May 3, 2021

Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
Renaissance Plaza
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Re: Grievance Complaint Regarding Attorney Therese Lendino, State Bar No. 1873629.

To the Grievance Committee,

Therese Lendino[1] committed serious prosecutorial misconduct in the prosecution of Eric Jenkins. In order to bolster a key witness's credibility, Lendino misrepresented her intentions to the court; she failed to correct what she knew to be false testimony by her key witness; she attempted to block the defense from correcting the false testimony; she reinforced the false testimony through re-direct; and she used the false testimony in her summation.[2] Lendino did all of this in a murder prosecution, when Jenkins was facing the prospect of life in prison. Instead of safeguarding his due process rights, as the law required of her,[3] Lendino violated Jenkins's rights.[4] The Second Circuit, finding all of the above, granted habeas relief and reversed the conviction.[5]

Even though the Second Circuit made Lendino's serious misconduct public in its decision, the Queens District Attorney's Office did not even *informally* admonish Lendino.[6] Instead,

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[1] Therese Michele Lendino, State Bar. No. 1873629, Queens District Attorney's Office, 125-01 Queens Blvd., Kew Gardens, New York 11415. Phone: (718) 286-6000. Email: tmlendino@queensda.org. We do not have personal knowledge of any of the facts or circumstances of Lendino or the cases mentioned; this grievance is based entirely on the court opinions, briefs and other documents cited herein.

[2] Exhibit A, *Jenkins v. Artuz*, 294 F.3d 284 (2d Cir. 2002). Available at: https://casetext.com/case/jenkins-v-artuz-2**.** The decision identifies Lendino as the trial prosecutor. *Id.* at 287.

[3] *See, e.g., Connick v. Thompson,* 563 U.S. 51, 65-66 (2011) (prosecutors have a special duty to seek justice, not merely to convict."); 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary) (prosecutor is a "minister of justice," responsible to guarantee "procedural justice and that guilt is decided upon the basis of sufficient evidence.").

[4] Ex. A, *Jenkins*, 294 F.3d at 294 ("ADA Lendino's attempt to hide Morgan's plea agreement from the jury and to use the false impression of its absence to bolster his credibility leaves us with no doubt that her behavior violated Jenkins's due process rights.").

[5] *Id.* at 297.

[6] Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 Fordham L. Rev. 537, 566 n.263 (2011) (citing to Lendino's deposition). Available at: https://fordhamlawreview.org/wp-content/uploads/assets/pdfs/Vol_80/Rudin_November.pdf.

Lendino rose through the prosecutorial ranks, becoming a Deputy Bureau Chief and then a Bureau Chief.[7]

Lendino'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.[8] 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.[9] The Appellate Division has repeatedly criticized Queens prosecutors' improper summation conduct and advised that the Office better train its trial prosecutors.[10] 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.[11] Lendino'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 the Grievance Committee hold prosecutors accountable for their misconduct. Despite the findings of misconduct noted in this grievance, as of the writing of this submission, the New York Attorney Detail Report lists "Disciplinary History: No record of public discipline" for Lendino.[12] The Grievance Committee must discipline Lendino for her serious misconduct.

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[7] Joe Walker, "They Love This Verdict," *New York Post*, July 25, 2011. We do not know Lendino's current position at the Queens District Attorney's Office. She remains listed at QDAO on the NY Attorney Directory website.

[8] *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.

[9] 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).

[10] *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.

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

[12] *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.[13] 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.[14]

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."[15] 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."[16]

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.[17] 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."[18] 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.[19] As the *New*

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[13] *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.").

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

[15] *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).

[16] 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.

[17] *Id.*

[18] *Id.*

[19] *Id.*

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."[20]

B. 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.[21] 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.[22] Prosecutors possess a "special duty" not to mislead a judge, jury, or defense counsel.[23]

C. Summation Misconduct is Pernicious and Widespread.

In closing ("summation") arguments, the prosecutor's task is to explain how trial evidence applies to the legal elements of the charged offenses. Thus, prosecutors "must stay within the four corners of the evidence"[24] and are not permitted to make arguments that rely on facts that are not in evidence.[25] Prosecutors are not permitted to engage in prejudicial or misleading argumentation that are sometimes referred to as "cardinal sins."[26] These missteps include making "irrelevant and inflammatory comments;"[27] expressing "personal belief or opinion as to the truth or falsity of any testimony or evidence,"[28] also known as vouching; appealing to the jurors'

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[20] 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.

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

[22] 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)

[23] 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.")

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

[25] *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).

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

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

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

sympathies or fears;[29] shifting the burden from the prosecution to the defense;[30] and denigrating the defense, defense counsel or the defendant.[31] Engaging in these prejudicial forms of arguments is improper and can violate the constitutional right to a fair trial.[32]

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."[33] 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.[34]

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."[35] 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."[36]

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

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[29] *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).

[30] *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).

[31] *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).

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

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

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

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

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

> 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?[37]

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."[38]

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."[39] In this role, the law requires of prosecutors "to see that the defendant is accorded procedural justice."[40] 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."[41]

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.[42]

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

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

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

[39] 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/.

[40] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

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

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

> 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.[43]

Justice Leventhal, in turn, suggested that the Queens District Attorney's Appeals Bureau train the trial prosecutors about summation misconduct.[44]

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.[45]

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

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.[46] 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.[47]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions "would provide an antidote to prosecutorial misconduct"[48]—has not been borne out. A 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct

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

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

[45] 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).

[46] *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").

[47] *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).

between 1963 and 2013. Of those, only 63 prosecutors—less than 2 percent—were ever publicly sanctioned.[49]

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."[50] "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."[51]

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

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[48] 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).

[49] 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).

[50] 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).

[51] *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.

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

[53] *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

[54] 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)

2. The Federal District Court and the Second Circuit Found Lendino Committed Serious Prosecutorial Misconduct When She Elicited and Used False Testimony.

Some background is helpful in explaining Lendino's misconduct. Mr. Jenkins was arrested and charged with murder in 1992.[55] During Jenkins's first trial, Lendino's predecessor on the case, prosecutor Solomon Landa, entered into an oral plea agreement with witness Morgan.[56] Pursuant to the agreement, Morgan would testify against Jenkins that same day, in exchange for a sentence of six months' imprisonment and five years' probation on his two outstanding, and unrelated, drug cases.[57] Jenkins's attorney objected that he had not been warned of Morgan's plea, and the trial judge declared a mistrial, citing Landa's "prosecutorial misconduct" in suppressing exculpatory evidence—the agreement—from the defense.[58]

Thus, when Lendino took over the case from Landa for the second trial, she was on notice that prosecutorial misconduct had already delayed the case and prejudiced Jenkins. Consequently, at the onset of the second trial, Lendino acknowledged the plea agreement with Morgan, and stated she expected to elicit information about the plea on Morgan's direct examination.[59]

There was no physical evidence linking Jenkins to the crime.[60] Instead, Lendino relied on only two witnesses to tie Jenkins to the murder—Napoleon and Morgan.[61] Napoleon was the only eyewitness to the shooting to testify at trial, but inconsistencies plagued his testimony,[62] and other evidence elicited by the defense further undermined his credibility.[63] Napoleon's testimony was therefore "weak or problematic."[64] Although not an eyewitness, Morgan's testimony was key to Lendino's prosecution, because he was to testify to Jenkins's motive to commit the crime.[65]

Thus, in the face of Napoleon's credibility issues, Lendino's ability to win a conviction rested heavily on Morgan and the jury's assessment of his credibility. But Morgan's plea agreement posed a problem: a jury could believe that Morgan had fabricated, or tailored, his testimony to implicate Jenkins, to get the benefit of a better sentence. Such an inference would diminish his credibility, leaving Lendino without credible evidence to win a conviction. Indeed, the Second Circuit recognized that Morgan's credibility was "a vital issue" in the trial.[66]

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[55] Ex. A, *Jenkins,* 294 F.3d at 287.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 295.

[61] *Id.* at 287.

[62] *Id.* at 287-88.

[63] *Id.* at 289.

[64] *Id.* at 295.

[65] Ex. A, *Jenkins* at 288.

Consequently, on direct-examination, and in complete contrast with her early assurance to the court, Lendino "asked Morgan no questions about his plea agreement with the State."[67] In the face of Lendino's failure to act on her assurance, Jenkins's attorney attempted to elicit the existence of the plea agreement from Morgan during cross-examination.[68] However, "Morgan falsely denied its existence."[69] At one point during the cross-examination, as Jenkins's attorney again attempted to elicit the plea's existence from Morgan, Lendino actually *objected* that the question had been "[a]sked and answered."[70] Only when confronted with his previous testimony did Morgan concede the plea's existence, but still he maintained it "wasn't no deal," only "what they offered me."[71]

On re-direct examination, instead of attempting to correct Morgan's "at-best-ambiguous testimony" about the plea—Lendino "reenforced [sic] the impression that no agreement existed."[72] After that line of questioning, Lendino rested.[73]

In her summation, Lendino "reminded the jury of Morgan's testimony on the absence of a deal between them."[74] She told the jury, Morgan "sold drugs twice, he got arrested, he pleaded guilty, he went to jail. Never met me before he testified, never made a deal with me."[75] Furthermore, Lendino suggested to the jury that Morgan had no personal motive in testifying: "Why should [Morgan] lie? What is the motive for [Morgan] to lie? You didn't hear anything about any bad blood between [Morgan] and the defendant. Why lie if there's no reason to lie?"[76]

The jury convicted Jenkins.[77] After extended appellate litigation, the Second Circuit affirmed the District Court's grant of habeas relief and overturned the conviction.[78] Both District and Circuit courts based this reversal exclusively on Lendino's blatant and egregious misconduct.[79]

The Second Circuit enumerated the many problems in Lendino's conduct. After Morgan's "at-best-ambiguous testimony"[80] about the plea, "Lendino did nothing to correct this false

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[66] *Id.* at 295.

[67] *Id.* at 288.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 293.

[72] *Id.* at 289.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 297.

[79] *See, e.g.*, *Id.* at 292, 294 (Lendino's conduct "leaves us with no doubt that her behavior violated Jenkins's due process rights").

[80] *Id.* at 289.

impression."[81] Quite the opposite: Lendino "further misled the jury."[82] First, by seeking "to foreclose defense counsel's inquiry into the plea agreement" through an objection.[83] Second, by eliciting Morgan's testimony on redirect that he had never met Lendino before that day, and that he had not made any plea deals with her.[84] This was technically correct, but "surely misleading,"[85] because Morgan had entered into an agreement with Lendino's colleague, Landa. In this way, Lendino "thwarted" the defense's attempt to correct the false testimony.[86]

Lendino's summation, the Second Circuit determined, was just as problematic. Lendino "bolstered" Morgan's credibility—on which her ability to win a conviction hinged—by "falsely suggesting the absence of a deal between Morgan and the prosecution."[87] She stated, "[Morgan] sold drugs twice, he got arrested, he pleaded guilty, he went to jail. Never met me before he testified, never made a deal with me."[88] Noting that there was no "bad blood between [Morgan] and the defendant," Lendino suggested that Morgan had no motive to lie.[89]

It is important to dwell on the Second Circuit's ascription of a *mens rea* to Lendino, because it is so unusual and so incriminating. Lendino "attempt[ed] to hide Morgan's plea" from the jury and attempted "to use the false impression" that no such plea existed to "to bolster" key witness Morgan's credibility.[90] The Second Circuit saw these actions for what they were: intentional and knowing tactics aimed at achieving an advantage at trial.

Although "[d]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice,"[91] Lendino did just that. Indeed, although on appeal the prosecution argued that Lendino's statements "merely clarified the facts,"[92] the Second Circuit found "no credible explanation for [Lendino's] conduct other than an attempt to reinforce Morgan's false testimony."[93] It then cited to the professional rules that prohibit the use of perjured testimony and false evidence, as discussed in the next section.[94]

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[81] *Id.* at 294.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* at 296.

[87] *Id.* at 294.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 292-93 (citing *Giglio v. United States*, 405 U.S. 150 (1972)).

[92] Ex. A, *Jenkins*, 294 F.3d at 296 n.2.

[93] *Id.* at 296.

[94] *Id.* at 296 n.2.

3. Further Litigation in Jenkins Revealed Another Apparently False Representation by Lendino.

After the Second Circuit granted habeas relief, the Queens District Attorney's Office unsuccessfully appealed to vacate that judgment.[95]

The Queens District Attorney's Office's unsuccessful claim alleged that the cooperation agreement with Morgan had become "void" for "lack of consideration" prior to the second trial.[96] Crucially, as part of this claim, the Queens District Attorney's Office's asserted that "Lendino learned these facts *while preparing* Morgan as a witness at the second trial."[97] It can be assumed that the Office made this claim upon representation from Lendino.

However, in Jenkins first trial, Lendino's re-direct examination of Morgan established that they had never met before:

> Q: [Morgan], have I ever met with you before today?
> A: No.
> Q: Did you make any deals with me?
> A: No.[98]

How could Lendino prepare Morgan for trial, but also never meet him? In other words, during the second trial, Lendino intentionally elicited testimony that she had never met Morgan before, as part of her deceitful misconduct. Follow-up litigation, however, revealed that Lendino had met with Morgan to prepare him for his testimony. Her question, then, contained another layer of misrepresentation that she both elicited and let stand.

This was not apparent to the Second Circuit because the contradictory facts arose only in later litigation. However, it reveals just how deeply deceptive Lendino's misconduct was.

4. The Grievance Committee Must Discipline Lendino 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."[99] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[100] Grievance Committees are "committed to … recommending discipline for lawyers who do not meet the high ethical standards of the profession."[101]

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[95] Exhibit B, *Jenkins v. Artuz*, 210 F. Supp. 2d 173 (E.D.N.Y. 2002). Available at: https://casetext.com/case/jenkins-v-artuz.

[96] *Id.* at 175 (quotations in original).

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

[98] Ex. A, *Jenkins,* 294 F.3d at 289.

[99] *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.

[100] 22 N.Y.C.R.R. Part 1240.

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."[102]

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."[103]

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."[104] 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.[105] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[106] 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.

A. Lendino's Misconduct Violated Rules of the New York 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.[107] 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.*'"[108]

The applicable professional set of rules in 1993,[109] when Lendino tried Jenkins, was the Code of Professional Responsibility. Rule DR 7-102(a)(4) prohibited attorneys from knowingly using

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

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

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

[104] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

[105] 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/.

[106] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b).

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

[108] *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]).

[109] *People v. Jenkins*, 230 A.D.2d 806, 806 (2d Dep't 1996).

perjured testimony or false evidence.[110] Rule DR 1-102 prohibited attorneys from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation."[111]

Lendino violated these rules multiple times: (i) she misrepresented her intention to elicit testimony about the agreement to the court before the trial; (ii) when Morgan testified falsely, Lendino did not correct the testimony, thus implicitly using false testimony; (iii) when defense counsel attempted to correct Morgan's testimony on cross-examination, Lendino attempted to thwart the correction of the record through an objection, an attempt to entrench the deception; (iv) on re-direct, Lendino tried to re-enforce the misrepresentation that no plea existed, in another attempt to deceive the jury and use the false testimony to bolster her case; and (v) in summation, Lendino used the false testimony. Lendino did these intentionally and knowingly, in order to obtain a trial advantage.

Lendino also violated the Code by prejudicing the administration of justice and conducting herself in a manner not befitting a lawyer. Rule DR 1-102 prohibited attorneys from engaging in conduct that was prejudicial to the administration of justice, or engaging in any other conduct that adversely reflected on their fitness to practice law.[112] An attorney's misrepresentation during a legal proceeding prejudices the administration of justice and reflects adversely on the lawyer's fitness, in violation of Rule DR 1-102.[113]

As discussed above, Lendino's use of false testimony and attempt to deceive the jury spanned multiple actions. Each one of those actions prejudiced the administration of justice and showed that Lendino is unfit to be a lawyer.

B. For Her Misconduct, Lendino Must 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."[114] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[115]

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[110] Code of Prof. Resp., DR 7-102(a)(4) (22 N.Y.C.R.R. § 1200.33) (repealed). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 3.4(a)(4) of the Rules of Professional Conduct replaced it in 2009.

[111] Code of Prof. Resp., DR 1-102 (22 N.Y.C.R.R. § 1200.3) (repealed). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 8.4(c) of the Rules of Professional Conduct replaced it in 2009. *See also In re Muscatello*, 87 A.D.3d 156, 158-59 (2d Dep't 2011) (prosecutor misrepresentation of content of evidentiary document to the grand jury violated Rule 8.4(c)).

[112] Code of Prof. Resp., DR 1-102 (22 N.Y.C.R.R. § 1200.3) (repealed). These rules were in effect when the misconduct, as outlined above, occurred. However, Rules 8.4(d) and (h) of the Rules of Professional Conduct replaced them in 2009.

[113] *In re Muscatello*, 87 A.D.3d 156, 158-59 (2d Dep't 2011) (prosecutor misrepresentation of content of evidentiary document to the grand jury violated Rules 8.4(d), (h), the modern equivalents of DR 1-102).

[114] 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/.

In measuring the appropriate discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in aggravation."[116] Simply being a prosecutor supports aggravated discipline because the law tasks prosecutors "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."[117] Similarly, extensive prosecutorial experience weights towards an aggravated sanction.[118]

Lendino entered the legal profession in 1983, meaning that by the time she made multiple attempts to deceive the jury in Jenkins's prosecution, she was already an experienced attorney. Deception is not excusable for any attorney, no matter what level of experience she has. This is even truer for a prosecutor, and especially for a prosecutor who is trying a person for murder—a charge that entails a possible life sentence. When the stakes are that high, all stakeholders must take care to protect due process to the highest degree. In such circumstances, intentional deception and misrepresentation are not forgivable.

The Grievance Committee must also discipline Lendino severely because of her supervisory role in the Queens District Attorney's Office. As early as 2008, Lendino served as a Deputy Bureau Chief, and by 2010, at the latest, she had risen in the ranks to become a Bureau Chief. These promotions came in the wake of the 2002 *Jenkins* decision that publicly found Lendino to have engaged in deceptive misrepresentation. In her leadership positions, Lendino supervised and trained dozens of new prosecutors, who presumably viewed her as a mentor and a role model. Thus, the Queens District Attorney's Office sent a message to its prosecutors that serious prosecutorial misconduct—even when called out publicly, explicitly and unequivocally by the *Second Circuit*—has currency in the office, and will serve as no barrier to advancement. One can only imagine what freedom of behavior, unconstrained by law and ethical standards, that message impressed on Queens prosecutors. The Grievance Committee must correct for this unethical, unprofessional and injurious messaging. It must send a strong and unequivocal signal that our profession does not tolerate such misconduct.

Just as prosecutors hold individuals accountable for crimes, so should the Grievance Committee hold prosecutors accountable for their misconduct. Although Lendino's misconduct was blatant, egregious and made public, she has never suffered professional or disciplinary repercussions. The Queens District Attorney's Office did not even *informally* admonish Lendino for her misconduct in *Jenkins*.[119] And as noted above, soon after the Second Circuit's decision, Lendino was promoted to the Deputy Chief position.

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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[115] *Id.*

[116] *Kurtzrock*, 192 A.D.3d 197; *See also Rain*, 162 A.D.3d at 1462 ("[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice.").

[117] *Id*.

[118] *Id*. *See also Rain*, 162 A.D.3d at 1461 (prosecutor's experience an aggravating factor).

[119] Rudin, *Three Case Studies That Prove That Assumption Wrong* at 566 n.263 (citing to Lendino's deposition).

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.

A prosecutor who deceives and misrepresents evidence to the court is unfit to practice law. Practicing law is a privilege, not a right. All of us—the legal profession, and society at large—can no longer trust Lendino to uphold her attorney obligations, to be truthful to the court, to prosecute justly or to supervise professionally and ethically. She violated the trust we put in her — as a professional, as an attorney, as a prosecutor—when she attempted to repeatedly deceive the jury in a murder trial. We cannot, and should not, give her the benefit of the doubt, or trust her with the privilege of practicing law any longer.

The Grievance Committee must disbar Lendino.

Conclusion

Lendino committed serious prosecutorial misconduct by intentionally deceiving the jury by eliciting and using perjured testimony and false evidence. In doing so, she violated the legal professional rules. To our knowledge, Lendino remains unsanctioned publicly or privately for her serious misconduct. Disbarment is the only appropriate sanction for this serious misconduct.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[120] 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."[121] 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 Lendino. 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."[122] Using its power to investigate, including to issue subpoenas and interview witnesses, the Committee can and should

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

[121] *Id.*

[122] Rule 8.3, Comment [1].

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 Lendino's other cases where the issue of misconduct was raised in the courts 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.[123]

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 Lendino and determine whether instances of prosecutorial misconduct can also be found in their work as prosecutors.

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[123] 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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