**7.4: Client Perjury**

*If the truth will hurt someone you love, tell a lie.*[[1]](#footnote-0)

Under the Model Rule of Professional Conduct 3.3, attorneys may not permit their clients to testify falsely or introduce false evidence. And under Model Rule 4.1, attorneys may be required to withdraw from representation, if they know that their client has or will introduce false evidence. As the Restatement of the Law Governing Lawyers § 120 observes, “A lawyer may not knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence.”

What should attorneys do, if they know that their client or a witness has or will introduce false evidence? In many cases, they can simply refuse to introduce the evidence in question. If their client plans to lie, they can refuse to call their client, and they can counsel their client not to lie. If their client does lie, they can ask the client to retract the false evidence. And if the client refuses, the attorney may withdraw from representation. If the false evidence could materially affect the outcome, the attorney must also disclose it to the court.

Criminal cases are more complicated, because criminal defendants have a constitutional right to testify under the Sixth Amendment. Attorneys should still advise criminal defendants not to lie. But if they know that their client intends to lie, some jurisdictions permit the client to testify in narrative form, so long as the attorney does not rely on the perjured testimony.

Some legal scholars, most notably the late Monroe Freedman, argue that an attorney’s duty of loyalty to the client must trump the attorney’s duty of candor to the court. Accordingly, attorneys should put criminal clients on the stand without notifying the court, even if they know the client will testify falsely. A few scholars argue that attorneys should simply refuse to call their client at all, if they know the client plans to lie.

*Each time I was wrong or each time that I lied or somebody made me scared, I would simply report them to Rosemary Woods, and she would make them disappear.*[[2]](#footnote-1)

[**Model Rule 3.3: Candor Toward the Tribunal**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/)

1. 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.
2. 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.
3. 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.
4. 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.

[**Model Rule 3.3: Comments**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/comment_on_rule_3_3/)

1. Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client’s wishes. This duty is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.
2. If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.
3. The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.
4. The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer’s knowledge that evidence is false, however, can be inferred from the circumstances. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.
5. Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client’s decision to testify.

[**Model Rule 4.1: Truthfulness in Statements to Others**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_1_truthfulness_in_statements_to_others/)

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

1. make a false statement of material fact or law to a third person; or
2. 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.

[**Model Rule 4.1: Comments**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_1_truthfulness_in_statements_to_others/comment_on_rule_4_1/)

Crime or Fraud by Client

1. Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client’s crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client’s crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud. If the lawyer can avoid assisting a client’s crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

**Restatement (Third) of the Law Governing Lawyers § 120 (2000): False Testimony or Evidence**

1. A lawyer may not:
   1. knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence;
   2. knowingly make a false statement of fact to the tribunal;
   3. offer testimony or other evidence as to an issue of fact known by the lawyer to be false.
2. If a lawyer has offered testimony or other evidence as to a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures and may disclose confidential client information when necessary to take such a measure.
3. A lawyer may refuse to offer testimony or other evidence that the lawyer reasonably believes is false, even if the lawyer does not know it to be false.

**Further Reading:**

* [Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091 (1985)](http://www.dougschafer.com/articles/Subin.1985.pdf)
* [H. Lowell Brown, *The Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge*, 44 Buffalo L. Rev. 777 (1996)](https://digitalcommons.law.buffalo.edu/buffalolawreview/vol44/iss3/14/)
* [Thomas L. Shaffer, *On Lying for Clients*, 71 Notre Dame L. Rev. 195 (1995-1996)](https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1243&context=law_faculty_scholarship)
* [Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 Duq. L. Rev. 715 (1998)](https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1414&context=law_facpub)
* Barry Adler, *The Ethics of Perjury*, 71 ABA Journal 76 (November 1985)
* [Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966)](https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1005&context=faculty_scholarship)
* [Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 Geo. J. Legal Ethics 133 (2008)](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103208)
* [Ray McKoski, *Prospective Perjury by a Criminal Defendant: It’s All about the Lawyer*, 44 Ariz. St. L.J. 1575 (2012)](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223601)



*Nix v. Whiteside* Courtroom Drawing

[***Nix v. Whiteside*, 475 U.S. 157 (1986)**](https://scholar.google.com/scholar_case?case=485214441959262506)

**Summary:** Emmanuel Charles Whiteside was charged with the murder of Calvin Love, and was represented by Gary L. Robinson and Donna Paulsen. Whiteside pleaded self-defense. Initially, he told Robinson that he believed Love had a gun, but had not actually seen one. Later, he told Robinson that he had seen “something metallic.” Robinson advised Whiteside that this testimony would be perjury, and that he would inform the court and withdraw from representation if Whiteside committed perjury. Whiteside did not testify that he had seen “something metallic,” and was convicted of second-degree murder. The Supreme Court of Iowa affirmed the conviction. Whiteside filed a federal habeas petition alleging ineffective assistance of counsel. The district court denied the writ, but the circuit court reversed. The Supreme Court granted certiorari and reversed the circuit court, holding that a criminal defendant does not have a right to commit perjury, so Whiteside’s right to counsel was not infringed.

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,[[3]](#footnote-2) 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.

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 testimony 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 sentence. 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)**](https://scholar.google.com/scholar_case?case=4506203134570477321)

**Summary:** Michael DePallo was charged with the murder of an elderly man. Initially, DePallo told his attorney that he had participated in the murder, but then insisted on testifying that he had been at home the entire night. In an *ex parte* meeting, DePallo’s attorney informed the court that his client was planning to commit perjury. The court permitted DePallo to testify in a narrative form, and his attorney did not use his testimony in summation. DePallo was convicted and appealed. The Appellate Division and Court of Appeals affirmed, holding that DePallo had no right to commit perjury, and his attorney’s disclosure to the court did not violate attorney-client confidentiality.

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](https://www.nytimes.com/1996/02/13/nyregion/killing-on-si-leads-to-a-ban-on-some-youths-in-group-homes.html?mtrref=www.google.com). 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?

**Knowledge of Falsehood**

*Oh don’t you lie to me, because it makes me mad, and I’ll get evil as a man can be.*[[4]](#footnote-3)

Attorneys are obligated to prevent or cure client perjury only if they “actually know” that their client probably will commit perjury or has committed perjury. Under Model Rule 3.3, a “reasonable belief” of perjury does not constitute actual knowledge. And in general, courts have adopted very high standards for “actual knowledge” of perjury.

All courts require a knowledge of perjury based on specific, actual facts, rather than a mere belief. The fact that a client’s account is internally inconsistent, has changed over time, or conflicts with other evidence is insufficient to create a knowledge of perjury. Defendants may even present testimony that appears to be manifestly incredible or absurd, so long as it is not demonstrably perjury.

However, different courts have adopted different interpretations of the “actual knowledge” test. Some courts require a “firm factual basis that the testimony will be false.” Others require either “good cause to believe the defendant’s proposed testimony would be deliberately untruthful” or a good faith determination of falsehood “based on objective circumstances firmly rooted in fact.”

Some courts have even rejected the “actual knowledge” test entirely. Illinois gives attorneys “great discretion” in determining whether their clients will commit perjury. Some jurisdictions require that counsel possess proof of perjury beyond a reasonable doubt. And others require “compelling support” for the expectation of perjury.

*I was taught to never tell a lie, to look you in the eye and tell it like it is. Always thought that you would be the same. It’s such a shame that’s not the way it is.*[[5]](#footnote-4)

[***State v. Hischke*, 639 N.W.2d 6 (Iowa 2002)**](https://scholar.google.com/scholar_case?case=3027552717440385302)

**Summary:** The police found marijuana in Hischke’s jacket pocket and charged him with possession. Bishop represented Hischke. Initially, Hischke told Bishop the marijuana was his, but when he learned that a third possession offense would cause an enhanced sentence, he denied ownership. Bishop informed the court that Hischke planned to commit perjury, and the court prohibited Hischke from testifying about the ownership of the marijuana. Hischke was convicted and appealed, claiming ineffective assistance of counsel. The Iowa Supreme Court affirmed, holding that Hischke had no right to commit perjury, and Bishop acted reasonably under the circumstances. The concurrence argued that criminal defense attorneys should never inform the court that their client intends to commit perjury.

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?

**Further Reading:**

* [Ellen Henak, *When the Interests of Self, Clients, and Colleagues Collide: The Ethics of Ineffective Assistance of Counsel Claims*, 33 Am. J. Trial Adv. 347 (2009)](https://www.wispd.org/attachments/article/240/The%20Ethics%20of%20Ineffective%20Assistance%20Claims-Am%20Journal%20of%20Trial%20Advocacy.pdf)

1. The Chromatics, *Tell a Lie* (1956). [↑](#footnote-ref-0)
2. Bill Horwitz, *If I Had a Friend Like Rosemary Woods*, Lies, Lies, Lies (1975). [↑](#footnote-ref-1)
3. 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. [↑](#footnote-ref-2)
4. Hudson “Tampa Red” Whitaker, *Don’t You Lie to Me* (1940). [↑](#footnote-ref-3)
5. Joan Jett and the Blackhearts, *Little Liar*, Up Your Alley (1988). [↑](#footnote-ref-4)