

THE EFFECTS AND DESIRABILITY
OF LEGAL ADVICE CONCERNING
INFORMATION TO PRESENT
IN LITIGATION

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ABSTRACT

Legal advice provided in the course of litigation often concerns the selection of information to present to the tribunal. We examine the effects and desirability of such advice. Advice may result in either more or less information reaching the tribunal and, in either case, it will tend to produce more favorable outcomes for clients. Because individuals, when deciding how to act, will take this latter effect into account, the availability of advice thus may influence compliance with the law. The factors determining whether the effect on compliance is desirable or detrimental are explored. It is emphasized that legal advice supplied during litigation differs significantly from advice provided when acts are initially contemplated, because only the latter sort of advice generally tends to channel behavior in accord with legal rules. The analysis raises basic questions about the wisdom of the attorney-client privilege and rules protecting confidentiality in the context of litigation and also suggests that the inquiry into the lawyer's role must be recast.

I. Introduction

A significant aspect of legal advice 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 deciding which witnesses to call to testify or which documents to offer in evidence, the lawyer plainly is influencing the information that reaches the tribunal through a process of selection. And, perhaps less obviously, the lawyer influences the information the tribunal receives through a selective process when 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 aspect of legal advice offered during litigation.¹ It emphasizes that such advice influences the operation of the legal system through its effect on the sanctions parties expect to be imposed; this in turn affects incentives to behave in conformity with legal norms. The Article concludes that the desirability of legal advice is open to question, as there is no a priori basis for believing that legal advice tends to promote adherence to the law.

As a preliminary matter, Part II discusses the extent to which lawyers in fact are able to influence the information

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

brought before the tribunal, given existing rules concerning confidentiality and discovery. Parts III and IV then present the main part of the analysis. For clarity and ease of exposition, the discussion and examples in these Parts often 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 tribunals. (These assumptions are relaxed in Part V.)

Part III itself examines the effects of legal advice. If individuals do not receive legal advice, they will not present all available evidence; rather, they will present what they believe is favorable and refrain from providing what they think is unfavorable. But, to the extent their knowledge is imperfect, individuals will tend to make mistakes in this unassisted selection of evidence: They may err by presenting evidence that is unfavorable or by failing to present evidence that would be 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 present only the evidence that is in fact favorable. 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 legal advice affects individuals' prior choices among acts that may result in their coming before a tribunal (whether to commit a crime, breach a contract). Because legal advice helps individuals avoid errors in their selection of

evidence, it only can lower anticipated sanctions and thereby reduce the disincentive for behavior that may result in sanctions.

Part IV addresses the question whether the effect of legal advice on behavior is socially desirable in the sense of promoting compliance with the law. It might appear that advice is undesirable because, as stated, it tends to encourage acts subject to a risk of sanctions.² This reasoning, however, is incomplete. First, in many systems of sanctions -- even systems that reflect society's attempt to set sanctions optimally -- some individuals may face excessive sanctions for certain acts, in which case the reduction in sanctions would be desirable. Advice thus would be desirable if it reduced sanctions mainly in such circumstances -- e.g., circumstances in which innocent individuals are mistakenly accused. One therefore must examine for which individuals and which acts advice lowers sanctions in order to determine whether advice is desirable or undesirable.

Second, any conclusion concerning the effect of legal advice must take into account the possibility of adjusting the system of sanctions itself. If sanctions would be too low as a result of legal advice, one must ask why sanctions could not be raised in an offsetting manner. Alternatively, if sanctions have been set at levels that are appropriate with legal advice and thus would be too high in the absence of advice, the legal system could control behavior appropriately without legal advice if sanctions

² This position was advanced forcefully by Bentham. See J. Bentham, *The Rationale of Evidence*, Book 5 (1827), discussed *infra* subsection V.F.1.

were reduced. Upon exploring these possibilities, we find that sanctions can be adjusted to offset completely the effects of legal advice in some instances but not others. The result is that there will be contexts in which, despite efforts to set sanctions optimally, some individuals will be underdeterred and others overdeterred with respect to some acts. Whether the influence of legal advice on compliance with the law 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 advice with regard to its effect on compliance can be made.

In the course of the analysis, we comment on two misconceptions about the desirability of advice. First, we note that legal advice offered in litigation does not tend to guide behavior directly for the simple reason that such advice is offered only after individuals have chosen how to act. An individual who is uncertain what will constitute a breach of contract hardly can make better decisions because a lawyer will later explain these rules in the process of defending a lawsuit. Second, the effect of legal advice on the information reaching the tribunal has no definite implication for the ability of the legal system to promote compliance with the law. As noted, there is no general reason to think that advice systematically results in either more or less information being presented. Moreover, there is no necessary relationship between the information tribunals receive as a result of legal advice from imperfectly

informed parties and the ability of the legal system to regulate behavior.

Part V considers a variety of issues that provide a more complete understanding of legal advice in litigation. We initially note that the analysis applies to aspects of legal advice beyond the selection of evidence and aspects of the legal system beyond sanctions per se. Next, we extend the analysis to account for the availability of legal advice to opposing parties. Then, we elaborate on the important difference between advice offered during litigation and advice offered at the stage when individuals are contemplating how to act. Following this, we examine a set of factors bearing on the social desirability of legal advice that were not taken into account 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. Finally, we comment on the literature most closely related to our subject, that addressed to confidentiality and evidentiary privileges, and speculate on modifications of the legal system that would reduce lawyers' ability or incentive to select strategically 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 lawyers to be able to select the best subset of information to present, they must have access to all favorable information clients possess and be able to withhold any unfavorable information.³ Confidentiality and the attorney-client privilege are designed to make this possible: Protection of confidentiality permits lawyers to refrain from presenting unfavorable information and, precisely for that reason, induces clients to furnish all relevant information to their lawyers even when clients suspect that some of it may be unfavorable.⁴

³ We suppose that lawyers are motivated to act in 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, note that generally there would not be clear, contrary interests.

⁴ Rule 1.6 of the Model Rules of Professional Conduct provides that: "A lawyer shall not reveal information relating to representation of a client" 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 covers "not merely . . . matters communicated in confidence by the client but also . . . all information relating to the representation, whatever its source."

The Model Code of Professional Responsibility is virtually the same in relevant respects:

CANON 4 A Lawyer Should Preserve the Confidences and Secrets of a Client

There are, however, two important limitations on lawyers' ability to select only that evidence which 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 select evidence is confined largely to that information initially available only to their clients. Second, rules concerning discovery and testimony by parties may require clients to disclose unfavorable information. The effect of such rules on issues concerning confidentiality has received little attention and thus requires further exploration here.

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 At most, narrow discovery is permitted by the

. . . DR 4-101 (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, defend self]. . . .

EC 4-1 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.

prosecution,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 that choose to testify, however, may be required to make further revelations under cross-examination.⁷ But if they perjure themselves (which 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.

⁵ The role of criminal prosecutors in this regard differs from that of defense attorneys and lawyers in civil litigation. See *infra* page 74 and accompanying notes.

⁶ It is true that many jurisdictions require that the defendant indicate in advance of trial an intention to rely on an alibi or insanity defense and some require divulging in advance the evidence one intends to offer. See Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 Calif. L. Rev. 1567, 1579-81 (1986). Such discovery, however, pertains to evidence that already has been selected with the help of an attorney, rather than to witnesses, documents, and other information in the defendant's knowledge that will not be presented.

⁷ Cross-examination is limited to the subjects of the defendant's testimony and impeachment. See McCormick on Evidence §26 (E. Cleary, 3d ed. 1984); 2 C. Wright, *Federal Practice and Procedure: Criminal* 2d 547-48 (1982).

⁸ The lawyer's duty to correct such deceit has continued to be controversial. Compare M. Freedman, *Lawyers' Ethics in an Adversary System* (1975) (arguing that confidentiality must prevail, particularly in the criminal setting), with Rotunda, *Book Review of Lawyers' Ethics in an Adversary System*, 89 Harv. L. Rev. 622 (1976) (rejecting Freedman's position). Rule 3.3 of the Model Rules of Professional Conduct, requiring "Candor Toward the Tribunal", provides that "[a] lawyer shall not knowingly . . . (4) offer evidence that the lawyer knows to be false." With respect to the criminal context, the Comment takes the position 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*, 106 S. Ct. 988 (1986).) See also *infra* note 19 (addressing 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 may do much to avoid "knowing" with the relevant certainty that testimony is false. In practice, most probably would state that many defendants lie on the stand -- with the lawyer often knowing well enough a more nearly true account -- and lawyers rarely expose such testimony by their clients.

It also is interesting that the Code of Professional Responsibility is far more limited than the Model Rules in what it requires:

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

DR 7-102 (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.

The exception as stated engulfs much of the rule, and little remains of the limitation in light of the interpretation that even nonprivileged secrets (that is, all confidential information under Canon 4) are covered by the final proviso. ABA Formal Opinion 341 (1975); see Note, *Client Fraud and the Lawyer -- An Ethical Analysis*, 62 Minn. L. Rev. 89 (1977). But see Rotunda, *When the Client Lies: Unhelpful Guides from the ABA*, 1 Corp. L. Rev. 34, 39 (1978).

⁹ Much of what is said here will apply in the criminal context when the defendant testifies, to the extent inquiries would be within the scope of cross-examination.

¹⁰ The attorney-client privilege covers testimony at trial. Rule 26(b)(1) of the Federal Rules of Civil Procedure limits discovery to matters "not privileged," and rule 26(b)(3) pertaining to trial preparation materials ("work product") implicitly imposes broader limits with regard to 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 clearly 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) ("But in equity proceedings, through the discovery process, could a party be made to answer questions and produce his memoranda to counsel, for those surely include facts within the party's knowledge? The answer was that indeed they must be produced"); 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").

of confidentiality would be irrelevant, but it is doubtful that discovery and compelled testimony at trial produce such a result.

First, clients are more forthcoming to their lawyers than their lawyers are in preparing clients' discovery responses and in coaching clients before testifying. 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 leave a significant gap between the information learned by the client's lawyer and the adversary's. Second, lawyers and their clients sometimes may improperly withhold unfavorable information. Even outright dishonesty is difficult to detect, as the verbal communications between lawyer and client often will be the only evidence of such violations. There is also some uncertainty concerning the lawyer's obligation to report the client's incomplete or untruthful answers to direct queries, either in discovery or in testimony. The legal system tends to attribute responsibility for telling the truth to the client rather than the lawyer.¹¹

¹¹ The Model Rules of Professional Conduct, in a Comment to Rule 3.3 on "Candor Toward the Tribunal," state: "An advocate . . . is usually not required to have personal knowledge of matters asserted in [pleadings and other litigation documents], for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer."

Rule 11 of the Federal Rules of Civil Procedure (as a result of the 1983 amendments) 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) explicitly applies to discovery responses. The rule itself focuses on 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:

Lawyers' duty to tell the truth is further obscured by their ability to learn their clients' information without actually "knowing" it for purposes of ethical rules.¹² Third, lawyers may be able to furnish legal advice before clients divulge information to them, allowing clients to obtain the benefits of legal expertise without risking exposure of their damaging evidence.¹³

These arguments are consistent with and may help to explain the commonly held belief that, in the civil context as well as in the criminal, lawyers are able to advise clients on what information to present without unfavorable information thus

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 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 emphasis seems to be on whether sufficient efforts have been made, not on 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 *supra* note 8, only forbids the lawyer from "knowingly" offering evidence the lawyer "knows" to be false, and 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 the circumstances." To similar effect are many provisions of the Model Code. *E.g.*, 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) is to interpret "actual" knowledge quite narrowly, *see, e.g.*, M. Freedman, note 8, at 51-58, which renders this requirement quite minimal.

¹³ The most well known illustration appears in R. Traver, *Anatomy of a Murder* 46-56 (1958). *See* 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 that must be interviewed to determine whether the testimony would help or hurt and the lawyer conducts an interview, it will be extremely difficult for the lawyer later to deny knowledge of such a witness when the witness's name is not divulged in response to an interrogatory.

becoming available to opposing parties.¹⁴ The extent to which this results from the adversary's failure to ask the right questions rather than from less than truthful responses by clients is not clear.

In addition, lawyers may influence significantly the information reaching the tribunal in ways independent of whether the opposing party gains access to the client's information. Most obviously, lawyers assist in identifying favorable evidence

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). Wayne Brazil's survey of lawyers concerning the discovery process revealed similar information:

[T]he 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. . . .

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 approximately 30 per cent 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 per cent of these lawyers reported having had that experience in at least one case they had tried to judgment. More than 80 per cent 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 per cent of the tried matters.

Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 *A.B.A.J.* 450, 451-54 (1981). Small case lawyers reported less problems with abusive discovery. *Id.* at 454.

that an unassisted client mistakenly might regard as unfavorable and thus fail to offer. Moreover, lawyers also make important tactical choices, such as determining when to present damaging information to preempt the opposing party's presentation¹⁵ or how to frame a case in opening and closing argument.

It thus 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 have such access. We do not purport to resolve the empirical, ethical, and legal issues concerning the extent of lawyers' ability to assist clients in selecting information. These issues that have been largely neglected,¹⁶ as both commentary¹⁷ and pronouncements in codes of ethics¹⁸ simply assume when addressing the virtues of confidentiality that the client is safe in telling all to the

¹⁵ Lawyers also will know better than clients which evidence is likely to be possessed by opposing parties, which is important in determining what information to present.

¹⁶ For example, Wolfram's text on legal ethics devotes an entire chapter to confidentiality without addressing this most frequent instance of application. C. Wolfram, *supra* note 10, Ch. 6. Discovery receives only passing mention in the discussion of work product protection. *Id.* §6.6.

Hazard makes no mention of discovery in his discussion of confidentiality, where he argues that the rules essentially serve as an absolute protection for the client in this context. 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). No attempt is made to reconcile these two positions -- in particular, to indicate the implication of his latter statement for his former discussion.

Wigmore, at the close of his policy discussion defending 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

lawyer -- suggesting implicitly that the lawyer may assist the client in offering (whether in discovery or to the tribunal¹⁹) only that which is in the client's interest.²⁰ As our analysis is designed to assess the effects of such legal assistance, we adopt for convenience the assumption that lawyers can exercise perfect control over what portion of clients' information is presented to the tribunal. The basic principles that emerge also will apply, although to a lesser extent, to the case in which the

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) (1st ed. 1904). Wigmore maintains his defense of the privilege (although "[i]t ought to be strictly confined," see *infra* page 103), offering no comment on why this observation does not undermine his argument or whether lawyers' duties in the event of client perjury override the privilege, thereby making it largely irrelevant.

¹⁷ E.g., McCormick on Evidence, *supra* note 7, §87.

¹⁸ See *supra* note 4 (Rule 1.6, Comment; Cannon 4, EC 4-1).

¹⁹ With regard to permissible behavior before the tribunal, consider Rule 3.3(a)(2) of the Model Rules of Professional conduct, which 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," is interpreted in the commentary as entailing 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 a 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 *supra* note 4. Query 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 also *infra* subsection V.F.3.

lawyer-client relationship does not permit such complete assistance.

III. The Effects of Legal Advice

This Part analyzes the effects, as opposed to the social desirability, of legal advice concerning what information to present to the tribunal. We consider a two-stage sequence of events. First, individuals²¹ decide among acts, some of which are subject to the risk of sanctions. This decision will reflect among other things their generally imperfect knowledge of the law and the legal system and whether they expect legal assistance to be available in the event 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 they expect will result if they come 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 will refer in this Part and the next to information as "evidence," with the understanding

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

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 will 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 will indicate 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 but 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 aspects of the legal system pertaining to the effect of evidence on sanctions.

1. Lawyers' Selection of Evidence for Clients. -- 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 evidence²⁵ and

²² See *infra* Section V.A.

²³ It will 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.

withhold any unfavorable evidence.²⁶ Lawyers decisions will be guided by their knowledge -- which, for convenience, we assume to be complete²⁷ -- of substantive rules, proof burdens, jury behavior, and a variety of other factors.²⁸

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

Firms 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 the waste was of an unusually harmful type, the sanction will be 1000; if the waste is shown to be of an unusual and essentially harmless type, the sanction will be 0.²⁹ Knowing this, a lawyer will

²⁴ In stating the lowest "sanction" rather than "expected sanction," we ignore for ease of exposition that the legal system (particularly factfinding) has important elements of uncertainty. This assumption is immaterial except for subtle effects involving risk aversion. See *infra* note 33.

²⁵ Of course, synergies are possible. For example, testimony placing the defendant outside a store near the scene of the crime, taken alone, might be unfavorable, but may be helpful to bolster the favorable testimony of another witness placing the defendant inside that store picking up an order. This possibility does not affect the reasoning to follow. (Also, one could simply interpret "favorable" evidence as that evidence which is favorable given what other evidence is selected.) For expositional simplicity, the discussion speaks in terms of evidence that simply is favorable or unfavorable. Also note that, when presenting unfavorable evidence to preempt its presentation by an adversary, it can be seen as favorable in the language of the text, since the relevant question is the effect of presenting it relative to that of withholding it.

²⁶ One might think that appropriately high sanctions for nondisclosure of evidence could induce complete revelation -- that is, make it advantageous to produce all evidence. For example, if there is some possibility that withheld evidence later will 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 information through sanctions while, at the same time, providing efficient incentives for behavior. See Shavell, *A Model of the Incentive to Provide Evidence to a Legal Tribunal and Optimal Sanctions*, Int'l Rev. L. & Econ. (forthcoming). 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.)

²⁷ To the extent lawyers' knowledge is understood to be 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.

²⁸ See *infra* Section V.A.

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. This problem is simple if all of a person's evidence is thought to be favorable (as may be true for some who did not commit the act for which they are accused) or if all is thought to be unfavorable (as may be true of some guilty parties). Legal advice does not affect the evidence presented in such instances; an individual will present everything if all the evidence is favorable or nothing if all is unfavorable -- which is exactly what a lawyer would advise.

In many instances, however, individuals reasonably will assume that some of their evidence may be favorable and some unfavorable. One who is innocent may have been spotted by a witness (not discovered by the police, but known to the defendant) in the vicinity of the crime. A guilty person may know of evidence suggesting others who may have had motive or opportunity. With some crimes and much of civil litigation, issues often will be a matter of degree (e.g., level of care,

²⁹ 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 necessarily would bear the sanction applicable when evidence is not presented even if the waste was of the harmless type. See Shavell, *supra* note 26.

amount of damages, nature of intent); whether some evidence is helpful or detrimental will depend on the precise nature of the claims and the other evidence that is presented. Such possibilities as well as the complicated nature of the law and complexities of the inference process guiding judicial assessment make it apparent that individuals often will be unsure whether certain evidence is favorable or unfavorable.³⁰ That individuals are uncertain what to present to the tribunal also is apparent from the extent of legal advice that they obtain to assist in these decisions.

Note that individuals' uncertainty about what evidence to present can arise from two sources. First, individuals may know what inferences would be reached based on various evidence they might present but may be unsure about the sanctions that are applicable to various acts. They may be unsure, for example, whether evidence establishing that they in fact killed someone, but in reaction to provocation, was favorable or unfavorable. Second, individuals may know what sanctions apply to various acts but not know how some evidence will affect the inferences the tribunal will make about the acts they have committed. For much

³⁰ For example, a person guilty of robbing a store may not know whether noting 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 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 been made safer, but at extremely high cost, is seen as establishing prudent conduct or improper conduct.

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 will focus on the more typical case of less knowledgeable actors, or sophisticated actors involved with complex problems, who face some significant uncertainty concerning what evidence is best to present.

of the discussion that follows, we will refer to uncertainty generally and, for convenience, discuss examples involving the first of these cases, although it will be clear that the analysis is equally applicable to the second case or to combinations. Where relevant,³¹ our discussion will distinguish the two cases.

When individuals are uncertain about what evidence to present, their decisions will reflect their beliefs concerning the likelihood of different consequences. Thus, they will be inclined to reveal evidence that probably is favorable and withhold evidence that probably is unfavorable. Of course, they also will consider the magnitude of the consequences that may result. For example, if one thinks some evidence is favorable, but expects to win in any event, one would withhold the evidence if introducing it might (although with lower probability) hurt one's cause to a very substantial extent. Individuals thus would decide what evidence to offer based upon their best, although knowingly imperfect, estimates of the probability and magnitude of the sanctions that will result from each possible choice.

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

Firms before the tribunal for discharging waste know that if they are silent the sanction will be 100 and that if they present evidence the sanction will be 0 or 1000. They are unsure, however, which of the latter sanctions is applicable to the substance they discharged: They believe there is a 50% chance that the sanction would be 0 and a 50% chance that it would be 1000.³² Hence, if such a firm is before the

³¹ See *infra* subsection IV.A.3.

tribunal and offers evidence about the waste, the expected sanction³³ will be 500 ($50\% \times 0 + 50\% \times 1000$). 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 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 reasons as follows: There is a 50% probability it will be told that it should present its

³² Note that this example corresponds to our first case; that is, firms uncertainty concerns which sanctions are applicable to their acts. One could readily modify the example to correspond to our second case: Assume that firms know which sanction the tribunal would apply to the waste they have discharged if the tribunal knew which it was, but that their evidence is only circumstantial, and they believe 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.

³³ Probability-discounted evaluations are conventionally called expected values, and the assumption that decisions are based on them is described as corresponding to risk neutrality. See H. Raiffa, *Decision Analysis* ch. 4 (1968). It will be evident to readers familiar with decision theory that 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, as would be typical with monetary sanctions for persons (rather than corporations), lawyers' value would depend in part on their effects on overall uncertainty (the effect could go in either direction). In addition, when comparing deterrent effects and the desirability of different sanction levels and legal systems, one would have to take account of not only the expected sanction, but also the patterns of uncertainty. For nonmonetary sanctions, the risk-neutrality assumption may be valid, so long as such sanctions are measured by the negative value parties associate with them.

evidence because it will thereby bear no sanction; likewise, there is a 50% probability 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 if it presents its evidence. It thus faces an expected sanction of 50 ($50\% \times 0 + 50\% \times 100$). In other words, legal advice reduces the expected sanction by 50 (from 100 to 50) and therefore has a value to the firm of 50.³⁴

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 $50\% \times 100$, or 50.

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

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.³⁵ Those who are very uncertain about what evidence to present³⁶ will believe that they are 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

³⁴ That is, a firm would be willing to pay up to, but not more than, 50 to obtain legal advice when before a tribunal.

³⁵ The stakes individuals' face also will influence the expected value of advice.

³⁶ Not all uncertainty about the law is relevant to the selection of evidence; one's uncertainty may relate to how favorable (or unfavorable) was various evidence rather than to whether or not such evidence was favorable.

they are wrong) will think they are unlikely to make mistakes and thus will place little value on advice. In the extreme, someone who is completely confident about what evidence to present will attach no value to advice.³⁷

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 evidence that is favorable but less that is unfavorable reaching the tribunal. The significance of these two effects will depend on the particular context;³⁸ no general conclusion can be drawn about the effect of advice on the quantity of information presented. In our example, advice sometimes resulted in more (favorable) information being presented, since firms that discharged the unusual, harmless waste would be told by lawyers to present this rather than keep silent (as they would in the absence of advice). On the other hand, in a slight variation of this 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 ($50\% \times 0 + 50\% \times 150$) 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 the waste it has discharged is of the

³⁷ If lawyers are sufficiently costly and the level of uncertainty and stakes are sufficiently low, individuals would choose not to hire lawyers, at least with regard to the selection of evidence. For such individuals, the availability of legal advice would have no effect.

³⁸ One possibility is noted in subsection V.F.1.

type that, if revealed, would be subject to 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 legal system to induce individuals to comply with the law.

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 we then compare the two cases to determine the effect of advice. We assume throughout that individuals choose acts that produce the greatest benefits net of expected sanction (if any).³⁹ The main point is that legal advice reduces expected

³⁹ If some people value legal compliance for its own sake -- that is, independent 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, those seeking to comply with the law will fail to the extent they understand the law imperfectly. Also, with acts typically subject to civil liability -- wherein, for example, contract breach or activity raising some risk of danger is desirable in some circumstances -- such attitudes do not directly apply (as the law commands individuals to act when their gain exceeds the anticipated liability).

sanctions and therefore tends to encourage acts subject to sanctions.

1. Decisions Among Acts When Legal Advice Will Be Available.⁴⁰ -- In evaluating the expected sanctions associated with various acts, individuals, in principle, would take into account the legal advice they expect to receive when brought before a tribunal. This will be true even though they are imperfectly informed about the law and thus will be uncertain (as described in Section A) about what evidence their lawyers would choose to present or what sanctions they ultimately would face.⁴¹ 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.⁴²

To fill a rush order, a firm has an unanticipated need to empty a holding tank that contains an unusual waste. The firm has the option of transporting the waste to a dump -- which will cost 85 but 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

⁴⁰ It will be apparent that our analysis is directed to whether or not legal advice is anticipated rather than whether or not it actually will be provided, as 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.

⁴¹ Expected sanctions also will be a function of other factors, including the likelihood of being brought before a tribunal and the evidence one will have available at that time (e.g., whether one recognized a witness). To simplify the discussion (without affecting the analysis), we do not discuss these factors.

⁴² The possibility that the firm would obtain legal advice before deciding whether to discharge waste from the tank will be considered in Section V.C and subsection V.E.5.

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 85.⁴³

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 if advice were available. They 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, 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 the cost of 85, rather than discharge the waste into the river, which involves bearing a sanction of 100.

3. The Effect of Legal Advice on Decisions Among Acts. -- An individual will be 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

⁴³ If legal costs were nontrivial, they would have to be factored into the decision. In particular, if legal costs exceeded 35, the costs of discharging into the river (expected sanction of 50 and legal costs exceeding 35) would be greater than the cost of 85 for using the dump.

sanction. Consider how, in our example, the availability of legal advice altered the firm's behavior.

Comparing the situations of firms 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 but only if it expects legal advice to be available.⁴⁴

Consider more precisely the implications of 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).⁴⁵

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 on our example illustrates this point.

As before, a firm faces an expected sanction of 100 without legal advice and 50 with legal advice if it discharges waste from the tank -- call it tank A --

⁴⁴ Of course, the reduction in expected sanctions caused by the prospect of legal advice would not alter behavior in some instances. First, a firm still may be deterred from the act subject to sanctions, as would be the case if 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 available). Alternatively, a firm may not be deterred from committing the act even without legal advice, as would be the case in the variation of our example presented in subsection A.4 that involved a high sanction of 150: The expected sanction without legal advice of only 75 would not deter the discharge of waste into the river when the alternative costs 85.

⁴⁵ One should not be concerned that this result (and our others derived from similar reasoning) assumes any high level of computational complexity on behalf of actors. The basic phenomenon is that those aware that they are not fully knowledgeable about the law -- that is, about the sanctions associated with evidence they might choose to present -- expect to do better with legal advice than without it. Thus, for example, given a sanctioning system, one would be somewhat more likely to engage in securities fraud or perform surgery (when there is the prospect of malpractice suits) if legal advice will be available in the event of litigation.

into the river, while saving 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,⁴⁶ while the net saving from discharging this tank into the river is only 80.⁴⁷

Without legal advice, discharging tank A into the river entails an expected sanction of 100 and a cost saving of 85; discharging tank B involves an expected sanction of 75 and a cost saving of 80. Hence, the firm will discharge tank B.

With legal advice, discharging tank A and tank B both entail an expected sanction of 50, but the cost saving from discharging tank A is greater (85 versus 80), so the firm will discharge tank A. (Note that advice reduces expected sanctions more for discharging from tank A than for discharging from tank B -- 50 versus 25.)

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). And when legal advice reduces expected sanctions more for some acts than others, the act chosen might not change (as when the benefits of all acts are less than the reduced level of expected sanctions, when the effect is insufficient to offset the relative benefits of the chosen act, or when the effect merely reinforces the choice that would have been made in the absence of legal advice).⁴⁸

⁴⁶ If, for example, the sanctioning scheme described in the variation in subsection A.4 involving a high sanction of 150 is applicable, the expected sanctions would be as described in the text.

⁴⁷ Suppose that, although the firm saves 85 by not having to transport the waste to a dump, the firm bears an expense of 5 in moving the waste from this tank to the river.

Finally, note that the availability of legal advice when individuals come before a tribunal -- while it may affect their decisions among acts -- does not necessarily lead them to choose acts in accord with actual sanctions, for individuals choose acts before they obtain 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. By assumption, there is a 50% chance that it expects to bear a sanction of 100 when before a tribunal.⁴⁹ Although the sanction thus may exceed the cost saving of 85 that results from the decision to discharge the waste into the river, the firm does not learn of when this is the case until after it has acted.⁵⁰

One can say, therefore, that although whether legal advice will be available affects actions taken, the particular content of

⁴⁸ The statements in text can be derived as follows: Let b_1 and b_2 correspond to the benefits of two acts, s_1 and s_2 the expected sanctions without legal advice, and r_1 and r_2 the reduction in expected sanctions due to legal advice. Without advice, individuals will choose the first act if

$$b_1 - s_1 > b_2 - s_2 \quad \text{and} \quad b_1 - s_1 > 0.$$

They will choose the second if the first inequality is reversed and $b_2 - s_2 > 0$. With advice, they will choose the first act if

$$b_1 - s_1 - r_1 > b_2 - s_2 - r_2 \quad \text{and} \quad b_1 - s_1 - r_1 > 0.$$

They will choose the second if the first inequality is reversed and $b_2 - s_2 - r_2 > 0$. Clearly, if individuals choose the first act without advice, they will be more inclined to choose the second act with advice the larger is r_2 relative to r_1 .

⁴⁹ That is, it will be advised to remain silent, rather than present its evidence and bear a sanction of 1000.

⁵⁰ 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 waste into the river if legal advice was not expected to be available. And, if legal advice was expected to be available, they still would refrain if they mistakenly believed that the 100 sanction was, for example, 500. Similarly, if they underestimated the typical sanction, they might mistakenly discharge into the river, with or without the expectation of legal advice.

legal advice that ultimately will be provided cannot -- for it is not provided until after individuals act.⁵¹

IV. The Question of the Social Desirability of Legal Advice

This part addresses the question whether the effect of legal advice on expected sanctions and thus on behavior is socially desirable or detrimental. (Section V.E will consider how legal advice affects the ability of the legal system to achieve other objectives.)

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 possibility is of interest chiefly because of the opportunity to raise sanctions to offset implicitly their dilution due to the availability of legal advice. Our analysis of these cases indicates that because the relevant aspect of legal advice is that it alters expected sanctions, it is useful to view advice as, in effect, a component of the sanctioning system. The conclusion we reach is that whether advice is socially desirable or detrimental depends on a variety of subtle and complex factors concerning the sanctioning system and on context; thus, no general statement about the desirability of advice can be made.

⁵¹ 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 content of advice refers to what inferences tribunals will make from evidence that might be presented.

A. Whether Advice Is Desirable When Sanctions Are Given

1. The Decision Whether to Commit Acts Subject To Sanctions.

-- Legal advice reduces expected sanctions for and thereby encourages the commission of acts subject to sanctions. Whether this effect is socially undesirable depends on the character of such acts and on the level of expected sanctions with and without legal advice. If an act is undesirable and is deterred sufficiently in the absence of advice, the effect of advice may be to lower expected sanctions enough to induce individuals to commit the act; thus advice could be detrimental. Alternatively, if an act is desirable but is deterred in the absence of advice due to the risk of sanctions, advice again may lower expected sanctions enough to lead individuals to commit the act; under these circumstances, however, advice would be beneficial.⁵² Both possibilities can arise in our example.

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. But this effect is desirable 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.

⁵² The problem of deterrence of desirable acts is, in principle, on equal footing with that of failure to deter undesirable acts; and, in practice, deterrence of desirable acts can be an important problem even when the legal system has been designed taking this concern into account. Desirable acts may be subject to sanctions because of mistakes (factual inference in the litigation context is inherently imperfect). Moreover, particularly in the civil context, the legal system often attempts to impose liability without regard to whether acts are desirable, where the level of liability is designed to induce appropriate behavior. (Areas of strict liability in tort and damage rules for breach of contract are two notable 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.

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 for expositional simplicity and because, as will be apparent from 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 too high so as to discourage certain desirable acts.

2. Decisions Among Acts Subject to Sanctions. -- Legal advice not only encourages the commission of acts subject to sanctions; it also influences choices among such acts, to the extent it reduces expected sanctions more for some acts than for others, as was described in subsection III.B.3. Whether this effect on the choice among acts is desirable or detrimental depends, as in the previous subsection, on the character of the particular acts in question and the level of expected sanctions with and without advice. For instance, an individual might choose the worse of two acts if advice is not expected to be available and the better act if it is; this could be possible when advice lowers expected sanctions more for the better act. The opposite case is similarly possible: Advice might lead an individual to choose the worse rather than the better act when 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.⁵³

⁵³ See *supra* page 28.

A firm, recall, 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. (Legal advice reduced 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 a harm of 1000 and the discharge from B would be harmless, this result is undesirable.⁵⁴ If, instead, the discharge from A would be harmless and that from B harmful, the effect of legal advice in leading to the selection of A rather than B would be desirable.⁵⁵

3. The Question of the Relevance of Information Reaching the Tribunal. -- We now examine whether the ability of the legal system to promote compliance with the law is influenced by the effect of legal advice on the information reaching the tribunal. In light of the analysis in the preceding subsections, the effect of advice on information would be desirable if the corresponding changes in expected sanctions more effectively channel behavior. To analyze the relationship, if any, between information reaching the tribunal and expected sanctions, we must distinguish the two cases introduced in subsection III.A.2 that specified the character of individuals' knowledge -- or lack thereof -- concerning the legal system.

Consider first the case in which individuals are uncertain about how their evidence may affect sanctions because they are unsure about what sanctions apply to their acts, but they are not uncertain about how particular evidence will affect the

⁵⁴ Note that the choice of A arises in this instance as a result of legal advice, despite the fact that the content of that advice, when given during litigation, would be that A is associated with a sanction of 1000.

⁵⁵ 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.

tribunal's inferences concerning their acts. In this case, there is no reason to think that the effect of legal advice on the information the tribunal receives will have any particular influence on behavior because individuals do not know at the time they act what this effect will be. To illustrate, consider the extreme assumption that, at the time they act, individuals believe that legal advice will have the effect of providing tribunals with perfect information concerning their acts (e.g., what substance a firm has discharged into the river) and that tribunals would impose appropriate sanctions for the acts (e.g., a high sanction for the harmful substance and no sanction for the harmless substance). That individuals anticipate this result, however, hardly can lead them systematically to act more in compliance with the law. After all, individuals' uncertainty in this case is precisely that they lack knowledge of sanctions at the time they act; advice remedies this deficiency in knowledge only after they have acted and thus cannot affect their behavior, for better or worse, except by coincidence.⁵⁶ Moreover, as explained in subsection III.A.4, there is no a priori basis for believing that advice tends to result in the tribunal receiving more (much less perfect) rather than less or simply a different mix of information about acts. Therefore, the notion that advice

⁵⁶ The conclusion concerning the irrelevance of information may be illustrated sharply by noting that advice may result in the tribunal 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 would 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 and thus the advice is undesirable in spite of the fact that the tribunal obtains more evidence.

is desirable because it leads to more information reaching the tribunal or undesirable because it leads to less is doubly mistaken in the present case.

Now consider the second case, in which individuals are uncertain about how evidence will affect the tribunal's inferences concerning their acts (e.g., firms are unsure whether their evidence would lead the tribunal to believe that they discharged the harmful or the harmless substance), but they fully understand what sanctions the tribunal would apply given the acts it ultimately determines to have been committed. In this case, it is possible that the quality of the information reaching the tribunal could affect behavior in a systematic way. Again, consider the extreme assumption that, at the time they act, individuals believe that legal advice would result in the tribunal receiving perfect information. Because individuals then would know what sanctions would be applied (unlike in the previous case), they would be led to choose acts in light of the actual sanctions that will result. If sanctions are appropriately chosen, therefore, individuals would be led to act desirably. Nevertheless, it is difficult to draw simple conclusions concerning the effect or desirability of legal advice in the present case. First, even short of the extreme and unrealistic⁵⁷ assumption that legal advice results in tribunals

⁵⁷ Note that so long as there is a chance that the individual might possess some relevant evidence that is unfavorable, legal advice cannot result in tribunals obtaining complete information, for lawyers would advise that such information be withheld. And if there was 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 without legal advice as well. See *supra* subsection III.A.2.

obtaining perfect knowledge of how individuals have acted, it need not be true that advice improves compliance even if advice tended to provide tribunals with better (although imperfect) information -- better in the sense that tribunals could determine more accurately individuals' acts and thus apply more appropriate sanctions. Because legal advice tends to encourage acts for which expected sanctions are reduced the most, it could be that advice reduces expected sanctions relatively more for acts that are more harmful, even though the advice would lead to more information reaching the tribunal and thus allow more accurate inferences.⁵⁸ Furthermore, as discussed in subsection III.A.4, advice has no necessary influence on the quantity of information reaching the tribunal.⁵⁹ The conclusion in our second case, as in the first, is that the effect of advice on information reaching the tribunal is not clearly good or bad. The reasoning, however, is different. In the second case, advice might be favorable if it improves the information tribunals receive and unfavorable if it worsens the information tribunals receive. In the first case, by contrast, there is no reason to believe that advice can affect the ability of the legal system to channel

⁵⁸ This statement holds even if actual sanctions are optimally determined. So 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.

⁵⁹ Thus, if better information improves compliance, legal advice may be undesirable because advice may result in the tribunal receiving worse information. Note that the relevant question for this argument 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.

behavior even if one could identify a clear effect of advice on the information tribunals receive.

Finally, how can one reconcile the dubious social value of information to the tribunal in the above two cases, particularly the first, with the apparently conflicting but intuitively plausible notion that it generally is socially desirable for tribunals to obtain better information about individuals' acts? The answer is that it is desirable for the tribunal to obtain more information when it is the case that, at the time individuals contemplate acts, they understand what information tribunals later will obtain and what sanctions will accordingly be applied.⁶⁰ Under these circumstances, better information allows the legal system more appropriately to tailor sanctions to acts and thus to obtain better compliance, as individuals will take the more fine-tuned sanctions into account in choosing how to act. Our analysis, by contrast, has focused on cases in which individuals are imperfectly informed in ways that interfere with the clear connection between the information the tribunal obtains and the expected sanctions individuals perceive at the time they act.⁶¹ These cases are illuminating precisely because it is only when individuals are imperfectly informed about these aspects of the legal system that advice will affect what information is presented and, ultimately, behavior. Moreover, we have focused

⁶⁰ 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.

⁶¹ Whether the tribunal has more or better information even when actors are ignorant of the law will be relevant to some of the objectives addressed in subsections E.4 and E.5.

on whether the tribunal receives more or less information as a consequence of the provision of legal advice in litigation. The significance of this observation is that advice affects the evidence presented to the tribunal only when the client would have made mistakes -- that is, only when individuals at the time they decide among acts would not know precisely what effect legal advice would have on the tribunal's information and sanctioning.

B. Whether Advice Is Desirable When Sanctions May Be Adjusted

The discussion thus far has taken the system of sanctions as given. Yet, in designing a legal system, a different level of sanctions may be employed in a regime in which legal advice is to be available than in one in which it is not. In particular, the schedule of sanctions may be chosen to be 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.⁶²

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 for all individuals. Thus, legal advice generally will make a difference for behavior, although the

⁶² If this result could be achieved in practice, the desirability of legal advice would be determined entirely by factors other than effects on behavior. See *infra* Section V.E.

difference often will be less than what was suggested by our analysis of the case in which sanctions were taken as given.

1. Adjustment of Sanctions May Offset Completely 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 that there is a 50% probability that it would be advised to present evidence of the waste it discharged so as to bear no sanction. Assume further that, if actual sanctions were different, firms would take such sanctions into account as before. (That is, their uncertainty is limited to which substances receive which sanctions).

Clearly, if the sanction for silence in the 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. $50\% \times 200 + 50\% \times 0 = 100$.) Because the expected sanction can be made the same when legal advice is available as when it is not, the same behavior can be induced, and thus the same degree of legal compliance obtained.

Similarly, if the sanction for silence in the 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 could be induced and the same degree of compliance obtained.

2. When the Adjustment of Sanctions Cannot Offset Perfectly the Effects of Legal Advice. -- Having just shown the possibility

that an adjustment in sanctions may offset fully the effect of legal advice, we now discuss factors suggesting that often the effect can be offset only partially and sometimes not at all. First, it may not be feasible⁶³ to adjust sanctions by a sufficient amount.⁶⁴ For example, an act already may be subject to capital punishment⁶⁵ or to the maximum punishment constitutionally permissible.⁶⁶

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

⁶³ In addition, for acts not subject to the maximum possible or permissible sanction, considerations of marginal deterrence may limit the desirability of adjusting sanctions.

⁶⁴ Note that, if it were necessary to lower sanctions in a regime without legal advice, a constraint that actual sanctions could not be less than zero might present a problem.

⁶⁵ For fines or monetary judgments in civil cases, awards are limited by defendants' wealth.

⁶⁶ 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, e.g., 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. LaFare & 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. But in light of Supreme Court decisions like *Rummel v. Estelle*, 445 U.S. 263 (1980) -- although limited by *Solem* -- it does not appear that constitutional restrictions with regard to proportionality are likely 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").

thus would not make up for the reduction in expected sanctions due to legal advice.

A third significant factor is that 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. 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.⁶⁷ In the extreme case, legal advice may not reduce expected sanctions for some, 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 where one group of actors is perfectly informed about relevant aspects of the legal system and another is imperfectly informed.⁶⁸ For the latter group, it would be necessary to impose higher sanctions in a regime with legal advice if expected sanctions are to be at the same level they would be in a regime without legal advice. But

⁶⁷ 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 *ex ante*. This factor also would be important if society did not wish to impose different sanctions on individuals with different perceptions of sanctions.

⁶⁸ Similar results would follow if tribunals need not rely on the individual for information for one group -- as when one is caught in the act by reliable authorities -- but must rely on such information for another group. If one felt constrained to apply the same sanctions to such individuals in both groups in cases where they have been determined to have committed the same acts, the problem would be much as in the case in the text.

the former group, who are perfectly informed, are unaffected by 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, one must compromise between the ability to control 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,⁶⁹ although the degree to which legal advice affects the ability of the legal system to induce compliance with the law will tend to be less when there is some ability to adjust sanctions.

⁶⁹ The brief heuristic statement in the text 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 predominates. 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 or undesirable if it results in the expected sanctions for the two groups being closer together or further apart, respectively. 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 concerning 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 there now 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) and some overdeterrence for the perfectly informed (who would not be overdeterred but for the availability of legal advice). 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 these cases, unlike the general case explored previously, there exists a regime in which optimal sanctions could be implemented for both groups simultaneously.

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. Whether the residual effect of legal advice on behavior is beneficial or detrimental will depend on several factors, including the ability to adjust actual sanctions, the relationship between expected and actual sanctions, and the variation among individuals' beliefs concerning expected sanctions. Having now considered these aspects of the legal system that at first seem far removed from an assessment of the desirability of legal advice, it remains our conclusion that no general statement can be made about the desirability of legal advice.

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 advice promotes compliance with the law. We now discuss a variety of issues that, taken together, provide a more complete understanding of our subject. Sections A through D consider the range 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 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**

While our language and examples referred to legal advice concerning the selection of evidence, the analysis applies more broadly to choices lawyers make on clients' behalf that affect the information the tribunal obtains. Just as a lawyer may select some evidence because it is favorable and withhold other evidence because it is unfavorable, so, for example, a lawyer may ask some questions on cross-examination and not others. In principle, a client could ask the same questions, but without legal advice the client mistakenly might overlook many that would be helpful and pursue some that would be counterproductive. Similarly, in advocating a client's case, as in opening and closing argument, a lawyer will choose 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. It is also the case that the fact-gathering process often involves choices (e.g., deciding which leads to follow, determining what to pursue in discovery). There surely are relevant differences among these elements of legal advice,⁷⁰ and there certainly are aspects of

⁷⁰ Consider discovery. 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

legal advice about which our analysis has little to say.⁷¹ But it should be clear that our analysis is relevant to a substantial portion of legal advice⁷² offered in litigation.⁷³

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 seek to minimize both expected sanctions and litigation costs.)

In many important respects, however, our framework is clearly incomplete. Discovery, unlike the selection of evidence from that uniquely available to 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 (for caveats, see *supra* Part II); because each side will present what helps 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 would 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 (in a manner that maximally evades) discovery requests would have the opposite effect. How these two aspects of legal advice offset each other is difficult to say, a priori. See *supra* note 14. Factual investigation is similar in that confidentiality and work product protections increase incentives to uncover information in those instances where 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).

⁷¹ Most obviously, 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, but 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).

⁷² Note also that "legal advice" need not come from 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 (e.g., court clerks) itself.

⁷³ "Litigation" should be construed broadly. First, the discussion proceeds as though being apprehended for an alleged act is followed necessarily by litigation before a tribunal, but the analysis requires no such assumption. Much of the relevant revelation may arise informally, as through 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 of Legal Costs*, 11 J. Leg. Stud. 55 (1982). As a result, our statements concerning the expectation of what evidence would be presented to the tribunal can be translated into settlements (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 expect to do better in settlement --

Our analysis is also 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 -- evidentiary rules, burdens of proof, predispositions of jurors and judges,⁷⁴ and the evidence likely to be possessed and presented by one's adversary -- that determine the functional relationship between the case presented by parties and the ultimate outcome. Thus, for example, where we spoke about adjusting the system of sanctions (to offset the effect of legal advice), one should not think only of changing damages or sentencing rules; one also should consider changing burdens of proof, altering what questions 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 prosecution⁷⁵). To

if one was not to have legal assistance to select evidence or assist in other decisions.

Second, 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.

⁷⁴ 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 choices are otherwise similar, would reinforce the effect on expected sanctions. If, on the other hand, factfinders who are sophisticated -- taking into account that the quality of each party's lawyer has affected the presentation through strategic selection decisions -- may adjust their inferences to offset the effect of legal advice. Of course, this simply would be one of the 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.

understand the effects and the desirability of advice given to plaintiffs, let us first take as given whether defendants have legal advice. Then, as should be evident, the analysis of plaintiffs will be analogous to our analysis of defendants.⁷⁶ The conclusions can be sketched as follows. Advice allows plaintiffs to present all favorable information and to avoid presenting any unfavorable information and therefore will have an ambiguous effect on the quantity of information reaching the tribunal. Advice will tend to 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 the 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 (e.g., entering into productive contracts where individuals otherwise might be discouraged by the prospect of the other party's breach for which they may not recover) or more undesirable behavior (e.g., acting in a contributorily negligent manner) cannot be determined a priori. As before, it will depend on aspects of the sanctioning system, on the character of particular acts, and on the nature of individuals' lack of knowledge about sanctions.

⁷⁵ Criminal prosecution is sufficiently different (due to the separation between victims of criminal activity and the prosecuting authority) to warrant consideration that goes beyond the scope of this section. See also *infra* page 74 (discussing unique aspects of the prosecuting attorney's role in current legal system).

⁷⁶ Where we spoke of a "defendant," substitute "plaintiff"; where we said "reduction in expected sanctions," substitute "increase in expected recovery"; and so forth.

A separate point is that enjoyment of legal advice by one party tends to affect the prospects for the opposing party. The availability of legal advice to plaintiffs tends to raise the expected sanctions for defendants; 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 case in which legal advice is available to both plaintiffs and defendants to that in which advice is available to neither. Defendants' expected sanctions, for example, are reduced by the legal advice they expect to obtain but are raised by the advice they expect plaintiffs to obtain. The net effect of legal advice on defendants' expected sanctions will depend upon the relative benefits of such advice for each party, as perceived by defendants.⁷⁷ By chance, the effects of advice for the two parties could be precisely offsetting,⁷⁸ but, more generally, the benefits may differ. If, for example, most of the relevant evidence not readily available to the tribunal is accessible only to defendants, advice will tend to benefit them more than plaintiffs. Or, if defendants are relatively well informed about the law but plaintiffs are not, advice will tend to be less important for defendants. Thus,

⁷⁷ The case of plaintiffs' expected recoveries is analogous.

⁷⁸ This can be seen as an instance of the general result 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 on defendants is higher, not because actual stated 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).

making legal advice available to both parties rather than to neither may have substantial net effects on expected sanctions. But whether the net effect is to raise or lower expected sanctions, how this will affect behavior, and whether these effects will be socially desirable or detrimental (taking into account the complication that sanctions may be adjusted) cannot be determined a priori.⁷⁹

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

1. The Difference between the Effects of Ex Ante and Ex Post Legal Advice on Behavior. -- There is reason to believe that legal advice provided at the time 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 appropriately set.⁸⁰

⁷⁹ This is not to say, of course, that in particular contexts there may not be a fairly clear conclusion. For any activity where a potential defendant uniquely possessed most of the evidence and underdeterrence was the problem (and one that could not be alleviated by adjusting the level of sanctions), allowing legal advice to both parties would be undesirable. If, instead, plaintiffs possessed the evidence and underdeterrence of defendants was the problem, legal advice for both parties would be desirable.

In either instance, and more generally, it might be best to permit legal advice to only one party so that the desirable effect of permitting or disallowing legal advice on one side is not even partially offset by providing the same treatment for the adversary. Although the effects and benefits or costs of legal advice usually are discussed in an adversary context where 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 U.S. legal system or others. See, e.g., *infra* page 74 (contrasting roles of criminal prosecutors and defense attorneys).

⁸⁰ 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 system's sanctions do not properly reflect harm caused.

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 when revealed to the tribunal will result in no sanctions, it will discharge that waste into the river. This will be desirable because the cost of transporting the waste to a dump will be avoided. On the other hand, if advised that its waste is harmful and when revealed to the tribunal would result in a sanction of 1000 (suggesting that the firm could be silent and bear a sanction of 100), the firm would transport the waste to a dump rather than discharge it into the river, again a 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 doubtful social value of advice offered during litigation. As emphasized in subsection IV.A.3, if individuals are uncertain what the sanction for their acts would be when they decide how to act, there is no reason to think that advice offered after they act will be helpful in channeling their behavior. And if individuals know what the sanction for acts will be, but the tribunal's information about their acts will not be improved by legal advice (and we saw no general reason to think it would be), then again there is no basis for believing that advice will be socially beneficial.

2. The Choice between Ex Ante Advice and Ex Post Advice.⁸¹ --

The availability of ex ante legal advice will affect the need for and effect of ex post advice. In particular, if complete ex ante

⁸¹ Ex post advice also may affect ex ante advice. To the extent that those receiving advice during litigation will contemplate similar acts in the future, they will have less need for ex ante advice in the future.

advice were obtained by all individuals, the availability of ex post advice would be irrelevant, as no one would demand it. And there is reason to believe that ex ante advice often will be obtained, for it allows individuals correctly to take account of possible sanctions in deciding how to act.

Individuals, however, will limit their purchases of ex ante advice for several reasons. First, such 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 expected cost of ex post legal advice will be low enough to induce individuals to purchase only this form of legal advice.

Second, ex ante advice that includes all that 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 a number of 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 arises. In addition, given the breadth of relevant legal expertise that might be relevant, as explored in Section A, it generally will be prohibitively costly to learn ex ante all that might later prove helpful.

There is, however, no need ex ante to know how to conduct litigation so long as ex post advice will be available. All one needs to know when contemplating acts is the bottom line: what expected sanction is associated with each act. One then can make informed choices about acts and, in the event of litigation, receive further advice about how to proceed. As a result, for many acts, one might expect that imperfectly informed individuals would, ex ante, purchase 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.⁸²

In contrast to this case, 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.⁸³ To the extent that actors do obtain ex ante advice concerning not only the level of expected sanctions but also how to select evidence (and make other tactical judgments in litigation), such

⁸² Note that, 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 and ex post advice may permit 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, and if all groups also obtain ex ante advice, they will all be told to expect the same sanctions for acts. Ex post advice alone does not accomplish this identity of expected sanctions, as explored in note 69. Ex ante advice alone would not provide the same expected sanctions because, if individuals will not have legal advice in litigation, their expected sanctions will depend on their legal knowledge which, by assumption, varies; the ex ante advice they receive would reflect this fact.

⁸³ See *infra* subsection E.2 (substitution of client efforts for lawyer efforts).

ex ante advice will in part have the effect of ex post advice -- reducing expected sanctions -- and to that extent be amenable to the analysis presented here.

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

Individuals generally place a positive value on having legal advice when they come before a tribunal. As explained in subsection III.A.3, the value is the estimated reduction in sanctions expected to result from advice. This reduction is hardly a direct social benefit; indeed, it now should be clear that its effect may be desirable, detrimental, or irrelevant with regard to the legal system's ability to control behavior.⁸⁴ The implication is that it may well be the case that the private demand for legal advice will 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 should be noted, moreover, that it is 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 serve their clients during

⁸⁴ Moreover, the factors that determine the desirability or undesirability of advice in terms of its effect on behavior -- which relate to the scheme of sanctions -- have no apparent connection to its value to private parties.

litigation.⁸⁵ Perhaps because it is not in the profession's interest to point to the possibility that advice offered during litigation may 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 carry over to other types of advice with regard to which evidentiary privileges exist or have been advocated. As already discussed,⁸⁶ this argument does not apply to legal advice offered when individuals contemplate acts. Nor does it cast doubt upon the social value of advice offered by a range of other professionals. For example, to the extent the doctor-patient privilege enables more information to flow to the professional (even if not to the legal system), the resulting benefit to the patient -- better health -- is also a benefit to society. Thus, our arguments casting doubt on the social value of legal advice in litigation sharply distinguish these other contexts involving professional advice that often have been seen as presenting related issues.⁸⁷

⁸⁵ See Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. Colo. L. Rev. 51, 55 (1982); cf. Wolfram, *Client Perjury*, 50 So. Calif. L. Rev. 809, 838-39 (1977) (suggesting that attorney's support the privilege because it limits criticism of the profession).

⁸⁶ See *supra* subsection C.1.

⁸⁷ As noted in subsection F.3, the common view that the lawyer-client relationship in litigation presents the strongest case for protection is backwards in terms of the social value served by facilitating the flow of information, although consistent with professional self-interest. Note, however, that it is likely that elimination of confidentiality (in a manner that induced professionals to reveal the information) 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

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. These costs constitute a negative factor 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, therefore, 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 what information to present to a tribunal, they would attempt to do for themselves what lawyers would have done on their behalf, but at higher cost.⁸⁸ If individual efforts would substitute completely for lawyer efforts, there would be little difference between the case where legal advice is available and that where it is not -- except that

maintained). In other situations, however, there is a direct private benefit to the flow of information (even if later revealed, to one's possible detriment, in a legal proceeding).

⁸⁸ 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 substitutes may be eliminated.

in the latter case more resources would be expended, which would be socially wasteful. More generally, one would expect substitution to be incomplete, due to considerations of cost and feasibility. Final conclusions regarding the effects of advice on behavior,⁸⁹ the net costs of legal advice, and other factors would have to take into account the degree of substitution that actually would occur.⁹⁰

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 that follows a standardized format; they give aid even in such mundane ways as directing parties to the proper courtrooms.⁹¹ Thus, lawyers enable the legal system to function more efficiently. Note that this socially beneficial aspect of legal advice is largely distinct from the aspect of advice we have addressed, which concerns strategic choice concerning the information to provide to tribunals.⁹² Because many of these facilitative functions

⁸⁹ As discussed *supra* in note 43, 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, it would be better to achieve them with direct increases in sanctions -- e.g., taxes on appearing in court -- rather than through means that consume additional resources.)

⁹⁰ The answer to the empirical question concerning the extent of substitution would depend substantially on the methods the legal system employed in making advice unavailable. See *infra* Section G.

⁹¹ Legal advice also may make settlement more likely, because legal advice might produce more convergent expectations concerning outcomes before a tribunal and because settlement might be a more attractive alternative in light of the probably greater costs of litigation.

⁹² A sharp theoretical distinction between facilitative and strategic aspects of legal advice, however, cannot always be maintained. Both involve advice on choices (what evidence to present, which courtroom to enter) and thus are amenable to our framework. All aspects of legal advice, in principle, are subject to the sort of substitution described in subsection 2, but only some

involve different activities, one could imagine retaining them while, for example, not extending the protection of confidentiality that is important in allowing lawyers to assist clients in the selective presentation of evidence.⁹³

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. Legal advice also affects the actual imposition of sanctions, which raises additional social concerns. On the 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 is designed to control 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 compliance with other court orders.

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

would directly reduce costs of operating the legal system. Even in such instances, however, the system's willingness to incur added costs rather than penalize parties unable to perform appropriately is a choice, not a necessity. (The many ways in which legal institutions -- e.g., a court bureaucracy -- assist parties are thus instances of legal advice.)

⁹³ See *infra* Section G (discussing this and other means of retaining facilitative functions while eliminating others).

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.⁹⁴ Legal advice will be relevant only if it affects the ability of the legal system to make trade-offs, such as between the cost of incarceration and the benefits of incapacitation⁹⁵ or of deterrence,⁹⁶ but the effect of advice

⁹⁴ Note that, 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, as well as 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). But once one takes into account that criminal sanctions (including, for example, the burden of proof -- see *infra* Section V.A) are presumably 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 or other factors to justify limiting subsidization to the indigent, as the analysis is applicable to all defendants -- those who can "afford" lawyers may well, from this perspective, expend too little even if they would not forgo legal assistance entirely.) See also *infra* page 62 (discussing the fairness of the availability of legal advice with regard to its relative effects on the rich and poor).

⁹⁵ Better information concerning, for example, who was truly guilty would be helpful in determining when additional expenditures for incapacitation would be beneficial, and worse information would be detrimental to this determination. But, as we have explained in subsection III.A.4, legal advice has an ambiguous effect on the information reaching the tribunal.

⁹⁶ 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 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 equivalent deterrence in the two systems (that with and that without legal advice). 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, but 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 adjustment necessary to restore deterrence, may result in greater actual imposition of sanctions

in this regard, if any, is ambiguous.

5. Concerns for Fairness. -- In the context we examine, fairness might be understood as requiring 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. The tribunal may thus be closer to or farther from the truth, and mete out fairer treatment in some instances and less fair treatment in others.

Another concept of fairness is that the sanctions one receives 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 legal 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.

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 lawyers will depend on the change in actual sanctions resulting from the availability of lawyers relative to the perceived change. That is, if lawyers lowered actual sanctions substantially but perceived sanctions only a little, lawyers are more likely to be desirable, and the opposite for the contrary assumption.

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, they might face different treatment as a consequence of their different actions.⁹⁷ (For equal treatment to result, legal advice would have to be provided both before they act and afterwards, when they come before a tribunal.) Moreover, the principle of equal treatment in the present context is of dubious 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

⁹⁷ Consider once again our extended 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 in tank A is harmful (it results in a sanction of 1000 if revealed). Those fully informed at the outset would discharge the substance from tank B. The uninformed who expect to receive legal advice discharge tank A. 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 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 using 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 80 or 85.

proscriptions of the legal system. It is not clear why society should prefer equality that is achieved by providing the means that encourage poorly informed individuals to commit the bad acts that well informed individuals are inclined to commit in any event.⁹⁸

⁹⁸ 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) (describing this idea as "crass and pernicious"; "[w]e 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); *id.* at 1544-48 (medical and psychological counselling privileges: analysis addressed almost entirely to sources of privacy interest and defending privileges on this ground, never noting that individuals could be required to testify about same matters without any no privacy protection). But the underlying norm is a bit mysterious. After all, in civil cases clients must submit to discovery and being called to testify by one's opponent and criminal defendants, once on the stand, must answer most pertinent questions. If the client has answered truthfully, there would be no embarrassment in having one's lawyer confirm one's statement, so the unwanted invasion 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 casts doubt on the argument that the privilege is needed to preserve 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); Alschuler, *The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel*, 54 U. Colo. L. Rev. 67, 72-73 (1982); Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 Vill. L. Rev. 279 (1963) (Part I); *id.* at 447 (Part II) (in the context of arguing for a severely limited 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 85, 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: Privilege in Federal Courts Today*, 31 Tul. L. Rev. 101 (1956); Radin, *The Privilege of Confidential Communication between Lawyer and Client*, 16 Calif. L. Rev. 487, 492 (1929). Whatever the merits of this argument in other settings (privileges with regard to marriage, psychological counseling), the attorney-client relationship in the litigation contexts exists for the purpose of the litigation itself, not to serve other values.

Finally, one might be concerned with the fairness of making legal advice available in terms of its relative effects on the rich and the poor. Our analysis indicates the difficulty of drawing any general conclusions, because it identifies conflicting effects. Recall that legal advice is valued more the greater one's uncertainty about the law and the operation of the legal system. It thus might appear that legal advice would be more valuable to the poor, being less sophisticated than the rich. Yet the rich may be more likely to confront complex aspects of the law, for which legal advice would be especially valuable.⁹⁹ 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 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.

⁹⁹ 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.

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 powerfully expressed conclusion -- one rarely voiced for a substantial period¹⁰⁰ -- 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 things to hide.¹⁰¹ Because the privilege helps only the guilty, he continued, all it does is reduce deterrence of violations of the law and therefore is socially undesirable.¹⁰²

¹⁰⁰ See J. Wigmore, *supra* note 16, at 549 ("Rarely indeed has any question been made of the soundness of this privilege.").

¹⁰¹ J. Bentham, *supra* note 2, at 473, 479:

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 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?

See *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."). Note that Bentham does not rely on the argument that abolishing the privilege will 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.

¹⁰² *Id.* at 475:

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?

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. As we observed in subsection III.A.2, the innocent may possess unfavorable information. Innocent people often will have been accused precisely because they have some relationship to the offense, making it more plausible that some of their information would appear incriminating. Moreover, as there often are gradations of offenses, it often may be that those "innocent" of an offense will be guilty of a lesser one, which also raises the possibility that some of their 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 hardly may be necessary to illuminate the benefits of concealing one's whereabouts or the location of a murder weapon. 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 innocent no doubt vary by context.

The second part of Bentham's argument -- that, if the guilty alone are helped by the privilege, violations of law will be encouraged -- is correct in its assessment concerning effects on sanctions and behavior, but the conclusion that the privilege therefore must be undesirable need not follow. 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 came to the defense of the privilege.¹⁰³ Because much of the subsequent commentary has borrowed directly from Wigmore's arguments or has paralleled 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"¹⁰⁴ 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,¹⁰⁵ perhaps because most of his discussion of the policy behind the privilege was cast as a series of responses to Bentham, whom he quotes extensively.

¹⁰³ Wigmore does qualify his conclusion, in stating that the privilege "ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." J. Wigmore, *supra* note 16, at 554 (footnote omitted). But Wigmore is not clear why it should be so confined if indeed its justifications are convincing -- that is, he does not attempt to demonstrate that the strength of his arguments in favor relative to that of those against the privilege diminishes in instances of broader application.

¹⁰⁴ *Id.* at 545; *see id.* § 2290; *Developments*, *supra* note 98, at 1501-02; Model Code of Evidence Rule 210, Comment (1942).

¹⁰⁵ He asserted, contrary to what our analysis demonstrates, that the rationale of the privilege applies equally to representation in and outside the litigation context. *See* J. Wigmore, *supra* note 16, at 566.

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."¹⁰⁶ This argument, as we have just suggested, constitutes an important, although incomplete criticism of Bentham's assumption that there is always simple innocence, accompanied by only favorable evidence. The argument does not, however, offer an affirmative justification for the privilege. One might form such an argument, within Bentham's paradigm, by reversing his empirical conjecture, arguing that it is the innocent who benefit most from legal representation. Wigmore does not advance such a position, and, as we have suggested, such an argument would remain incomplete to the extent it does not take into account how the level of sanctions is determined.

Wigmore also questioned the applicability of Bentham's attack on the privilege in 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."¹⁰⁷ He illustrated his point with a case involving legal uncertainty concerning a land title. This argument, however, does nothing more than suggest that Bentham's

¹⁰⁶ *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 to fully effective representation; if not, his point does not undermine Bentham's argument.

¹⁰⁷ *Id.* at 552 (emphasis omitted).

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.¹⁰⁸ In order for this point to be cast as an argument favoring the privilege, Wigmore would have had to indicate how the privilege beneficially would affect individuals' behavior with regard to legal norms, which he did not attempt to do.

Wigmore also suggested that lawyers might not help the guilty if they think their client's cause is unjust.¹⁰⁹ Again, this argument fails to provide any affirmative justification for the privilege. It also is inconsistent with his view of the purpose of the privilege¹¹⁰ and is contrary to the generally accepted understanding of the lawyer's role. Finally, Wigmore argued that "[t]he consideration of 'treachery' . . . is after all not to be dismissed with a sneer."¹¹¹ Why the attorney's sense of honor

¹⁰⁸ Presumably, Wigmore does not believe that compliance with laws concerning land titles and with the rest of civil rules is unimportant.

¹⁰⁹ *Id.* at 553.

¹¹⁰ The argument suggests that whatever benefits Wigmore assumes with regard to the free flow of information from clients to lawyers would not arise; for if it were the case that lawyers would be less effective when they thought their clients' cases were weaker, clients would be chilled from divulging information 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 chilled.

¹¹¹ *Id.* at 553-54. He elaborates the sense of treachery by 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. at 553. Wigmore's advancement of this argument is in some tension with his seeming approval of the abandonment as a reason for the privilege of the

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.¹¹²

3. Modern Commentary on Confidentiality and the Attorney-Client Privilege. -- Modern commentators, as did Wigmore, emphasize empirical questions concerning how much the privilege promotes consultation while simply assuming that its effects (which are not identified) are socially desirable.¹¹³ 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 receives¹¹⁴ -- to which the common reply is that, but for the protection of confidentiality, the information would not have reached the attorney and thus would not be available to the tribunal in any event.¹¹⁵ Commentators conceive the instrumental desirability of confidentiality primarily in terms of the extent to which clients would be

attorney's "point of honor" in keeping a clients' confidences. 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.").

¹¹² The sense of treachery typically is stated in more recent times in terms of the client's privacy interest, discussed *supra* note 98.

¹¹³ See, e.g., Hazard, *supra* note 10, at 1062-63: "There is no responsible opinion suggesting that the privilege be completely abolished." After noting that support for the privilege is strongest for criminal defendants, he states: "Beyond this there is controversy as to the proper scope of the privilege, although superficially the authorities are in substantial agreement." See also *Developments*, *supra* note 98, at 1473 (simply asserting that "[s]ociety would surely suffer if the lack of a privilege discouraged clients from conferring with their lawyers . . .").

¹¹⁴ See, e.g., M. Frankel, *Partisan Justice* 64-66 (1980); Hazard, *supra* note 10, at 1085 (arguing that defining the scope of the attorney-client privilege creates a dilemma by expressing "a value choice between the protection of privacy and discovery of truth").

¹¹⁵ See, e.g., Alschuler, *supra* note 98, at 350-51; Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597, 610 (1980).

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 state the assumptions used in the course of argument,¹¹⁶ 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 they believe to be served by the privilege and rules of confidentiality is reflected by various flaws in their analyses. For example, the distinction between *ex ante* and *ex post* legal advice often is ignored. As Section C explains, the effects of legal advice on those contemplating acts and on those before a tribunal for acts already committed are entirely different in kind and thus require separate analysis. Although no distinction is drawn by most commentators analyzing these issues, when one reaches detailed arguments and illustrations, the particular points offered inevitably apply to only one of the two types of advice. For example, commentators often argue that one should be able to know of the law in order

¹¹⁶ For example, one commonly finds disagreement about precisely how the balance between protecting communication and increasing the availability of information should be struck, without examining just how the legal system's purposes are implicated by either component (particularly the former). See, e.g., Saltzburg, *supra* note 115, at 605 (criticizing Wigmore's balance). Saltzburg reasonably argues that, absent protection, clients would be more reluctant to confide in their attorneys, but, like Wigmore, does not directly consider what the impact of this effect would be. See *id.* at 607-09.

that one can obey it.¹¹⁷ This argument justifies ex ante legal advice but, as we have emphasized, is inapplicable to ex post legal advice.

Similarly, commentary frequently groups all the privileges, discussing their costs and benefits as a whole and freely borrowing arguments from one when evaluating another. It often is argued affirmatively that the principles justifying the different privileges largely are the same.¹¹⁸ Much of the problem is that the benefits are largely taken for granted.¹¹⁹ But, in terms of the social desirability of facilitating protected communication, 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.¹²⁰

Second, modern commentary does not examine carefully the implications that follow given the assumptions it typically (and often implicitly) makes. For example, the argument that

¹¹⁷ See, e.g., *Developments*, *supra* note 98, 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 typical in that it is preceded by comments on legal advice *in litigation* and immediately followed by a further comment on that subject. See *id.*

¹¹⁸ See, e.g., *Developments*, *supra* note 98, 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.").

¹¹⁹ See *supra* note 113. As with the attorney-client privilege, much of the debate focuses 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.

¹²⁰ It is also the case that the empirical question that is the focus of many of these discussions -- the degree to which lack of confidentiality would inhibit communication -- differs greatly for ex ante legal advice, ex post legal advice, and other professional relationships. See *supra* note 87.

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 channeled better 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.

Another important instance where assumptions are not stated clearly or followed to their conclusion involves discussion of the empirical question of the effect of confidentiality on communication, which has been the primary focus of modern commentary.¹²¹ When considering how clients would behave without confidentiality, commentators generally do not state whether the alternative regime is that the professional may disclose damaging information or must do so; and, 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 currently exists, there generally is no discussion of the extent of affirmative

¹²¹ For example, one extensive exploration of the traditional justification for evidentiary privileges confines its critique entirely to the empirical dimension. See *Developments*, *supra* note 98, at 1474-80.

We limit our attention here, as elsewhere, to legal advice in litigation. For *ex ante* legal advice, see Shavell, *supra* note 80.

disclosure requirements that may remain for lawyers in litigation.¹²² As Part II 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 their importance is illuminated by our analysis. To avoid any confusion, we explicitly defined two hypothetical regimes -- full protection and effective full disclosure -- and, in each instance, offered plausible conjectures concerning 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 the ability of lawyers to select information for their clients, while not interfering with their ability to facilitate the legal process.¹²³ We are, however hardly

¹²² As discussed previously, see *supra* note 16, Wigmore suggests the possibility that the 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 98, at 1509-14.

¹²³ Proposals for alternative dispute resolution that involve elimination of lawyers might have the effect of implementing to some extent a regime of no legal advice in the sense we have discussed, although many variations only may eliminate lawyers' presence before the decisionmaker but not lawyers' prior contact with clients. Even outright elimination of lawyers in much of

advocating change. Our Article constitutes an attempt to identify factors bearing on the social desirability of the lawyer's role in selecting information, rather than to examine empirically the application of our framework in various contexts. 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 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, as by ethical or procedural rules requiring disclosure of facts adverse to clients.¹²⁴ This approach already is embodied in many current

litigation should not be viewed as beyond imagination, as it is only in the past couple of centuries in the history of the Anglo-American legal system that lawyers have been used extensively.

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 clients were permitted to work with their lawyers in presenting only that portion of information that was in their interest. As Part II and subsection V.F.3 indicate, the current system with regard to confidentiality is at least some distance from both the extreme of complete protection and that of full disclosure, suggesting that the status quo would be hard to defend purely on the ground of protecting the attorney-client relationship.

¹²⁴ Such a rule has been proposed by Judge Frankel, although subject to the caveat that there is no requirement in the presence of a privilege. See Frankel, *supra* note 98, at 1057-58. He advocates this reform as part of a general program to make litigation less adversarial and does not address specifically the issues considered here. He refers to his proposal as one "for wholesale disclosure of evidence in litigation," *id.* at 1058, suggesting (he does not consider the issue) that he imagines the "privilege" qualification would, in practice, cover 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 (noting that no decisions in the latter half of eighteenth century sustained privilege claims).

One also could imagine imposing affirmative disclosure requirements on clients, even beyond those already entailed in rules against perjury and

rules with respect to some client activities subject to extensive regulation (e.g., securities regulation), ex parte proceedings under the Model Rules of Professional Conduct,¹²⁵ directly adverse legal precedent,¹²⁶ and, depending on one's conclusions with respect to the issues raised in Part II, much of civil litigation. Similar approaches, to the extent not already present, could be applied 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.¹²⁷

A second 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.¹²⁸ Such a regime resembles the present day system in the United States for public prosecutors;¹²⁹ they are required to disclose

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).

¹²⁵ Model Rules of Professional Conduct, Rule 3.3(d) (1983) ("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.").

¹²⁶ Model Rules of Professional Conduct, Rule 3.3(a)(3) (1983); Model Code of Professional Responsibility, DR 7-106(B)(1) (1970).

¹²⁷ Thus, it may be that much disclosure -- e.g., 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 avenues might have a substantial effect.

¹²⁸ Compensation and promotion could be based on success in achieving all of these objectives.

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 verdict.¹³⁰ Although the extent to which these dictates are followed is a matter of some dispute,¹³¹ and application in civil cases¹³² would raise somewhat different questions,¹³³ the existence of the prosecutorial system should lead one to take seriously the possibility of a general regime of state-employed lawyers.

A third approach would attempt to remove the influence of lawyers on information presented by attempting to acquire parties' information before they obtain legal advice. For example, government officials or prospective opposing parties could depose individuals immediately after the occurrence of incidents that may give rise to litigation.¹³⁴ A requirement that selection of evidence be made before a lawyer could be

¹²⁹ It is also much like continental systems, which give a more central role to magistrates 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*, 86 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).

¹³⁰ See *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *Model Rules of Professional Conduct*, Rule 3.8 (1983); *Model Code of Professional Responsibility*, DR 7-103 (1970); *ABA Standards Relating to the Administration of Criminal Justice*, The Prosecution Function, Standards 3-1.1(c), 3-3.9(a), 3-3.11; see also 18 U.S.C. §3500 (1982) (Jenck's Act). See generally W. LaFare & J. Israel, *Criminal Procedure* 755-64 (1985).

¹³¹ See, e.g., Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 Stan. L. Rev. 1133 (1982).

¹³² Criminal defense attorneys often are paid by the state and sometimes employed by the state, although they are given a purely adversarial mandate.

¹³³ 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.

consulted¹³⁵ would alleviate many problems of circumvention associated with other options. Of course, the ability to obtain immediate depositions will be limited, and individuals still may be able to obtain legal advice from some source before the formal system takes over.¹³⁶

VI. Conclusion

This Article has examined an important aspect of legal representation in the context of litigation: lawyers' ability to guide clients in the selection of information to present to the tribunal.¹³⁷ Our inquiry differs from most previous discussions of the desirability of the lawyer-client privilege and other rules of confidentiality in that we assumed, for purposes of analysis, that the rules have their intended effect. Our conclusions cast doubt on the social value of lawyers' role in selecting information and thereby undermine one of the fundamental premises of the legal system.

Skepticism concerning the value of legal advice in litigation is suggested by the manner in which it differs from advice

¹³⁴ 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).

¹³⁵ Those who withheld information at their initial statement might be disbelieved when they later make contrary claims or simply might be prohibited from changing their stories.

¹³⁶ Such alternatives also could be subject to regulation.

¹³⁷ Although the discussion focused on legal advice concerning which evidence to present, the argument applies, as explained, to many of the ways lawyers help clients.

provided before people act. The latter type of advice will lead individuals to act more in accord with the law. Advice provided in litigation, after individuals have acted, has no such general tendency. Thus, there is no obvious reason to believe that advice given ex post is socially valuable, however strongly it is desired by clients and thus is in the interest of the legal profession to provide.

If such advice does not furnish a direct guide to behavior, what does it do? Its direct effect is to reduce 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 could set a higher level of sanctions to offset the diluting effect of legal advice. We found that, in many instances, it would not be possible to offset completely legal advice, in which case the effect of legal advice with regard to compliance with legal norms might be undesirable or desirable, depending upon rather subtle and complex considerations. We also considered how advice would affect choices among acts subject to sanctions (as opposed to choices between acts subject to sanctions and those not subject to sanctions). Here we concluded that advice may not affect behavior and, when it does, it could (largely by happenstance) improve choices or worsen them. After considering all these effects of legal advice on prospective defendants, we noted that the availability of advice to one's adversary will have opposing effects. Depending on the context,

such effects may offset each other or those pertaining to the advice received by one party may be dominant.

Along the way, 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, to state explicitly the purposes advice is meant to serve and how advice may serve them. One misconception is that it is socially desirable for clients to give their lawyers as much information as possible and thus that the protection of confidentiality, to the extent it promotes this end, is useful. Our analysis shows that this is not the case when viewed in terms of the legal system's ability to control behavior, nor is it clear why such exchanges should be deemed valuable in themselves. A second misconception is that promoting free exchange of information between lawyer and client will result in the tribunal 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 a party as possible. While this will be true in many contexts, it is not necessarily so with regard to the effect of legal advice: To the extent individuals are ignorant of the law governing their acts when they decide how to act, whether advice results in the tribunal receiving more or less information does not affect the degree to which the legal system can achieve compliance with its norms.

In the end, our analysis undermines any clear affirmative case for much of legal advice offered in litigation and suggests a range of questions that require further pursuit by lawyers and scholars.