

PERJURY BY THE CRIMINAL DEFENDANT: THE RESPONSES OF LAWYERS IN AUSTRALIA AND THE UNITED STATES

PETER W TAGUE*

His credibility rent on cross-examination, a criminal defendant admits to his defence lawyer having lied in answering questions on direct examination. A second defendant, though innocent, insists in conference that while testifying he will lie in denying being near the scene of a robbery, from concern that that admission would circumstantially buttress the victim's erroneous identification of him. A third defendant's instructions are so risible that the lawyer, were she a juror, would urge the others to convict without discussion.¹

Fear of conviction and sanction will impel many defendants, guilty or innocent, to believe they must testify, and lie in doing so. As with the third defendant, most will hide that intent from their lawyers, from the added fear of reducing the advocate's interest and effectiveness in defending.

With defendants like these three, how do lawyers in Australia and the United States respond?² Answering that question, at least with the first two defendants, illustrates how difficult the choice is, for American lawyers generally reject the Australian response, but are themselves divided over what to do. In turn, these various responses reveal differences in the model of advocacy adopted by lawyers in both countries.

I INTRODUCTION

Lawyers in the two countries respond to the first two defendants in one of four ways. A summary is useful before the critique of each in Parts IV and V.

* Professor of Law, Georgetown University Law Center, Washington, DC.

1 See, eg, *McCoy v Louisiana*, 138 S Ct 1500 (La, 2018): a reversible error for the defence lawyer, spurred by the hope of avoiding the death penalty, to refuse to adopt the defendant's preposterous defence.

2 'Lawyer' is an omnibus term for legal practitioners in both countries. In non-fused states in Australia, 'lawyers' practice as barristers, solicitors or amalgams. 'Lawyer' will denote every practitioner representing criminal defendants unless a particular issue engages a barrister or solicitor.

If the first defendant ('Defendant One') refuses to recant, Australian lawyers withdraw, without revealing the reason to the court.³ That choice is puzzling, for it virtually guarantees that this defendant can lie with impunity. That response therefore clashes with the Australian lawyers' avowal to elevate their duty to the court over their duty to the client when, as here, those duties conflict, perhaps as dramatically as anywhere in criminal defence.⁴

Indeed, were Australian lawyers serious about that ordering of their duties, rather than withdraw, they would volunteer to testify for the prosecution if the defendant refused to disclaim his lies or,⁵ having withdrawn, follow the trial to be sure the defendant did not lie and, if he did, again volunteer to testify. If that solution is audacious, should they not adopt the current position of the American Bar Association ('ABA'), one that orders lawyers in the United States ('US') to 'remedy' the defendant's lie by revealing to the court, if necessary, that the defendant has committed perjury or intends to do so?⁶

Turning to the second defendant ('Defendant Two'), the Australian approach is unclear. By its language the rule governing the first defendant does not apply, even as one commentator,⁷ overlooking that absence, expects lawyers to withdraw here, too. But another rule, applicable to solicitors, might apply. Breathtakingly broad, it authorises solicitors to disclose the client's confidential information for the 'purpose of avoiding the probable commission of a serious criminal offence'.⁸ This rule is both more and less extreme than the ABA's solution: more so in having a lesser burden of proof in anticipating perjury,⁹ less so in authorising rather than requiring solicitors to disclose. Squaring this authority to disclose a defendant's intent to lie with the prohibition on disclosing his having lied will

3 See Australian Bar Association, *Barristers' Conduct Rules* (at 1 February 2010) r 78(a) ('*Barristers' Conduct Rules*'); Law Council of Australia, *Australian Solicitors' Conduct Rules* (at 24 August 2015) r 20.1.5 ('*Australian Solicitors' Conduct Rules*').

4 *Barristers' Conduct Rules* (n 3) r 25: '[a] barrister has an overriding duty to the [c]ourt to act with independence in the interests of the administration of justice'. See also *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 15 [26] (Gleeson CJ, Gummow, Hayne and Heydon JJ): 'the duty to the court is paramount'.

5 See *Nix v Whiteside*, 475 US 157, 158 (Burger CJ for Burger CJ, White, Powell, Rehnquist and O'Connor JJ) (1986) ('*Whiteside*'): the lawyer warned the defendant he would 'impeach' him if the defendant testified in a way the lawyer thought was false. In the appeals process following the defendant's conviction for murder, that lawyer was never asked to explain if he intended to try to testify on behalf of the prosecution to counter the defendant's false testimony: see below n 45 and accompanying text.

6 See American Bar Association, *Model Rules of Professional Conduct* (at 2016) r 3.3(a)(3) ('*Model Rules*'). While suggesting that withdrawal might be a remedy, the ABA concedes that only disclosure will work: see Standing Committee on Ethics and Professional Responsibility, American Bar Association, *Lawyer's Responsibility with Relation to Client Perjury* (Formal Opinion No 87-353, 20 April 1987) ('Formal Opinion 87-353'). Of course, disclosure will almost surely force the lawyer to withdraw if required to testify against the defendant or at least to identify, perhaps in an in-camera hearing, the locus of the lie(s) and the reasons the lawyer knows the defendant has lied or will lie: see below Part V(A)(2)(b).

7 See Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (LexisNexis Butterworths, 6th ed, 2014) 542 [15.8].

8 *Australian Solicitors' Conduct Rules* (n 3) r 9.2.4.

9 See below nn 23-4.

require attention.¹⁰

With ambiguous conditions triggering this permission to disclose,¹¹ it is perhaps not surprising that, at least with our defendants, there seems to be no recorded instance when a solicitor has informed — informed who, the police or the court? — that the defendant will ‘probably’ commit a ‘serious criminal offence’ (perjury). The ambiguity of this rule’s application suggests that Australian lawyers are apt to respond by withdrawing, adopting the same response as with Defendant One.

With the third defendant (‘Defendant Three’), the Australian solicitors’ rule authorising disclosure is so broad that it might apply here as well.¹² Here too the solicitor-advocate might withdraw. Though tempted to withdraw to avoid a farcical trial, lawyers in both countries are nonetheless schooled to execute this defendant’s instructions,¹³ hoping onlookers will stifle laughter at the attempt to make those instructions credible.

American lawyers are bedevilled by the first two defendants. Over the last fifty years,¹⁴ they have heatedly debated how to respond to the criminal defendant’s actual or anticipated perjury. As befitting the most contentious and thoroughly discussed issue involving professional ethics in criminal defence,¹⁵ alternatives other than the ABA’s position have their adherents.

The most controversial alternative is the opposite of the ABA’s: the lawyer calls the defendant to give evidence, questions him in the normal way, and treats his false answers as if they were true in arguing to the jury that it should acquit.¹⁶ This daring choice inverts the Australian lawyer’s ordering of duties, criminal defendant over court. The defendant commits a crime (perjury),¹⁷ and the lawyer may commit one as well.¹⁸ As the antithesis of the search for truth, Australian

10 For more, see below Part V(A)(3)(b).

11 How are ‘probable’ and ‘serious’ defined? The *Australian Solicitors’ Conduct Rules* (n 3), with neither examples nor commentary, are difficult to interpret, at least to one from another country. By contrast, the ABA includes extensive, and very helpful, commentary about its *Model Rules* (n 6).

12 *Australian Solicitors’ Conduct Rules* (n 3) r 9.2.4.

13 See above n 1.

14 What to do with Defendant One and Defendant Two erupted as an issue with the publication of one of the most provocative articles over the lawyers’ professional ethics: see Monroe H Freedman, ‘Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions’ (1966) 64(8) *Michigan Law Review* 1469.

15 See Deborah L Rhode and David Luban, *Legal Ethics* (Foundation Press, 4th ed, 2004) 324: ‘[n]o issue in legal ethics has attracted greater attention than the problem of perjury by criminal defendants’. For one list of citations to the voluminous literature, see Stephen Gillers, *Regulation of Lawyers* (Aspen Publishers, 8th ed, 2009) 400. (With both volumes, later editions have been published, but they do not include the matter cited.)

16 This position, proposed by Freedman (n 14) 1475, catalysed debate.

17 Perjury is a crime in both countries: see *Crimes Act 1900* (NSW) s 327; *Crimes Act 1958* (Vic) s 314; 18 USC § 1621 (2012).

18 It is a crime intentionally to aid another to commit a crime (here, perjury): see NY Penal Law § 20.00 (McKinney 2005).

lawyers would never adopt this choice — one also uniformly rejected by courts¹⁹ and denounced by many commentators,²⁰ in the US.

American lawyers have a third response, one that might be more attractive to Australian lawyers as an attempt to bridge the lawyer's competing duties to the court and the client. Called the narrative approach, the defendant testifies, but with only minimal help from the lawyer, who then ignores that testimony in arguing to the jury that the evidence of guilt is insufficient to convict.²¹

Australian professional organisations appear never to have publicly defended their solution, withdrawal alone. Nor have they evaluated the incandescent discussion among American lawyers over what the response should be.

The Americans' three solutions are not unknown in Australia.²² But the discussion of them has been superficial, not addressing the benefits and costs of each. A fresh and sympathetic evaluation of them might prompt Australian lawyers to reassess withdrawal. A reassessment is warranted because, when scored by the values of preventing the defendant from lying (or benefitting from lying), protecting the integrity of the trial, and of conserving judicial resources, withdrawal by itself is arguably next to the worst, if not the worst, of the four solutions.

To presage the conclusion, however, this problem is intractable for having no obviously superior solution. In the end, Australian lawyers will stick with withdrawal because it can be defended by their role and because its deficiencies can be hidden from public view.

Before reaching that unexciting conclusion, after having examined the four solutions in Parts IV and V, we address, in Part II, what might appear to be a diversion. But rather than straying from our topic — the response to the defendant's perjury — the subject of Part II involves the threshold question that deserves more than the cursory consideration possible. What condition triggers the lawyer's obligation to respond to the defendant's perjury? How lawyers in the two countries answer that question could render our subject practically unimportant if nonetheless conceptually vital in understanding the models of advocacy adopted in each country.

II TAKING INSTRUCTIONS, BRIEFLY CONSIDERED

Before evaluating the four solutions, it is useful to identify the condition that triggers the lawyer's responsibility to choose one of them. The respective rules

19 See, eg, *People v Johnson*, 72 Cal Rptr 2d 805 (Ct App, 1998) (*'People v Johnson'*).

20 See, eg, Warren E Burger, 'Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint' (1966) 5(1) *American Criminal Law Quarterly* 11, 12, branding Freedman's solution as 'pernicious' and 'utterly absurd'. For those who espouse it, see below n 146.

21 For discussion, see below Part V(C).

22 See Ross (n 7) 543–6 [15.11]–[15.18].

in the two countries suggest that lawyers in the US will confront or seek to avoid this vexing problem of defendant perjury more often than their counterparts in Australia.

Lawyers in Australia must respond upon ‘learn[ing]’, from ‘information provided by the client’, that he ‘has lied’ ‘during a hearing’.²³ American lawyers must respond once they ‘know’ the defendant intends to lie or has lied while giving evidence.²⁴

As written, the Australian rule is curious in its limited application to the defendant’s post-testimonial disclosure. First, unless shameless or naive, how often will defendants admit having lied, no matter how thoroughly their credibility was destroyed during cross-examination?

Second, that limit ignores the settings that beset lawyers in the US and in Australia, too. Before testifying, the defendant — our Defendant Two — reveals that he intends to lie or, more guardedly, retracts a damaging admission, or embellishes or claims to remember a helpful point without explicitly admitting that the new position is false. Those changes commonly occur after the lawyer has informed the defendant of previously unknown incriminating evidence or has offered a devastating assessment of the defendant’s chance of acquittal given his instructions.

As the representation begins, there are two ways for lawyers to avoid their respective triggering conditions, one blunt, the other more disguised.

The blunter way is for the lawyer to warn the defendant that if he intends to lie, he must not admit he will. As explanation, the lawyer indicates that such an admission could harm the defendant by forcing the lawyer to adopt whichever of the three solutions²⁵ (withdrawal, etc) the lawyer’s jurisdiction has chosen.

This candid warning has the benefit of letting the representation proceed, the lawyer unhindered by the moral distaste in representing a lying defendant and by the legal demand to choose one of the three solutions.

It otherwise invites the client to lie, or at least to understand that, if later he decides he must lie, he can do so without censure or consequences from the lawyer. To the extent we want clients to believe their lawyers embody moral integrity, such advice will weaken if not destroy the basis for that belief. Told that the lawyer is no bulwark against committing perjury, that advice might even embolden defendants to seek other illegal ways of preventing a conviction (by, for example, intimidating witnesses or persuading others to provide a false alibi).

23 *Barristers’ Conduct Rules* (n 3) r 78; *Australian Solicitors’ Conduct Rules* (n 3) r 20.1.

24 *Model Rules* (n 6) r 3.3(a)(3): ‘offer evidence that the lawyer knows to be false’.

25 This warning is not relevant if the lawyer will treat the defendant’s perjury as the truth.

Moreover, that candid advice may not insulate the lawyer from the perjury problem. For, in taking instructions or in conference, the defendant might admit something that could compromise the lawyer. In hope of preventing the perjury problem from erupting, then, the lawyer may at the outset need to expand the warning from not admitting lying to not disclosing any information that could curb the lawyer's ability to defend in challenging the prosecution's evidence or in adducing evidence. But that expansion creates a separate problem: misunderstanding something's significance, the defendant might hide information of legitimate use in defending.²⁶

That last point provides a segue to the more disguised ways of avoiding the perjury problem, those involved in taking instructions.

Recall that by focusing on Defendant One the Australian rule ignores the pre-trial stage when the issue of perjury is more likely to emerge.

Ignoring the process of taking instructions from Defendant Two and of preparing that defendant to testify is fitting for barristers in England, from whom Australian lawyers adopted their rule of withdrawing (with Defendant One).²⁷ Barristers in England rarely confer with defendants much before the trial. Their role is to present the defendant's instructions, prepared exclusively by the solicitor. They are accordingly not likely to learn of the defendant's prevarications until he testifies. And the solicitor in England can hide the defendant's shifting positions in the final instructions prepared for the advocating barrister.²⁸ In Australia, however, lawyers — even barristers in non-fused states — do not escape the possibility that the defendant forms the intent to lie as they learn the defendant's story.

When in that first instance Defendant Two reveals he wants to give evidence and to lie in doing so, let us assume that lawyers in Australia will withdraw, treating the defendant's insistence on lying as the equivalent of having lied.²⁹ But what if, instead of revealing an intent to lie, the defendant suspiciously shifts his story, in

26 The ABA's Criminal Justice Section once expected lawyers deftly to explain to a defendant the jurisdiction's 'limit[s upon] confidentiality' (code for disclosing perjury, per *Model Rules* (n 6) r 3.3(a)(3)) without giving the 'impression' that the defendant 'must or should conceal facts so as to afford counsel the opportunity to take some action counsel would be precluded from taking if counsel knew such facts': American Bar Association, *ABA Standards for Criminal Justice: Prosecution and Defense Function* (3rd ed, 1993) standard 4-3.1 cmt. The comment offered no examples to imbue lawyers with the Solomon-like acumen needed both to warn against candour but to encourage it. In the current, fourth edition (2015) the standard remains the same but the ABA has not yet included commentary. Hence, we do not know whether the ABA will sensibly delete reference to either way of interviewing the defendant. See American Bar Association, *ABA Standards for Criminal Justice: Defense Function* (4th ed, 2015).

27 In 1961 the Law Society of South Australia asked the Bar of England and Wales for advice on what to do if a client admitted having committed perjury before judgment was announced. The Bar of England and Wales advised that 'counsel' ought not to inform the court but that '[h]e would be well advised to terminate his connection' with the client immediately: General Council of the Bar, *Annual Statement of the General Council of the Bar* (1961) 26.

28 See especially Peter W Tague, *Effective Advocacy for the Criminal Defendant: The Barrister vs the Lawyer* (William S Hein, 1996) 42–3.

29 See Ross (n 7) 543.

the ways described above? The Australian lawyer's response turns on whether the defendant's instructions are regarded as carved in stone or traced on sand. More precisely, may the defendant change his instructions, perhaps repeatedly, so long as he insists the new ones are truthful?

As the defendant alters his position, the punctilious Australian lawyer may opt to withdraw, finding distasteful a lying defendant who denies lying. But the Australian rule invites lawyers to let the defendant change his instructions. Recall the rule's condition: the lawyer must '[learn]' from 'the client' that he 'has lied' (or, assume, intends to lie).³⁰ Unless the defendant speaks that talismanic statement — 'I am lying and intend to lie while giving evidence' — the rule seems not to require the lawyer to choose one of the four solutions.

A narrow interpretation of 'learning' is supported by case law suggesting that Australian lawyers are not expected to be overly scrupulous in judging the defendant's honesty. In one case, for example, the defendant's effort to shift responsibility to others was thwarted by evidence the prosecution offered during the trial.³¹ The defendant's lawyers responded by advising him to plead guilty, for they would withdraw if he changed his instructions to offer an innocent explanation for an otherwise incriminating fact.³² The defendant's conviction was reversed on appeal when he claimed that his lawyers had refused to accept his reversal of position earlier in the trial.³³ Because his lawyers did not know that his contradiction was false, their problem was not ethical, but instead tactical in the sense of finding a way to persuade the jury to accept a new defence that negated the original one.³⁴

Nonetheless, to avoid the conundrum created by 'learning' from the defendant of his intent to lie while giving evidence, Australian lawyers may be tempted to employ wiles in taking instructions to avoid that triggering condition. More often than Australian lawyers, their American counterparts have discussed the subtle ways of interviewing defendants to avoid learning some fact or to steer

30 See above n 23.

31 *R v Nerbas* [2012] 1 Qd R 362, 375 [53] (McMurdo J) ('*Nerbas*'), using 'know' rather than 'learn'. The defendant rented an office to which drugs, hidden in computer monitors, were sent. He had first claimed that a co-defendant had used the computers to search the internet in an incriminating way. When at trial the prosecution produced evidence nullifying that attempt to shift responsibility, his advocates refused to accept his claim to have searched the internet himself, but for an innocent purpose. Effectively abandoned by his advocates during the trial, the defendant pleaded guilty, a plea reversed on appeal.

32 *Ibid* 371 [34]–[35], 375 [52].

33 *Ibid* 376 [57].

34 *Ibid* 375 [53].

the defendant to tell the only story that could be defended.³⁵ One small study in Australia does suggest, however, that Australian lawyers are not inoculated against using ploys to avoid learning of the defendant's interest in lying while testifying.³⁶

The plight of one barrister will deter other Australian lawyers from providing excessive help to defendants searching for a not-guilty story.³⁷ In an interview, after the defendant admitted guilty to being present at the crime scene, his barrister (Punch) advised him that the only way to defend was to contest his identification.³⁸ In giving evidence at his trial, the defendant lied in claiming to be elsewhere, and Punch then called four witnesses who falsely provided an alibi.³⁹ Acquitted of the initial charge (robbery), the defendant later, and separately, pleaded guilty to perjury.⁴⁰ Struck from the rolls, Punch's defence to wrongdoing was disingenuous.⁴¹

One American solution is to let Punch's defendant commit perjury. *New South Wales Bar Association v Punch* ('Punch No 1')⁴² and *New South Wales Bar Association v Punch [No 3]* ('Punch No 3')⁴³ suggest that that choice will never be adopted officially by lawyers in Australia, and would be perilous for a lawyer covertly to adopt in a given case. Nonetheless, American supporters of this choice would try to distinguish *Punch No 1* and *Punch No 3* by claiming that that

35 See Richard C Wydick, 'The Ethics of Witness Coaching' (1995) 17(1) *Cardozo Law Review* 1. In our abbreviated review of taking instructions, one oft-discussed, troubling example must suffice. Is it proper to educate the defendant about the law before asking him to provide facts? Doing so obviously alerts the defendant to fashion the 'facts' to fit the defence. But is not the defendant entitled to know the law before providing instructions? For the iconic description of the 'lecture', see Robert Traver, *Anatomy of a Murder* (St Martin's Press, 1958) 45–8: in that novel, the defence lawyer told the defendant that the only defence was insanity, but did not describe its components. The defendant responded by providing the (false) facts needed to support it. The 'lecture' is not unknown in Australia: condemned by one, see Justice G N Williams, *Harrison's Law and Conduct of the Legal Profession in Queensland* (Lawyers Bookshop Press, 2nd ed, 1984) 36; but found 'instructive' by another, see Justice Sheppard, 'Communications with Witnesses before and during Their Evidence' (1987) 3(1) *Australian Bar Review* 28, 33. The Australian prohibition on 'rehears[ing] ... or coach[ing]' witnesses about 'their evidence', D A Ipp, 'Lawyers' Duties to the Court' (1998) 114 (January) *Law Quarterly Review* 63, 92, is aimed at a different practice, one adopted by American lawyers but too far afield from our central topic (perjury) to warrant discussion.

36 See Ben Clarke, 'An Ethics Survey of Australian Criminal Law Practitioners' (2003) 27(3) *Criminal Law Journal* 142. Clarke reports that 70% of his 20 respondents thought it was proper to stop a defendant from telling them "'exactly what happened'" and 15% admitted having 'coached a witness ... to suggest testimony which would assist their client's case': at 147–8. Regrettably, Clarke apparently did not ask whether the lawyers thought the testimony 'suggest[ed]' was true, false or unclear: at 147. Note that those lawyers would coach witnesses, not simply the defendant.

37 See *New South Wales Bar Association v Punch* [2008] NSWADT 78 ('Punch No 1'); *New South Wales Bar Association v Punch [No 3]* [2008] NSWADT 146 ('Punch No 3').

38 *Punch No 1* (n 37) [18], [26].

39 *Ibid* [2].

40 *Ibid* [34].

41 See *Punch No 3* (n 37). In the disciplinary hearing Punch's lawyer claimed that the defendant must have changed his instructions, thus allowing Punch to call him and the alibi witnesses to give evidence: *Punch No 1* (n 37) [36]–[39]. That claim was not substantiated: Punch did not testify nor did he call the defendant.

42 *Punch No 1* (n 37).

43 *Punch No 3* (n 37).

barrister's real error was calling the alibi witnesses. On this view, the defendant is treated uniquely: he may lie, but to call lying witnesses to support the defendant's perjury, as Punch did, is intolerable.

If Punch went too far even for American proponents of that most extreme pro-defendant approach, it is nonetheless likely that American lawyers may be more tempted than Australians to use questionable means to obtain instructions. That is so because their obligation to respond arises in more settings. American lawyers must not knowingly present false evidence (here, the defendant's perjury). But knowledge is not limited to the defendant's admission, as is arguably so with learning from the defendant, of an intent to lie. Knowledge 'may be inferred from circumstances'.⁴⁴ Despite uncertainties over that test,⁴⁵ American lawyers may not escape the need to respond when the defendant insists that his new instructions are honest (as *R v Nerbas* says is so in Australia).⁴⁶

In ending our brief discussion of taking instructions, one American case must suffice to illustrate the difference between 'knowing' and 'learning'.⁴⁷ In claiming self-defence, the defendant first told his lawyer he knifed the deceased when the latter pulled a 'pistol' from behind a pillow while lying on a bed.⁴⁸ Because no gun was found by the police, the lawyer tried to persuade the defendant that self-defence remained viable so long as his fear was reasonable (which it was). The defendant then conceded that he saw no weapon. Shortly before trial, however, the defendant switched again, now insisting that he had seen 'something metallic' in the deceased's hand.⁴⁹ He added that his defence was 'dead' if the jury did not think the deceased was armed.⁵⁰ The lawyer thought this new, intermediate position was false, and threatened to withdraw and to 'impeach' the defendant if he expressed it while testifying.⁵¹ At trial, the defendant testified as the lawyer demanded: he feared being killed, thought the deceased was armed, but saw nothing in the deceased's hand. During the post-conviction process,⁵² all courts

44 *Model Rules* (n 6) r 1.0(f).

45 What level of confidence warrants inferential 'knowledge'? For the many ways courts have answered that question, see *Commonwealth v Mitchell*, 781 NE 2d 1237, 1246–7 [1] (Greaney J for the Court) (Mass, 2003) ('*Mitchell*'), quoting *Shockley v State*, 565 A 2d 1373, 1379 [5] (Horsey J for the Court) (Del, 1989) ('beyond a reasonable doubt'), *State v Hischke*, 639 NW 2d 6, 10 [13] (Streit J) (Iowa, 2002) ('good cause to believe'), *Sanborn v State*, 474 So 2d 309, 313 n 2 (Nesbitt DCJ) (D Fla Ct App, 1985) ('compelling support'), *United States ex rel Wilcox v Johnson*, 555 F 2d 115, 122 [5–7] (Forman J for the Court) (3rd Cir, 1977) ('firm factual basis') and *People v Barte*, 566 NE 2d 855, 857 (McLaren J for the Court) (Ill, 1991) ('good-faith determination').

46 *Nerbas* (n 31) 375 [53] (McMurdo J).

47 See *Whiteside* (n 5): this is the only case decided by the US Supreme Court in our area of the lawyer's responsibility with the defendant's suspected perjury.

48 *Ibid* 160 (Burger CJ for Burger CJ, White, Powell, Rehnquist and O'Connor JJ).

49 *Ibid* 161.

50 *Ibid*.

51 *Ibid* 173 n 7.

52 On appeal the issue was whether the lawyer's bullying denied the defendant the constitutional right to effective representation. In rejecting that claim, the Supreme Court held that defendants have no right to commit perjury, and thus to testify as *Whiteside* had wanted to do.

accepted that the lawyer ‘knew’ the defendant’s first and third positions were false,⁵³ even as the defendant had stoutly claimed otherwise. Although no court explained that conclusion, the defendant’s belief that a no-gun defence would fail exposed a motive to lie.

Together with their respective rules (‘knowing’ versus ‘learning’), *Nix v Whiteside* suggests that American lawyers must choose a response to client perjury in more settings than most Australian lawyers.⁵⁴ Confirming that prediction would, of course, require an empirical study of how lawyers in Australia react when the defendant shifts his story. But to return to our simile, the defendant Whiteside would probably be treated differently by an Australian lawyer.

If the defendant’s instructions are regarded as carved in stone, the Australian lawyer would accept Whiteside’s initial claim to have seen a pistol, even if the other evidence belied that claim.⁵⁵ If instead they are treated as if traced in sand, the Australian lawyer would present Whiteside’s third version, so long as he insisted that what he now says is accurate or his best memory.

Assume that, as with Defendant Two, the lawyer has not been adroit in structuring the conferences or the defendant has inadvertently revealed an intent to lie while testifying. With both Defendant One and Defendant Two, the lawyer must now choose one of the four responses. Part IV discusses the Australian lawyer’s choice, withdrawal without more. Part V addresses the three American solutions, first those on the extremes — remedying perjury, the ABA’s requirement, or treating the defendant’s perjury as if it were the truth — followed by the narrative approach.

Before turning to those defendants, Part III considers, briefly, how lawyers approach Defendant Three.

III THE ABSURD DEFENCE

We have rather ignored the Defendant Three mentioned in the introduction — the one who insists his ludicrous instructions are true — because defending him involves a question of tactics (and of saving face) for the lawyer rather than of ethics. Lawyers in both countries will probably react in the same way, initially by explaining to Defendant Three why his instructions are unpersuasive and then, when that effort fails, by warning him that punishment following conviction at

53 *Whiteside* (n 5) 161 (Burger CJ for Burger CJ, White, Powell, Rehnquist and O’Connor JJ).

54 *Whiteside* (n 5).

55 Note an important forensic implication. Whiteside’s lawyer’s aim was different from the usual problem with a defendant’s perjury. The lawyer tried to persuade Whiteside that telling the truth would be more effective than lying. If Australian lawyers do not aggressively challenge a defendant’s dubious instructions, then, ironically, an innocent or not-provably guilty defendant might be convicted more readily because he is not persuaded that the truth provides a better defence than his current lie.

trial is likely to be much more severe than following a guilty plea. That last point particularly distresses American lawyers, for a guilty plea may be the only way to limit what otherwise could be a shockingly long sentence to prison.⁵⁶ American lawyers often resort to any device — cajolery, threats, anything — to persuade such a defendant to bargain to plead guilty to lesser charges or for a certain punishment.⁵⁷

Despite the lawyer's view that contesting guilt is folly, this defendant, no less than those who profess to be innocent, has the right to force the prosecution to prove guilt at trial. When a trial ensues, lawyers learn how skilful they are, even if the best they can do is to avoid kindling merriment among onlookers.

Occasionally, to the defending lawyer's surprise, a juror or two, persuaded that the unimaginable cannot be eliminated, vote to acquit, and the jury hangs. That outcome — a mistrial — is the defending lawyer's aim, in hope that the prosecution will not reinstate the charges or, to rid itself of the cost of a retrial, will let the defendant plead guilty to an outcome he will accept.

In defending Defendant Three, the lawyer confronts an ethical question only if tempted to help him massage his instructions to make them somewhat more credible. That question was addressed, too summarily, in Part II: recall what happened to the barrister Punch.

We turn to the first and second defendants, those who admit having lied or express an intent to lie.

IV PERJURY: THE AUSTRALIAN LAWYERS' RESPONSE

A *Avoiding the Problem of Choosing a Response*

If a defendant who reveals an intent to lie while giving evidence has also admitted guilt, Australian lawyers may escape the need to choose a response to the expected perjury. A separate rule forbids them from 'set[ting] up an affirmative case inconsistent with the [defendant's] confession'.⁵⁸ False testimony by such a defendant would obviously violate that prohibition.

By explaining that limitation on their advocacy, Australian lawyers might

56 As but one of countless examples, see District Judge Robert J Conrad Jr and Katy L Clements, 'The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges' (2018) 86(1) *George Washington Law Review* 99, 144–5: using federal sentencing guidelines, a hypothetical defendant could be sentenced to 75 years in prison if found guilty after a trial but 7 to 10 after a guilty plea.

57 See, eg, Randy Bellows, 'Lawyers for Criminal Defendants: Notes of a Public Defender' in Philip B Heymann and Lance Liebman (eds), *The Social Responsibilities of Lawyers: Case Studies* (Foundation Press, 1988) 69, 89: if 'gentle persuasion' fails, 'you [the defending lawyer] wheedle, you cajole, you twist arms, you harangue ... [t]he one thing you do not do is let a client reject a plea which is inescapably in his best interest'.

58 *Barristers' Conduct Rules* (n 3) r 79(c).

persuade a defendant to think he may not testify. But what if the defendant insists? Unanswered is whether in respecting that rule's limit the lawyer may forbid the defendant from giving (false) evidence. There is a hint in the case law that the Australian lawyer possesses that authority.⁵⁹ The American lawyer almost surely does not.⁶⁰ In the US, moreover, the lawyer's announcement that the defendant will not give evidence is typically insufficient to waive the defendant's right to testify. Defendants must themselves waive that right. When asked by the judge if he understands he may testify, the defendant is apt to reveal that the lawyer seeks to abrogate that right. The controversy over how the lawyer should respond then erupts.

If in Australia the lawyer lacks the authority to overrule the guilty defendant's desire to give evidence, or if the defendant insists that he is not guilty, then the lawyer must choose a response. And that response is to withdraw, without revealing the reason. We turn to an evaluation of that choice.

B Will Australian Lawyers Withdraw?

That question seems pointless to ask — of course they will withdraw — were it not for the way two Australian commentators discuss that choice.⁶¹ While they do not doubt that Australian lawyers will withdraw, Parker and Evans are cynical about the reason. The lawyer's motive to withdraw does not spring from an exalted duty to the court, they contend, but rather from fear of being blackmailed to help the defendant commit perjury were there a subsequent prosecution.⁶² This explanation seems fanciful. First, even in a non-fused state a barrister, bound by the cab rank rule,⁶³ could feign to be unavailable, and thus refuse the defendant's next brief. Second, if the lawyer called the defendant's bluff, the defendant, by revealing that the lawyer had not withdrawn when he lied, might expose himself to a charge of perjury (depending upon the statute of limitations). Then, if desperate, the lawyer could lie, denying that the defendant had admitted his testimony was false. It is unlikely that either would have made a record of the

59 See, eg, *R v Birks* (1990) 19 NSWLR 677, 683 (Gleeson CJ) ('*Birks*'): '[d]ecisions as to what witnesses to call' are the lawyer's to make. In that case, however, the defendant did testify (with no hint of lying). In suggesting that *Birks* (n 59) might support not calling the lying defendant, a leading barrister, Stephen Odgers, wrote that it would be 'a very rare case that the [Australian attorney] refused to call the accused [who] insisted on being called': Email from Stephen Odgers to Peter W Tague, 29 August 2012.

60 See, eg, *Rock v Arkansas*, 483 US 44 (1987): the constitutional right to testify. While that constitutional right does not entail the right to commit perjury, see *Whiteside* (n 5) 173-4 [5] (Burger CJ for Burger CJ, White, Powell, Rehnquist and O'Connor JJ), no case has held that the American lawyer may bar a defendant from testifying. It is in part because of that constitutional right that American lawyers have struggled over how to respond to the defendant who wants to lie. The narrative approach, for example, could be understood as an effort to respect the right to testify while reducing the likelihood the perjury will succeed in persuading the jury to acquit.

61 Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd ed, 2014) 146.

62 *Ibid.*

63 See *Barristers' Conduct Rules* (n 3) r 21(a): '[a] barrister must accept a brief from a solicitor to appear before a court ... if ... the brief is within the barrister's ... skill and experience'.

defendant's disclosure of the intent to lie if the lawyer did not withdraw. Most importantly, unless truly unabashed, the defendant who admitted committing perjury during the first prosecution will know not to repeat that admission, even with the same lawyer, during the second.

Australian lawyers will nonetheless withdraw, but for ethical and for different personal reasons. It is difficult to imagine a greater affront to their supposedly superior duty to the court, a duty they claim to have inculcated, than to help a defendant to lie. The turmoil among American lawyers as to the proper response to a defendant's perjury is absent in Australia because no lawyer in that country seems ever to have questioned whether withdrawal is appropriate. Moreover, Australian courts readily permit lawyers to withdraw who claim to be 'embarrassed' were they to continue to represent the defendant.⁶⁴

Among the personal reasons, the financial cost of withdrawing is not a significant deterrent because the lawyer will be paid for the work done, whether compensated by the defendant or legal aid.⁶⁵ In non-fused states, there are two other reasons. The division of responsibility between solicitors and barristers may mean neither feels loyal to a defendant in the way that inclines American lawyers to protect defendants and even, as explored in Parts V(B)(2) and (3) below, to help them commit perjury. Also, if the instructing solicitor does not punish barristers for returning a brief, the barrister might return it to avoid being entangled with a defendant who might be lying. In this instance the barrister would not reveal the reason to either the solicitor or the defendant.

C Does Withdrawal by Itself Satisfy the Lawyer's Duty to the Court?

Withdrawing without disclosing that the reason is the client's perjury is an understandable response by advocates. By lying in giving evidence, the defendant abuses the advocate's role as confidant and defender. No matter how intimate or

64 For an explanation of that code word 'embarrassment', see below n 73.

65 A defendant able to pay might do so for fear that the lawyer will reveal why he withdrew in a lawsuit to recover the fee. See *Model Rules* (n 6) r 1.6(b)(5): '[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to establish a claim ... on behalf of the lawyer in a controversy between the lawyer and the client ...'. Victoria Legal Aid would also 'pay the barrister the brief fee and an appearance fee for any trial day': Email from Erin Van Krimpen, Assignments Coordinator, Victoria Legal Aid to Peter W Tague, 28 January 2014.

uninvolved their relationship,⁶⁶ no advocate will welcome being exploited by the defendant. Moreover, disclosure, as explained in the next section, threatens to embroil the advocate in uncomfortable ways in the judicial process of resolving how to react to the defendant's false testimony.

Nonetheless, as a solution, withdrawal is problematic, in two principal ways: it is disruptive, and it educates a defendant determined to lie on how to disguise any prevarication.

Perhaps in a short, uncomplicated trial, the judge could interrupt the proceedings for a day or two to enable the new lawyer(s) to immerse themselves in the case.⁶⁷ But a trial of any duration or complexity will need to be aborted. Rescheduling the trial may be difficult. Witnesses will be inconvenienced, new jurors required. Ironically, the defendant could suffer too, in that acquittal in the current trial might be more likely than in a later one, if the prosecution could strengthen its evidence in the interim,⁶⁸ or if the current jurors appeared sceptical of the prosecution's evidence.

Indeed, the resources lost by mistrials explain why American lawyers grapple to find a solution other than withdrawal. Whereas advocates in Australia blithely believe their request to withdraw will be granted,⁶⁹ their counterparts in the US expect the reverse.⁷⁰ One American fictional depiction of client machinations is illustrative.⁷¹ The judge mocked the defence lawyer's revelation that a witness

66 Lawyers in the US, and in fused states in Australia are the most involved, playing the dual roles of solicitor and barrister. Barristers in England are the least involved. Rarely conferring with defendants much before the trial, the latter's role is to present the defendant's instructions, prepared exclusively by the solicitor. For a review of the English barrister's model of advocacy, see Tague (n 28) 42–3. In Australia, even in non-fused jurisdictions, barristers often act more like American lawyers than their counterparts in England, in that they sometimes play a role in helping the defendant to develop a defence. In Victoria, for example, in appearing at committal hearings, barristers might structure the cross-examination to signal to the defendant how to instruct his defenders so as to support a not-guilty defence. Solicitors also sometimes let barristers take the defendant's instructions as a way of helping the barrister to prepare more efficiently. By contrast to American lawyers, practitioners in Australia and England seek no moral relationship with the defendant, with the result that they would refrain from trying to persuade him not to lie.

67 Continuing the trial without replacing the defendant's lawyers would force the judge to decide how the defendant might address the jury in a final speech, and whether to alter the summing up to the jury to include the sort of attacks on the evidence a defending lawyer would offer.

68 One witness whose testimony was not as strong as expected could be replaced by another witness. Or the prosecution might review with a witness how to fend off the defending barrister's attack.

69 See, eg, Ross (n 7) 543 [15.9].

70 See, eg, *People v Andrades*, 828 NE 2d 599 (NY Ct App, 2005) ('*Andrades*'). The lawyer was forbidden to withdraw, even before the trial began, when he first would say no more than that he would have an 'ethical problem' if forced to continue, then added enough for the judge to realise that the reason involved the defendant's anticipated perjury: at 601 [1] (Smith J for the Court). Also, once the trial begins, for tactical reasons lawyers usually call the defendant as the last defence witness. At a point so late in the trial, were the defendant to admit to the lawyer he was about to lie, a judge would be even more reluctant than was the court in *Andrades* (n 70), to let the lawyer withdraw.

71 See Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* (Wolters Kluwer, 11th ed, 2018) 19–20: a fictional setting is used because in life judges and advocates are unlikely candidly to express their views of the candour of witnesses. By including a case where the trial judge was as candid as the fictional judge, Gillers adds, humorously, that '[l]ife follows Hollywood': at 320. See *United States v Litchfield*, 959 F 2d 1514 (10th Cir, 1992).

was lying at the instigation of the defendant by cynically observing that lying by witnesses is endemic.⁷² It was the prosecutor's responsibility to expose the lie as it was the defence lawyer's to present the testimony. Withdrawal, in this view, solves nothing, merely transferring the problem to the next advocate, at great cost.

As practised, withdrawal also schools defendants to disguise their lie as the truth, the second major problem with this response. Consider the mechanics of withdrawal. The Australian lawyer requests permission from the court to withdraw by announcing, in code, of being 'embarrassed' if forced to continue. Without demanding an explanation of that predicament, the judge releases the lawyer.⁷³ In a non-fused jurisdiction, the solicitor withdraws with the barrister.⁷⁴

It is nonetheless easy to identify various ways the lawyer could be compromised, and thus 'embarrassed'. The lawyer will learn about the defendant's perjury either before or after he testifies. If before giving an opening statement the lawyer learns, what does he say about the defendant's evidence? One assumes he would waive this opportunity, for, otherwise, he must adopt Freedman's solution of treating the defendant's lies as if they were true, or ignore what the defendant will say. If the lawyer learns later, say after the prosecution has rested, the lawyer may realise he has structured the defence inconsistently with the defendant's new (and false) position. The judge may then pointedly ask the lawyer whether, in light of the defendant's testimony, his instructions have changed, a question that casts the lawyer with the choice to request to withdraw or to adopt Freedman's approach.

If while testifying the defendant admits, privately to the lawyer, having lied, the lawyer may again be asked by the judge whether the defence as presented was consistent with the defendant's testimony.

Without regard to the timing of the defendant's disclosure, what does the lawyer say in the final speech? Ignore the defendant's testimony, thereby adopting one part of the narrative solution? Incorporate the defendant's lies, thereby adopting Freedman's solution?

It is perhaps not surprising that, to extract themselves from these quandaries, Australian lawyers opt to withdraw.

In requesting to withdraw, the lawyer will not expose the reason for embarrassment. How will defendants react to this exchange between their lawyer and the judge? It is not necessary for the lawyer to reveal the source of embarrassment to the court, Parker and Evans contend, because defendants will be cowed either not

72 Gillers (n 71) 319.

73 One reason for the court to grant the application is the lawyer's apparent reaction to its denial. It is said that 'counsel must not do anything further in the case': Ross (n 7) 543 [15.9]. For the lawyer not to present the defendant's other evidence, or cross-examine any rebuttal evidence, or give a final speech, would convert the trial into a travesty.

74 Geoffrey Sawyer, 'The Guilty Accused' (1971) *Summons* 30, 32.

to commit perjury or to admit to the court of having done so, upon learning that the advocate will otherwise withdraw. Defendants will recognise, they think, that their advocate's withdrawal will 'communicate something of their guilt to the jury'.⁷⁵ This is dubious, in two ways. First, advocates will not, in the jury's presence, proclaim being embarrassed, sweep up their papers, and abruptly depart the courtroom. Instead, in private the advocate will inform the judge who, when the jury returns, will explain that the advocate was excused, without indicating the reason. Second, even if in the jury's presence the advocate brashly tried to embarrass the defendant by announcing his own 'embarrassment', the jury is no more likely to think the reason is the defendant's perjury than some disagreement over tactics or a personal problem of the advocate's.

Having withdrawn, Australian lawyers eschew responsibility to prevent the defendant from lying or benefitting from having lied while testifying. They do not tell their replacements why they withdrew, nor share their notes or the defendant's instructions.

The replacements will not be inquisitive. They will take new instructions from the defendant without asking him or their predecessors why the latter withdrew. The defendant, now aware of the dire consequences of revealing to his defenders an intent to commit perjury, will lie to the replacements and simply claim that his false instructions are true. The new team, while likely sceptical of the defendant's story, will treat what he says as if it were true.

Perhaps this is the only way to structure withdrawal.⁷⁶ After all, if the replacements learned why the first set of defenders withdrew, they too would be forced to withdraw — unless willing to accept the defendant's claim that the story he once admitted was false is instead true. The result is that withdrawal is nugatory when judged by the goal of preventing the defendant from committing perjury.

75 Parker and Evans (n 61) 146. They do not address the possible ramifications of disclosure. In the US if the defendant agreed to let the lawyer 'inform the court of [his] lie' (*Barristers' Conduct Rules* (n 3) r 78), as lawyers in Australia insist must be done or otherwise they withdraw, the defendant could escape being prosecuted under one perjury statute, 18 USC § 1623 (2012) (false declaration to a court), but perhaps not under the basic perjury statute, 18 USC § 1621 (2012). The former creates an affirmative defence for retraction. If retraction provides no defence to a perjury prosecution in Australia, the defendant's decision whether to admit having lied becomes more difficult if the advocate is noncommittal over whether he will be replaced by another advocate if he withdraws.

Disclosure could also create a procedural muddle. If the defendant yields to the advocate's threat to withdraw, *Barristers' Conduct Rules* (n 3) r 78 expects the barrister to inform the court of the locus of the defendant's perjury. If the defendant has completed his testimony, must he be recalled for the prosecutor to explore why he lied, and how his lie affected his other testimony? Or could the defendant withdraw part or even all of his testimony? The prosecutor might oppose such an application if cross-examination had undermined other aspects of the defendant's ostensibly truthful testimony.

76 An alternative approach would be for the departing lawyer(s) to monitor the trial to be sure that the defendant did not tell the jury what he had admitted was false. But this approach would be pointless unless lawyers decided that the defendant's effort to use them to lie sundered the professional privilege and permitted them voluntarily to disclose that the defendant was lying to the jury. If Australian lawyers now reject that view (ie, the ABA's solution: see below Part V(A)), there is no reason to believe they would disclose via this alternative approach.

To be true, the jury may not be persuaded to acquit, either because the defendant's lie is not convincing or because his credibility is shattered during the prosecutor's persistent effort to uncover the lie that she suspects caused the defendant's first defenders to withdraw. Also, in summing up to the jury, the judge, if also aware that the defendant's first advocates withdrew because they were 'embarrassed', might be inclined to question the credibility of the defendant's testimony even more pointedly than normal.⁷⁷

Whether or not the defendant's perjury leads to an acquittal, withdrawal by itself, when assessed by the goal of fidelity to the truth or at least of minimising the defendant's effort to thwart the jury from deciding guilt accurately, ranks with treating the defendant's perjury as if it were true as the worst choice of the various responses.

As a result, this response seems designed more to protect the Australian lawyer's personal integrity than to reflect a superior duty to the court. Viewed as such, it embodies the original purpose of the legal professional privilege: honourable people would never disclose what they were told in confidence,⁷⁸ but neither would they help that confidant to act corruptly (here, by committing perjury). Of course, in escaping personal responsibility, the departing lawyer uses his or her replacement's ignorance, assuming that the defendant is wily enough to disguise as truth what he told the first lawyer were lies.

Despite these defects with this solution, its origin might help to explain why it is thought to fit the Australian lawyer's ordering of their duties, court over client (defendant). Bound by the cab rank rule, barristers in England have almost nothing to do with obtaining the defendant's instructions.⁷⁹ It is understandable they would feel exploited by a defendant whose perjury they unwittingly extracted, during direct examination, and learned about only while or after he testified. Moreover, by comparison with American lawyers, English barristers' lesser sense of loyalty to the defendant is reinforced by what was once their approach in defending a guilty defendant who refused to plead guilty. They were warned to return the brief. Were they instead to continue, they 'would most certainly be seriously

77 The judge, however, might hesitate to slant the summing-up in this way because they are aware that the source of the advocate's 'embarrassment' might be something other than the defendant's perjury. For example, barristers may withdraw if at loggerheads with the defendant over an issue of tactics. Even as barristers believe they have the authority to overrule the defendant in a dispute over tactics, they will instead invite the defendant to fire them if the defendant insists that the barristers do something they think is tactically inadvisable.

78 The privilege originally protected the lawyer rather than the client: it was not seemly for a person of honour to disclose what was learned in confidence: see Ross (n 7) 344 [11.11].

79 While not included in their current rules, the Bar in England and Wales once instructed its barristers 'not ... to provide or devise a line of defence for the accused': Sir William Boulton, *A Guide to Conduct and Etiquette at the Bar of England and Wales* (Butterworths, 6th ed, 1975) 70, citing Sir Malcolm Hilbery, *Duty and Art in Advocacy* (Stevens & Sons, 1946) 12. This suggests that they would have accepted Whiteside's first version — the deceased was armed — even as the evidence belied that claim: *Whiteside* (n 5) 157. In other words, a defendant's instructions are carved in stone.

embarrassed in the conduct of the case'.⁸⁰ The locus of that embarrassment was left unexplained, but the directive augments the sense that barristers should renounce a defendant who sought to undermine — by perjury or even by refusing to plead guilty — the effort to reach the correct result external to the vicissitudes of a trial.

The Bar of England and Wales also cavalierly justified returning the brief of such a defendant because 'no harm can be done to the accused by requesting him to retain another advocate'.⁸¹ (In fact, as is so with the defendant's perjury, the guilty defendant would be helped, not harmed, by the barrister's withdrawal, for he would then know not to admit culpability to the replacement.)

In Australian professional codes this guilty defendant who insists on a trial is ignored by barristers but not by solicitors. If they chose to 'cease to act',⁸² solicitors were urged to advise this defendant to lie to their replacements about his guilt.⁸³ That advice, while candid, is baffling for its inversion of the Australian lawyers' supposed elevation of the duty to the court over the defendant. Withdrawal here, as with Defendant One and Defendant Two, invites the defendant to lie. The Australian lawyer becomes complicit with the defendant akin to treating the defendant's perjury as if it was the truth. Withdrawal with both defendants, then, strengthens the view that Australian lawyers are trying to protect themselves more from entanglement with the defendant than with helping the court to resolve the accusation without being polluted by the defendant's lies.

V THE AMERICAN LAWYERS' RESPONSES

Before turning to their three solutions, it must be noted that American lawyers believe it vital to exhort the defendant not to commit perjury.⁸⁴ Moral arguments are not apt to succeed. Whether guilty or innocent, a defendant charged with a serious crime who thinks that unless he testifies falsely conviction is certain will not be swayed by the lawyer's plea that it is wrong to commit a separate crime.⁸⁵

Identifying the risks of lying could be effective, however. After exposing the

80 Sir Boulton (n 79) 70.

81 Ibid.

82 *Australian Solicitors' Conduct Rules* (n 3) r 20.2.1.

83 See Sawyer (n 74) 32. While at odds with a reverence for the truth, Sawyer's point was practical, for if the defendant indiscreetly revealed his guilt to the new lawyers, they too might withdraw. Regress was avoided only if the 'retiring counsel and solicitor [told] the client not to reveal the full facts to his next advisers': at 32 (emphasis omitted).

84 See *Model Rules* (n 6) r 3.3 cmt 6: 'the lawyer should seek to persuade the client that the evidence should not be offered'.

85 The maximum five-year sentence for perjury in federal prosecutions, see 18 USC § 1621 (2012), is much less than sanctions for offences like bank robbery, see 18 USC § 2113 (2012): 10 years, and 25 if a weapon (even a toy) is used.

implausibility of the defendant's lies in a mock cross-examination,⁸⁶ the defence lawyer will warn the defendant that if the advocate committed to helping the defendant can shred his story, imagine how easily an aggressive prosecutor will do the same. Conviction is therefore ever more certain if the defendant testifies and lies. And if the defendant's lies fail to persuade the jury to acquit, the judge, the defence lawyer will add, may increase the sanction if he thinks the defendant did lie while testifying.⁸⁷

If these dire risks fail to cow the defendant either not to testify or to testify truthfully, American lawyers must then choose how to respond. They are more divided than Australian advocates over what to do for two reasons, one practical and the other conceptual. The practical reason, as noted,⁸⁸ is that because lawyers expect courts to deny their request to withdraw, they must find an alternative solution. The conceptual reason involves the implications of the lawyer's role. Almost everyone agrees that if any client may be represented aggressively, it is the criminal defendant.⁸⁹ But at what cost to the lawyer's own view of the moral limits of advocacy, and of the duty, subsidiary perhaps in criminal defence, not to let perjury contradict the trial's purpose of seeking the truth?

Of the three responses, the first and third — the antipodes — are discussed first, followed by the second.

A The ABA's Solution: Requiring Lawyers to Disclose the Defendant's Perjury

The ABA believes the only effective way to thwart perjury by the defendant is for the defence lawyer to disclose to the court that the defendant intends to commit or has committed perjury.⁹⁰ That solution must be examined on the merits and on whether any legal rule blocks its adoption in either country. To address those subjects it is useful to identify the rules about confidentiality adopted by lawyers in both countries.

86 American lawyers may rehearse a witness' answers on direct examination and to the questions anticipated on cross. In addition to showing a guilty defendant that it is better not to testify than to lie, the lawyer might also persuade a not-guilty defendant that lying is unnecessary because the truth will establish the defence. See, eg, *Whiteside* (n 5) 158–9 [1] (Burger CJ for Burger CJ, White, Powell, Rehnquist and O'Connor JJ), where the defendant's lawyer explained why it was unnecessary for the defendant to lie in claiming to have seen something metallic in the deceased's hand: self-defence could be established by the defendant's understandable fear of being injured. Although the defendant was convicted, the lawyer's forensic assessment of the story to tell was sensible because no weapon had been found and none of the other witnesses had seen one in the deceased's hand.

87 See *United States v Dunnigan*, 507 US 87 (1993), where the sanction may reflect the defendant's unproven perjury ('*Dunnigan*').

88 See above nn 70–1.

89 See, eg, W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton University Press, 2010) 192–3. For the lone(ly) dissenter, see William H Simon, 'The Ethics of Criminal Defense' (1993) 91(7) *Michigan Law Review* 1703, 1704–5, for an opposing model of 'aggressive defense' in all cases.

90 Formal Opinion 87–353 (n 6).

1 Confidentiality: What do the Lawyers' Codes Provide?

In Australia, barristers and solicitors have imposed upon themselves an obligation not to reveal 'confidential information ... concerning' the defendant.⁹¹ Unlike barristers, solicitors have adopted an exception to that general prohibition: they are authorised to disclose otherwise confidential information 'for the sole purpose of avoiding the probable commission of a serious criminal offence'.⁹² Perhaps barristers have denied themselves that permission by treating a defendant's admission of having lied while giving evidence as akin to an admission of having committed the crime charged, and thus a completed rather than a future crime. Whatever the reason, the barristers' code ignores Defendant Two, the one who reveals, in conference, the desire to lie while giving evidence. Whether solicitors (or lawyers in fused states) will rely on their exception to reveal the second defendant's desire is discussed below.

Except for perjury, the ABA forbids American lawyers to reveal 'information relating to the representation of a client'.⁹³ That rule silences American lawyers even more than does its counterpart in Australia, for 'information' includes everything learned about the client, no matter the source, and without regard to its confidentiality.⁹⁴

The breadth of that prohibition indicates how radical is the ABA's exception requiring criminal defence lawyers to remedy perjury by disclosing its occurrence or the defendant's plan to do it. It constitutes a volte-face from the ABA's positions in its earlier codes of conduct.⁹⁵ Combating perjury is now more important, in the ABA's hierarchy, than preventing the client from causing 'death or substantial bodily harm',⁹⁶ or 'substantial injury to the financial interests or property of another'.⁹⁷ With those harms, American lawyers are only authorised — not required — to disclose whatever leads them to believe either will occur. They

91 *Barristers' Conduct Rules* (n 3) r 108. See also *Australian Solicitors' Conduct Rules* (n 3) r 9.1.

92 See *Australian Solicitors' Conduct Rules* (n 3) r 9.2.4.

93 *Model Rules* (n 6) r 1.6(a).

94 *Ibid* r 1.6(a) cmt 3.

95 For a sketch of the extensive discussion of *Model Rules* (n 6) r 3.3(a)(3), see Center for Professional Responsibility, American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005* (American Bar Association, 2006) 431–46. The ABA's reversals over the lawyer's obligation suggest that the competing interests are closely balanced. Concentrating on the highlights, it first forbade disclosure: Standing Committee on Ethics and Professional Responsibility, American Bar Association (Formal Opinion No 287, 27 June 1953). Then, in its second code, it required lawyers to 'reveal' that the client had 'perpetrated a fraud [eg, perjury] upon a ... tribunal', if the client refused to 'rectify' that act: American Bar Association, *ABA Model Code of Professional Responsibility* (at 12 August 1969) r 7-102(B)(1). Awakening to the effect of that disciplinary rule, the ABA amended that rule to forbid disclosure 'when the information is protected as a privileged communication': at r 7-102(B)(1). That amendment gelded the requirement to remedy perjury because lawyers will not know the client had lied or intends to lie except through a conversation arguably protected by the legal professional privilege. For more about the privilege, see below Part V(A)(3).

96 *Model Rules* (n 6) r 1.6(b)(1).

97 *Ibid* r 1.6(b)(2).

thus may hide, and may be required to hide, harm of many sorts and considerable amounts by corporate clients as well as by individuals.

That said, this remedy of disclosure applies generally to the offer of false evidence of any sort, in any proceeding.⁹⁸ It applies, then, to a document containing false information as well as to lies by a defendant's alibi witness. If courts were to hold that the constitution created an exception for perjury by criminal defendants, so be it, thought the ABA.⁹⁹ But unless courts disagreed, the ABA refused to exempt criminal defendants so as to repudiate Freedman's position (and to reject the narrative approach).¹⁰⁰ While a cynical interpretation, perhaps the ABA elevated perjury's harm above all other harms¹⁰¹ because in practice so few criminal defendants would suffer from the disclosure requirement: only naive defendants would inform the lawyer of an intent to lie, and of those lawyers who conceded 'knowing' the defendant would lie, most would covertly let the defendant testify rather than honour the requirement.

2 The Merits of the ABA's Solution

Do the benefits of requiring disclosure outweigh the costs? Unless the answer is resoundingly affirmative, lawyers in Australia will never replace their choice (withdrawal) with the ABA's.

(a) The Benefits of Disclosure

The benefits are obvious. The likelihood of an undeserved acquittal plummets if the judge informs the jury not to trust the defendant's testimony or the prosecutor, sensing from the trial's administration¹⁰² that the defendant will lie, exposes that lie through persistent cross-examination. Indeed, the threat of disclosure may cause the defendant to testify truthfully or not at all, or even to seek a plea bargain if persuaded that conviction at trial is certain without false testimony. Those

98 Ibid r 3.3(a)(3): 'offer evidence that the lawyer knows to be false'.

99 See Commission on Evaluation of Professional Standards, American Bar Association, *Model Rules of Professional Conduct* (Discussion Draft, 30 January 1980) 66 r 3.1 cmt ('Discussion Draft') (as it was then numbered), recognising that the 'requirements of due process and the right to counsel' might override the remedy of disclosure.

100 It named the lawyers' three solutions discussed in this article, including Freedman's (without naming him) in its unnumbered comments to r 3.3 in the initial (1983) version of the *Model Rules* (n 6): American Bar Association, *ABA Model Rules of Professional Conduct* (at 2 August 1983) 1280.

101 See above nn 96–7 and accompanying text (death, financial harm). As well, exempting criminal defendants from the bar of permitting perjury by other clients would not have been politically feasible when in 1980 the ABA first published its discussion draft: Discussion Draft (n 99). That year was the end of a decade of soaring crime rates, President Nixon's 'war on crime', and Nixon's own lies about his involvement in the Watergate scandal.

102 Having been told, in-camera, by the defence lawyer that the defendant will lie, the judge will surely conduct an ex parte hearing to assess the lawyer's contention. That interruption in the trial will pique the prosecutor's suspicions that the reason was the defendant's anticipated perjury. And the prosecutor will be all but sure that that was the reason when the first lawyer is replaced by another or a mistrial is declared, when the judge does not explain either occurrence.

alternatives to perjury become inviting once the defendant learns from the lawyer that judges may sanction a convicted defendant more harshly if they think the defendant lied while testifying¹⁰³ — and the lawyer's disclosure will confirm the judge's suspicion that the defendant will lie or has lied.

Disclosure also protects lawyers,¹⁰⁴ by absolving them of ethical responsibility for an outcome (acquittal) tainted by a second crime (the defendant's perjury) and by eliminating the risk that they might be charged with a crime or punished professionally for aiding the defendant to commit perjury.¹⁰⁵

(b) The Costs of Disclosure

Disclosure will be disruptive¹⁰⁶ and increase considerably the costs of resolving the criminal accusation. If, as expected, the defendant rejects the lawyer's claim that he will lie, the judge must conduct a hearing to resolve this dispute. That hearing will occur *ex parte* (and *in-camera*), for the lawyer will almost surely be revealing otherwise privileged communications by the defendant. And that hearing will be awkward, for the defendant may need to be represented by a different lawyer,¹⁰⁷ whose role would be to challenge the disclosing lawyer's memory and assessment of the defendant's statements.

If the judge accepts the defendant's disavowal of lying and claim that the lawyer misunderstood what he said about his testimony, the trial can continue, but only if that lawyer's disclosure and performance during that hearing have not fatally poisoned the relationship with the defendant. If their relationship has dissolved, a mistrial may be unavoidable, and the benefits of disclosure will be lost.¹⁰⁸

If, on the other hand, the judge agrees with the defence lawyer that the defendant

103 See *Dunnigan* (n 87).

104 Of course, it is not only the conscientious lawyer who might feel sullied by the need to help a defendant to lie to the jury.

105 For criminal exposure, see above n 18. For professional punishment, recall the barrister Punch: see above n 41 and accompanying text. See also *Re Attorney Discipline Matter*, 98 F 3d 1082 (8th Cir, 1996), where an American lawyer was disbarred for aiding defendant's perjury.

106 Indeed, disclosure might 'convert the proceedings in court into the wildest chaos', worried Samuels AP, in dicta, in a judgment finding that a solicitor was not guilty of contempt for failing to correct false information submitted by another: *Ditfort v Brown* (1990) 19 NSWLR 49, 54. What Samuels AP envisioned that so unnerved him — the advocate must interrupt the client's testimony to announce, in open court, before the jury, that it was false — ignores the tact with which lawyers could be expected to inform the judge of the defendant's lie or intent to lie.

107 In its first promulgation of the *Model Rules* (n 6) the ABA recognised that if the defendant disputes the lawyer's claim to know the defendant will lie or has lied 'the lawyer cannot represent the client in [the court's] resolution of the issue': Discussion Draft (n 99) 66. In its comments to the current rule the ABA says nothing about that point, leaving to the court how to orchestrate the hearing.

108 With a mistrial, the defendant is in the same position as is a defendant whose Australian lawyer withdrew. Neither defendant will reveal to the replacement advocate that he intends to lie when testifying. Both can thus lie with impunity at the second trial unless the first lawyer monitors that trial and testifies against the former client if he does commit perjury. That unseemly consequence of the ABA's rule is one lawyers will not embrace. I know of no instance when a lawyer has been called as a rebuttal witness by the prosecution to testify that the former client lied while testifying.

will lie, what does the judge do with this unwelcome information?¹⁰⁹ A mistrial is again likely, for the judge will be reluctant to force the defendant to represent himself.¹¹⁰ If instead the trial is delayed for a short period to enable a replacement to prepare, what does the judge do when the defendant, called to give evidence by the new lawyer, testifies in a way the judge has concluded is false? If told by the judge that the defendant is lying, will jurors punish the defendant by ignoring weaknesses in the evidence of guilt, and thus not hold the prosecution to meet its burden of proof?

That last possibility endangers the defendant's constitutional right to an impartial jury,¹¹¹ even if it is the defendant's criminal act that created that danger. Not only would the likelihood of conviction rise, but the defendant would be exposed to a prosecution for perjury.¹¹² This risk is not minimal if, as discussed below,¹¹³ the legal professional privilege would not protect the defendant from having the prosecution force the defence lawyer to testify about whatever the defendant said that led the lawyer to conclude the defendant would commit perjury.¹¹⁴

A different cost of disclosure involves that requirement's effect on defence lawyers. Disclosure is so incompatible with their model of representation — unbounded loyalty and zealous advocacy¹¹⁵ — that they may adopt disingenuous ways of avoiding 'knowing' that the defendant will lie.¹¹⁶ They might speciously refuse to admit that they knew the defendant was lying, even when the defendant admits as much.¹¹⁷

The benefits of the ABA's solution are considerable; so are its costs. The

109 The ABA offers no help to judges to resolve these nettling issues. See *Model Rules* (n 6) r 3.3 cmt 10: in reaction to the lawyer's disclosure, '[i]t is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing'.

110 But the judge might do so, in what would appear to be a disguised way of punishing the defendant for intending to lie and roiling the proceedings. See *Brown v Commonwealth*, 226 SW 3d 74 (Ky, 2007), where the defence lawyer left the courtroom as the defendant testified and then made a final speech to the jury; conviction reversed, however, because the narrative approach, the lawyers' third solution, should have been used.

111 See *United States Constitution* amend VI: right to a 'public trial, by an impartial jury'.

112 In acknowledging that its remedial duty 'can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury', the ABA underscores how much it does not want lawyers to help defendants commit perjury: *Model Rules* (n 6) r 3.3 cmt 11.

113 See below n 120.

114 The defendant's statements would be admissions: see *Federal Rules of Evidence* r 801(d)(2)(A). The defendant might be protected, however, by objecting that no witness, not even his former defence lawyer, could opine that he was lying, cf *Federal Rules of Evidence* r 704(b), even as the lawyer could report the facts that led him to believe the defendant had lied or would lie.

115 For an expression of the views of criminal defence lawyers, see Abbe Smith and Monroe H Freedman (eds), *How Can You Represent Those People?* (Palgrave Macmillan, 2013).

116 See above n 35. Knowledge is supposedly avoided by informing the defendant to tell what he knows about the accusation as if the information were hypothetically true, or by ordering the defendant never to reveal he is lying.

117 In his day, the doyen of the criminal bar in Melbourne, Frank Galbally, took a similarly extreme position in asserting that nothing short of seeing his client commit the crime would persuade him that he was guilty: Frank Galbally, *Galbally for the Defence: Crimes and Controversies* (Penguins Books, 1993) 2.

weighing is inconclusive, made more so because the items on each side are also incommensurable: how do we weigh the value of not tarnishing the pursuit of truth by the defendant's lies while giving evidence against the financial cost of disclosure when the trial is aborted?

3 Do Lawyers in Either Country Have the Authority to Reveal the Defendant's Perjury?

Assuming that the benefits of disclosing the defendant's perjury, actual or intended, outweigh the harms, are lawyers in either country blocked from doing so, without the defendant's consent, by the legal professional privilege? Consider first the US, then Australia.

(a) The US

In its extensive comments to *Model Rules* r 3.3(a)(3), the ABA did not address the relevancy of the lawyer-client privilege, as the legal professional privilege is known in the US, to its remedy of disclosure. At first glance, this is surprising, if not astonishing, because the privilege has attained constitutional protection in criminal cases.¹¹⁸ But perhaps the ABA said nothing because its obligation to disclose arguably does not conflict with the privilege. While lawyers inculcate the importance of protecting exchanges with the client, the privilege does not itself block a lawyer from voluntarily disclosing those communications. Instead, the privilege shields clients from use by others of those communications against them. Thus, so long as the privilege remains intact, a defendant could block the prosecutor from calling the former defence lawyer to reveal what led him to tell the judge the defendant would lie while giving evidence.¹¹⁹

But if the defendant's communications themselves may not be used against him, what of their fruits? If the prosecutor even suspected that the interruption in the trial resulted from an inquiry over client perjury, she would benefit, her cross-examination of the defendant energised by the belief he was lying. She might even blurt out, during a final speech to the jury, that the trial's administration underscored why the defendant's testimony should not be trusted. Trial judges themselves might be affected, either by permitting the prosecutor more leeway in cross-examining, overruling the defence's evidentiary objections or, in Australia at least, summing-up more robustly against the defendant.

118 See *Neku v United States*, 620 A 2d 259, 262 [2] (Farrell AsJ for the Court) (DC App, 1993). While privilege itself lacks constitutional status, it achieves that status to protect defendants' Sixth Amendment right to representation.

119 See *Newman v State*, 863 A 2d 321 (Md, 2004), where the defence lawyer properly revealed the defendant's threat to harm another, but privilege prevented him from being forced to reveal that information during the defendant's trial.

If the scope of the privilege's protection is rather uncertain, no less clear in either country is the answer to the threshold question of whether the defendant's perjury destroys the privilege. If it does, questions over the scope of the privilege's protection become moot. Also, if the privilege is lost, or never applied, lawyers who oppose disclosure on principle might be mollified to accept the requirement.

In the US a client forfeits the privilege by using the lawyer to commit a crime.¹²⁰ Whether this exception applies in our context, however, is debatable. To be true, the lawyer is involved as the defendant commits a crime (perjury). At the very least, the defendant relies on the lawyer to ask the questions on direct examination that the defendant will answer falsely. Also, in sharing their evaluation of the evidence and in preparing the defendant to testify, lawyers, whether wittingly or not, will help the defendant to improve his testimony, and thereby his lies.

In the US, courts divide over the privilege's application to our first two defendants. One federal court flatly held that the privilege does not apply to conversations about perjury.¹²¹ Others reject that blanket approach, and, hewing to the language of the exception in federal courts, ask instead when the defendant decided to use the lawyer to commit a crime (perjury). The privilege is lost only if the defendant intended to use the lawyer to commit the crime *before* their relationship began. If the defendant decided to lie *after* their relationship was formed, the crime-fraud exception does not apply, and the privilege remains intact.¹²² That is likely to be the case, for the defendant's catalyst to lie will usually be the lawyer's unexpectedly gloomy assessment of the prospect of acquittal.

The ABA's failure to consider the application of the privilege is all the more remarkable because its disclosure obligation is at odds with this second interpretation of the crime-fraud exception in another way. Per *Model Rules* r 3.3(a)(3), the lawyer is expected to reveal to the court upon learning that the defendant intends to lie. But the evidentiary exception applies only if the defendant does commit the crime (here, perjury).¹²³ Until that point, the defendant

120 This is the so-called 'crime-fraud' exception to the privilege. See proposed r 503(d)(1) of the *Federal Rules of Evidence*, quoted in *Rules of Evidence for United States Courts and Magistrates*, 56 FRD 183, 236 (1972): '[i] here is no privilege ... [i]f the services of the lawyer were sought ... to enable ... anyone to commit or plan to commit what the client knew ... to be a crime'. (While no version of the lawyer-client privilege was enacted into legislation, the proposed rule follows the common law's version of this privilege.) If the exception is lost in this way, the lawyer can be forced to reveal the no-longer privileged communications if, for example, subpoenaed to testify under oath. It is a leap, however, for a professional organisation like the ABA to require lawyers voluntarily to disclose, as it now does with *Model Rules* (n 6) r 3.3(a)(3).

121 See *United States v Gordon-Nikkar*, 518 F 2d 972, 975 (Ainsworth J for the Court) (5th Cir, 1975). That case could be interpreted narrowly, however, because it was the lawyer who persuaded the defendant and others to commit perjury.

122 See *Re Grand Jury Subpoena*, 745 F 3d 681, 691 [14] (Fisher J for the Court) (3rd Cir, 2014), where the crime-fraud exception 'is stated in the present tense, and does not by its terms apply to a situation where a client consults an attorney about a possible course of action and later forms the intent to undertake that action': *United States v Moazzeni*, 906 F Supp 2d 505 (ED Va, 2012). In these cases the lawyers joined with the defendants in opposing being forced to disclose.

123 See *Re Grand Jury Matter #3*, 847 F 3d 157 (3rd Cir, 2017).

might be persuaded by the lawyer not to testify, or not to lie while testifying. In those instances the defendant has not committed the crime, and the crime-fraud exception therefore does not apply.

(b) Australia

Turning to the law in Australia, consider first a rule adopted by solicitors, then the legal professional privilege and its exception for crimes, and last a venerable case, *Tuckiar v The King* (*'Tuckiar'*),¹²⁴ that censured a defending barrister for blurting out something concerning the defence.

(i) Australian Solicitors' Conduct Rules r 9.2.4

With r 9.2.4 of the *Australian Solicitors' Conduct Rules*, solicitors in Australia have adopted a rule authorising them to disclose 'confidential client information', inter alia, 'for the sole purpose of avoiding the probable commission of a serious criminal offence'. This rule parallels the discretion given by the ABA to American lawyers to disclose 'information' about a client in settings other than perjury.¹²⁵ While r 9.2.4 does not require solicitors to disclose, it seems ostensibly to permit solicitors to disclose our first two defendants' interest in or commission of perjury.

But solicitors may hesitate to embrace this authorisation to disclose in our setting for several reasons. The first involves two ways in which the rule is ambiguous. Left undefined, 'probable' is all but vacuous, open to different interpretations by solicitors. Solicitors are apt to define it rigorously because that adverbial qualifier introduces a much larger possibility that the solicitor will err in predicting the client's future conduct. Any error exposes the client to criminal investigation (and prosecution if, of course, the solicitor's evaluation of the client's intent proves accurate). As well, disclosure threatens to harm a defendant much more than withdrawal will, and yet the latter requires much greater certitude ('learning') about the client's likely conduct than does the former ('probably').

The rule is also ambiguous about the nature of anticipated criminal behavior. While perjury would seem to qualify as a 'serious criminal offence', the rule may be aimed more at preventing physical harm to another. With 'victimless crime[s]' — as perjury is — solicitors are expected to weigh the competing considerations more carefully than if 'physical injury' is the risk.¹²⁶

Last, given the ambiguities in the rule, by disclosing, solicitors would jeopardise their personal interests. They risk being sued by the client for breach of confidence.

124 (1934) 52 CLR 335 (*'Tuckiar'*).

125 See above nn 96–7.

126 See Attachment to Email from Murray Hawkins, Law Council of Australia, Director of Regulatory Policy and Research to Peter W Tague, 3 April 2018.

To be true, at least with criminal defendants this may be a fanciful risk. They will be preoccupied with defending the principal charge. If sued, the solicitor may also defend against a claim of breaching confidence if the information involved an ‘iniquity’ (including a crime).¹²⁷ And, at least in the US, a lawyer may reveal ‘information’ in defending against a suit by a (former) client¹²⁸ — the very information that might otherwise be protected from use by the legal professional privilege. No matter: even if the risk of being sued is low, and of losing even lower, no solicitor wants to become enmeshed in a dispute with a now-former client over the propriety of disclosing confidences.

As well, while disclosure might please commentators worried that the legal professional privilege slights society’s safety,¹²⁹ it will not endear the solicitor to defendants (or a barrister to instructing solicitors) who might otherwise wish to be represented by the solicitor.

Accordingly, one expects Australian solicitors (and lawyers in fused jurisdictions) to be wary of disclosing to expose the client’s future wrongdoing. To prevent the defendant from murdering a prosecution witness is one thing; to expose that the defendant intends to lie while testifying in hope of avoiding conviction, no matter how deserved, is quite another. In representing Defendant Two, solicitors can be expected to adopt the safer approach of withdrawing, or even of using one of the ruses discussed in Part II to avoid learning of the defendant’s intent.

(ii) The Legal Professional Privilege and the Crime Exception

Given how imbued lawyers in both countries are with the importance of protecting a client’s confidences, Australian lawyers, like their American counterparts, might be more emboldened to do so if the legal professional privilege did not apply to the information that led them to believe Defendant Two would lie. What, then, of the crime-fraud exception to the privilege in Australia?¹³⁰

Written broadly, the exception may apply in Australia,¹³¹ and if so, explode the protection that Defendant One and Defendant Two would otherwise have. But predicting this exception’s application is even more perilous than in the US because of a lack of judicial interpretation. One hoary English case,¹³² thought

127 See Kaaren Koomen, ‘Breach of Confidence and the Public Interest Defence: Is It in the Public Interest?’ (1994) 10 *Queensland University of Technology Law Journal* 56, 57.

128 See *Model Rules* (n 6) r 1.6(b)(5). For the lawyer to exercise that rule’s discretion returns us to the overarching issue of whether the *United States Constitution* prevents disclosure.

129 See below n 142.

130 For a discussion of this doctrine in the US, see above nn 120–2 and accompanying text.

131 See *Evidence Act 2008* (Vic) s 125: ‘a communication made ... by a client ... in furtherance of the commission of ... an offence’. This version has been adopted widely in Australia. See Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2nd ed, 2014) 1, noting that 7 of 10 court systems now have a uniform evidence law.

132 *R v Cox and Railton* (1884) 14 QBD 153 (*‘Cox and Railton’*).

by Australian commentators to supply their country's law, seemingly obliterates the privilege if, as they interpret it, the 'communications [were] made as part or in furtherance of a crime'.¹³³ Unlike our setting, however, in *R v Cox and Railton* ('*Cox and Railton*')¹³⁴ the clients were bent on committing the crime before conferring with the solicitor. Indeed, *during* a conference the solicitor told them that their plan was criminal, a plan they nonetheless sought to execute through a different solicitor.

In *Cox and Railton*, the better way of describing the privilege's application is that it never existed rather than that it was lost. It would be a travesty for the privilege to silence a lawyer who unintentionally provided a blueprint for a prospective client to commit the crime he then undertook.¹³⁵

While more recent English cases suggest that the privilege is not lost if the defendant uses the barrister to commit perjury, they are tantalisingly incomplete for not explicitly addressing the problem of perjury in our settings.¹³⁶ They suggest that a client's lies to a solicitor about the facts that support a separate claim remain privileged (even if those lies indicate that the claim itself is baseless). Our setting differs in that the defendant's false testimony is not only a way of defeating the crimes charged, but is a crime itself. *R (Hallinan Blackburn Gittings & Nott (A Firm)) v Crown Court at Middlesex Guildhall*¹³⁷ recognised the distinction, observing that the client's lies 'if acted upon, [would] lead to the commission of the crime of perjury [at trial]'.¹³⁸ But if that condition occurred, the effect this would have on the client's privilege was not discussed.

Until Australian courts construe the crime-fraud exception's application to Defendant Two's anticipated or Defendant One's actual perjury, their lawyers have another reason, in addition to the costs of disclosure, to hesitate to adopt the ABA's requirement.

133 Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (Cavendish Publishing, 2nd ed, 2004) 99 [7.2.6]. In their commentary about the uniform evidence law, those authors continue to cite only *Cox and Railton* (n 132), again overlooking the timing issue of when the defendant decided to use the lawyer to commit a crime: see Gans and Palmer, *Uniform Evidence* (n 131) 318–19 [15.3.5].

134 *Cox and Railton* (n 132).

135 For a hilarious exploration of the lawyer's quandary were the privilege to apply, see the French film *La Poison* (Gaumont, 1951). A farmer learns from a famous criminal defence lawyer how he should have killed his wife to escape conviction, then hires the lawyer to defend him after he follows the advice: see 'La Poison', *Wikipedia* (Web Page, 13 May 2019) <en.wikipedia.org/wiki/La_Poison>.

136 *R (Hallinan Blackburn Gittings & Nott (A Firm)) v Crown Court at Middlesex Guildhall* [2004] EWHC 2726 (Admin) ('*Crown Court at Middlesex Guildhall*'). See also *R v Central Criminal Court; Ex parte Francis & Francis* [1989] 1 AC 346 ('*Ex parte Francis & Francis*'); *R v Snaresbrook Crown Court; Ex parte DPP* [1988] QB 532. The discussion of the effect of the client's lies on the privilege was dictum in all three cases. The first involved the Crown's attempt to force the defendant's solicitors to produce a document that contained information that was likely to be converted into a witness statement.

137 *Crown Court at Middlesex Guildhall* (n 136).

138 *Ibid* 770 [18] (Rose LJ), quoting the judgment of Lord Goff in *Ex parte Francis & Francis* (n 136) 397 (emphasis added).

(iii) Tuckiar

Turn now to *Tuckiar*. Does that iconic case muzzle Australian lawyers from revealing to the court what Defendant One and Defendant Two have told them about perjury? That case's facts do not throw up that question, but its holding could be stretched to forbid disclosure.

After conferring with the defendant, an Aboriginal person accused of murdering a police officer, his barrister, in the jury's presence, exclaimed, impliedly,¹³⁹ that he had learned the defendant was guilty. After that impulsive act, the barrister then told the judge, in chambers, that the defendant had admitted the murder. On appeal, the conviction was reversed, the barrister reprimanded.¹⁴⁰ Two commentators erect this case to defend, obliquely, the Australian lawyers' choice to withdraw both in our settings and when a guilty defendant does not testify.¹⁴¹ The more obvious response with those defendants, they think, is to reveal that fact to the court. Not doing so, they contend, would '[seem] to make a mockery of any sense of truth and justice'.¹⁴² They nonetheless interpret *Tuckiar* to silence the advocate and, thus, by implication, to block Australian lawyers from adopting the ABA's disclosure obligation. *Tuckiar*'s trial judge might have agreed, for he said that rather than disclose the barrister should have withdrawn.¹⁴³

Tuckiar differs crucially from our situation in that *Tuckiar* did not testify. Our Defendant One and Defendant Two, by contrast, actively seek to pollute the process of determining their guilt by lying while giving evidence. It would be difficult to find a lawyer in either country who believes guilty defendants, assuming *Tuckiar* was,¹⁴⁴ are not in principle entitled to force the prosecution to prove their guilt. A jury might acquit our defendants by crediting their perjury just as it might acquit a guilty defendant who did not give evidence because it was unpersuaded by the prosecution's evidence. Is perjury different? As judged by their responses, the ABA thinks so; Australian lawyers do not.

Withdrawal, then, rather than disclosure, becomes the Australian lawyers' universal solution: if the defendant admits guilt before or during the trial, or reveals the intent to lie or having lied while giving evidence.

139 His worry that he had to speak with the judge because he was in 'the worst predicament ... in all his legal career' was code for my client is guilty: *Tuckiar* (n 124) 341 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ).

140 *Ibid* 346–7.

141 Parker and Evans (n 61) 145–7.

142 *Ibid* 144.

143 *Tuckiar* (n 124) 344 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ).

144 Ironically, *Tuckiar* might have been acquitted if he had explained his reasons for spearing the officer: *ibid* 146.

(iv) Summary

For several reasons Australian lawyers are not apt to rush to adopt the ABA's requirement that American lawyers must disclose the defendant's intent to commit or commission of perjury. First, the benefits and costs are difficult to identify, and compare. Second, it is not clear in Australia (or in the US) whether the legal professional privilege never applied, continues or is destroyed by the defendant's perjury. Third, and not yet noted, the remedy is so at odds with (at least) the American criminal defence lawyer's ethos of protecting the defendant that it will apply rarely: only especially scrupulous lawyers¹⁴⁵ would disclose and only naive defendants would reveal the information that triggers such a lawyer's obligation to disclose.¹⁴⁶ Even as Australian lawyers profess to subordinate the duty to the client over that to the court, they too might be tempted to ignore the defendant's hints, even admissions, about perjury so as to avoid the troubling problem of how to respond.

The discussion now turns to the American lawyers' two other solutions, to consider whether either would be more appealing to Australian advocates.

B Treating the Defendant's Perjury as if it Were the Truth

For the lawyer to treat the defendant's perjury as if it were the truth is the most controversial of all four solutions. The ABA would discipline a lawyer who so thoroughly supported a defendant's perjury.¹⁴⁷ In stark contrast, Freedman, the original and persistent proponent of this approach, would discipline a lawyer who did not.¹⁴⁸

145 To be true, that lawyers ignore the requirement or find ways to avoid it, see above Part II, are not reasons for counseling the ABA to adopt a different solution. The ABA cannot be expected to authorise lawyers to help a client, even a criminal defendant, commit a crime.

146 For example, the defendant in *Whiteside* (n 5) 161 (Burger CJ for Burger CJ, White, Powell, Rehnquist and O'Connor JJ), worried that his defence (of self-defence) was 'dead' unless he claimed, as had a defendant in a different case, to have seen something 'metallic' in the hand of the person he stabbed. That innocent reference to a different prosecution persuaded his lawyer that Whiteside was lying in retracting his repeated admission of not having seen the deceased with a weapon. The cost of requiring lawyers to disclose is likely to be borne only by those defendants, like Whiteside, who are poor and thus represented by lawyers appointed by the court who have no stake in protecting the defendant. By contrast, white-collar defendants, on their own or with schooling from their lawyers, recognise they must reveal nothing that could trigger their lawyers' obligation to disclose. See Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* (Yale University Press, 1985) 103–22, discussing ways lawyers representing white-collar defendants avoid learning compromising information. If by happenstance white-collar defence lawyers learn that the client will commit perjury, they have an incentive to ignore the requirement to disclose, for fear of losing business from prospective clients.

147 See *Board of Overseers of the Bar v Dineen*, 481 A 2d 499 (Me, 1984), where the lawyer was disbarred after admitting he knew the defendant was lying as he denied guilt while testifying (no discussion of the reasons to adopt or reject Freedman's position).

148 See Commission on Professional Responsibility, The Roscoe Pound-American Trial Lawyers Foundation, *The American Lawyer's Code of Conduct: Including a Proposed Revision of the Code of Professional Responsibility* (Revised Draft, May 1982) ch I [1(i)]: a disciplinary violation for a lawyer to adopt the narrative approach, thereby not treating the defendant's testimony as if it were the truth; a fortiori, disclosure would be sanctioned. Freedman was the reporter of the committee that published that code.

Defended by a few,¹⁴⁹ vilified by most,¹⁵⁰ this solution is probably the one adopted, tacitly, by many practicing defence lawyers.¹⁵¹ It has certain benefits. Of the four approaches, its use expends the fewest resources in that no hearing will be required to test the defence lawyer's belief that the defendant will lie. Nor, obviously, will the trial be aborted, and a retrial needed. Those savings in resources are outweighed, in the view of critics of this approach, by the non-financial importance of not countenancing perjury by the defendant. For those critics, it is ironic that the lawyer using this approach is in the best position to persuade the defendant that, for tactical reasons, he should not testify or, if he does, not to lie. That salutary result could come if the defendant trusts the judgment of a lawyer so loyal that he would imperil himself were the defendant to insist upon committing perjury.¹⁵²

Freedman's position could also be defended by divorcing morals from law, and thus by focusing solely on the defendant's constitutional rights. In the Fifth Amendment to the *United States Constitution's* privilege against self-incrimination and the Sixth Amendment to the *United States Constitution's* right to present a defence could be found a reason to help the defendant to commit perjury,¹⁵³ even were the advocate to abhor doing so. Those rights coalesce arguably to protect the defendant from being harmed in any way by the defence lawyer. Such an interpretation is especially forceful if the harm stemmed from something the lawyer learned from the defendant in confidence. The other responses to client perjury — withdrawal with or without disclosure and the narrative approach — will all alert the prosecutor and the judge, and perhaps the jurors, that the defence lawyer knows something is amiss with the client's defence.¹⁵⁴ Nonetheless, this ambitious constitutional interpretation depends on

149 Ibid ch I cmt. See also Advisory Committee on Professional Ethics of New Jersey, *Privileged Communications: Criminal Cases* (Opinion No 116, 19 October 1967): to underscore the importance of protecting the defendant's confidences, lawyers should 'on the basis of the sworn [but false] testimony of the defendant, [allow] the court and jury to determine the defendant's innocence or guilt'.

150 See above nn 19–20.

151 In a survey conducted long ago (1972) of lawyers who practiced in Washington, DC, 87% (115 of 132) said they would question the lying defendant as if he were telling the truth: see Steven Allen Friedman, 'Professional Responsibility in DC: A Survey' [1972] (Fall) *Res Ipsa Loquitur* 60, 81. Despite the ABA's adoption of *Model Rules* (n 6) r 3.3(a)(3), criminal defence lawyers probably continue to adopt this approach, as suggested by its recent endorsement by an association representing them: see National Association of Criminal Defense Lawyers, 'What is the Proper Course for the Criminal Defense Attorney if the Defendant Proposes to Commit Perjury?' (1993) 17(2) *The Champion* 23, adopting Freedman's approach.

152 See above nn 18, 105. Freedman was himself at risk for expressing his position. His most prominent critic, then-judge Justice Warren Burger tried unsuccessfully to have Freedman disbarred because of his proposal: see Monroe H Freedman, 'Getting Honest About Client Perjury' (2008) 21(1) *Georgetown Journal of Legal Ethics* 133, 133 (citations omitted). Having failed in that effort, Burger CJ, after his ascension to the Supreme Court, seized the opportunity to excoriate Freedman (without naming him) in his opinion for a unanimous court: *Whiteside* (n 5) 173 ('never been responsibly advanced').

153 Among its protections, the Fifth Amendment to the *United States Constitution* provides that '[n]o person shall be ... compelled in any criminal case to be a witness against himself'. The Sixth Amendment to the *United States Constitution* 'guarantees criminal defendants a meaningful opportunity to present a complete defense': *Holmes v South Carolina*, 547 US 319, 324 (Alito J for the Court) (2006) (citations omitted).

154 See below nn 177–8.

viewing the perjury as enmeshed in defending the crime charged, rather than as a separate crime.¹⁵⁵

The point is not that a defendant has a right to lie; rather, it is that the defendant who lies has a right not to be harmed by the defence lawyer for committing even that morally indefensible and criminal act.

Freedman's lawyer might be regarded as a tragic figure, forced to abandon his moral compass to protect the legal right of an undeserving defendant.¹⁵⁶ But that concern, a proponent of this solution might say, ignores the lawyer's paramount duty: protecting the client's autonomy.¹⁵⁷ As an agent, the lawyer's function is to 'assist' the principal, the client,¹⁵⁸ not to censor him privately, surely not to harm him publicly. While remonstrating with the defendant not to lie, the lawyer must accept the defendant's contrary decision to commit perjury. To do otherwise would violate the defendant's right to decide how to act in a matter of fundamental importance.

In the US a criminal defendant's autonomy is protected in other ways that do not exist to the same extent in Australia. Three examples suffice. A defendant cannot be forced to testify first or not at all.¹⁵⁹ Conversely, his decision to forego testifying is immune from comment by the prosecutor or judge.¹⁶⁰ Then, defendants who tell

155 See Monroe H Freedman and Abbe Smith, *Understanding Lawyers' Ethics* (LexisNexis, 3rd ed, 2004) 176 [6.13].

156 For Freedman, representing a client does involve a moral decision, but its locus is elsewhere than with the defendant's perjury. American lawyers, not bound by the cab rank rule, must decide whether to represent a client. It is at that point that Freedman would have lawyers compare their values with the goals of the client and the means needed to achieve them: see *ibid* apps A 371–82, B 383–92. Once the representation begins, judging ends: the lawyer must not temper his support of the client. By contrast, the ABA permits lawyers to judge the client's ends and the means needed to achieve them after representation begins. See *Model Rules* (n 6) r 1.16(b)(4): lawyers may withdraw if the 'client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement'. Lawyers might reject Freedman's model because the defendant will ensnare the lawyer in his desire to lie while giving evidence typically only after the representation begins. Freedman never said what he would do if in their initial meeting, before the relationship was formed, the prospective client said he would lie while testifying if charged or if the accusation went to trial.

157 Stressing the lawyer's devotion to the client, the Commission on Professional Responsibility that adopted Freedman's position (see above n 148) condemned the ABA for viewing 'lawyers as ombudsmen, who serve the system as much as they serve clients': see Theodore I Koskoff, 'The American Lawyer's Code of Conduct: A Preface' [1982] (July) *Trial* 55, 56.

158 See *United States Constitution* amend VI: '[i]n all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence'. The insistence that the lawyer 'assist' the defendant rather than control every decision was central in holding that defendants could represent themselves: see *Faretta v California*, 422 US 806 (1975).

159 See *Brooks v Tennessee*, 406 US 605, 607–12 (Brennan J for Brennan, Douglas, White, Marshall and Powell JJ) (1972). While in England defendants must testify first or not at all, see *Police and Criminal Evidence Act 1984* (UK) s 79, in Australia it is the custom, not the rule, for them to do so, see *RPS v The Queen* (2000) 199 CLR 620, 648–9 [83]–[84]. The purpose of such a sequence meshes with our article: to limit the ability of defendants to lie or alter their stories to fit that of other defence evidence.

160 See *Griffin v California*, 380 US 609, 610–15 (Douglas J) (1965). In Australia, jurisdictions that once permitted the judge to comment now forbid it. Compare *Weissensteiner v The Queen* (1993) 178 CLR 217, 233 (Brennan and Toohey JJ) (permissible) and *Evidence Act 1995* (NSW) s 20 (permissible) with *Jury Directions Act 2015* (Vic) s 42 (not permissible). In England the court may comment: see *Criminal Justice and Public Order Act 1994* (UK) s 35.

the judge they are innocent may nonetheless plead guilty.¹⁶¹ If one may condemn oneself to prison by lying (by admitting guilt), might not a defendant be permitted to lie in hope of preventing a conviction? To be true, the values seem inverted: an innocent person is sanctioned while a guilty one (who commits perjury) may escape a deserved conviction.

Those examples of special treatment do not entail Freedman's solution. But they suggest that viewing the criminal defendant's testimony — even perjury — as unique is not outlandish. Not forsaking defendants who want to lie would thus be the price the judicial system must tolerate for the lawyers' promise to use whatever they learn from defendants only to help them.¹⁶²

Those arguments, if they represent Freedman's position, are open to challenge on various grounds. The emphasis on constitutional protection is, perhaps, a peculiarly American focus. Moreover, in its only decision discussing a defendant's suspected perjury, the US Supreme Court demolished Freedman's assumption that the constitutional amendments protect the defendant from the risk of any adversarial harm created by the lawyer's conduct.¹⁶³ Others would reject Freedman's position as epitomising the problem of role-differentiation, whereby lawyers must do in role — here, helping the client to lie — what they would recoil from doing out of role. Both the constitutional and the legal professional privileges could then have a different conceptual understanding: they protect defendants only in so far as they seek what the law permits, and perjury is forbidden.

Freedman's solution nonetheless draws strength from what is perhaps a peculiarly American model of criminal defence. Given the ramifications of a criminal conviction, lawyers defending the criminal accused are exempt from restrictions on their advocacy in other contexts.¹⁶⁴ The defence lawyer's role is atomistic, to

161 See *North Carolina v Alford*, 400 US 25, 37–8 (White J for Burger CJ, White, Harlan, Stewart and Blackmun JJ) (1970). While assisting a defendant to plead guilty, who insists he is not, barristers (and the defendant) will act as if the defendant is guilty: see New South Wales Bar Association, *New South Wales Barristers' Rules* (at 6 January 2014) r 40C(b) (any 'mitigation ... must be consistent with admitting guilt').

162 Does it follow that the lawyer must help the defendant to bolster his perjury by calling other witnesses to lie? Freedman and Smith would call the defendant's 'spouse/partner or parent', but no one else: see Monroe H Freedman and Abbe Smith, *Understanding Lawyers' Ethics* (Carolina Academic Press, 5th ed, 2016) 168 [6.12]. By contrast, with evidence other than the criminal defendant's testimony, the ABA authorises lawyers to refuse to present any evidence that 'the lawyer reasonably believes is false': see *Model Rules* (n 6) r 3.3(a) (3).

163 *Whiteside* (n 5) 173 (Burger CJ for Burger CJ, White, Powell, Rehnquist and O'Connor JJ). See above n 52 and accompanying text. Because while testifying Whiteside gave the version his defence lawyer thought was true, the lawyer was never forced to carry out his threat to impeach Whiteside's testimony. During Whiteside's appeals, no court discussed the limits of what a lawyer may do to counter the defendant's perjury, and thus whether the ABA's disclosure remedy is constitutional.

164 See, eg, *Model Rules* (n 6) r 3.1, effectively authorising lawyers representing criminal defendants to use frivolous arguments, prohibited elsewhere.

defend this person with unqualified bias.¹⁶⁵ It is for others to catch the defendant lying (the prosecutor) and to enforce procedural rules to cabin adversarial excess (the judge).

That model fits the perhaps unusual milieu of advocacy in criminal cases in the US. A few examples suffice. When possible, defence lawyers will mislead the fact finder about the meaning of true but incomplete information.¹⁶⁶ Prosecutors are permitted to act in ways that would result in a settlement's undoing in civil litigation.¹⁶⁷ Apart from what they may do, prosecutors thirst for convictions. When elected, they risk defeat by losing trials, as tempering their advocacy might cause. That thirst induces them to stretch and even contravene the rules. As but one example, it leads them too often to breach their niggardly but constitutionally-commanded obligation to disclose evidence that favours the defendant.¹⁶⁸

The 'battle' model of advocacy adopted by American defence lawyers in criminal cases is not needed by Australian defenders. While the latter might also feign having an unfailing belief in the defendant's innocence,¹⁶⁹ they do not need to worry about prosecutorial excess in the way American defence lawyers do. By the trial, the defence will have been told as much about the evidence as the prosecutor knows.¹⁷⁰ Moreover, those who prosecute in Australia follow a different adversarial attitude than do too many of their counterparts in the US. They do not see their purpose as primarily to achieve a conviction, rejecting that

165 Embracing Lord Brougham's (in)famous maxim that the advocate 'knows but one person in all the world', Bartolomeo Bergami, *Trial of Queen Caroline: The Defence, Part 1*, ed J Nightingale (J Robins & Albion Press, 1821) 8, defence lawyers rein their enthusiasm for flouting the rules of evidence and giving provocative arguments in a final speech, for example, only for forensic reasons. Excess is checked only by the prosecutor's objection and the judge's ruling.

166 Even as Australian advocacy is beginning to be characterised as zealous, see Paula Baron and Lillian Corbin, *Ethics and Legal Professionalism in Australia* (Oxford University Press, 2nd ed, 2017) 89 [2.1], to an American colleague of mine their advocacy involves a fealty to the truth unusual by American lawyers' behavior (at least in criminal defence): see Abbe Smith, 'Defending the Unpopular Down-Under' (2006) 30(2) *Melbourne University Law Review* 495, 532. In representing a guilty defendant, for example, American lawyers are not hamstrung in the way Australians are. Cf *Barristers' Conduct Rules* (n 3) r 79.

167 *People v Jones*, 375 NE 2d 41 (NY, 1978): there was no error for the prosecutor, before trial, not to inform the defendant that a critical witness, without whose testimony the case would be dismissed, was dead. Cf *Virzi v Grand Trunk Warehouse and Cold Storage Co*, 571 F Supp 507 (ED Mich, 1983), where the settlement was voided when the plaintiff's lawyer did not reveal that the plaintiff had died.

168 The failure by the prosecution to share exculpatory or significant impeaching information with the defence is a reversible error only if, in hindsight, there was 'a reasonable probability that, had the evidence been disclosed ... the result of the [trial] would have been different': *United States v Bagley*, 473 US 667, 682 (Blackmun J for the Court) (1985). Of countless examples of this endemic problem, see Emily Bazelon, 'Guilt by Omission' (6 August 2017) *The New York Times*. To explain why they bury exculpatory evidence, prosecutors observed that 'the reward structure fostered a win-at-all-costs mind-set, fueled by the belief that "everyone is guilty all the time"': at 44.

169 See Freedman (n 14) 1471: because jurors believe defence lawyers know whether the defendant is guilty, their 'every word, action, and attitude [must] be consistent with the conclusion that [the] client is innocent'.

170 Interview with Mark Tedeschi, New South Wales Senior Crown Prosecutor (Rule of Law Institute of Australia, 15 October 2012) <www.ruleoflaw.org.au/education/videos/innocence/>.

pursuit as unfair to defendants and also as ineffective as a forensic strategy.¹⁷¹

A last reason for Australian lawyers to reject Freedman's solution involves his apparent disregard for the harm that results from an acquittal based on a guilty defendant's lie. Consider the odd illustration — our Defendant Two — he uses to defend his position.¹⁷² Charged with robbing an elderly woman, Freedman's defendant admits to his lawyer that he was a short distance from the scene of the crime when it was committed. Although in fact innocent, the defendant understandably fears that revealing his location while testifying might lead the jury to overlook obvious problems with the victim's ability to identify the culprit. So he testifies that he was elsewhere, a lie that the defence lawyer treats as the truth. While with this example Freedman loads his argument — is it permissible to do wrong (perjury) to achieve the correct result (an acquittal)? — he could also be expected not to flinch from treating a guilty (and dangerous) defendant's perjury in the same way.

C The Narrative Approach

By requiring lawyers to remedy the defendant's perjury, the ABA rejected the narrative approach,¹⁷³ one that had been adopted by one of its sections.¹⁷⁴ It has, however, been adopted by an archipelago of important jurisdictions in the US.¹⁷⁵

Supporters of one of the other three responses will assail the narrative approach as providing either too much or too little protection for the defendant: the former in that the defendant's perjury might persuade the jury to acquit if the prosecutor fails to expose it; the latter in that it jeopardises the defendant's chance of acquittal in ways that withdrawal and Freedman's approach do not.

As a compromise, however, this approach provides the advantages of respecting the lawyer's moral integrity, saving resources and balancing the lawyer's twin duties to the client and court.

171 As to the first point, see *Barristers' Conduct Rules* (n 3) r 82: '[a] prosecutor must fairly assist the court to arrive at the truth [and] must seek impartially to have the whole of the relevant evidence placed intelligibly before the court'. By contrast, in federal prosecutions the defence does not even learn who will testify against the defendant until the person is called to give evidence by the prosecutor: see *Federal Rules of Criminal Procedure* r 16. As to the second, Australian lawyers believe that understated advocacy in prosecuting is more likely to persuade a jury to convict than aggressive cross-examination and lachrymose final speeches.

172 See Monroe H Freedman and Abbe Smith, *Understanding Lawyers' Ethics* (Carolina Academic Press, 5th ed, 2016) 157–9 [6.05]. Freedman and Smith have not varied this single example of their position in all four editions of the book.

173 Discussion Draft (n 99) 65 r 3.1 (as then numbered). The ABA concedes that the narrative approach supersedes its own in a jurisdiction that has adopted that response: at 67.

174 See American Bar Association, *Standards Relating to the Prosecution Function and the Defense Function* (1971) standard 7.7(c).

175 See, eg, California in *People v Johnson* (n 19); Massachusetts in *Mitchell* (n 45); New York in *People v DePallo*, 754 NE 2d 751 (NY, 2001); Pennsylvania in *Commonwealth v Jermyn*, 620 A 2d 1128 (Pa, 1993).

Defence lawyers uneasy with Freedman's response would welcome this approach. They avoid being degraded if forced to burnish a defendant's lies, lies that would debase an acquittal to which they contribute.

Because the lawyer does not withdraw, the cost is lower than with the Australian and the ABA's approaches, as there is no need for a second trial.¹⁷⁶

It could also be regarded as the most ethical because the lawyer seeks to honor both duties, to the defendant and to the court. The other three approaches elevate one of the other duties far above the other.

By withdrawing, the Australian lawyer abandons the defendant; by disclosing the defendant's perjury, the ABA's approach, the lawyer betrays the defendant's trust in the advocate's loyalty and the latter's pledge of confidentiality. With the narrative approach, by contrast, the lawyer remains with the defendant, as they wrestle over whether the defendant will lie, and needs to lie to persuade the jury to acquit. Moreover, by refusing to accede to the defendant's belief that only perjury will prevent conviction, the lawyer may be spurred to work diligently to find other ways to defend successfully.

As withdrawal and Freedman's approach emphasise the lawyer's duty to the client, the narrative approach better recognises the lawyer's duty to the court, if not to the same extent as the ABA's.

The risk that the court's process will be corrupted by the defendant's perjury is less because the defendant may not escape being harmed by lying while giving evidence. This is due in part to the fact the defendant is not apt to lie effectively. Upon learning that the defendant intends to lie, the lawyer stops helping the defendant prepare to testify. Bereft of that help, and now unsure whether lying will be persuasive, the defendant might be persuaded by the lawyer either not to testify or not to lie if he does. By contrast, with a mistrial almost surely precipitated by the Australian lawyers' and the ABA's solutions, the defendant can hide any lies from the replacement advocate, and could thus lie more effectively to the jury in the second trial because this time he will be assisted in preparing to testify.

If the lawyer fails to persuade the defendant not to lie, narrative testimony increases the risks of conviction and of a harsher sentence if the jury convicts. The peculiar mechanics of this form of testimony signal to the judge and the prosecutor that the defendant is lying, because, rather than structuring the defendant's testimony on direct examination in the normal way, the defence lawyer unusually invites

¹⁷⁶ As with the ABA's approach, the judge may need to conduct a hearing if the defendant protests that he wants to testify as other witnesses do because he can refute the lawyer's belief he will lie. If the judge agrees with the defendant that the lawyer does not 'know' the defendant will lie, the trial continues, with the defence lawyer swallowing the concern over perjury to treat the defendant's testimony as if it was true.

the defendant to tell the jury what he pleases.¹⁷⁷ The prosecutor would ordinarily respond by objecting that the defendant must answer questions, not ramble on with unstructured testimony that consumes pages of transcript. By limiting his involvement, however, the defence lawyer impliedly alerts the prosecutor not to invoke the evidentiary objection to the narrative form of the defendant's testimony (while the prosecutor might still object on other grounds, like hearsay).

The peculiar form of the direct examination will also spur the prosecutor to cross-examine doggedly in an effort to locate the defendant's perjury. If that effort succeeds, conviction is all but certain. Indeed, jurors may be more ready to convict because they themselves understand why the defence lawyer truncated the direct examination, and then ignored the defendant's testimony in trying to persuade them, in argument, not to convict.¹⁷⁸

Since this approach increases the likelihood of conviction, it also creates the risk for the defendant that the punishment will be harsher if conviction occurs. As noted,¹⁷⁹ the judge may increase the sentence to reflect the defendant's suspected perjury. Any reservation the judge might harbour over whether or not the defendant has lied is eliminated by the defence lawyer's resort to this approach.

In the end, this approach straddles the lawyer's twin duties to the court and to the defendant better than do the other three responses. Like Freedman's, it minimises the resources needed to adjudicate guilt, but unlike Freedman's, it insulates the lawyer from the vituperative objection of treating the defendant's lies as the truth. While respecting the value of permitting the defendant to decide what to tell the jury, it also poses the least risk of the four solutions that the defendant's perjury will persuade the jury inappropriately to acquit. For these reasons it is arguably the most defensible approach to adopt.

177 For example, the defence lawyer might begin by asking the defendant: 'What would you like to tell the jury?' And then: 'Are you finished? Is there more you wish to add?' Implementing the narrative approach nonetheless involves tactical and ethical issues. Suppose the defence lawyer knows that the defendant will lie about point one, but does not know whether he is lying about points two, three and four. Does the defence lawyer question the defendant about the latter three and resort to the narrative about point one? Or does the defence lawyer use the narrative approach for all four? The first choice is consistent with the narrative approach, but highlights for the prosecutor, the judge and any astute juror the point about which the defence lawyer knows the defendant lies. The second approach forces the defendant to tell his story without help from the defence lawyer, but hides the locus of the defendant's lie, thereby making it more difficult for the prosecutor to uncover it. With either choice, the defence lawyer must not help the defendant improve his lie(s). But may the defence lawyer at least identify the topics that the defendant must discuss when telling his story as a narrative?

178 As Ross notes, a lawyer used the narrative approach during an episode on the American television series *The Practice*: Ross (n 7) 546 [15.17], citing 'Dog Bite', *The Practice* (20th Century Fox Television, 1997), cited in Michael Asimow and Richard Weisberg, 'When the Lawyer Knows the Client is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature' (2009) 18(2) *Southern California Interdisciplinary Law Journal* 229, 242 n 63 (the episode aired on 4 October 1997, during the program's second year). As noteworthy as that series was in exploring the ethics of criminal defence, that episode is, to my knowledge, the only instance when via a television program the public might have learned of this approach.

179 See above n 87.

VI CONCLUSION

Defendant One and Defendant Two, but not Defendant Three, create for lawyers in both countries the ethical problem of how to respond to their anticipated or actual perjury.

Defendant Three's advocate will defend as effectively as possible, even calling him as a witness to offer his preposterous story, if he cannot be persuaded to rely on the advocate's ability to weaken the force of the prosecution's evidence. Defendant Three plays no role in this article's subject.

With Defendant One and Defendant Two, we have assumed their lawyers have not employed the ruses discussed in Part II to prevent them from 'learning' or 'knowing' that the defendant will lie or has lied in giving evidence. But, as suggested in that Part, favouring the interests of the court over the client, as Australian lawyers claim to do, does not constrain their advocacy if they permit defendants to alter their instructions, indeed if they help defendants to shape those instructions. Only the dumbest or most brazen of defendants will trigger the Australian lawyer's obligation to respond to their perjury.

Nonetheless, we assumed that the condition triggering the lawyers' need to respond — 'learning' or 'knowing' — occurs. Burdened by that knowledge, the responses of advocates in the two countries expose rifts between their models of advocacy. Those differing responses also suggest the difficulty, with this issue at least, of reconciling the dual, and here conflicting, duties to court and client.

By withdrawing, and thus by abandoning the defendant, Australian lawyers believe they honour their superior duty to the court. It is true that by withdrawing the advocate escapes being soiled by the defendant's crime. But this solution is otherwise unattractive. It is expensive if the lawyer's withdrawal precipitates a mistrial. It is worse than useless if the goal is to prevent the defendant from committing perjury, for it instructs the defendant to hide his lies from the new advocates, who will suppress their scepticism about the defendant's instructions and treat his false testimony as if it were the truth.

For other reasons, at least two of the American lawyers' three alternative solutions are not much more attractive than the Australian advocates'.

Along the continuum between honouring the duties to the court and to the defendant, of the four solutions, the ABA's — requiring the lawyer to disclose that the defendant will lie or has lied — most exalts the former over the latter. But by complying with this obligation, the lawyer betrays the principled and

pragmatic premises of the legal professional privilege.¹⁸⁰ And if at the outset of their relationship the lawyer warns the defendant of this disclosure obligation,¹⁸¹ then the defendant is alerted that he can lie so long as he does not carelessly reveal that intent. Also, like the Australian solution, the ABA's goal — to prevent defendants from benefitting from perjury — is lost if a new trial is necessary.

In ranking the advocate's two duties, treating the defendant's lies as if they were true, Freedman's solution, is the antithesis of the ABA's. This solution is the quintessential — and probably unique¹⁸² — instance where the court's interests are ignored to protect the defendant's ability to force the prosecution to overcome all impediments to conviction.

Australian lawyers will not stomach Freedman's approach. How can a person of honour help guilty defendants compound their culpability by committing a crime designed to escape primary responsibility for the crime charged? To say that this approach is required by the advocate's role requires embracing an unappealing, extreme version of that role — one in direct opposition to at least a barrister's, if not all Australian lawyers' idealised model of the dispassionate advocate, one unconcerned with the outcome so long as the client's position is presented adequately.¹⁸³

The narrative approach is perhaps the most useful contrivance, saving judicial resources (because the trial continues to verdict), and letting defendants tell their story to the jury, albeit less effectively than were either Freedman's or the Australian approaches adopted. Indeed, even if the prosecutor fails to expose the locus of the defendant's lies, this approach is far more likely than the others to lead to a justifiable outcome — the defendant's conviction — since the peculiar nature of the examination-in-chief may cause jurors to doubt the defendant's veracity.

In the end, Australian lawyers are not likely to alter their approach. It enables them to escape the discomfort of participating in the defendant's perjury, thus avoiding actively helping the defendant undermine the jury's search for truth. It also enables them to preserve their personal honour by escaping from representing a defendant who insists on committing a separate crime to avoid conviction for

180 The principle undergirding the legal professional privilege is protecting our ability to decide how much information about ourselves to reveal to others. The pragmatic purpose is to coax the client to reveal to the lawyer everything relevant to the controversy, for otherwise, fearful of disclosure, the client may withhold information that could be of use to the lawyer.

181 For a discussion see above n 26 and accompanying text.

182 While Freedman and Smith would call certain witnesses to support the defendant's lies (close relatives), one imagines that other lawyers would be reluctant to follow them and Punch, and offer evidence supporting the defendant's lies: see Monroe H Freedman and Abbe Smith, *Understanding Lawyers' Ethics* (Carolina Academic Press, 5th ed, 2016).

183 See, eg, George Hampel and Elizabeth Brimer, *Hampel on Ethics and Etiquette for Advocates* (Leo Cussen Institute, rev ed, 2006) 6, quoting *Ex parte Lloyd* (Lord Eldon, 5 November 1822), cited in *Ex parte Elsee* (1830) Mont & B 69, 72 n (a): '[t]he result of the cause is to [the advocate] a matter of indifference'.

the one charged. However, withdrawal without disclosure also effectively hides from the public the fact that they do nothing to prevent defendants from lying about their complicity, albeit to the next jury. As a result, is it truly candid for Australian lawyers to contend that withdrawal alone fulfils their superior duty to the court?