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 Margaret Finerty, State Bar No. 1066299

To the Grievance Committee,

We write to complain about the professional misconduct of Margaret Finerty[1] in prosecuting *People v. Colon and Ortiz*.[2] Finerty was an Assistant District Attorney in the New York County District Attorney's Office when she prosecuted Danny Colon and Anthony Ortiz. The two men were wrongfully convicted and spent nearly 17 years in prison before their cases were finally dismissed in 2011.[3] Then men obtained a settlement of $9 million for their wrongful imprisonment. "I am scarred by losing so many years of my life," said Ortiz in 2014. "I lost the opportunity to raise my son, and can never get that back."[4]

In *Colon and Ortiz*, the Court of Appeals unanimously overturned the murder convictions of Colon and Ortiz because of Finerty's serious misconduct. Specifically, Finerty withheld evidence of the benefits she gave to her key witness; elicited, then failed to correct, false testimony from this key witness; emphasized this perjured testimony during summation; and withheld other evidence favorable to the defense.[5]

After the Court vacated his conviction and the New York County District Attorney's Office declined to retry him, Colon filed a civil lawsuit that alleged that Finerty had committed additional

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[1] Margaret Joan Finerty, State Bar No. 1066299, Getnick & Getnick LLP, 521 5th Avenue, FL 33, New York, New York 10175. Phone: (212) 376-5666. Email: mfinerty@getnicklaw.com. *See* New York Unified Court System, Attorney Online Services – Search, https://tinyurl.com/347srhpu [search by attorney Margaret Finerty, click on Name hyperlink]. These writers do not have personal knowledge of any of the facts or circumstances of Finerty or the cases mentioned. This grievance is based entirely on the court opinions, briefs and other documents cited herein.

[2] Exhibit A, *People v Colon,* 13 NY3d 343 (2009), https://tinyurl.com/ykd5tyy9. The decision does not name Finerty. However, the appellate brief for Colon's co-defendant Anthony Ortiz—whose conviction the court also overturned in *Colon* on the same grounds—names Finerty as the trial prosecutor who committed the misconduct. *See* Exhibit B, Brief for Defendant-Appellant, in *People v Ortiz*, 55 AD3d 444 (1st Dept 2008), available at 2008 WL 5942487 (hereafter "Appellant Brief"). The *New York Times* also named Finerty as the trial prosecutor in an article discussing the Court of Appeals' decision. *See* John Eligon, *Appeals Court Voids '93 Murder Convictions*, NY Times (Nov 19, 2009), https://tinyurl.com/8w48x47d.

[3] Larry McShane, *Innocent Man Danny Colon Seeks $120 Million in Lawsuit against Two NYPD Detectives and Manhattan Prosecutor*, NY Daily News (Sept. 19, 2012), https://tinyurl.com/y7xdmye3.

[4] Larry McShane, *New York City, state, housing authority to pay $9 million to end lawsuits by wrongly convicted, imprisoned pair*, NY Daily News (Nov. 13, 2014), https://tinyurl.com/7u35s7n9.

[5] *Colon,* 13 NY3d at 347-50.

misconduct.[6] These allegations included additional, undisclosed benefits that Finerty conferred on her key witness and suppression of other favorable evidence. While the lawsuit was settled before the claims were adjudicated, the Grievance Committee should investigate these additional allegations and ascertain whether Finerty committed further misconduct beyond that discussed by the Court of Appeals in its opinion reversing the wrongful convictions of Colon and Ortiz.

By the time Finerty prosecuted Colon and Ortiz, she was already a seasoned prosecutor with over a decade of experience. Two years after her misconduct, she became a New York City judge and assumed responsibility for enforcing the law. Finerty, now in private practice, advertises her prosecutorial experience on her firm website.[7] According to Finerty's firm biography, she has taught "numerous Continuing Legal Education courses," including on *legal ethics*.[8] While Colon and Ortiz languished in prison for nearly 17 years, Finerty's career continued on as a judge, private attorney, member of prestigious professional committees, and teacher of our profession. Despite a judicial finding of misconduct and media publicly naming Finerty as directly involved in the wrongful convictions of Colon and Ortiz,[9] as of this writing, the New York Attorney Detail Report lists "Disciplinary History: No record of public discipline" for Finerty.[10]

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.[11] 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.[12]

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

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[6] Exhibit C, Civil Complaint in *Danny Colon v The City of New York, et al.*, Sup Ct, Bronx County (Sept. 19, 2012) (hereafter "Colon Complaint").

[7] Exhibit D, Getnick & Getnick LLP, *Margaret J. Finerty*, https://tinyurl.com/yv44nwnt.

[8] *Id*.

[9] *See, e.g.*, Marc Santora, *$9 Million to Settle Case for 2 Wrongly Convicted*, NY Times (Nov. 13, 2014), https://tinyurl.com/539nb29r.

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

[11] *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.").

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

every legitimate means to bring about a just one."[13] 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."[14]

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.[15] 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."[16] 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.[17] 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.[18] 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."[19]

B. Prosecutors are Required to Provide Exculpatory Evidence to the Defense under the *Brady* Doctrine, State Discovery Laws, and Rule of Professional Conduct 3.8, Yet Often Fail to Comply with these Obligations.

One of the most damaging forms of prosecutorial misconduct is the *Brady* violation—when a prosecutor suppresses exculpatory or impeachment evidence.[20] A prosecutor's duty to disclose *Brady* evidence is indispensable to the rights to due process and a fair trial.[21] Consequently, a conviction must be overturned when the suppressed evidence is "material"[22] and where there is a

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[13] *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).

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

[15] *Id.*

[16] *Id.*

[17] *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).

[18] *See* Sapien & Hernandez.

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

[20] *See generally Brady v Maryland*, 373 US 83 (1963); *Giglio v United States*, 405 US 150 (1972).

[21] *Brady*, 373 US at 87.

[22] *United States v Bagley*, 473 US 667, 669, 676 (1984); *Kyles v Whitley*, 514 US 419, 433 (1995). The U.S. Supreme Court has not addressed, and courts and scholars disagree, whether the appellate-level "materiality" standard applies to a prosecutor's pre-trial disclosure burden. *See, e.g.*, *Boyd v United States*, 908 A2d 39, 60 (D.C. 2006) (the "Supreme Court in *Strickler* contemplated the existence of a broad 'duty of disclosure,' but recognized

"reasonable probability" that the undisclosed evidence would have changed the result.[23] New York places an even greater burden on prosecutors, as it uses a less stringent standard for *Brady* reversals than the U.S. Supreme Court.[24] In New York, if the defense requested the evidence and the prosecution still failed to provide it, the conviction must be reversed if there is a "reasonable possibility"—less than the "reasonable probability" required under *United States v. Bagley*—that the failure to disclose contributed to the verdict.[25]

In our legal system, *Brady* disclosures permit the defense to investigate and litigate different leads, present evidence that the prosecution's case is inaccurate, present evidence that the testimony of the prosecution's witnesses is inaccurate or false, present evidence of the accused's innocence to the jury, and ultimately, to protect the accused from a wrongful conviction. It is unsurprising, then, that suppression of *Brady* evidence has played a role in over 44 percent of known wrongful convictions and 61 percent of known wrongful convictions for murder.[26]

A prosecutor has an affirmative duty to search for favorable and material evidence in their own records and those of related agencies—and to turn these over to the defense.[27] Under federal law, a prosecutor who commits an intentional *Brady* violation could seemingly be charged with a felony.[28]

The New York legislature and the New York judiciary have emphasized the importance of the *Brady* rule by codifying it in statutes and court orders. Even before the 2020 discovery reform legislation, New York State's discovery statute required prosecutors to disclose all evidence that must be disclosed per the United States and New York constitutions—including any *Brady* evidence.[29] Other New York criminal procedure law sections obligated the prosecutor to disclose

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that, when the government fails to carry out its duty, its noncompliance with that obligation will only rise to the level of a constitutional violation if materiality is subsequently established. *The Court thus recognized that a duty of disclosure exists even when the items disclosed later prove not to be material.*") (emphasis added). This appears to coincide with Justice Kennedy's understanding, as summed up in a 2012 oral argument: "I think you misspoke when you [were asked] what is the test for when *Brady* material must be turned over. And you said whether or not there's a reasonable probability . . . that the result would have been different. That's the test for when there has been a *Brady* violation. You don't determine your *Brady* obligation by the test for the *Brady* violation. You're transposing two very different things." Transcript of Oral Argument at 49, *Smith v Cain*, 565 US 73 (2012) (No. 10-8145), https://tinyurl.com/dmmu7b44; *see also* Janet C. Hoeffel & Stephen I. Singer, *Activating A Brady Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 NYU Rev L & Soc Change 467, 473 (2015) ("[B]y the very nature of appellate and post-conviction review, the Court has not had to decide the proper standard for the prosecution's pretrial duty to disclose favorable evidence."). The ethical rules governing a prosecutor's pretrial disclosure obligations, however, do not include a materiality requirement.

[23] *Bagley*, 473 US 667.

[24] *People v Vilardi*, 76 NY2d 67 (1990).

[25] In the 1990 *Vilardi* case, the New York Court of Appeals emphasized the importance of "elemental fairness to the defendant and … concern that the prosecutor's office discharge its ethical and professional obligations." The Court maintained the New York rule that if the defense has requested the favorable evidence, the suppression of that evidence mandates reversal if there is just a "reasonable possibility" that the failure to disclose contributed to the verdict.

[26] National Registry of Exonerations, Government Misconduct and Convicting the Innocent at 81 (Sept. 1, 2020), https://tinyurl.com/yha56e4b.

[27] *See Kyles v Whitley*, 514 US 419, 432 (1995); *Strickler v Green,* 527 US 263, 280-281 (1999).

[28] 18 USC § 242.

[29] McKinney's Cons Laws of NY, CPL 240.20(1)(h) (repealed); *Doorley v Castro*, 160 AD3d 1381, 1383 (4th Dept 2018).

types of evidence that commonly contain *Brady* information.[30] The 2020 discovery reform preserved the statutory codification of *Brady* and further expanded a prosecutor's discovery obligations.[31]

The prosecutor's obligation to provide helpful evidence to the defense is of such import that it is codified into its own subsection in New York Rule of Professional Conduct 3.8(b):

> A prosecutor . . . shall make timely disclosure…of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.[32]

Rule 3.8, which binds New York prosecutors, is broader than the *Brady* obligation in an important respect: the prosecutor must provide *all* evidence that tends to negate the guilt of the accused, not just *materially* exculpatory evidence.[33] That is, there is no requirement that disclosure of the evidence would have any probability of changing the result of the proceeding. As a consequence, a significant amount of conduct will violate Rule 3.8 but not the constitutional rule. Similarly, the Standards of the American Bar Association Standards extend beyond the *Brady* rule with respect to materiality, requiring the prosecutor to "diligently seek to identify" and disclose all mitigating, exculpatory and impeachment evidence "regardless of whether the prosecutor believes it is likely to change the result of the proceeding."[34]

Despite the significance of the *Brady* rule and Rule 3.8 in the criminal legal system, the New York State Justice Task Force has pointed to "[d]ocumented instances of inconsistent application by prosecutors of the requirement for disclosure of exculpatory evidence." The New York State Bar has acknowledged that "New York *Brady* violations occur at all phases of the criminal justice process and are often not discovered until after conviction."[35]

C. Prosecutors Have a Duty to Present Evidence Honestly.

Prosecutors may not mislead the court or jury and multiple prohibitions on prosecutorial conduct relate to dishonesty. For example, it violates due process for a prosecutor to knowingly

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[30] McKinney's Cons Laws of NY, CPL 240.20 (repealed).

[31] CPL § 245.20(1)(k).

[32] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b). This Rule was previously codified in New York's Code of Professional Responsibility DR 7-103 (22 NYCRR 1200.34 (repealed)). As is evident from the text of the rule (quoted above), Rule 3.8 only applies to evidence known to the prosecutor, unlike *Brady*, which applies to evidence in the possession of the entire prosecution team, including evidence in the possession of investigative agencies of which the prosecutor is unaware. *See, e.g., United States v. Agurs*, 427 U.S. 97, 110 (1976); *Kyles*, 514 US at 437.

[33] NY City Bar Assn Comm on Prof Ethics Formal Op 2016-3 (2016) ("While *Brady* has been held to require a prosecutor to disclose only 'material' evidence favorable to the accused, Rule 3.8 on its face is not subject to the same materiality limitation."); *see also*, ABA Comm on Ethics and Prof Responsibility Formal Op 09–454 (2009); *United States v. Gatto,* 316 F.Supp.3d 654, n 17 (2018); and *People v Waters*, 35 Misc 3d 855, 859-60 (Sup Ct, Bronx County 2012) (Rule 3.8(b) is "[i]ndependent of *Brady*").

[34] ABA Criminal Justice Standards: Prosecution Function Standard 3-5.4(c).

[35] NY State Bar Assn, *Report of the Task Force on Criminal Discovery* at 52 (Jan. 30, 2015), https://tinyurl.com/f78tjetx.

present perjured testimony.[36] 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.[37] Because they are representatives of the state, not lawyers for an individual, prosecutors possess a "special duty" not to mislead a judge, jury, or defense counsel.[38]

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.[39] 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.[40]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions would "provide an antidote to prosecutorial misconduct"—has not been borne out.[41] 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.[42]

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[36] *See, e.g.*, *Giglio v United States*, 405 US 150, 153-154 (1972); *Miller v Pate*, 386 US 1, 7 (1967).

[37] *See People v Waters*, 35 Misc 3d 855, 861 (Sup Ct, 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 US 264, 269 (1959)); *see also Napue*, 360 US at 271 (finding a due process violation when prosecutor failed to correct witness's false testimony that he had not received any promise in return for his testimony)).

[38] *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 US 51, 65-66 (2011); *see also* Bennett L. Gershman, The Prosecutor's Duty to Truth, 14 Geo J Legal Ethics 309, 316 (2001) ("The courts have recognized that, as a minister of justice, a prosecutor has a special duty not to impede the truth.")

[39] *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").

[40] *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).

[41] *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).

[42] 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*

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."[43] 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."[44] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.[45] "Prosecutors engage in misconduct because they know they can get away with it."[46]

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.[47] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[48] But even a short suspension like that received by Rain and Kurtzrock[49]—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 Finerty will continue unabated and undeterred.

2. The Court of Appeals Reversed Two Murder Convictions Due to Finerty's Misconduct.

Finerty prosecuted Colon and Ortiz jointly for murder—a charge that can lead to life imprisonment upon conviction.[50] The incident underlying the case, a drive-by shooting that took place in 1989, left two people dead and two wounded.[51] "[O]nly two witnesses linked" Colon and Ortiz to the crime, making witness credibility central to Finerty's ability to win a conviction.[52]

Professional Discipline of Prosecutors, 79 NC L Rev 721, 725 (2001) (describing the "rarity of discipline" of prosecutors).

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

[44] *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).

[45] Sapien & Hernandez.

[46] *Id.*

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

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

[49] 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.

[50] *Colon*, 13 NY3d at 346.

[51] *Id.*

[52] *Id.* at 346, 350.

The credibility of Daniel Core, one of these two witnesses, was called into serious question. Core, while he was facing life imprisonment on unrelated murder charges, claimed he had spoken to Ortiz and Colon while incarcerated together, and that they had admitted their involvement in the crime to him.[53] Core reported this information to the authorities while facing both murder charges and federal drug conspiracy charges.[54] Core had signed a cooperation agreement with state and federal prosecutors in the hope that his testimony against Ortiz and Colon would lead to "substantially reduced sentences" for himself.[55] Further undermining Core's credibility were his admissions that he had been grossing $140,000 a day from his drug dealing operation; that he was responsible for numerous murders stemming from his drug dealing operations; and that he had previously lied to a grand jury in an unrelated case.[56]

Consequently, the credibility of the second witness, Anibal Vera, was "crucial."[57] Vera claimed that Colon had admitted to the shooting and to Ortiz's participation.[58] But Vera had implicated Ortiz and Colon only after police arrested him on misdemeanor drug charges in March 1990.[59] At trial, Vera testified against Colon and Ortiz in exchange for the benefit of pleading guilty to a non-criminal violation on his misdemeanor case, and avoiding jail time on a separate probation violation.[60]

At the trial, held in 1993, Vera testified on direct examination by Finerty that the "only benefit" he received for his testimony was the favorable plea deal for his misdemeanor case.[61] He also testified that Finerty did not "have anything to do with the disposition" of a separate 1992 felony drug charge, for which he received a sentence of 2.5 to 5 years in prison upon a guilty plea.[62]

In her summation argument, Finerty bolstered Vera's credibility to the jury. She stressed Vera's claim that he had not received "any benefit" for his testimony besides the plea on the misdemeanor charges.[63] Finerty also claimed she had "nothing to do with the plea [Vera] ultimately took with a two and a half to five year sentence" in the 1992 felony drug case.[64]

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[53] *Id.* at 347.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 350.
[58] *Id.* at 346.
[59] *Id.* at 346-47.
[60] *Id.* at 347.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*

A. The Court of Appeals Found that Finerty Suppressed Favorable Evidence and Elicited False Testimony.

Finerty's summation remarks, and Vera's direct testimony, proved to be false. The Court of Appeals ruled that Finerty had "engaged in further activity on Vera's behalf," which she had not "revealed [before or] during the trial."[65]

First, Finerty had personally contacted the New York City Housing Authority to assist Vera's grandparents in relocating.[66] Second, Finerty was personally involved in Vera's 1992 felony case: she had appeared in person in court to tell Vera about the plea offer of 2.5 to 5 years; and she had left a voicemail with the prosecutor handling Vera's felony case regarding Vera's status as a witness in her trial.[67] Third, Finerty had been aware that a gun was recovered from Vera's hotel room before the trial; the police did not arrest Vera, and Finerty's office did not prosecute him.[68]

The court held that not only did Finerty "fail[] to correct Vera's misleading testimony," she compounded the problem by "repeating and emphasizing [the same] misinformation" in her summation.[69] Indeed, Finerty personally "elicited" Vera's "false testimony" that the *only* benefit he received was a misdemeanor drug plea and that Finerty was not involved in his felony drug case.[70] Instead of correcting this false testimony, Finerty "exacerbated the problem" in her summation, by echoing Vera's false statements.[71]

The Court also found that Finerty should have provided her "handwritten notes" of interviews with two different witnesses who claimed to have information about the shootings.[72] According to Ortiz's appellate brief, both witnesses named the four participants in the shooting as people *other than Ortiz*.[73] The defense was not provided these notes, even though they were favorable to the defense case and bore upon the question of guilt or innocence.

The Court of Appeals unanimously reversed Ortiz's and Colon's convictions based on Finerty's severe misconduct. The Court found that Finerty failed to disclose the exculpatory notes, as well as information about the gun found in Vera's hotel.[74] Moreover, Finerty also acted improperly by eliciting false testimony that "may well have impacted the jury's perception" of Vera's credibility—and then failing to correct it.[75]

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[65] *Id.* at 348.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* at 349.

[70] *Id.* at 350.

[71] *Id.*

[72] *Id.* at 348-49.

[73] Appellant Brief at 51.

[74] *Colon* at 350, 350 n.4.

[75] *Id.* at 350.

After the Court of Appeal's decision, the New York County District Attorney's Office dismissed the charges against Colon and Ortiz rather than pursue another trial.[76]

B. The Grievance Committee Must Investigate Beyond the Court's Findings in *Colon*.

After the dismissal of the criminal charges against him, Colon sued the City of New York. His civil complaint contained additional allegations of prosecutorial misconduct.[77] Because the civil case settled before adjudication of the claims, there was no ruling on these additional allegations. However, in evaluating this Grievance, the Committee should investigate them.

First, Colon alleged that long before trial, Finerty withheld evidence that negated probable cause to believe that he had committed the murders. This evidence included: information that survivors of the incident identified a different person as involved in the shooting, leading to the arrest and indictment of that person;[78] and information that initially, Vera had not identified Colon as a perpetrator.[79]

Second, Colon alleged that Finerty provided even greater benefits to Vera than discussed in the Court of Appeals decision. Among other actions, Finerty allegedly protected Vera from the consequences of repeated probation violations in the time leading to the trial, and she allegedly intervened on Vera's behalf when he was arrested for jumping bail in his 1992 felony drug case.[80]

A settlement ended the litigation, so no findings were made regarding Colon's allegations of further misconduct by Finerty. However, the Grievance Committee should investigate these allegations by obtaining the grand jury minutes and other documents relied upon by Colon.

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 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

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[76] *See* Colon Complaint at 2; Sean Gardiner, *Case Tossed Out*, Wall Street Journal (June 30, 2011), https://tinyurl.com/kmvzmt22.

[77] *See generally* Colon Complaint.

[78] *Id.* at 10-11.

[79] *Id.*

[80] *Id.* at 11-14.

[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*.

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. Finerty's Misconduct Violated Multiple Rules of the Code of Professional Responsibility.

The standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence—not a higher standard, such as clear and convincing or beyond a reasonable doubt.[89] As the Court of Appeals explained, "the 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."[90]

The Code of Professional Responsibility ("Code") was the applicable set of professional rules in 1993, when Finerty committed misconduct in *Colon.* First, Finerty violated the Code when she knowingly withheld evidence tending to negate guilt. Rule DR 7-103(b) required a prosecutor to make "timely disclosure … of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment."[91] Two other rules similarly required disclosure, and prohibited

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

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

[91] 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.

knowing concealment, of evidence.[92] Importantly, a prosecutor's duty to disclose under DR 7-103(b) applied even if the evidence was not material. *In the Matter of Glenn Kurtzrock*, the Appellate Division both analyzed and found a violation of Rule 3.8(b), the contemporary equivalent of DR 7-103(b), as separate and distinct from the prosecutor's *Brady* violation.[93] In finding a Rule 3.8(b) violation, the Appellate Division neither undertook a materiality analysis nor listed materiality as an element of the rule.[94] Thus, while a *Brady* violation requires a finding of prejudice due to the materiality of the suppressed evidence, a violation of Rule DR 7-103(b) does not depend on whether the evidence was material.[95]

According to the Court of Appeals, Finerty withheld at least five different pieces of evidence: the help she offered Vera's grandparents; her involvement in Vera's drug felony case; the gun found in Vera's hotel room; and the two separate sets of notes from two interviews naming other people as perpetrators.[96] Additionally, the Grievance Committee must investigate Colon's allegations that Finerty suppressed even more benefits and other exculpatory evidence.

Second, Finerty violated the Code when she knowingly permitted perjured testimony and misled the court. Rule DR 7-102(a)(4) prohibited prosecutors from using perjured testimony or false evidence.[97] Prosecutors were not to knowingly make a false statement to the court or use evidence they knew to be false.[98] More generally, Rule DR 1-102 prohibited prosecutors from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation."[99]

The Court of Appeals found that Finerty elicited false testimony from Vera. She failed to correct it, though she knew it was false. Instead, she misled the court and jury in summation by repeating the false testimony and further bolstering Vera's false claims.

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[92] Code of Professional Responsibility DR 7-102(a)(4) (22 NYCRR 1200.33 (repealed)); Code of Professional Responsibility DR 7-109(a) (22 NYCRR 1200.40 (repealed)). These two rule 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."). *See also Rain*, 162 AD3d at 1460-61 (suppression of favorable evidence violated Rule 3.4(a)(1)).

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

[94] *Id.*

[95] *See supra* n 32.

[96] Moreover, a "deliberate pattern of avoidance, or willful blindness," to the existence of such exculpatory evidence—including failure to conduct a *Brady* analysis of evidence, or delegation of this duty to law enforcement—constitutes knowledge under Rule DR 7-103(b). *See Kurtzrock*, 192 AD3d 197 (deliberate pattern of avoidance or willful blindness constitutes knowledge under Rule 3.8(b), the modern equivalent of Rule DR 7-103(b)).

[97] Code of Professional Responsibility DR 7-102(a)(4) (22 NYCRR 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.

[98] 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.

[99] 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)).

Third, Finerty violated Rule DR 1-102 of the Code, which prohibited prosecutors from engaging in conduct that was prejudicial to the administration of justice or any other conduct that adversely reflected on their fitness to practice law.[100] The Court of Appeals has stated that a prosecutor's improper summation remarks amount to prosecutorial misconduct.[101] That misconduct, in addition to her violation of Rule DR 7-103(b), clearly prejudiced the administration of justice and reflected adversely on the her fitness as a lawyer in violation of Rule DR 1-102.[102]

Finerty withheld evidence and deceived the court by using perjured testimony and repeating it in summation. This conduct prejudiced the administration of justice and the ensuing trial resulted in wrongful convictions for two people who were sentenced to two consecutive sentences of 25 years to life.

B. For Her Misconduct, Finerty Must be Disciplined.

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."[103] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[104]

"The purpose of a sanction in a disciplinary proceeding is not to punish but to protect the public, to deter similar conduct, and to preserve the reputation of the Bar."[105] Prosecutorial misconduct that violates the U.S. and New York constitutions has a devastating impact on due process. It is a long-standing, largely unaddressed problem in the court system that is only rarely discovered and even more rarely corrected.

In considering discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in aggravation."[106] Simply being a prosecutor supports aggravated discipline because the law tasks prosecutors "with seeing that justice is done—to act impartially, to have fair

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[100] 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.

[101] *People v Wright*, 25 NY3d 769, 780 (2015).

[102] 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. *See also Rain*, 162 AD3d at 1459 (summation misconduct violated Rules 8.4(d), (h)); *Kurtzrock*, 192 AD3d 197 (finding disclosure violation prejudiced the administration of justice and reflected adversely on the prosecutor in violation of Rules 8.4(d), (h)).

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

[104] *Id.*

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

[106] *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.").

dealing with the accused, to be candid with the courts, and to safeguard the rights of all."[107] Similarly, extensive prosecutorial experience weighs towards a more serious sanction.[108]

The Grievance Committee must seek public and severe discipline for Finerty's serious misconduct. In 1993, when she tried Colon and Ortiz, Finerty *had been an attorney for 14 years*.[109] Despite extensive prosecutorial experience, she committed serious misconduct that wrongfully imprisoned two men for nearly 17 years. Only two years after committing serious misconduct, but before the misconduct came to light in the Court of Appeal's decision, Finerty became a New York City judge, a position she held for three years.[110] She has been a member of multiple bar committees, including those aimed at selecting new judges.[111] Finerty attests to having taught "numerous" CLE courses, including on legal ethics.[112] Because of her high-profile, prestigious positions and former judgeship, a failure to properly discipline Finerty would send a message to prosecutors that even the most grave misconduct will not hold them back from advancement in our profession. Such a failure would create the appearance that because of her status as a former judge, and the many prestigious positions she occupies within the profession, Finerty is beyond reproach and above the law.

We believe a grave sanction, such as a lengthy suspension or disbarment, is the appropriate discipline 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 for on-the-job misconduct, including Texas, Minnesota, Pennsylvania, North Carolina, and Arizona, we have not found a single such occurrence in New York, despite the state's large court system and the many criminal cases that pass through New York courts every year.

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

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

[108] *Id.*

[109] Exhibit D, Getnick & Getnick LLP, *Margaret J. Finerty*, https://tinyurl.com/yv44nwnt.

[110] *Id.*

[111] *Id.*

[112] *Id.*

Conclusion

The Court of Appeals found that Finerty elicited false testimony, failed to correct it, repeated it in her summation, and withheld evidence that would have shown it to be false. In doing so, she violated multiple Rules of the Code of Professional Responsibility. To these writers' knowledge, Finerty has faced no professional or disciplinary consequences for her egregious misconduct.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[113] 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."[114] 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 Finerty. 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."[115] 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 Finerty'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.[116] 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."[117]

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

[114] *Id.*

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

[116] *Kurtzrock*, 192 AD3d 197.

[117] *Id.* at 220.

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.[118] 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 *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.[119] The judge concluded that the suppression constituted "more than exceptionally serious misconduct."[120]

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.[121] 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,"[122] which the report characterized as a "potential systemic issue."[123]

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**. [124] These disclosures have already spurred applications to review convictions.[125] The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate,[126] an important step given that, in explaining the lenient two-year suspension for Kurtzrock's

[118] 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.

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

[120] 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).

[121] 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.

[122] *Id.* at 5.

[123] *Id.* at 4.

[124] *Id.* at 6.

[125] *Id.*

[126] *Id.* at 7.

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"[127] and the need for the Grievance Committee to systematically investigate this prosecutor's work.

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.[128]

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.[129]

4. The Committee should identify any prosecutors trained and/or supervised by Finerty 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

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

[128] 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

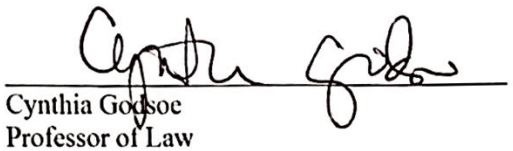
(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(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.

[129] 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."

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.



Cynthia Godsoe
Professor of Law
Brooklyn Law School

Nicole Smith Futrell
Associate Professor of Law
CUNY School of Law

Steven Zeidman
Professor of Law
CUNY School of Law

Daniel S. Medwed
University Distinguished Professor of
Law and Criminal Justice
Northeastern University

Abbe Smith
Scott K. Ginsburg Professor of Law
Director, Criminal Defense & Prisoner Advocacy Clin
Co-Director, E. Barrett Prettyman Fellowship Program
Georgetown University Law Center

Justin Murray
Associate Professor of Law
New York Law School