ERIC M. FINK

PROFESSIONAL RESPONSIBILITY

ELON UNIVERSITY SCHOOL OF LAW

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Eric M. Fink
Elon University School of Law
Greensboro, North Carolina 27408

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Part I

Advocacy and Interactions with Nonclients

Chapter 1
Duties in Litigation

1. Ensuring Truthfulness

Model Rules of Prof. Conduct, Rule 3.3

Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comments

1. Lorem ipsum dolor sit amet, consectetur adipiscing elit. Donec vitae justo id ante maximus feugiat id eu ipsum. Vestibulum eleifend tellus arcu, ac feugiat tortor mollis suscipit. Nunc mauris orci, vulputate id fringilla eget, faucibus at sem. Sed elementum enim eu neque rutrum, imperdiet pellentesque massa eleifend. Morbi sed gravida mauris, id pulvinar libero. Nulla dictum justo vestibulum massa imperdiet blandit. Donec posuere cursus lorem, vel laoreet urna lacinia sit amet.

Rest. (3d) of the Law Governing Lawyers § 120

False Testimony or Evidence

(a) Lorem ipsum dolor sit amet, consectetur adipiscing elit. Donec vitae justo id ante maximus feugiat id eu ipsum. Vestibulum eleifend tellus arcu, ac feugiat tortor mollis suscipit. Nunc mauris orci, vulputate id fringilla eget, faucibus at sem. Sed elementum enim eu neque rutrum, imperdiet pellentesque massa eleifend. Morbi sed gravida mauris, id pulvinar libero. Nulla dictum justo vestibulum massa imperdiet blandit. Donec posuere cursus lorem, vel laoreet urna lacinia sit amet.

Nix v. Whiteside

475 U.S. 157 ((1986))

BURGER, C.J.

We granted certiorari to decide whether the Sixth Amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial.

Whiteside was convicted of second-degree murder by a jury verdict which was affirmed by the Iowa courts. The killing took place on February 8, 1977, in Cedar Rapids, Iowa. Whiteside and two others went to one Calvin Love's apartment late that night, seeking marihuana. Love was in bed when Whiteside and his companions arrived; an argument between Whiteside and Love over the marihuana ensued. At one point, Love directed his girlfriend to get his "piece," and at another point got up, then returned to his bed. According to Whiteside's testimony, Love then started to reach under his pillow and moved toward Whiteside. Whiteside stabbed Love in the chest, inflicting a fatal wound.

Whiteside was charged with murder, and when counsel was appointed he objected to the lawyer initially appointed, claiming that he felt uncomfortable with a lawyer who had formerly been a prosecutor. Gary L. Robinson was then appointed and immediately began an investigation. Whiteside gave him a statement that he had stabbed Love as the latter "was pulling a pistol from underneath the pillow on the bed." Upon questioning by Robinson, however, Whiteside indicated that he had not actually seen a gun, but that he was convinced that Love had a gun. No pistol was found on the premises; shortly after the police search following the stabbing, which had revealed no weapon, the victim's family had removed all of the victim's possessions from the apartment. Robinson interviewed Whiteside's companions who were present during the stabbing, and none had seen a gun during the incident. Robinson advised Whiteside that the existence of a gun was not necessary to establish the claim of self-defense, and that only a reasonable belief that the victim had a gun nearby was necessary even though no gun was actually present.

Until shortly before trial, Whiteside consistently stated to Robinson that he had not actually seen a gun, but that he was convinced that Love had a gun in his hand. About a week before trial, during preparation for direct examination, Whiteside for the first time told Robinson and his associate Donna Paulsen that he had seen something "metallic" in Love's hand. When asked about this, Whiteside responded:

> In Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead.

Robinson told Whiteside that such testimony would be perjury and repeated that it was not necessary to prove that a gun was available but only that Whiteside reasonably believed that he was in danger. On Whiteside's insisting that he would testify that he saw "something metallic" Robinson told him, according to Robinson's testimony:

> We could not allow him to testify falsely because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it. I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony.

Robinson also indicated he would seek to withdraw from the representation if Whiteside insisted on committing perjury.

Whiteside testified in his own defense at trial and stated that he "knew" that Love had a gun and that he believed Love was reaching for a gun and he had acted swiftly in self-defense. On cross-examination, he admitted that he had not actually seen a gun in Love's hand. Robinson presented evidence that Love had been seen with a sawed-off shotgun on other occasions, that the police search of the apartment may have been careless, and that the victim's family had removed everything from the apartment shortly after the crime. Robinson presented this evidence to show a basis for Whiteside's asserted fear that Love had a gun.

The jury returned a verdict of second-degree murder, and Whiteside moved for a new trial, claiming that he had been deprived of a fair trial by Robinson's admonitions not to state that he saw a gun or "something metallic." The trial court held a hearing, heard testimony by Whiteside and Robinson, and denied the motion. The trial court made specific findings that the facts were as related by Robinson.

The Supreme Court of Iowa affirmed respondent's conviction. That court held that the right to have counsel present all appropriate defenses does not extend to using perjury, and that an attorney's duty to a client does not extend to assisting a client in committing perjury. Relying on the Iowa Code of Professional Responsibility for Lawyers, which expressly prohibits an attorney from using perjured testimony, and the Iowa Code, which criminalizes subornation of perjury, the Iowa court concluded that not only were Robinson's actions permissible, but were required. The court commended "both Mr. Robinson and Ms. Paulsen for the high ethical manner in which this matter was handled."

Whiteside then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. In that petition Whiteside alleged that he had been denied effective assistance of counsel and of his right to present a defense by Robinson's refusal to allow him to testify as he had proposed. The District Court denied the writ. Accepting the state trial court's factual finding that Whiteside's intended testimony would have been perjurious, it concluded that there could be no grounds for habeas relief since there is no constitutional right to present a perjured defense.

The United States Court of Appeals for the Eighth Circuit reversed and directed that the writ of habeas corpus be granted. The Court of Appeals accepted the findings of the trial judge, affirmed by the Iowa Supreme Court, that trial counsel believed with good cause that Whiteside would testify falsely and acknowledged that under *Harris v. New York*, a criminal defendant's privilege to testify in his own behalf does not include a right to commit perjury. Nevertheless, the court reasoned that an intent to commit perjury, communicated to counsel, does not alter a defendant's right to effective assistance of counsel and that Robinson's admonition to Whiteside that he would inform the court of Whiteside's perjury constituted a threat to violate the attorney's duty to preserve client confidences. According to the Court of Appeals, this threatened violation of client confidences breached the standards of effective representation set down in *Strickland v. Washington*. The court also concluded that *Strickland*'s prejudice requirement was satisfied by an implication of prejudice from the conflict between Robinson's duty of loyalty to his client and his ethical duties. A petition for rehearing en banc was denied. We granted certiorari and we reverse.

A.

The right of an accused to testify in his defense is of relatively recent origin. Until the latter part of the preceding century, criminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case. Iowa was among the states that adhered to this rule of disqualification.

By the end of the 19th century, however, the disqualification was finally abolished by statute in most states and in the federal courts. Although this Court has never explicitly held that a criminal defendant has a due process right to testify in his own behalf, cases in several Circuits have so

held, and the right has long been assumed. We have also suggested that such a right exists as a corollary to the Fifth Amendment privilege against compelled testimony.

B.

We turn next to the question presented: the definition of the range of "reasonable professional" responses to a criminal defendant client who informs counsel that he will perjure himself on the stand. We must determine whether, in this setting, Robinson's conduct fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment.

In *Strickland*, we recognized counsel's duty of loyalty and his "overarching duty to advocate the defendant's cause." Plainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted by the American Bar Association in 1908. The 1908 Canon 32 provided:

> No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. He must observe and advise his client to observe the statute law.

Of course, this Canon did no more than articulate centuries of accepted standards of conduct. Similarly, Canon 37, adopted in 1928, explicitly acknowledges as an exception to the attorney's duty of confidentiality a client's announced intention to commit a crime:

> The announced intention of a client to commit a crime is not included within the confidences which the attorney is bound to respect.

These principles have been carried through to contemporary codifications of an attorney's professional responsibility. Disciplinary Rule 7-102 of the Model Code of Professional Responsibility (1980), entitled "Representing a Client Within the Bounds of the Law," provides:

> *A* In his representation of a client, a lawyer shall not: 4 Knowingly use perjured testimony or false evidence. 7 Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

This provision has been adopted by Iowa, and is binding on all lawyers who appear in its courts.

The more recent Model Rules of Professional Conduct (1983) similarly admonish attorneys to obey all laws in the course of representing a client:

> RULE 1.2 Scope of Representation *d* A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.

Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct also adopt the specific exception from the attorney-client privilege for disclosure of perjury that his client intends to commit or has committed. Indeed, both the Model Code and the Model Rules do not merely authorize disclosure by counsel of client perjury; they require such disclosure.

These standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence. This special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice. The offense of perjury was a crime recognized at common law, and has been made a felony in most states by statute, including Iowa. An attorney who aids false testimony by questioning a witness when perjurious responses can be anticipated risks prosecution for subornation of perjury.

It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct. Withdrawal of counsel when this situation arises at trial gives rise to many difficult questions including possible mistrial and claims of double jeopardy.

The essence of the brief amicus of the American Bar Association reviewing practices long accepted by ethical lawyers is that under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called "a search for truth." The suggestion sometimes made that "a lawyer must believe his client, not judge him" in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury.

Considering Robinson's representation of respondent in light of these accepted norms of professional conduct, we discern no failure to adhere to reasonable professional standards that would in any sense make out a deprivation of the Sixth Amendment right to counsel. Whether Robinson's conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a "threat" to withdraw from representation and disclose the illegal scheme, Robinson's representation of Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland*.

The Court of Appeals assumed for the purpose of the decision that Whiteside would have given false testimony had counsel not intervened; its opinion denying a rehearing en banc states:

> We presume that appellant would have testified falsely. Counsel's actions prevented Whiteside from testifying falsely. We hold that counsel's action deprived appellant of due process and effective assistance of counsel. Counsel's actions also impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation by counsel and confidentiality upon appellant's restricted testimony.

While purporting to follow Iowa's highest court "on all questions of state law," the Court of Appeals reached its conclusions on the basis of federal constitutional due process and right to counsel.

The Court of Appeals' holding that Robinson's "action deprived Whiteside of due process and effective assistance of counsel" is not supported by the record since Robinson's action, at most, deprived Whiteside of

his contemplated perjury. Nothing counsel did in any way undermined Whiteside's claim that he believed the victim was reaching for a gun. Similarly, the record gives no support for holding that Robinson's action "also impermissibly compromised Whiteside's right to testify in his own defense by conditioning continued representation and confidentiality upon Whiteside's restricted testimony." The record in fact shows the contrary: (a) that Whiteside did testify, and (b) he was "restricted" or restrained only from testifying falsely and was aided by Robinson in developing the basis for the fear that Love was reaching for a gun. Robinson divulged no client communications until he was compelled to do so in response to Whiteside's post-trial challenge to the quality of his performance. We see this as a case in which the attorney successfully dissuaded the client from committing the crime of perjury.

Paradoxically, even while accepting the conclusion of the Iowa trial court that Whiteside's proposed testimony would have been a criminal act, the Court of Appeals held that Robinson's efforts to persuade Whiteside not to commit that crime were improper, first, as forcing an impermissible choice between the right to counsel and the right to testify; and, second, as compromising client confidences because of Robinson's threat to disclose the contemplated perjury. Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely. In *Harris v. New York*, we assumed the right of an accused to testify "in his own defense, or to refuse to do so" and went on to hold:

> That privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully.

In *Harris* we held the defendant could be impeached by prior contrary statements which had been ruled inadmissible under *Miranda v. Arizona*. *Harris* and other cases make it crystal clear that there is no right whatever – constitutional or otherwise – for a defendant to use false evidence.

The paucity of authority on the subject of any such "right" may be explained by the fact that such a notion has never been responsibly advanced; the right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment.

Robinson's admonitions to his client can in no sense be said to have forced respondent into an impermissible choice between his right to counsel and his right to testify as he proposed for there was no permissible choice to

testify falsely. For defense counsel to take steps to persuade a criminal defendant to testify truthfully, or to withdraw, deprives the defendant of neither his right to counsel nor the right to testify truthfully. In *United States v. Havens*, we made clear that "when defendants testify, they must testify truthfully or suffer the consequences." When an accused proposes to resort to perjury or to produce false evidence, one consequence is the risk of withdrawal of counsel.

On this record, the accused enjoyed continued representation within the bounds of reasonable professional conduct and did in fact exercise his right to testify; at most he was denied the right to have the assistance of counsel in the presentation of false testimony. Similarly, we can discern no breach of professional duty in Robinson's admonition to respondent that he would disclose respondent's perjury to the court. The crime of perjury in this setting is indistinguishable in substance from the crime of threatening or tampering with a witness or a juror. A defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no "right" to insist on counsel's assistance or silence. Counsel would not be limited to advising against that conduct. An attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct. In short, the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard.

The rule adopted by the Court of Appeals, which seemingly would require an attorney to remain silent while his client committed perjury, is wholly incompatible with the established standards of ethical conduct and the laws of Iowa and contrary to professional standards promulgated by that State. The position advocated by petitioner, on the contrary, is wholly consistent with the Iowa standards of professional conduct and law, with the overwhelming majority of courts, and with codes of professional ethics. Since there has been no breach of any recognized professional duty, it follows that there can be no deprivation of the right to assistance of counsel under the Strickland standard.

Conclusion

Whiteside's attorney treated Whiteside's proposed perjury in accord with professional standards, and since Whiteside's truthful testimony could not have prejudiced the result of his trial, the Court of Appeals was in error to direct the issuance of a writ of habeas corpus and must be reversed.

JUSTICE BRENNAN, concurring in the judgment.

This Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics.

Accordingly, it is not surprising that the Court emphasizes that it "must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." I read this as saying in another way that the Court cannot tell the States or the lawyers in the States how to behave in their courts, unless and until federal rights are violated.

Unfortunately, the Court seems unable to resist the temptation of sharing with the legal community its vision of ethical conduct. But let there be no mistake: the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law. As JUSTICE BLACKMUN observes, that issue is a thorny one, but it is not an issue presented by this case. Lawyers, judges, bar associations, students, and others should understand that the problem has not now been "decided."

I join JUSTICE BLACKMUN's concurrence because I agree that respondent has failed to prove the kind of prejudice necessary to make out a claim under *Strickland v. Washington*.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, concurring in the judgment.

How a defense attorney ought to act when faced with a client who intends to commit perjury at trial has long been a controversial issue. But I do not believe that a federal habeas corpus case challenging a state criminal conviction is an appropriate vehicle for attempting to resolve this thorny problem. When a defendant argues that he was denied effective assistance of counsel because his lawyer dissuaded him from committing perjury, the only question properly presented to this Court is whether the lawyer's actions deprived the defendant of the fair trial which the Sixth Amendment is meant to guarantee. Since I believe that the respondent in this case suffered no injury justifying federal habeas relief, I concur in the Court's judgment.

I

On February 7, 1977, Emmanual Charles Whiteside stabbed Calvin Love to death. At trial, Whiteside claimed self-defense. On direct examination, he testified that Love's bedroom, where the stabbing had occurred, was "very much dark, and that he had stabbed Love during an argument because he believed that Love was about to attack him with a weapon:

> Q. Did you think that Calvin had a gun? A. Most definitely I thought that. Q. Why did you think that? A. Because of Calvin's reputation, his brother's reputation, because of the prior conversation that Calvin and I had, I didn't have no other choice but to think he had a gun. And when he told his girlfriend to give him his piece, I couldn't retreat.

Whiteside's testimony was consistent with that of other witnesses who testified that the room was dark, and that Love had asked his girlfriend to get his "piece" (which they all believed referred to a weapon). No gun, however, was ever found.

Whiteside, who had been charged with first-degree murder, was convicted of second-degree murder, and sentenced to 40 years' imprisonment. He moved for a new trial, contending that his court-appointed attorneys, Gary Robinson and Donna Paulsen, had improperly coerced his testimony. Whiteside now claimed that he had seen a gun, but had been prevented from testifying to this fact.

At an evidentiary hearing on this motion, Whiteside testified that he had told Robinson at their first meeting that he had seen a weapon in Love's hand. Some weeks later, Robinson informed Whiteside that the weapon could not be found and, according to Whiteside, told him to say only that he thought he had seen a gun, rather than that he in fact had seen one. Whiteside "got the impression at one time that maybe if I didn't go along with—with what was happening, that it was no gun being involved, maybe that he will pull out of my trial."

Robinson's testimony contradicted Whiteside's. According to Robinson, Whiteside did not initially claim to have seen a gun, but rather claimed only that he was convinced Love had had one. Roughly a week before the trial, however, in the course of reviewing Whiteside's testimony, Whiteside "made reference to seeing something 'metallic' I don't think he ever did say a gun":

> And at the end Donna asked him about that, because that was the first time it had ever been mentioned either to her or to myself. His response to that was, "in Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead." I explained to him at that time that it was not necessary that the gun be physically present for self-defense, one; two, that to say that would be perjury on his part because he had never at any time indicated that there was a gun; three, that we could not allow him to do that; four, I advised him that if he did do that it would be my duty to advise the Court of what he was doing; also, that I probably would be allowed to attempt to impeach that particular testimony. I told him that there was no need for him to lie about what had happened, that he had a good and valid defense on the facts as he had related them to us, and we felt we could present a good self-defense case on the facts he had stated to us.

Robinson acknowledged that Whiteside's claim of self-defense would have been stronger had the gun been found, but explained that at trial "we tried to create a gun," through testimony from people who had seen Love carrying a gun on other occasions, through a stipulation that Love had been convicted of possession of a weapon, and through suggestions made during cross-examination of the State's witnesses that the initial police search had been too cursory to discover the weapon and that Love's girlfriend had removed it from the apartment prior to a second, more thorough, search.

The trial court rejected Whiteside's motion for a new trial, "finding the facts to be as testified to by Ms. Paulsen and Mr. Robinson." The Iowa Supreme Court affirmed.

Whiteside then sought federal habeas relief in the United States District Court for the Southern District of Iowa. The parties agreed to rest on the record made in the state-court proceedings. Chief Judge Stuart held that the trial judge's factual finding that Whiteside would have committed perjury had he testified at trial actually to having seen a gun was fairly supported by the record and thus entitled to a presumption of correctness. Since Whiteside had no constitutional right to perjure himself, he had been denied neither a fair trial nor effective assistance of counsel.

The Court of Appeals for the Eighth Circuit reversed. The court recognized that the issue before it was not whether Robinson had behaved ethically,[1] but rather whether Whiteside had been deprived of effective assistance of counsel. In the Court of Appeals' view, Robinson had breached the obligations of confidentiality and zealous advocacy imposed on defense counsel by the Sixth Amendment. In addition, the Court of Appeals concluded that Robinson's actions impermissibly compromised Whiteside's constitutional right to testify in his own behalf by conditioning continued representation and confidentiality on Whiteside's limiting his testimony.

The court recognized that, under *Strickland v. Washington*, a defendant must normally demonstrate both that his attorney's behavior was professionally unreasonable and that he was prejudiced by his attorney's unprofessional behavior. But it noted that *Strickland v. Washington* had recognized a "limited" presumption of prejudice when counsel is burdened by an actual conflict of interest that adversely affects his performance. Here, Whiteside had shown that Robinson's obligations under the Iowa Code of Professional Responsibility conflicted with his client's wishes, and his threat to testify against Whiteside had adversely affected Whiteside by "undermining the fundamental trust between lawyer and client" necessary for effective representation.

Petitioner's motion for rehearing en banc was denied by a vote of 5 to 4. In dissent, Judge John R. Gibson, joined by Judges Ross, Fagg, and Bowman, argued that Whiteside had failed to show cognizable prejudice. *Cuyler v. Sullivan* was inapposite, both because finding a conflict of interest required making the untenable assumption that Whiteside possessed the right to testify falsely and because Robinson's threat had had no adverse effect on the trial since Whiteside testified fully in his defense. Moreover, the result of the proceeding should not have been different had Whiteside been permitted to testify as he wished.

[1] The court stated:

> That question is governed solely by the Iowa Code of Professional Responsibility, as it was in effect at the time of the trial in this case, and as it has been authoritatively interpreted by the Supreme Court of Iowa. The Supreme Court of Iowa is the last word on all questions of state law, and the Code of Professional Responsibility is a species of state law.

Thus, the court declined to address the question whether Robinson's actions were either compelled or condoned by Iowa law.

A separate dissent by Judge Fagg, joined by Judges Ross, John R. Gibson, and Bowman, addressed the performance prong of *Strickland*. Robinson's admonition to Whiteside to testify truthfully simply could not be viewed as creating a conflict of interest; Robinson presented a full and zealous defense at trial; and, although Robinson's warning to Whiteside may have been "strident," he had communicated with his client in a manner the client understood.

II

A

The District Court found that the trial judge's statement that "I find the facts to be as testified to by Ms. Paulsen and Mr. Robinson" was a factual finding that Whiteside "would have perjured himself if he had testified at trial that he actually saw a gun in his victim's hand." This factual finding by the state court is entitled to a presumption of correctness, which Whiteside has not overcome.

Respondent has never attempted to rebut the presumption by claiming that the factfinding procedure employed by Iowa in considering new trial motions in any sense deprived him of a full and fair hearing or failed to provide a sufficient basis for denying his motion. Although respondent's argument to this Court in large part assumes that the precluded testimony would have been false, he contends, first, that the record does not fairly support the conclusion that he intended to perjure himself because he claimed in his first written statement that Love had been pulling a pistol from under a pillow at the time of the stabbing, and, second, that whether Robinson had sufficient knowledge to conclude he was going to commit perjury was a mixed question of law and fact to which the presumption of correctness does not apply.

Neither contention overcomes the presumption of correctness due the state court's finding. First, the trial judge's implicit decision not to credit the written statement is fairly supported by Robinson's testimony that the written statement had not been prepared by Whiteside alone and that, from the time of their initial meeting until the week before trial, Whiteside never again claimed to have seen a gun. Second, the finding properly accorded a presumption of correctness by the courts below was that Whiteside's "proposed testimony would have been deliberately untruthful." The lower courts did not purport to presume the correctness of

the Iowa Supreme Court's holding concerning the mixed question respondent identifies—whether Robinson's response to Whiteside's proposed testimony deprived Whiteside of effective representation.

B

The Court approaches this case as if the performance-and-prejudice standard requires us in every case to determine "the perimeters of the range of reasonable professional assistance, but *Strickland v. Washington* explicitly contemplates a different course:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

In this case, respondent has failed to show any legally cognizable prejudice. Nor, as is discussed below, is this a case in which prejudice should be presumed.

The touchstone of a claim of prejudice is an allegation that counsel's behavior did something "to deprive the defendant of a fair trial, a trial whose result is reliable." The only effect Robinson's threat had on Whiteside's trial is that Whiteside did not testify, falsely, that he saw a gun in Love's hand. Thus, this Court must ask whether its confidence in the outcome of Whiteside's trial is in any way undermined by the knowledge that he refrained from presenting false testimony.

This Court long ago noted: "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial." When the Court has been faced with a claim by a defendant concerning prosecutorial use of such evidence, it has "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Similarly, the Court has viewed a defendant's use of such tes-

timony as so antithetical to our system of justice that it has permitted the prosecution to introduce otherwise inadmissible evidence to combat it. The proposition that presenting false evidence could contribute to (or that withholding such evidence could detract from) the reliability of a criminal trial is simply untenable.

It is no doubt true that juries sometimes have acquitted defendants who should have been convicted, and sometimes have based their decisions to acquit on the testimony of defendants who lied on the witness stand. It is also true that the Double Jeopardy Clause bars the reprosecution of such acquitted defendants, although on occasion they can be prosecuted for perjury. But the privilege every criminal defendant has to testify in his own defense "cannot be construed to include the right to commit perjury." To the extent that Whiteside's claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right the law simply does not recognize. "A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice.

The Court of Appeals erred in concluding that prejudice should have been presumed. *Strickland v. Washington* found such a presumption appropriate in a case where an attorney labored under "an actual conflict of interest that adversely affected his performance." In this case, however, no actual conflict existed. I have already discussed why Whiteside had no right to Robinson's help in presenting perjured testimony. Moreover, Whiteside has identified no right to insist that Robinson keep confidential a plan to commit perjury. The prior cases where this Court has reversed convictions involved conflicts that infringed a defendant's legitimate interest in vigorous protection of his constitutional rights. Here, Whiteside had no legitimate interest that conflicted with Robinson's obligations not to suborn perjury and to adhere to the Iowa Code of Professional Responsibility.

In addition, the lawyer's interest in not presenting perjured testimony was entirely consistent with Whiteside's best interest. If Whiteside had lied on the stand, he would have risked a future perjury prosecution. Moreover, his testimony would have been contradicted by the testimony of other eyewitnesses and by the fact that no gun was ever found. In light of that impeachment, the jury might have concluded that Whiteside lied as well about his lack of premeditation and thus might have convicted him of first-degree murder. And if the judge believed that Whiteside had lied, he could have taken Whiteside's perjury into account in setting the sen-

tence. In the face of these dangers, an attorney could reasonably conclude that dissuading his client from committing perjury was in the client's best interest and comported with standards of professional responsibility. In short, Whiteside failed to show the kind of conflict that poses a danger to the values of zealous and loyal representation embodied in the Sixth Amendment. A presumption of prejudice is therefore unwarranted.

C

In light of respondent's failure to show any cognizable prejudice, I see no need to "grade counsel's performance." The only federal issue in this case is whether Robinson's behavior deprived Whiteside of the effective assistance of counsel; it is not whether Robinson's behavior conformed to any particular code of legal ethics.

Whether an attorney's response to what he sees as a client's plan to commit perjury violates a defendant's Sixth Amendment rights may depend on many factors: how certain the attorney is that the proposed testimony is false, the stage of the proceedings at which the attorney discovers the plan, or the ways in which the attorney may be able to dissuade his client, to name just three. The complex interaction of factors, which is likely to vary from case to case, makes inappropriate a blanket rule that defense attorneys must reveal, or threaten to reveal, a client's anticipated perjury to the court. Except in the rarest of cases, attorneys who adopt "the role of the judge or jury to determine the facts," pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.

I therefore am troubled by the Court's implicit adoption of a set of standards of professional responsibility for attorneys in state criminal proceedings. The States, of course, do have a compelling interest in the integrity of their criminal trials that can justify regulating the length to which an attorney may go in seeking his client's acquittal. But the American Bar Association's implicit suggestion in its brief amicus curiae that the Court find that the Association's Model Rules of Professional Conduct should govern an attorney's responsibilities is addressed to the wrong audience. It is for the States to decide how attorneys should conduct themselves in state criminal proceedings, and this Court's responsibility extends only to ensuring that the restrictions a State enacts do not infringe a defendant's federal constitutional rights. Thus, I would follow the suggestion made in the joint brief amici curiae filed by 37 States at the certiorari stage that we allow the States to maintain their "differing approaches" to a complex ethical question. The signal merit of asking first whether a defendant has

shown any adverse prejudicial effect before inquiring into his attorney's performance is that it avoids unnecessary federal interference in a State's regulation of its bar. Because I conclude that the respondent in this case failed to show such an effect, I join the Court's judgment that he is not entitled to federal habeas relief.

JUSTICE STEVENS, concurring in the judgment.

Justice Holmes taught us that a word is but the skin of a living thought. A "fact" may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.

As we view this case, it appears perfectly clear that respondent intended to commit perjury, that his lawyer knew it, and that the lawyer had a duty—both to the court and to his client, for perjured testimony can ruin an otherwise meritorious case—to take extreme measures to prevent the perjury from occurring. The lawyer was successful and, from our unanimous and remote perspective, it is now pellucidly clear that the client suffered no "legally cognizable prejudice."

Nevertheless, beneath the surface of this case there are areas of uncertainty that cannot be resolved today. A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury—as well as judicial review of such apparent certainty—should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked. Similarly, the post-trial review of a lawyer's pretrial threat to expose perjury that had not yet been committed—and, indeed, may have been prevented by the threat—is by no means the same as review of the way in which such a threat may actually have been carried out. Thus, one can be convinced—as I am—that this lawyer's actions were a proper way to provide his client with effective representation without confronting the much more difficult questions of what a lawyer must, should, or may do after his client has given testimony that the lawyer does not believe. The answer to such questions may well be colored by the particular circumstances attending the actual event and its aftermath.

Because JUSTICE BLACKMUN has preserved such questions for another day, and because I do not understand him to imply any adverse criticism of this lawyer's representation of his client, I join his opinion concurring in the judgment.

Questions

1. Why did the majority conclude that Whiteside was planning to commit perjury? Is it possible that he recollected something new about the incident? Is it appropriate to rely on the trial court's finding of fact about what Whiteside saw?
2. Why do the concurring justices disagree with the majority opinion? How do they think attorneys should evaluate the truthfulness of client testimony?

People v. DePallo

754 N.E.2d 751 (NY 2001)

WESLEY, J.

This case calls upon us to clarify a defense attorney's responsibilities when confronted with the dilemma that a client intends to commit perjury.

Defendant and his accomplices executed a calculated attack on a 71-year-old man, ransacking his home, stabbing him repeatedly with a knife and scissors, and finally bludgeoning him to death with a shovel. Defendant's blood was found at the scene and on the victim's clothing. Defendant's fingerprint was also discovered in the home and, upon arrest, he made several incriminating statements placing him at the scene of the crime. Defendant also insisted on making a statement during pre-trial proceedings in which he admitted that he had forced one of his accomplices to participate in the crime under threat of death.

At trial, defense counsel noted at a sidebar that he had advised defendant that he did not have to testify and should not testify, but if he did, he should do so truthfully. Defendant confirmed counsel's statements to the court but insisted on testifying. Defense counsel elicited defendant's direct testimony in narrative form. Defendant testified that he was home the entire evening of the crime, and that his contrary statements to the police were induced by promises that he could return home. During the prosecutor's cross-examination, defense counsel made numerous objections.

After both sides rested, defense counsel addressed the court in Chambers, outside the presence of defendant and the prosecutor. Counsel stated:

> Prior to the defendant's testimony, I informed the Court that the defendant was going to take the witness stand, and that he had previously told me he was involved in this homicide. Although I did not get into details with him, I don't know exactly what his involvement was, but he had stated to me that he was there that night, he had gotten at least that far. Knowing that, I told the defendant I cannot participate in any kind of perjury, and you really shouldn't perjure yourself. But, he, you know, dealing with him is kind of difficult and he was insistent upon taking the stand. He never told me what he was going to say, but I knew it was not going to be the truth, at least to the extent of him denying participation.

The court then noted that counsel had complied with the procedures for such circumstances as outlined in *People v. Salquerro*. During summations, defense counsel did not refer to defendant's trial testimony. Defendant was convicted of two counts of second degree murder, two counts of first degree robbery, two counts of first degree burglary, and one count of second degree robbery. The Appellate Division affirmed, rejecting defendant's claims that he was denied effective assistance of counsel when his attorney disclosed the perjured testimony to the court and that the ex parte conference was a material stage of trial. A Judge of this Court granted leave to appeal, and we now affirm.

The ethical dilemma presented by this case is not new. Defense attorneys have confronted the problem of client perjury since the latter part of the 19th century when the disqualification of criminal defendants to testify in their own defense was abolished by statute in federal courts and in most states, including New York in 1869. A lawyer with a perjurious client must contend with competing considerations—duties of zealous advocacy, confidentiality and loyalty to the client on the one hand, and a responsibility to the courts and our truth-seeking system of justice on the other. Courts, bar associations and commentators have struggled to define the most appropriate role for counsel caught in such situations.

Notwithstanding these ethical concerns, a defendant's right to testify at trial does not include a right to commit perjury, and the Sixth Amendment right to the assistance of counsel does not compel counsel to assist or participate in the presentation of perjured testimony. In light of these limitations, an attorney's duty to zealously represent a client is circumscribed by an "equally solemn duty to comply with the law and standards of professional conduct to prevent and disclose frauds upon the court." The United States Supreme Court has noted that counsel must first attempt to persuade the client not to pursue the unlawful course of conduct. If unsuccessful, withdrawal from representation may be an appropriate response, but when confronted with the problem during trial, as here, an "attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response."

This approach is consistent with the ethical obligations of attorneys under New York's Code of Professional Responsibility. DR 7-102 expressly prohibits an attorney, under penalty of sanctions, from knowingly using perjured testimony or false evidence; knowingly making a false statement of fact; participating in the creation or preservation of evidence when the attorney knows, or it is obvious, that the evidence is false; counseling or assisting the client in conduct the lawyer knows to be illegal or fraudulent; and knowingly engaging in other illegal conduct. Additionally, DR 7-102(b)(1) mandates that "a lawyer who receives information clearly establishing that the client has, in the course of the representation, perpetrated a fraud upon a tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected tribunal, except when the information is protected as a confidence or secret."

In accordance with these responsibilities, defense counsel first sought to dissuade defendant from testifying falsely, and indeed from testifying at all. Defendant insisted on proceeding to give the perjured testimony and, thereafter, counsel properly notified the court.

The intent to commit a crime is not a protected confidence or secret, Moreover, in this case defense counsel did not reveal the substance of any client confidence as defendant had already admitted at a pre-trial hearing that he had forced one of his accomplices to participate in the crime under threat of death.

Finally, defendant contends that his counsel should have sought to withdraw from the case. However, substitution of counsel would do little to resolve the problem and might, in fact, have facilitated any fraud defendant wished to perpetrate upon the court. We agree with *Salquerro*

that withdrawal of counsel could present other unsatisfactory scenarios which ultimately could lead to introduction of the perjured testimony in any event or further delay the proceedings.

In this case, defendant was allowed to present his testimony in narrative form to the jury. The remainder of defense counsel's representation throughout the trial was more than competent. The lawyer's actions properly balanced the duties he owed to his client and to the court and criminal justice system; "since there has been no breach of any recognized professional duty, it follows that there can be no deprivation of the right to assistance of counsel."

We also reject defendant's contention that his right to be present during a material stage of trial was violated by his absence from the ex parte communication between the court and his attorney. Although a defendant has a constitutional and statutory right to be present at all material stages of a trial, and at ancillary proceedings when he or she may have something valuable to contribute or when presence would have a substantial effect on a defendant's ability to defend against the charges, this right does not extend to circumstances involving matters of law or procedure that have no potential for meaningful input from a defendant.

The purpose of this ancillary proceeding was simply to place on the record matters which had already occurred regarding defendant's perjury and his attorney's response. The conference memorialized counsel's dilemma for appellate review and possible analysis of counsel's professional ethical obligations. Thus, defendant's presence was not mandated; it had no bearing on his ability to defend against the charges or on the outcome of this jury trial. The situation here is akin to *People v. Keen*. In *Keen*, we held that the defendant had no right to be present at two ex parte conferences held at defense counsel's behest which involved discussions regarding the testimony and anticipated perjury of a key witness—matters which we characterized as simply procedural.

In sum, because the subject matter of the ex parte communication here was merely procedural, and there was no hearing or other factual inquiry beyond that which had transpired earlier in the proceedings, defendant had no right to be present.

Accordingly, the order of the Appellate Division should be affirmed.

Questions

1. The *New York Times* reported on this murder here. Michael DePallo and his two friends were 15-16 years old and living in a foster-care group home on Staten Island, when they broke into the home of 71 year old Gus Ferrera and murdered him. How should an attorney evaluate the truthfulness of a teenager's testimony?
2. Should DePallo's attorney have disclosed his belief that DePallo planned to commit perjury? Would nondisclosure have affected the outcome? Should the attorney have prevented DePallo from testifying? Could it have improved the outcome?

State v. Hischke

639 N.W.2d 6 (Iowa 2002)

STREIT, Justice.

Mark Hischke made an eleventh-hour decision to deny possession of marijuana after previously admitting to the police and his lawyer the marijuana belonged to him. Hischke's trial counsel, John Bishop, informed the court Hischke intended to commit perjury. After a jury trial, the court convicted Hischke of possession of marijuana. Hischke appeals contending he was denied effective assistance of counsel when his trial lawyer alerted the court to his "personal belief" Hischke planned to present perjured testimony. Because we find Bishop had good cause to believe Hischke's proposed testimony would be deliberately untruthful, we affirm.

I. Facts

On December 5, 1999, Waterloo police officers executed an arrest warrant on Eric Twesme at his apartment. When the officers arrived, Twesme and Mark Hischke were present in the apartment. Twesme answered the door and permitted the officers to enter. In the apartment, the officers saw syringes, spoons, and cotton. The officers asked Hischke to wait in

the hallway where he consented to a search of his person. The officer discovered a syringe in Hischke's shirt pocket. Before going to the police station, Twesme asked the officers for a jacket. One of the officers saw a leather jacket in the apartment draped over the back of the chair where Hischke had been sitting. The officer asked Twesme if the jacket was his and Twesme said it did not belong to him. Hischke admitted ownership of the jacket but said he was not responsible for anything in the pockets. During a consent search, the police officer found a small bag of marijuana in the jacket.

Mark Hischke was charged with possession of marijuana. On the day the trial was scheduled to begin, Hischke's attorney, John Bishop, moved to withdraw from the case. Bishop stated his client initially claimed ownership of the marijuana but shortly before the trial Hischke denied ownership. Bishop explained to the court,

> It's my personal belief that Mr. Hischke's original statements to me that the marijuana was his was the truth, and if Mr. Hischke requires me to present evidence otherwise I think I would be presenting perjured testimony, and so I don't feel I can ethically be permitted to do that. But Mr. Hischke wishes to present that defense and that's, I guess, the dilemma we have here.

The district court informed Hischke he would not be permitted to testify as to the ownership of the marijuana. Hischke declined to testify and the jury found him guilty as charged.

On appeal, Hischke contends he was denied effective assistance of counsel when Bishop informed the court he believed his client was going to present perjured testimony. Hischke argues it is not sufficient for an attorney to merely "believe" a client intends to commit perjury. Hischke asks us to adopt a standard that requires an attorney to have "actual knowledge" the client's testimony will be false. Hischke argues prejudice should be presumed.

The State contends an attorney need only have a "firm factual basis" for believing a client plans to lie before taking any measures designed to prevent such perjury. The State argues Bishop satisfied this standard.

III. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, Hischke must demonstrate both ineffective assistance and prejudice. Both elements must be proven by a preponderance of the evidence. If a claim lacks one of the elements of an ineffective assistance of counsel claim, it is not necessary for us to address the other element.

Hischke must first prove Bishop's performance was not within the normal range of competence. We measure the attorney's performance by standards of reasonableness consistent with "prevailing professional norms." We begin our analysis with the presumption Bishop performed competently. Claims of ineffective assistance of counsel are more likely to be found where counsel lacked diligence as opposed to the exercise of judgment.

Bishop believed his client planned on committing perjury. Trial counsel may not knowingly present perjured testimony. When counsel knows a client has committed perjury or plans on doing so, counsel may reveal the perjury to the court. On this appeal, we must determine whether Bishop performed competently and reasonably in deciding to inform the court his client intended to present perjured testimony.

The central issue before us is what standard of knowledge is required before a lawyer may inform the court of his or her client's plan to commit perjury. There are several factors to consider in making this determination: (1) how certain counsel was the proposed testimony was false; (2) at what stage of the proceedings counsel discovered the plan; and (3) the ways in which the attorney may be able to dissuade his or her client from committing perjury.

Other jurisdictions have addressed the standard to be applied when a lawyer informs the court his or her client intends to commit perjury. Some courts require a lawyer to have knowledge "beyond a reasonable doubt" before disclosing to the court the belief a client is planning on committing perjury. Other courts have adopted the "firm factual basis" standard. Another court requires a "good faith determination" by counsel the defendant will commit perjury when he testifies. Certain other courts require counsel to engage in an independent investigation of the facts before determining the defendant's anticipated testimony will constitute perjury.

We have not addressed this particular issue in Iowa since 1978. At that time, we addressed this issue within the context of a case with factual circumstances very similar to the case before us. In *Whiteside*, the lawyer relied on the defendant's pronouncement shortly before trial that was inconsistent with his story during the initial phases of the proceedings. In asserting self-defense the defendant initially claimed he "thought" the victim had a gun but he did not actually see the gun. Then, before trial, the defendant told counsel he intended to testify he did see a gun because without such testimony he was "dead." We concluded a lawyer is required to be convinced with good cause to believe the defendant's proposed testimony would be deliberately untruthful. Moreover, the lawyer was not required to conduct an independent investigation of the facts before determining his client planned to commit perjury. We reaffirm our holding in *Whiteside*.

We now turn to the facts before us to determine whether Hischke was denied effective assistance when Bishop alerted the court to Hischke's plan to testify falsely. These are the relevant facts as they occurred before Hischke's change in story. Immediately before Hischke's arrest, he told the police officers he owned the leather jacket but was not responsible for anything inside the pockets. This statement indicates Hischke was aware the officers would find something illegal in the jacket. Consistent with Hischke's declaration of ownership, Twesme told the police officers the leather jacket did not belong to him. Hischke then wore the leather jacket to the police station. During his initial contact with Bishop, Hischke stated the jacket belonged to him.

Shortly before the trial was scheduled to begin, Hischke learned of the enhanced sentence that would accompany his third conviction on a charge of possession of marijuana. At this time Hischke changed his testimony and told Bishop the jacket did not belong to him. Hischke claims he had only been taking "the rap" for his friend Twesme but would no longer do so because of the enhanced punishment Hischke faced. This statement is questionable because of its lateness.

In addition to the facts above, other factors contributed to Bishop's objectively reasonable basis for believing Hischke intended to commit perjury. The police officers found a syringe in Hischke's shirt pocket when they patted him down outside of the apartment. Hischke was visiting a friend who had an outstanding warrant for selling morphine and who lives in an apartment openly littered with drug paraphernalia. As stated above, this was not Hischke's first brush with the law. He has two prior marijuana convictions.

Given these facts, we find Bishop performed competently and reasonably in deciding to inform the court of Hischke's recent change in testimony. Bishop's belief was reasonable under these circumstances. He did not merely suspect or guess Hischke would commit perjury. The facts do not support a finding it was simply Bishop's "gut-level belief" Hischke planned to commit perjury. Moreover, his decision to act on this personal belief is entirely consistent with "prevailing professional norms." Bishop was "convinced with good cause to believe defendant's proposed testimony would be deliberately untruthful." Further, it was not necessary for Bishop to conduct an independent investigation of the facts.

We decline to adopt the standard of "actual knowledge" suggested by Hischke. Such a standard would be virtually impossible to satisfy unless the lawyer had a direct confession from his or her client or personally witnessed the event in question. Consequently, the standard of actual knowledge would eviscerate the rules of professional responsibility forbidding a lawyer from presenting perjured testimony.

In finding Bishop's performance was within the normal range of competence we are not stating Bishop was required to take the particular course of action he chose to pursue. This has not been presented to us. We recognize when counsel is faced with the situation of client perjury, he or she has competing interests at stake. Counsel must contend with duties of zealous advocacy, confidentiality, and loyalty to the client. On the other hand, these interests are counter-balanced by duties of accountability to the courts and justice. In order to accommodate these competing interests, there are various appropriate options a lawyer may choose among to decide how to handle such a situation.

IV. Conclusion

We conclude Hischke's trial counsel acted reasonably when he informed the court his client intended to commit perjury. Hischke satisfied the requisite standard that a lawyer must be "convinced with good cause to believe the defendant's proposed testimony would be deliberately untruthful." Because we find Hischke was not denied effective assistance of counsel, we do not address whether Hischke has demonstrated prejudice. We affirm.

CARTER, Justice (concurring specially).

I concur in affirming defendant's conviction.

This case vividly illustrates the difficulty in determining whether a lawyer has a sufficiently convincing reason to believe a client is about to commit perjury. I have no disagreement with the test, which the opinion of the court employs for making such determinations consistent with the lawyer's ethical obligation. Nor do I question the conclusion of defendant's counsel in the present case in the face of that test. The decision could have gone either way on these facts.

This case does not discuss, because the issue is not raised, whether the action that defendant's counsel took upon becoming convinced of the impending perjury was proper. I am convinced that it was not. My disagreement with defense counsel's action flows from a belief that it is never proper for counsel to advise the court that counsel believes a client will testify falsely. Such conduct will inevitably damage the client's case beyond repair.

Counsel who reach the conclusion that a client is about to testify falsely should first attempt to dissuade the client from giving the offending testimony. If unsuccessful, counsel should attempt a quiet withdrawal from the representation. The reasons set forth in the application to withdraw should only identify the existence of an unspecified attorney-client disagreement that might compromise the attorney's ethical responsibilities. At no time should the matter of impending perjury be disclosed. If the attempt to withdraw fails, then counsel should proceed with the case and conduct any questioning of the witness so as not to invite the suspected perjury. If the suspected perjury nonetheless occurs, counsel should make no reference of it in arguing the case to the trier of fact. I believe that if a lawyer proceeds in this manner, he or she may fully satisfy the lawyer's ethical obligation to prevent perjury without the necessity of advising the court as to the client's intent to testify falsely.

Questions

1. Is it possible that Hischke's proposed testimony was truthful? Did his attorney actually know it was false?
2. What standard should criminal defense attorneys adopt in determining whether their client will commit or has committed perjury?

2. Ensuring Fairness and Impartiality

Model Rules of Prof. Conduct, Rule 3.1

Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Model Rules of Prof. Conduct, Rule 3.2

Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Model Rules of Prof. Conduct, Rule 3.4

Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Model Rules of Prof. Conduct, Rule 3.5

Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Model Rules of Prof. Conduct, Rule 3.6

Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Model Rules of Prof. Conduct, Rule 3.7

Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Chapter 2
Prosecutorial Misconduct

ABA Standards for the Prosecution Function

Standard 3-1.2—The Function of the Prosecutor

(a) The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor's office should exercise sound discretion and independent judgment in the performance of the prosecution function.

(b) The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

(c) The prosecutor should know and abide by the standards of professional conduct as expressed in applicable law and ethical codes and opinions in the applicable jurisdiction. The prosecutor should avoid an appearance of impropriety in performing the prosecution function. A prosecutor should seek out, and the prosecutor's office should provide, supervisory advice and ethical guidance when the proper course of prosecutorial conduct seems unclear. A prosecutor who disagrees with a governing ethical rule should seek its change if appropriate, and directly challenge it if necessary, but should comply with it unless relieved by court order.

(d) The prosecutor should make use of ethical guidance offered by existing organizations, and should seek to establish and make use of an ethics advisory group akin to that described in Defense Function Standard 4-1.11.

(e) The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases. The prosecutor's office should be available to assist community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

(f) The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action. The prosecutor should provide service to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions. A prosecutorial office should support such activities, and the office's budget should include funding and paid release time for such activities.

Model Rules of Prof. Conduct, Rule 3.8

Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comments

1. A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

2. When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

3. Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

4. A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Taylor v. Kavanagh

640 F. 2d 450 (2d Cir. 1981)

IRVING R. KAUFMAN, Circuit Judge:

Plaintiff Rodney Taylor, pro se, instituted this action against Michael Kavanagh, an Assistant District Attorney for Ulster County, New York. Claiming that Kavanagh lied to him during plea negotiations and violated the terms of the negotiated plea agreement, Taylor seeks to set aside a criminal conviction resulting from his guilty plea. He also requests compensatory and punitive damages amounting to $5.5 million.

I.

Taylor was arrested in Kingston, New York, in October 1974, and on December 20, 1974, he was indicted and charged with third degree burglary and attempted grand larceny. He was taken into custody again on August 14, 1975, and charged with third degree burglary and criminal possession of a controlled substance in the seventh degree.

On June 9, 1976, Taylor, represented by counsel, pleaded guilty in the Ulster County Court to the third degree burglary charge contained in the December 1974 indictment. This plea was in full satisfaction of the charges resulting from both the October 1974 and the August 1975 arrests, although no indictment concerning the events of August 1975 had ever been returned. The court was advised that Taylor and Assistant District Attorney Kavanagh had agreed that no recommendation or statement would be made relating to the sentence to be imposed.

On June 7, 1977, Taylor moved in the state court to vacate his guilty plea, claiming that 1) during plea negotiations and at the time he entered his plea, the Assistant District Attorney had misrepresented to him and the court that a grand jury had returned an indictment on the charges relating to the August 1975 arrest; and 2) Kavanagh had indicated he would not abide by his promise not to recommend any sentence. This motion was denied.

At the sentencing proceeding in February 1978, Kavanagh made a lengthy and detailed statement concerning Taylor's prior criminal record and recommended that he receive the maximum punishment. The court then sentenced Taylor to an indeterminate term of six years, with a minimum term of two years. Taylor appealed the judgment of conviction, but the Appellate Division affirmed, ordering, however, that Taylor be resentenced. The court stated that although the misrepresentation by the prosecutor concerning the existence of the second indictment was harmless error, resentencing was necessary because the prosecutor failed to honor his promise. Taylor eventually was resentenced to the same term he had previously received.

Taylor filed the instant action in October 1978, claiming he was induced to plead guilty by the Assistant District Attorney's misrepresentations concerning the alleged second indictment. He also asserted that he should be awarded damages for Kavanagh's breach of the plea bargain.

The defendant moved for judgment on the pleadings, which Judge Griesa granted in July 1980. He reasoned that because a prosecutor does not have custody over a convicted prisoner, Kavanagh was not a proper defendant in the suit to set aside Taylor's conviction. Extending the doctrine of absolute immunity to a prosecutor's plea bargaining activities. Judge Griesa also held that Kavanagh was immune from liability, and dismissed the action. We affirm.

We note at the outset that when a prisoner is challenging his imprisonment in state facilities, his sole federal remedy is a writ of habeas corpus. Taylor followed this approach in September 1979, seeking a writ in the United States District Court for the Northern District of New York. Judge Port dismissed the petition and denied a certificate of probable cause. Taylor did not appeal this order. Accordingly, we hold that he cannot raise this request to be set free in the instant civil rights action.

Taylor's damages claim also fails because the Assistant District Attorney's conduct in the plea bargaining negotiations and the sentencing proceeding in state court is protected by the doctrine of absolute prosecutorial

immunity. Imblerv. Pachtman , 424 U.S. 409 (1976) . Imbler provided the basis for the development of a functional approach to the immunity question. The Court held that absolute immunity from § 1983 liability exists for those prosecutorial activities "intimately associated with the judicial phase of the criminal process." These protected "quasijudicial" activities include the initiation of a prosecution and the presentation of the Government's case.

Absolute protection does not extend, however, to a prosecutor's investigative or administrative acts. Accordingly, we have recognized that where prosecutors act in this capacity, only the qualified "good faith" immunity that protects, for example, police officers, is available.

The task of determining whether a particular activity is better characterized as "quasi-judicial" and subject to absolute immunity, or "investigative" and subject to only qualified "good faith" immunity requires more than the mechanical application of labels. An examination of the functional nature of prosecutorial behavior, rather than the status of the person performing the act, is determinative. Thus, a prosecutor is insulated from liability where his actions directly concern the pre-trial or trial phases of a case. For example, the swearing of warrants to insure a witness's attendance at trial, the falsification of evidence and the coercion of witnesses, or the failure to drop charges until immediately before trial, have been held to be prosecutorial activities for which absolute immunity applies. Similarly, because a prosecutor is acting as an advocate in a judicial proceeding, the solicitation and subornation of perjured testimony, the withholding of evidence, or the introduction of illegally-seized evidence at trial does not create liability in damages. The rationale for this approach is sound, for these protected activities, while deplorable, involve decisions of judgment affecting the course of a prosecution. The efficient, and just, performance of the prosecutorial function would be chilled if Government attorneys were forced to worry that their choice of trial strategy and tactics could subject them to monetary liability, or at best, the inconvenience of proving a "good faith" defense to a § 1983 action.

In contrast, activities in which a prosecutor engages that are independent of prosecution are not protected by the doctrine of absolute immunity. For example, only a "good faith" immunity is available where a prosecutor testifies falsely as a witness, distributes extraneous statements to the press designed to harm a suspect's reputation, or participates in an illegal search that violates a suspect's Fourth Amendment rights.

Decisions to engage in conduct of this character are not directly related to the delicate judgments prosecutors must make concerning the development of the Government's case. The "investigatory" and "administrative" work involved in testifying before a grand jury, accumulating evidence, and disseminating information to the press is analogous to the tasks performed by the police, and therefore only the same qualified "good faith" immunity is available.

This functional approach requires us to evaluate plea bargaining in light of the general purpose of the absolute immunity doctrine. Judge Griesa properly recognized that the purpose of the doctrine "is to insure that a prosecutor will perform his difficult function with complete vigor and independence, undeterred by the spectre of liability for damages with respect to his activities." Learned Hand has told us that the doctrine we apply today supports the just administration of the criminal law, for we all would suffer if prosecutors "who try to do their duty were subject to the constant dread of retaliation." The threat of § 1983 liability would inhibit prosecutors from exercising independent judgment and would divert their attention from the immediate matters at hand.

We are satisfied that a prosecutor's activities in the plea bargaining context merit the protection of absolute immunity. The plea negotiation is an "essential component" of our system of criminal justice. It is at this stage that the prosecutor evaluates the evidence before him, determines the strength of the Government's case, and considers the societal interest in disposing of the case by a negotiated guilty plea. The effective negotiation of guilty pleas would be severely chilled if a prosecutor were constantly concerned with the possibility of ruinous personal liability for judgments and decisions made at this critical stage of the criminal process.

Moreover, reference to the type of harm suffered from the alleged misconduct during a plea negotiation demonstrates that defendant Kavanagh should be afforded absolute immunity in this case. We recently noted that there can be no monetary liability for injuries related solely to the prosecution itself. Thus, if as a result of prosecutorial misconduct, a defendant is compelled to face prosecution, or to suffer imprisonment or pretrial detention, the harm cannot be redressed via a § 1983 civil rights suit. But, where the alleged harm is inflicted independently from the prosecution — for example, the damage to reputation caused by a prosecutor's dissemination of false information to the press or the violation of Fourth Amendment privacy rights resulting from a prosecutor's authorization of an illegal search — the prosecutor cannot rely on the blanket protection of absolute immunity. In this case, the only harm caused by Kavanagh's

purported misrepresentations and his failure to abide by a promise was imprisonment, an injury for which the Imbler doctrine of immunity protects the prosecutor.

Finally, we note that by extending the doctrine of absolute immunity to a prosecutor's plea bargaining activities, we do not condone Kavanagh's alleged misconduct. Prosecutorial abuses can and should be remedied at the trial and appellate levels, as well as by state and federal post-conviction collateral procedures. Relief for misconduct committed during a plea negotiation includes the setting aside of the plea or ordering specific performance of the agreement. 113 In this case, Taylor raised vigorous objections to Kavanagh's conduct in state court. He also employed the federal habeas corpus procedure, without success. His failure to prevail in both the state and federal forums cannot justify the creation of another remedy, one which would impose a tremendous burden on society by severely undercutting prosecutorial independence and morale.

Questions

1. In Imbler v. Pachtman, the Supreme Court held that prosecutors are protected by absolute immunity from tort liability under § 1983 for the exercise of their prosecutorial powers. Accordingly, even manifest abuse of those powers cannot create tort liability for the prosecutor or the government, although it can be the basis for discipline. The Supreme Court held that absolute immunity is necessary in order to protect prosecutorial independence. Do you agree?

In re Jordan

913 So. 2d 775 (La. 2005)

TRAYLOR, J.

This attorney disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel against respondent, Roger W. Jordan, Jr., a former Orleans Parish prosecutor.

UNDERLYING FACTS AND PROCEDURAL HISTORY

On April 22, 2003, the ODC filed one count of formal charges against respondent, alleging that he violated Rules 3.8(d) 114 and 8.4(a) 115 of the Rules of Professional Conduct by failing to timely disclose to the defense evidence tending to negate the guilt of the accused or mitigate the offense. The formal charges against respondent arise from the capital prosecution of Shareef Cousin and respondent's undisputed failure to turn over an eyewitness's statement to the defense.

FACTS AND PROCEDURAL HISTORY OF STATE V. COUSIN:

Before addressing the merits of the case, it is necessary to discuss, in some detail, the underlying facts and procedural history of Shareef Cousin's criminal case.

On March 2, 1995, Michael Gerardi was shot at point-blank range during an armed robbery attempt outside the Port of Call restaurant in New Orleans. Connie Ann Babin, Mr. Gerardi's date that evening and the only eyewitness to the murder, gave three separate statements to the New Orleans Police Department during the homicide investigation. When questioned on the night of the murder, a "visibly shaken" Ms. Babin told the police that she "did not get a good look at the perpetrators and probably could not identify them." In the second statement, which was tape recorded by police at Ms. Babin's home on March 5, 1995, three days after the murder, Ms. Babin was asked by a New Orleans Police Department detective whether she could "describe the person who did the shooting, his clothing?" In response, Ms. Babin said that she remembered the shooter was wearing an oversized denim jacket. She continued:

> I don't know, it was dark and I did not have my contacts nor my glasses so I'm coming at this at a disadvantage. I … you know you could see outlines and shapes and things that stick out, but er … the socks, I remember the colorful socks, because he kept drawing my attention to it when he kept fidgeting at his ankle area.

Ms. Babin went on to describe the shooter's hair and to say that the shooter was in his late teens and five feet seven or eight inches tall. After providing this description, Ms. Babin stated:

> As he looked to me … I keep getting this vision of a young man with, with an older man's face … er I don't know that if this is coming … er somewhere, or if I really did see this person … if this is just coming from my imagination or what, but I … every time I go over it and close my eyes er … I remember thinking that he had an older man's face or a young body, on a young person … how I visualize that, I don't know.

On March 25, 1995, three weeks after the murder, Ms. Babin viewed a photographic lineup presented by the police and positively identified sixteen-year old Shareef Cousin as the shooter. Mr. Cousin was arrested a short time later and indicted for the first degree murder of Mr. Gerardi.

In the summer of 1995, the criminal case was assigned to respondent, then an assistant district attorney in Orleans Parish. When respondent was first assigned the case, he recalls that there were three identification witnesses. However, Ms. Babin was the only witness to positively identify Mr. Cousin.

In preparing for trial, respondent interviewed Ms. Babin. She informed him that she is nearsighted and only needs her contacts or glasses for nighttime driving, but not to see at close distances. Considering this information, respondent unilaterally determined that the absence of contacts or glasses on the night of the murder did not affect Ms. Babin's identification of Mr. Cousin as the shooter.

Respondent testified at his disciplinary hearing that he believed Ms. Babin's second statement provided significant additional details that tended to corroborate her identification of Mr. Cousin, especially the observation of the killer as having "an old man's face" on "a young person's body." Respondent therefore concluded that, in his judgment, Ms. Babin's second statement was not material exculpatory evidence to which the defense would be entitled under *Brady v. Maryland*. Accordingly, he did not produce that statement to Mr. Cousin's attorneys

in response to their motion for the production of exculpatory evidence. Respondent has never maintained that he was unaware of his obligation as a prosecutor to disclose exculpatory evidence pursuant to *Brady*.

Prior to the trial, Mr. Cousin's defense team filed a motion to suppress Ms. Babin's identification of Mr. Cousin. Ms. Babin testified at the suppression hearing, and, in response to questions by respondent, explained the manner by which she came to identify Mr. Cousin in the photographic lineup conducted by the NOPD. On cross-examination, Mr. Cousin's attorney questioned Ms. Babin as to whether she had given a description of the perpetrator to the police "when they questioned you about this case." Ms. Babin testified she described the perpetrator as youthful, slim, slightly shorter than Mr. Gerardi, with short cropped hair and a very distinctive "unusual" or "evil-looking" face. Mr. Cousin's attorney also asked whether Ms. Babin told the police "about any characteristics that you felt were outstanding." Ms. Babin said that she could only recall stating "that he had an older-looking face on a younger body." While Mr. Cousin's attorney attempted to discover whether or not Ms. Babin had given any additional descriptions to anyone else prior to the photographic lineup, respondent objected, and the question was rephrased. Eventually, Mr. Cousin's attorney questioned Ms. Babin as to whether she had provided any additional statements to the police other than the night of the murder and the photographic lineup. Ms. Babin testified that her description had been consistent throughout. Thus, the only way that the defense could have known about Statement 2 would have been disclosure by respondent.

Ms. Babin testified at trial and repeated her positive identification of Mr. Cousin. Mr. Cousin was convicted of first degree murder. The same jury subsequently sentenced him to death in a bifurcated penalty phase.

Several days after the completion of the guilt phase of the trial but before the penalty phase, a copy of Statement 2 was delivered anonymously to defense counsel. On appeal, the defense raised as error respondent's failure to produce Statement 2 prior to trial. This Court did not reach that issue. Instead, a unanimous Court reversed Mr. Cousin's conviction and death sentence based on the erroneous admission of a witness' testimony as impeachment evidence and respondent's improper use of that evidence in closing argument. Nevertheless, the Court commented in footnotes that Ms. Babin's second statement was "obviously" exculpatory, material to the issue of guilt, and "clearly" should have been produced to the defense under *Brady* and *Kyles v. Whitley*.

Following this court's decision in *Cousin*, the Orleans Parish District Attorney's Office elected not to retry Mr. Cousin for the murder of Michael Gerardi.

DISCIPLINARY PROCEEDINGS

DISCIPLINARY COMPLAINT

In May 1998, Mr. Cousin and his sister, Tonya Cropper, filed a complaint against respondent with the ODC, alleging, among other things, that respondent wrongfully suppressed *Brady* evidence by failing to disclose Ms. Babin's second statement. In his July 1998 response to the complaint, respondent asserted his belief that the witness's statement at issue was more inculpatory than exculpatory, and his determination that disclosure of the statement was not required by *Brady*. Respondent reiterated this assertion in his sworn statement taken by the ODC on June 16, 1999.

Following its investigation, the ODC dismissed the complaint against respondent. Ms. Cropper appealed the dismissal, but the hearing committee found that the ODC did not abuse its discretion in dismissing the complaint. Subsequently, the disciplinary board remanded the matter to the ODC with instructions to file formal charges against respondent.

FORMAL HEARING

The hearing committee conducted a formal hearing on the charges. ODC called several witnesses in its case in chief, including respondent, Shareef Cousin's defense attorney, and the complainant, Tonya Cropper. Respondent presented character testimony from several members of the bench and bar.

Hearing Committee Recommendation

In a split decision, the chair and the public member of the committee found that the ODC did not prove a violation of Rules 3.8(d) and 8.4(a) as charged, and recommended that the formal charges against respondent be dismissed. In a nineteen page report, the majority found respondent's testimony credible regarding the nature of the *Brady* material. The committee acknowledged that respondent was in possession of the statement yet failed to disclose the second statement to the defense. However, the

committee found no violation of Rule 3.8, as the committee determined that respondent reasonably believed that Ms. Babin's statement was inculpatory rather than exculpatory. The committee concluded that the defense was aware of the second statement and that it did not believe that the prosecution had an obligation "to help out the defense" by providing the statement. Based on these factual determinations, the majority of the committee concluded that respondent did not violate the Rules of Professional Conduct.

The lawyer member of the committee dissented, noting her objection to the majority's interpretation of a prosecutor's duty under *Brady*. She commented that she did not believe that the prosecutor has the discretion to determine whether to disclose exculpatory evidence to the defense. Rather, she interpreted *Brady* as imposing an affirmative duty on the prosecutor to disclose material exculpatory evidence, irrespective of whether a request was made by the defense.

The ODC filed an objection to the hearing committee's report and recommendation.

Ruling of the Disciplinary Board

The disciplinary board determined that respondent technically violated the Rules of Professional Conduct, but found that no discipline was appropriate and dismissed the formal charges against respondent. While the board adopted the hearing committee's factual findings, it rejected the committee's legal conclusions and application of the Rules of Professional Conduct. The board determined that the committee erred in its finding that respondent did not violate either *Brady* or Rule 3.8(d) when he failed to produce Ms. Babin's second statement. The board concluded that respondent was ethically bound to voluntarily disclose Statement 2, which tended to negate the guilt of the accused by calling into question Ms. Babin's positive identification of Cousin as the perpetrator of the crime. By failing to do so, respondent violated Rule 3.8(d).

The board found no aggravating factors present in this case, but found "numerous and weighty" mitigating factors, including the absence of a prior disciplinary record, absence of a dishonest or selfish motive, full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings, character and reputation, and remorse. The board concluded:

> While the board finds that respondent's actions constitute a technical violation of the Rules of Professional Conduct, considering all of the factors, particularly respondent's good faith and lack of intent, the lack of any actual injury, respondent's excellent reputation among judges and colleagues and his unblemished disciplinary record, and considering the purpose of lawyer discipline, the board finds that no formal discipline is warranted.

Based on this reasoning, the formal charges against respondent were dismissed.

The ODC sought review of the board's ruling in this Court. We ordered the parties to submit briefs addressing the issue of whether the record supports the disciplinary board's report. After reviewing the briefs filed by both parties, we docketed the matter for oral argument.

DISCUSSION

In our system of justice, we entrust vast discretion to a prosecutor. Because a prosecutor is given such great power and discretion, he is also charged with a high ethical standard. A prosecutor stands as the representative of the people of the State of Louisiana. He is entrusted with upholding the integrity of the criminal justice system by ensuring that justice is served for both the victims of crimes and the accused. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." The actions, or inactions in this case, of the prosecutor are paramount to a fair administration of justice; and the people of this state must have confidence in a prosecutor's integrity in performing his duty to disclose exculpatory evidence in order for the system to be just. Any intentional deviation from the principle of the fair administration of justice will be dealt with harshly by this Court.

This is a case of first impression in the State of Louisiana. Never before have we been confronted with the issue of disciplining a prosecutor for failing to disclose "evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." The language of Rule 3.8(d) is recognizably similar to the prosecutor's duty set forth in *Brady* and its progeny. Moreover, the Louisiana Code of Criminal Procedure likewise imposes a corresponding statutory duty on a prosecutor to disclose exculpatory evidence to the defendant.

The duty of a prosecutor to disclose exculpatory evidence is embedded in the principle that a criminal defendant is deprived of a fair trial when the state withholds exculpatory evidence that is material to guilt or punishment. The state's failure to disclose material evidence favorable to a criminal defendant implicates more than the defendant's discovery rights; the prosecutor has an affirmative duty to disclose such evidence under the Fourteenth Amendment's Due Process Clause. Failure to reveal this evidence implicates the defendant's right to a fair trial.

Whether the questioned evidence is material under *Brady* has been explained by this Court in *Marshall*:

> The issue is whether the exculpatory evidence is material under the *Brady-Bagley-Kyles* line of cases. Evidence is material only if it is reasonably probable that the result of the proceeding would have been different had the evidence been disclosed to the defense. A reasonable probability is one which is sufficient to undermine confidence in the outcome. This Court must provide a cumulative evaluation of the suppressed evidence, keeping in mind that Marshall does not have to show that, with the addition of the suppressed evidence, his trial would have resulted in acquittal or that there would be an insufficiency of the evidence to support a conviction. Marshall need only show that "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable."

During his testimony before the hearing committee, respondent testified that he did not believe Ms. Babin's second statement was material and did not qualify as the type of evidence to be disclosed under *Brady*. Specifically, respondent stated that he thought the evidence was inculpatory rather than exculpatory as Ms. Babin recounted specific details regarding the defendant's clothing and colorful socks. While the definition of materiality set forth in *Kyles* and its progeny may be seen as leaving a prosecutor with a degree of discretion, it does not.

Exculpatory evidence includes evidence which impeaches the testimony of a witness whose credibility or reliability may determine guilt or innocence. Additionally, *United States v. Bagley* reiterates the principle that there is no distinction between exculpatory evidence and impeachment evidence under *Brady*. Clearly, Ms. Babin's second statement negates her ability to positively identify the defendant in a lineup. The statement should have been disclosed to the defense. As we noted in our decision overruling Mr. Cousin's conviction, citing Justice Souter's eloquent statement in *Kyles*, a prosecutor anxious about "tacking too close to the wind will disclose a favorable piece of evidence" and "will resolve doubtful questions

in favor of disclosure." Respondent failed to produce evidence which was clearly exculpatory and should have resolved this issue in favor of disclosure.

Accordingly, we agree with the factual findings of the disciplinary board that respondent violated Rule 3.8(d) by failing to disclose the second statement of Ms. Babin to the defendant.

SANCTIONS

In considering the issue of sanctions, we are mindful that disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved, considered in light of any aggravating and mitigating circumstances. Thus, we must consider the facts as they are presented herein in deciding the type of discipline to impose on respondent.

The violation of Rule 3.8(d) by a prosecutor raises a great deal of concern to this Court. Rule 3.8(d) exists to ensure that the integrity of the prosecutorial arm of our criminal justice system is maintained. Moreover, prosecutors are in a unique position from other members of the bar as they are immune from civil liability under *Imbler v. Pachtman*. Neither are they realistically subject to criminal sanctions. Our research reveals only one instance in which a judge held a prosecutor in contempt of court for failing to disclose evidence. Thus, absent consequences being imposed by this Court under its authority over disciplinary matters, prosecutors face no realistic consequences for *Brady* violations.

In deciding the appropriate sanction, we begin our analysis with Supreme Court Rule XIX, § 10(C), which sets forth the following considerations in imposing discipline:

1. Whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
2. Whether the lawyer acted intentionally, knowingly, or negligently;
3. The amount of the actual or potential injury caused by the lawyer's misconduct; and
4. The existence of any aggravating or mitigating factors.

By withholding material exculpatory evidence from a criminal defendant, respondent violated a duty owed to the public. As a prosecutor, respondent is charged with a high ethical standard and may not carelessly skirt his obligation. Although neither *Brady* nor Rule 3.8 incorporates a mental element, Rule XIX, § 10(C) does. Based on the testimony of respondent and the character evidence discussed below, we find that respondent knowingly withheld Brady evidence.[6] As to the element regarding actual injury, this Court reversed Shareef Cousin's conviction on other grounds and granted him a new trial. However, this Court's actions in reversing the conviction does not vitiate the potential injury to the criminal justice system, or to Cousin, caused by respondent's actions, and warrants serious consideration and discipline by this Court.

As to the issue of aggravating and mitigating factors, we find the only aggravating factor present in this case is respondent's substantial experience as a prosecutor. However, on the issue of mitigation, we find a host of factors present. Specifically, we find the absence of any prior disciplinary record, absence of a dishonest motive, full and free disclosure to the board, a cooperative attitude towards the proceedings, and good character and reputation in the legal community.

As stated above, the issue of discipline against a prosecutor for his violation of Rule 3.8 is *res nova* in the State of Louisiana. While this Court has the benefit of Rule XIX considerations, we have no prior case law on the issue. However, Louisiana is not the first jurisdiction to address the issue of a prosecutor's failure to disclose evidence to a defendant. Our brethren in North Carolina, Kansas, South Carolina, Ohio and Iowa have imposed discipline against an attorney who fails to disclose evidence pursuant to Brady. Thus, we find some guidance in their decisions. The sanctions imposed in other jurisdictions range from public reprimand or censure to a six-month suspension from the practice of law. Based upon the facts of this case, we conclude the appropriate baseline sanction for respondent's misconduct is a three-month suspension from the practice of law. However, in light of the mitigating factors, we will defer this suspension in its entirety, subject to the condition that any misconduct during a one-year period following the finality of this judgment may be grounds for making the deferred suspension executory, or imposing additional discipline, as appropriate.

JOHNSON, J. concurs in part, dissents in part, for the reasons that follow.

I concur in the majority's opinion that respondent knowingly withheld *Brady* evidence, that respondent's experience as a prosecutor was an aggravating factor, that the Court's actions in reversing defendant's conviction failed to invalidate the potential injury to the criminal justice system, or to defendant, and that respondent's behavior warrants discipline by this Court. However, because of the actual injury caused by respondent's prosecutorial misconduct, I dissent from the majority's conclusion that respondent's suspension should be deferred.

As cited in the majority opinion, Louisiana Supreme Court Rule XIX, § 10(c) sets forth four factors to be considered when imposing lawyer discipline. The third factor in this analysis is the "amount of the actual or potential injury caused by the lawyer's misconduct." Regarding actual injury, the majority opinion states that "this Court reversed Shareef Cousin's conviction on other grounds and granted him a new trial." Thus, the majority opinion adopts the reasoning, stated explicitly by the disciplinary board in the lower proceedings, that no injury resulted from respondent's conduct since the defendant's conviction was reversed. Although reversal of defendant's sentence of death by lethal injection amends the wrongful sentence, it fails to negate the actual injury caused by respondent's misconduct.

Pursuant to Louisiana Supreme Court Rule XIX, § 10(c), this court has held that an attorney caused an actual injury because the attorney's failure to pay a client's medical bill resulted in a negative report to a credit agency. In another matter, we determined that an attorney caused an actual injury when he abandoned his legal practice and failed to return a $750 fee to a client and delayed the client's legal proceedings. In my view, the taking of a liberty interest is an even greater injury. As one legal commentator noted, "liberty is absolute and the loss of it is the greatest of all human injustices." Indeed, how can we ignore the injury caused by the wrongful taking of freedom, or the despair that inevitably follows as a defendant sits on death row and prepares for execution by lethal injection. "The execution of a legally and factually innocent person would be a constitutionally intolerable event," wrote Justice Sandra Day O'Connor in *Herrera v. Collins*. It is noteworthy that Shareef Cousin faced this predicament at the age of sixteen. The United States Supreme Court has since determined that execution of individuals who were under the age of 18 at the time of their capital crimes is unconstitutional.

Wrongful conviction constitutes an actual injury. Moreover, the United States Supreme Court has held that a wrongful conviction "has continuing collateral consequences." Michael Anthony Williams, who was recently freed from Angola State Penitentiary after serving 24 years for a crime he did not commit, and who, like Shareef Cousin, was convicted at the age of sixteen, described his time in prison as "a living hell." He stated that "a lot of terrible things happened to me while I was in there." Williams confessed that when he was younger, he was sexually abused "while guards turned their backs." Persons wrongfully convicted lose time during incarceration that cannot be retrieved. Furthermore, inmates, generally, leave prison with no savings, dismal employment prospects, and oftentimes medical and mental issues. Wrongful conviction can also cause significant stress on family relationships including the financial pressure that may have been created by legal fees associated with the wrongful conviction.

In the present case, disciplinary charges were filed against respondent by Shareef Cousin and his sister, Tonya Cropper. Tonya Cropper's testimony at the Hearing Committee describes the emotional turmoil that the Cousin family endured as a result of defendant's wrongful conviction.[7]

In 1976, the United States Supreme Court held that individual prosecutors have absolute immunity under common law tort claims as well as section 1983 suits. This court adopted the *Imbler* court's reasoning in *Knapper v. Connick*, when we determined that "prosecutors are entitled to absolute immunity for conduct within the course and scope of their prosecutorial functions." Thus, prosecutors have absolute immunity even in instances, such as the present case, where the prosecutor suppressed exculpatory information. However, the *Imbler* decision also identifies the legal community's responsibility for maintaining the integrity of prosecutors and deterring prosecutors from violating standards of the legal profession. The court concluded that "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." Therefore, our function in dispensing disciplinary action is critical both for upholding the highest ethical and professional standards among prosecutors and ensuring fundamental fairness for defendants. As expressed by the Honorable Calvin Johnson of Orleans Parish Criminal Court, in a letter contained in the record to then Orleans Parish District Attorney Harry Connick, Rule 3.8 was established to ensure professional responsibility among lawyers as well as to guarantee the constitutional due process rights of criminal defendants.[8]

In determining whether respondent caused an actual injury pursuant to Louisiana's Supreme Court Rule XIX, § 10(c), our focus should be on the unnecessary and unlawful suffering of the wrongfully convicted as a result of the prosecutorial misconduct, not just the reversal of the wrongfully imposed sentence. Because, in my view, loss of a liberty interest is more valuable than financial loss or injury to one's credit, I would impose an actual period of suspension.

Questions

1. On May 2, 1995, at about 10:20 P.M., Michael Gerardi and Connie Babin left the Port of Call restaurant in the French Quarter of New Orleans. While they were walking to Gerardi's truck, three men followed them, and one of the men shot and killed Gerardi. Shortly afterward, the New Orleans police arrested James Rowell on nine counts of armed robbery. In exchange for reduced charges, Rowell provided information to the police. Among other things, he claimed that Shareef Cousin had bragged about killing Gerardi. The police arrested Cousin, and Babin eventually identified him as the killer. In fact, Cousin was playing basketball when Gerardi was killed. The basketball game was videotaped, and a clock showed that it ended at about 10:00 P.M., after which coach Eric White drove Cousin and three other players home. At trial, Jordan not only suppressed Babin's testimony that she was not wearing contact lenses during the murder, but also altered recorded statements made by White in order to suppress the videotape of the basketball game and prevented the other basketball players from testifying. On January 25, 1996, Cousin was convicted of first-degree murder and sentenced to death. The Louisiana Supreme Court reversed Cousins's murder conviction and death sentence in 1998. State v. Cousin , 710 So. 2d 1065 (La. 1998) . But Cousin had also pleaded guilty to four counts of armed robbery, and was not released from prison until 2005. Cousins told his story in CNN , NPR , and TIME , among other publications. You can watch a short video of Cousins describing his experiences here . After his release from prison, Cousins began working for Stephen Bright at the Southern Center for Human Rights in Atlanta. Unfortunately, Cousins applied for credit cards in Bright's name and charged $42,000. In 2008 , he pleaded guilty to identity theft and credit card fraud and served three years in prison. He currently lives in New Orleans and is active in criminal justice reform advocacy.
2. The New York Times reported on the Orleans Parish District Attorney Office's long history of prosecutorial misconduct here . The Huffington Post reported on prosecutorial misconduct in New Orleans and elsewhere here.
3. In assessing Jordan's culpability, the Louisiana Supreme Court found only one aggravating factor and many mitigating factors. How would you assess Jordan's culpability?
4. The Louisiana Supreme Court sanctioned Jordan by imposing a three-month suspension, deferred. The dissent argued that the suspension should not be deferred. What sanction would you have imposed, if any?

Hillman v. Nueces County

579 S.W.3d 354 (Tex. 2019)

Summary: Eric Hillman was an assistant district attorney in Nueces County, Texas. In 2014, he prosecuted a defendant for intoxicated assault and leaving the scene of an accident. In the course of investigating the case, Hillman interviewed a witness who stated the defendant was not intoxicated. The police report did not identify the witness, so Hillman informed his supervisor that he needed to disclose the witness to the defense, but his supervisor told him not to disclose. Hillman consulted with the State Bar Ethics Hotline and the Texas Center for Legal Ethics. Both told him to disclose, so he did, and he was fired. Hillman filed a wrongful termination action against Nueces County, but the trial court granted the county's motion to dismiss and the appeals court affirmed. The Texas Supreme Court also affirmed, holding that sovereign immunity barred Hillman's action.

JEFFREY S. BOYD, Justice.

A former assistant district attorney filed this suit alleging that the county wrongfully terminated his employment because he refused his supervisor's order to withhold exculpatory evidence from a criminal defendant. The trial court dismissed the suit for lack of jurisdiction, and the court of appeals affirmed. Because we agree with those courts that governmental immunity bars the suit, we also affirm.

I. Background

Eric Hillman served as an assistant district attorney in Nueces County for two years. While preparing to prosecute a defendant charged with intoxicated assault and leaving the scene of an accident, Hillman discovered and interviewed a witness who said she was with the defendant the night of the incident and he was not intoxicated. Because the police report did not identify this witness, Hillman told his supervisor that he needed to disclose the witness to the defendant's attorney. The supervisor disagreed and instructed Hillman not to disclose the witness. Believing that he was legally required to disclose the witness, Hillman called the State Bar Ethics Hotline and the Texas Center for Legal Ethics for advice. Both told him he should disclose the information.

Three days before the defendant's trial, the victim confirmed to Hillman that the witness had been present at the scene. Hillman relayed this information to his supervisor and informed her that he had decided to disclose the witness to the defense attorney. On the day of trial, Hillman was fired for "failing to follow instructions." He alleges he was fired solely for refusing to withhold exculpatory evidence.

Hillman sued the County, the District Attorney's Office, and then-District Attorney Mark Skurka, in his official capacity, seeking actual damages for lost wages and benefits, mental anguish, pain and suffering, and loss of earning capacity, and exemplary damages. The County moved to dismiss on the ground that governmental immunity bars Hillman's claims. The trial court agreed and dismissed the case, and the court of appeals affirmed.

II. Governmental Immunity

Sovereign immunity—usually called governmental immunity when referring to political subdivisions—protects governmental entities against suits and legal liabilities. The County pleaded immunity from both suit and liability in this case, but only immunity from suit implicates the courts' jurisdiction. Because the trial court dismissed this case for lack of jurisdiction, we focus here solely on governmental immunity from suit. Because Hillman filed suit seeking money damages against a county and its department and official, governmental immunity bars this suit unless immunity has been waived.

Like every court of appeals that has addressed the issue, the court of appeals concluded here that governmental immunity applies to Hillman's wrongful-termination claim and has not been waived. Presenting three alternative grounds for reversal, Hillman argues that (1) this Court abrogated or waived the County's immunity from this type of suit in Sabine Pilot Service, Inc. v.

Hauck, in which we recognized a cause of action for wrongful termination of an at-will employee for refusal to perform an illegal act, (2) the Texas legislature waived the County's immunity through the Michael Morton Act, or (3) we should abrogate or waive the County's immunity from such suits today. Although Hillman and his supporting amici bolster these grounds with serious and important policy concerns, we ultimately find the grounds themselves unconvincing.

A. Sabine Pilot

Texas—"steadfastly an at-will employment state"—generally permits both employers and employees to terminate their relationship at any time for any reason unless they contractually agree otherwise. The law recognizes, however, a number of exceptions to this rule. One "very narrow exception to the employment-at-will doctrine," which we adopted in Sabine Pilot, prohibits employers from terminating at-will employees "for the sole reason that the employee refused to perform an illegal act." An employer who terminates an employee solely for that reason is liable to the employee for all resulting "reasonable tort damages, including punitive damages."

Sabine Pilot involved claims against a private-sector employer, and this Court's very brief opinion never mentioned the duties or obligations of government employers. Noting that the Court did not expressly limit the exception to private employers or declare it inapplicable to government employers, Hillman argues that Sabine Pilot prohibits all employers—government as well as private—from terminating at-will employees solely for refusing to perform an illegal act. This argument reads too much into Sabine Pilot. Nothing in that opinion indicates anything regarding government employers. Because we simply did not consider or address whether the exception applies to government employers in Sabine Pilot, it provides no controlling principle on that issue here.

Hillman suggests that even if Sabine Pilot did not resolve the issue, we can and should clarify today that the Sabine Pilot exception applies to government employers. We have no problem holding that the exception applies to all Texas employers, in the sense that they all have a common-law-tort duty not to terminate at-will employees solely because the employee refuses to perform an illegal act. But holding that the Sabine Pilot exception applies to government employers does not help Hillman. Hillman's problem is not that the duty does not apply to government employers, but that immunity bars any suit for a government employer's breach of that duty.

Governmental immunity protects all governmental entities against suits and liabilities for their governmental actions, even when acting as employers. The legislature has provided a limited waiver of that immunity for certain tort and breach-of-contract actions. These statutes do not create tort or contractual duties or impose them on governmental entities. Those common-law duties preexist the statutes and apply to governmental entities as to anyone else, but immunity bars suits for breach of those duties.

Instead of creating or imposing duties, the statutes waive the immunity that would otherwise protect the government, removing the barrier that precludes suits or liability for breach of those preexisting common-law duties. So although we can say that the common-law-tort duty we recognized in Sabine Pilot applies to all Texas employers, Hillman still cannot pursue this suit for the County's alleged breach of that duty unless the legislature has waived the County's governmental immunity. Because Sabine Pilot did not involve a governmental defendant and did not address governmental immunity or its waiver, it does not support Hillman's argument that the trial court had jurisdiction over his claim.

B. The Michael Morton Act

More than fifty-five years ago, the United States Supreme Court held that the Constitution's dueprocess clause prohibits criminal prosecutors from suppressing material evidence that is "favorable to an accused." Just over five years ago, the Texas legislature statutorily addressed "Brady violations" by passing the Michael Morton Act. The Michael Morton Act expressly requires prosecutors to

> disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

Prosecutors must disclose such information whenever they discover it, whether "before, during, or after trial."

Hillman contends that the Michael Morton Act required him to disclose the witness's information in the case he was prosecuting, so the County wrongfully terminated him for refusing to perform an illegal act. But even accepting these assertions as true, the issue here is not whether Hillman has pleaded a valid Sabine Pilot claim, but whether the Act waives the County's governmental immunity against that claim.

To waive governmental immunity, a statute must use "clear and unambiguous language" expressing that intent. When deciding whether a statute clearly and unambiguously waives governmental immunity, we

(1) consider "whether the statutory provisions, even if not a model of clarity, waive immunity without doubt";

(2) resolve any "ambiguity as to waiver in favor of retaining immunity";

(3) generally find waiver "if the Legislature requires that the governmental entity be joined in a lawsuit even though the entity would otherwise be immune from suit";

(4) consider whether the legislature "provided an objective limitation on the governmental entity's potential liability"; and

(5) consider "whether the statutory provisions would serve any purpose absent a waiver of immunity."

Like the Sabine Pilot opinion, the Michael Morton Act does not address governmental immunity or waiver at all. None of its language waives immunity "without doubt" or even creates any ambiguity on the point. The Act does not require that the government be joined in any lawsuit or impose any limitation on the government's potential liability in such a suit. Implicating only the fifth consideration, Hillman argues that the Act necessarily must waive the County's immunity from his wrongful-termination suit because the Act's sole purpose is to require prosecutors to disclose exculpatory evidence. He contends that the Act would be "illusory" unless it waives immunity from Sabine Pilot claims, and finding no waiver "would defeat the sole purpose for passing the Michael Morton Act in the first place." As Hillman puts it, "A law making it a crime for a prosecutor to withhold evidence from the defense, but at the same time allowing the prosecutor's supervisor to fire him for refusing to do so is nonsensical and cannot possibly be what the legislature intended when it enacted the Michael Morton Act."

These arguments read too much into the Michael Morton Act. The Act serves obvious purposes separate and apart from addressing any wrongful-termination issues. It codifies and "supplements" prosecutors' constitutional obligations under Brady. It requires production of several items that "previously were not discoverable" in criminal cases, including "written witness statements, written communications between the State and its agents, and work product." And violations of the Act may constitute grounds for reversing a conviction.

Of course, the legislature could always do more to ensure that prosecutors disclose exculpatory information. Presumably, at least, prosecutors would be more likely to disclose such information if the Act authorized civil-damages suits—and waived immunity for such suits— against those who violate its requirements or who terminate subordinates who refuse to violate them. Whether countervailing policy concerns outweigh such benefits, however, "is the very essence of legislative choice." And the mere fact that a statute prohibits a government official from engaging in particular conduct does not establish that the statute also waives governmental

immunity whenever a government employer terminates an employee for refusing to engage in that conduct. If that were true, every statutory prohibition would waive immunity from wrongfultermination claims.

Nothing in the Michael Morton Act indicates a legislative intent to waive governmental immunity from a wrongful-termination suit under Sabine Pilot. No explicit language or even ambiguous language indicates such an intent. We hold that the Michael Morton Act does not waive the County's governmental immunity from this suit.

C. Judicial Abrogation of Immunity

Alternatively, Hillman urges us to abolish the "ancient and antiquated" doctrine of governmental immunity altogether, or at least modify it to allow for Sabine Pilot claims against governmental entities. He notes that sovereign immunity developed and exists as a common-law doctrine, and "it remains the judiciary's responsibility to define the boundaries of the common-law doctrine and to determine under what circumstances sovereign immunity exists in the first instance." But in fulfilling that responsibility, we must respect both our precedent and our limitations under the constitutional separation of powers.

Having existed for more than six hundred years, the governmental-immunity doctrine is "an established principle of jurisprudence in all civilized nations." We first recognized it as a principle of Texas law more than 170 years ago. Although the justifications for its existence have evolved through the years, we have steadfastly retained it in modern times precisely because it shields "the public from the costs and consequences of improvident actions of their governments," and ensures that the taxes the public pays are used "for their intended purposes."

We are not blind to the truism that, "just as immunity is inherent to sovereignty, unfairness is inherent to immunity." But as the Court's majority explained in that case, we resolve that concern by deferring to the legislature, as the policy-making branch of government, "to decide whether and to what extent that immunity should be waived." As important as Hillman's and his supporting amici's policy concerns may be, they do not justify discarding these fundamental principles of Texas law.

We in no way discount the serious policy concerns that Hillman, his supporting amici, and today's concurring opinion express. Governmental immunity from Sabine Pilot claims eliminates one means by which the law could ensure that prosecutors disclose exculpatory evidence as Brady

and the Michael Morton Act require. As the amici note, the Act has enjoyed broad, bipartisan support in the legislature, the public, and the press, and the legislature has further strengthened the Act in more recent legislative sessions. But to hold that governmental immunity does not apply to Sabine Pilot claims, we must trespass across the boundary between defining immunity's scope (a judicial task) and waiving it (a legislative task). The distinction between scope and waiver is "a fine one," and we must "be very hesitant to declare immunity nonexistent in any particular case," lest we use our authority to define the scope as "a ruse for avoiding the Legislature."

As we have repeatedly confirmed, "it is the Legislature's sole province to waive or abrogate sovereign immunity." That the legislature has recently revised the Michael Morton Act to strengthen its protections illustrates its continuing awareness of the Act and its importance, as well as its willingness to take steps to improve it. Whether waiving immunity from Sabine Pilot claims should be the next step in that process is up to the legislature, and we must defer to it to "protect its policymaking function."

III. Conclusion

"Sovereign immunity from suit defeats a trial court's subject matter jurisdiction." When, as here, a claim falls within the realm of governmental immunity, courts have no jurisdiction to hear the case unless immunity has been waived. We hold that neither Sabine Pilot nor the Michael Morton Act waives the County's governmental immunity from Hillman's wrongful-termination claim, and we defer to the legislature to decide whether such a waiver would be appropriate as a matter of public policy. We affirm the trial court's judgment granting the County's plea to the jurisdiction and dismissing the case.

Justice GUZMAN, joined by JUSTICE LEHRMANN and JUSTICE DEVINE, concurring.

> No tyranny is more cruel than the one practiced in the shadow of the laws and under color of justice.

Imagine being accused, charged, and convicted of bludgeoning your spouse to death. You are innocent but sentenced to life in prison, effectively orphaning your only child. Over the next 24 years, you wage an uphill battle to prove your innocence, eventually discovering that the prosecution held the keys to your jail cell before you ever set

foot in it. Eyewitness testimony pointing the finger at someone else and DNA evidence that was never tested would have exculpated you if the prosecutor had not secreted the evidence from those who were constitutionally charged with defending you. Ultimately exonerated after nearly a quarter century in confinement, you walk free. The prosecutor—now a judge—is found in contempt of court for suppressing this evidence. Small comfort. Justice delayed is justice denied. But more than that, justice delayed is life denied.

While you were locked away for a crime you did not commit, you were denied your unalienable rights of life, liberty, and the pursuit of happiness. You lost your constitutional right to parent your child. To have his love and companionship. To shape who he is and how he became that way. Instead, your beautiful toddler is now a man struggling to reconnect with a person he doesn't know, can't remember as a parent, and spent years thinking was a vicious monster. And worse, the actual perpetrator of this heinous crime continued to walk the streets. Free to kill again.

Alas, this is not a hypothetical. This is the true story of Michael Morton. Husband. Father. Supermarket manager. An ordinary Texan whose young wife fell victim to a stranger's brutality. And while Morton languished in jail, another young wife—Debra Baker—paid the ultimate price at the hands of the same killer, leaving yet another young child motherless. Foreseeable victims of overzealous prosecution.

Unfortunately, this is not an isolated incident. Official misconduct has been a factor in more than half of the nationally reported exonerations since 1989—nearly four score of which have occurred in Texas. Wrongful convictions are anathema to our constitution. And suppression of evidence is anathema to the duty of a prosecutor to seek justice. Concealment of exculpatory evidence undermines the integrity of our criminal justice system, which is of vital importance to every one of us: "Society wins not only when the guilty are convicted but when criminal trials are fair. The administration of justice suffers when any accused is treated unfairly."

The tragic story of Michael Morton and Debra Baker compelled the Legislature to take affirmative steps to prevent wrongful convictions due to prosecutorial misconduct. In the legislative session following Morton's exoneration, the Texas Legislature unanimously passed the Michael Morton Act. The Morton Act extends, but has not altered, prosecutors' longstanding obligation under Brady to disclose exculpatory evidence in the prosecution's possession. Before the Morton Act, prosecutors had a constitutional duty under Brady to disclose all evidence that might exonerate

the defendant, but the defense had very limited pretrial discovery rights. Under the Morton Act, if the defense requests discovery, the prosecution is under a statutory duty to continually disclose exculpatory, mitigating, or impeachment evidence. The Act is an important legislative step towards ensuring Brady compliance and bolstering the integrity of the criminal justice system.

As this case sadly demonstrates, however, unacceptable gaps remain. When one good man refuses to stay silent, refuses to "just follow orders," and refuses to do the wrong thing under the misguided belief that it's for the greater good, he should not lose his job. While Hillman might have had a viable ultra vires claim, had he chosen to pursue one, the limited remedies available under that theory are manifestly inadequate to ensure accountability in matters of the highest constitutional dimension. The law must—but currently does not—afford a remedy that advances the Legislature's calculated efforts to secure our constitutional guarantees.

I. Injustice anywhere is a threat to justice everywhere

In 2013, Eric Hillman, an assistant district attorney in Nueces County, was assigned to prosecute David Sims for intoxication assault and leaving the scene of an accident. Hillman performed a diligent independent investigation and located a witness who was not listed in the police report. The witness told Hillman she was with Sims the entire evening, he had only consumed two alcoholic beverages, and he was not intoxicated when the accident occurred.

Hillman immediately informed his supervisor that a new witness with exculpatory testimony had been located and he would be releasing that information to Sims's defense counsel. The supervisor demanded Hillman withhold the information, assuring him it was proper to do so.

Unconvinced, Hillman conducted an independent investigation of his ethical obligations, consulting with both the Texas Center for Legal Ethics and the State Bar of Texas Ethics Hotline. Both admonished him to disclose the information to defense counsel. Hillman therefore reported to his supervisor that he intended to turn over the evidence to the defense because withholding it would be unethical. According to Hillman, his supervisor responded, "Eric, you need to decide if you want to be a prosecutor or a defense attorney." A week after Hillman announced his intention to disclose the information, former District Attorney Mark Skurka summarily terminated Hillman's employment for refusing to "follow instructions."

Hillman sued the County, District Attorney Skurka, and the District Attorney's Office for wrongful termination, but his case was dismissed on a plea to the jurisdiction.

I concur in today's judgment and join in much of the Court's reasoning. The gravamen of this case is governmental immunity: whether the County is immune from a wrongful-termination suit alleging a prosecutor was fired because he insisted on doing what the law requires. Under our immunity jurisprudence, this case is fairly straightforward, and the Court's analysis is sound. First, we did not abrogate governmental immunity in Sabine Pilot. The employer in that case was not a governmental entity, so the issue of governmental immunity was not before us and cannot be inferred sub silentio. Second, immunity has not been waived. We defer to the Legislature to waive immunity, and I agree with the Court that the Morton Act contains no such waiver because no "clear and unambiguous language" expresses that intent. Third, we should not abrogate immunity here. Although we have the power to abrogate immunity, we have rarely done so, and even then we limited it to offset claims rather than allowing unlimited recovery of monetary damages. Sanctioning the recovery of monetary damages—without any legislatively considered limitations like those in the Texas Tort Claims Act—would have significant public-fisc implications that raise separation-of-powers concerns. Finally, though Hillman arguably has a viable ultra vires claim, he has disclaimed any intent to assert one. Accordingly, I agree with the Court that the County is immune from suit in this case and that remand is not appropriate. I write separately, however, to highlight a lacuna in the legislative scheme that neuters the Legislature's efforts to forestall prosecutorial misconduct that could lead to wrongful convictions.

II. If impunity is not demolished, all efforts to bring an end to corruption are in vain.

Taking Hillman's account as true, he was fired for endeavoring to fulfill constitutional and statutory obligations imposed on all prosecutors. By any measure of law and morality in a civilized country, that is wrongful termination. Those we entrust to pursue justice should not be put to the Hobson's choice of earning a living or doing the right thing. Cloaking governmental employers with absolute immunity in such circumstances erodes public confidence in the criminal justice system and undermines concerted legislative efforts to reform that system. By and large, prosecutors are honorable public servants committed to fairness in the administration of justice, but when unlawful practices are tolerated, encouraged, or rewarded with career advantages, others may be enticed to cross the

line or may be cowed by consequences visited on those who resist. It's fair to assume that the Legislature did not envision such a consequence when enacting the Morton Act without adopting measures to ensure prosecutors could comply with the Act without losing their jobs. In light of the underbelly this case exposes, it would be appropriate for the Legislature to do so now.

Both Brady and the Morton Act obligate prosecutors to disclose certain types of evidence to the defense as a function of due process and to stave off wrongful convictions by thwarting pernicious prosecutorial practices. Wrongful convictions, as numerous studies have shown, come at a significant cost to our society. Financial burdens on the taxpayers accumulate through "an appeal, an appellate reversal, a retrial, investigational efforts to trace the real offender, possible civil lawsuits, and compensatory payments." While we can calculate economic losses from wrongful convictions—for example, the state has paid more than $93 million in compensation to 101 men and women who were wrongfully sent to prison over the past 25 years—the true cost is immeasurable. There is simply no way to restore lost time, no reset button that erases the financial and emotional consequences to the wrongfully incarcerated and their families.

On the other side of the coin, for every innocent person that sits in jail, a criminal roams free. Free to commit more crimes. If DNA-exoneration cases are any kind of indicator, the societal consequences of convicting the wrong person—however it happens—are devastating. For example, out of 325 DNA-exoneration cases from 1989 to 2014, 68 of the true perpetrators later committed an additional 142 violent crimes—including 77 rapes, 34 homicides, and 31 other violent crimes.

With such grave consequences, the best defense is a good offense. The Morton Act is a strong foundation, but more is required to ensure that those wielding power use it as the founders intended. Prosecutors are on the forefront of avoiding wrongful convictions and ameliorating the ensuing societal costs. Based on data compiled by the National Registry of Exonerations, official misconduct ranks second among the top five factors contributing to exonerations, leading to over half of the 2,401 (and counting) exonerations since 1989. The most common type of official misconduct involves concealing exculpatory evidence.

While multiple external forces are aimed at ensuring accountability for misconduct—including professional discipline, potential criminal charges, and loss of elected office—this case epitomizes the limits of existing accountability measures. Research shows professional discipline

and criminal charges are rarely imposed for prosecutorial misconduct. Even in the rare instances when misconduct is uncovered, it usually does not surface until after an innocent person has stayed in prison for years, presenting time-based challenges to any investigation or prosecution of wrongdoing. The possibility of some adverse consequence in some future public election has even less force as a deterrent and, more importantly, does absolutely nothing to alleviate irreparable harm resulting from the wrong.

Brady violations are difficult to uncover because, by definition, they involve concealment of evidence in the prosecution's exclusive possession and control. Indeed, exposure of Brady violations generally requires the prosecution's own admission, some "chance discovery" by the defense team, or "dumb luck." The most effective way to combat prosecutorial misconduct is to provide a disincentive extrinsic to an individual prosecutor's own moral compass. "Ironically, the only one who can act as a check on the prosecution is the prosecution itself." This case places the internal dynamics within the prosecutor's office under a microscope. Although many district attorney's offices have implemented internal guidance or best practices, when the pressure to withhold evidence comes from the top, internal guidelines are at best a window dressing. Under circumstances like those alleged here, it is imperative that honest prosecutors not be punished.

Absent legislative action, the best someone in Hillman's position could hope for is to seek prospective equitable relief under an ultra vires theory. An ultra vires claim can be brought against a state official if the officer "acted without legal authority." Although a district attorney has discretion to fire subordinates, one could argue there is no discretion to undertake such an action if it "conflicts with the law." If Hillman had not opposed consideration of his claims under an ultra vires theory, I would remand in the interest of justice to allow him to pursue that claim.

However, as a policy matter, I am dubious that a remedy limited to prospective equitable relief is strong enough to deter the egregious conduct alleged here. To be effective, the remedy must be proportional to the wrong. To my mind, the threat of other consequences, including monetary relief, would provide the external pressure required to motivate vigilance and self-policing. The Legislature is better suited, and constitutionally constituted, to weigh the policy interests that bear on whether to waive immunity (and to what extent), but as to that matter, this case makes painfully clear that what's past is prologue.

Questions

1. Do you agree with the court's conclusion that sovereign immunity bars Hillman's action? Should the court have construed sovereign immunity differently? Should Hillman have a claim against Skurka? Would absolute prosecutorial immunity bar any such claim? Should it?
2. Under the circumstances, what should Hillman have done? Did he have any other options?

Chapter 3
Interacting with People Other Than Clients

1. Duties to Nonclients

Model Rules of Prof. Conduct, Rule 4.1

Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Model Rules of Prof. Conduct, Rule 4.3

Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Model Rules of Prof. Conduct, Rule 4.4

Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

2. Nonclients Represented by Counsel

Model Rules of Prof. Conduct, Rule 4.2

Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rest. (3d) of the Law Governing Lawyers § 99

A Represented Nonclient—The General Anti-Contact Rule

1. A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless:

    a. the communication is with a public officer or agency to the extent stated in § 101;

    b. the lawyer is a party and represents no other client in the matter;

    c. the communication is authorized by law;

    d. the communication reasonably responds to an emergency; or

    e. the other lawyer consents.

2. Subsection (1) does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer's client with a represented nonclient.

Rest. (3d) of the Law Governing Lawyers § 100

Definition of a Represented Nonclient

Within the meaning of § 99, a represented nonclient includes:

1. a natural person represented by a lawyer; and:
2. a current employee or other agent of an organization represented by a lawyer:

a. if the employee or other agent supervises, directs, or regularly consults with the lawyer concerning the matter or if the agent has power to compromise or settle the matter;

b. if the acts or omissions of the employee or other agent may be imputed to the organization for purposes of civil or criminal liability in the matter; or

c. if a statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter.

Rest. (3d) of the Law Governing Lawyers § 101

A Represented Governmental Agency or Officer

1. Unless otherwise provided by law (see § 99(1)(c)) and except as provided in Subsection (2), the prohibition stated in § 99 against contact with a represented nonclient does not apply to communications with employees of a represented governmental agency or with a governmental officer being represented in the officer's official capacity.
2. In negotiation or litigation by a lawyer of a specific claim of a client against a governmental agency or against a governmental officer in the officer's official capacity, the prohibition stated in § 99 applies, except that the lawyer may contact any officer of the government if permitted by the agency or with respect to an issue of general policy.

In re Disciplinary Proceeding Against Haley

126 P. 3d 1262 (Wash. 2006)

Attorney Jeffrey T. Haley appeals the recommendation of the Disciplinary Board of the Washington State Bar Association that Haley was subject to a six-month suspension for knowingly violating RPC 4.2(a), which provides that, "in representing a client, a lawyer shall not communicate with a party represented by another lawyer."

Although we hold that, under RPC 4.2(a), a lawyer acting pro se is prohibited from contacting a party represented by counsel in the matter, we apply our interpretation of RPC 4.2(a) prospectively only and dismiss the violation.

FACTS

In 1994, Haley filed a lawsuit against Carl Highland, the former chief executive officer of a defunct closely held corporation, Coresoft, of which Haley was formerly a shareholder and board member. Initially, Haley acted pro se in the matter but hired counsel when the case went to trial in November 1995. After the trial ended, Haley's counsel filed notice of withdrawal and Haley reverted to pro se status as to appeal and collection issues. Highland was represented by various attorneys at all times during this matter, and Haley knew that Highland was consistently represented by counsel.

The hearing officer and Board concluded that Haley's improper contact with a represented party arose out of two incidents. First, while Haley was acting pro se after the trial, he sent a letter to Highland and his wife proposing settlement. The letter was dated September 9, 1996, and stated in full as follows:

I am about to spend approximately $25,000 on costs and attorneys fees for the appeal. If the appeal is successful, the personal earnings of both Ronda Hull and Carl Highland will be subject to garnishment to satisfy my judgment and the judgment now held by Carl Highland will be overruled. Also, the amount I am about the [sic. spend on costs and attorneys fees will be added to the judgment.

This is the last opportunity to settle the case before I spend the money on the appeal. This settlement offer will not be open after this week and may be withdrawn at any time if it is not promptly accepted. I am offering that all claims and judgments between the parties be releases [sic. with no payments. Please respond directly to me.

Highland forwarded the letter to his attorney who, in turn, suggested to Haley that the letter constituted a violation of RPC 4.2(a) and warned him not to have any further contact with Highland. Second, on January 31, 1997, Haley again contacted Highland, this time by telephone. Haley left the following voice message on Highland's phone:

Carl, this is Jeff Haley. I hope your attorneys have told you Jim Bates decided that your judgment against me is collectable only from my separate assets and I have none; they're all community assets. And, therefore, your judgment is uncollectable [sic.. And the chance for appeal of that determination by Jim Bates has run so you can't appeal it so that if the appeal proceeds my position can only improve and yours can only get worse and if you have nothing collectable there's no chance of ever getting anything collectable. It seems to me that we ought to settle this case and if we do so Monday there'll be an opportunity on Monday to do so if you're interested. Give me a call."

In his "Amended Findings of Fact and Conclusions of Law," the hearing officer stated that Haley's letter and phone message were "clearly prohibited" by RPC 4.2(a), but he acknowledged that there was some authority supporting Haley's position that attorneys acting pro se are not subject to the prohibition. Ultimately, in his "Additional Findings of Fact,

Application of Standards, and Recommendation," the hearing officer determined that, "because of the specific language of RPC 4.2 (i.e., 'In representing a client') and because of the apparent absence of authority within the state of Washington on this specific issue, Mr. Haley could have harbored a sincere belief that contacts with a represented opposing party were not prohibited." Consequently, the hearing officer concluded that the violation was "negligent" and that the presumptive sanction was thus a reprimand.

Deleting the hearing officer's conclusion that Haley's violation was negligent, the Board substituted its contrary determination that "Haley's mental state was knowledge" and that the presumptive sanction was therefore a suspension. In doing so, the Board took note that Haley knew Highland was represented by counsel at all times and stated that a "reasonable reading of RPC 4.2 prohibits a lawyer, while representing himself or her-

self, from contacting a represented party." The Board also faulted Haley for not "taking time to determine whether his conduct was an ethical violation."

The hearing officer recommended that Haley be reprimanded for the violation. The Board recommended a six-month suspension.

Does RPC 4.2(a) prohibit a lawyer who is acting pro se from contacting a party who is represented by counsel? If so, should the rule be applied in the present case?

ANALYSIS

Applicability of RPC 4.2(a) to Lawyer Acting Pro Se. RPC 4.2(a) reads in full as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The rule is virtually identical to model rule 4.2. While we have not formally adopted the commentary to the ABA Annotated Model Rules, we have noted that it "may be 'instructive in exploring the underlying policy of the rules.' " As the comment to model rule 4.2 explains, the rule aims to protect those represented by counsel "against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation." In Carmick, we acknowledged that "the rule's purpose is to prevent situations in which a represented party is taken advantage of by adverse counsel."

At issue in the present case is whether RPC 4.2(a) applies to lawyers acting pro se or, more precisely, whether a lawyer who is representing himself or herself is, in the words of RPC 4.2(a), "representing a client." This court has not previously addressed this issue; nor has the WSBA issued an ethics opinion, formal or informal, on the question. Other jurisdictions that have considered the rule's applicability to lawyers acting pro se have generally concluded that the policies underlying the rule are better served by extending the restriction to lawyers acting pro se.

Haley asks this court to take the contrary view and hold that the plain meaning of the word "client" in RPC 4.2(a) precludes application of the rule to a lawyer acting pro se. The word "client" is variously defined as "a person or entity that employs a professional for advice or help in that professional's line of work," and "a person who engages the professional advice or services of another." Thus, for the rule to apply to lawyers acting pro se, such lawyers would, in effect, be employing or engaging themselves for advice, help, or services. This, as Haley contends, suggests that lawyers who are acting pro se are excluded from the scope of the rule because such lawyers have no client.

In the alternative, Haley maintains that, even if RPC 4.2(a) were construed to restrict pro se lawyers from contacting represented parties, we should conclude that the rule as applied to him, a lawyer proceeding pro se, was unconstitutionally vague, violating his constitutional due process rights. Such a resolution finds support in Schaefer. There, the Nevada State Supreme Court relied on the principle that "a statute or rule is impermissibly vague if it 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " The Schaefer court based its determination that Nevada's Supreme Court Rule 182, a rule identical to RPC 4.2(a), was unconstitutionally vague on "the absence of clear guidance" from the Nevada State Supreme Court and on "the existence of conflicting authority from other jurisdictions."

Both factors relied on in Schaefer are present here. First, as noted above, no prior opinion of this court has addressed the application of RPC 4.2(a) to lawyers proceeding pro se. Second, in late 1996 and early 1997 when Haley contacted Highland, authority permitting such contacts counterbalanced the prohibitions then existing from four jurisdictions. The comment to rule 2100 of the California RPCs, a rule identical to RPC 4.2(a) in all material respects, explicitly permits a lawyer proceeding pro se to contact a represented party:

The rule does not prohibit a lawyer who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Likewise, a comment to the restatement specifically provides that "a lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals."

Alongside these explicit statements permitting the questioned contact, other authorities supported a reasonable inference that our RPC 4.2(a) did not foreclose a pro se lawyer's communication with a represented opposing party. For example, the comparable rule in Oregon, DR 7-104(A)(1), put lawyers acting pro se squarely within the rule's ambit:

> (A) During the course of the lawyer's representation of a client, a lawyer shall not: > (1) Communicate or cause another to communicate with a person the lawyer knows to be represented by a lawyer. This prohibition includes a lawyer representing the lawyer's own interests.

The absence of an explicit prohibition in RPC 4.2(a) could have suggested that Washington's rule was narrower in scope than Oregon's and did not apply to lawyers acting pro se. Additionally, the commentary to model rule 4.2 includes the statement that "parties to a matter may communicate directly with each other." Unlike the commentary to the restatement and to California's RPC 2-100, this comment does not pointedly refer to a lawyer-party acting pro se; consequently, the breadth of the statement permits an inference that all parties may communicate unreservedly with each other. Finally, the holding in Pinsky v. Statewide Grievance Committee , appears to call into question the policy concerns supporting the application of RPC 4.2(a) to lawyers acting pro se. In Pinsky, the Connecticut State Supreme Court concluded that a represented lawyer-party had not violated an identical version of RPC 4.2(a) when he directly contacted his landlord, who was also represented by counsel, during an eviction matter. The Pinsky court took note that "contact between litigants is specifically authorized by the comments under rule 4.2" and concluded that Pinsky was not "representing a client" as stated in the rule. The Pinsky court thus determined that communication between a represented lawyer-party and a represented nonlawyer party did not conflict with a key purpose of RPC 4.2(a) the protection of a represented nonlawyer party from "possible overreaching by other lawyers who are participating in the matter." Because the Pinsky decision did not address why contacts from a lawyer acting pro se would pose a greater threat of overreaching than would contacts from a represented lawyer-party, Pinsky provides further equivocal authority on the application of RPC 4.2(a) to lawyers acting pro se.

In sum, consistent with the resolution of the same issue in Schaefer, we hold that a lawyer acting pro se is "representing a client" for purposes of RPC 4.2(a), but given the absence of a prior decision from this court, along with the presence of conflicting or equivocal authority from other jurisdictions and legal commentaries, we find the rule impermissibly vague as to its applicability to pro se attorneys and thus apply our interpretation of the rule prospectively only. We therefore dismiss the violation alleged in count 2. We need not reach Haley's alternative contention that the application of RPC 4.2(a) to his communications with Highland violated his free speech rights.

CONCLUSION

We hold that RPC 4.2(a) prohibits a lawyer who is representing his own interests in a matter from contacting another party whom he knows to be represented by counsel. However, because we conclude that RPC 4.2(a) was impermissibly vague as applied to Haley, we apply our interpretation of RPC 4.2(a) prospectively only and thus dismiss.

MADSEN, J. (concurring).

I agree with part one of Justice Sanders' concurrence. This court currently has a new set of RPCs pending before it. Because I agree with the majority that the better policy is to include self-represented lawyers within the prohibition of RPC 4.2(a), I would revise that rule in conjunction with the review of the RPCs and avoid the issue of prospectivity.

SANDERS, J. (concurring).

The majority holds that self-represented lawyers are "representing a client" under RPC 4.2(a) and therefore may not contact a represented party. But it refrains from sanctioning Haley, implicitly holding that the scope of RPC 4.2(a) is ambiguous. I concur only in the result, because the majority incorrectly construes RPC 4.2(a). The plain language of RPC 4.2(a) exempts selfrepresented lawyers. And the rule of lenity requires strict and narrow construction of an ambiguous penal statute. We must apply RPC 4.2(a) prospectively just as we apply it today.

I. THE PLAIN LANGUAGE OF RPC 4.2(A) PERMITS SELF-REPRESENTED LAWYERS TO CONTACT REPRESENTED PARTIES

Court rules like the Code of Professional Responsibility "are subject to the same principles of construction as are statutes." Thus, when interpreting a rule we give "the words their ordinary meaning, reading the language as a whole and seeking to give effect to all of it." If the plain language of the rule is unambiguous, additional interpretation is unnecessary.

The plain language of RPC 4.2(a) unambiguously exempts self-represented lawyers. "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." A "client" is "a person who consults or engages the services of a legal advisor," or a "person or entity that employs a professional for advice or help in that professional's line of work." In other words, a "client" is a third party who engages a lawyer. Because self-represented lawyers have no client, under RPC 4.2(a) they may contact a represented party.

The majority concedes that RPC 4.2(a) applies only when a lawyer is "representing a client" but nonetheless construes it to cover self-represented lawyers. Apparently, the majority concludes that self-represented lawyers are "employing or engaging themselves for advice, help, or services."

This ingenious bit of legal fiction illustrates the wisdom of avoiding interpretations "conceivable in the metaphysical sense" when the plain language of a statute "is both necessary and sufficient." Assuming that a self-represented lawyer represents a "client" certainly produces the majority's preferred outcome. Unfortunately, it does so only at the expense of coherence. Lawyers cannot retain themselves any more than pro se litigants can claim legal malpractice or

ineffective assistance of counsel. Undoubtedly, wise lawyers follow their own counsel. But it is a neat trick indeed to advise oneself.

The majority's claim to follow an emerging majority rule is unavailing. Indeed, it cites decisions from six states concluding that self-represented lawyers are their own clients. But none offers any more convincing a ratio-

nale for this curious conclusion than the majority. Conclusory statements cannot substitute for legal reasoning, and another court's error cannot justify our own.

Likewise, the majority's reliance on the "purpose" of RPC 4.2(a) is misplaced. As the author of the court rules, we are "in a position to reveal the actual meaning which was sought to be conveyed." But in the interest of certainty and consistency, we approach them "as though they had been drafted by the Legislature." Whatever the purpose of RPC 4.2(a), it cannot extend to persons and actions its plain language excludes. We may not expand the scope of a rule by fiat. If we conclude that self-represented lawyers should not contact represented parties, we should simply rewrite the rule to clearly prohibit that conduct. Other states have already done so. Lawyers should not have to read slip opinions to divine their professional obligations.

II. THE RULE OF LENITY REQUIRES A CONSTRUCTION OF RPC 4.2(A) EXEMPTING SELF-REPRESENTED LAWYERS

Even assuming that the plain language of RPC 4.2(a) is somehow ambiguous, the rule of lenity requires a strict and narrow construction exempting self-represented lawyers. The rule of lenity is a venerable canon of statutory interpretation, requiring courts "to interpret ambiguous criminal statutes in the defendant's favor." While the Rules of Professional Conduct are only "quasicriminal," the rule of lenity applies to both criminal and quasi-criminal statutes. The deciding factor is the nature of the sanction imposed.

As a general rule, courts apply the rule of lenity to any statute imposing penal sanctions. "We are mindful of the maxim that penal statutes should be strictly construed." A statute is penal if it "can be punished by imprisonment and/or a fine" and remedial if it "provides for the remission of penalties and affords a remedy for the enforcement of rights and the redress of injuries."

The Rules of Professional Conduct are penal because they concern punishing an offender, not compensating a victim. Professional discipline "is punitive, unavoidably so, despite the fact that it is not designed for that purpose." While the "purpose of disciplining an attorney is not primarily to punish the wrongdoer," punishment is an important purpose and a necessary consequence of professional discipline.

Courts have long recognized that disbarment is "penal in its nature" and subject to the rule of lenity. The same holds for all other sanctions. "Because attorney suspension is a quasi-criminal punishment in character, any disciplinary rules used to impose this sanction on attorneys must be strictly construed resolving ambiguities in favor of the person charged."

In his dissent, Chief Justice Alexander suggests that the Rules of Professional Conduct can tolerate a degree of vagueness. But RPC 4.2(a) is not vague. It is ambiguous. And the Rules of Professional Conduct certainly cannot tolerate ambiguity.

A statute is ambiguous if it "refers to P, P can alternatively encompass either a or b, and it is beyond dispute that the defendant did a" and vague if it "refers to X, but we cannot tell whether the disputed event is an X." No one disputes what Haley did: While representing himself, he contacted a represented party. The only question is whether the term "representing a client" encompasses self-represented lawyers, as well as lawyers representing third parties. And if the term "representing a client" is "susceptible to more than one reasonable meaning," it is ambiguous.

Courts routinely apply the rule of lenity to ambiguous statutes. And the rule of lenity is peculiarly appropriate to the Rules of Professional Conduct. We have recognized that "in a disciplinary proceeding, all doubts should be resolved in favor of the attorney." Because lawyers "are subject to professional discipline only for acts that are described as prohibited in an applicable lawyer code, statute, or rule of court," courts "should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code." Application of the rule of lenity reflects that caution. It demands that we adopt the stricter, narrower construction, excluding self-represented lawyers.

III. CONCLUSION

The majority objects to the plain language of RPC 4.2(a) only because it believes that permitting self-represented lawyers to contact represented parties would violate the "purpose" of the rule. But the putative "spirit and intent" of a rule can trump only a "strained and unlikely" interpretation. And the plain language of RPC 4.2(a) is neither strained nor unlikely. It prohibits a lawyer representing a client but not a self-represented lawyer from contacting a represented party. As the majority concedes, several commentators and courts have found the plain language of essentially

identical rules entirely unambiguous. We must not manufacture ambiguity and rely on legal fictions to arrive at a preferred result. Especially when we may simply write that result into law.

I therefore concur in result.

ALEXANDER, C.J. (dissenting).

I agree with the majority that RPC 4.2(a) prohibits lawyers who are representing themselves from communicating directly with opposing, represented parties unless they first obtain the consent of the parties' counsel. I disagree, however, with the majority's decision to limit application of this important rule to future violators. I know of no authority that supports imposition of a rule of professional conduct prospectively only. I believe, therefore, that this court should suspend Jeffrey Haley from the practice of law for his violation of RPC 4.2(a). The violation is especially egregious in light of Haley's claim that he "studied the rule" before directly

contacting his opposing party, and in view of the fact that he contacted the party a second time after the party's lawyer warned him that doing so would violate RPC 4.2(a). Because the majority concludes that Haley should not be subjected to discipline for a violation of RPC 4.2(a),

I dissent.

The majority correctly observes that among states considering the question with which we are here presented, the prevailing trend has been to apply RPC 4.2(a) to attorneys acting pro se, as was Haley, and not just to attorneys representing someone other than themselves. The majority acknowledges, additionally, that in late 1996 and early 1997, when Haley twice attempted to negotiate a settlement without going through the opposing party's lawyer, at least four jurisdictions already had concluded that RPC 4.2(a) prohibited such contacts. Yet none of the four jurisdictions mentioned by the majority applied the rule to pro se attorneys on a prospective basis only, as the majority does here. Rather, all four jurisdictions applied the rule to the facts before them, as this court should do. These four opinions, all cited by the majority, are sound and make it clear that at the time Haley engaged in the prohibited conduct, the weight of authority supported the disciplining of violators and did not even hint at the prospective-only application embraced by the majority in this case. In shielding Haley from application of RPC 4.2(a), the majority borrows from the reasoning of the Nevada Supreme Court in In re Discipline of Schaefer. There, the Nevada court declined to punish an attorney's viola-

tion of the Nevada equivalent of RPC 4.2(a) because of: (a) the "absence of clear guidance" from the court, and (b) "conflicting authority from other jurisdictions" as to whether the rule applied to pro se attorneys.

In effect, the majority establishes a new test: if there is any doubt about how a rule will be construed, a violator will not be punished. That is a dangerous message to send.

Furthermore, whereas the Schaefer court relied on due process principles articulated by the United States Supreme Court in Connally in applying the Nevada rule prospectively, it is worth noting that this court has never drawn from Connally the proposition that discipline is inappropriate just because a rule is being interpreted for the first time. In fact, in Haley v.

Medical Disciplinary Board, the only discipline case in which this court cited Connally, we affirmed sanctions against a physician for violating a statute prohibiting "moral turpitude" although we recognized "uncertainties associated with" the statutory language in question.

Thus, this court has previously declined to interpret Connally in the way the Nevada court did in Schaefer and the majority does here as if professional license holders have a due process right to avoid discipline simply because a court is newly construing the rule in question. Such an interpretation will have far-reaching impact, as many discipline cases that come before this court raise an issue of construction. In declining to sanction Haley for violating RPC 4.2(a), despite the fact that Haley had "studied" the rule and should have known that the prevailing construction prohibited his conduct, the majority suggests that questionable conduct will be tolerated as long as there is no prior Washington court decision exactly on point.

We must remember that our purpose in disciplining attorneys is to "protect the public and to preserve confidence in the legal system." In Curran, an attorney argued that he should not be punished for violating RLD 1.1(a) because, in forbidding actions that reflect "disregard for the rule of law," the rule was unconstitutionally vague. This court said, "We choose to give these words a narrowing construction. This law is not so vague as to be unconstitutional, given this limiting construction." We noted that "a statute will not be considered unconstitutionally vague just because it is difficult to determine whether certain marginal offenses are within the meaning of the language under attack." This court suspended the attorney, Curran, saying, "Standards may be used in lawyer disciplinary cases which would be impermissibly vague in other contexts." Just as we dis-

ciplined Curran there, despite uncertainty about the rule in question, so should Haley be disciplined for violating RPC 4.2(a) in order to "protect the public and to preserve confidence in the legal system."

Curran also weighs against the position taken by Justice Sanders in his concurring opinion that attorney discipline is a punishment scheme and therefore is subject to the rule of lenity a criminal law doctrine. We said in that case, "The purposes of bar discipline do not precisely duplicate the purposes of the criminal law." More notably, we have said numerous times that "punishment is not a proper basis for discipline." In In re Disbarment of Beakley, we said:

Neither disbarment nor suspension is ordered for the purpose of punishment, but wholly for the protection of the public. When a matter such as this comes before the court, the question presented is not: What punishment should be inflicted on this man? The question presented to each of its judges is simply this: Can I, in view of what has been clearly shown as to this man's conduct, conscientiously participate in continuing to hold him out to the public as worthy of that confidence which a client is compelled to repose in his attorney?

Thus, this court has long rejected the notion that attorney discipline is penal, and the concurrence cannot point to any discipline case in which we have applied the rule of lenity to resolve ambiguity in the attorney's favor.

In sum, because the purpose of attorney discipline is to protect the public, it is our duty to enforce RPC 4.2(a) in this case. The majority provides no authority for applying RPC 4.2(a) to pro se attorneys prospectively only. I would apply the rule to Haley and suspend him for six months.

Questions

1. What is the purpose of Model Rule 4.2 and its prohibition on attorneys engaging in ex parte communications with represented persons? Is it intended to protect clients or their attorneys? 2 Why don't the model rules prohibit clients from engaging in ex parte communications? Should ex parte communications between represented persons be encouraged, discouraged, or neither? 3 Haley retained counsel when the action at issue went to trial. If he had engaged in ex parte communications with Highland while represented by an attorney, would it have violated Model Rule 4.2? Should attorneys who are parties to an action and represented by counsel be permitted to engage in ex parte communications with represented persons? What if both parties are attorneys represented by counsel?

Niesig v. Team

76 N.Y.2d 363 (N.Y. 1990)

Plaintiff in this personal injury litigation, wishing to have his counsel privately interview a corporate defendant's employees who witnessed the accident, puts before us a question that has generated wide interest: are the employees of a corporate party also considered "parties" under Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility, which prohibits a lawyer from communicating directly with a "party" known to have counsel in the matter? The trial court and the Appellate Division both answered that an employee of a counseled corporate party in litigation is by definition also a "party" within the rule, and prohibited the interviews. For reasons of policy, we disagree.

As alleged in the complaint, plaintiff was injured when he fell from scaffolding at a building construction site. At the time of the accident he was employed by DeTrae Enterprises, Inc.; defendant J.M. Frederick was the general contractor, and defendant Team I the property owner. Plaintiff thereafter commenced a damages action against defendants, asserting two causes of action, and defendants brought a third-party action against DeTrae.

Plaintiff moved for permission to have his counsel conduct ex parte interviews of all DeTrae employees who were on the site at the time of the accident, arguing that these witnesses to the event were neither managerial nor controlling employees and could not therefore be considered "personal synonyms for DeTrae." DeTrae opposed the application, asserting that the disciplinary rule barred unapproved contact by plaintiff's lawyer with any of its employees. Supreme Court denied plaintiff's request, and the Appellate Division modified by limiting the ban to DeTrae's current employees.

The Appellate Division concluded, for theoretical as well as practical reasons, that current employees of a corporate defendant in litigation "are presumptively within the scope of the representation afforded by the attorneys who appeared in the litigation on behalf of that corporation." The court held that DeTrae's attorneys have an attorney-client relationship with every DeTrae employee connected with the subject of the litigation, and that the prohibition is necessitated by the practical difficulties of distinguishing between a corporation's control group and its other employees. The court further noted that the information sought from employee witnesses could instead be obtained through their depositions.

In the main we disagree with the Appellate Division's conclusions. However, because we agree with the holding that DR 7-104(A)(1) applies only to current employees, not to former employees, we modify rather than reverse its order, and grant plaintiff's motion to allow the interviews.

We begin our analysis by noting that what is at issue is a disciplinary rule, not a statute. In interpreting statutes, which are the enactments of a coequal branch of government and an expression of the public policy of this State, we are of course bound to implement the will of the Legislature; statutes are to be applied as they are written or interpreted to effectuate the legislative intention. The disciplinary rules have a different provenance and purpose. Approved by the New York State Bar Association and then enacted by the Appellate Divisions, the Code of Professional Responsibility is essentially the legal profession's document of self-governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline. While unquestionably important, and respected by the courts, the code does not have the force of law.

That distinction is particularly significant when a disciplinary rule is invoked in litigation, which in addition to matters of professional conduct by attorneys, implicates the interests of non-lawyers. In such instances, we are not constrained to read the rules literally or effectuate the intent of the drafters, but look to the rules as guidelines to be applied with due

regard for the broad range of interests at stake. "When we agree that the Code applies in an equitable manner to a matter before us, we should not hesitate to enforce it with vigor. When we find an area of uncertainty, however, we must use our judicial process to make our own decision in the interests of justice to all concerned."

DR 7-104(A)(1), which can be traced to the American Bar Association Canons of 1908, fundamentally embodies principles of fairness. "The general thrust of the rule is to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact." By preventing lawyers from deliberately dodging adversary counsel to reach and exploit the client alone, DR 7104(A)(1) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions.

There is little problem applying DR 7-104(A)(1) to individuals in civil cases. In that context, the meaning of "party" is ordinarily plain enough: it refers to the individuals, not to their agents and employees. The question, however, becomes more difficult when the parties are corporations as evidenced by a wealth of commentary, and controversy, on the issue.

The difficulty is not in whether DR 7-104(A)(1) applies to corporations. It unquestionably covers corporate parties, who are as much served by the rule's fundamental principles of fairness as individual parties. But the rule does not define "party," and its reach in this context is unclear. In litigation only the entity, not its employee, is the actual named party; on the other hand, corporations act solely through natural persons, and unless some employees are also considered parties, corporations are effectively read out of the rule. The issue therefore distills to which corporate employees should be deemed parties for purposes of DR 7-104(A)(1), and that choice is one of policy. The broader the definition of "party" in the interests of fairness to the corporation, the greater the cost in terms of foreclosing vital informal access to facts.

The many courts, bar associations and commentators that have balanced the competing considerations have evolved various tests, each claiming some adherents, each with some imperfection. At one extreme is the blanket rule adopted by the Appellate Division and urged by defendants, and at the other is the "control group" test both of which we reject. The first is too broad and the second too narrow.

Defendants' principal argument for the blanket rule correlating the corporate "party" and all of its employees rests on Upjohn v United States. As the Supreme Court recognized, a corporation's attorney-client privilege

includes communications with low- and mid-level employees; defendants argue that the existence of an attorney-client privilege also signifies an attorney-client relationship for purposes of DR 7-104(A)(1).

Upjohn, however, addresses an entirely different subject, with policy objectives that have little relation to the question whether a corporate employee should be considered a "party" for purposes of the disciplinary rule. First, the privilege applies only to confidential communications with counsel, it does not immunize the underlying factual information which is in issue here from disclosure to an adversary. Second, the attorney-client privilege serves the societal objective of encouraging open communication between client and counsel, a benefit not present in denying informal access to factual information. Thus, a corporate employee who may be a "client" for purposes of the attorney-client privilege is not necessarily a "party" for purposes of DR 7-104(A)(1).

The single indisputable advantage of a blanket preclusion as with every absolute rule is that it is clear. No lawyer need ever risk disqualification or discipline because of uncertainty as to which employees are covered by the rule and which not. The problem, however, is that a ban of this nature exacts a high price in terms of other values, and is unnecessary to achieve the objectives of DR 7-104(A)(1).

Most significantly, the Appellate Division's blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes. Foreclosing all direct, informal interviews of employees of the corporate party unnecessarily sacrifices the long-recognized potential value of such sessions. "A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case, and to explore the witness' knowledge, memory and opinion frequently in light of information counsel may have developed from other sources. This is part of an attorney's so-called work product." Costly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly interviews attended by adversary counsel, are no substitute for such off-the-record private efforts to learn and assemble, rather than perpetuate, information.

Nor, in our view, is it necessary to shield all employees from informal interviews in order to safeguard the corporation's interest. Informal encounters between a lawyer and an employee witness are not as a blanket ban assumes invariably calculated to elicit unwitting admissions; they serve long-recognized values in the litigation process. Moreover, the corporate party has significant protection at hand. It has possession of its

own information and unique access to its documents and employees; the corporation's lawyer thus has the earliest and best opportunity to gather the facts, to elicit information from employees, and to counsel and prepare them so that they will not make the feared improvident disclosures that engendered the rule.

We fully recognize that, as the Appellate Division observed, every rule short of the absolute poses practical difficulties as to where to draw the line, and leaves some uncertainty as to which employees fall on either side of it. Nonetheless, we conclude that the values served by permitting access to relevant information require that an effort be made to strike a balance, and that uncertainty can be minimized if not eliminated by a clear test that will become even clearer in practice.

We are not persuaded, however, that the "control group" test defining "party" to include only the most senior management exercising substantial control over the corporation achieves that goal. Unquestionably, that narrow (though still uncertain) definition of corporate "party" better serves the policy of promoting open access to relevant information. But that test gives insufficient regard to the principles motivating DR 7-104(A)(1), and wholly overlooks the fact that corporate employees other than senior management also can bind the corporation. The "control group" test all but "nullifies the benefits of the disciplinary rule to corporations." Given the practical and theoretical problems posed by the "control group" test, it is hardly surprising that few courts or bar associations have ever embraced it.

By the same token, we find unsatisfactory several of the proposed intermediate tests, because they give too little guidance, or otherwise seem unworkable. In this category are the case-bycase balancing test, and a test that defines "party" to mean corporate employees only when they are interviewed about matters within the scope of their employment.

The test that best balances the competing interests, and incorporates the most desirable elements of the other approaches, is one that defines "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally.

Unlike a blanket ban or a "control group" test, this solution is specifically targeted at the problem addressed by DR 7-104(A)(1). The potential unfair advantage of extracting concessions and admissions from those who

will bind the corporation is negated when employees with "speaking authority" for the corporation, and employees who are so closely identified with the interests of the corporate party as to be indistinguishable from it, are deemed "parties" for purposes of DR 7-104(A)(1). Concern for the protection of the attorney-client privilege prompts us also to include in the definition of "party" the corporate employees responsible for actually effectuating the advice of counsel in the matter.

In practical application, the test we adopt thus would prohibit direct communication by adversary counsel "with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation." This test would permit direct access to all other employees, and specifically as in the present case it would clearly permit direct access to employees who were merely witnesses to an event for which the corporate employer is sued.

Apart from striking the correct balance, this test should also become relatively clear in application. It is rooted in developed concepts of the law of evidence and the law of agency, thereby minimizing the uncertainty facing lawyers about to embark on employee interviews. A similar test, moreover, is the one overwhelmingly adopted by courts and bar associations throughout the country, whose long practical experience persuades us that in day-to-day operation it is workable.

Finally, we note the particular contribution made by the various amici curiae in this case; by highlighting the diverse contexts in which the question may arise, their submissions have enlarged our comprehension of the broad potential impact of the issue presented. In so doing, however, they have also alerted us to the wisdom of flagging what is in any event implicit in our decisions that they are limited by the facts before us and the questions put to us. Today's decision resolves the present controversy by allowing ex parte interviews with nonmanagerial witnesses employed by a corporate defendant; even in that limited context, we recognize that there are undoubtedly questions not raised by the parties that will yet have to be answered. Defendants' assertions that ex parte interviews should not be permitted because of the dangers of overreaching, moreover, impel us to add the cautionary note that, while we have not been called upon to consider questions relating to the actual conduct of such interviews, it is of course assumed that attorneys would make their identity and interest known to interviewees and comport themselves ethically.