Attorney Grievance Committee
Supreme Court, Appellate Division
First Judicial Department
180 Maiden Lane
New York, New York 10038
AD1-AGC-newcomplaints@nycourts.gov

Re: Grievance Complaint Regarding Attorney Dustin Chao, State Bar No. 2806669

To the Grievance Committee,

We write to complain about the professional misconduct of attorney Dustin Chao[1] in prosecuting Ronald Moye.[2] We call on the Grievance Committee to seek Chao's suspension for this misconduct.

Ronald Moye was charged with a drug transaction. The defense challenged the police officer's claim to have seen a transaction and before the trial, the prosecution and police reenacted the alleged drug transaction, with the police officer witnesses, the prosecutor Chao, and a supervisor from the New York County District Attorney's Photography Unit. At trial, the police witness claimed that the drug transaction was visible at the reenactment—but was flatly contradicted by the New York County DA photographer, who said it was not. In his summation, Chao vouched for the police officer over the photographer, which the Appellate Division found was "an egregious violation of the unsworn witness rule."[3] Chao's peers even conceded the vouching on appeal.[4] Because of Chao's "highly prejudicial" misconduct, the Appellate Division reversed the conviction and ordered a new trial.[5] The Court of Appeals affirmed.[6]

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[1] Dustin Ming Chao, State Bar No. 2806669, United States Attorney's Office for the District of Massachusetts, One Courthouse Way, Boston, MA 02210. Phone: (617) 748-3100. The Unified Court System website does not list an email for Chao. Chao was admitted to the New York State in the First Department. These writers 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] *See* Exhibit A, *People v Moye*, 52 AD3d 1 (1st Dept 2008); Exhibit B, *People v Moye*, 12 NY3d 743 (2009). The Appellate Division decision identified Chao by his last name, while Moye's appellate brief identified Chao by his full name. *See* Exhibit C, Brief for Respondent at *2, in *People v Moye*, 12 NY3d 743 (2009), available at 2008 WL 5644060 (hereafter "Respondent Brief").

[3] *Moye*, 52 AD3d at 2.

[4] *Id.* at 7.

[5] *Id.* at 2.

[6] *Moye*, 12 NY3d at 744. The appellate courts did not resolve, and the Grievance Committee should investigate, which version was actually true and which was false. If the photographer's testimony was true, and the police officer's false, the Grievance Committee should investigate whether Chao, who was also present during the reenactment, knowingly presented false testimony from the police officer, committed a *Brady* violation, and deceived the court.

Chao was no novice prosecutor when he committed this misconduct. At the time, he had several years of experience, and was prosecuting serious felonies. Despite the finding 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.[7] Today, Chao seemingly continues to prosecute people, now as an Assistant United States Attorney in Massachusetts.[8]

Because of the egregious nature of the misconduct here, the Grievance Committee must recommend discipline for Chao.

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.[9] When any attorney errs, it can cause harm, typically to an individual person. But a prosecutor's misconduct can not only destroy a person's life, and that of their family, but also derail the legal system's promises of fairness and equality for all. When state actors harness the punitive power of the state in a manner that violates the state's own rules, it sends the message that power—not justice—is the driving force behind legal actions. A single prosecutor's misconduct can damage "the reputation and public confidence placed" in all prosecutors and the justice system itself.[10]

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."[11] 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."[12]

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[7] *See* New York Unified Court System, Attorney Online Services – Search, https://tinyurl.com/347srhpu [search by attorney Dustin Chao, click on Name hyperlink].

[8] *Id*.

[9] *Matter of Rain*, 162 AD3d 1458, 1462 (3d Dept 2018) ("[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice."); *see also* ABA Criminal Justice Standards: Prosecution Function 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.").

[10] *Rain*, 162 AD3d at 1462.

[11] *Berger v United States,* 295 US 78, 88 (1935) (emphasis added); *see also People v Jones*, 44 NY2d 76, 80 (1978) (quoting *Berger*, 295 US at 88); *People v Calabria*, 94 NY2d 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."); *People v Levan*, 295 NY 26, 36 (1945).

[12] Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody,* ProPublica (Apr. 3, 2013), https://tinyurl.com/t2ryucec.

But misconduct by prosecutors remains widespread and unchecked in the New York criminal legal system. A 2013 study of ten years of state and federal decisions revealed more than two dozen instances in which judges reversed convictions explicitly because of prosecutorial misconduct.[13] Yet these appellate courts "did not routinely refer prosecutors for investigation by the state disciplinary committees," and the disciplinary committees otherwise "almost never took serious action against prosecutors."[14] Indeed, among these numerous cases in which judges overturned convictions based on prosecutorial misconduct, only one prosecutor was publicly disciplined by a New York disciplinary committee.[15] None of the other implicated prosecutors were disbarred, suspended, or publicly censured and, according to personnel records gathered by ProPublica, several prosecutors were promoted and given raises soon after courts cited them for abuses.[16] As the *New York Times* Editorial Board wrote in 2018, "there's no reliable system for holding prosecutors accountable for their misconduct, and they certainly can't be entrusted with policing themselves."[17]

B. 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 stay within the four corners of the evidence"[18] and are not permitted to make arguments that rely on facts that are not in evidence.[19] Prosecutors are not permitted to engage in prejudicial or misleading argument, which is sometimes referred to as a "cardinal sin."[20] These missteps include making "irrelevant and inflammatory comments";[21] expressing "personal belief or opinion as to the truth or falsity of any testimony or evidence,"[22] also known as vouching; appealing to the jurors' sympathies or fears;[23] shifting the burden from the prosecution to the defense;[24] and

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[13] *Id.*

[14] *Id.*

[15] *Id.*; *see also In re Stuart*, 22 AD3d 131, 133 (2d Dept 2005) (holding, following a Grievance Committee disciplinary proceeding, that a prosecutor's misconduct warranted a three-year suspension from the practice of law).

[16] *See* Sapien & Hernandez.

[17] Editorial Board, *Prosecutors Need a Watchdog*, NY Times (Aug. 14, 2018), https://tinyurl.com/4ntvsv85.

[18] *People v Mehmood*, 112 AD3d 850, 853 (2d Dept 2013) (internal quotation marks and citation omitted).

[19] *People v Ashwal*, 39 NY2d 105, 109-110 (1976); *see also People v Wright*, 25 NY3d 769, 779-780 (2015); *People v Singh*, 128 AD3d 860, 863 (2d Dept 2015).

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

[21] *Mehmood*, 112 AD3d at 853.

[22] *People v Bailey,* 58 NY2d 272, 277 (1983) (quotation marks omitted).

[23] *See, e.g.*, *Ashwal,* 39 NY2d at 110; *People v Lindo*, 85 AD2d 643, 644 (2d Dept 1981); *People v Fernandez*, 82 AD2d 922, 923 (2d Dept 1981); *People v Fogarty*, 86 AD2d 617, 617 (2d Dept 1982); *People v Brown,* 26 AD3d 392, 393 (2d Dept 2006).

[24] *See, e.g.*, *People v DeJesus*, 137 AD2d 761, 762 (2d Dept 1988); *People v Lothin*, 48 AD2d 932, 932 (2d Dept 1975).

denigrating the defense, defense counsel or the defendant.[25] Engaging in these forms of arguments is prejudicial and improper and can violate the accused's constitutional right to a fair trial.[26]

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."[27] 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.[28]

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."[29] Countering the gamesmanship and instinct to win that overcome 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."[30]

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?… [W]hy 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?[31]

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[25] *See, e.g.*, *People v Damon*, 24 NY2d 256, 260 (1969); *People v Lombardi*, 20 NY2d 266, 272 (1967); *People v Gordon*, 50 A.D.3d 821, 822 (2d Dept 2008); *Brown,* 26 AD3d at 393; *People v LaPorte,* 306 AD2d 93, 95 (1st Dept 2003).
[26] *DeJesus*, 137 AD2d at 762.
[27] *People v Fielding*, 158 NY 542, 547 (1899).
[28] *People v Wolf*, 183 NY 464, 471-476 (1906) (emphasis added).
[29] *Ashwal*, 39 NY2d at 109.
[30] *People v Payne,* 187 AD2d 245, 247 (4th Dept 1993).
[31] Oral Argument at 0:46:55-0:48:05 in *People v Velez*, 164 AD3d 622 (2d Dept 2018), available at https://tinyurl.com/52jhn78a. (Justice LaSalle is now the Presiding Justice.) In *Velez*, the court ultimately found that the evidence of guilt was overwhelming so any impropriety did not affect the verdict. *See* 164 AD3d. at 622.

As the above statement of Justice LaSalle makes clear, prosecutors make improper arguments in summation because such arguments 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."[32]

For this 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 at trial is not just to win the case: the law requires that prosecutors "seek justice . . . not merely to convict."[33] In this role, the law requires of prosecutors "to see that the defendant is accorded procedural justice."[34] 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."[35]

Professor and former New York 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.[36]

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

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

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[32] Oral Argument at 0:27:45-0:28:13 in *People v Cherry,* 163 AD3d 706 (2d Dept 2018), available at https://tinyurl.com/4mc9hv26 or https://tinyurl.com/2wwtdwsm; *see also Cherry*, 163 AD3d at 707 ("We agree . . . that the prosecutor's comments in his opening statement about the grand jury's indictment were improper. The prosecutor's comments in his opening statement about the victim and his family, which could only have been intended to evoke the jury's sympathy, were also improper.").

[33] ABA Criminal Justice Standards: Prosecution Function Standard 3-1.2(b) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.").

[34] Rules of Professional Conduct 22 NYCRR 1200.0, Rule 3.8(b) (McKinney Commentary).

[35] ABA Criminal Justice Standards: Prosecution and Defense Function Standard 3-5.8 (1993).

[36] Bennett L. Gershman, Prosecutorial Misconduct § 11:1 (2d ed Aug. 2018) (internal citations omitted); *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).

when they neglect their duties, the absolute immunity doctrine shields prosecutors from civil accountability.[37] 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.[38]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions would "provide an antidote to prosecutorial misconduct"—has not been borne out.[39] 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.[40]

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."[41] 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."[42] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.[43] "Prosecutors engage in misconduct because they know they can get away with it."[44]

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[37] *See, e.g.*, *Imbler v Pachtman*, 424 US 409, 427 (1976); *Shmueli v City of New York*, 424 F3d 231, 237 (2d Cir 2005) (noting that prosecutors have "absolute immunity" for the "conduct of a prosecution"); *Dann v Auburn Police Dept*, 138 AD3d 1468, 1469 (4th Dept 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 NY2d 561, 562 (1982) (holding that "the doctrine of prosecutorial immunity" precludes "recovery against the State" for "acts of prosecutorial misconduct").

[38] *Imbler,* 424 US at 429; *see also Matter of Malone*, 105 AD2d 455, 459 (3d Dept 1984) (rejecting public official's claim to prosecutorial immunity in a professional ethics proceeding).

[39] *See* 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, 242–243 (2012).

[40] Center for Prosecutor Integrity, *An Epidemic of Prosecutor Misconduct* at 8 (Dec. 2013) https://tinyurl.com/rpxyadhb; *see also* Project On Government Oversight, *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards* (Mar. 2014), https://tinyurl.com/vjkfr2eh; 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 NC L Rev 721, 725 (2001) (describing the "rarity of discipline" of prosecutors).

[41] Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L Rev 51, 65 (2017).

[42] *Id.* at 65 (citation omitted); *see also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 NC L Rev 693, 697 (1987).

[43] Sapien & Hernandez.

[44] *Id.*

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.[45] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[46] But even a short suspension like that received by Rain and Kurtzrock[47]—indeed, public discipline of any kind—remains rare.

Prosecutors, the public officials tasked with holding the public accountable, are not being held accountable for their own misconduct. Absent strong, public discipline, misconduct like that of Chao will continue unabated and undeterred.

2. The Appellate Courts Vacated a Conviction Due to Chao's Egregious and Prejudicial Summation Misconduct.

A. In *Moye*, a Police Witness Was Directly Contradicted by the Supervisor of the District Attorney's Photography Unit and Chao Vouched for the Police Witness.

(1) Mistrial in First Prosecution

Chao prosecuted Moye for criminal possession of a controlled substance in the third degree, a felony.[48] Police officer Jeselson had allegedly seen Moye, in a car, hand his co-defendant drugs in exchange for money.[49] When backup officers reached the scene, they arrested Moye and his co-defendant, and found four packets of marijuana and $1,000 in cash inside the car.[50] At the trial, the defense argued that officers could not have seen any exchange based on where they claimed Moye's car had been and where they were at the time.[51] The first trial ended in a mistrial, as the jury could not reach a verdict.[52]

(2) Conflicting Testimony About the Police Officer's View of the Crime Scene

Before the second trial, Chao, Officer Jeselson, and Laura Badger took photos to recreate the scene of the alleged crime.[53] The Respondent's Brief about the 2003 *Moye* trial describes Badger

[45] *Rain*, 162 AD3d at 1462.

[46] *In the Matter of Glenn Kurtzrock*, 192 AD3d 197 (2d Dept 2020).

[47] 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 (Sept. 20, 2017), https://tinyurl.com/yhvmd43k; Bennett L. Gershman, *A Most Dangerous Prosecutor: A Sequel*, HuffPost (Oct. 1, 2016), https://tinyurl.com/fp9yfs8x; Nina Morrison, *What Happens When Prosecutors Break the Law?*, NY Times (June 18, 2018), https://tinyurl.com/52ar9tjx.

[48] *Moye*, 52 AD3d at 3.

[49] *Id.* at 6.

[50] *Id.* at 3.

[51] *Id.*

[52] *Id.*

[53] *Id.*

as a Supervisor in the District Attorney's Photographic Unit,[54] the same title given in a 2019 District Attorney's Office press release.[55]

Badger took photos purporting to show Officer Jeselson's vantage point from his observation post.[56] A second officer parked in the spot where Moye's car had allegedly parked on the night of the crime.[57] This second officer extended his hand from the car, to establish that Moye's drug exchange was visible from Jeselson's vantage point.[58]

At Moye's second trial, Officer Jeselson testified that during the reenactment, the second officer's hand was visible from the observation post.[59]

In contrast, the District Attorney employee Badger testified that it was *not possible to see the second officer's hand from the observation post*.[60] Badger added that during the reenactment, Officer Jeselson asked the driver of the police car to move the car to a different position—not the location where Moye had parked the car—where apparently the hand became visible.[61]

After Badger testified to this exculpatory observation, the court held a sidebar conversation with Chao and the defense.[62] Because Badger's testimony was exculpatory, and Badger was an employee of the District Attorney's Office, her account should have been turned over as *Brady* evidence. However, at the sidebar, Chao alleged that Badger was mistaken in her testimony, and claimed to be as surprised as anyone else by her testimony.[63] Based on Badger's revelation, however, the defense argued in summation that Officer Jeselson committed perjury in his testimony.[64]

(3) Chao's Summation Misconduct Included Acting as An Unsworn Witness to Shore Up the Police Testimony Called Into Question by the District Attorney's Own Employee.

In his summation, Chao responded to the defense argument by improperly acting as an unsworn witness and vouching for Officer Jeselson:

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[54] Respondent Brief at *5.

[55] The 2019 press release credits "Photography Unit Supervisor Laura Badger." *See* New York County District Attorney, D.A. Vance: All Defendants Convicted of Manslaughter For East Village Building Explosion (Nov. 15, 2019).

[56] Respondent Brief at *4.

[57] *Id.*

[58] *Id.*

[59] *Moye*, 52 AD3d at *4.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

> [Defense counsel] spoke about people on that roof. It's in evidence. Officer Jeselson was on that roof, the photographer Laura Badger was on the roof, *and I was on that roof*. Now, if he is directing something improperly, that is Officer Jeselson, well, *it's in front of me*.
>
> And if he knew he was going to get away with it when I say that's the opportunity, you know [defense counsel] talked about a lot of people losing their jobs about perjuring themselves, about the integrity of Robert Morgenthau's office. Well, if Officer Jeselson thought he was going to get away with it—
>
> [overruled objection]
>
> If Officer Jeselson thought he was going to get away with it with me present, all that talk about firing, *that should be me because I'm prosecuting this case*, not Officer Jeselson.
>
> [overruled objection]
>
> Ladies and gentlemen, Mr. Morgenthau should fire me if Officer Jeselson thinks he is going to be able to say that in court, lie to you, *when the person who is standing right next to him on that roof is me. Well, that lies with me*.
>
> So what's the explanation? If there's no motive, no opportunity for why Ms. Badger remembers it differently. Well, there's evidence that you heard the officer was on the roof. Evidence that you heard *I was on the roof also. I have no other answer other than the fact that she is mistaken . . . .*[65]

In other words, Chao argued that Officer Jeselson had not committed perjury because Chao himself was there and therefore knew Officer Jeselson was telling the truth. In addition, Chao implied that the officer was "unlikely" to engage in any impropriety in front of a prosecutor, so he must be telling the truth.[66]

At the end of the second trial, the jury convicted Moye. However, on appeal, the Appellate Division reversed the conviction based on Chao's summation argument, and the Court of Appeals affirmed.[67]

B. The Court Found that Chao Acted as an Unsworn Witness and Vouched for His Witness.

The Appellate Division found that in summation, Chao had "injected himself, his pretrial conduct and his credibility" into the trial, thus committing "prosecutorial misconduct."[68]

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[65] *Id.* at *5 (emphasis added).

[66] *Id.* at *7.

[67] *Moye*, 12 NY3d at 744.

[68] *Moye*, 52 AD3d at 2.

When a prosecutor vouches for the credibility of a witness or expresses personal opinions about a case, it is always improper. As the Court of Appeals has explained, a prosecutor "may not inject his own credibility into the trial" because of the "possible danger that the jury, impressed by the prestige of the office of the District Attorney, will accord great weight to the beliefs and opinions of the prosecutor."[69] Therefore, the prosecutor may not express his personal belief on matters that "may influence the jury," argue "his own credibility" on summation, "vouch[] for the credibility of the People's witnesses," or "suggest[] the existence of facts not in evidence."[70] Prosecutors may not vouch for the credibility of her own witnesses.[71]

But Chao's conduct consisted of a far more dangerous form of vouching, as Chao implicitly rendered himself a fact witness—immune from cross-examination—who had special, personal knowledge of the witness' veracity, and by extension, the defendant's guilt. The law prohibits such conduct.[72]

On appeal, the court explained that because Chao's summation "reference[d] to his own pretrial conduct," Chao himself became an unsworn witness which the defense could not cross-examine.[73] This misconduct was "an egregious violation of the unsworn witness rule."[74] Moreover, by referencing both his job as a prosecutor and his presence at the re-creation scene, Chao improperly drew on the "prestige" of his office to vouch for the credibility of Officer Jeselson.[75] This instance of vouching was so blatant that the prosecution, on appeal, conceded that

[69] *People v Paperno*, 54 NY2d 294, 300-01 (1981).

[70] *Id.*; *see also People v Lovello*, 1 NY2d 436, 439 (1956) (improper for prosecutor to "mak[e] himself an unsworn witness and support[] his case by his own veracity and position"); *People v Tassiello*, 300 NY 425, 430 (1950) ("the jury might reasonably have inferred that the prosecuting officer intended thereby to make known his personal knowledge, gained from undisclosed sources").

[71] *See United States v Young*, 470 US 1, 18-19 (1985) (holding it was misconduct for prosecutor to vouch for a witness); *People v Puglisi*, 44 NY2d 748, 750 (1978) (same); *Brown*, 26 A.D.3d at 293 (finding improper a prosecutor's remark that witnesses were "credible and accurate," "told you the truth," and "told you exactly how it happened"); *People v Valdivia*, 108 A.D.2d 885, 887 (2d Dep't 1985) (holding that it is "fundamental" that prosecutors not present their opinions about the veracity of witnesses); *People v Paul*, 229 A.D2d 932, 933 (4th Dept 1996) (holding prosecutorial vouching improper); *People v Hicks*, 102 AD2d 173, 183 (1st Dept 1984) (same).

[72] *People v Morgan*, 111 A.D.3d 1254, 1256 (4th Dep't 2013) ("[M]ost egregious misconduct occurred when she made herself an unsworn witness and injected the integrity of the District Attorney's office into the case").

[73] *Moye*, 52 AD3d at 8. *See People v Whalen,* 59 N.Y.2d 273, 281 (1983) (vouching improper); *Singh*, 128 AD3d at 863 (same).

[74] *Moye*, 52 AD3d at 2.

[75] *Id.* at 8; *see also Paperno*, 54 N.Y.2d at 300-01 (a prosecutor "may not inject his own credibility into the trial" because of the "possible danger that the jury, impressed by the prestige of the office of the District Attorney, will accord great weight to the beliefs and opinions of the prosecutor); *People v Walters*, 251 AD2d 433, 434-35 (2d Dept 1998).

Chao had done so.[76] Because of these "highly prejudicial" actions, the Appellate Division reversed the conviction and ordered a new trial.[77]

The Court of Appeals affirmed the reversal in a short opinion, noting that Chao improperly made himself an unsworn witness and, by doing so, vouched for his witness.[78]

C. The Grievance Committee Must Investigate Whether Chao Presented Perjured Testimony and False Evidence, Withheld Exculpatory Evidence, and Deceived the Court.

The courts' decisions leave an important question unanswered: what actually happened at the reenactment? Neither the Appellate Division nor the Court of Appeals directly resolved this crucial issue. The question is important for assessing whether Chao committed misconduct beyond the vouching and unsworn testimony mentioned above.

Moye's appellate brief argued the following conclusions based on witness Badger's testimony. First, Officer Jeselson's testimony that he saw the hand at the reenactment (and presumably during the charged incident) was false, as Badger testified that the hand could *not* be seen from the roof. Second, during the reenactment, an officer moved the vehicle to a different place so the hand could be seen, close-up photographs of the hand were taken, and then the car was re-positioned in the original place so wide-angle photographs could be taken "giving the impression that the close-ups were merely enlargement of the vehicle parked along the curb."[79] In contrast, again according to Moye's appellate brief, Chao told the trial judge that the hand *was* visible and photographed when the car was parked in the original place, apparently in direct contradiction of the sworn testimony of his co-worker Badger.[80]

Thus, the Grievance Committee must investigate and resolve this factual issue, including the discrepancies between Badger's testimony, Jeselson's testimony, and Chao's unsworn statements to the court. These writers have no personal knowledge of the facts of the trial or the case. If Badger testified truthfully under oath, Chao may be implicated in a direct lie to the court, the presentation of false testimony by Officer Jeselson, the knowing withholding of exculpatory evidence, and the manipulation of evidence to mislead the court and jury.

3. The Grievance Committee Must Seek Discipline 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

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[76] *Moye*, 52 AD3d at 7.

[77] *Id.* at 2, 9.

[78] *Moye*, 12 NY3d at 744.

[79] Respondent Brief at *11-12.

[80] *Id.* at *10.

Conduct."[81] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[82] Grievance Committees are "committed to . . . recommending discipline for lawyers who do not meet the high ethical standards of the profession."[83]

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."[84]

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."[85]

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."[86] 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.[87] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[88] 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. Chao's Misconduct Violated Rules of the New York Code of Professional Responsibility.[89]

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.[90] As the Court of Appeals explained, "the privilege to practice law is not a personal or liberty interest,

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[81] Attorney Grievance Committee of the First Judicial Department, *How to File a Complaint*, https://tinyurl.com/39axvffr.

[82] Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.2(a).

[83] *How to File a Complaint*.

[84] *Connick v Thompson*, 563 US 51, 65-66 (2011) (quotation marks omitted).

[85] *Kurtzrock*, 192 AD3d 197, 219.

[86] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b) Comment [1].

[87] ABA Criminal Justice Standards: Prosecution Function Standard 3-1.2 ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.").

[88] *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b).

[89] The applicable professional set of rules at the time that Chao tried this case was the Code of Professional Responsibility. The Rules of Professional Conduct, the set of rules in effect today, replaced the Code in 2009.

[90] *See e.g. Matter of Capoccia*, 59 NY2d 549, 551 (1983).

but is more nearly to be classified as a property interest, as to which the higher standard of proof has not been required."[91]

At the time of the 2003 trial, the Code of Professional Responsibility ("Code") was the applicable professional set of rules. Chao violated Rule DR 1-102 of the Code, which 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.[92] In the prosecution of Moye, the court found that Chao acted as an unsworn witness and vouched for his key witness, in violation of the laws and rules governing trial conduct. His violation was so egregious that two courts—including the highest court in the state—found it sufficiently prejudicial to necessitate a reversal. In prosecuting a felony, Chao should have shown a high level of care, guaranteed that justice was done, and safeguarded Moye's rights. Instead, Chao's actions prejudiced the accused and thus prejudiced the administration of justice.

As noted above, the Grievance Committee should also investigate whether Chao made false statements to the court, knowingly presented false evidence, and created and/or presented manipulated and misleading photographic evidence. If that occurred, such misconduct would violate multiple professional rules: (1) Rules DR 7-102 and DR 1-102, which prohibited attorneys from knowingly making a false statement to the court; using evidence they knew to be false; or engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation;"[93] (2) Rules DR 7-103(b), DR 7-102(a)(3) and DR 7-109(a), which require a prosecutor to turn over evidence he knows about and has a legal obligation to disclose;[94] and (3) two subsections of Rule DR 1-102, prohibiting 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.[95]

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[91] *Matter of Seiffert,* 65 NY2d 278, 280 (1985) (quotation marks omitted); *see also Matter of Scudieri*, 174 AD3d 168, 173 (2019).

[92] Code of Professional Responsibility DR 1-102 (22 NYCRR 1200.3 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rules 8.4(d) and (h) of the Rules of Professional Conduct replaced it in 2009.

[93] Code of Professional Responsibility DR 7-102 (22 NYCRR 1200.33 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 3.3 of the Rules of Professional Conduct replaced it in 2009. Code of Professional Responsibility DR 1-102 (22 NYCRR 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 AD3d 156, 158-59 (2d Dept 2011) (prosecutor misrepresentation of content of evidentiary document to the grand jury violated Rule 8.4(c)).

[94] Code of Professional Responsibility DR 7-103(b) (22 NYCRR 1200.34 (repealed)). This rule was in effect when the discussed misconduct occurred. However, Rule 3.8(b) of the Rules of Professional Conduct replaced it in 2009. Code of Professional Responsibility DR 7-102(a)(3) (22 NYCRR 1200.33 (repealed)); . Code of Professional Responsibility DR 7-109(a) (22 NYCRR 1200.40 (repealed)). These two rules were replaced in 2009 by Rules of Professional Conduct (22 NYCRR 1200.0) rules 3.4(a)(1), (3) (a lawyer shall not "suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce…[or] conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."). *Rain*, 162 AD3d at 1460-61 (suppression of exculpatory evidence violated Rule 3.4(a)(1)).

[95] Code of Professional Responsibility DR 1-102 (22 NYCRR 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.

B. For His Misconduct, Chao Must be Suspended.

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."[96] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[97]

In considering discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in aggravation."[98] 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."[99] Similarly, extensive prosecutorial experience weighs towards a more serious sanction.[100]

Chao entered the legal profession in 1997, meaning that by the time of his serious misconduct in this case in 2003, he was already an experienced attorney. Moreover, Chao appears to have evaded professional and disciplinary accountability for his misconduct. This lack of accountability is especially troubling because Chao appears to have continued his prosecution career as an AUSA in Massachusetts.

Based on his improper summation, the Grievance Committee should recommend Chao's suspension. Needless to say, it is rare indeed that an employee of the District Attorney's Office contradicts the trial prosecutor in sworn testimony. As noted above, the Grievance Committee must also investigate whether Chao also misled the court and suppressed the exculpatory re-creation. If so, the Grievance Committee should seek Chao's disbarment.

Conclusion

Chao committed serious prosecutorial misconduct by acting as an unsworn witness and vouching for his witness. In doing so, he violated the legal professional rules. To these writers' knowledge, Chao remains unsanctioned publicly or privately for his serious misconduct. The Grievance Committee must take prompt and serious action in recommending discipline.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[101] To that end, "the grievance process exists to protect the public . . . . By bringing a

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[96] ABA Model Rules for Lawyer Disciplinary Enforcement rule 32 (Commentary 2020).

[97] *Id.*

[98] *Kurtzrock*, 192 AD3d at 219; *see also Rain*, 162 AD3d at 1462 ("[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice.").

[99] *Kurtzrock*, 192 AD3d at 219.

[100] *Id.*

[101] NY St Bar Assn Comm on Prof Discipline, Guide to Attorney Discipline, https://tinyurl.com/47scv4pb.

complaint to a committee's attention, the public helps the legal profession achieve its goal."[102] 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."[103] 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 appeal, or was the subject of other ethical grievances, mentioned in the media, or identified in any other source.

   This type of comprehensive investigation may seem onerous, but the recent investigation into former Suffolk County Assistant District Attorney Glenn Kurtzrock demonstrates both the viability and overwhelming necessity of a systematic investigation. In a 2017 murder trial, *People v. Booker*, Kurtzrock committed a wide range of egregious discovery violations, leading to his resignation and the Appellate Division's December 2020 ruling suspending his law license for two years.[104] In imposing this sanction, the Appellate Division highlighted as a mitigating factor that "there was no showing that [Kurtzrock] engaged in any similar conduct in any other cases."[105]

   But at the time of the December 2020 Appellate Division ruling, there was in fact already significant evidence of similar misconduct by Kurtzrock in other cases, which would have been easily identified if a systematic investigation had been undertaken.[106] To start, after Kurtzrock's *Brady* violation was revealed during the 2017 *Booker* trial, defense counsel for a different murder case in which Kurtzrock had obtained a conviction, *People v. Lawrence*, then pending on appeal, requested a reexamination of the discovery in that case. The District Attorney's Office agreed, and the investigation revealed that Kurtzrock had failed to disclose more than 40 items of *Brady* and/or

[102] *Id.*

[103] Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

[104] *Kurtzrock*, 192 AD3d 197.

[105] *Id.* at 220.

[106] Letter to Second Department (unfiled), Nina Morrison of the Innocence Project and Paul Shechtman of Bracewell LLP, January 20, 2021; see also Morrison, *What Happens When Prosecutors Break the Law?*, NY Times, https://tinyurl.com/52ar9tjx.

Rosario evidence in *Lawrence* as well, including a payment to a witness and exculpatory witness statements. Consequently, the judge dismissed the indictment in 2018, and Shawn Lawrence, who had served six years of incarceration of his 75-years-to-life sentence, was released.[107] The judge concluded that the suppression constituted "more than exceptionally serious misconduct."[108]

A systematic investigation of Kurtzrock ensued that uncovered even more suppressed evidence. Following the Appellate Division's December 2020 ruling, the Suffolk County District Attorney's Office ("SCDAO") worked with the New York Law School Post-Conviction Innocence Clinic to conduct a comprehensive review of Kurtzrock's trial cases and other cases where Kurtzrock's actions raised discovery issues.[109] The investigation and resulting public report identified that numerous prosecutions by Kurtzrock were infected by "practices similar to those criticized by the Appellate Division in the [2017] *Booker* case,"[110] which the report characterized as a "potential systemic issue."[111]

As a result of the investigation, the SCDAO provided new evidence to defendants in **100 percent of Kurtzrock's homicide cases and 76 percent of all trial cases reviewed**. [112] These disclosures have already spurred applications to review convictions.[113] The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate,[114] an important step given that, in explaining the lenient two-year suspension for Kurtzrock's misconduct in *Booker*, the Appellate Division cited the ostensible lack of evidence of misconduct by him in other cases.

The Kurtzrock investigation thus demonstrates the sound logic behind the comment to Rule 8.3 that "[a]n apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover"[115] and the need for the Grievance Committee to systematically investigate this prosecutor's work.

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[107] Morrison, *What Happens When Prosecutors Break the Law?*, NY Times, https://tinyurl.com/52ar9tjx.

[108] County of Suffolk Office of District Attorney, Review of the Disclosure Practices of Assistant District Attorney Glenn Kurtzrock, https://tinyurl.com/2a7ba9cd (hereafter "Kurtzrock report") at 11 (discussing case of *People v. Shawn Lawrence*) (internal quotation marks omitted).

[109] The SCDAO "attempted to identify and examine for *Brady/Giglio* and *Rosario* compliance all cases Kurtzrock tried while serving as an ADA with the SCDAO, both as a homicide prosecutor and while serving in a bureau that prosecutes non-fatal violent crimes and other felony offenses. The CIB also examined additional cases… that Kurtzrock did not try himself but in which Kurtzrock's actions prior to trial were identified as raising *Brady*/*Giglio* and/or *Rosario* compliance concerns." *Id.* at 4.

[110] *Id.* at 5.

[111] *Id.* at 4.

[112] *Id.* at 6.

[113] *Id.*

[114] *Id.* at 7.

[115] Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

2. The Committee should promptly investigate whether any supervising attorney at the New York County District Attorney's Office 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.[116]

3. The Grievance Committee should investigate whether the New York County District Attorney's Office 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. [117]

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.

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 systematically investigate all cases identified in #1-4 above and advise the court if this investigation casts doubt on the integrity of any convictions. To be clear, we do not mean a closed-door, cloaked process inside a 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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[116] Rules of Professional Conduct (22 NYCRR 1200.0) rule 5.1 (d) reads: A lawyer shall be responsible for a violation of these Rules by another lawyer if:

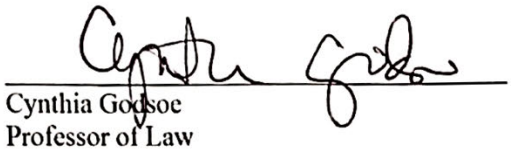
(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(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.

[117] District Attorney offices qualify as "law firms" under Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.0 (h). "'Firm' or 'law firm' includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization."



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