1981); *People v. Fogarty*, 86 A.D.2d 617, 617 (2d Dep't 1982); *People v. Brown,* 26 A.D.3d 392, 393 (2d Dep't 2006).

[31] *People v. DeJesus*, 137 A.D.2d 761, 762 (2d Dep't 1988); *People v. Lothin*, 48 A.D.2d 932, 932 (2d Dep't 1975).

[32] *See, e.g., People v. Damon*, 24 N.Y.2d 256, 260 (1969); *People v. Lombardi*, 20 N.Y.2d 266, 272 (1967); *People v. Gordon*, 50 A.D.3d 821, 822 (2d Dep't 2008); *Brown,* 26 A.D.3d at 393; *People v. LaPorte,* 306 A.D.2d 93, 95 (1st Dep't 2003).

[33] *DeJesus*, 137 A.D.2d at 762.

[34] *People v. Fielding*, 158 N.Y. 542, 547 (1899).

[35] *People v. Wolf*, 183 N.Y. 464, 471-76 (1906) (emphasis added).

But those early rebukes from the courts seem to have had little impact on prosecutors' practices. Over the last few decades, New York courts have had to remind prosecutors over and over that "summation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at his command."[36] Countering the gamesmanship and instinct to win that overcomes many prosecutors at trial, courts have reminded them that "our adversarial system of justice is not a game, it has rules, and it is unfortunate when a prosecutor … plays fast and loose with them."[37]

Summation misconduct continues—apparently unabated—to this day. During oral argument in 2018, Justice LaSalle of the Appellate Division sharply criticized the regularity of summation misconduct:

> At what point does the unprofessionalism stop? At what point do we stop trying to win trials by being glib and win them on the evidence?… why weren't these [summation] statements so prejudicial, so unprofessional, so glib, as to inflame the passions of the jury so they wouldn't even consider themselves of the evidence, and come back with a verdict simply based on those [] unprofessional statements?[38]

As the above statement of Justice LaSalle makes clear, prosecutors make improper arguments in summation because such remarks are *effective* at winning cases—they go beyond the evidence, to manipulate biases, prejudice, and passions. Discussing prosecutorial misconduct in opening statements—where attorneys are even more limited than in summation—Justice Alan D. Scheinkman of the Appellate Division remarked in oral argument, "It's obvious that the prosecutor who tried this case was saying things for the purpose of winning it."[39]

For that reason, summation misconduct is not trivial or a "mere technicality." Summation misconduct increases the likelihood of a guilty verdict—and of the prosecutor winning their case. However, the prosecutor's role in a criminal trial is not just to win the case: the law requires that prosecutors "seek justice…not merely to convict."[40] In this role, the law requires of prosecutors "to see that the defendant is accorded procedural justice."[41] Winning a case through summation misconduct violates this fundamental obligation. The American Bar Association's own ethical standards insist that "prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office."[42]

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[36] *Ashwal*, 39 N.Y.2d at 109.

[37] *People v. Payne,* 187 A.D.2d 245, 247 (4th Dep't 1993).

[38] *Velez*, 2014-09698, Oral Argument at 0:46:55-0:48:05.

[39] *Cherry,* 2014-10909*,* Oral Argument at 0:27:45-0:28:13.

[40] American Bar Association, Standard 3-1.2 Functions and Duties of the Prosecutor (2017) ("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/.

[41] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

Improper summations have been a particular problem at the Queens District Attorney's Office in recent years, distorting numerous trials, and sometimes resulting in reversal. As Justice Miller of the Appellate Division stated in oral argument:

> I could read this summation and without knowing what office it is from would say it is from Queens. That's the reputation that your office is building with this court. Because this [summation misconduct] happens repeatedly.[43]

Similarly, commenting on the Queens District Attorney's Office's opening and closing statement misconduct, Justice Austin of the Appellate Division stated in oral argument:

> I feel like a broken record because I address this every time. Almost every time the Queens DA is before us . . . When do we say to your office, enough is enough? . . . I've got to tell you, it distresses me to no end, the line that you consistently cross. Consistently! . . . You always agree [that these remarks are improper] when you're here [in the Appellate Division]. But you keep doing it and you keep doing it and you keep doing it … I've heard somebody from your office standing there every time I've been here saying the same exact thing [agreeing remarks were improper]. And I'm here 9 years this week. It's 9 years of the same thing.[44]

Justice Leventhal, in turn, suggested that the Queens District Attorney's Appeals Bureau train the trial prosecutors about summation misconduct.[45]

Professor and former prosecutor Bennett Gershman highlights the broad shadow that summation misconduct continues to cast over the entire criminal justice system:

> The problem is not new … [M]isconduct by prosecutors in oral argument has indeed become staple in American trials. Even worse, such misconduct shows no sign of abating or being checked by institutional or other sanctions … Virtually every federal and state appellate court at one time or another has bemoaned the 'disturbing frequency' and 'unheeded condemnations' of flagrant and unethical prosecutorial behavior.[46]

Despite the courts' clear prohibition of summation misconduct, prosecutors often ignore the law in an attempt to win their cases.

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[42] Commentary, Criminal Justice Standards Comm., Am. Bar Ass'n, Standards for Criminal Justice: Prosecution and Defense Function Standards 3-5.8 (3d ed. 1993).

[43] *Velez*, 2014-09698, Oral Argument at 0:48:30-0:49:00.

[44] *Cherry,* 2014-10909*,* Oral Argument at 0:26:34-0:29:31.

[45] *Velez*, 2014-09698, Oral Argument at 0:49:30-0:50:15.

[46] Bennett L. Gershman, *Prosecutorial Misconduct*. § 11:1. Introduction (2d ed.) (August 2018 update) (internal citations omitted.) Gershman is a former New York prosecutor. See also Daniel S. Medwed, *Closing the Door on Misconduct: Rethinking the Ethical Standards that Govern Summations in Criminal Trials*, 38 Hastings Const. L. Q.915 (2011).

C. 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.[47] 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.[48]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions "would provide an antidote to prosecutorial misconduct"[49]—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 disciplined.[50]

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."[51] "It's an insidious system," said Marvin Schechter, then-

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[47] *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").

[48] *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).

[49] 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).

[50] 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).

[51] 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).

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."[52]

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.[53] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[54] But even a short suspension like that received by Rain and Kurtzrock[55]—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 Chao will continue unabated and undeterred.

2. The Appellate Division and the Federal District Court Found That Chao Improperly Remarked on the Defendant's Silence in *People v. Scott.*

Chao's known trial misconduct begins with Scott's trial in 2008.[56] Upon appeal, Chao's colleagues—the appellate prosecutors—conceded that Chao improperly remarked on Scott's silence, writing that "[t]hough it is error for a prosecutor to refer at trial to a defendant's post-arrest silence," Chao's error was harmless.[57] The Appellate Division, with a sparse remark, concluded that Scott "correctly contend[ed]" that Chao's cross-examination was improper.[58]

After the denial of his appeal, Scott filed for habeas relief. While Scott was ultimately unsuccessful, the federal District Court was much more expansive in its rebuke of Chao's

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[52] *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.

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

[54] *Matter of Kurtzrock*, 192 A.D.3d 197 (2d Dep't 2020).

[55] 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)

[56] The *Scott* decision does not name Chao as the trial prosecutor. However, pages from the trial transcript identify Chao by name. *Scott* Trial Transcript at 491-92.

[57] Ex. A2, Br. for Resp't at *40.

[58] Ex. A, *Scott*, 85 A.D.3d at 827. Prosecutors cannot use a defendant's pretrial silence in their direct case. *People v. Conyers*, 49 N.Y.2d 174, 177 (1980); *People v. Pavone*, 26 N.Y.3d 629, 638-39 (2015). This rule applies to both post-arrest and prearrest silence. *People v. DeGeorge*, 73 N.Y.2d 614, 618-19 (1989). In the vast majority of cases, prosecutors cannot use pre-arrest silence for impeachment. *Id. See also People v. McArthur*, 101 A.D.3d 752, 753 (2d Dep't 2012) (prosecutor improperly commented on defendant's pretrial silence).

misconduct. The District Court concluded that "[t]here is no doubt that [Chao] violated Scott's constitutional rights when she cross-examined him about his post-arrest-silence."[59] The District Court enumerated the different improper questions that Chao asked of Scott:

- "[A]t the point that the police came, correct, you were the victim and you had property that Hector gave you? You supposedly saw the police stop Hector, since you were the victim, did you tell the police, he gave me those rings?"
- "[S]o when the police were supposedly by Hector Santana, and he told you to shut up, you didn't say a word?"
- "[A]nd you didn't tell the police there goes the guy who gave me those two watches?"
- "[Y]ou are telling me you were arrested for a crime you didn't commit and yet you wouldn't tell the police that Hector gave you stolen property, and you sit there and not talk to the police."[60]

Moreover, the District Court noted, when the trial court sustained an objection to the last of these questions, Chao, "undaunted," "snidely asked Scott 'You don't want to answer that?'"[61]

Chao did not limit her misconduct to cross-examination. The District Court noted that Chao made the following remarks in summation:

> [I]f that's not enough evidence look at the defendant's action. At the time that the police got out of the car he tried to go the other way. If he was really just holding onto Hector's watch and he saw Hector at the time that the police stopped him, you saw his demeanor on the stand. *You think that the police would have been able to shut him up? Absolutely not. He was on the stand and he kept talking and talking. You think the police, if they told him to be quiet, he would have?* And let Hector, the one who supposedly gave him the watch, go? His own actions are consistent with guilt.[62]

Because of these remarks, the District Court concluded that Chao had committed misconduct in her summation as well.[63]

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[59] Ex. A1*, Sheahan*, 2013 WL 3938501, at *8.

[60] *Id*.

[61] *Id.*

[62] *Id.* at *8. n. 7 (emphasis added).

[63] *Id.* at *8.

3. In *Collins,* Chao Again Raised the Defendant's Silence in Questioning and Summation; the Prosecution Conceded Chao's Misconduct on Appeal, but Successfully Argued that the Verdict Should Stand.

Chao's misconduct continued in Collins's trial,[64] where she cross-examined Collins on his pre-arrest silence, and then remarked on this silence in her summation.[65] Chao's colleagues on appeal conceded that her cross-examination and summation constituted misconduct:

> [Chao's] *improper* cross-examination of defendant, and her *improper* references in summation to defendant's pre-trial silence, passed without objection…should this Court choose to examine the unpreserved *prosecutorial errors*…the *prosecutorial misconduct* can safely be said beyond a reasonable doubt not to have affected the verdict.[66]

Chao's questioning of Collins explains why Chao's appellate colleagues conceded misconduct. Chao asked of Collins,

- "[Y]ou saw the police arriving at White Castles?"
- "You didn't go up to the police?"
- "[D]id you tell the police that Perry beat you up?"
- "[D]d you tell the officer look what he did to me?"
- "[You didn't tell the police, l]ook what's on my shirt?"
- "You didn't go up to the police and tell the police this is the gun that I used to try to defend myself, look it's a fake pellet gun, right?"
- "You just got your face bashed in, but yet you can't call the police and tell the police when they arrived?"[67]

As in *Davis*, infra, Chao continued to argue the defendant's silence in summation. Chao argued that Collins should not be believed because Collins "never filed a complaint" with the police.[68] She then continued to highlight the pre-arrest silence:

> [Collins] [n]ever calls the police. The defendant never calls the police, never goes to the precinct, never files a complaint… He could have at any point ran in to the police officers and told the officers this is what happened, look what they did to me… Members of the

[64] The *Collins* decision does not name Chao as the trial prosecutor. However, the trial transcript identifies Chao by name. *Collins* Trial Transcript at 1091. Note that the *Collins* Trial Transcript notes the indictment number as 180-08, which appears to be mistaken. The correct indictment number appears to be 1820-08, as used in the prosecution's appellate brief. Ex. B1, Br. for Resp't.

[65] Ex. B, *Collins*, 109 A.D.3d 482. Prosecutors cannot use a defendant's pretrial silence in the direct case. *Conyers*, 49 N.Y.2d at 177; *Pavone*, 26 N.Y.3d at 638-39. This rule applies to both post-arrest and prearrest silence. *DeGeorge*, 73 N.Y.2d at 618-19. In the vast majority of cases, prosecutors cannot use pre-arrest silence for impeachment. *Id. See also McArthur*, 101 A.D.3d at 753 (prosecutor improperly commented on defendant's pretrial silence).

[66] Ex. B1, Br. for Resp't at *51, *55 (emphasis added).

[67] *Collins* Trial Tr. at 992:11-993:14, 999:9-11.

[68] *Id.* at 1074:19-20.

> jury, the reason why he didn't report it to the police is because he was the perpetrator of the crime, not the victim.[69]

In its decision, the Appellate Division accepted the prosecution's appellate argument that Chao's misconduct did not impact the verdict, concluding that "any error resulting from the prosecutor's use of the defendant's prearrest silence for impeachment purposes was harmless."[70] While the Appellate Division declined to find an error that required a remedy, like Chao's colleagues, the court abstained from exonerating Chao or finding her conduct to be proper.[71]

4. In *Davis,* the Appellate Division Yet Again Found That Chao Committed Misconduct When She Remarked on the Defendant's Silence in Summation.

In June 2013—*after* the Appellate Division had found Chao committed misconduct in *Scott* (June 2011) and *after* Chao's own colleagues described her tactics in *Collins* as improper, erroneous, and prosecutorial misconduct (September 2012)—Chao committed the same misconduct, *again*.[72]

In her *Davis* summation,[73] Chao told the jury,

> And you know who else corroborates the testimony of [the witness]? The defendant. The defendant, his actions on August 21, 2010, his actions spoke louder than any of the testimony in this courtroom… If he was a true robbery victim and the police came, he could have, he would want the police to be present. And when he stated that he was robbed, and the officer asked him you want to file a complaint? Give me a description. He remained silent.[74]

On Davis's appeal, the Appellate Division vacated the conviction and remanded for a new trial because of the trial judge's extensive questioning of witnesses.[75] But even though it was reversing the conviction, the Appellate Division found it important to note that Chao made improper remarks on summation. The type of improper remarks is unsurprising—comments on the defendant's silence upon arrest.[76]

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[69] *Id.* at 1082:3-21.

[70] Ex. B, *Collins*, 109 A.D.3d 482.

[71] *See Id.*

[72] Prosecutors cannot use a defendant's pretrial silence in the direct case. *Conyers*, 49 N.Y.2d at 177; *Pavone*, 26 N.Y.3d at 638-39. This rule applies to both post-arrest and prearrest silence. *DeGeorge*, 73 N.Y.2d at 618-19. In the vast majority of cases, prosecutors cannot use pre-arrest silence for impeachment. *Id. See also McArthur*, 101 A.D.3d at 753 (prosecutor improperly commented on defendant's pretrial silence).

[73] The *Davis* decision does not name Chao as the trial prosecutor. However, the trial transcript identifies Chao by name. *Davis* Trial Transcript at 831.

[74] *Id.* at 861:11-862:1.

[75] Ex. C, *Davis*, 147 A.D.3d at 1079.

[76] *Id.* at 1079.

Most tellingly, in noting the improperness of Chao's conduct in *Davis*, the Appellate Division cited to *People v. Brisco*—another one of Chao's misconduct cases, discussed infra.

Though not addressed by the Appellate Division, Chao's *Davis* summation included other types of improper arguments, which Chao repeated in her subsequent prosecution of *Brisco*. In *Davis*, Chao impermissibly remarked that a witness, who did not testify at trial, "has nothing to offer," "adds nothing," and that his "testimony is of no value" because he "did not see [the security guard who testified for the prosecution] remove the gun."[77] With these remarks, Chao impermissibly acted as an unsworn witness;[78] impermissibly asked the jury to draw conclusions that were not fairly inferable from the evidence;[79] and impermissibly conveyed to the jury "the impression that evidence not presented to the jury, but known to [her], support[ed] the charges against" Davis.[80]

Still, in her *Davis* summation, Chao made the *same improper arguments* disparaging defense counsel that she would make—and be condemned for on appeal—in *People v. Brisco*. Using the same playbook as in *Brisco*, Chao remarked that defense counsel would have argued whatever worked given the evidence:

> Let's assume…[t]he DNA of the Defendant is on the gun. You think that's going to help you convict him anymore? You think [defense counsel] is going to get up here and say, members of the jury, my client's DNA is on the gun, therefore, convict him[?]… No. What's [sic] he going to say to you, of course my client's DNA is on the gun…it was a hot night…[H]e was sweating. The officers touched the defendant…and they must have transferred his sweat onto the gun.[81]

It is well established—and Chao must have known—that a prosecutor may not mischaracterize the defense's argument.[82] Yet here, Chao went even further, making up what defense arguments would have been. Moreover, the clear suggestion of these remarks was that defense counsel was unscrupulous and should not be trusted because he would say anything to get his client acquitted. Such personal attacks against defense counsel have been repeatedly condemned by courts.[83] None of that stopped Chao from making these remarks.

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[77] *Davis* Trial Tr. at 862:21-22, 862:25-863:1, 864:1-3.

[78] *See Singh*, 128 A.D.3d at 863.

[79] *See Ashwal*, 39 N.Y.2d at 109-10; *People v. Irving*, 130 A.D.3d 844, 846 (2d Dep't 2015) (asking jury to draw conclusions concerning complainant's action that were not fairly inferable from evidence).

[80] *United States v. Young*, 470 U.S. 1, 18-19 (1985). Such an impression jeopardizes the right to be tried solely by evidence presented at trial. *See also People v. Smith*, 288 A.D.2d 496, 497 (2d Dep't 2001) (improper for prosecutor to suggest uncalled witness would have corroborated complainant's testimony).

[81] *Davis* Trial Tr. at 873:11-24.

[82] *See People v. Whalen*, 59 N.Y.2d 273, 280-81 (1983) (reversible error when prosecutor knowingly misrepresented defense).

[83] *See People v. Baum*, 54 A.D.3d 605, 606 (1st Dep't 2008) (improper for prosecutor to remark that defense counsel was "speaking out of both sides of her mouth"); *People v. Rivera*, 116 A.D.2d 371, 374 (1st Dep't 1986).

5. In *Brisco,* the Appellate Division Reversed the Conviction Because Chao's Misconduct Deprived the Defendant of a Fair Trial.

By the time of Brisco's trial in December 2013, Chao had been publicly rebuked by the Appellate Division, the federal district court, and her own office's appellate filings. Undeterred, Chao again committed extensive misconduct. The Appellate Division held that Chao's improper comments in summation were so egregious that they "deprived [Brisco] of a fair trial," requiring a reversal of the conviction.[84] Chao's misconduct spanned several different types, or categories, of improper remarks.

First, as in *Davis*, Chao "directly attacked defense counsel's role and his integrity."[85] Echoing her misconduct in *Davis* almost word for word, Chao told the jury,

> [S]uppose for one second that defendant's DNA was on that gun. You think [defense counsel is] going to get up and say to you find my client guilty[?]… You think [defense counsel is] going to concede because his client's DNA is on the gun that he's guilty? No, he's going to say, ["]of course, his DNA is on the gun. He was sweating. The officer placed him under arrest and when the officers touched him and touched the gun they transferred his DNA onto the gun.["][86]

The Appellate Division explained that Chao's "hypothetical" in fact "bore no relation to the evidence in the case" and served as an impermissible attack "on the legitimacy of defense counsel's role."[87] "We strongly disapprove of this attack," the Appellate Division noted.[88]

Second, Chao "improperly referenced facts not in evidence in order to call for speculation by the jury."[89] For instance, she asserted that because "officers 'did their jobs,' 'fortunately, nothing happened.'"[90] This comment—along with an assertion that Brisco possessed a loaded gun while families from nearby buildings were cooking and celebrating the holiday—also "improperly appealed to the jury's sympathies and generalized fear of crime."[91] These comments also improperly suggested that Brisco "intended to commit crimes with which he was not charged."[92]

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[84] Ex. D, *Brisco*, 145 A.D.3d at 1030. The decision does not name Chao as the trial prosecutor. However, the trial transcript identifies Chao by name. *Brisco* Trial Transcript at 673.

[85] Ex. D, *Brisco*, 145 A.D.3d at 1029. Such attacks are generally impermissible. *See Baum*, 54 A.D.3d at 606 (1st Dep't 2008) (improper for prosecutor to remark that defense counsel was "speaking out of both sides of her mouth"); *People v. Davis*, 23 A.D.3d 833, 835 (3d Dep't 2005) (prosecutor's challenge to the "guts" of defense counsel had "no place in a criminal trial").

[86] *Brisco* Trial Tr. at 726:4-14.

[87] Ex. D, *Brisco*, 145 A.D.3d at 1029.

[88] *Id.* at 1029.

[89] *Id.* References to facts not in evidence, thus eliciting speculation, are impermissible. *See People v. Brown*, 256 A.D.2d 414, 416 (2d Dep't 1998).

[90] Ex. D, *Brisco*, 145 A.D.3d at 1029-30.

[91] *Id.*

Third, Chao "misstated critical testimony provided by a defense witness, alleging that certain facts were 'undisputed' when in fact they were disputed."[93] An officer had observed on a security monitor a suspect wearing a tan "fisherman's" hat and holding a gun.[94] When officers arrived, they alleged that they found Brisco wearing such a hat—but they did not recover such a hat.[95] A defense witness testified that Brisco had been wearing a tan "baseball" hat the day before, but could not recall if he had been wearing the baseball hat on the day of the incident.[96] The witness was present for Brisco's arrest and testified that another man, not Brisco, had been wearing a tan "fisherman's" hat that night.[97] Yet the facts were no barrier to Chao, who declared, "It's also undisputed that on that day [Brisco] was wearing a tan hat."[98] Whether Brisco had been wearing a tan fisherman's hat—a "critical" piece of evidence in a case of possible misidentification—was much disputed.

Fourth, Chao employed a classically improper "safe streets" argument.[99] Upon praising the officers for doing "their job," Chao advised the jury, "'[n]ow it's your turn to uphold your oaths as jurors and do your jobs' by finding the defendant guilty."[100] As the Appellate Division noted, "safe streets" arguments are "inflammatory and [have] repeatedly been disapproved by the courts."[101]

Finally, Chao improperly suggested that Brisco's *appearance* indicated his guilt.[102] Specifically, she "compared [Brisco's] in-court demeanor and appearance to how he appeared on the night of his arrest in order to argue that the jury should not be fooled into considering him a 'gentleman.'"[103] Chao even "went so far as to point to [Brisco's] precinct photo and stated that his appearance there represented his *'true colors.'*"[104]

Reversal based on summation misconduct is highly unusual. That the Appellate Division would vacate a conviction solely because of a prosecutor's remarks emphasizes just how egregious Chao's conduct was.

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[92] *Id.*

[93] *Id.* at 1029.

[94] Brief for Appellant *Brisco* at 4-5.

[95] *Id.* at 5.

[96] *Id.* at 56.

[97] *Id.* at 5.

[98] *Brisco* Trial Tr. at 709:4-5.

[99] Ex. D, *Brisco*, 145 A.D.3d at 1030.

[100] *Id.*

[101] *Id. See also People v. Jackson*, 199 A.D.2d 535, 535 (2d Dep't 1993).

[102] Ex. D, Brisco, 145 A.D.3d at 1030.

[103] *Id.*

[104] *Id.* (emphasis added).

6. The Grievance Committee Must Discipline Chao 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."[105] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[106] Grievance Committees are "committed to … recommending discipline for lawyers who do not meet the high ethical standards of the profession."[107]

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."[108]

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."[109]

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."[110] 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.[111] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[112] 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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[105] *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.

[106] 22 N.Y.C.R.R. Part 1240.

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

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

[109] *Kurtzrock*, 192 A.D.3d 197.

[110] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

[111] 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/.

[112] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b).

A. Chao's Misconduct in Summation Violated the New York Rules of Professional Conduct.

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.[113] 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.*'"[114]

In New York, professional misconduct for an attorney includes any violation of the New York Rules of Professional Conduct. Chao's repeated improper remarks constituted professional misconduct.

Under Rules 8.4(d) and 8.4(h), a lawyer shall not engage in conduct that is prejudicial to the administration of justice or engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.[115] Summation misconduct violates these rules. The Court of Appeals has stated that a prosecutor's improper statements in summations amount to prosecutorial misconduct.[116] The Appellate Division has affirmed that a prosecutor's summation misconduct violated Rule 8.4, as the remarks were "prejudicial to the administration of justice" and constituted "conduct adversely reflecting on her fitness as a lawyer."[117]

Chao's improper misconduct was prejudicial to the administration of justice, as it repeatedly violated several of the fundamental rules of summation set forth by appellate courts. As such, Chao's remarks violated Rule 8.4(d). At the same time, by making these remarks, Chao demonstrated she is not fit to be a lawyer. She violated Rule 8.4(h).

B. For Her Misconduct, Chao 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."[118] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[119]

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

[114] *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]).

[115] 22 N.Y.C.R.R. Part 1200, Rule 8.4.

[116] *Wright*, 25 N.Y.3d at 780.

[117] *Rain*, 162 A.D.3d at 1459.

[118] 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/.

[119] *Id.*

Chao's documented misconduct demonstrates that Chao did not change her behavior in the face of sharp rebukes by the Appellate Division, the federal District Court, and her own appellate colleagues. Chao seemingly began her career as a prosecutor in 2001, and presumably had about seven years of prosecutorial experience when she committed misconduct in *Scott* and, a year later, in *Collins*. That experience did not stop her from committing misconduct. While litigating *Davis*, with the benefit of her colleagues' appellate concessions and the Appellate Division's explicit finding, Chao committed the same misconduct yet again. Several months later, while trying Brisco and after the District Court published its opinion repudiating Chao's conduct further, Chao again committed extensive misconduct.

Chao's training and experience was seemingly insufficient to redirect her toward proper conduct. Instead of suffering any repercussions for these violations, Chao is now working as a court attorney, interpreting the law and creating new law, even though she ignored the law and violated it as a prosecutor.

Chao's misconduct did not occur in a vacuum. As discussed above, the Appellate Division has found several ethical violations by Queens prosecutors. Appellate Division case law is replete with rebukes of Queens prosecutorial summations. These have been apparently insufficient to effect a change of prosecutorial behavior—in Queens or elsewhere.

Though the ethical rules may be obscure to the general public, attorneys must know and follow them. In 2011, the District Attorneys Association of the State of New York mailed an ethical guide to *every prosecutor in the state* warning prosecutors to comply with the ethical rules and even specifically quoting Rule 8.4 - the rule that Chao violated.[120]

Because direct, published rebuke by the courts has failed, professional discipline, through the Grievance Committee, is the only remaining mechanism to hold Chao, and prosecutors like her, accountable. "The purpose of a sanction in a disciplinary proceeding is…to protect the public, to deter similar conduct, and to preserve the reputation of the Bar."[121]

Without appropriate sanctions, this Committee will derelict its duty and send a message—to prosecutors, defense attorneys, the courts, defendants and the public at large—that it does not take prosecutorial misconduct seriously. Only a strong message from the Grievance Committee can hold Chao accountable and minimize repeated occurrences of this misconduct by other prosecutors.

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

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[120] "*The Right Thing" - Ethical Guidelines for Prosecutors*, District Attorneys Association of the State of New York (August 2012) http://www.daasny.com/wp-content/uploads/2014/08/Ethics-Handbook-9.28.2012-FINAL1.pdf. Note that this is the 2012 version. The introductory letter states that in 2011, the Ethics Handbook was mailed to "every District Attorney and Assistant District Attorney in the state." It is unclear if this version is the exact same as the 2011 version that was mailed.

[121] *Malone*, 105 A.D.2d at 460.

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.

The Grievance Committee must disbar Chao.

Conclusion

Prosecutorial misconduct in summation has a devastating impact on due process and the right to a fair trial. It is a long-standing, largely unaddressed problem in the court system. Here, even though multiple decisions found that Chao acted improperly, to these writers' knowledge, Chao remains unsanctioned publicly for her misconduct. We are not aware of any professional or employment repercussions for her misconduct.

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 Chao. 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 Chao's other cases where the issue of misconduct was raised in the courts before trial, at trial, or on

[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].

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 Chao 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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