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LEGAL ADVICE ABOUT INFORMATION TO PRESENT IN LITIGATION: ITS EFFECTS AND SOCIAL DESIRABILITY

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TABLE OF CONTENTS

ARTICLE

LEGAL ADVICE ABOUT INFORMATION TO PRESENT IN LITIGATION: ITS EFFECTS AND SOCIAL DESIRABILITY

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Legal advice provided in the course of litigation often concerns the selection of information to present to a tribunal. Professors Kaplow and Shavell examine the effects and social desirability of this kind of advice. They observe that such advice may result in either more or less information reaching the tribunal and that, in either case, it will tend to produce more favorable outcomes for clients. Because individuals will take this effect into account when deciding how to act, the prospect of advice may alter their behavior. The authors explore the factors determining whether the influence on behavior is desirable or detrimental. They emphasize that legal advice supplied during litigation differs significantly from advice given when acts are initially contemplated, because only the latter type of advice generally tends to channel behavior in a socially desirable manner. The authors' analysis raises basic questions about the wisdom of the attorney-client privilege and rules protecting confidentiality in the context of litigation, and it suggests that inquiry into the lawyer's role be recast.

I. INTRODUCTION

A significant aspect of legal advice provided in litigation involves selecting, from the potential pool of information about the case at hand, that portion to present to the tribunal. When advising clients on their testimony, or when deciding which witnesses to call at trial or which documents to offer in evidence, the lawyer plainly influences the information that reaches the tribunal through a process of selection. Perhaps less obviously, the lawyer influences the information the tribunal receives through a selective process when, for example,

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choosing how to conduct questioning or how to frame a case in opening and closing argument.

The present Article considers the effects and the social desirability of this important type of legal advice. It emphasizes that such advice influences the operation of the legal system by altering the sanctions parties expect to be imposed on them; this effect in turn changes incentives to behave in conformity with legal norms. The Article concludes that the desirability of legal advice about information to present to the tribunal is open to question; there is no a priori basis for believing that such advice tends to promote socially desirable behavior.[1]

As a preliminary matter, Part II discusses the extent to which lawyers are able to influence the information brought before tribunals, given existing rules concerning confidentiality and discovery. Parts III and IV present the main part of the analysis. For clarity and ease of exposition, the discussion and examples in these Parts refer to a stylized model in which individuals are assumed to be defendants (civil or criminal) and lawyers to have the sole function of selecting which evidence to present to a tribunal. (These assumptions are relaxed in Part V.)

Part III itself examines the effects of legal advice in the model. If individuals do not receive legal advice, they will not present all evidence they possess; rather, they will present evidence they believe is favorable and refrain from presenting evidence they believe is unfavorable. But, to the extent their knowledge is imperfect, individuals will tend to make mistakes in this unassisted selection of evidence: They may present some evidence that is unfavorable or fail to present some evidence that is favorable. By contrast, if individuals have legal advice, they will make neither of these errors, assuming as we do that lawyers, with their superior knowledge of the law, will advise their clients to present only favorable evidence. As a consequence, legal advice reduces the amount of unfavorable information reaching the tribunal and augments the amount of favorable information.

We then consider how the prospect of legal advice affects individuals' prior choices among acts that may result in their coming before a tribunal — whether to commit a crime or break a contract, for example. Because legal advice helps individuals avoid errors in their selection of evidence, they will anticipate lower sanctions and therefore be more likely to commit acts that may result in sanctions.

Part IV addresses the question of whether the effect of legal advice on behavior is socially desirable. It may appear that advice is undesirable because, as stated, it tends to encourage acts subject to a risk

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[1] Hereafter, unless otherwise noted, "legal advice" will refer to advice about information to present to the tribunal.

of sanctions.[2] This reasoning, however, is incomplete. First, some individuals probably will face excessive sanctions for certain acts even when society attempts to set sanctions appropriately. Advice would be desirable if it reduced sanctions mainly in such circumstances — for instance, in circumstances where innocent individuals are mistakenly accused. One must, therefore, examine the particular individuals and acts for which advice lowers sanctions in order to determine whether advice is desirable or undesirable.

Second, any conclusion about the social desirability of legal advice must take into account the possibility of adjusting the system of sanctions. For example, if sanctions would be too low as a result of legal advice, perhaps they could be raised in an offsetting manner. After exploring this and other possibilities, we determine that sanctions can be adjusted to offset completely the effects of legal advice only in some instances. Despite efforts to set sanctions optimally, there ordinarily will be individuals who will not be deterred from committing certain undesirable acts while there will be others who will be deterred from committing certain desirable acts. Whether the influence of legal advice on behavior will, in the end, be desirable or undesirable depends on a complex, context-specific, and in some respects fortuitous interaction of features of the system of sanctions. As a result, no general statement about the social desirability of the effect of legal advice on behavior can be made.

In the course of the analysis, we correct two erroneous beliefs about the desirability of advice. First, we emphasize that legal advice offered during litigation cannot guide behavior for the simple reason that such advice is given only *after* individuals have chosen how to act. An individual who is uncertain about what will constitute a breach of contract can hardly make better decisions because a lawyer explains rules of contract law in the process of defending the individual in a lawsuit; legal advice would have to be offered *beforehand* for the individual's decisions to be improved. Second, we explain that the effect of legal advice on information reaching the tribunal has no definite implication for the ability of the legal system to induce socially desirable behavior. As noted earlier, there is no general reason to think that advice systematically results either in more or in less information being presented. Further, we indicate that there is no necessary correlation between the information tribunals receive as a result of legal advice and the ability of the legal system to regulate behavior.

In Part V, we consider a variety of issues that provide a more complete understanding of legal advice offered during litigation. We note initially that our analysis applies to aspects of legal advice that

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[2] This position was advanced forcefully by Bentham. See J. BENTHAM, THE RATIONALE OF EVIDENCE bk. 5 (1827), discussed in subsection V.F.1.

go beyond the selection of evidence and to aspects of the legal system other than sanctions per se. Next, we reexamine the analysis assuming that legal advice is available to opposing parties. Then, we elaborate on important differences between advice offered during litigation and advice offered at the stage when individuals are contemplating how to act. Following this, we investigate a set of factors bearing on the social desirability of legal advice that were not studied in Part IV; these include the cost of legal advice, elements of advice that facilitate the legal process, and the connection between advice and the fairness of legal treatment. Afterward, we comment on the literature most closely related to our subject, that addressed to confidentiality and evidentiary privileges. Finally, we speculate on modifications of the legal system that would reduce lawyers' ability and incentive to strategically select information to present to the tribunal while preserving their ability to help clients in other respects.

II. LAWYERS' ABILITY TO SELECT INFORMATION REACHING THE TRIBUNAL

The analysis in the Parts to follow rests on the assumption that lawyers select from the set of available information all that is favorable to present and withhold all that is unfavorable. In this Part, we consider briefly the extent to which this assumption is valid in our legal system.

For the assumption to be valid, lawyers must have access to all favorable information clients possess and be permitted to withhold any unfavorable information clients possess.[3] Protection of confidentiality and the attorney-client privilege seem to make this possible. They appear to allow lawyers to refrain from presenting unfavorable information and, as a consequence, appear to induce clients to furnish all relevant information to their lawyers, even when clients suspect that some of it may be unfavorable.[4]

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[3] We suppose that lawyers are motivated to act on their clients' behalf, in light of their natural desire to please their clients, their economic and reputational interests, and the norm of zealous representation stressed in the profession. In addition, we note that in most cases lawyers would not have interests clearly contrary to their clients' with respect to the issues we address.

[4] The *Model Rules* provide that: "A lawyer shall not reveal information relating to representation of a client . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter MODEL RULES]. The comment states: "A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." It also indicates that the rule applies "not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."

There are, however, two important limitations on lawyers' ability to select only evidence that is favorable to their clients. First, some unfavorable information will be available from sources beyond clients' control — the police, disinterested individuals, opposing parties in litigation — so that the importance of lawyers' ability to refrain from presenting unfavorable evidence is confined largely to information available only to their clients. Second, rules concerning discovery and testimony by parties may require clients to disclose unfavorable information.

Rules concerning discovery and testimony by parties differ substantially in the criminal and civil contexts. In the criminal setting, the situation is relatively clear. Lawyers are able to keep from the tribunal most of what defendants tell them in confidence.[5] The prosecutor is permitted only narrow discovery,[6] and the fifth amendment allows defendants to withhold their information. Lawyers for defendants who do not testify are free to offer other evidence selectively. Defendants who choose to testify, however, may be required to make

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The *Model Code* is virtually the same in relevant respects. The Disciplinary Rules provide:

> DR 4-101 Preservation of Confidences and Secrets of a Client
>
> . . . .
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> . . . .
>
> (C) A lawyer may reveal:
>
> (1) [With consent of client].
>
> (2) [When permitted elsewhere by rules or required by law].
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> (4) [To collect fees or to defend self].

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980) [hereinafter MODEL CODE] (footnotes omitted). The ethical considerations provide:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer . . . . A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

Id. EC 4-1 (footnotes omitted).

[5] The role of criminal prosecutors in this regard differs from that of defense attorneys and lawyers in civil litigation. *See infra* pp. 612–13.

[6] Although many jurisdictions require defendants to indicate before trial an intention to rely on an alibi or insanity defense and some require them to divulge the evidence they intend to offer, *see* Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567, 1579–81 (1986), these requirements pertain to evidence already selected with the help of attorneys, not to witnesses, documents, and other information that defendants do not intend to present.

further revelations under cross-examination.[7] But if they perjure themselves — an act that may include denying knowledge of witnesses, documents, or other damaging evidence — it is unclear whether their deceit will be discovered or whether their lawyers must disclose the truth to the tribunal,[8] as we will discuss below.

In the civil context, lawyers appear to be less able to withhold unfavorable information from the tribunal.[9] Although confidential communications themselves need not be revealed,[10] clients may be

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[7] Cross-examination generally is limited to the subject matter of the defendant's testimony and to impeachment. *See* MCCORMICK ON EVIDENCE § 26 (E. Cleary 3d ed. 1984); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 546–47 (1982).

[8] The lawyer's duty to correct such deceit continues to be controversial. *Compare* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 27–42 (1975) (arguing that protecting confidentiality is more important than preventing perjury, particularly in the criminal setting) *with* Rotunda, *Book Review*, 89 HARV. L. REV. 622 (1976) (rejecting Freedman's position). The *Model Rules* requiring "Candor Toward the Tribunal" provide that a "lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false." MODEL RULES, *supra* note 4, Rule 3.3(a)(4). In the criminal context, the comment states that, if other options fail, lawyers must reveal their clients' perjury to the court unless constitutional requirements in the jurisdiction prohibit such disclosure. The United States Constitution does not. *See* Nix v. Whiteside, 475 U.S. 157 (1986); *see also infra* note 19 (examining the civil context). Most of the debate on the subject and the comments to the *Model Rules* do not address whether statements on cross-examination of the sort considered in the text would be included in the "offer" of evidence. In addition, as discussed in the text to follow and note 12, lawyers can do much to avoid "knowing" with the requisite level of certainty that testimony is false. In practice, there seems to be little doubt that many defendants lie on the stand — with their lawyers often knowing well enough a more nearly true account — and that lawyers rarely expose their clients' deceit to the tribunal.

The *Model Code* is far more limited than the *Model Rules* in what disclosure it requires:

> DR 7-102 Representing a Client Within the Bounds of the Law
> (A) In his representation of a client, a lawyer shall not:
> . . . .
> (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
> (4) Knowingly use perjured testimony or false evidence.
> . . . .
> (B) A lawyer who receives information clearly establishing that:
> (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

MODEL CODE, *supra* note 4, DR 7-102 (footnotes omitted). The privilege exception engulfs much of the rule, and little remains of the initial limitation in light of the interpretation that even nonprivileged secrets (that is, all confidential information under Canon 4) are covered by the final proviso. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975); *see also* Note, *Client Fraud and the Lawyer — An Ethical Analysis*, 62 MINN. L. REV. 89 (1977). *But see* Rotunda, *Officers, Directors, and Their Professional Advisors — Rights, Duties, and Liabilities*, 1 CORP. L. REV. 34, 39 (1978) (noting that under DR 4-101(C)(3) a lawyer may reveal "the intention of his client to commit a crime" and suggesting that DR 7-102(B)(1) thus seems to require a lawyer to reveal client frauds that are continuing crimes).

[9] Much of what is said here also applies in the criminal context when the defendant testifies, to the extent that inquiries fall within the scope of cross-examination.

[10] The attorney-client privilege covers testimony at trial. Rule 26(b)(1) of the Federal Rules

compelled to testify and extensive discovery is permitted. Indeed, through direct questioning at deposition or at trial, interrogatories, and document requests, opposing parties in principle have access to virtually any relevant information that lawyers can obtain from their clients. If opponents did enjoy full access to clients' evidence, protection of confidentiality would be irrelevant. It is doubtful, however, that discovery and compelled testimony at trial produce such a result.

First, clients are more forthcoming to their lawyers than lawyers are in preparing their clients' discovery responses and than their clients are advised to be in their testimony. The combination of carefully crafted responses, limited testimony, and the adversary's inability to conceive of (or to expend the resources to ask) every possible question may well result in a significant gap between the information learned by the adversary's lawyer and that possessed by the client's. Second, lawyers and their clients sometimes may improperly withhold unfavorable information. Even outright dishonesty may be difficult to detect, because verbal communications between lawyer and client often will be the only evidence of misbehavior. Moreover, the lawyer's obligation to report the client's incomplete or untruthful answers to direct queries, either in discovery or in testimony, is uncertain. The legal system tends to attribute to the client rather than to the lawyer the responsibility for telling the truth.[11] Lawyers' ability to learn their

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of Civil Procedure limits discovery to matters "not privileged," and Rule 26(b)(3), which pertains to trial preparation materials ("work product"), further protects information obtained by lawyers. *See, e.g.*, C. WOLFRAM, MODERN LEGAL ETHICS § 6.6 (1986).

Before the modern development of discovery under the Federal Rules of Civil Procedure and similar state rules, such discovery as then existed implied that there was no complete attorney-client privilege. *See* Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1083 (1978); *see also id.* at 1085–86 (discussing how early courts recognized this dilemma, which "had to become worse when parties became competent as witnesses not only in equity but also at law").

[11] A comment to the *Model Rules* states: "An advocate . . . is usually not required to have personal knowledge of matters asserted [in pleadings and other documents prepared for litigation], for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer." MODEL RULES, *supra* note 4, Rule 3.3 comment.

Rule 11 of the Federal Rules of Civil Procedure as amended in 1983 requires an attorney to sign all pleadings and provides that "[t]he signature . . . constitutes a certificate by the signer that the signer has read the [pleadings and] that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact . . . ." Rule 26(g) applies explicitly to discovery responses. The rule itself addresses whether such responses (and other discovery actions) are consistent with the rules, not interposed for improper purposes, and not unduly burdensome. The question of whether they are complete and truthful to the best of the lawyer's knowledge is addressed quite indirectly in the Advisory Committee Notes:

> Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. . . . Nor

clients' information without actually "knowing" it for purposes of the ethical rules further dilutes their duty to tell the truth.[12] Third, by furnishing legal advice before clients divulge information to them, lawyers sometimes can give clients the benefits of legal expertise without learning their clients' damaging evidence.[13] These arguments are consistent with, and may help to explain, the commonly held belief that, in both the civil and criminal contexts, lawyers often are able to advise clients about what information to present without allowing unfavorable information to become available to opposing parties.[14]

> does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery . . . response . . . is substantially justified.

The note emphasizes whether sufficient efforts have been made, not what the lawyer must do if, despite such efforts, a client wishes to withhold damaging information — information the lawyer learned through privileged communications or other avenues normally subject to work product protection. In addition, the rule refers to the attorney's knowledge and beliefs, which may differ from the client's, as the text to follow emphasizes.

[12] For example, Rule 3.3(a)(4), quoted in note 8, only forbids the lawyer from "knowingly" offering evidence the lawyer "knows" to be false; the section of the *Model Rules* on "Terminology" states: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Many provisions of the *Model Code* are to similar effect. *See, e.g.,* MODEL CODE, *supra* note 4, EC 7-26 ("A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured."). The tradition (among self-interested lawyers) to interpret "actual" knowledge narrowly, *see, e.g.*, M. FREEDMAN, *supra* note 8, at 51–58, may render this requirement minimal.

[13] A well known illustration appears in R. TRAVER, ANATOMY OF A MURDER 46–56 (1958). *See also* G. HAZARD, ETHICS IN THE PRACTICE OF LAW 128–31 (1978). Such an approach is, however, limited in some respects. For example, if the client knows of a witness who must be interviewed to determine whether the witness's testimony would help or hurt and the lawyer conducts an interview, it will be extremely difficult for the lawyer, after having withheld the witness's name in response to an interrogatory, later to deny knowledge of such a witness.

[14] Deborah Rhode reports:

> In a national survey of 1500 large-firm litigators, half of those responding believed that unfair and inadequate disclosure of material information prior to trial was a "regular or frequent" problem. Similarly, 69% of surveyed antitrust attorneys had encountered unethical practices in complex cases; the most frequently cited abuses were tampering with witnesses' responses and destroying evidence.

Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 598–99 (1985) (footnote omitted). Wayne Brazil's survey of lawyers concerning the discovery process presents similar results:

> The big case litigators we interviewed made it quite clear that they spend considerable time and creative energy trying to increase the odds that opposing counsel will fail to discover damaging information from their clients.
>
> . . . .
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> . . . The data provided by the litigators we interviewed indicate that in half of the larger, more complex lawsuits that are closed by settlement, at least one of the attorneys believes he knows something of significance about the case that counsel for other parties have not discovered. Lawyers who typically handle larger cases also reported that in half of the cases they settle they believe that another party still has relevant information, including communications protected by privilege, that they have not discovered.
>
> . . . .
>
> . . . The predominantly big case litigators in our sample reported that in approxi-

In addition, lawyers can significantly influence the information reaching the tribunal regardless of whether opposing parties gain access to clients' information. Most obviously, lawyers identify favorable evidence that unassisted clients mistakenly may regard as unfavorable and fail to offer. Lawyers also make important tactical choices, such as determining when to present damaging information to preempt the opposing party.[15]

Thus it appears that opposing parties generally do not have full access to clients' damaging evidence and that lawyers perform an important role in helping clients present information to the tribunal even when opposing parties do have such access. Our purpose is not to resolve the empirical, ethical, and legal issues concerning the extent of lawyers' ability to assist clients in selecting information. (We note, however, that these issues have been largely neglected;[16] both commentary[17] and pronouncements in codes of ethics[18] simply assume that the client is safe in telling all to the lawyer — suggesting that

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mately 30 percent of the cases they had tried to completion they "still had arguably significant information (including information protected by privilege) which . . . another party had not discovered." About 75 percent of these lawyers reported having had that experience in at least one case they had tried to judgment. More than 80 percent of the big-case litigators also admitted having been surprised by new information produced by an opponent in at least one trial, but surprises reportedly occur only in about 15 percent of the tried matters.

Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450, 451–54 (1981). Lawyers litigating small cases reported fewer problems with discovery abuse. *See id.* at 454.

[15] A lawyer also knows better than a client the evidence that an opposing party is likely to possess; this may be important in determining what information the client should present.

[16] For example, Wolfram's text on legal ethics devotes an entire chapter to confidentiality without addressing this issue. *See* C. WOLFRAM, *supra* note 10, ch. 6. Discovery receives only passing mention in the discussion of work product protection. *See id.* § 6.6.

Hazard makes no mention of discovery in his discussion of confidentiality, where he argues that the rules serve as an essentially absolute protection for the client in this context. *See* G. HAZARD, *supra* note 13, at 21–33. Yet, when discussing the adversary system, he states that "[i]n civil cases, it is generally accepted that the advocate . . . has a duty to see that his client produces evidence legitimately demanded by the other side, even if the evidence is very damaging." *Id.* at 126 (noting that the question is unsettled in the criminal context). Hazard makes no attempt to reconcile these two positions — in particular, he does not indicate the implication of his latter statement for his former discussion.

Wigmore, at the close of his defense of the attorney-client privilege, states:

> But now that he can be freely interrogated and called to the stand by the opponent and made to disclose [on] oath all that he knows, it is evident that the disclosure of his admissions made to his attorney would add little to the proof except so far as the client is a person capable of perjuring himself when interrogated in court.

8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291, at 554 (J. McNaughton rev. ed. 1961). Wigmore maintains his defense of the privilege (although arguing that "[i]t ought to be strictly confined," *see infra* note 100), but offers no comment on why this final observation does not undermine his argument or whether lawyers' duties in the event of client perjury override the privilege, and thereby make it largely irrelevant.

[17] *E.g.*, MCCORMICK ON EVIDENCE, *supra* note 7, § 87, at 204.

[18] *See* MODEL RULES, *supra* note 4, Rule 1.6 comment; MODEL CODE, *supra* note 4, EC 4-1.

the lawyer may assist the client in offering, whether in discovery or to the tribunal,[19] only information favorable to the client's interest.[20]) Rather, our purpose is to assess the effects and desirability of such legal assistance, whatever its extent. We thus find it convenient to assume in our analysis in the next two Parts that lawyers can exercise perfect control over the portion of clients' information that is presented to the tribunal. The conclusions that will emerge from the analysis will apply in obvious ways to the realistic situation in which the lawyer-client relationship does not permit lawyers to exercise perfect control over the presentation of information.

III. THE EFFECTS OF LEGAL ADVICE

This Part analyzes the effects, as opposed to the social desirability, of legal advice about what information to present to the tribunal. We consider a two-stage sequence of events. First, individuals[21] decide among acts, some of which are subject to the risk of sanctions. This decision will reflect, among other things, individuals' generally imperfect knowledge of the law and the legal system and whether they expect legal assistance to be available should they come before a tribunal. Second, if individuals come before a tribunal, they decide — with or without legal assistance, as the case may be — what evidence to present, and the tribunal imposes a sanction in light of the evidence presented. We analyze the second stage first because one cannot study how individuals will choose among acts without having examined the consequences that they expect will result if they come

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[19] With regard to permissible behavior before the tribunal, consider the rule that prohibits "knowingly . . . fail[ing] to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a . . . fraudulent act by the client." MODEL RULES, *supra* note 4, Rule 3.3(a)(2). The rule is interpreted in the commentary to entail an affirmative duty:

> Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure 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. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

The statement is not reconciled with the comment to Rule 1.6 indicating that confidentiality is designed to encourage full disclosure by clients "even as to . . . legally damaging subject matter." *See id.* Rule 1.6 comment; *supra* note 4. One wonders how many lawyers have so turned on their clients. The apparent rarity of this phenomenon could be explained by client honesty, the refusal of lawyers to adhere to such rules (in light of their incentives), or the ability of lawyers to disclaim the relevant "knowledge."

[20] *See infra* subsection V.F.3.

[21] "Individuals" should be understood to include groups, firms, and other entities.

before a tribunal. Thus, section A considers the effect of legal advice on the decision to offer evidence, and section B examines how this effect of legal advice relates to the decision concerning how to act.

Recall that, for concreteness, we refer in this Part and the next to information as "evidence," with the understanding that most of the analysis applies more broadly.[22] In addition, we restrict attention to the effects of legal advice on defendants (civil or criminal); when comparing the case with legal advice to that without it, we imagine that the situation of the opposing party (the plaintiff or the state) is unchanged.[23] (Section V.B will discuss the provision of advice to opposing parties.)

A. The Decision Concerning Which Evidence to Present

This section first considers how lawyers select evidence on behalf of their clients and then how individuals would select evidence if legal advice were unavailable. Comparison of these cases indicates both the value of legal advice to an individual and how legal advice affects the information that reaches the tribunal. The main points to be developed here are that advice leads to the presentation of more favorable and less unfavorable evidence — one cannot determine a priori which effect is greater — and that individuals will tend to place a greater value on legal advice the more uncertain they are about the relationship between evidence presented and sanctions imposed.

1. Lawyers' Selection of Evidence for Clients. — We assume that lawyers assist clients by offering, from among the set of available evidence, that subset they believe will result in the lowest sanction.[24] That is, lawyers present all favorable evidence and withhold any unfavorable evidence.[25] Lawyers' decisions will be guided by their

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[22] *See infra* section V.A.

[23] It does not matter whether the opponent is assumed to have the full benefits of legal advice, no legal assistance, or some intermediate level. All that is relevant is that the contemplated level is the same throughout.

[24] In stating the "lowest sanction" rather than the "lowest expected sanction," we ignore for ease of exposition that the legal system (particularly in factfinding) involves important elements of uncertainty. This assumption is immaterial except for subtle effects involving risk aversion. *See infra* note 32.

[25] Whether some evidence is favorable may depend on what other evidence is presented. For example, testimony placing a defendant outside a store near the scene of a crime might be seen as unfavorable if taken alone, but might be seen as favorable if there were other testimony that the defendant had just been inside the store making a delivery. Such possibilities do not affect the reasoning to follow. (Also, one could interpret "favorable" evidence as evidence that is favorable given what other evidence is selected.) For simplicity, however, we will speak of evidence as being definitely favorable or definitely unfavorable. Note that unfavorable evidence offered to preempt its presentation by an adversary can be seen as favorable because the relevant question is the effect of presenting it relative to that of withholding it.

One might think that the threat of very high sanctions for nondisclosure of evidence could induce its complete revelation. For example, if there is some possibility that evidence withheld

knowledge — which, for convenience, we assume to be complete[26] — of substantive rules, burdens of proof, jury behavior, and a variety of other factors.[27]

Consider the following example (which will be reexamined and modified as the analysis proceeds).

> Firms called before a tribunal for having discharged waste into a river will bear a sanction of 100 if they present no evidence. If, however, they present evidence that their waste was of an unusually harmful type, the sanction will be 1000; if they show that their waste was of an unusual and essentially harmless type, the sanction will be 0.[28] Knowing this, a lawyer will advise a firm that discharged the waste for which there is no sanction to present its evidence and a firm that discharged the waste for which the sanction would be 1000 to be silent and bear a sanction of 100.

2. Individuals' Selection of Evidence Without Legal Advice. — If individuals do not have legal advice, they must select the evidence to present based on their own, generally imperfect knowledge of the relationship between evidence presented and sanctions imposed. As a result, in many instances, individuals will be uncertain about what evidence they should present. When litigation concerns such issues as the nature of intent, level of care, or amount of damages, often it will not be obvious whether particular evidence is favorable or unfavorable.[29] That individuals are uncertain about what evidence to present

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will later come to light, a sufficiently high sanction for initial withholding might make it advantageous to present all evidence in the first instance. Yet this will not always be feasible. Nor is it generally possible directly to induce revelation of all evidence through sanctions for failure to disclose while, at the same time, providing efficient incentives for behavior. *See* Shavell, *Optimal Sanctions and the Incentive to Provide Evidence to Legal Tribunals*, 9 INT'L REV. L. & ECON. (forthcoming 1989); *infra* note 28. It is probably the case, however, that the full potential to achieve revelation through these means has not been exhausted. (Note, however, that sanctions for withholding in the criminal context are subject to the limitations of the fifth amendment.)

[26] To the extent that lawyers' knowledge is imperfect, legal advice would have the effects we outline, only to a correspondingly lesser degree. The logic of our argument requires only that individuals think lawyers' knowledge is superior to their own. When this is not the case, lawyers would not be hired for the purposes addressed here.

[27] *See infra* section V.A.

[28] While these sanctions should be taken as given in the example, note that it may not be advantageous for the state to set the sanction for failure to present evidence at a sufficiently high level to induce all evidence to be presented. Firms unable to establish the type of waste they discharged would necessarily bear the sanction applicable when evidence is not presented, even if the waste was of the harmless type. *See* Shavell, *supra* note 25.

[29] For example, a person who has robbed a store may not know whether revealing the existence of an accomplice will result in a greater or lesser sanction, or whether disclosing that the store owner provoked anger by refusing to provide a refund for defective goods will be taken as a mitigating factor or as an aggravating one. Similarly, a defendant in a product liability suit may be unsure whether its knowledge of the possibility that the product could have

to the tribunal is also apparent from the extent of legal advice they obtain to assist them in this regard.

Individuals' uncertainty about what evidence to present can arise from two sources. First, individuals may be unsure about the *sanctions* that are applicable to various acts even if they know what inferences about their acts would be made based on various evidence they might present. Second, individuals may not know how some evidence will affect the *inferences* that the tribunal will make about the acts they have committed (even if they know what sanctions apply to various acts). In much of the discussion that follows, we will refer to uncertainty generally and discuss examples involving the first source of uncertainty, although it will be clear that the analysis is equally applicable to the second. Where relevant, our discussion will distinguish between the two sources.[30]

When individuals are uncertain about what evidence to present, they will be inclined to reveal evidence that they believe is probably favorable and to withhold evidence that they believe is probably unfavorable. Of course, they also will consider the importance of the consequences that may result. For example, if one thinks some evidence probably will help one's cause slightly, but expects to win even without such help, one would withhold the evidence if introducing it might (although with lower probability) hurt one's cause substantially. Individuals thus will decide what evidence to offer based upon their best, although imperfect, estimates of the probability and magnitude of the sanctions that will result from each possible choice.

Consider again our example, but now assume that firms must decide for themselves, based on their limited knowledge of the consequences, whether to offer evidence to the tribunal.

> A firm that has come before the tribunal for discharging waste knows that if it is silent the sanction will be 100 and that if it presents evidence the sanction will be 0 or 1000. The firm is unsure, however, which of the latter sanctions is applicable to the substance it discharged: It believes there is a 50% chance that the sanction will be 0 and a 50% chance that it will be 1000.[31] Hence, if such a firm is

been made safer, but at extremely high cost, will be seen as establishing prudent conduct or intentional misconduct.

Some parties, no doubt, are quite sophisticated with respect to some areas of law and would be able to do almost as well without a lawyer, despite these complications. Our analysis focuses on the more typical cases of less knowledgeable actors or sophisticated actors involved with complex problems, who face some significant uncertainty concerning what evidence is best to present.

[30] *See infra* subsection IV.A.3.

[31] This illustrates our first case: The firm's uncertainty concerns what sanctions apply to its acts. One could readily modify the example to make it correspond to our second case. Suppose that the firm knows what sanctions apply to the discharge of various waste products, but that

before the tribunal and offers evidence about the waste, its expected sanction[32] will be 500 (50% × 0 + 50% × 1000). Thus, the firm will prefer to remain silent and bear a sanction of 100.

3. The Value of Legal Advice to Individuals. — Those who are uncertain about the law will recognize that the evidence they would present on their own may differ from what a lawyer would present on their behalf. In particular, they are aware that, without advice, some of the evidence they would offer may in fact be unfavorable and some they would withhold may in fact be favorable. Legal advice is valuable because it allows individuals to avoid both types of mistake. Specifically, individuals value advice by the amount of the reduction in expected sanctions that they anticipate lawyers will bring about. To illustrate, reconsider our example.

Without legal advice, the firm would choose to keep silent and bear a sanction of 100. With legal advice, the firm would reason as follows: There is a 50% probability that it will be told to present its evidence because it will thereby bear no sanction; likewise, there is a 50% probability that it will be told not to present its evidence, thereby bearing a sanction of 100 (as it would in the absence of advice), rather than a sanction of 1000. The firm thus faces an expected sanction of 50 (50% × 0 + 50% × 100). In other words, legal advice reduces the expected sanction by 50 (from 100 to 50) and therefore has a value to the firm of 50.[33]

Another way to calculate the value of legal advice is to note that the firm expects legal advice to alter its decision concerning what evidence to present 50% of the time. In such instances, it will bear no sanction rather than a sanction of 100. The expected reduction in sanctions is therefore 50% × 100, or 50.

In this example, advice was valuable because it allowed firms to avoid one type of mistake: withholding favorable evidence. In a variation of this example in the following subsection, advice allows firms to avoid the mistake of presenting unfavorable evidence. When more than one selection of evidence must be made, of course, legal advice may help to avoid both types of mistake in a single case.

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its evidence is only circumstantial, and it believes that there is a 50% chance that the tribunal would infer that the waste was of the harmful type and a 50% chance that it would infer that the waste was of the harmless type.

[32] Probability-discounted evaluations are conventionally called expected values, and the assumption that decisions are based on them corresponds to risk neutrality. *See* H. RAIFFA, DECISION ANALYSIS ch. 4 (1968). In this context the assumption of risk neutrality is one of convenience: The qualitative nature of our results does not depend on it. (Note that, if parties were risk-averse, the value of advice would depend in part on whether it increased or decreased uncertainty; it might do either.)

[33] That is, a firm would be willing to pay up to, but not more than, 50 to obtain legal advice when it must appear before a tribunal.

Note that the expected value of legal advice will vary among individuals according to their knowledge — or rather their lack of knowledge — of the law as it relates to the favorableness of evidence.[34] Those who are very uncertain about what evidence to present[35] will believe that they are very likely to make mistakes without advice and thus will value it highly. In contrast, those who feel very certain about what evidence to present (even if they are wrong) will think that they are unlikely to make mistakes and thus will place little value on advice.

4. The Effect of Legal Advice on the Evidence Reaching the Tribunal. — Because legal advice allows individuals to avoid making mistakes in presenting evidence, advice results in more favorable and less unfavorable evidence reaching the tribunal. The magnitude of these two effects will depend on the particular context;[36] no general conclusion can be drawn about the effect of advice on the quantity of information presented. In our example, advice sometimes results in more (favorable) information being presented, because firms that discharged the unusual, harmless waste would be told by their lawyers to present this information rather than keep silent (which is what they would do in the absence of advice). On the other hand, in a slight variation of the example, advice sometimes results in less (unfavorable) information being presented to the tribunal.

> Assume that the sanction for the unusual, harmful waste is 150 rather than 1000 (and that firms know this). Hence, a firm that has discharged an unusual waste and has come before the tribunal without legal advice will face an expected sanction of only 75 (50% × 0 + 50% × 150) if it offers evidence about the waste; the firm therefore will decide to present its evidence rather than keep silent and bear a sanction of 100. If, however, the firm has legal advice, it will be told to keep silent if it has discharged the unusual, harmful waste that, if revealed, would result in the high sanction of 150. Thus, advice may lead to less evidence being presented to the tribunal.

Since it cannot be determined a priori whether legal advice will result in more or less evidence reaching the tribunal, one cannot say whether advice enhances or diminishes the ability of the tribunal to make inferences about parties' behavior. Subsection IV.A.3 explains the somewhat complex relationship between the quality of information reaching the tribunal as a result of legal advice and the ability of the

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[34] The severity of the consequences that individuals face will also influence the expected value of advice.

[35] Not all uncertainty about the law is relevant to the selection of evidence. For example, if one is uncertain about the degree to which a piece of evidence will help, but is sure that the evidence will not hurt, one definitely will want to present the evidence.

[36] One possibility is discussed in subsection V.F.1.

legal system to induce individuals to behave in a socially desirable manner.

B. The Decision Concerning How to Act

Having examined how legal advice affects the selection of evidence presented to the tribunal, we now investigate the influence that the availability of advice has on individuals' prior decisions concerning how to act. Our method of analysis parallels that in the last section. We begin by considering separately the cases in which legal advice will and will not be available and then compare the two cases to determine the effect of advice. We assume throughout that individuals choose acts that produce for themselves the greatest benefits net of expected sanctions (if any).[37] The main point is that legal advice reduces expected sanctions and therefore tends to encourage acts subject to sanctions.

1. Decisions Among Acts When Legal Advice Will Be Available.[38] — In theory, when individuals evaluate the expected sanctions associated with various acts, they will take into account the legal advice they expect to receive if brought before a tribunal. They will do so even though they are imperfectly informed about the law and thus are uncertain (as described in section A) about what evidence their lawyers would choose to present or what sanctions they ultimately would face.[39] To illustrate, consider an extended version of our example, focusing on a firm's initial decision to discharge waste, where legal advice is expected to be available in the event the firm comes before a tribunal.[40]

> To fill an unanticipated order, a firm needs to empty a holding tank that contains an unusual waste. The firm has the option of

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[37] If some people valued legal compliance for its own sake — that is, independently of expected sanctions — compliance would be higher for any given level of sanctions, but our analysis, which speaks largely in terms of comparative and achievable deterrence, would remain applicable. Of course, even those seeking to comply with the law will fail to the extent their understanding of the law is imperfect. Also note that with respect to acts typically subject to civil liability — wherein, for example, activity raising some risk of danger or contract breach is desirable in some circumstances — the implication of some individuals' valuing compliance per se is less clear because the law commands individuals to act when their gain exceeds the anticipated liability.

[38] Our analysis is directed to whether legal advice is anticipated rather than whether it actually will be provided, because only the former affects behavior. Of course, the actual availability of legal advice presumably will have a strong effect on such perceptions, particularly over the long run.

[39] Expected sanctions also will be a function of other factors, including the likelihood of being brought before a tribunal and the set of evidence one will have available at that time. To simplify the discussion (without affecting the analysis), we do not discuss these factors.

[40] The possibility that the firm would obtain legal advice before deciding whether to discharge the waste will be considered in section V.C.

transporting the waste to a dump — which will cost 85 and result in no risk of liability — or discharging it into the river — which is costless, except for the possibility of sanctions. The firm knows that, if it discharges waste into the river, it definitely will come before a tribunal and that it will have legal advice at that time. But, as described previously, the firm does not know whether its waste is of the type that, if revealed to the tribunal, will result in a sanction of 1000 or 0.

In this situation, the firm will decide to discharge the waste into the river rather than transport it to a dump: As explained in subsection A.3, the expected sanction with legal advice is 50, which is less than the cost saving of 85.[41]

2. Decisions Among Acts When Legal Advice Will Not Be Available. — If individuals will not have legal advice when they come before a tribunal, they will not expect to fare as well as they would if advice were available. They will anticipate that they may make mistakes in their selection of evidence and will take this into account when determining the expected sanctions associated with various acts. Consider again our example, assuming that the firm does not expect legal advice to be available in the event it comes before the tribunal.

As explained in subsection A.2, the expected sanction for a firm that discharges waste into the river, if it does not have legal advice, is 100 (because the firm will keep silent rather than risk bearing the sanction of 1000). As a result, the firm will transport its waste to a dump, bearing a cost of only 85.

3. The Effect of Legal Advice on Decisions Among Acts. — An individual is more likely to commit a potentially sanctionable act if legal advice will be available than if not because legal advice can only lower expected sanctions: Individuals expect their lawyers to choose differently on their behalf only when a different choice will produce a lower sanction. Consider how in our example the availability of legal advice alters the firm's behavior.

Comparing the situations of the firm in the previous two subsections, observe that legal advice reduces expected sanctions for discharging waste into the river from 100 to 50. Because discharging the waste into the river saves the firm 85, the firm will do so if and only if it expects legal advice to be available.[42]

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[41] If the expected cost of legal advice were nontrivial, it would need to be factored into the decision. In particular, if legal costs exceeded 35, the costs of discharging into the river (the expected sanction of 50 plus legal costs exceeding 35) would be greater than the cost of 85 for using the dump.

[42] Of course, the reduction in expected sanctions caused by the prospect of legal advice would not alter behavior in some instances. A firm still may be deterred from the act subject to sanctions if, for example, the cost of transporting the waste to a dump were only 45 (less than the expected sanction of 50 for discharging it into the river when legal advice will be

Several implications flow from the general point that legal advice lowers the expected sanctions associated with an act. First, as in our example, the prospect of advice will tend to encourage acts associated with a risk of sanctions relative to those not associated with such a risk (or for which the risk is trivial).[43]

Second, among acts associated with a risk of sanctions, the prospect of advice will tend to result in the commission of those acts for which expected sanctions are reduced most. A further variation of our example illustrates this point.

> As before, a firm will face an expected sanction of 100 without legal advice and a sanction of 50 with legal advice if it discharges waste from the tank — call it tank *A* — into the river, while it will save 85 by not having to transport the waste to a dump. We now add the possibility that the firm may instead discharge waste from another tank — tank *B* — into the river: The expected sanction for this act is 75 without legal advice and 50 with legal advice.[44] Transporting the waste from tank *B* to a dump costs 85, but discharging the waste into the river costs 5.
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> Advice reduces expected sanctions more for discharging from tank *A* than for discharging from tank *B* (50 versus 25), which will induce the firm to change its decision accordingly. Without legal advice, the firm would discharge tank *B* into the river: Discharging tank *A* into the river entails an expected sanction of 100; discharging tank *B* involves an expected sanction of 75 and a direct cost of 5, for a total cost of 80; transporting the waste from either tank to the dump costs 85. With legal advice, the firm would discharge tank *A* into the river: Discharging either tank *A* or tank *B* results in an expected sanction of 50, but discharging from tank *A* rather than tank *B* avoids the cost of 5 in moving the waste to the river.

In this example, the prospect of legal advice leads the firm to act differently, although this result will not arise in all cases. For instance, legal advice might reduce expected sanctions for acts by an equal amount (as would be the case if discharges of waste from both tanks were thought to be subject to the same sanctioning scheme).

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available). Alternatively, a firm would not be deterred from committing the act even without legal advice if, for example, the cost of transporting the waste to a dump were 105 (greater than the expected sanction of 100 for discharging it into the river when legal advice will not be available).

[43] For this result (and the others derived from similar reasoning) to have practical importance, it need not be true that actors are capable of making highly complex computations. It need only be the case that those aware of their ignorance about the law — that is, about the sanctions associated with evidence that they might choose to present — expect to do better with legal advice than without it. Thus, for example, given a system of sanctions, individuals would be somewhat more likely to engage in securities fraud, or to perform surgery despite the prospect of malpractice suits, if legal advice were available in the event of litigation.

[44] These figures correspond to the sanctioning scheme described in the variation of our example in subsection A.4.

Also, even if legal advice reduces expected sanctions more for some acts than others, the act chosen still might not change (as when the benefit of each act is still less than its expected sanction despite the reduction associated with advice, when the effect is insufficient to offset the relative benefits of the act chosen in the absence of advice, or when the effect merely reinforces the choice that would have been made in the absence of legal advice).[45]

Note, finally, that although the prospect of legal advice may affect individuals' decisions among acts, it will not ordinarily lead them to choose acts in accord with actual sanctions, for individuals choose acts before they obtain the advice.

> In the initial example, legal advice reduces expected sanctions from 100 to 50 and thereby induces a firm to discharge its waste into the river rather than transport it to a dump at a cost of 85. By assumption, it believes that there is a 50% chance that it will bear a sanction of 100 when brought before a tribunal.[46] Although the firm's actual sanction thus may exceed the cost saving of 85 that results from its decision to discharge the waste into the river, the firm does not learn whether this is the case until after it has acted.[47]

One can say, therefore, that the *prospect* of legal advice affects actions taken, but the *particular content* of the advice ultimately received cannot — for advice is not provided until after individuals act.[48]

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[45] The statements in the text can be explained as follows. Let b_1 and b_2 correspond to the benefits of two acts, s_1 and s_2 to the expected sanctions without legal advice, and r_1 and r_2 to the reduction in expected sanctions due to legal advice. Without advice, individuals will prefer the first act to the second if and only if

$$b_1 - s_1 > b_2 - s_2.$$

With advice, they will prefer the first act to the second if and only if

$$b_1 - (s_1 - r_1) > b_2 - (s_2 - r_2).$$

Clearly, if individuals prefer the first act in the absence of advice, they will continue to choose the first act with advice if r_1 is larger than r_2; they will be more inclined to choose the second act rather than the first the larger is r_2 relative to r_1.

[46] This will occur when the firm is advised to remain silent rather than to present its evidence and bear a sanction of 1000.

[47] To illustrate further, note that if firms were mistaken in believing that the sanction associated with remaining silent was 100, and it was actually 10, they nonetheless would refrain from discharging the waste into the river if legal advice was not expected to be available. Also, if firms mistakenly believed that the sanction of 100 was, for example, 500, they would refrain from discharging the waste into the river even if legal advice was expected to be available. Similarly, if they underestimated the typical sanction, they mistakenly might discharge the waste into the river, with or without the expectation of legal advice.

[48] In the example in the text, the particular content of advice received by clients is the sanction associated with their acts. For the second case identified in subsection A.2, in which uncertainty concerns the inference process rather than the sanctions associated with various acts, the particular advice received will concern the inferences tribunals will make from evidence that might be presented.

IV. THE QUESTION OF THE SOCIAL DESIRABILITY OF LEGAL ADVICE

This Part addresses the question of whether the effect of legal advice on expected sanctions and thus on behavior is socially desirable or detrimental.[49] (Section V.E will consider how legal advice affects the ability of the legal system to achieve objectives going beyond inducement of optimal behavior.) Our viewpoint is that advice is, in effect, a component of the sanctioning system because the relevant aspect of legal advice is that it alters expected sanctions.

We examine two cases. Section A considers the desirability of advice when the system of sanctions is taken as given. Section B reconsiders the question taking into account that the system of sanctions may be adjusted. This is of interest primarily because of the possibility that sanctions could be increased to offset their dilution due to the availability of legal advice. We conclude that whether advice is socially desirable or detrimental depends on a variety of subtle and complex factors concerning the sanctioning system and on the context; thus, no general statement about the desirability of advice can be made.

A. Whether Advice Is Desirable When Sanctions Are Given

1. The Decision Whether to Commit Acts Subject to Sanctions. — Legal advice reduces expected sanctions, thereby encouraging the commission of acts subject to sanctions. Whether this effect is socially undesirable depends on the character of the acts and on the level of expected sanctions with and without legal advice. If an act is undesirable and would be deterred in the absence of advice, and if advice lowers expected sanctions enough to induce individuals to commit the act, advice would be detrimental. Alternatively, if an act is desirable and would be deterred in the absence of advice, and advice lowers expected sanctions enough to lead individuals to commit the act, advice would be beneficial.[50] Both possibilities can arise in our example.

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[49] We assume that some acts are desirable and others are not, but make no assumption about the criteria employed to determine which acts are good and which bad; our analysis applies for any criteria one might choose. It is important to note, however, that desirable behavior in some contexts will result in legal liability even when legal rules are designed to deter only undesirable behavior. *See infra* note 50 (mistakes, imposition of liability without regard to fault). Thus, if one were concerned about promoting compliance with existing law, one would have to keep in mind that some "noncompliant" acts are socially desirable.

[50] The problem of deterrence of desirable acts is, in principle, on equal footing with that of failure to deter undesirable acts; in practice, deterrence of desirable acts can be an important problem even when the legal system has been designed with this concern in mind. Desirable acts may be subject to sanctions because of mistakes (factual inference in the litigation context

> Recall that as a result of legal advice, which reduces the expected sanction from 100 to 50, a firm would be led to discharge waste into the river rather than transport it to a dump at a cost of 85. This effect of advice on behavior is undesirable if, in fact, the waste is the harmful type, actually causing damages of 1000. This effect is desirable, however, if the waste is the harmless type, for then the result of advice is to save the cost of 85 in transporting waste to a dump.

One might question the appropriateness of describing legal advice — rather than the existing level of sanctions — as desirable or undesirable. In this section, we take sanctions as given because it simplifies exposition and because, as will become apparent in section B, even if the schedule of sanctions is chosen optimally, various factors may result in sanctions being too low to discourage certain undesirable acts or so high that they discourage certain desirable acts.

2. Decisions Among Acts Subject to Sanctions. — Recall that legal advice not only encourages the commission of acts subject to sanctions but also influences choices among such acts. Whether this effect on the choice among acts is desirable or undesirable depends, as in the previous subsection, on the desirability of the particular acts in question and the level of expected sanctions with and without advice. For instance, if advice lowers expected sanctions by a greater amount for the more socially desirable of two acts, an individual might choose the better of the two acts if advice is expected to be available and the worse act if it is not. On the other hand, advice might lead an individual to choose the worse rather than the better act if advice lowers expected sanctions relatively more for the worse act. Consider the extension of our example in which a firm may choose which of two tanks to discharge.[51]

> Recall that a firm will discharge waste from tank *B* into the river when legal advice is not expected to be available and from tank *A* when legal advice is expected to be available. (Legal advice reduces expected sanctions for discharging from tank *A* by 50 and for discharging from tank *B* by only 25.) If in fact the discharge from tank *A* would cause harm of 1000 and the discharge from tank *B* would be harmless, this result is undesirable.[52] If, instead, the discharge

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is inherently imperfect) or because the legal system imposes liability without regard to acts' desirability in order to induce appropriate behavior (areas of strict liability in tort and damage rules for breach of contract are two important instances). For these reasons and others (notably, considerations of marginal deterrence), optimal deterrence involves subtle trade-offs that unavoidably may give rise to problems of overdeterrence as well as underdeterrence.

[51] *See supra* p. 584.

[52] Note that the choice of tank *A* arises in this instance as a result of the prospect of legal advice, despite the fact that the actual legal advice given during litigation would indicate that tank *A* is associated with a sanction of 1000.

from tank *A* would be harmless and that from tank *B* harmful, the effect of the legal advice would be desirable.[53]

3. The Question of the Social Desirability of the Effect of Advice on the Information Reaching the Tribunal. — We now examine the question of whether the legal system would be more (or less) able to induce socially desirable behavior if legal advice tended to result in better (or worse) information about parties' behavior reaching the tribunal.[54] (Of course, there is no a priori reason to believe that legal advice does tend to result in the tribunal receiving more (or less) information.) In answering the question, it is useful to distinguish between the two cases introduced in subsection III.A.2 specifying the source of individuals' lack of knowledge about the legal system.

Consider first the case in which individuals are uncertain how their evidence will affect sanctions only because they are unsure what sanctions apply to their acts. In this case, even if legal advice improves the information the tribunal receives, there will not be any systematically desirable influence on behavior. Because individuals do not know at the time they choose how to act what the true sanctions are, they also do not know what will result from the tribunal's learning more about their acts. Advice remedies this deficiency in their knowledge only after they act and thus cannot affect their behavior, for better or worse, except by coincidence.[55]

Now consider the second case, in which individuals know the sanctions applicable to their acts but are uncertain about how evidence will affect the tribunal's inferences concerning the acts they truly committed. In this case, it is possible that an increase (or decrease) in the quality of the information reaching the tribunal would affect behavior in a systematically desirable (or undesirable) way. To illustrate, consider the (extreme and concededly unrealistic[56]) assumption

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[53] This result is true despite the fact that the firm does not know at the time it selects tank *A* that it is the one that would yield a sanction of zero.

[54] The relevant question for the discussion in the text is not, strictly speaking, whether legal advice actually results in better or worse information reaching the tribunal, but rather is whether individuals, at the time they act, believe that the effect of advice on information will be in one direction or the other. As the former question admits of conflicting possibilities, we do not see, in the absence of any empirical evidence on individuals' beliefs in this regard, any basis for offering a particular resolution of the latter question.

[55] This conclusion is well illustrated by noting that advice may result in the tribunal's obtaining more information at the same time that it leads to worse behavior. Suppose that, if advice is unavailable, individuals who commit a bad act will keep silent and suffer the sanction for silence. As a consequence of anticipating this sanction, many will be deterred from committing the bad act. Suppose, however, that if legal advice is available, individuals will anticipate lower sanctions because they will be told what evidence will be favorable to reveal. The reduction in sanctions will lead more individuals to commit the bad act. Thus, advice is undesirable despite the fact that the tribunal thereby would obtain more evidence from individuals who committed the act.

[56] As long as individuals believe that they might possess some unfavorable evidence, they

that, at the time they act, individuals believe that legal advice will result in the tribunal's receiving information that allows it to make perfect inferences concerning their acts. Because individuals know what sanctions will be applied (unlike in the first case), they will be led to choose acts in light of the sanctions that actually will result. If sanctions are appropriately chosen, therefore, individuals will be led to act in a socially desirable manner. This example, however, should be interpreted cautiously. If advice merely improves, but does not render perfect, the tribunal's information, better behavior may not result. The reason is that legal advice tends to encourage acts for which expected sanctions are reduced the most, and it may well be that advice reduces expected sanctions relatively more for acts that are more harmful even when the advice would improve the information reaching the tribunal.[57]

Finally, one may ask how the effect of legal advice on the quality of information reaching the tribunal can be of doubtful social significance when it seems intuitively plausible that information should be socially desirable for tribunals to obtain. The answer is that it *is* socially desirable for the tribunal to obtain more information if, *at the time they contemplate how to act*, individuals understand what information tribunals later will obtain and what sanctions will then be applied.[58] Because receipt of more information allows the legal system to link sanctions more closely to acts, it enables the legal system to induce better behavior under these circumstances, for individuals will take the better tailored sanctions into account when they choose their acts.

Our conclusion differs, of course, because we have assumed that individuals do not understand what information tribunals later will obtain and what the sanctions will be.[59] Therefore, although receipt of more information enables the legal system to link sanctions more

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cannot believe that legal advice would result in tribunals obtaining complete information, for lawyers would advise that such information be withheld. If they believe that there is no such chance, individuals without legal advice would know that they could only gain by presenting all their evidence, so the tribunal would obtain complete information even if legal advice were unavailable. *See supra* subsection III.A.2.

[57] This statement holds even if actual sanctions are optimally determined. As long as advice does not provide complete information, the expected sanctions with advice for some acts may be too high and for others too low. Whether behavior will be better or worse in comparison to the case without advice will depend on the particular circumstances.

[58] If individuals obtain legal advice at the time they contemplate their acts, *see infra* section V.C, then the assumptions necessary for more information to be unambiguously desirable would hold.

[59] We examined this important set of circumstances because legal advice affects what information is presented and, ultimately, how individuals behave only when individuals are imperfectly informed. Whether the tribunal has more or better information even when actors are ignorant of the law, however, will be relevant to some of the objectives addressed in subsections V.E.4 and V.E.5.

closely to acts, it does not enable the system to induce better behavior. On reflection, this should not be surprising, for advice affects the evidence presented to the tribunal only when individuals would have made mistakes — that is, only when, at the time they decide among acts, individuals would not know precisely what effect legal advice will have on the tribunal's information and on sanctions.

B. Whether Advice Is Desirable When Sanctions May Be Adjusted

The discussion thus far has taken sanctions as given. Yet, a different system of sanctions may be employed in a regime in which legal advice is available from the system used in a regime in which advice is not available. In particular, the schedule of sanctions may be set at a higher level in a regime with legal advice in order to counter the diluting effect of advice on expected sanctions. Subsection 1 demonstrates the theoretical possibility that, for this reason, legal advice may not matter: Its effects on expected sanctions might be offset precisely by an appropriate adjustment of sanctions.[60] Subsection 2 emphasizes, however, that the ability to adjust sanctions is limited and that, even when sanctions can be adjusted freely, there may be no way to offset completely the effect of legal advice on the behavior of *all* individuals. Thus, legal advice generally will affect behavior, although to a lesser degree than was suggested by our analysis in section A, where sanctions were taken as given.

1. The Possibility That Adjustment of Sanctions Offsets Perfectly the Effects of Legal Advice. — In our example, it is possible to increase sanctions when legal advice is available in such a way that a firm's situation is identical to that when legal advice is not available. It is also possible to lower sanctions when legal advice is unavailable so as to replicate the situation when advice is available.

> Recall that, if a firm comes before the tribunal and advice is unavailable, it would choose to keep silent and bear a sanction of 100, whereas, if advice is available, it would bear an expected sanction of only 50, for it believes there is a 50% probability that it would be advised to present evidence of the waste it discharged and thus bear no sanction. Assume that, if actual sanctions were different, firms would take these different sanctions into account.
>
> If the sanction for silence in a regime in which legal advice is available were raised to 200, the firm would bear the same expected sanction, 100, as in the initial regime in which advice is unavailable. (There is a 50% probability that the firm, as before, will be advised to keep silent, resulting in a sanction of 200, and a 50% probability that it will be advised to present its evidence, resulting in no sanction.

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[60] If this result could be achieved in practice, the desirability of legal advice would be determined entirely by factors other than its effects on behavior. *See infra* section V.E.

50% × 200 + 50% × 0 = 100.) Because the expected sanction when legal advice is available can be made to equal the expected sanction when advice is not available, the same behavior can be induced, and thus the same degree of legal compliance obtained.

Similarly, if the sanction for silence in a regime without legal advice were lowered to 50, the expected sanction would be 50, which is the same as in the initial regime in which advice is available. Again, the same behavior can be induced and the same degree of compliance obtained.

2. Reasons Why the Adjustment of Sanctions May Not Offset Completely the Effects of Legal Advice. — Having just shown the possibility that an adjustment in sanctions can offset fully the effect of legal advice, we now discuss factors suggesting that often the effect cannot be offset completely, if at all. First, it may not be feasible to adjust sanctions by a sufficient amount.[61] For example, an act already may be subject to capital punishment[62] or to the maximum punishment constitutionally permissible.[63]

Second, the ability to offset the effects of legal advice may be limited because perceived sanctions may not change sufficiently in response to changes in actual sanctions. If, for instance, some individuals' beliefs about sanctions are virtually fixed, changes in actual sanctions would have little effect and thus would not offset the reduction in expected sanctions due to legal advice.

Third, individuals may differ in the sanctions they anticipate, as one would expect among those with varying knowledge of the legal system. Consequently, the increase in sanctions needed to counterbalance the effect of legal advice often will vary among individuals.

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[61] For acts not subject to the maximum possible or permissible sanction, considerations of marginal deterrence may limit the desirability of adjusting sanctions. In addition, if it were necessary to lower sanctions in a regime without legal advice, there might be a problem if actual sanctions could not be less than zero.

[62] For fines or monetary judgments in civil cases, awards are limited by defendants' wealth.

[63] In this regard, the question arises whether punishments necessary for effective deterrence in a scheme that was rational as a whole ever would violate the eighth amendment prohibition against cruel and unusual punishment. Because most discussions of proportionality notions look to punishments actually imposed and do not account for probabilities of punishment or perceptions of uninformed actors, *see, e.g.*, Solem v. Helm, 463 U.S. 277 (1983); W. LAFAVE & A. SCOTT, CRIMINAL LAW 179 (2d ed. 1986), a rational scheme in light of deterrence purposes may have characteristics quite different from those normally contemplated. For example, minor offenses that often escape detection might require higher penalties than readily detected but more severe offenses. Despite *Solem*'s limitation, Supreme Court decisions like Rummel v. Estelle, 445 U.S. 263 (1980), which upheld a life sentence imposed for a third nonviolent felony, each one having netted under $125, suggest that constitutional restrictions with regard to proportionality are unlikely to be very restrictive.

One also could increase sanctions by increasing the likelihood of detection — although this would be costly — or by decreasing requirements for conviction, *see infra* section V.A — which itself might pose constitutional obstacles, *see, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970) (requiring "proof beyond a reasonable doubt of every fact necessary to constitute the crime").

It therefore will be impossible to offset the effect of legal advice for all individuals by any chosen increase in the system of sanctions; the adjustment necessary for some will be too large or too small for others.[64] In the extreme case, legal advice may not reduce expected sanctions at all for some individuals, so any adjustment would be inconsistent with their facing the same expected sanctions with and without legal advice.

To illustrate this third factor, consider the case in which one group of actors is perfectly informed about relevant aspects of the legal system and another is imperfectly informed.[65] For the latter group, higher sanctions must be imposed in a regime with legal advice if expected sanctions are to be at the same level as in a regime without legal advice. But the perfectly informed group is unaffected by the availability of legal advice. As a result, the adjustment in sanctions required to offset legal advice for the uninformed group will change expected sanctions and accordingly the behavior of the informed group. Thus, in attempting to set sanctions optimally, society must compromise between control of each group. In the end, legal advice will tend to be desirable or undesirable according to the analysis of section A, if sanctions are taken as given at the level that optimally would control the behavior of the informed,[66] although the degree to

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[64] The implicit and often realistic assumption here is that the tribunal is unable to apply different sanctions to individuals based on the sanctions they perceived at the time they acted, because the tribunal will be unable to determine what sanctions individuals perceived before acting. This factor also would be important if society did not wish to impose different sanctions on individuals with different perceptions of sanctions.

[65] Similar conclusions follow if tribunals need not rely on the information from one group of individuals — such as those caught in some illegal act by police — but must rely on information from other individuals accused of committing the same act. If society felt constrained to apply the same sanctions to individuals in both groups determined to have committed the same act, the problem would be much as in the case in the text.

[66] This brief heuristic statement should not be taken to imply that sanctions should be set so as to control optimally the behavior of the informed group. Such sanctions would be approximately optimal for the population as a whole if the informed group predominated. In other cases, it may be appropriate to set actual sanctions between the levels that would be optimal for each group, considered independently. Legal advice will tend to be desirable if it results in the expected sanctions for the two groups being closer together and undesirable if it causes expected sanctions for the groups to be further apart. There is no a priori basis for assuming that one result is more plausible than the other, as the issue turns on the empirical question of the beliefs of uninformed individuals about expected sanctions. (Contrast actual sanctions, which, under the assumptions we employ, will be identical for both groups in a regime with legal advice and higher for the uninformed in a regime without legal advice.)

The above analysis may be clarified by considering some particular cases. First, suppose that, at the level of sanctions that would be ideal if all were perfectly informed, the uninformed are properly controlled without legal advice and face insufficient expected sanctions with legal advice. Allowing legal advice could be partly offset by an increase in actual sanctions, but then there would be excessive expected sanctions for the perfectly informed. Thus, the ultimate effect of legal advice in a legal system that fully took advice into account in tailoring sanctions may be some underdeterrence for the uninformed (but less than if no adjustment were made)

which legal advice affects the ability of the legal system to induce socially desirable behavior will tend to be less when there is some ability to adjust sanctions.

In light of these factors, it will often be infeasible or undesirable to offset completely the effect of legal advice on expected sanctions, and in some instances little if any adjustment may be in order.

V. Further Considerations

We have analyzed a simplified model of the role of lawyers in litigation in order to illuminate the effects of legal advice and to assess whether it promotes socially desirable behavior. We now discuss a variety of issues that, taken together, provide a more complete understanding of our subject. Sections A through D consider the scope of legal advice and aspects of the legal system to which our analysis applies, the importance of advice to opposing parties, the contrast between legal advice offered in litigation and that given at the time acts are contemplated, and the divergence between the private and the social value of legal advice. Section E examines a number of factors bearing on the social desirability of legal advice apart from its effect on behavior. Finally, section F comments on prior literature, and section G briefly sketches how lawyers' ability to select only the information most favorable to their clients might be limited.

A. Aspects of Legal Advice and the Legal System to Which the Analysis Applies

Although our language in the preceding two Parts refers to legal advice concerning the selection of evidence, our analysis applies more broadly, to virtually all the choices lawyers make on clients' behalf that affect the information that tribunals obtain. For example, just as a lawyer may select some evidence because it is favorable and withhold other evidence because it is unfavorable, so too may a lawyer ask some questions on cross-examination because they are likely to reveal helpful information and not ask others because they are likely to reveal damaging information. In principle, a client could do this also, but without legal advice the client mistakenly might overlook many questions that would be helpful and ask some that would be detrimental. Similarly, in arguing a client's case, a lawyer will choose

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and some overdeterrence for the perfectly informed (who would be optimally deterred if legal advice were unavailable). Conversely, if the uninformed were properly controlled with advice at the level of sanctions that would be ideal if all were perfectly informed, an optimal regime without legal advice may involve some overdeterrence of the uninformed and some underdeterrence of the perfectly informed. In both cases, unlike the general case explored previously, there exists a regime in which optimal sanctions could be implemented for both groups simultaneously.

the most advantageous way to frame the facts; unassisted clients may not think of all the favorable characterizations that are available and may fail to select the best from among those they consider. The information-gathering process itself also involves choices — deciding which leads to follow, determining what to pursue in discovery, and so on. Although surely there are significant differences among these elements of legal advice[67] and there are aspects of legal advice about which our analysis has little to say,[68] our analysis is clearly relevant to a substantial portion of legal advice[69] offered in litigation.[70]

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[67] In the discovery context, for example, the framework offered in this Article is applicable. Corresponding to the unassisted individual's error of failing to offer favorable evidence would be the error of failing to pursue all useful lines of questioning. Analogous to the error of presenting unfavorable evidence would be the error of pursuing lines of discovery that tipped one's hand to the opponent or were not cost-justified. (Individuals presumably seek to minimize the sum of expected sanctions and litigation costs.)

In important respects, however, our framework is incomplete. Discovery, unlike the selection of evidence from that available to only one party, will tend systematically to increase the evidence before a tribunal, because one reasonably might assume that parties having a larger base of information to choose from will present more evidence. In the extreme case where both sides are well represented, the result of two-way discovery may be to make most evidence available to both sides. *But cf. supra* Part II (discussing caveats). Because each side will then present the evidence helpful to its cause, the tribunal may receive nearly all relevant information. Moreover, as described in subsection IV.A.3, if this result is anticipated at the time actors determine their behavior, the result may be desirable. Thus, from the perspective of information available to a tribunal and the ability to control behavior, legal advice in making discovery requests stands in a different light from other aspects of advice. On the other hand, legal advice in answering discovery requests (in a manner that evades them) would have the opposite effect. The net result of these two effects of legal advice is difficult to determine a priori. *See supra* note 14. With regard to factual investigation, confidentiality and work product protections increase incentives to uncover information when there is some probability that the information will be unfavorable, while at the same time such protections tend to increase costs by encouraging duplicative investigations. *See* Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 361–62 (1982); Pashigian, *Regulation, Preventive Law, and the Duties of Attorneys*, in THE CHANGING ROLE OF THE CORPORATE ATTORNEY 3, 31 (W. Carney ed. 1982).

[68] Most obviously, although legal advice as it pertains to advocacy concerning interpretation of the law raises some similar questions in that lawyers make choices designed to produce lower sanctions, it raises significantly different questions with regard to whether the anticipated effects of such advice on behavior are socially desirable (for interpreting the law involves determining what is socially desirable). *See also infra* subsection E.3 (discussing the facilitative aspect of many dimensions of legal advice).

[69] Note also that "legal advice" need not be supplied by lawyers. The analysis pertains to any source of information about the legal system: lawyers, other experts, friends, and official notice or assistance by the legal system itself.

[70] "Litigation" should be construed broadly. Although the discussion proceeds as though being apprehended for an alleged act is necessarily followed by a trial before a tribunal, the analysis requires no such assumption. Much of the relevant disclosure of information may arise informally, for example, in pre-trial negotiations. Moreover, the actual outcomes of settled cases are a function of one's expectations concerning outcomes at trial. *See* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation*

Our analysis also is more general than might have appeared in that our discussion of sanctions should be interpreted as applying not only to stated rules governing liability, damages, and sentencing, but also to other features of the legal system that determine the functional relationship between the case parties present and its ultimate outcome, such as evidentiary rules, burdens of proof, predispositions of jurors and judges,[71] and the evidence likely to be possessed and presented by one's adversary. Thus, for example, in considering adjusting the system of sanctions to offset the effect of legal advice, one should think not only of changing damages or sentencing rules; one also should consider changing burdens of proof, altering the questions that may come before the jury, modifying the options available to the adversary, and the like.

B. Legal Advice and Opposing Parties

Although we chose for expositional simplicity to examine legal advice for defendants, our analysis is applicable to civil plaintiffs (and has some bearing on criminal prosecution[72]). To understand the effects and the desirability of advice provided to plaintiffs, let us first take as given whether defendants have legal advice. Then, as should be apparent, the analysis of plaintiffs will be analogous to our analysis of defendants.[73] In particular, advice will allow plaintiffs to present all favorable information and to avoid presenting any unfavorable information; therefore, advice will have an ambiguous effect on the quantity of information reaching the tribunal. Advice will tend to

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of Legal Costs, 11 J. LEG. STUD. 55 (1982). As a result, our statements about the expectation of what evidence would be presented to the tribunal can be translated into settlements (or plea bargains) that would likely be reached in light of the evidence one would choose to offer. It is plausible that one would be willing to settle for less — and that the opposition would hold out for more — if one was not to have legal assistance to select evidence or assist in other decisions.

Also note that our framework applies to any sanctioning system — for example, to taxpayers represented by accountants at IRS audits and to employees aided by union representatives at grievance proceedings.

[71] One factor of interest is that a factfinder may take into account the skill of one's lawyer in making its inferences. If jurors tend to place added trust in skilled counsel, the very fact of having such a lawyer, even if the choices made are similar, would produce an effect on expected sanctions. On the other hand, if factfinders are sophisticated — taking into account that the quality of each party's lawyer has affected the selection of information — they may adjust their inferences to offset the effect of legal advice. Of course, this simply is one of many mechanisms by which the legal system may adjust the level of sanctions; as the text emphasizes, relevant effects on sanctions may arise from virtually all components of the legal system.

[72] Criminal prosecution is sufficiently different, because of the separation between victims of criminal activity and the prosecuting authority, to warrant consideration that goes beyond the scope of this Article. *See also infra* pp. 612–13 (discussing unique aspects of the prosecuting attorney's role).

[73] Where we spoke of a "defendant," substitute "plaintiff"; where we said "reduction in expected sanctions," substitute "increase in expected recovery"; and so forth.

increase plaintiffs' expected recoveries and, for this reason, prospective plaintiffs — individuals who contemplate committing acts that might expose themselves to injury for which there is some possibility of legal recovery — will be more inclined to commit such acts if legal advice is to be available to them in the event of suit than if it is not. Whether the result will be more desirable behavior (for example, entering into socially productive contracts that might otherwise be deterred by the prospect of an uncompensated breach) or more undesirable behavior (for example, acting in a contributorily negligent manner) cannot be determined a priori. As before, it will depend on various aspects of the sanctioning system, on the character of particular acts, and on the nature of individuals' lack of knowledge about sanctions.

A separate point is that the availability of legal advice to one party affects the prospects for the opposing party. The availability of legal advice to plaintiffs tends to raise the expected sanctions that defendants bear; plaintiffs' higher prospective recoveries and defendants' higher prospective payments are one and the same. Conversely, the availability of advice to defendants, which reduces their expected sanctions, will lower plaintiffs' expected recoveries.

We may now compare the situation in which legal advice is available to both plaintiffs and defendants to that in which it is available to neither. The net effect of legal advice on expected sanctions will depend upon the relative benefits of advice for each type of party.[74] By chance, the benefits of advice for the two types of party could be precisely offsetting;[75] generally, however, the benefits will differ. If, for example, most of the relevant evidence not readily available to the tribunal is accessible only to defendants, advice will benefit them more than plaintiffs. Or, if defendants are relatively well informed about the law but plaintiffs are not, advice will benefit plaintiffs more. Thus, the availability of legal advice to both plaintiffs and defendants may well have substantial net effects on expected sanctions. But whether the net effect is to raise or lower expected sanctions and whether the resulting effect on behavior will be socially desirable or detrimental (taking into account the complication that sanctions may be adjusted) cannot be determined a priori.[76]

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[74] Note that what will be relevant in determining the effect of advice on defendants is how their expectations of sanctions are affected by the availability of legal advice to them and to plaintiffs; what *plaintiffs* believe will be irrelevant in determining the effect of advice on defendants' expected sanctions. Conversely, only plaintiffs' beliefs are relevant in determining the effect on plaintiffs of the general availability of advice.

[75] This can be seen as related to the point presented in subsection IV.B.1, in which the level of sanctions was adjusted to offset the effect of legal advice. Here, the level of expected sanctions borne by defendants is higher, not because actual sanctions are higher, but because procedural rules have the effect of producing higher expected sanctions. *See supra* section A (discussing procedural rules as an aspect of sanctions).

[76] This is not to say, of course, that in particular contexts there may not be a fairly clear

C. The Relationship Between Legal Advice Provided When Acts Are Contemplated and Advice Provided During Litigation

1. The Difference Between the Effects on Behavior of Ex Ante and Ex Post Legal Advice. — There is a general reason to believe that legal advice provided when individuals are deciding how to act will tend to be socially beneficial. Such advice informs individuals before they act about the sanctions the legal system actually employs. As a result, individuals will be led to behave desirably if the level of sanctions is set appropriately.[77] Consider our example in which a firm does not know whether the waste it might discharge into the river is harmful or harmless.

> If a firm is advised ex ante that its waste is harmless and, if revealed to the tribunal, will not result in a sanction, it will discharge the waste into the river. This will be socially desirable because the firm will not incur the cost of 85 to transport the waste to a dump. On the other hand, if the firm is advised that its waste is harmful and, if revealed to the tribunal, will result in a sanction of 1000 (suggesting that the firm could be silent and bear a sanction of 100), the firm will transport the waste to a dump rather than discharge it into the river, again a socially desirable result. In contrast, recall that in our initial discussion of this example in section IV.A, where it was assumed that no ex ante legal advice was obtained, it was possible, both in cases with and without ex post legal advice, that the firm would take undesirable actions.

The socially desirable character of legal advice offered ex ante stands in sharp contrast to the questionable social value of advice offered during litigation. As emphasized in subsection IV.A.3, if individuals are uncertain about sanctions when they decide how to act, there is no reason to think that advice offered after they act will be helpful in guiding their behavior. Also, if individuals know what the sanction for acts will be, but legal advice does not improve the tri-

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conclusion. For an activity in which potential defendants alone possess most evidence and underdeterrence is the problem (and cannot be alleviated by adjusting the level of sanctions), allowing legal advice to both parties would be undesirable. If, instead, plaintiffs alone possess most evidence, legal advice for both parties would be desirable.

Sometimes it may be best to permit or disallow legal advice for only one party, so that the desirable effect of permitting or disallowing legal advice for one side is not even partially offset by doing the same for the adversary. Although the effects and benefits or costs of legal advice usually are discussed in an adversary context in which it is assumed that both parties will be treated in a similar manner, this need not be the case and has not always been true in the United States or elsewhere. *See, e.g., infra* pp. 612–13 (contrasting the roles of criminal prosecutors and defense attorneys).

[77] This subject is explored in Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEG. STUD. 123 (1988). The article emphasizes that the desirability of the effect of advice about contemplated acts is ambiguous when the legal system's sanctions do not properly reflect harm caused.

bunal's information about their acts (and we saw no general reason to think it would), then again there is no basis for believing that advice will be socially beneficial.

2. Individuals' Choice Between Ex Ante Advice and Ex Post Advice. — The availability of ex ante legal advice will affect the need for and effect of ex post advice.[78] In particular, if individuals purchased complete advice ex ante, the availability of ex post advice would be irrelevant, for no one would demand it. Moreover, other things equal, individuals should prefer ex ante advice, because it allows them correctly to take account of possible sanctions in deciding how to act.

Individuals, however, usually will limit their purchases of ex ante advice. First, the advice may be more expensive than ex post advice because it is purchased with certainty, whereas one must pay for ex post advice only if called before a tribunal. For some acts involving only a small probability of injury or detection (such as many potentially tortious acts), the probability-discounted cost of ex post legal advice will be sufficiently lower to induce individuals to purchase only this form of advice.

Second, ex ante advice about everything a person would need to know to function effectively before a tribunal without legal assistance would be far more expensive than ex post advice. At the time one acts, one cannot know which of several factual situations one will face if and when litigation arises, so it generally would be less costly to wait and obtain advice ex post about the particular factual situation that ultimately does arise. Given the breadth of legal expertise that may be relevant, it generally will be prohibitively costly to learn ex ante all that might later prove helpful.

There is, however, no need to know ex ante the details concerning how to conduct any litigation that may arise, as long as ex post advice will be available. All individuals need to know when contemplating acts is the bottom line: what expected sanction is associated with each act. With this knowledge, an individual can make informed choices about acts and, in the event of litigation, receive further advice about how to proceed. Consequently, one might expect that imperfectly informed individuals often would purchase ex ante advice limited in its scope to the level of expected sanctions and thus behave in a manner that accurately reflects legal rules. The availability of legal advice in litigation, of course, will affect the level of sanctions they would be told to associate with various acts.[79]

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[78] Ex post advice also may affect ex ante advice. To the extent that those receiving advice during litigation will contemplate committing acts in the future similar to one currently being adjudicated, they will have less need for ex ante advice in the future.

[79] With regard to the problem of controlling the behavior of groups in the population with varying degrees of legal knowledge, *see supra* subsection IV.B.2, the combination of ex ante

In contrast, if legal advice in litigation were made unavailable, one might expect individuals to purchase more detailed advice ex ante. Yet, given the greater cost of such advice, there are limits to how much substitution would occur.[80] Note that, to the extent actors do obtain ex ante advice concerning not only the level of expected sanctions but also how to select evidence, such ex ante advice will in part have the effect of ex post advice — reducing expected sanctions — and to that extent will be amenable to the analysis presented here.

D. The Divergence Between the Private and the Social Value of Legal Advice in Litigation

Individuals generally place a positive value on having legal advice when they come before a tribunal, which is the estimated reduction in sanctions expected to result from advice. But, as has been argued, there is no direct connection between this reduction in sanctions and social welfare; while in some instances the reduction will be desirable, in others it will be detrimental or irrelevant to the legal system's ability to control behavior.[81] The implication is that the private demand for legal advice may well diverge from, and exceed, what would be socially appropriate. Private parties may be willing to spend resources on legal advice when such expenditures are not socially valuable (or are less valuable than the cost of the services obtained).

It is, however, in the economic interest of the legal profession to foster the private demand for legal services. Thus, the profession benefits by promoting respect for the attorney-client privilege and other protections of confidentiality, the general duty to serve clients zealously, and other norms that allow lawyers to help their clients during litigation.[82] Perhaps because it is not in the profession's interest to point to the possibility that advice offered during litigation may

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and ex post advice may allow the legal system to obtain results that could not be achieved independently. If all groups would obtain ex post advice in the event of litigation, they would bear the same sanctions if initially they chose to commit the same acts; if all groups also would obtain ex ante advice, they would all be told to expect the same sanctions for the acts. Ex post advice alone would not accomplish this identity of expected sanctions. *See supra* note 66. Ex ante advice alone would not provide the same expected sanctions because, if individuals would not have legal advice in litigation, their expected sanctions would depend on their legal knowledge, which, by assumption, varies; the ex ante advice they receive would reflect this fact. (If individuals all had the same imperfect knowledge of the law, this problem concerning the ability to adjust sanctions to offset ex post advice would not arise even when ex ante advice was not obtained.)

[80] *Cf. infra* subsection E.2 (discussing the substitution of client efforts for lawyer efforts).

[81] Moreover, the factors that determine the desirability or undesirability of advice in terms of its effect on behavior have no apparent connection to its value to private parties.

[82] *See* Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51, 55 (1982); *cf.* Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 838–39 (1977) (suggesting that attorneys support the privilege because it limits criticism of the profession).

be socially detrimental, one does not frequently see this view advanced.

Finally, it should be emphasized that the divergence between the clearly positive private value and the questionable social value of legal advice provided in litigation does not describe other types of advice, for which evidentiary privileges exist or have been advocated. As already discussed,[83] the divergence does not exist with regard to legal advice offered when individuals contemplate acts. Nor does it exist with respect to advice offered by a range of other professionals. For example, to the extent the doctor-patient privilege enables more information to flow to the doctor (even if not to the legal system), the resulting benefit to the patient — better health — is also a benefit to society.[84]

E. The Social Desirability of Legal Advice: Additional Considerations

In this section, we discuss briefly a number of considerations that bear on the question of the social desirability of legal advice, apart from the effect of advice on behavior, which has been the focus until now.

1. The Cost of Legal Advice. — Legal advice involves the expenditure of time and effort and the use of other resources, costs that must be taken into account in any assessment of the social desirability of advice. For legal advice, in the end, to be socially desirable, one must not only rule out the possibility that its effects are detrimental or neutral, but also establish that its effects are sufficiently beneficial to justify its costs.

2. Substitution of Individual Effort for Less Costly Legal Advice. — If individuals were not permitted to receive legal advice concerning the selection of information to present to a tribunal, they would attempt to do for themselves, but at a higher cost, what lawyers would have done on their behalf.[85] If individual efforts would sub-

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[83] *See supra* subsection C.1.

[84] As noted in subsection F.3, the common view that the attorney-client relationship in litigation presents the strongest case for protection of confidentiality, although consistent with professional self-interest, seems wrong — it presents the weakest. Note, however, that elimination of the protection of confidentiality (in a manner that induced professionals to reveal the information) probably would discourage the flow of information to lawyers in litigation more than to professionals in other contexts. In litigation, the only purpose for transmitting the information is to enable one's lawyer to help obtain the lowest possible sanction (which, as Part II notes, depends in part on confidentiality being maintained). In other situations, however, there is a direct private benefit from the flow of information (even if it is later revealed, to one's possible detriment, in a legal proceeding).

[85] Efforts might include reading, asking others with more experience, or obtaining more formal education. A system that sought to deny access to legal advice could, in principle, encompass some of these alternatives as well, although there surely are limits on the degree to which they could be regulated.

stitute completely for lawyers' efforts, there would be little difference between the case where legal advice is available and the one where it is not — except that in the latter case more resources would be expended, which would be socially wasteful. More generally, one would expect substitution to be incomplete, because of considerations of cost and feasibility. Final conclusions regarding the effects of advice on behavior,[86] the net costs of legal advice, and other factors would have to take into account the degree of substitution that actually would occur.[87]

3. The Facilitative Effect of Legal Advice. — In some important respects, lawyers play a facilitative role in the operation of the legal system. Notably, lawyers help to present information in an organized fashion following a standard format; they give aid even in such mundane ways as directing parties to the proper courtrooms.[88] Thus, lawyers may enable the legal system to function more efficiently.[89] This aspect of legal advice is to a significant degree distinct from the aspect of advice we have addressed, which involves strategic choice concerning the information to provide to tribunals. And because the facilitative functions of lawyers often involve different activities from those pertaining to lawyers' choosing what information to present, one can imagine retaining the former while attempting to eliminate the latter.[90]

4. Sanctions Actually Imposed. — Our analysis has focused on how the prospect of obtaining legal advice influences individuals' behavior prior to litigation through its effect on expected sanctions. But legal advice raises additional issues of social consequence, because it affects the actual imposition of sanctions. On one hand, the use of sanctions may itself prevent harm: The criminal sanction of imprisonment incapacitates dangerous people, and the civil remedy of injunctive relief also controls future behavior. On the other hand, the imposition of sanctions may involve direct social costs, such as those associated with operation of the prison system, the collection of fines, and enforcing compliance with other court orders.

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[86] As discussed in note 41, costs will affect behavior, so a more costly system will discourage more acts and affect the choices among acts. If such effects on behavior were desired, however, it would be better to achieve them with direct increases in sanctions rather than through means that consume additional resources.

[87] The extent of substitution would depend substantially on the methods the legal system employed in making advice unavailable. *See infra* section G.

[88] Legal advice also tends to make settlement more likely, because legal advice often produces closer expectations about trial outcomes and because settlement might be a more attractive alternative in light of the probably greater costs of litigation.

[89] Of course, lawyers may interfere with the operation of the legal system in other ways, such as by delaying proceedings.

[90] *See infra* section G (discussing means of retaining facilitative functions while eliminating others). Some activities of lawyers, such as making an organized and persuasive opening argument, involve both facilitation of the legal process and the strategic choice of information.

Legal advice reduces the social benefits and social costs associated with the actual imposition of sanctions, but this reduction has no clear implications for the desirability of legal advice because the level of sanctions presumably is chosen to take these benefits and costs into account. If, for example, the length of a prison sentence is determined to reflect (among other factors) the social benefit of incapacitation and the social cost of incarceration, it would be mistaken to reason that advice is undesirable because it tends to reduce this benefit or desirable because it reduces this cost.[91] Legal advice will be socially desirable only if it enhances — and undesirable only if it diminishes — the ability of the legal system to make trade-offs between such factors as the cost of incarceration and the benefits of incapacitation[92] and deterrence; but the actual effect of advice in this regard, if any, is ambiguous.[93]

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[91] For a given level of deterrence, the analysis in the text implies that legal advice is more likely to be desirable (or less undesirable) in contexts where the actual imposition of sanctions tends, all things considered, to be more costly. Because imprisonment tends to be more socially costly than damage payments, this consideration is consistent with providing government-paid lawyers to criminal defendants who cannot afford them, *see* Gideon v. Wainwright, 372 U.S. 335 (1963), but not to civil litigants, and with doctrines that make the availability of this support contingent on whether imprisonment is a likely sanction, *see* Scott v. Illinois, 440 U.S. 367 (1979) (counsel must be provided only if imprisonment actually occurs); Argersinger v. Hamlin, 407 U.S. 25 (1972) (absent a waiver, an individual may be imprisoned only if represented by an attorney at trial). However, once one takes into account that criminal sanctions presumably are set with the costs of imprisonment in mind, there is no basis from this perspective for assuming that such asymmetric provision of lawyers to the indigent is desirable. In addition, even without such a presumption, the argument only suggests that lawyers are likely to be more desirable (or less undesirable) in the stated cases; government provision could be desirable in all contexts or in none. Finally, if it is efficient to subsidize legal advice when there are nonmonetary sanctions, it would require further analysis to justify limiting subsidies to the indigent, as the analysis is applicable to all defendants — those who can "afford" lawyers may well, from this perspective, expend too little on advice even if they would not forgo legal assistance entirely. *See also infra* p. 605 (discussing the fairness of the availability of legal advice with regard to its relative effects on the rich and poor).

[92] Better information concerning, for example, who was truly guilty would be helpful in determining when additional expenditures for incapacitation would be beneficial. But, as explained in subsection III.A.4, legal advice has an ambiguous effect on the information reaching the tribunal.

[93] If the level of actual sanctions has been set to take into account the effect of legal advice on deterrence, the effect of lawyers may well be irrelevant even when taking into account the costs and benefits of the actual imposition of sanctions, just as it was in the simple case of subsection IV.B.1. This equivalence would hold if lawyers reduced actual (in contrast to expected) sanctions by precisely the amount that the actual imposition had to be increased when adjusting sanctions to provide deterrence in the regime with legal advice equivalent to that provided in the regime without it. In general, this need not be the case, and the added consideration of costly sanctions could render legal advice more or less desirable than it otherwise might be.

The limitations explored in subsection IV.B.2 would be relevant, and may have additional implications for actual sanctions. For example, if actual sanctions had to be increased substantially to have even a modest effect on perceptions, legal advice, after taking into account any

5. Concerns for Fairness. — In the context we examine, fairness could be taken to mean several things. First, it might be understood to require legal treatment in accord with one's true actions. More generous treatment than would be provided if the tribunal had full knowledge of actions would be unfair, as would less generous treatment. Legal advice, however, does not promote this notion of fairness. As discussed in subsection III.A.4, advice results in the presentation of more favorable and less unfavorable information. Advice thus may lead the tribunal closer to the truth or farther from it, and therefore result in fairer treatment in some instances and less fair treatment in others.

Another concept of fairness is that the sanctions one bears be in accord with what one understood to be the law at the time one acted. But, as described in section III.A, legal advice in litigation affects the treatment clients receive precisely when the advice indicates that sanctions are different from what clients had thought. Thus, advice can hardly align actual sanctions with what those imperfectly informed about the law had expected. Only ex ante legal advice, which corrects individuals' misperceptions before they act, can provide the desired correspondence between understanding at the time of action and legal treatment.

Fairness also might require that those ignorant of the law be treated equally with those knowledgeable about the law. While legal advice provided during litigation does, by definition, put individuals with different knowledge about the law on equal footing *if* they have committed the same acts, such advice does not result in fully equal treatment because it does not result in their committing the same acts. Thus, knowledgeable and ignorant individuals, otherwise in identical situations, might not both come before the tribunal and, if they both do, might face different treatment as a consequence of their different actions.[94] (For equal treatment to result, legal advice would have to

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adjustment necessary to restore deterrence, may result in greater actual imposition of sanctions and thus greater social cost. The same logic suggests that if only modest adjustments in actual sanctions are necessary to have large effects on sanctions perceived by the uninformed, legal advice would be desirable because, even after adjusting actual sanctions to account for the deterrence effect, the actual imposition of costly sanctions would be less. In addition, the desirability of legal advice will depend on the change in actual sanctions resulting from the availability of legal advice relative to the perceived change. That is, legal advice is more likely to be desirable to the extent that it lowers actual sanctions more than it lowers expected sanctions.

[94] Consider once again our example involving two tanks.

> Assume that the substance in tank *B* is harmless (it results in a sanction of 0 if revealed to the tribunal) and that the substance in tank *A* is harmful (it results in a sanction of 1000 if revealed). Those fully informed at the outset discharge tank *B*. The uninformed who expect to receive legal advice discharge tank *A*, for reasons explained previously. The result in this instance is that the uninformed would be advised to keep silent and thus would bear a sanction of 100, which is greater than their cost saving of

be provided both before they act and when they come before a tribunal.) Moreover, the principle of equal treatment in the present context is of questionable appeal in precisely those instances in which it would be decisive — when legal advice otherwise would be considered detrimental because, for example, it assisted parties in circumventing the proscriptions of the legal system. It is not obvious why society should prefer equality that is achieved by providing to poorly informed individuals the means that encourage them to commit bad acts that well informed individuals are inclined to commit in any event.[95]

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85. The uninformed who will receive legal advice suffer, in the end, a net loss of 15, while those fully informed at the outset have a net gain of 80 (the net cost saving associated with discharging tank *B*).

Alternatively, if the uninformed perceive the sanction applicable when they present no evidence to be 250, they will not discharge either tank into the river: The expected sanction of 125 exceeds the cost saving from transporting the waste from either tank to a dump. Those fully informed at the outset would discharge whichever substance would yield no sanction: They receive a benefit of 85 or 80.

[95] Judge Frankel has described the defense of the lawyer's role on fairness considerations of this sort as amounting to the view "that the client must be armed for effective perjury as well as he would be if he were himself legally trained. To offer anything less is arrogant, elitist, and undemocratic." Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1055–56 (1975) ("We may want to ask . . . whether it would be an excessive price for the client to be stuck with the truth rather than having counsel allied with him for concealment and distortion."); *see also infra* subsection F.1 (describing Bentham's argument).

A privacy rationale also has been advanced frequently. *See, e.g.*, *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1450, 1480–83 (1985) [hereinafter *Developments*]; *id.* at 1544–48 (discussing medical and psychological counseling privileges and defending these privileges on the basis of privacy interests but never noting that individuals could be required to testify about these matters without any privacy protection). The underlying norm, however, is unclear. After all, in civil cases a client must submit to discovery and may be called to testify by the opposing party; in all cases, a litigant, once on the stand, must answer most pertinent questions. If the client has answered truthfully, there would be no embarrassment in having the lawyer confirm the client's statement; thus, the unwanted invasion of privacy arises only when perjury is revealed. *See, e.g.*, Landesman, *Confidentiality and the Lawyer-Client Relationship*, in THE GOOD LAWYER: THE LAWYERS' ROLES AND LAWYERS' ETHICS 191, 209–10 (D. Luban ed. 1984); *see also supra* Part II.

This consideration also calls into question the argument that the privilege is needed to preserve a client's sense of fairness in the legal system. *See, e.g.*, Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 351–53 (1981) [hereinafter *Preservation of Confidences*] (arguing that the privilege is needed for fairness); Alschuler, *The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel*, 54 U. COLO. L. REV. 67, 72–73 (1982) (same); Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279 (1963) (pt. I); *id.* at 447 (pt. II) (appealing to fairness, although arguing for a severely limited attorney-client privilege). Fairness is undermined only if it demands that the client's ability to commit perjury be facilitated by lawyers. Clients simply could be informed of the limits of what their attorneys may do on their behalf. *See, e.g.*, Frankel, *supra* note 82, at 57; Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921, 951.

Related to the privacy interest is the notion that it is intrinsically desirable to protect confidential relationships. *See, e.g.*, Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956); Radin, *The Privilege of Confidential*

Finally, one might be concerned about a difference between the value of legal advice to the rich and the poor. Our analysis indicates, however, that it is difficult to draw general conclusions in this regard, as there are conflicting effects. As we discussed, the value of legal advice is higher the greater one's uncertainty about the law and the operation of the legal system. This suggests that the value of advice to the poor would exceed the value to the rich, because the poor presumably are less sophisticated about the law. Yet the rich may be more likely to confront complex aspects of the law, for which legal advice would be especially valuable.[96] Also, the rich are likely to obtain legal advice of higher quality than the poor and thus to derive more advantage from advice. In all, whether the rich or poor benefit more from advice is likely to depend on the context.

F. Comments on the Literature

The literature most closely related to our subject concerns the attorney-client privilege and rules of confidentiality. As discussed in Part II, lawyers' ability to further their clients' interests in selecting information to present to the tribunal is promoted by rules of confidentiality and the attorney-client privilege because they encourage individuals to be forthcoming with their lawyers and permit lawyers to shield from the tribunal information that would be unfavorable. We begin by discussing Bentham's writing on the attorney-client privilege and Wigmore's response to Bentham; we then consider modern commentary.

1. Bentham. — Jeremy Bentham's treatment of the attorney-client privilege in his treatise on evidence was the first serious analysis of the subject of which we are aware. His argument is notable for its conclusion — one rarely voiced for a substantial period[97] — that the privilege is a pernicious institution. Bentham asserted that the privilege is of no value to the innocent, as they have nothing to fear from the law, but that the privilege is of definite value to the guilty, as they have much to hide.[98] Because the privilege helps only the guilty,

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Communication Between Lawyer and Client, 16 CALIF. L. REV. 487, 492 (1928). Whatever the merits of this argument in other settings (for example, privileges with regard to marriage or psychological counseling), the attorney-client relationship in the context of litigation exists for the purpose of the litigation itself, not to serve other values.

[96] On the other hand, if the rich also were more likely to obtain legal advice ex ante, the benefits of ex post advice might not be as great.

[97] *See* J. WIGMORE, *supra* note 16, at 549 ("Rarely indeed has any question been made of the soundness of this privilege.").

[98]

> The man by the supposition is guilty; if not, by the supposition there is nothing to betray . . . . Whence comes it that any one loves darkness better than light, except it be that his deeds are evil? Whence but from a confirmed habit of viewing the law as the enemy of innocence, — as scattering its punishments with so ill-directed and so unsparing

he continued, all it does is reduce deterrence of violations of the law and therefore it is socially undesirable.[99]

What can be said about this argument in light of our analysis? Most obviously, the claim that only the guilty are helped by the privilege does not stand as a logical proposition. Innocent people may possess unfavorable information, as they often will have been accused precisely because they have some relationship to the offense, making it plausible that some of the information they possess would appear incriminating. Moreover, as there often are gradations of offense, it may easily be that those "innocent" of one offense are guilty of a lesser one, raising the possibility that some evidence would suggest guilt of the more serious offense. At the same time, the guilty may not always place a substantial value on the privilege because they may realize which facts are best to conceal. Legal advice is hardly necessary if the question is whether the guilty who stand accused would benefit from concealing the location of a weapon used in the commission of a crime. Hence, Bentham's assertion — that the guilty generally are helped by the privilege whereas the innocent are not — must be regarded as an empirical claim; in truth, the relative benefits of legal advice for the guilty and the innocent no doubt vary from one case to the next.

The second part of Bentham's argument — that, if the guilty alone are helped by the privilege, violations of law will be encouraged — is incomplete. Bentham did not consider how sanctions are set nor did he account for the possibility that insufficient deterrence may be remedied by raising sanctions. In Part IV, we explained how the ability to adjust sanctions may make legal advice irrelevant to deterrence and that, when it does not, the effects of legal advice on behavior may be desirable or undesirable.

2. Wigmore. — John Wigmore defended the privilege.[100] Because much of the subsequent commentary borrows directly from Wigmore's

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a hand, that the most virtuous of mankind, were all his actions known, could no more hope to escape from them than the most abandoned of malefactors?

J. BENTHAM, *supra* note 2, at 473, 479; *see also id.* at 473 ("What, then, will be the consequence [of abandoning the privilege]? That a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present."). Bentham did not rely on the argument that abolishing the privilege would allow tribunals directly to obtain more information — an argument implicitly assumed in much modern commentary to be necessary in order to establish that the privilege has undesirable effects, *see infra* subsection 3.

[99] So much the better. To what object is the whole system of penal law directed, if it be not that no man shall have it in his power to flatter himself with the hope of safety, in the event of his engaging in the commission of an act which the law, on account of its supposed mischievousness, has thought fit to prohibit?

J. BENTHAM, *supra* note 2, at 475.

[100] Wigmore did qualify his conclusion, stating that the privilege "ought to be strictly confined

arguments or parallels them to a substantial extent, it is of interest to consider his claims in light of our analysis.

Wigmore began by noting that during the nineteenth century it had become clear that the policy behind the privilege was utilitarian: "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed . . . ."[101] He did not, however, discuss why the legal system *should* promote such consultation — that is, unlike Bentham, he failed to analyze what he believed to be the effects of the privilege or why they might be desirable.[102]

The remainder of Wigmore's discussion consisted primarily of responses to Bentham. Wigmore's main criticism was that Bentham oversimplified in talking about the innocent and guilty. "[A] person who has a partly good cause would often be deterred from consultation by virtue of the bad part or of the part that might possibly (to his notion) be bad."[103] This argument, as we have just suggested, is a valid criticism of Bentham's assumption that innocence is always accompanied by only favorable evidence. Wigmore's argument does not, however, constitute a justification for the privilege. One might form such an argument, within Bentham's paradigm, by arguing that it is the innocent who benefit most from legal representation. Wigmore did not advance such a position, and, as we have suggested, such an argument would remain incomplete to the extent it did not take into account how the level of sanctions is determined.

Wigmore also questioned whether Bentham's attack on the privilege was applicable to the civil context, where often there is "no hard and fast line between guilt and innocence, which will justify us as stigmatizing one or the other party and banning him from our sympathy."[104] He illustrated his point with a case involving legal uncertainty concerning a land title. This argument, however, does nothing

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within the narrowest possible limits consistent with the logic of its principle." J. WIGMORE, *supra* note 16, at 554. But Wigmore was unclear why it should be so confined if indeed its justifications are convincing — that is, he did not attempt to demonstrate that the strength of his arguments in favor of the privilege relative to that of those against it diminishes in instances of broader application.

[101] *Id.* at 545; *see id.* § 2290; *Developments*, *supra* note 95, at 1501–02; MODEL CODE OF EVIDENCE Rule 210 comment a (1942).

[102] He asserted, contrary to what our analysis demonstrates, that the rationale of the privilege applies equally to representation in and outside of the litigation context. *See* J. WIGMORE, *supra* note 16, at 566.

[103] *Id.* at 552. In the course of this argument, Wigmore added that the guilty may seek and benefit from lawyers in the absence of a privilege, simply by withholding negative information. *See id.* at 552–53. Yet if he accepted that the assistance would be equally effective without the privilege, he would be conceding that the free flow of information induced by the privilege was unnecessary for fully effective representation; if not, his point would not undermine Bentham's argument.

[104] *Id.* at 552 (emphasis omitted).

more than suggest that Bentham's concern for controlling behavior is more important in the criminal context than in land title disputes. Wigmore offered no reason why it would be desirable to facilitate the evasion of whatever legal rule is ultimately deemed appropriate.

Wigmore also suggested that lawyers might not help the guilty if they think their clients' causes are unjust.[105] This fails to provide an affirmative justification for the privilege, seems inconsistent with his view of the purpose of the privilege, and is contrary to the generally accepted understanding of the lawyer's role.[106] Finally, Wigmore argued that the sense of "treachery" the lawyer feels in disclosing confidences "is after all not to be dismissed with a sneer."[107] Why the attorney's sense of honor should be deemed important and why it should be seen as honorable to assist the guilty in subverting the legal system (assuming arguendo the rest of Bentham's argument) is not stated.[108]

3. Modern Commentary on Confidentiality and the Attorney-Client Privilege. — Modern commentators, as did Wigmore, emphasize empirical questions about how much the privilege promotes consultation, while simply assuming that its effects (which are not identified) are socially desirable.[109] The only social cost of protecting the confidentiality of the lawyer-client relationship is seen in the tribunal's inability to obtain information the attorney receives[110] — to which the common

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[105] *See id.*

[106] If lawyers were reluctant to help the guilty, then whatever benefits Wigmore attributes to the free flow of information from clients to lawyers would not arise; for if lawyers would provide less assistance when they thought their clients' cases were weaker, clients would be discouraged from divulging information to their lawyers even with the privilege. In light of Wigmore's first two criticisms of Bentham, it hardly would be responsive to this inconsistency to suggest that the truly innocent would not be so discouraged.

[107] *Id.* at 553. Wigmore elaborates on this point, noting:

> [T]he position of the legal adviser would be a difficult and disagreeable one, for it must be repugnant to any honorable man to feel that the confidences which his relation naturally invites are liable at the opponent's behest to be laid open through his own testimony. . . . If only for the sake of the peace of mind of the counselor, it is better that the privilege should exist.

Id. This argument is in some tension with Wigmore's seeming approval of the abandonment of the attorney's "point of honor" as a reason for the privilege. *See id.* at 543 ("The judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy, nor was there any moral delinquency or public odium in breaking one's pledge under force of the law.").

[108] Today, the primary defense given for the attorney being honor-bound is that divulging information would violate the client's privacy interest, discussed above in note 95.

[109] *See, e.g.*, Hazard, *supra* note 10, at 1062 ("There is no responsible opinion suggesting that the privilege be completely abolished."). After noting that support for the privilege is strongest for criminal defendants, Hazard states: "Beyond this there is controversy as to the proper scope of the privilege, although superficially the authorities are in substantial agreement." *Id.* at 1062–63; *see also Developments*, *supra* note 95, at 1473 (simply asserting that "[s]ociety would surely suffer greatly if the lack of a privilege discouraged clients from conferring with their lawyers").

[110] *See, e.g.*, M. FRANKEL, PARTISAN JUSTICE 64–66 (1980); Hazard, *supra* note 10, at 1085

reply is that, but for the protection of confidentiality, the information would not have reached the attorney and thus would be unavailable to the tribunal in any event.[111] Commentators conceive of the instrumental desirability of confidentiality primarily in terms of the extent to which clients would be willing to divulge unfavorable information to their lawyers without confidentiality: If clients would be nearly as willing, the presumed benefits of consultation would be maintained and tribunals would obtain additional unfavorable information from lawyers; if clients would be substantially less willing, the benefits of consultation would be lost and little gained in return. Contemporary debate, in failing to define explicitly the problem it addresses or to state the assumptions used in the course of argument,[112] excessively confines its focus and misanalyzes many aspects of the problem.

First, the failure of modern commentators to specify the objectives of the legal system that they believe are served by the rules of confidentiality results in various flaws in their analyses. For example, the distinction between ex ante and ex post legal advice often is ignored. As section C explains, however, the effects of legal advice on those contemplating acts and on those before a tribunal for acts already committed are different in kind and thus require separate analysis. Although most commentators draw no distinction in analyzing these issues, when one reaches detailed arguments and illustrations, the particular points offered apply to only one of the two types of advice. For instance, commentators sometimes argue that one should be able to know of the law in order that one can obey it.[113] This argument justifies ex ante legal advice but not ex post.

Similarly, commentary frequently groups all the privileges, discussing their costs and benefits as a whole and freely borrowing

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(arguing that defining the scope of the attorney-client privilege creates a dilemma by expressing "a value choice between protection of privacy and discovery of truth").

[111] *See, e.g.*, Alschuler, *Preservation of Confidences*, *supra* note 95, at 350–51; Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 610 (1980).

[112] For example, one commonly finds disagreement over the appropriate balance between protecting communication and increasing the availability of information, but without an examination of how the legal system's purposes are related to either component (particularly the former). *See, e.g.*, Saltzburg, *supra* note 111, at 605 (criticizing Wigmore). Saltzburg reasonably argues that, in the absence of protection, clients would be more reluctant to confide in their attorneys, although, like Wigmore, he fails to consider why this effect is important. *See id.* at 607–09.

[113] *See, e.g.*, *Developments*, *supra* note 95, at 1505–06 ("This right stems from a basic principle inherent in the concept of the rule of law, that 'the law must be capable of being obeyed' and 'of guiding the behavior of its subjects.'" (quoting J. RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW 210, 213, 214 (1979))). This discussion is preceded by comments on legal advice provided *during litigation* and immediately followed by a further comment on that subject. *See id.*

arguments for one when evaluating another. It often is argued that the principles justifying the different privileges are largely the same.[114] Much of the problem is that the benefits largely are taken for granted.[115] In terms of the social desirability of facilitating protected communication, however, section D explained how the attorney-client privilege is similar to other privileges only with regard to legal advice about contemplated acts; legal advice in litigation thus differs from these other privileges as well.[116]

Second, modern commentary does not examine carefully the conclusions that follow from the assumptions it typically (and often implicitly) makes. For example, the argument that eliminating confidentiality is desirable because it would result in tribunals' receiving more unfavorable information from lawyers assumes that individuals, at the time they divulge such information to their lawyers, either do not know that the information is unfavorable or do not realize that their lawyers will disclose it to the tribunal. But, as we emphasized in subsection IV.A.3, even if the tribunal receives more information, individuals' behavior will not be improved if they do not understand, at the time they act, what the effect of such additional information will be on the sanctions they will bear.

Discussion of the empirical question concerning the effect of confidentiality on communication, a focus of modern commentary,[117] is another instance in which assumptions are not stated clearly or followed to their conclusions. When considering how clients would behave if confidentiality were not protected, commentators usually do not state whether the alternative regime allows professionals to disclose damaging information or requires them to do so; even if the latter is the alternative, there is generally no discussion of what incentives, if any, would lead professionals to disclose the information. When considering a regime with confidentiality, as now exists, ordinarily there is no discussion of the extent of affirmative disclosure requirements that may remain for lawyers in litigation.[118] As Part II

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[114] *See, e.g.*, *id.* at 1473; *id.* at 1530 ("Although the medical and counseling privileges are not as widely recognized as the attorney-client privilege, they share its underlying rationale.").

[115] *See supra* note 109. As with the attorney-client privilege, the debate centers on the empirical question of the degree to which the privilege encourages communication between clients and professionals. *See, e.g.*, J. WIGMORE, *supra* note 16, § 2380a.

[116] It is also the case that the answer to the empirical question that is the focus of many modern discussions — the degree to which lack of confidentiality would inhibit communication — differs significantly for ex ante legal advice, ex post legal advice, and advice from professionals other than lawyers. *See supra* note 84.

[117] For example, one exploration of the traditional justification for evidentiary privileges confines itself to empirical questions. *See Developments*, *supra* note 95, at 1474–80.

We limit our attention here, as elsewhere, to legal advice in litigation. For a discussion of ex ante legal advice, see Shavell, cited in note 77.

[118] As discussed previously, *see supra* note 16, Wigmore suggests the possibility that the

emphasized, discovery and ethical requirements effectively may demand disclosure in some or many instances, depending on how one interprets some unclear and controversial provisions and what one assumes about how the attorney-client interaction is conducted. Like existing commentary, we do not resolve these issues, but our analysis illustrates their importance. To avoid confusion, we defined two hypothetical regimes — full protection and effective full disclosure — and, in each, offered plausible conjectures about how individuals would choose to disclose information and traced the implications of our assumptions.

G. Limiting Lawyers' Ability to Select Which Information to Present

This section speculates on how the legal system could be modified to reduce lawyers' ability to select information for their clients, without impeding their ability to facilitate the legal process.[119] We are not, however, advocating change. Our Article constitutes an attempt to identify factors bearing on the social value of the lawyer's role in selecting information, rather than an effort to assess empirically the importance of the factors. Moreover, policies of the sort we are about to discuss raise issues in addition to those concerning the effects of legal advice on the presentation of information to tribunals. Nevertheless, because our analysis raises basic questions about the social desirability of the lawyer's role, a brief look at how, in principle, this role might be altered is warranted.

Consider three possible approaches. First, lawyers' ability to select information may be regulated directly by ethical or procedural rules requiring disclosure of facts unfavorable to clients.[120] This approach

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ability of one's adversary to interrogate the client may undermine the effect of any protection, but then drops the issue without further discussion.

Another extensive examination of the attorney-client privilege argues that the exception for client fraud is at the core of the privilege in that it allows only "socially desirable" legal counseling to take place. But virtually no comment is made on whether this exception swallows the rule, at least in the litigation context, or has little effect. *See Developments*, *supra* note 95, at 1509–14.

[119] Proposals for alternative dispute resolution that eliminate lawyers might implement to some extent a regime without legal advice, although many variations may only eliminate lawyers' presence before the decisionmaker but not lawyers' prior contact with clients.

If one wished to move in the opposite direction, to establish a system of complete protection, one simply could change aspects of procedural and ethical rules (particularly with regard to discovery and client testimony) to make it absolutely clear that lawyers were permitted to help their clients present only information favorable to them. As Part II indicates, the current system provides some, but incomplete, protection of confidentiality, suggesting that it reflects concerns going beyond protecting the communication between attorney and client.

[120] Judge Frankel has proposed such a rule, subject to the caveat that there be no requirement to disclose in the presence of a privilege. *See* Frankel, *supra* note 95, at 1057–58. He advocates this reform as part of a general program to make litigation less adversarial and does not address

already is embodied in many current rules with respect to some client activities subject to extensive regulation (for example, securities regulation), ex parte proceedings under the *Model Rules of Professional Conduct*,[121] directly adverse legal precedent,[122] and, depending on one's conclusions with respect to the issues raised in Part II, much of civil litigation. Similar rules could be applied with respect to the information that lawyers obtain from clients during litigation. A serious problem accompanies rules requiring disclosure, however, because lawyers' incentives may lead them not to disclose and violations would be difficult to detect.[123]

A second, radical approach would address directly the problem of lawyers' incentives by requiring that lawyers work for the state. Lawyers would have a duty to represent clients, but at the same time have obligations concerning the disclosure of information.[124] Such a regime would resemble the present-day system in the United States for public prosecutors,[125] who are required to disclose relevant evidence to the defense and are commanded to place a higher value on the pursuit of truth than on whether the government obtains a guilty

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specifically the issues considered here. He refers to his proposal as favoring "wholesale disclosure of evidence in litigation," *id.* at 1058, thus suggesting that he imagines that the "privilege" qualification, in practice, would include only a narrow subset of what an attorney uncovers in preparing a case. With regard to such a reform, note that the attorney-client privilege has not always been recognized. *See, e.g.*, Hazard, *supra* note 10, at 1080–81 (stating that no decisions in the latter half of the eighteenth century sustained privilege claims).

One also could imagine imposing affirmative disclosure requirements on clients beyond those already contained in the rules prohibiting perjury and permitting discovery. Our discussion proceeds on the assumption that such rules alone would be insufficient, making it necessary to control lawyers' behavior. *See generally* Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986).

[121] *See* MODEL RULES, *supra* note 4, Rule 3.3(d) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.").

[122] *See id.* Rule 3.3(a)(3); MODEL CODE, *supra* note 4, DR 7-106(B)(1).

[123] Thus, it may be that much disclosure — for example, of client perjury — currently is required but rarely observed. We do not argue that enforcement of such disclosure requirements would be impossible. High sanctions, risks of client reporting to seek revenge for unsuccessful representation or high bills, undercover operations, and other enforcement techniques might have substantial effect in ensuring compliance.

[124] Compensation and promotion could be based on success in achieving all of these objectives.

[125] It is also much like prosecution in continental systems, in which magistrates have an important role in directing the investigation and formulation of cases. *See generally* Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973). There exists disagreement about the extent to which civil law systems generally differ from adversary systems. *See, e.g.*, Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977); Langbein & Weinreb, *Continental Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978); Goldstein & Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570 (1978).

verdict.[126] Although the extent to which these dictates are followed is a matter of some dispute,[127] and application in civil cases would raise somewhat different questions,[128] the existence of the prosecutorial system serves to illustrate the possibility of a general regime of state-employed lawyers.[129]

A third approach would seek to reduce the influence of lawyers on the information presented to tribunals by attempting to acquire parties' information before they obtain legal advice. For example, government officials or prospective opposing parties might be allowed to depose individuals immediately after the occurrence of incidents that may give rise to litigation.[130] A requirement that selection of evidence be made before a lawyer could be consulted would alleviate many problems of circumvention associated with other approaches. The ability to obtain immediate depositions, however, would be limited as a practical matter, and individuals might be able to obtain legal advice from some source before the formal system came into play.

VI. CONCLUSION

This Article has examined an important aspect of legal representation in the context of litigation: lawyers' ability to assist clients in the selection of information to present to the tribunal. Our inquiry differs from most previous discussions of the attorney-client privilege and other rules of confidentiality; we assume, for purposes of analysis, that these rules serve their intended function of promoting the flow of information from clients to lawyers and examine whether or not the effects of this function are desirable. Our conclusions cast doubt on the social value of lawyers' role in selecting information for their

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[126] *See* Brady v. Maryland, 373 U.S. 83, 87–88 (1963); MODEL RULES, *supra* note 4, Rule 3.8; MODEL CODE, *supra* note 4, DR 7-103; *ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function*, Standards 3-1.1(c), 3-3.9(a), 3-3.11 (1974); *see also* 18 U.S.C. § 3500 (1982) (Jencks Act). *See generally* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 755–64 (1985).

[127] *See, e.g.*, Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1982).

[128] Most obviously, there may be less reason to fear abuse of power by state-employed lawyers in the civil context, but maintaining incentives and accountability to avoid lax performance may be more difficult.

[129] Criminal defense attorneys often are paid by the state and sometimes are employed by the state, although they are given a purely adversarial mandate.

[130] Those who withheld information at this initial deposition might be prohibited from changing their stories. Even if they were not, they might well be disbelieved if they later made contrary claims.

For a discussion of some of the issues this alternative poses in the criminal context, where fifth amendment limitations apply, see L. WEINREB, DENIAL OF JUSTICE 147–64 (1977).

clients, thereby challenging one of the fundamental premises of the legal system.

Skepticism about the value of legal advice in litigation is suggested by the manner in which it differs from advice provided before people act. The latter type of advice will lead individuals to behave more in accord with the law. Advice provided in litigation, after individuals have acted, has no similar general tendency. Thus, there is no obvious reason to believe that advice supplied ex post is socially valuable, however strongly clients desire it and however much the legal profession profits by providing it.

If such advice does not furnish a guide for behavior, what does it do? It reduces the sanctions prospective defendants expect to suffer, making the commission of acts subject to sanctions more likely. A complete analysis of this point required us to take into account, among other things, that the state can set a higher level of sanctions to offset the diluting effect of legal advice. We found that it generally is not possible to offset completely this effect of legal advice, in which case the effect of advice with respect to behavior may be undesirable or desirable, depending upon rather subtle and complex considerations. We also considered how advice affects choices among acts subject to sanctions (as opposed to choices between acts subject to sanctions and acts not subject to sanctions). In this regard, we concluded that advice may (largely by happenstance) improve behavior, worsen it, or not affect it at all. After considering all these effects of legal advice on prospective defendants, we noted that the availability of advice to one's adversary has conflicting effects. Depending on the context, such effects may be offsetting, or those pertaining to the advice received by one party may be dominant.

We observed that there are a variety of misconceptions about the role of legal advice. These misconceptions are rooted in a failure to understand how legal advice is, in essence, a component of the sanctioning system and, more generally, in a failure to state explicitly the purposes advice is meant to advance and how advice may further them. One misconception is that it is socially desirable for clients to give their lawyers as much information as possible and thus that protection of confidentiality, to the extent it promotes this end, is useful. Our analysis indicates why this is not the case, where social desirability refers to the legal system's ability to control behavior. (It is not clear why full exchange between lawyers and clients should be deemed valuable in itself.) A second misconception is that greater exchange of information between lawyers and clients will result in tribunals' receiving more information. We explain that this claim is empirical rather than logical, and that there is no strong reason to believe that it is valid. A third misconception is that it is socially valuable for the tribunal to obtain as much information about parties as possible. While this will be true in many contexts, it is not true

in the one we examine: To the extent that individuals are ignorant of the law governing their acts when they decide how to act, whether legal advice results in the tribunal receiving more or less information does not affect the degree to which the legal system can induce socially desirable behavior.

In the end, our analysis undermines the general notion that much of legal advice offered in litigation is socially desirable and suggests a range of questions that deserve further study.