Chapter 7

Duties in Litigation

1. Integrity of the Proceedings

1.1 Truthfulness

Model Rules of Professional 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.

Nix v. Whiteside, 475 U.S. 157 (1986)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

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.

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 [...]. During summations, defense counsel did not refer to defendant's trial testimony. Defendant was convicted of two counts of second degree murder (intentional and felony murder based on the burglary), two counts of first degree robbery, two counts of first degree burglary, and one count of second degree rob-

bery. 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 * * * [t]he 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. [W]ithdrawal 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; "[s]ince 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".

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

State v. Hischke, 639 N.W.2d 6 (Iowa 2002)

Streit, J.

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 sus-

pected 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.

U.S. v. Long, 857 F. 2d 436 (8th Cir. 1988)

Heaney, Circuit Judge

Thaddeus Adonis Long and Edward Larry Jackson appeal from their convictions on a number of counts for their involvement in a check forging and bank fraud scheme. We affirm their convictions on all counts.

On August 14, 1986, the United States issued a treasury check in the amount of $434,188.80, payable to Land O'Frost, an Illinois company. The check was sent to Land O'Frost but ended up in the hands of Long or Jackson. Jackson offered Dennis Mentzos $100.00 to assist him in cashing the check. Mentzos accepted.

Jackson obtained a rubber stamp with "Land O'Frost" and the signature of "James Frost" printed on it and an ID card in the name of John Turner of Thermo-Dynamics. Mentzos signed the name John D. Turner on the ID card. Mentzos and Jackson rented a telephone answering service listed under the name Thermo-Dynamics.

Using the name John D. Turner, Mentzos opened an account at Norwest Bank in downtown St. Paul and deposited $50.00. He supplied the bank with a telephone number of Thermo-Dynamics and a reference, the State Bank of St. Cloud. On the signature card, he signed the name John D. Turner. At Jackson's home in St. Paul, Jackson asked Mentzos to endorse the check with the name John D. Turner. Mentzos refused but agreed to sign a blank piece of paper. Jackson copied the signature on the back of the check and stamped the Land O'Frost endorsement on it. An acquaintance of Jackson deposited the treasury check, and the bank credited the Thermo-Dynamics account in the amount of the check.

Long flew to Minnesota from Chicago. He registered at a hotel as Mr. Kimball. On August 25, using the name Anthony Smith and posing as an executive of Thermo-Dynamics, Long bought a Porsche automobile from a dealer with a $28,000 Thermo-Dynamics check.

On August 26, Mentzos and Jackson picked up Long at his hotel. Jackson gave Long various forms of false identification in the name of Anthony Smith. They went to Norwest. Long signed the name Anthony Smith on the Thermo-Dynamics signature card and obtained a number of starter checks. Outside the bank, Mentzos signed, as John D. Turner, two of the checks. Mentzos was later paid $100 and a bonus of $400 for his help.

That same day, Long returned to Norwest and asked to cash a $16,000 check from Thermo-Dynamics payable to Irving Kimble. Long was given the amount in cash.

On August 29, while at temporary offices which he had rented, Long asked the receptionist on duty to type the name Anthony Smith under the drawer signature line of a number of blank Norwest checks. Long asked that one of those checks be made payable to Norwest Bank of St. Paul in the amount of $56,685.

Norwest subsequently began an investigation of the Thermo-Dynamics account. It discovered that the telephone number supplied by Mentzos was for a residence and that the State Bank of St. Cloud did not exist. Long went into the bank to cash the check for $56,685. After he endorsed the check before a Norwest employee, the St. Paul police arrested him. An officer searched Long's belongings and found an Illinois driver's license, a Thermo-Dynamics identification card, and a Minnesota driver's license receipt, all in the name of Anthony Smith. The police apparently arrested Jackson soon thereafter.

Jackson was indicted on seven counts [...]. Jackson was found guilty on all counts and sentenced to concurrent sentences of five years on the first four counts, to a consecutive sentence of five years on the fifth count, and to a consecutive sentence of five years on the sixth count. The sentence on the seventh count was suspended, and a five-year term of probation, to begin after Jackson's release from prison, was imposed. Thus, Jackson's total sentence was fifteen years of imprisonment with five years of probation.

Long was indicted on five counts [...]. He was found guilty of all counts and was sentenced to four years for the first two counts and consecutive sentences of four years for the second two counts. The sentence on the fifth count was suspended and a term of probation, to begin after release from prison, was imposed. Thus, Long's total sentence was twelve years of imprisonment with five years of probation.

Long and Jackson claim a number of errors.

D. Ineffective Assistance of Counsel

Jackson contends his trial counsel was ineffective. To prevail on an ineffective assistance of counsel claim, a defendant must show that his or her attorney's performance "fell below an objective standard of reasonableness," and that, but for this ineffective assistance, there is a reasonable probability that the outcome of the trial would have been different.

Jackson cites a number of instances of ineffectiveness. [...]

Finally, Jackson claims his attorney abandoned his role as Jackson's advocate and coerced Jackson not to testify. He allegedly did this by suggesting to the trial judge, out of the presence of the jury, that his client might perjure himself. This, according to Jackson, violated his sixth amendment right to effective assistance of counsel and his fifth amendment right to testify.

In *Nix v. Whiteside*, the Supreme Court addressed the troubling question of how an attorney should respond upon learning a client will commit perjury upon taking the stand. In that case, Emmanuel Whiteside was convicted of the murder of Calvin Love. At trial, Whiteside had claimed he stabbed Love in self-defense.

On collateral attack of that conviction, Whiteside alleged that his right to counsel and to testify had been violated because, although he took the stand, his attorney had coerced him not to testify that he had seen a gun in Love's hand before stabbing him. The trial court found that Whiteside would have perjured himself if he testified that he had seen the gun. It held that, because Whiteside's rights to effective assistance of counsel and to testify did not include the right to testify falsely, those rights were not violated. This Court reversed.

The Supreme Court overruled this Court. It held that when a defendant "announces" an intention to commit perjury, the defendant's rights to effective assistance of counsel and to testify are not violated if the attorney takes certain clear steps to prevent the presentation of that false testimony. Those steps include attempting to dissuade the client from testifying falsely, threatening to report the possibility of perjury to the trial court, and possibly testifying against the defendant should he be prosecuted for perjury. As the Court observed, neither right was violated, because the right to testify does not "extend to testifying falsely," and because "the right to counsel includes no right to have a lawyer who will cooperate with planned perjury."

In the instant case, Jackson's lawyer asked to approach the bench after the government had presented its case. The lawyer told the trial judge that Jackson wanted to testify and that he was concerned about his testimony. The lawyer said he advised Jackson not to take the stand. The judge excused the jury and everyone else in the courtroom, except a United States Marshal, Jackson, and his lawyer. At that point, the lawyer said, "I'm not sure if it wouldn't be appropriate for me to move for a withdawal from this case based upon what I think may be elicited on the stand.... I'm concerned about the testimony that may come out and I'm concerned about my obligation to the Court." The trial judge informed Jackson he had a right under the law to testify on his own behalf, which Jackson said he understood. The court also informed Jackson that his counsel was bound by his professional obligation not to place evidence before the court which he believed to be untrue. Jackson also said he understood this.

The judge stated that Jackson could take the stand and give a narrative statement without questioning from his lawyer. The judge noted that if Jackson's attorney found "things which he believes to be not true ... he may have other obligations at that point." The lawyer responded that he had again discussed the matter with Jackson and that Jackson had decided, on his own, not to testify. Upon questioning by the judge, Jackson again stated that he understood his right to testify and his attorney's obligations. Jackson thereupon informed the court that he did not wish to testify.

This case differs from *Whiteside* in three respects. Each difference raises important questions which can only be answered after an evidentiary hearing.

First, in *Whiteside*, a finding was made that Whiteside would have testified falsely had he given the testimony he initially wanted to give. Such a finding has not been made here. In terms of a possible violation of Jackson's rights, this is crucial. If, for example, Jackson's lawyer had no basis for believing Jackson would testify falsely and Jackson, in fact, wanted to testify truthfully, a violation of his rights would occur.

We do not know what measures Jackson's attorney took to determine whether Jackson would lie on the stand. He was required to take such measures as would give him "a firm factual basis" for believing Jackson would testify falsely. As we stated in our opinion in *Whiteside v. Scurr*:

> Counsel must act if, but only if, he or she has "a firm factual basis" for believing that the defendant intends to testify falsely or has testified falsely.... It will be a rare case in which this factual requirement is met. Counsel must remember that they are not triers of fact, but advocates. In most cases a client's credibility will be a question for the jury.

The Supreme Court's majority opinion in *Whiteside* emphasizes the necessity of such caution on the part of defense counsel in determining whether a client has or will commit perjury. In discussing the attorney's duty to report possible client perjury, the majority states that it extends to "a client's *announced plans* to engage in future criminal conduct." Thus, a clear expression of intent to commit perjury is required before an attorney can reveal client confidences.

The concurring opinions in *Whiteside* support this interpretation. Justice Stevens advised circumspection: "A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury * * * 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." And, Justice Blackmun in his concurrence observed that "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."

Justices Blackmun and Stevens focus in their concurring opinions on the reasons the majority opinion carefully limits its holding to "announced plans" to commit perjury. The tensions between the rights of the accused and the obligations of her attorney are considerable in the context of potential client perjury. Justice Stevens points to the potential inaccuracy of a lawyer's perception. For many reasons, a lawyer's perception may be incorrect. Ideally, a client will tell her lawyer "everything." But "everything" may not be one consistent explanation of an event. Not only may a client overlook and later recall certain details, but she may also change intended testimony in an effort to be more truthful. Moreover, even a statement of an intention to lie on the stand does not necessarily mean the client will indeed lie once on the stand. Once a client hears the testimony of other witnesses, takes an oath, faces a judge and jury, and contemplates the prospect of cross-examination by opposing counsel, she may well change her mind and decide to testify truthfully.

As Justice Blackmun observes, an attorney who acts on a belief of possible client perjury takes on the role of the fact finder, a role which perverts the structure of our adversary system. A lawyer who judges a client's truthfulness does so without the many safeguards inherent in our adversary system. He likely makes his decision alone, without the assistance of fellow fact finders. He may consider too much evidence, including that which is untrustworthy. Moreover, a jury's determination on credibility is always tempered by the requirement of proof beyond a reasonable doubt. A lawyer, finding facts on his own, is not necessarily guided by such a high standard. Finally, by taking a position contrary to his client's interest, the lawyer may irrevocably destroy the trust the attorney-client relationship is designed to foster. That lack of trust cannot easily be confined to the area of intended perjury. It may well carry over into other aspects of the lawyer's representation, including areas where the client needs and deserves zealous and loyal representation. For these reasons and others, it is absolutely essential that a lawyer have a firm factual basis before adopting a belief of impending perjury.

The record before us does not disclose whether Jackson's lawyer had a firm factual basis for believing his client would testify falsely. This can only be adequately determined after an evidentiary hearing.

Second, in *Whiteside*, the defendant did testify and was "'restricted' or restrained only from testifying falsely." Here, Jackson did not testify at all. It simply is impossible to determine from the record before us whether Jackson was "restrained" by his lawyer from giving truthful testimony. Again, this can only be determined after an evidentiary hearing.

Third, in *Whiteside*, the defense attorney did not reveal his belief about his client's anticipated testimony to the trial court. In contrast, the disclosure to the trial court here was quite explicit. The attorney said to the judge that he might have to withdraw because of what might be elicited on the stand.

Such a disclosure cannot be taken lightly. Even in a jury trial, where the judge does not sit as the finder of fact, the judge will sentence the defendant, and such a disclosure creates "significant risks of unfair prejudice" to the defendant.[1]

We note that, once the possibility of client perjury is disclosed to the trial court, the trial court should reduce the resulting prejudice. It should limit further disclosures of client confidences, inform the attorney of his other duties to his client, inform the defendant of her rights, and determine whether the defendant desires to waive any of those rights.

The trial judge here acted primarily with these concerns in mind. The judge discussed the conflict with only the attorney and his client present. He prevented further disclosures of client confidences. He advised Jackson of his right to testify and determined that Jackson understood his rights and his attorney's ethical obligation not to place false testimony before the court. He advised Jackson that if he took the stand, his lawyer would be required to refrain from questioning Jackson on issues which the lawyer believed Jackson would perjure himself and that Jackson would have to testify in narrative form.[2] He then directly asked Jackson if he wished to testify. We add that a trial court should also impress upon defense counsel and the defendant that counsel must have a firm factual basis before further desisting in the presentation of the testimony in question.[3]

Under such a procedure, the chance for violations of the defendant's constitutional rights will be reduced, the revelation of further client confidences will be prevented, and the defendant can make a knowing waiver of her constitutional right to testify and to counsel. It will also be necessary to establish that the waiver was voluntary and that the defendant's rights were not violated prior to the waiver. Such inquiries, however, are best made at an evidentiary hearing.

CONCLUSION

The most weighty decision in a case of possible client perjury is made by the lawyer who decides to inform the court, and perhaps incidentally his adversary and the jury, of his client's possible perjury. This occurs when the lawyer makes a motion for withdrawal (usually for unstated reasons) or allows his client to testify in narrative form without questioning from counsel. Once this has been done, the die is cast. The prejudice will have occurred. At a minimum, the trial court will know of the defendant's potential perjury. For this reason, defense counsel must use extreme caution before revealing a belief of impending perjury. It is, as Justice Blackmun noted, "the rarest of cases" where an attorney should take such action.

Once the disclosure of the potential client perjury has occurred, the trial judge can limit the resulting prejudice by preventing further disclosures of client confidences, by informing the attorney of the obligation to his client, and by informing the client of her rights and determining whether she desires to waive any of them.

1 (n.6 in opinion) Before disclosing to the court a belief of impending client perjury, not only must a lawyer have a firm factual basis for the belief that his or her client will commit perjury, but the lawyer must also have attempted to dissuade the client from committing the perjury. Such dissuasion is usually in the defendant's interest because [...] "perjured testimony can ruin an otherwise meritorious case."

2 (n.7 in opinion) When a lawyer is confronted during trial with the prospect of client perjury, allowing the defendant to testify in narrative form was recommended by the American Bar Association in its Standards for Criminal Justice, Proposed Standard 4-7.7. This Standard, however, has not been in force since 1979 when the American Bar Association House of Delegates failed to approve it. It has been criticized because it would indicate to the judge and sophisticated jurors that the lawyer does not believe his client, and because the lawyer would continue to play a passive role in the perjury. In this case, these concerns were largely removed because the judge had already been notified of the potential perjury and because the judge had instructed the attorney to proceed in this manner.

3 (n.8 in opinion) We believe a trial court should also specifically inform a defendant of the possible consequences of false testimony: (1) the lawyer may reveal to the court what he believes to be false; (2) the lawyer may refrain from referring to the false testimony in final argument; and (3) the defendant may be prosecuted for perjury.

The determination whether the prejudice was undue must occur at an evidentiary hearing. Two alternatives are available in this case for an evidentiary hearing:[4] either on remand or on a motion by Jackson at a 28 U.S.C. § 2255 proceeding. In *United States v. Dubray*, we observed that claims of ineffective assistance of counsel are normally raised for the first time in collateral proceedings. Since Jackson's claim is, in part, one of ineffective assistance of counsel, we hold that a collateral proceeding would be the proper forum to address the claimed violations of Jackson's rights to effective assistance of counsel and to testify.

We therefore affirm the judgment of the district court but without prejudice to Jackson to claim in a section 2255 proceeding an infringement of his rights to effective assistance of counsel and to testify.

4 (n.10 in opinion) Various methods have been suggested by commentators as an alternative to such a post hoc procedure. For example, one suggests that before allowing a defendant to give what a lawyer believes is perjurious testimony, a recess should be called, and a judge, other than the presiding judge, should hold a hearing and determine beyond a reasonable doubt that the defendant would commit perjury by testifying. Another suggests creating a board of attorneys to decide ethical issues. Either of these procedures would assist attorneys in determining whether there is a firm factual basis for believing a client is about to commit perjury, although we do not say, at this point, that the Constitution necessarily requires their implementation.

1.2 Fairness & Impartiality

Model Rules of Professional Conduct,

Rule 3.1: Meritorious Claims & Defenses

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.

Rule 3.2: Expediting Litigation

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

Rule 3.4: Fairness to Opposing Party & 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.

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.

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.)

1.3 Extrajudicial Statements

Model Rules of Professional 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).

In re Litz, 721 N.E.2d 258 (Ind. 1999)

The respondent, Steven C. Litz, defended a woman accused of neglect of a dependent. While a retrial of that case proceeded, the respondent caused to be published in several newspapers a letter which stated his client had committed no crime, criticized the prosecutor's decision to retry the case, and mentioned that his client had passed a lie detector test. For that, we find today that the respondent violated Ind. Professional Conduct Rule 3.6(a), which forbids attorneys from making extrajudicial statements which they know or reasonably should have known a substantial likelihood of materially prejudicing an adjudicative proceeding.

This case is now before us for approval of a *Statement of Circumstances and Conditional Agreement for Discipline* reached by the parties in resolution of this matter pursuant to Ind. Admission and Discipline Rule 23 & 11(c). Our jurisdiction here is a result of the respondent's admission to this state's bar on October 12, 1984.

The parties agree that the respondent represented a client in criminal proceeding in Morgan County in which a jury found the client guilty of neglect of a dependent resulting in serious bodily injury. The respondent represented the client in the appeal of her conviction and succeeded in obtaining a reversal of the conviction from the Indiana Court of Appeals. The Court of Appeals remanded the case to the trial court, finding that the lower court erred in determining that evidence of "battered women's syndrome" was irrelevant and inadmissible in the first trial.

After remand on June 2, 1997, the trial court set the matter for a new jury trial on November 3, 1997. On June 25, 1997, a "Letter to the Editor" written and submitted by the respondent appeared in the Bloomington, Indiana *Herald-Times* and the Mooresville, Indiana *Times*. An identical letter from the respondent appeared in the June 26, 1997, edition of the *Indianapolis Star*. The respondent's letter stated this his client had spent the "last 18 months in jail for a crime she did not commit" and revealed that she had passed a lie detector test. The letter also decried the de-

cision to retry his client, characterizing it as "abominable." On September 29, 1997, the respondent, on behalf of the client, filed a *Motion for Change of Venue* from Morgan County, citing "prejudicial pre-trial publicity." The court granted the motion.

Indiana Professional Conduct Rule 3.6(a) provides:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Indiana Professional Conduct Rule 3.6(b) provides that certain types of extrajudicial [sic] statements referred to in subsection (a) are "rebuttably presumed" to have a substantial likelihood of materially prejudicing an adjudicative proceeding, including the results of any examination or test, any opinion as to the guilt or innocence of a defendant in a criminal case that could result in incarceration, or information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial.

Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. The respondent's letters to area newspapers created a substantial likelihood of material prejudice to the pending jury retrial of the respondent's own client. Some of the statements contained therein presumptively presented that risk: his description of evidence that could have been inadmissible at trial (i.e., the fact and result of the lie detector test), and his opinion that his client did not commit the crime for which she was charged. Further, the respondent's identification of the prosecution's decision to retry the case as "abominable," despite the fact that retrial of the case was well within the prosecutor's discretion, tended to contribute to a pre-trial atmosphere prejudicial to the prosecution's case. In sum, the respondent's letters created an environment where a fair trial was much less likely to occur. Additionally, the respondent effectively set the stage for his own subsequent motion for change of venue based on prejudicial pre-trial publicity. Accordingly, we find that the respondent's published commentary created a substantial likelihood of materially prejudicing retrial of his client's criminal case, and thus violated Prof. Cond. R. 3.6(a).

The parties agree that the appropriate sanction for the misconduct is a public reprimand. Among the factors we consider in assessing the adequacy of that proposed sanction are aggravating and mitigating circumstances. In mitigation, the parties agree that the respondent has not previously been the subject of a disciplinary proceeding, that he cooperated with the Commission, and that he continued to represent the client through the resolution of her case. No factors in aggravation were cited.

We view the respondent's actions as a purposeful attempt to gain an unfair advantage in retrial of his client's case. Although the respondent had no real selfish motive (and instead apparently sought only to advocate zealously his client's cause), he nonetheless was bound to do so only within the bounds of our ethical rules. His public comments were inappropriate because they threatened or in fact impinged the prospect of a fair trial for his client. Whether extrajudicial statements of this sort warrant reprimand or suspension is fact sensitive. Here, we take into account the fact that the respondent's primary motivation appears to have been the welfare of his client. We are also cognizant while assessing the proposed sanction of our policy of encouraging agreed resolution of disciplinary cases. We find that, in this case, the agreed sanction of a public reprimand is appropriate.

2. Prosecutorial Misconduct

Model Rules of Professional 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.

[7] 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.

[8] 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.

[9] 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.

ABA Criminal Justice Standards for the Prosecution Function (2017)

<class="legal-code">

Standard 3-1.2: Functions and Duties 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.

Standard 3-1.3: The Client of the Prosecutor

The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor's clients. The public's interests and views should be determined by the chief prosecutor and designated assistants in the jurisdiction.

Standard 3-1.4: The Prosecutor's Heightened Duty of Candor

(a) In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations. However, the prosecutor should be circumspect in publicly commenting on specific cases or aspects of the business of the office.

(b) The prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes. In addition, while seeking to accommodate legitimate confidentiality, safety or security concerns, a prosecutor should correct a prosecutor's representation of material fact or law that the prosecutor reasonably believes is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder.

(c) The prosecutor should disclose to a court legal authority in the controlling jurisdiction known to the prosecutor to be directly adverse to the prosecution's position and not disclosed by others.

Standard 3-1.6: Improper Bias Prohibited

(a) The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. A prosecutor should not use other improper considerations, such as partisan or political or personal

considerations, in exercising prosecutorial discretion. A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority.

(b) A prosecutor's office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work. A prosecutor's office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the prosecutor's jurisdiction, and eliminate those impacts that cannot be properly justified.

Standard 3-1.12: Duty to Report and Respond to Prosecutorial Misconduct

(a) The prosecutor's office should adopt policies to address allegations of professional misconduct, including violations of law, by prosecutors. At a minimum such policies should require internal reporting of reasonably suspected misconduct to supervisory staff within the office, and authorize supervisory staff to quickly address the allegations. Investigations of allegations of professional misconduct within the prosecutor's office should be handled in an independent and conflict-free manner.

(b) When a prosecutor reasonably believes that another person associated with the prosecutor's office intends or is about to engage in misconduct, the prosecutor should attempt to dissuade the person. If such attempt fails or is not possible, and the prosecutor reasonably believes that misconduct is ongoing, will occur, or has occurred, the prosecutor should promptly refer the matter to higher authority in the prosecutor's office including, if warranted by the seriousness of the matter, to the chief prosecutor.

(c) If, despite the prosecutor's efforts in accordance with sections (a) and (b) above, the chief prosecutor permits, fails to address, or insists upon an action or omission that is clearly a violation of law, the prosecutor should take further remedial action, including revealing information necessary to address, remedy, or prevent the violation to appropriate judicial, regulatory, or other government officials not in the prosecutor's office.

Berger v. United States, 295 U.S. 78 (1935)

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner was indicted in a federal district court charged with having conspired with seven other persons named in the indictment to utter counterfeit notes purporting to be issued by designated federal reserve banks, with knowledge that they had been counterfeited. The indictment contained eight additional counts alleging substantive offenses. Among the persons named in the indictment were Katz, Rice and Jones. Rice and Jones were convicted by the jury upon two of the substantive counts and the conspiracy count. Petitioner was convicted upon the conspiracy count only. Katz pleaded guilty to the conspiracy count, and testified for the government upon an arrangement that a *nolle prosequi* as to the substantive counts would be entered. It is not necessary now to refer to the evidence further than to say that it tended to establish not a single conspiracy as

charged but two conspiracies — one between Rice and Katz and another between Berger, Jones and Katz. The only connecting link between the two was that Katz was in both conspiracies and the same counterfeit money had to do with both. There was no evidence that Berger was a party to the conspiracy between Rice and Katz. During the trial, the United States attorney who prosecuted the case for the government was guilty of misconduct, both in connection with his cross-examination of witnesses and in his argument to the jury.

That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner. [...] The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.

The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury. A reading of the entire argument is necessary to an appreciation of these objectionable features. The following is an illustration: A witness by the name of Goldie Goldstein had been called by the prosecution to identify the petitioner. She apparently had difficulty in doing so. The prosecuting attorney, in the course of his argument, said:

> Mrs. Goldie Goldstein takes the stand. She says she knows Jones, and you can bet your bottom dollar she knew Berger. She stood right where I am now and looked at him and was afraid to go over there, and when I waved my arm everybody started to holler, 'Don't point at him.' You know the rules of law. Well, it is the most complicated game in the world. I was examining a woman that I knew knew Berger and could identify him, she was standing right here looking at him, and I couldn't say, 'Isn't that the man?' Now, imagine that! But that is the rules of the game, and I have to play within those rules.

The jury was thus invited to conclude that the witness Goldstein knew Berger well but pretended otherwise; and that this was within the personal knowledge of the prosecuting attorney.

Again, at another point in his argument, after suggesting that defendants' counsel had the advantage of being able to charge the district attorney with being unfair "of trying to twist a witness," he said:

> But, oh, they can twist the questions, . . . they can sit up in their offices and devise ways to pass counterfeit money; 'but don't let the Government touch me, that is unfair; please leave my client alone.'

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak — depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.

In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt "overwhelming," a different conclusion might be reached. Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded.

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.

II.

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. *Imbler v. Pachtman*, 424 U.S. 409 (1976), 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 "quasi-judicial" 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.

III.

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. 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.

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.

On April 22, 2003, the ODC filed one count of formal charges against respondent, alleging that he violated Rules 3.8(d) and 8.4(a) 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. 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.

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.

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.

Hillman v. Nueces County, 579 S.W.3d 354 (Tex. 2019)

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 due-process 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 wrongful-termination 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.* [5]

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

5 (n.1 in opinion) Charles de Secondat, Baron de Montesquieu, *Considerations on the Causes of the Greatness of the Romans and Their Decline* 130 (David Lowenthal trans., Hackett Pub. Co., 1999) (1965).

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.[6]

6 (n.9 in opinion) Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963).

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. [7]

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

7 (n.18 in opinion) Rigoberta Menchú Tum, *The Plague of Corruption: Overcoming Impunity and Injustice*, in GLOBAL CORRUPTION REPORT 2001, at 155 (Robin Hodess, Jessie Banfield & Toby Wolfe eds., Transparency Int'l 2001).

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.