SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of the Application of RICHARD A. BROWN, District Attorney of Queens County,	:	
Petitioner,	:	Index No. 2010-09688
For a Judgment in the Name of Prohibition under Article 78 of the Civil Practice Law and Rules,	:	
-against-	:	
The Honorable JOEL L. BLUMENFELD, Acting Justice, Supreme Court of the State of New York; ELISAUL PEREZ, named as Defendant in Queens County Indictment Number 1202/2009,	:	
Respondents.	:	

MEMORANDUM OF LAW OF *AMICI CURIAE* NEW YORK COUNTY LAWYERS' ASSOCIATION ETHICS INSTITUTE, QUEENS COUNTY BAR ASSOCIATION, BRONX BAR ASSOCIATION, CUNY LAW SCHOOL CRIMINAL DEFENSE CLINIC, ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS, AND PROFESSIONAL RESPONSIBILITY PROFESSORS AND PRACTITIONERS

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PRELIMINARY STATEMENT

The undersigned (the "*amici*") respectfully submit this Brief in support of their opposition to the application of the Queens County District Attorney's Office (the "District Attorney") for a writ of prohibition under CPLR Article 78, seeking to prevent the Hon. Joel L. Blumenfeld ("Justice Blumenfeld" or the "trial court") from relying upon an ethics opinion the judge commissioned from Professor Ellen Yaroshefsky ("Professor Yaroshefsky") when ruling on a suppression motion in a criminal case entitled *People v. Elisaul Perez,* Queens. Co. Indictment No. 1202/2009 (the "*Perez* Case").

The undersigned *amici* include:

- the Ethics Institute of the New York County Lawyers' Association (the "NYCLA Ethics Institute"), which coordinates all ethics-related activities of the 9,000 member Association, engages in independent research and scholarship regarding professional responsibility issues, and furthers lawyer professionalism through its Professionalism Task Force;
- the Queens County Bar Association, a 135-year old, 2000-member organization which is, among other things, dedicated to the impartiality and independence of the judiciary and has a strong

interest in ensuring that judges conduct themselves in a proper and ethical manner;

- the Bronx Bar Association, founded in 1902 and dedicated to, among other things, promoting the practice of law in a professional manner, advancing reforms in the law that are in the public interest, applying its knowledge and experience in the law for the public good, and arranging for the provision of legal services for indigent adults seeking representation in criminal cases;
- The CUNY Law School Criminal Defense Clinic, which is one of two law school clinics in Queens County providing legal services to indigent criminal defendants;
- professors who teach Professional Responsibility Law on a full-time and adjunct basis at local law schools (Brooklyn Law School, Cardozo School of Law, Columbia University School of Law, Fordham University School of Law, Hofstra University School of Law, New York Law School, New York University School of Law, Pace University School of Law, and Rutgers University Law School) and law schools around the nation (Georgetown University Law Center, Pennsylvania State University – Dickinson School of Law, Roger Williams School of Law, University of San Francisco School

of Law, University of Utah School of Law, University of Virginia School of Law, University of Wisconsin School of Law, and Yale University School of Law, among others);

- leading professional responsibility lawyers from across the U.S., including former disciplinary counsel, former members of the ABA Standing Committee on Professionalism, current and former members of professional and judicial ethics committees of the ABA, New York State Bar Association, New York City Bar Association and NYCLA, and many others; and
- The Association of Professional Responsibility Lawyers ("APRL"), a national organization with more than 400 members who practice and teach professional responsibility law.[1] The APRL Board has voted to join the *amicus* brief to the limited extent that it supports the propriety of a judge seeking outside expert advice on the parameters of ethical attorney conduct and condemns *ad hominem* arguments. APRL refrains from taking a position on the remaining issues.

[1] A more detailed description of APRL can be found at its website, www.aprl.net.

A full list of the individual *amici* and their affiliations is attached as an Addendum to this Brief.[2]

INTRODUCTION

Professor Yaroshefsky, Director of the Jacob Burns Center of Ethics in the Practice of Law at the Cardozo Law School of Yeshiva University, was asked by Justice Blumenfeld to opine on certain practices employed as a matter of policy and routine by the Queens County District Attorney's Office. Justice Blumenfeld acted pursuant to 22 N.Y.C.R.R. § 100.3(b)(6)(B), which permits a judge to seek the advice of a disinterested expert on the law if the judge gives notice to the parties and an opportunity to be heard; these formalities were followed here. The practices in question were employed in the *Perez* Case and include "scripted" interviews by Assistant District Attorneys ("ADAs") of post-arrest, pre-arraignment suspects. Acting at the direction of the District Attorney's Office, ADAs use the "script" and time the interview just prior to arraignment and appointment of counsel. In relation to the ADAs, the suspects are unrepresented adverse parties.

At Justice Blumenfeld's request, Professor Yaroshefsky[3] reviewed the practices used in the *Perez* Case and concluded, *inter alia*, that some, but not all,

[2] The *amici* are expressing their personal views and do not purport to act on behalf of their respective universities, law firms or organizations, except where otherwise noted.

[3] Professor Yaroshefsky is a member of both APRL and the NYCLA Ethics Institute.

were ethically flawed and violated New York's professional responsibility standards, in particular the rules that govern contacts with unrepresented individuals and prohibit deception and dishonesty. In response, the District Attorney filed papers criticizing Professor Yaroshefsky's opinion, accusing her of bias (based in part on the identity of a supposed former client), and insisting that Justice Blumenfeld strike her report from the record. When Justice Blumenfeld refused, the District Attorney commenced this Article 78 proceeding, seeking a writ of prohibition by challenging the trial court's authority to consider the ethical implications of the District Attorney's conduct in the context of a suppression motion.

The District Attorney asks this Court to limit the traditional power of trial judges in criminal cases to investigate and rule upon the unethical conduct of lawyers appearing before them. Indeed, the District Attorney suggests that prosecutors are specifically exempt from the ethics rules, at least insofar as questions may arise in connection with the possible suppression of evidence in a criminal prosecution. Such a ruling would restrict the ability of criminal court judges, who observe and interact with prosecutors and defense lawyers every day, to take steps to regulate their conduct (as it pertains to matters pending before them) and would set a novel and dangerous precedent. It would also limit criminal court judges' compliance with the New York's Code of Judicial Conduct, which

requires them to take "appropriate action" when confronted by ethical misconduct by *any* lawyer appearing before them, including prosecutors. *Amici* respectfully submit that on this important point – one that addresses the interface between New York's professional responsibility rules and the criminal law -- our collective knowledge and experience as professional responsibility practitioners can assist this Court.

In this Brief, we will demonstrate (a) the propriety of the trial court's approach, (b) the merits of Professor Yaroshefsky's original submission, and (c) the inappropriate nature of the District Attorney's actions in this case, as well as their potentially troubling consequences.

A R G U M E N T

I.

THE TRIAL COURT HAS THE AUTHORITY TO REGULATE THE CONDUCT OF ALL LAWYERS, INCLUDING PROSECUTORS, APPEARING BEFORE IT IN A CRIMINAL CASE

The District Attorney argues at length that Justice Blumenfeld has engaged in improper conduct in addressing the ethics of the prosecutors who work in his office, either in the context of the suppression motion or as a separate issue. That proposition is without foundation, and it is especially disturbing that the District Attorney of Queens County – an official managing hundreds of prosecutors, all imbued with the public trust – asserts such an unmeritorious position.

A. New York Courts Have Exclusive Authority to Regulate New York Lawyers

It is fundamental that the courts take the primary role in regulating New York lawyers. *La Rocca v. Lane*, 37 N.Y. 2d 575, 581 (1975) ("Petitioner does not, as he could not, dispute the power of the court to regulate generally counsel's conduct and appearance."). As described in detail in Chief Judge Cardozo's opinion in *People ex rel. Karlin v. Culkin,* 248 N.Y. 465, 477-78 (1928), the principle of court regulation of lawyers was embedded in the very first Constitution of this State, the Constitution of 1777, which required that "all attorneys, solicitors, and counselors at law hereafter to be appointed, be appointed by the court and licensed by the first judge of the court in which they shall respectively plead and practice; *and be regulated by the rules and orders of the said courts*" (emphasis added). This basic principle, though removed from the Constitution that was adopted in 1821, was then extended over the next 135 years, first (albeit briefly) by statute,[4] and later by judicial decisions making clear that the courts' power to regulate lawyers was "inherent." *See Karlin,* 248 N.Y. at 472 (citing cases). In 1912, the predecessor of N.Y. Jud. Law § 90 was signed into law, codifying once and for all the courts' jurisdiction over lawyers.

[4] The act of April 17, 1823 (L. 1823, Ch. 182, § 19) included the exact words of the Constitution of 1777, but those words were dropped when the statute was revised four years later. *Karlin,* 248 N.Y. at 477.

The court system's regulatory responsibility includes both the promulgation of the applicable rules of professional conduct, and the establishment and supervision of the disciplinary system. N.Y. Jud. Law § 90(2) (empowering "the appellate division of the supreme court of each department" to impose attorney discipline). Each Department has its own Chief Disciplinary Counsel, maintains its own disciplinary staff, promulgates its own procedural rules for discipline, and makes the final determination on all disciplinary proceedings. *Id.*; *see also* 22 N.Y.C. R.R. §§ 605.1 *et seq.* (First Department disciplinary procedures), §§ 691 *et seq.* (Second Department disciplinary procedures), §§ 806 *et seq.* (Third Department disciplinary procedures), and §§ 1022 *et seq.* (Fourth Department disciplinary procedures).

Courts also are responsible for regulating the conduct of the lawyers who appear before them. Lawyers practice before the courts of New York each day and when a judge learns of misconduct by a lawyer, a proper response is for the judge to make a referral to disciplinary authorities. This, however, is far from the only remedy available to judges who, though unable to impose formal discipline, can take appropriate steps to regulate the conduct of lawyers appearing before them. *See First Nat. Bank v. Brower*, 42 N.Y.2d 471, 474, 398 N.Y.S.2d 875 (1977) (Courts have the "inherent and statutory power to regulate the practice of law.") *citing Gair v. Peck,* 6 N.Y.2d 97, 188 N.Y.S.2d 491 (N.Y. 1959); N.Y. Code of

Jud. Conduct, 22 N.Y.C.R.R. §100.3(D)(2) ("A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.").

Thus Judge Blumenfeld, like any other New York trial court judge, had the authority to consider the professional conduct of the District Attorney and the lawyers he supervises as it affected the underlying suppression motion, as well as more generally. This authorized judicial scrutiny may properly result in a broad range of judicial actions, including criticism of the lawyer in an opinion, imposition of sanctions, disqualification, suppression of evidence, dismissal of a prosecution, and referral for formal disciplinary action. The District Attorney's cramped notion that an ethical inquiry has no place on a suppression motion is simply incorrect.

B. Courts May Consider Ethics Provisions in a Range of Actions that Directly Impact the Fact Finding Process

The options available to a trial judge confronted with the ethical misconduct of a lawyer include actions that directly impact the trial process. In the civil arena, New York courts, state and federal, routinely take steps against miscreant lawyers that fall short of formal discipline, such as disqualifying lawyers when they: have a current client conflict of interest under Rule of Professional Conduct ("RPC") 1.7 (formerly DR 5-105(A), *see, e.g., GSI Commerce Solutions, Inc. v. BabyCenter LLC,* 618 F.3d 204 (2d Cir. 2010) (disqualifying firm that sought to represent

entity suing subsidiary of current client); have a former client conflict of interest under RPC 1.9 (formerly DR 5-108), *see, e.g., Tekni-Plex, Inc. v. Meyner and Landis,* 89 N.Y.2d 123, 651 N.Y.S.2d 954 (1996) (disqualifying law firm that formerly represented corporation from representing former owner against that corporation); or violate the "advocate-witness" rule under RPC 3.7 (formerly DR 5-102), *see, e.g., Dubin v. Miller,* 801 F. Supp. 1101 (S.D.N.Y. 1992) (disqualifying attorney who wrote key documents from handling trial, but allowing his law firm to remain as trial counsel). Even more on point here, New York courts handling civil matters carefully enforce the "no-contact" rule of RPC 4.2 (formerly DR 7-104(A)(1)), which limits direct communications between a lawyer and a represented adverse party, and will often suppress evidence as well as disqualify counsel when that rule is violated. *See, e.g., Matter of Marvin Q,* 45 A.D.3d 852, 846 N.Y.S.2d 356 (2d Dep't 2007), *lv. app. dismissed,* 10 N.Y.3d 927, 862 N.Y.S.2d 330 (2008) (disqualifying counsel and suppressing statements he obtained); *accord, Papanicolou v. Chase Manhattan Bank, N.A.,* 720 F. Supp. 1080 (S.D.N.Y. 1989).

Courts also enforce the professional conduct rules *vís à vís* defense lawyers in the criminal context, even when the defendant's constitutional rights at trial might be implicated. As just one notable example, where a defense lawyer has knowledge that his client has, or is about to, commit perjury during a criminal trial,

courts enforce the client perjury rule of RPC 3.3 (formerly DR 7-102(A)) by, among other things, allowing a defense lawyer to inform the court of the prospective perjury [*People v. Andrades,* 4 N.Y.3d 355, 795 N.Y.S.2d 497 (2005)]; allowing the defense lawyer to present the defendant's testimony through a narrative format [*People v. DePallo,* 96 N.Y.2d 437, 729 N.Y.S.2d 649 (2001)]; and allowing the defense lawyer to not mention the defendant's testimony during summation. *Id.* All of these adversely affect the defendant's constitutional rights to testify and to be represented by counsel – nevertheless, courts permit these limitations in order "to walk the fine line between honoring a criminal defendant's constitutional right to testify and avoiding the direct involvement of the defense lawyer in offering and using perjured testimony." R. Simon, Simon's New York Code of Professional Responsibility Annotated, 1223 (Thomson/West 2008) (hereafter, "*Simon*").

Given the breadth of situations in which trial courts cite and apply the professional responsibility rules, the District Attorney's reliance on the Preamble to the RPCs is misplaced. He cites portions of the Preamble, such as paragraphs 7, 8 and 9, which make clear that the RPCs "presuppose a larger legal context shaping a lawyer's role," including "laws defining specific obligations of lawyers and substantive and procedural law in general." *See* RPCs, Scope, ¶ 7. These citations actually support *amici's* position since, as already demonstrated, cases

involving the interface between civil or criminal law, on the one hand, and the ethics rules, on the other, show that those rules can be, and often are, used by trial judges to regulate or comment upon the conduct of practitioners. *See, e.g., People v. Shiu Yan Yee,* 114 Misc. 2d 515, 522, 451 N.Y.S.2d 965 (Sup. Ct. Queens Co. 1982) (Goldstein, J.) (actions of ADA who surreptitiously tape recorded phone conversations and advised suspect to surrender "represent a gross misunderstanding by the assistant involved as to the duty of a public prosecutor 'to seek justice, not merely to convict") (*citing* EC 7-13).

Indeed, the Preliminary Statement to the former Code of Professional Responsibility (the "Code"), which was in effect at the time of the *Perez* case, contains guidance directly on point:

> *Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to* ***all lawyers****, regardless of the nature of their professional activities* (emphasis added).

C. Courts May Apply the Ethics Rules to Regulate the Conduct of Prosecutors

In his petition, the District Attorney asserts, as a threshold matter, that the trial court cannot properly consider a prosecutor's alleged breach of a disciplinary rule when evaluating a defendant's motion to suppress in a criminal case. That is not correct. As the language just quoted makes clear, prosecutors enjoy no special exemption from the ethics rules, under either the RPCs or the former Code. Indeed, in some instances, the rules impose higher ethical obligations on

prosecutors recognizing their high position of public trust and responsibility. *See* RPC 3.8 (a) and (b) (formerly DR 7-103(A) and (B)) (prohibiting the prosecutor from instituting criminal charges where she "knows or it is obvious that the charge is not supported by probable cause," and requiring prosecutor to disclose evidence that "tends to negate the guilt of the accused"). Accordingly, New York courts, including the highest court in this State, have frequently relied upon disciplinary rules in evaluating a prosecutor's conduct in circumstances comparable to those presented here.

Instructive is *People v. Skinner,* 52 N.Y.2d 24, 436 N.Y.S.2d 207 (1980). There, a suspect retained an attorney after becoming the target of a homicide investigation. Despite being informed of defense counsel's involvement, the ADA in charge of the investigation sent detectives to serve the defendant with an order requiring him to appear in a line-up. While doing so, the detectives questioned the suspect and obtained a confession. Reversing the lower courts, the Court of Appeals suppressed the confession. Although its decision relied primarily on the constitutional right to counsel, the Court made clear that the "no-contact" rule of DR 7-104(A)(1) also applied:

> This court's vigilance in protecting the right to counsel finds additional support even in the ethical responsibility of attorneys in civil matters not to communicate on the subject of the representation with an individual known to be represented by an attorney on the matter [citing DR 7-104]. *We would be hard pressed logically to proscribe such conduct in the civil context yet blithely overlook it in*

> *the criminal sphere. Id.* at 29-30 (emphasis added; citations omitted except as noted).

See also People v. Hobson, 39 N.Y.2d 479, 484, 384 N.Y.S.2d 419 (1976) ("[A]n attempt to secure a waiver of the right to counsel in a criminal proceeding in the absence of a lawyer, already retained or assigned, would constitute a breach of professional ethics, as it would be in the least-consequential civil matter"); *People v. Goldfinger,* 149 Misc. 2d 765, 771, 565 N.Y.S.2d 993 (Sup. Ct. N.Y. Co. 1991) (Andreas, J.) (suppressing statements made during investigation stage, after suspect had retained counsel; "[w]hile my conclusion rests on the New York State right to counsel, there is also ample support for the result reached herein under the proscriptions of Disciplinary Rule 7-104(A)(1)").

The Second Circuit has been just as direct. In *U.S. v. Jamil,* 707 F.2d 638, 645 (2d Cir. 1983), the Court held that "DR 7-104(A)(1) may be found to apply to a criminal case, . . . to government attorneys, . . . [and] to non-attorney government law enforcement officers when they act as the alter ego of government prosecutors." In *U.S. v. Foley*, 735 F.2d 45, 48 (2d Cir. 1984), *cert. denied,* 469 U.S. 1161 (1985), the Court intimated that pre-arraignment interviews might violate DR 7-104(A)(1) even if they pass constitutional muster. *Id.* ("We think that this practice of routinely conducting pre-arraignment interviews raises serious constitutional questions . . . as well as ethical ones . . . ."). Most vigorously, the Court in *U.S. v. Hammad,* 858 F.2d 834 (2d Cir. 1988), held that a violation of DR

7-104(A)(1) in the pre-indictment stage could result in suppression of evidence in order to deter prosecutors from future misconduct. *Id*. at 840-41 ("suppression may be ordered in the District Court's discretion").

Courts have rejected the arguments of federal prosecutors that they were exempt from the ethics rules. *In re John Doe*, 801 F. Supp. 478, 484-87 (D. N. Mex. 1992); *see also United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993) ("[B]eginning at the latest upon the moment of indictment, a prosecuting attorney has a duty under ethical rules like [California's no-contact rule] to refrain from communicating with represented defendants.") As the *Doe* court observed, "ethical standards are not merely a guide for the lawyer's conduct, but are an integral part of the administration of justice." *Doe*, 801 F. Supp. at 479.

D. The Trial Court Is Acting Within Its Authority Here

We discern no principled basis to distinguish between the ethics rule applied in the cases above, which proscribes contact with a represented party, and those put into issue in Professor Yaroshefsky's opinion – the rules prohibiting certain communications with an *un*represented party, and those prohibiting fraud and deceit. It cannot be correct to say, as the District Attorney argues, that the trial court lacks any authority to consider the conduct of the District Attorney's Office in a case pending before the court. Not only are New York courts empowered to regulate the conduct of attorneys in the cases before them, as we have already

shown; they may do so *sua sponte*. *See Dorsainvil v. Parker,* 14 Misc.3d 397, 400 (Sup. Ct. Kings Co. 2006) ("[t]he judiciary has the ability to question any 'impropriety [which] appears on the record and the issue may be raised *sua sponte*'"), *quoting Booth v. Continental Ins. Co.,* 167 Misc.2d 429, 435 (Sup. Ct. Westchester Co. 1995).

Thus, it cannot, *ipso facto*, have been wrong for the trial court in the *Perez* Case to solicit an ethics opinion from a qualified expert regarding the conduct of the District Attorney's Office (including those working under its direction) in interviewing the defendant before his arraignment. The court could properly consider this opinion when ruling on the underlying legal issue (whether to suppress) as well as with regard to the conduct of the *Perez* ADA and the ADA's supervisors more generally. With respect to consideration of the conduct of counsel, the judge was authorized to make a referral to the disciplinary authorities and, insofar as that conduct affected the case, adjudicate the relevant issues himself. The judge has the authority to choose either of these options, or both, and that choice would be entirely consistent with the judiciary's responsibility to regulate the conduct of lawyers who appear before it. It follows that an "extraordinary" writ of prohibition does not lie. *See Schumer v. Holtzman*, 60 N.Y.2d 46, 51, 467 N.Y.S.2d 182 (1983) (a writ of prohibition is available only "[t]o prevent or control a body or officer acting in a judicial or quasi-judicial

capacity from proceeding or threatening to proceed without or in excess of its jurisdiction and then only when the *clear legal right* to relief appears and, in the court's discretion, the remedy is warranted") (emphasis added).

The District Attorney's petition should be rejected for these reasons alone.

II.

THE YAROSHEFSKY REPORT IS NARROW AND REACHED REASONABLE AND, IN OUR VIEW, CORRECT CONCLUSIONS

We recognize that this Article 78 proceeding does not place the issue of the validity of Professor Yaroshefsky's report before this Court. Nevertheless, it is important to note that, in our view, the conclusions Professor Yaroshefsky reached are correct or, at the very least, are more than sufficiently reasonable to warrant consideration by the trial court. This makes the District Attorney's criticisms of her, and his attempts to use the power and resources of his office to suppress her opinion, all the more disturbing.

Professor Yaroshefsky's initial conclusions were narrowly drawn and directed only towards concerns with the script used by the ADAs during their discussions with unrepresented individuals, as applied in the context of the interview itself. She did not challenge the District Attorney's right to conduct these scripted discussions, but simply concluded that certain questions in the script, when read in context, violated the ethics rules. A review of the applicable

Disciplinary Rules[5] – DR 7-104(A)(2) (communications with unrepresented persons) and DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation) – will demonstrate that this conclusion is correct.

A. The Applicable Rules

The District Attorney's script for the pre-arraignment interviews in the *Perez* Case implicated two important Disciplinary Rules.

The first, DR 7-104(A)(2), addresses communications between a lawyer and an unrepresented party whose interests conflict with those of the lawyer's client, as follows:

> (A) During the course of the representation of a client a lawyer shall not:
>
> * * *
>
> (2) *Give advice to a party who is not represented by a lawyer*, other than the advice to secure counsel, *if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client* (emphasis added).

DR 7-104(A)(2) recognized the danger that lawyers, by dint of education and experience, may have out-sized influence over non-lawyers, and that, as a result, an unrepresented party may misapprehend the role of the adverse lawyer, even to

[5] Although the District Attorney makes much of the fact that Professor Yaroshefsky cited the RPCs instead of the Code concerning events that took place in March 2009 (two weeks before the RPCs went into effect), the distinction is of no moment. First, the differences between the two sets of rules are not significant when applied to these facts; indeed, the prohibitions on fraud and deceit, RPC 8.4 and former DR 1-102(A)(4), are exactly the same. Second, given that the District Attorney intends to continue the pre-arraignment interviews, the RPCs remain highly relevant. Nevertheless, for the avoidance of doubt, we will analyze the events in *Perez* based on the Code.

the point of seeking or accepting advice from her. *See Simon* at 1311 (an unrepresented potential witness "may not realize the implications of giving information to a lawyer"). As a leading commentator noted, "DR 7-104(A)(2) is a conflict of interest rule designed to protect a non-client against receiving legal advice from a lawyer who has a conflict or potential conflict arising out of the existing representation." *Id.; accord,* N.Y. State Bar Ass'n Ethics Op. 768 (2003).

The second and equally relevant rule is DR 1-102(A)(4), which prohibited lawyers from "engag[ing] in conduct involv[ing] dishonesty, fraud, deceit or misrepresentation." This DR had broad reach, covering "every kind of dishonesty, fraud, deceit or misrepresentation, inside or outside law practice, whether criminal or civil." *Simon* at 44. It encompasses not just outright deception, but also misleading conduct and material omissions. *See, e.g., Dibella v. Hopkins,* 285 F. Supp. 2d 394 (S.D.N.Y. 2003) (sanctioning lawyer who made misleading redaction and misleading statement in open court). While some courts held that this DR did not apply to prosecutors conducting undercover investigations, *see, e.g., U.S. v. Parker,* 165 F. Supp. 2d 431 (W.D.N.Y. 2001), we have found no case under the ethics rules that allowed prosecutors to make misleading statements, no matter how well-intentioned, in a more controlled setting like a pre-arraignment interview.

B. Professor Yaroshefsky's Opinion Reached Reasonable and, in our View, Correct Conclusions Regarding the District Attorney's Script

Two aspects of the District Attorney's script demonstrate that it violates DRs 7-104(A)(2) and 1-102(A)(4). When analyzing these provisions, the Court must be mindful, as Professor Yaroshefsky's Report makes clear, that the interview takes place in a context in which the detective and ADA know, and the suspect does not, that the suspect will imminently secure counsel to provide independent advice as to whether and how to provide information to the prosecution. We will address the questions in the script one by one.

Item 1: "If there is something you would like us to investigate concerning this incident, you must tell us now so that we can look into it."

This is legal advice, pure and simple. The District Attorney's representative[6] advises the unrepresented suspect that he or she "*must*" tell the investigators "*now*" about anything he or she would like them to investigate. This is not a statement of the District Attorney's legal position, or the recitation of a non-negotiable standard protocol (*e.g.,* "You have to get the standard form from Room 201"); rather, it is guidance as to how the suspect should proceed in a situation where several legal options are available. *See* Va. Ethics Op. 1795 (2004)

[6] The script may be read either by the ADA who is present or the detective; either way , they are acting under the District Attorney's supervision, thus implicating DR 1-102(A)(2) ("A lawyer or law firm shall not . . . circumvent a disciplinary rule through the actions of another") and DR 1-104(A) ("A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules").

(opining that, under Model Rule 4.3, criminal defense lawyer may ask unrepresented crime victim to speak to him before speaking to prosecutor, but may not tell her she does not have to speak to prosecutor or appear in court unless subpoenaed).

Moreover, there can be no doubt that the ADA's interests are "in conflict" with those of the suspect within the meaning of DR 7-104(A)(2). The District Attorney argues to the contrary, contending that the scripted interviews give unrepresented suspects their "first opportunity to speak" and that by using this technique 50 interviewees (out of more than 5500) were released – a grand total of 0.9%.[7] *See* Affirmation of Hon. Richard A. Brown ("Brown Aff."), ¶¶ 12-13. This depiction of the pre-arraignment, pre-counsel interview as a benevolent gesture for the benefit of the suspect is at odds with the fact that this benefit would be equally, if not more, effective after the suspect had an opportunity to consult with counsel. In short, despite the prosecutor's obligation to reach the correct result, the criminal justice system relies upon a highly-regulated adversarial process and once a suspect is arrested, it is not accurate to say that the prosecution's interests are "not in conflict" with those of the suspect.

[7] Compare this to the fact that, according to the District Attorney, 19% of those questioned confessed to the crime, and another 44% made a video statement about the crime. Brown Aff. ¶ 12. This suggests that the interview process is more about gathering *inculpatory* evidence than it is about exonerating suspects.

For similar reasons, the instruction "you must tell us now" is misleading and incorrect, and thus violates DR 1-102(A)(4). There is nothing critical about "now." The accused will have the benefit of a lawyer within minutes or (at worst) hours and the same information may be conveyed with the same result then. The District Attorney explains that "now" is required because it prevents "a filtered version, second hand," being provided through a defense lawyer. This ignores the fact that in our system of justice, the actor who is best suited to investigating and presenting defenses is the defense lawyer, and the defense lawyer has many options how to present those defenses – including, if appropriate, arranging an interview session with the client and the ADA.

The District Attorney's main argument is that, whatever happens during the interview, all is cleansed by the administration of the *Miranda* warnings after the questions are asked but before answers are obtained. That is not so. The courts should be particularly concerned with the interviews precisely because they are designed to neutralize any effect that the after-delivered *Miranda* warnings might provide. This is because, before the warnings are recited, the District Attorney's office has already suggested to the unrepresented accused person how helpful it will be if he or she talks to the District Attorney, providing supposedly exculpatory information, and that the accused must do so "now" because once the accused gets a lawyer the opportunity to talk to the prosecutor and get the charges dropped will

be lost. Similar considerations undoubtedly prompted the Court of Appeals to rule in *Hobson* and *Skinner* that the interrogations of represented suspects in those cases violated the ethics rules even though the *Miranda* warnings had been administered. *Skinner,* 52 N.Y.2d at 27 (*Miranda* warnings administered); *Hobson,* 39 N.Y.2d at 484 (same).

As those cases and others make clear, it is no answer to assert that the conduct of the Queens District Attorney's Office is ethically proper simply because it meets a minimal constitutional standard. The authority and power of our profession requires the District Attorney to abide by the Rules of Professional Conduct *and* the Constitution, not just one of them. *See, e.g., Hammad,* 858 F.2d at 839 ("the Sixth Amendment and the disciplinary rule serve separate, albeit congruent purposes").

Item 2: "If your version of the events of the day differs from what we have heard, this is your opportunity to tell your story."

Again, this is legal advice from the conflicted District Attorney's office. The suspect is advised that "this is [her] opportunity" to tell her story and refute any inculpatory information she may believe the police have been provided. This statement has two possible implications, both misleading. It implies either (a) that this is *the only* opportunity the suspect will have to speak; or, at the very least, (b) that this is *the best* opportunity, with the ADA and investigators present. Neither implication, of course, is true: the suspect will soon be given a lawyer, and will be

able to present the same information in a setting much more protective of her rights.

The District Attorney says he conducts his interrogations in this way because the program is designed to get only "exculpatory" information. But this only compounds the misleading nature of what occurs. How is the accused going to know what is exculpatory? How many times have lawyers asked their clients to give them "exculpatory" information only to receive just the opposite?

Putting the exact questions aside, there is the over-riding context of the interviews, which suggest that the ADAs and investigators are there to help the suspect. They offer to listen to the suspect's tale and help investigate any alibi or other exculpatory information. While they state their official positions, their role vis-à-vis the suspect is never made clear. They create the misleading impression that they are working for the suspect, when the exact opposite is true.

To counter this, the District Attorney focuses on a "mistake" Professor Yaroshefsky supposedly made when she premised part of her argument on the fact that the suspect was charged with a crime even though she had not yet been formally arraigned. The interview, however, takes place just before the formal arraignment; the charges have already been drawn up. Indeed, the script that the ADAs use specifically tells the detective to inform the accused of "the specific charges and the date, time and location of the occurrence."

Then Professor Yaroshefsky is criticized because some of the authority she relies upon involves cases of *pro se* litigants, and these interviewees are not acting *pro se*, the District Attorney says, because in the future they will be represented. This argument is frivolous. At the time of the interviews the suspects are unrepresented and deserving of the protections afforded to all *pro se* litigants. There is no special pre-arraignment exception to the ethics rules, especially when the investigation stage is all but over and the suspect is moments away from being formally charged.

In sum, the circumstances around the interview, including the fact that the arrestees are kept from court by the District Attorney's office until the interview is conducted because the ADAs know (but the suspects do not) that a lawyer is about to be provided, lead us to conclude that the main reason for the pre-arraignment interviews and the false urgency the script depicts is to induce the suspect to speak before he has counsel. This conduct violates DR 1-102(A)(4) and DR 7-102(A)(2). *See U.S. v. Foley*, 735 F.2d at 48 ("We think that this practice of routinely conducting pre-arraignment interviews raises serious constitutional questions . . . as well as ethical ones . . . .").

III.

THE ATTEMPT TO SUPPRESS PROFESSOR YAROSHEFSKY'S OPINION VIA THIS PROCEEDING IS UNWARRANTED

Regardless of what this Court thinks of the merits of Professor Yaroshefsky's report, there is another troubling dimension to the District Attorney's response. *Amici* are hard pressed to recall an instance where a prosecutor resorted to seeking a writ of prohibition in order to prevent a judge from even considering a professional responsibility lawyer's opinion which questions that prosecutor's conduct. This tactic, applied to the facts here, is unwarranted.

A. Public Inquiry Regarding Prosecutorial Conduct is Integral to a Democracy

Courts historically have viewed the dissemination of knowledge about the practices and procedures of the justice system as essential to democracy. Such practices "play a vital part in a democratic state." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1070 (1991) (a prosecutors' actions "exist in a larger context of a government ultimately of the people, who wish to be informed . . . and, if sufficiently informed . . . might wish to make changes in the system.").

In a democratic society, the programs and policies of prosecutors work best when exposed to "scrutiny, debate, and review" in the public square. *See* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U.L. Rev. 1, 51 (2009). At the

state and federal level, prosecutors are accountable to the public they serve. *See* Sean Gardiner, *Getting It Right: Experts Eye Measures to Prevent Injustices*, Newsday, Dec. 11, 2002, A8 (Queens County executive ADA explained that prosecutors have incentive to prevent or rectify wrongful convictions because they are "accountable to the people"). Accountability without transparency, however, deprives citizens of the tools they need to determine whether changes are necessary. *See Kyles v. Whitney*, 514 U.S. 419, 439 (1995) (transparency serves to "justify trust in the prosecutor 'as the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done"), *citing Berger v. United States*, 295 U.S. 78, 88 (1935).

One indispensable element of this cultivation of openness is a willingness to identify mistakes and correct them. Distinguished prosecutors have set themselves apart with their openness to constructive criticism. *See* Griffin B. Bell with Ronald J. Ostrow, Taking Care of the Law 204 (1982) (former United States District Judge and Attorney General observed that "[a]dmitting mistakes [is] . . . fundamental," even when observers react "as if the emperor were confessing that he had no clothes"); R. Kuh, *Aftermath: In the Matter of District Attorney Hogan:* Letter to the Editor, N.Y. Magazine, Jan. 3, 1972, at 6, 7 (future N.Y. County District

Attorney observed that "No public official is beyond scrutiny" and that "carefully watching . . . the work of our prosecutors" is "useful service").[8]

In the instant case, reasonable minds can differ on whether the interview program at issue is lawful, wise, or ethical. What should not be debated is the importance of public dialogue and deliberation on interrogation practices. Yet the District Attorney here appears to be seeking to use a writ of prohibition to prevent Professor Yaroshefsky's opinion from even being considered by the trial court. Rather than allow a careful judicial review of his office's tactics – even one constrained by the limits of courtroom procedure – he is attempting to quash one side of that debate, discredit Professor Yaroshefsky, and prevent her views from being aired and even considered by the courts. As professional responsibility attorneys who devote our careers to furthering professionalism among all lawyers, we consider such a result unacceptable.

B. Professor Yaroshefsky Is Qualified to Issue the Requested Ethics Opinion.

This Court should be quite troubled by the *ad hominem* nature of the charges against Professor Yaroshefsky.

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[8] *See* http://books.google.com/books?id=a6Bfz1a8X8YC&pg=PA6&lpg=PA6&dq=frank+hogan+district+attorney&source=bl&ots=A8bUxqIGXk&sig=M9R2k8M23-3qDXKjNJOTLPIuRIY&hl=en&ei=OrrBTJqeKYL48AaR0uXXBg&sa=X&oi=book_result&ct=result&resnum=5&ved=0CCcQ6AEwBDgU#v=onepage&q=frank%20hogan%20district%20attorney&f=false

There can be no question as to Professor Yaroshefsky's qualifications to provide an ethics opinion. She has been an ethics and criminal law professor at Cardozo School of Law for more than 20 years, teaching ethics to countless law students and receiving an award from the New York State Bar Association for "Outstanding Contribution in the Field of Criminal Law Education." She has written numerous articles on legal ethics topics, including prosecutorial ethics. She maintains a small private practice, and over the decades has advised dozens upon dozens of lawyers on ethics matters. She has served actively on numerous Bar ethics committees, including as: a member of the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC"), which drafted proposed revisions to the former Code of Professional Responsibility; co-chair of the Ethics, Gideon and Professionalism Committee of the Criminal Justice Section of the American Bar Association; and a member of the Advisory Board of the NYCLA Justice Center.

The District Attorney tries to ignore all these obvious qualifications and contends that Professor Yaroshefsky is an "interested witness." In the usual instance, an interested witness is a party or some other person with an identifiable pecuniary or other concrete interest in the outcome of a case. By contrast, "experts have no antecedent relation to the event and therefore are not interested witnesses." *Dillon v. Kaminsky,* 256 A.D.2d 483, 485 (2nd Dep't 1998); *cf. New York State*

Senator Kruger v. Bloomberg, 1 Misc.3d 192, 195 (Sup. Ct. N.Y. Co. 2003) ("to be an 'interested' party, one must have a legally cognizable claim"). We are unable to find any case authority to support the District Attorney's argument that an expert might be deemed "interested" for the defense in a specific criminal case and thus ineligible to provide an opinion pursuant to 22 NYCRR § 100.3(B)(6)(b) merely because the expert's past work purportedly suggests that she harbors "pro-defense" political views that one of the litigants considers unfavorable.

Petitioner's targeting of Professor Yaroshefsky's representation of criminal defense lawyer Lynne Stewart – actually, she provided ethics advice to Ms. Stewart's defense *lawyers* – does not buttress his argument. *See* Petitioner's Memorandum of Law at 36; *cf.* Shawn McCarthy, *Radical lawyer plans to appeal terror verdict*, Globe and Mail (Canada), Feb. 14, 2005, A13 (reporting on Stewart's plan to appeal conviction and identifying Professor Yaroshefsky as "member of [Stewart's] defense team"). Representation of the unpopular has been a core commitment of American lawyers since the colonial era. *See United States v. Reid*, 214 F. Supp. 2d 84, 95 (D. Mass. 2002) (in rejecting government's request for restrictions on defense lawyers in case of "shoe-bomber" Richard Reid, judge reminded parties that "John Adams represented the British soldiers who allegedly committed the Boston Massacre"). It is disturbing to see a public prosecutor who is a former judge of this Court take an expert to task for having represented, or

been involved in the representation of, a particular litigant and for having criticized (mildly) the government's prosecution of that litigant – especially since the District Attorney has taken Professor Yaroshefsky's remarks completely out of context. The District Attorney relies on remarks Professor Yaroshefsky made while speaking on a panel at the New York City Bar Association on April 29, 2010, claiming they show she acted as Ms. Stewart's ethics advisor, when in fact, according to the panel chair, the remarks were much more general and were intended to question the use of criminal prosecutions to suppress unpopular advocacy. *See* Janeanne Murray, *Letter to the Editor,* N.Y.L.J., 10/18/10 at 2.

Seeking to disqualify an expert because she has expressed views that are unpopular in some quarters would also establish a troubling precedent for the admission of expert testimony. When courts determine whether an expert's analysis is helpful to the tribunal, they typically look to neutral factors such as her training, general experience, and methodology. Of course, parties routinely subject an expert's background and views to the salutary rigors of cross-examination. Nevertheless, to rule that a litigant, such as the District Attorney, may properly move to disqualify an expert because she allegedly pronounced opinions or views with which the litigant disagrees could dissuade a potential expert from even participating in a given matter. That chilling effect would in turn impede a tribunal's recourse to helpful expertise, which 22 N.Y.C.R.R. § 100.3(B)(6)(b)

specifically allows. We do not mean to suggest that the District Attorney has sought this outcome, but we fear that accepting his position would have that result.

CONCLUSION

For the reasons stated above, the District Attorney's application for a writ of prohibition should be denied.

Dated: New York, New York
December 15, 2010

Respectfully submitted,

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The Individual Amici Are Listed on Exhibit B to Affirmation of Ronald C. Minkoff in Support of Motion For Leave to File Brief as Amici Curiae

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Petitioner,	:	Index No. 2010-09688
For a Judgment in the Name of Prohibition under Article 78 of the Civil Practice Law and Rules,	:	
-against-	:	
The Honorable JOEL L. BLUMENFELD, Acting Justice, Supreme Court of the State of New York; ELISAUL PEREZ, named as Defendant in Queens County Indictment Number 1202/2009,	:	
Respondents.	:	

MEMORANDUM OF LAW OF *AMICI CURIAE* NEW YORK COUNTY LAWYERS' ASSOCIATION ETHICS INSTITUTE, QUEENS COUNTY BAR ASSOCIATION, BRONX BAR ASSOCIATION, CUNY LAW SCHOOL CRIMINAL DEFENSE CLINIC, ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS, AND PROFESSIONAL RESPONSIBILITY PROFESSORS AND PRACTITIONERS

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PRELIMINARY STATEMENT

The undersigned (the "*amici*") respectfully submit this Brief in support of their opposition to the application of the Queens County District Attorney's Office (the "District Attorney") for a writ of prohibition under CPLR Article 78, seeking to prevent the Hon. Joel L. Blumenfeld ("Justice Blumenfeld" or the "trial court") from relying upon an ethics opinion the judge commissioned from Professor Ellen Yaroshefsky ("Professor Yaroshefsky") when ruling on a suppression motion in a criminal case entitled *People v. Elisaul Perez,* Queens. Co. Indictment No. 1202/2009 (the "*Perez* Case").

The undersigned *amici* include:

- the Ethics Institute of the New York County Lawyers' Association (the "NYCLA Ethics Institute"), which coordinates all ethics-related activities of the 9,000 member Association, engages in independent research and scholarship regarding professional responsibility issues, and furthers lawyer professionalism through its Professionalism Task Force;
- the Queens County Bar Association, a 135-year old, 2000-member organization which is, among other things, dedicated to the impartiality and independence of the judiciary and has a strong

interest in ensuring that judges conduct themselves in a proper and ethical manner;

- the Bronx Bar Association, founded in 1902 and dedicated to, among other things, promoting the practice of law in a professional manner, advancing reforms in the law that are in the public interest, applying its knowledge and experience in the law for the public good, and arranging for the provision of legal services for indigent adults seeking representation in criminal cases;
- The CUNY Law School Criminal Defense Clinic, which is one of two law school clinics in Queens County providing legal services to indigent criminal defendants;
- professors who teach Professional Responsibility Law on a full-time and adjunct basis at local law schools (Brooklyn Law School, Cardozo School of Law, Columbia University School of Law, Fordham University School of Law, Hofstra University School of Law, New York Law School, New York University School of Law, Pace University School of Law, and Rutgers University Law School) and law schools around the nation (Georgetown University Law Center, Pennsylvania State University – Dickinson School of Law, Roger Williams School of Law, University of San Francisco School

of Law, University of Utah School of Law, University of Virginia School of Law, University of Wisconsin School of Law, and Yale University School of Law, among others);

- leading professional responsibility lawyers from across the U.S., including former disciplinary counsel, former members of the ABA Standing Committee on Professionalism, current and former members of professional and judicial ethics committees of the ABA, New York State Bar Association, New York City Bar Association and NYCLA, and many others; and
- The Association of Professional Responsibility Lawyers ("APRL"), a national organization with more than 400 members who practice and teach professional responsibility law.[1] The APRL Board has voted to join the *amicus* brief to the limited extent that it supports the propriety of a judge seeking outside expert advice on the parameters of ethical attorney conduct and condemns *ad hominem* arguments. APRL refrains from taking a position on the remaining issues.

[1] A more detailed description of APRL can be found at its website, www.aprl.net.

A full list of the individual *amici* and their affiliations is attached as an Addendum to this Brief.[2]

INTRODUCTION

Professor Yaroshefsky, Director of the Jacob Burns Center of Ethics in the Practice of Law at the Cardozo Law School of Yeshiva University, was asked by Justice Blumenfeld to opine on certain practices employed as a matter of policy and routine by the Queens County District Attorney's Office. Justice Blumenfeld acted pursuant to 22 N.Y.C.R.R. § 100.3(b)(6)(B), which permits a judge to seek the advice of a disinterested expert on the law if the judge gives notice to the parties and an opportunity to be heard; these formalities were followed here. The practices in question were employed in the *Perez* Case and include "scripted" interviews by Assistant District Attorneys ("ADAs") of post-arrest, pre-arraignment suspects. Acting at the direction of the District Attorney's Office, ADAs use the "script" and time the interview just prior to arraignment and appointment of counsel. In relation to the ADAs, the suspects are unrepresented adverse parties.

At Justice Blumenfeld's request, Professor Yaroshefsky[3] reviewed the practices used in the *Perez* Case and concluded, *inter alia*, that some, but not all,

[2] The *amici* are expressing their personal views and do not purport to act on behalf of their respective universities, law firms or organizations, except where otherwise noted.

[3] Professor Yaroshefsky is a member of both APRL and the NYCLA Ethics Institute.

were ethically flawed and violated New York's professional responsibility standards, in particular the rules that govern contacts with unrepresented individuals and prohibit deception and dishonesty. In response, the District Attorney filed papers criticizing Professor Yaroshefsky's opinion, accusing her of bias (based in part on the identity of a supposed former client), and insisting that Justice Blumenfeld strike her report from the record. When Justice Blumenfeld refused, the District Attorney commenced this Article 78 proceeding, seeking a writ of prohibition by challenging the trial court's authority to consider the ethical implications of the District Attorney's conduct in the context of a suppression motion.

The District Attorney asks this Court to limit the traditional power of trial judges in criminal cases to investigate and rule upon the unethical conduct of lawyers appearing before them. Indeed, the District Attorney suggests that prosecutors are specifically exempt from the ethics rules, at least insofar as questions may arise in connection with the possible suppression of evidence in a criminal prosecution. Such a ruling would restrict the ability of criminal court judges, who observe and interact with prosecutors and defense lawyers every day, to take steps to regulate their conduct (as it pertains to matters pending before them) and would set a novel and dangerous precedent. It would also limit criminal court judges' compliance with the New York's Code of Judicial Conduct, which

requires them to take "appropriate action" when confronted by ethical misconduct by *any* lawyer appearing before them, including prosecutors. *Amici* respectfully submit that on this important point – one that addresses the interface between New York's professional responsibility rules and the criminal law -- our collective knowledge and experience as professional responsibility practitioners can assist this Court.

In this Brief, we will demonstrate (a) the propriety of the trial court's approach, (b) the merits of Professor Yaroshefsky's original submission, and (c) the inappropriate nature of the District Attorney's actions in this case, as well as their potentially troubling consequences.

A R G U M E N T

I.

THE TRIAL COURT HAS THE AUTHORITY TO REGULATE THE CONDUCT OF ALL LAWYERS, INCLUDING PROSECUTORS, APPEARING BEFORE IT IN A CRIMINAL CASE

The District Attorney argues at length that Justice Blumenfeld has engaged in improper conduct in addressing the ethics of the prosecutors who work in his office, either in the context of the suppression motion or as a separate issue. That proposition is without foundation, and it is especially disturbing that the District Attorney of Queens County – an official managing hundreds of prosecutors, all imbued with the public trust – asserts such an unmeritorious position.

A. New York Courts Have Exclusive Authority to Regulate New York Lawyers

It is fundamental that the courts take the primary role in regulating New York lawyers. *La Rocca v. Lane*, 37 N.Y. 2d 575, 581 (1975) ("Petitioner does not, as he could not, dispute the power of the court to regulate generally counsel's conduct and appearance."). As described in detail in Chief Judge Cardozo's opinion in *People ex rel. Karlin v. Culkin,* 248 N.Y. 465, 477-78 (1928), the principle of court regulation of lawyers was embedded in the very first Constitution of this State, the Constitution of 1777, which required that "all attorneys, solicitors, and counselors at law hereafter to be appointed, be appointed by the court and licensed by the first judge of the court in which they shall respectively plead and practice; *and be regulated by the rules and orders of the said courts*" (emphasis added). This basic principle, though removed from the Constitution that was adopted in 1821, was then extended over the next 135 years, first (albeit briefly) by statute,[4] and later by judicial decisions making clear that the courts' power to regulate lawyers was "inherent." *See Karlin,* 248 N.Y. at 472 (citing cases). In 1912, the predecessor of N.Y. Jud. Law § 90 was signed into law, codifying once and for all the courts' jurisdiction over lawyers.

[4] The act of April 17, 1823 (L. 1823, Ch. 182, § 19) included the exact words of the Constitution of 1777, but those words were dropped when the statute was revised four years later. *Karlin,* 248 N.Y. at 477.

The court system's regulatory responsibility includes both the promulgation of the applicable rules of professional conduct, and the establishment and supervision of the disciplinary system. N.Y. Jud. Law § 90(2) (empowering "the appellate division of the supreme court of each department" to impose attorney discipline). Each Department has its own Chief Disciplinary Counsel, maintains its own disciplinary staff, promulgates its own procedural rules for discipline, and makes the final determination on all disciplinary proceedings. *Id.*; *see also* 22 N.Y.C. R.R. §§ 605.1 *et seq.* (First Department disciplinary procedures), §§ 691 *et seq.* (Second Department disciplinary procedures), §§ 806 *et seq.* (Third Department disciplinary procedures), and §§ 1022 *et seq.* (Fourth Department disciplinary procedures).

Courts also are responsible for regulating the conduct of the lawyers who appear before them. Lawyers practice before the courts of New York each day and when a judge learns of misconduct by a lawyer, a proper response is for the judge to make a referral to disciplinary authorities. This, however, is far from the only remedy available to judges who, though unable to impose formal discipline, can take appropriate steps to regulate the conduct of lawyers appearing before them. *See First Nat. Bank v. Brower*, 42 N.Y.2d 471, 474, 398 N.Y.S.2d 875 (1977) (Courts have the "inherent and statutory power to regulate the practice of law.") *citing Gair v. Peck,* 6 N.Y.2d 97, 188 N.Y.S.2d 491 (N.Y. 1959); N.Y. Code of

Jud. Conduct, 22 N.Y.C.R.R. §100.3(D)(2) ("A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.").

Thus Judge Blumenfeld, like any other New York trial court judge, had the authority to consider the professional conduct of the District Attorney and the lawyers he supervises as it affected the underlying suppression motion, as well as more generally. This authorized judicial scrutiny may properly result in a broad range of judicial actions, including criticism of the lawyer in an opinion, imposition of sanctions, disqualification, suppression of evidence, dismissal of a prosecution, and referral for formal disciplinary action. The District Attorney's cramped notion that an ethical inquiry has no place on a suppression motion is simply incorrect.

B. Courts May Consider Ethics Provisions in a Range of Actions that Directly Impact the Fact Finding Process

The options available to a trial judge confronted with the ethical misconduct of a lawyer include actions that directly impact the trial process. In the civil arena, New York courts, state and federal, routinely take steps against miscreant lawyers that fall short of formal discipline, such as disqualifying lawyers when they: have a current client conflict of interest under Rule of Professional Conduct ("RPC") 1.7 (formerly DR 5-105(A), *see, e.g., GSI Commerce Solutions, Inc. v. BabyCenter LLC,* 618 F.3d 204 (2d Cir. 2010) (disqualifying firm that sought to represent

entity suing subsidiary of current client); have a former client conflict of interest under RPC 1.9 (formerly DR 5-108), *see, e.g., Tekni-Plex, Inc. v. Meyner and Landis,* 89 N.Y.2d 123, 651 N.Y.S.2d 954 (1996) (disqualifying law firm that formerly represented corporation from representing former owner against that corporation); or violate the "advocate-witness" rule under RPC 3.7 (formerly DR 5-102), *see, e.g., Dubin v. Miller,* 801 F. Supp. 1101 (S.D.N.Y. 1992) (disqualifying attorney who wrote key documents from handling trial, but allowing his law firm to remain as trial counsel). Even more on point here, New York courts handling civil matters carefully enforce the "no-contact" rule of RPC 4.2 (formerly DR 7-104(A)(1)), which limits direct communications between a lawyer and a represented adverse party, and will often suppress evidence as well as disqualify counsel when that rule is violated. *See, e.g., Matter of Marvin Q,* 45 A.D.3d 852, 846 N.Y.S.2d 356 (2d Dep't 2007), *lv. app. dismissed,* 10 N.Y.3d 927, 862 N.Y.S.2d 330 (2008) (disqualifying counsel and suppressing statements he obtained); *accord, Papanicolou v. Chase Manhattan Bank, N.A.,* 720 F. Supp. 1080 (S.D.N.Y. 1989).

Courts also enforce the professional conduct rules *vís à vís* defense lawyers in the criminal context, even when the defendant's constitutional rights at trial might be implicated. As just one notable example, where a defense lawyer has knowledge that his client has, or is about to, commit perjury during a criminal trial,

courts enforce the client perjury rule of RPC 3.3 (formerly DR 7-102(A)) by, among other things, allowing a defense lawyer to inform the court of the prospective perjury [*People v. Andrades,* 4 N.Y.3d 355, 795 N.Y.S.2d 497 (2005)]; allowing the defense lawyer to present the defendant's testimony through a narrative format [*People v. DePallo,* 96 N.Y.2d 437, 729 N.Y.S.2d 649 (2001)]; and allowing the defense lawyer to not mention the defendant's testimony during summation. *Id.* All of these adversely affect the defendant's constitutional rights to testify and to be represented by counsel – nevertheless, courts permit these limitations in order "to walk the fine line between honoring a criminal defendant's constitutional right to testify and avoiding the direct involvement of the defense lawyer in offering and using perjured testimony." R. Simon, Simon's New York Code of Professional Responsibility Annotated, 1223 (Thomson/West 2008) (hereafter, "*Simon*").

Given the breadth of situations in which trial courts cite and apply the professional responsibility rules, the District Attorney's reliance on the Preamble to the RPCs is misplaced. He cites portions of the Preamble, such as paragraphs 7, 8 and 9, which make clear that the RPCs "presuppose a larger legal context shaping a lawyer's role," including "laws defining specific obligations of lawyers and substantive and procedural law in general." *See* RPCs, Scope, ¶ 7. These citations actually support *amici's* position since, as already demonstrated, cases

involving the interface between civil or criminal law, on the one hand, and the ethics rules, on the other, show that those rules can be, and often are, used by trial judges to regulate or comment upon the conduct of practitioners. *See, e.g., People v. Shiu Yan Yee,* 114 Misc. 2d 515, 522, 451 N.Y.S.2d 965 (Sup. Ct. Queens Co. 1982) (Goldstein, J.) (actions of ADA who surreptitiously tape recorded phone conversations and advised suspect to surrender "represent a gross misunderstanding by the assistant involved as to the duty of a public prosecutor 'to seek justice, not merely to convict") (*citing* EC 7-13).

Indeed, the Preliminary Statement to the former Code of Professional Responsibility (the "Code"), which was in effect at the time of the *Perez* case, contains guidance directly on point:

> *Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to* ***all lawyers****, regardless of the nature of their professional activities* (emphasis added).

C. Courts May Apply the Ethics Rules to Regulate the Conduct of Prosecutors

In his petition, the District Attorney asserts, as a threshold matter, that the trial court cannot properly consider a prosecutor's alleged breach of a disciplinary rule when evaluating a defendant's motion to suppress in a criminal case. That is not correct. As the language just quoted makes clear, prosecutors enjoy no special exemption from the ethics rules, under either the RPCs or the former Code. Indeed, in some instances, the rules impose higher ethical obligations on

prosecutors recognizing their high position of public trust and responsibility. *See* RPC 3.8 (a) and (b) (formerly DR 7-103(A) and (B)) (prohibiting the prosecutor from instituting criminal charges where she "knows or it is obvious that the charge is not supported by probable cause," and requiring prosecutor to disclose evidence that "tends to negate the guilt of the accused"). Accordingly, New York courts, including the highest court in this State, have frequently relied upon disciplinary rules in evaluating a prosecutor's conduct in circumstances comparable to those presented here.

Instructive is *People v. Skinner,* 52 N.Y.2d 24, 436 N.Y.S.2d 207 (1980). There, a suspect retained an attorney after becoming the target of a homicide investigation. Despite being informed of defense counsel's involvement, the ADA in charge of the investigation sent detectives to serve the defendant with an order requiring him to appear in a line-up. While doing so, the detectives questioned the suspect and obtained a confession. Reversing the lower courts, the Court of Appeals suppressed the confession. Although its decision relied primarily on the constitutional right to counsel, the Court made clear that the "no-contact" rule of DR 7-104(A)(1) also applied:

> This court's vigilance in protecting the right to counsel finds additional support even in the ethical responsibility of attorneys in civil matters not to communicate on the subject of the representation with an individual known to be represented by an attorney on the matter [citing DR 7-104]. *We would be hard pressed logically to proscribe such conduct in the civil context yet blithely overlook it in*

> *the criminal sphere. Id.* at 29-30 (emphasis added; citations omitted except as noted).

See also People v. Hobson, 39 N.Y.2d 479, 484, 384 N.Y.S.2d 419 (1976) ("[A]n attempt to secure a waiver of the right to counsel in a criminal proceeding in the absence of a lawyer, already retained or assigned, would constitute a breach of professional ethics, as it would be in the least-consequential civil matter"); *People v. Goldfinger,* 149 Misc. 2d 765, 771, 565 N.Y.S.2d 993 (Sup. Ct. N.Y. Co. 1991) (Andreas, J.) (suppressing statements made during investigation stage, after suspect had retained counsel; "[w]hile my conclusion rests on the New York State right to counsel, there is also ample support for the result reached herein under the proscriptions of Disciplinary Rule 7-104(A)(1)").

The Second Circuit has been just as direct. In *U.S. v. Jamil,* 707 F.2d 638, 645 (2d Cir. 1983), the Court held that "DR 7-104(A)(1) may be found to apply to a criminal case, . . . to government attorneys, . . . [and] to non-attorney government law enforcement officers when they act as the alter ego of government prosecutors." In *U.S. v. Foley*, 735 F.2d 45, 48 (2d Cir. 1984), *cert. denied,* 469 U.S. 1161 (1985), the Court intimated that pre-arraignment interviews might violate DR 7-104(A)(1) even if they pass constitutional muster. *Id.* ("We think that this practice of routinely conducting pre-arraignment interviews raises serious constitutional questions . . . as well as ethical ones . . . ."). Most vigorously, the Court in *U.S. v. Hammad,* 858 F.2d 834 (2d Cir. 1988), held that a violation of DR

7-104(A)(1) in the pre-indictment stage could result in suppression of evidence in order to deter prosecutors from future misconduct. *Id*. at 840-41 ("suppression may be ordered in the District Court's discretion").

Courts have rejected the arguments of federal prosecutors that they were exempt from the ethics rules. *In re John Doe*, 801 F. Supp. 478, 484-87 (D. N. Mex. 1992); *see also United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993) ("[B]eginning at the latest upon the moment of indictment, a prosecuting attorney has a duty under ethical rules like [California's no-contact rule] to refrain from communicating with represented defendants.") As the *Doe* court observed, "ethical standards are not merely a guide for the lawyer's conduct, but are an integral part of the administration of justice." *Doe*, 801 F. Supp. at 479.

D. The Trial Court Is Acting Within Its Authority Here

We discern no principled basis to distinguish between the ethics rule applied in the cases above, which proscribes contact with a represented party, and those put into issue in Professor Yaroshefsky's opinion – the rules prohibiting certain communications with an *un*represented party, and those prohibiting fraud and deceit. It cannot be correct to say, as the District Attorney argues, that the trial court lacks any authority to consider the conduct of the District Attorney's Office in a case pending before the court. Not only are New York courts empowered to regulate the conduct of attorneys in the cases before them, as we have already

shown; they may do so *sua sponte*. *See Dorsainvil v. Parker,* 14 Misc.3d 397, 400 (Sup. Ct. Kings Co. 2006) ("[t]he judiciary has the ability to question any 'impropriety [which] appears on the record and the issue may be raised *sua sponte*'"), *quoting Booth v. Continental Ins. Co.,* 167 Misc.2d 429, 435 (Sup. Ct. Westchester Co. 1995).

Thus, it cannot, *ipso facto*, have been wrong for the trial court in the *Perez* Case to solicit an ethics opinion from a qualified expert regarding the conduct of the District Attorney's Office (including those working under its direction) in interviewing the defendant before his arraignment. The court could properly consider this opinion when ruling on the underlying legal issue (whether to suppress) as well as with regard to the conduct of the *Perez* ADA and the ADA's supervisors more generally. With respect to consideration of the conduct of counsel, the judge was authorized to make a referral to the disciplinary authorities and, insofar as that conduct affected the case, adjudicate the relevant issues himself. The judge has the authority to choose either of these options, or both, and that choice would be entirely consistent with the judiciary's responsibility to regulate the conduct of lawyers who appear before it. It follows that an "extraordinary" writ of prohibition does not lie. *See Schumer v. Holtzman*, 60 N.Y.2d 46, 51, 467 N.Y.S.2d 182 (1983) (a writ of prohibition is available only "[t]o prevent or control a body or officer acting in a judicial or quasi-judicial

capacity from proceeding or threatening to proceed without or in excess of its jurisdiction and then only when the *clear legal right* to relief appears and, in the court's discretion, the remedy is warranted") (emphasis added).

The District Attorney's petition should be rejected for these reasons alone.

II.

THE YAROSHEFSKY REPORT IS NARROW AND REACHED REASONABLE AND, IN OUR VIEW, CORRECT CONCLUSIONS

We recognize that this Article 78 proceeding does not place the issue of the validity of Professor Yaroshefsky's report before this Court. Nevertheless, it is important to note that, in our view, the conclusions Professor Yaroshefsky reached are correct or, at the very least, are more than sufficiently reasonable to warrant consideration by the trial court. This makes the District Attorney's criticisms of her, and his attempts to use the power and resources of his office to suppress her opinion, all the more disturbing.

Professor Yaroshefsky's initial conclusions were narrowly drawn and directed only towards concerns with the script used by the ADAs during their discussions with unrepresented individuals, as applied in the context of the interview itself. She did not challenge the District Attorney's right to conduct these scripted discussions, but simply concluded that certain questions in the script, when read in context, violated the ethics rules. A review of the applicable

Disciplinary Rules[5] – DR 7-104(A)(2) (communications with unrepresented persons) and DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation) – will demonstrate that this conclusion is correct.

A. The Applicable Rules

The District Attorney's script for the pre-arraignment interviews in the *Perez* Case implicated two important Disciplinary Rules.

The first, DR 7-104(A)(2), addresses communications between a lawyer and an unrepresented party whose interests conflict with those of the lawyer's client, as follows:

> (A) During the course of the representation of a client a lawyer shall not:
>
> * * *
>
> (2) *Give advice to a party who is not represented by a lawyer*, other than the advice to secure counsel, *if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client* (emphasis added).

DR 7-104(A)(2) recognized the danger that lawyers, by dint of education and experience, may have out-sized influence over non-lawyers, and that, as a result, an unrepresented party may misapprehend the role of the adverse lawyer, even to

[5] Although the District Attorney makes much of the fact that Professor Yaroshefsky cited the RPCs instead of the Code concerning events that took place in March 2009 (two weeks before the RPCs went into effect), the distinction is of no moment. First, the differences between the two sets of rules are not significant when applied to these facts; indeed, the prohibitions on fraud and deceit, RPC 8.4 and former DR 1-102(A)(4), are exactly the same. Second, given that the District Attorney intends to continue the pre-arraignment interviews, the RPCs remain highly relevant. Nevertheless, for the avoidance of doubt, we will analyze the events in *Perez* based on the Code.

the point of seeking or accepting advice from her. *See Simon* at 1311 (an unrepresented potential witness "may not realize the implications of giving information to a lawyer"). As a leading commentator noted, "DR 7-104(A)(2) is a conflict of interest rule designed to protect a non-client against receiving legal advice from a lawyer who has a conflict or potential conflict arising out of the existing representation." *Id.; accord,* N.Y. State Bar Ass'n Ethics Op. 768 (2003).

The second and equally relevant rule is DR 1-102(A)(4), which prohibited lawyers from "engag[ing] in conduct involv[ing] dishonesty, fraud, deceit or misrepresentation." This DR had broad reach, covering "every kind of dishonesty, fraud, deceit or misrepresentation, inside or outside law practice, whether criminal or civil." *Simon* at 44. It encompasses not just outright deception, but also misleading conduct and material omissions. *See, e.g., Dibella v. Hopkins,* 285 F. Supp. 2d 394 (S.D.N.Y. 2003) (sanctioning lawyer who made misleading redaction and misleading statement in open court). While some courts held that this DR did not apply to prosecutors conducting undercover investigations, *see, e.g., U.S. v. Parker,* 165 F. Supp. 2d 431 (W.D.N.Y. 2001), we have found no case under the ethics rules that allowed prosecutors to make misleading statements, no matter how well-intentioned, in a more controlled setting like a pre-arraignment interview.

B. Professor Yaroshefsky's Opinion Reached Reasonable and, in our View, Correct Conclusions Regarding the District Attorney's Script

Two aspects of the District Attorney's script demonstrate that it violates DRs 7-104(A)(2) and 1-102(A)(4). When analyzing these provisions, the Court must be mindful, as Professor Yaroshefsky's Report makes clear, that the interview takes place in a context in which the detective and ADA know, and the suspect does not, that the suspect will imminently secure counsel to provide independent advice as to whether and how to provide information to the prosecution. We will address the questions in the script one by one.

Item 1: "If there is something you would like us to investigate concerning this incident, you must tell us now so that we can look into it."

This is legal advice, pure and simple. The District Attorney's representative[6] advises the unrepresented suspect that he or she "*must*" tell the investigators "*now*" about anything he or she would like them to investigate. This is not a statement of the District Attorney's legal position, or the recitation of a non-negotiable standard protocol (*e.g.,* "You have to get the standard form from Room 201"); rather, it is guidance as to how the suspect should proceed in a situation where several legal options are available. *See* Va. Ethics Op. 1795 (2004)

[6] The script may be read either by the ADA who is present or the detective; either way , they are acting under the District Attorney's supervision, thus implicating DR 1-102(A)(2) ("A lawyer or law firm shall not . . . circumvent a disciplinary rule through the actions of another") and DR 1-104(A) ("A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules").

(opining that, under Model Rule 4.3, criminal defense lawyer may ask unrepresented crime victim to speak to him before speaking to prosecutor, but may not tell her she does not have to speak to prosecutor or appear in court unless subpoenaed).

Moreover, there can be no doubt that the ADA's interests are "in conflict" with those of the suspect within the meaning of DR 7-104(A)(2). The District Attorney argues to the contrary, contending that the scripted interviews give unrepresented suspects their "first opportunity to speak" and that by using this technique 50 interviewees (out of more than 5500) were released – a grand total of 0.9%.[7] *See* Affirmation of Hon. Richard A. Brown ("Brown Aff."), ¶¶ 12-13. This depiction of the pre-arraignment, pre-counsel interview as a benevolent gesture for the benefit of the suspect is at odds with the fact that this benefit would be equally, if not more, effective after the suspect had an opportunity to consult with counsel. In short, despite the prosecutor's obligation to reach the correct result, the criminal justice system relies upon a highly-regulated adversarial process and once a suspect is arrested, it is not accurate to say that the prosecution's interests are "not in conflict" with those of the suspect.

[7] Compare this to the fact that, according to the District Attorney, 19% of those questioned confessed to the crime, and another 44% made a video statement about the crime. Brown Aff. ¶ 12. This suggests that the interview process is more about gathering *inculpatory* evidence than it is about exonerating suspects.

For similar reasons, the instruction "you must tell us now" is misleading and incorrect, and thus violates DR 1-102(A)(4). There is nothing critical about "now." The accused will have the benefit of a lawyer within minutes or (at worst) hours and the same information may be conveyed with the same result then. The District Attorney explains that "now" is required because it prevents "a filtered version, second hand," being provided through a defense lawyer. This ignores the fact that in our system of justice, the actor who is best suited to investigating and presenting defenses is the defense lawyer, and the defense lawyer has many options how to present those defenses – including, if appropriate, arranging an interview session with the client and the ADA.

The District Attorney's main argument is that, whatever happens during the interview, all is cleansed by the administration of the *Miranda* warnings after the questions are asked but before answers are obtained. That is not so. The courts should be particularly concerned with the interviews precisely because they are designed to neutralize any effect that the after-delivered *Miranda* warnings might provide. This is because, before the warnings are recited, the District Attorney's office has already suggested to the unrepresented accused person how helpful it will be if he or she talks to the District Attorney, providing supposedly exculpatory information, and that the accused must do so "now" because once the accused gets a lawyer the opportunity to talk to the prosecutor and get the charges dropped will

be lost. Similar considerations undoubtedly prompted the Court of Appeals to rule in *Hobson* and *Skinner* that the interrogations of represented suspects in those cases violated the ethics rules even though the *Miranda* warnings had been administered. *Skinner,* 52 N.Y.2d at 27 (*Miranda* warnings administered); *Hobson,* 39 N.Y.2d at 484 (same).

As those cases and others make clear, it is no answer to assert that the conduct of the Queens District Attorney's Office is ethically proper simply because it meets a minimal constitutional standard. The authority and power of our profession requires the District Attorney to abide by the Rules of Professional Conduct *and* the Constitution, not just one of them. *See, e.g., Hammad,* 858 F.2d at 839 ("the Sixth Amendment and the disciplinary rule serve separate, albeit congruent purposes").

Item 2: "If your version of the events of the day differs from what we have heard, this is your opportunity to tell your story."

Again, this is legal advice from the conflicted District Attorney's office. The suspect is advised that "this is [her] opportunity" to tell her story and refute any inculpatory information she may believe the police have been provided. This statement has two possible implications, both misleading. It implies either (a) that this is *the only* opportunity the suspect will have to speak; or, at the very least, (b) that this is *the best* opportunity, with the ADA and investigators present. Neither implication, of course, is true: the suspect will soon be given a lawyer, and will be

able to present the same information in a setting much more protective of her rights.

The District Attorney says he conducts his interrogations in this way because the program is designed to get only "exculpatory" information. But this only compounds the misleading nature of what occurs. How is the accused going to know what is exculpatory? How many times have lawyers asked their clients to give them "exculpatory" information only to receive just the opposite?

Putting the exact questions aside, there is the over-riding context of the interviews, which suggest that the ADAs and investigators are there to help the suspect. They offer to listen to the suspect's tale and help investigate any alibi or other exculpatory information. While they state their official positions, their role vis-à-vis the suspect is never made clear. They create the misleading impression that they are working for the suspect, when the exact opposite is true.

To counter this, the District Attorney focuses on a "mistake" Professor Yaroshefsky supposedly made when she premised part of her argument on the fact that the suspect was charged with a crime even though she had not yet been formally arraigned. The interview, however, takes place just before the formal arraignment; the charges have already been drawn up. Indeed, the script that the ADAs use specifically tells the detective to inform the accused of "the specific charges and the date, time and location of the occurrence."

Then Professor Yaroshefsky is criticized because some of the authority she relies upon involves cases of *pro se* litigants, and these interviewees are not acting *pro se*, the District Attorney says, because in the future they will be represented. This argument is frivolous. At the time of the interviews the suspects are unrepresented and deserving of the protections afforded to all *pro se* litigants. There is no special pre-arraignment exception to the ethics rules, especially when the investigation stage is all but over and the suspect is moments away from being formally charged.

In sum, the circumstances around the interview, including the fact that the arrestees are kept from court by the District Attorney's office until the interview is conducted because the ADAs know (but the suspects do not) that a lawyer is about to be provided, lead us to conclude that the main reason for the pre-arraignment interviews and the false urgency the script depicts is to induce the suspect to speak before he has counsel. This conduct violates DR 1-102(A)(4) and DR 7-102(A)(2). *See U.S. v. Foley*, 735 F.2d at 48 ("We think that this practice of routinely conducting pre-arraignment interviews raises serious constitutional questions . . . as well as ethical ones . . . .").

III.

THE ATTEMPT TO SUPPRESS PROFESSOR YAROSHEFSKY'S OPINION VIA THIS PROCEEDING IS UNWARRANTED

Regardless of what this Court thinks of the merits of Professor Yaroshefsky's report, there is another troubling dimension to the District Attorney's response. *Amici* are hard pressed to recall an instance where a prosecutor resorted to seeking a writ of prohibition in order to prevent a judge from even considering a professional responsibility lawyer's opinion which questions that prosecutor's conduct. This tactic, applied to the facts here, is unwarranted.

A. Public Inquiry Regarding Prosecutorial Conduct is Integral to a Democracy

Courts historically have viewed the dissemination of knowledge about the practices and procedures of the justice system as essential to democracy. Such practices "play a vital part in a democratic state." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1070 (1991) (a prosecutors' actions "exist in a larger context of a government ultimately of the people, who wish to be informed . . . and, if sufficiently informed . . . might wish to make changes in the system.").

In a democratic society, the programs and policies of prosecutors work best when exposed to "scrutiny, debate, and review" in the public square. *See* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U.L. Rev. 1, 51 (2009). At the

state and federal level, prosecutors are accountable to the public they serve. *See* Sean Gardiner, *Getting It Right: Experts Eye Measures to Prevent Injustices*, Newsday, Dec. 11, 2002, A8 (Queens County executive ADA explained that prosecutors have incentive to prevent or rectify wrongful convictions because they are "accountable to the people"). Accountability without transparency, however, deprives citizens of the tools they need to determine whether changes are necessary. *See Kyles v. Whitney*, 514 U.S. 419, 439 (1995) (transparency serves to "justify trust in the prosecutor 'as the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done"), *citing Berger v. United States*, 295 U.S. 78, 88 (1935).

One indispensable element of this cultivation of openness is a willingness to identify mistakes and correct them. Distinguished prosecutors have set themselves apart with their openness to constructive criticism. *See* Griffin B. Bell with Ronald J. Ostrow, Taking Care of the Law 204 (1982) (former United States District Judge and Attorney General observed that "[a]dmitting mistakes [is] . . . fundamental," even when observers react "as if the emperor were confessing that he had no clothes"); R. Kuh, *Aftermath: In the Matter of District Attorney Hogan:* Letter to the Editor, N.Y. Magazine, Jan. 3, 1972, at 6, 7 (future N.Y. County District

Attorney observed that "No public official is beyond scrutiny" and that "carefully watching . . . the work of our prosecutors" is "useful service").[8]

In the instant case, reasonable minds can differ on whether the interview program at issue is lawful, wise, or ethical. What should not be debated is the importance of public dialogue and deliberation on interrogation practices. Yet the District Attorney here appears to be seeking to use a writ of prohibition to prevent Professor Yaroshefsky's opinion from even being considered by the trial court. Rather than allow a careful judicial review of his office's tactics – even one constrained by the limits of courtroom procedure – he is attempting to quash one side of that debate, discredit Professor Yaroshefsky, and prevent her views from being aired and even considered by the courts. As professional responsibility attorneys who devote our careers to furthering professionalism among all lawyers, we consider such a result unacceptable.

B. Professor Yaroshefsky Is Qualified to Issue the Requested Ethics Opinion.

This Court should be quite troubled by the *ad hominem* nature of the charges against Professor Yaroshefsky.

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[8] *See* http://books.google.com/books?id=a6Bfz1a8X8YC&pg=PA6&lpg=PA6&dq=frank+hogan+district+attorney&source=bl&ots=A8bUxqIGXk&sig=M9R2k8M23-3qDXKjNJOTLPIuRIY&hl=en&ei=OrrBTJqeKYL48AaR0uXXBg&sa=X&oi=book_result&ct=result&resnum=5&ved=0CCcQ6AEwBDgU#v=onepage&q=frank%20hogan%20district%20attorney&f=false

There can be no question as to Professor Yaroshefsky's qualifications to provide an ethics opinion. She has been an ethics and criminal law professor at Cardozo School of Law for more than 20 years, teaching ethics to countless law students and receiving an award from the New York State Bar Association for "Outstanding Contribution in the Field of Criminal Law Education." She has written numerous articles on legal ethics topics, including prosecutorial ethics. She maintains a small private practice, and over the decades has advised dozens upon dozens of lawyers on ethics matters. She has served actively on numerous Bar ethics committees, including as: a member of the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC"), which drafted proposed revisions to the former Code of Professional Responsibility; co-chair of the Ethics, Gideon and Professionalism Committee of the Criminal Justice Section of the American Bar Association; and a member of the Advisory Board of the NYCLA Justice Center.

The District Attorney tries to ignore all these obvious qualifications and contends that Professor Yaroshefsky is an "interested witness." In the usual instance, an interested witness is a party or some other person with an identifiable pecuniary or other concrete interest in the outcome of a case. By contrast, "experts have no antecedent relation to the event and therefore are not interested witnesses." *Dillon v. Kaminsky,* 256 A.D.2d 483, 485 (2nd Dep't 1998); *cf. New York State*

Senator Kruger v. Bloomberg, 1 Misc.3d 192, 195 (Sup. Ct. N.Y. Co. 2003) ("to be an 'interested' party, one must have a legally cognizable claim"). We are unable to find any case authority to support the District Attorney's argument that an expert might be deemed "interested" for the defense in a specific criminal case and thus ineligible to provide an opinion pursuant to 22 NYCRR § 100.3(B)(6)(b) merely because the expert's past work purportedly suggests that she harbors "pro-defense" political views that one of the litigants considers unfavorable.

Petitioner's targeting of Professor Yaroshefsky's representation of criminal defense lawyer Lynne Stewart – actually, she provided ethics advice to Ms. Stewart's defense *lawyers* – does not buttress his argument. *See* Petitioner's Memorandum of Law at 36; *cf.* Shawn McCarthy, *Radical lawyer plans to appeal terror verdict*, Globe and Mail (Canada), Feb. 14, 2005, A13 (reporting on Stewart's plan to appeal conviction and identifying Professor Yaroshefsky as "member of [Stewart's] defense team"). Representation of the unpopular has been a core commitment of American lawyers since the colonial era. *See United States v. Reid*, 214 F. Supp. 2d 84, 95 (D. Mass. 2002) (in rejecting government's request for restrictions on defense lawyers in case of "shoe-bomber" Richard Reid, judge reminded parties that "John Adams represented the British soldiers who allegedly committed the Boston Massacre"). It is disturbing to see a public prosecutor who is a former judge of this Court take an expert to task for having represented, or

been involved in the representation of, a particular litigant and for having criticized (mildly) the government's prosecution of that litigant – especially since the District Attorney has taken Professor Yaroshefsky's remarks completely out of context. The District Attorney relies on remarks Professor Yaroshefsky made while speaking on a panel at the New York City Bar Association on April 29, 2010, claiming they show she acted as Ms. Stewart's ethics advisor, when in fact, according to the panel chair, the remarks were much more general and were intended to question the use of criminal prosecutions to suppress unpopular advocacy. *See* Janeanne Murray, *Letter to the Editor,* N.Y.L.J., 10/18/10 at 2.

Seeking to disqualify an expert because she has expressed views that are unpopular in some quarters would also establish a troubling precedent for the admission of expert testimony. When courts determine whether an expert's analysis is helpful to the tribunal, they typically look to neutral factors such as her training, general experience, and methodology. Of course, parties routinely subject an expert's background and views to the salutary rigors of cross-examination. Nevertheless, to rule that a litigant, such as the District Attorney, may properly move to disqualify an expert because she allegedly pronounced opinions or views with which the litigant disagrees could dissuade a potential expert from even participating in a given matter. That chilling effect would in turn impede a tribunal's recourse to helpful expertise, which 22 N.Y.C.R.R. § 100.3(B)(6)(b)

specifically allows. We do not mean to suggest that the District Attorney has sought this outcome, but we fear that accepting his position would have that result.

CONCLUSION

For the reasons stated above, the District Attorney's application for a writ of prohibition should be denied.

Dated: New York, New York
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Respectfully submitted,

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The Individual Amici Are Listed on Exhibit B to Affirmation of Ronald C. Minkoff in Support of Motion For Leave to File Brief as Amici Curiae

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