

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 Bridget Fleming, State Bar No. 2497337

To the Grievance Committee,

Bridget Fleming¹ was the prosecutor in *People v. Griffin*.² The Appellate Division found that Fleming “intentional[ly]”³ violated the trial court’s “explicit[.]”⁴ order regarding the scope of cross-examination, leading to a reversal of the conviction.

We call on the Grievance Committee to hold Fleming accountable for her prosecutorial misconduct by recommending her suspension. In *Griffin*, not only did Fleming intentionally violate the court’s explicit order, but by doing so she also risked inflaming the jurors’ passions, making it “impossible” for them to deliberate dispassionately.⁵ Fleming’s misconduct was so egregious that it violated Griffin’s constitutional fair trial right,⁶ contributing to a reversal of his conviction. He was subsequently acquitted.⁷

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 Fleming.⁸

The Grievance Committee must seek to discipline Fleming for her misconduct.

¹ Bridget Mary Fleming, Registration No. 2497337. The Attorney Detail Report lists Fleming’s information as 46 Pine Neck Ave, Sag Harbor, NY 11963-1740 and registration status as “Attorney - Due to Register within 30 Days of Birthday.” New York Unified Court System, Attorney Online Services – Search, <https://tinyurl.com/347srhpu> [search by attorney Bridget Fleming, click on Name hyperlink]. These writers do not know whether Fleming’s registration is valid and up-to-date.

² Exhibit A, *People v Griffin*, 242 AD2d 70 (1st Dept 1998), available at <https://tinyurl.com/7nt2xk8d>. The decision does not name the prosecutor, but Bridget Fleming was identified as the prosecutor in a news article about the case. See David Rohde, *In a Retrial, a Doctor Is Acquitted of Molesting a Patient*, NY Times (Apr. 12, 2000), <https://tinyurl.com/ycr68zfy> (hereafter “Rohde NY Times”). These writers do not have personal knowledge of any of the facts or circumstances of Fleming or the cases mentioned; this grievance is based entirely on the court opinions, briefs, and other documents cited herein.

³ *Griffin*, 242 AD2d at 72.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 73.

⁷ Rohde NY Times.

⁸ See New York Unified Court System, Attorney Online Services – Search, <https://tinyurl.com/347srhpu> [search by attorney Bridget Fleming, click on Name hyperlink].

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

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

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>.

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).

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. 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.¹⁸ 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.¹⁹

Unfortunately, the U.S. Supreme Court’s assumption—that professional disciplinary actions would “provide an antidote to prosecutorial misconduct”—has not been borne out.²⁰ 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.²¹

In their 2016 article, “Prosecutorial Accountability 2.0,” ethics experts Professors Ellen Yaroshefsky and Bruce Green pointed out that prosecutors “were rarely disciplined for

¹⁶ See Sapient & Hernandez.

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

¹⁸ 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”).

¹⁹ *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).

²⁰ 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).

²¹ 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).

misconduct, and if so, not very seriously.”²² 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.”²³ “It’s an insidious system,” said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.²⁴ “Prosecutors engage in misconduct because they know they can get away with it.”²⁵

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.²⁶ In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.²⁷ But even a short suspension like that received by Rain and Kurtzrock²⁸—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 Fleming will continue unabated and undeterred.

2. The Appellate Division Found That Fleming Violated an Explicit Court Order and Inflamed the Jury’s Passions Against Griffin.

Fleming prosecuted Griffin for sex crimes arising from his treatment of the complainant, in his capacity as a gastroenterologist.²⁹ The complainant alleged that Griffin engaged in oral sex with her while she was heavily sedated during an endoscopy and colonoscopy procedure.³⁰ Griffin, in turn, denied any wrongdoing, and claimed that the complainant sought to enlist his services as an

²² Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L Rev 51, 65 (2017).

²³ *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).

²⁴ Sapien & Hernandez.

²⁵ *Id.*

²⁶ *Rain*, 162 AD3d at 1462.

²⁷ *In the Matter of Glenn Kurtzrock*, 192 AD3d 197 (2d Dept 2020).

²⁸ 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>.

²⁹ *Griffin*, 242 AD2d at 71. The decision does not name Fleming, but news coverage of the case did name her as the trial prosecutor. Similarly, Fleming is named in a subsequent decision by the trial court. See Exhibit B, *People v Griffin*, 171 Misc 2d 145 (Sup Ct, NY County 1996), available at <https://tinyurl.com/43dwm7y>; Rohde NY Times.

³⁰ *Griffin*, 242 AD2d at 71-72.

expert witness in a multi-million dollar lawsuit against her landlord.³¹ According to Griffin, when he refused, the complainant fabricated the claims against him.³²

Fleming's misconduct arose during the trial. In a pre-trial hearing, Fleming sought permission to cross-examine Griffin about an alleged romantic relationship with a female patient (not the complainant).³³ Specifically, Fleming sought to inquire whether Griffin had "masturbated in front of" the partially disrobed patient.³⁴ The trial court permitted a limited inquiry about the allegations, but "*explicitly* excluded any reference to masturbation as too inflammatory."³⁵

Fleming blatantly ignored the trial court's explicit instruction. "Undeterred" by the trial court's "meticulous instructions" and "apparently angered,"³⁶ Fleming asked Griffin explicitly and directly about masturbation:

Fleming: Do you remember ... at any point a woman in November of '91 coming into your office at Central Park West and that you took her shirt off and fondled her breasts?

Griffin: Absolutely not.

Griffin: And you don't remember at any point masturbating?³⁷

The jury convicted Griffin.³⁸

While encompassing only a single question, the court found that Fleming's "intentional misconduct" had a "poisonous impact."³⁹ Because of the repugnant nature of the allegations against Griffin, "it was essential" that the jury remain "dispassionate [and] free of prejudicial distraction."⁴⁰ But by bringing up an allegation about masturbation, Fleming had "deliberately chosen" to make a prejudicial distraction, making dispassionate deliberation "impossible."⁴¹

Thus, Fleming's misconduct was twofold. First, Fleming ignored an explicit court order. This is serious and can even constitute criminal contempt.⁴² Second, Fleming inflamed the passions of

³¹ *Id.* at 72.

³² *Id.*

³³ *Id.* at 72.

³⁴ *Id.*

³⁵ *Id.* (emphasis in original).

³⁶ *Id.* at 73.

³⁷ *Id.*

³⁸ *Id.* at 71.

³⁹ *Id.*

⁴⁰ *Id.* at 72.

⁴¹ *Id.*

⁴² See PL § 215.50(3) ("A person is guilty of criminal contempt in the second degree when he engages in [i]ntentional disobedience or resistance to the lawful process or other mandate of a court").

the jury, undermining the right of an accused to a fair trial.⁴³ The Appellate Division explained the prejudicial impact:

On appeal, the People are unpersuasive in minimizing the poisonous impact of the prosecutor's intentional misconduct. Not surprisingly, they point to the curative instruction given by the court to the jury in a futile attempt to 'unring the bell' Simply put, this bell had tolled, ringing a sad curfew to the notion of a fair trial."⁴⁴

Based on Fleming's misconduct and two other legal errors in the trial, the Appellate Division reversed the conviction and ordered a new trial.⁴⁵

According to the National Registry of Exonerations, Griffin lost his medical license after the conviction.⁴⁶ The Registry page continues that at a second trial, the "patient again testified and was cross-examined in depth about her finances and alleged false statements. Griffin again denied the sexual assault. The defense also presented evidence that the medication and sedatives the woman was given on the day of the colonoscopy can lead patients to experience sexual fantasies."⁴⁷ The jury acquitted Griffin at the second trial.⁴⁸

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."⁴⁹ Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."⁵⁰ Grievance Committees are "committed to . . . recommending discipline for lawyers who do not meet the high ethical standards of the profession."⁵¹

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

⁴³ See, e.g., *People v Mehmood*, 112 AD3d 850, 853 (2d Dept 2013); *People v Green*, 183 AD2d 617, 618 (1st Dept 1992) (prosecutor's remarks "appear as a calculated appeal to the jury's emotions, in particular wrath toward the defendant, and sympathy for the victim. We strongly disapprove of such efforts to inflame the passions of the jury.").

⁴⁴ *Griffin*, 242 AD2d 70.

⁴⁵ *Id.* at 73. While the Appellate Division found other errors, by noting that Fleming's misconduct violated Griffin's fair trial right, it implicitly ruled that that error, alone, sufficed to reverse the conviction. Otherwise, the Court would have included language on the cumulative effect of the different errors.

⁴⁶ The National Registry of Exonerations, Patrick Griffin, <https://tinyurl.com/5bukse9k>.

⁴⁷ *Id.*

⁴⁸ Rohde NY Times.

⁴⁹ Attorney Grievance Committee of the First Judicial Department, *How to File a Complaint*, <https://tinyurl.com/39axvffr>.

⁵⁰ Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.2(a).

⁵¹ *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.”⁵²

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.”⁵³

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.”⁵⁴ 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.⁵⁵ The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.⁵⁶ 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. Fleming’s Misconduct Violated Rules of the New York Code of Professional Responsibility.⁵⁷

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.⁵⁸ 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.”⁵⁹

At the time of the 1996 trial, the Code of Professional Responsibility (“Code”) was the applicable professional set of rules. Fleming 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.⁶⁰

⁵² *Connick v Thompson*, 563 US 51, 65-66 (2011) (quotation marks omitted).

⁵³ *Kurtzrock*, 192 AD3d 197, 219.

⁵⁴ Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b) Comment [1].

⁵⁵ 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.”).

⁵⁶ *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b).

⁵⁷ The applicable professional set of rules at the time that Fleming tried Griffin was the Code of Professional Responsibility. The Rules of Professional Conduct, the set of rules in effect today, replaced the Code in 2009.

⁵⁸ *See, e.g., Matter of Capoccia*, 59 NY2d 549, 551 (1983).

⁵⁹ *Matter of Seiffert*, 65 NY2d 278, 280 (1985) (quotation marks omitted); *see also Matter of Scudieri*, 174 AD3d 168, 173 (2019).

⁶⁰ 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.

Fleming violated the trial court’s explicit instruction. Even though a judge told her not to refer to masturbation, Fleming did just that. This was no mistake: the Appellate Division found it to have been an intentional, deliberate act. This same action also inflamed the jury’s passions, making dispassionate deliberation impossible. Consequently, Fleming prejudiced the judicial process and Griffin’s fair trial right. By disobeying the court and inflaming the jurors’ passions, Fleming demonstrated inappropriate conduct raising a question of fitness to be an attorney.

B. For Her Misconduct, Fleming 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.”⁶¹ The ABA’s Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline “exempt from all statutes of limitations.”⁶²

In considering discipline, the Appellate Division has considered the role of prosecutor as a “substantial factor in aggravation.”⁶³ 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.”⁶⁴ Similarly, extensive prosecutorial experience weighs towards a more serious sanction.⁶⁵

Fleming entered the legal profession in 1992, meaning that she was already an experienced attorney by the time of the misconduct in this case. After her prosecutorial career, it appears that Fleming was an elected official on the Southampton Town Board⁶⁶ and is currently an elected legislator in Suffolk County.⁶⁷ Fleming is now campaigning for a seat in the U.S. Congress,⁶⁸ touting her experience in the New York County District Attorney’s Office.⁶⁹

For her intentional disobedience of an explicit court order and the resulting prejudice to Griffin’s constitutional fair trial right, the Grievance Committee must seek Fleming’s suspension.

⁶¹ ABA Model Rules for Lawyer Disciplinary Enforcement rule 32 (Commentary 2020).

⁶² *Id.*

⁶³ *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.”).

⁶⁴ *Kurtzrock*, 192 AD3d at 219.

⁶⁵ *Id.*

⁶⁶ *See* Suffolk County Legislature, About Bridget, <https://tinyurl.com/4pmzu5x5>.

⁶⁷ *See* Suffolk County Legislature, A Message From Bridget, <https://tinyurl.com/y2sx26x4>.

⁶⁸ Lisa Finn, *Bridget Fleming Announces 2022 Run For Congress*, Patch (May 2, 2021) <https://tinyurl.com/p99hpkhe>.

⁶⁹ *See* Bridget Fleming for Congress, Meet Bridget, <https://tinyurl.com/8xp78ka2>.

Conclusion

Fleming committed serious prosecutorial misconduct by intentionally violating an explicit court order and inflaming the passions of the jury. In doing so, she violated the legal professional rules. To these writers' knowledge, Fleming remains unsanctioned publicly or privately for her serious misconduct. Suspension is the only appropriate sanction for this serious misconduct.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."⁷⁰ 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."⁷¹ 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 Fleming. 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."⁷² 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 Fleming'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.⁷³ 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."⁷⁴

⁷⁰ NY St Bar Assn Comm on Prof Discipline, Guide to Attorney Discipline, <https://tinyurl.com/47scv4pb>.

⁷¹ *Id.*

⁷² Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

⁷³ *Kurtzrock*, 192 AD3d 197.

⁷⁴ *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.⁷⁵ 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.⁷⁶ The judge concluded that the suppression constituted “more than exceptionally serious misconduct.”⁷⁷

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.⁷⁸ 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,”⁷⁹ which the report characterized as a “potential systemic issue.”⁸⁰

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.**⁸¹ These disclosures have already spurred applications to review convictions.⁸² The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate,⁸³ an important step given that, in explaining the lenient two-year suspension for Kurtzrock’s

⁷⁵ 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>.

⁷⁶ Morrison, *What Happens When Prosecutors Break the Law?*, NY Times, <https://tinyurl.com/52ar9tjx>.

⁷⁷ 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).

⁷⁸ 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.

⁷⁹ *Id.* at 5.

⁸⁰ *Id.* at 4.

⁸¹ *Id.* at 6.

⁸² *Id.*

⁸³ *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”⁸⁴ 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.⁸⁵
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.⁸⁶
4. The Committee should identify any prosecutors trained and/or supervised by Fleming 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

⁸⁴ Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

⁸⁵ 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.

⁸⁶ 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.



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