

LEGAL ADVICE ABOUT  
ACTS ALREADY COMMITTED

Louis Kaplow and Steven Shavell

Discussion Paper No. 56

6/89

Program in Law and Economics  
Harvard Law School  
Cambridge, MA 02138

The Program in Law and Economics is supported by  
a grant from the John M. Olin Foundation.

LEGAL ADVICE ABOUT  
ACTS ALREADY COMMITTED

Louis Kaplow and Steven Shavell

## LEGAL ADVICE ABOUT ACTS ALREADY COMMITTED

Louis Kaplow and Steven Shavell

### *Abstract*

Much legal advice is provided after individuals have committed acts -- when they come before a tribunal -- rather than at the time they decide how to act. This paper considers the effects and social desirability of such legal advice. It is emphasized that legal advice tends to reduce expected sanctions, which may encourage acts subject to sanctions. There is, however, no a priori basis for believing that this is socially undesirable, because, among other reasons, it may be possible to raise the level of sanctions to offset their dilution due to legal advice. In addition, legal advice has no general tendency to improve the effectiveness of the legal system through its influence on the information presented to tribunals.

Note: This paper is a formal treatment of the subject discussed in Discussion Paper No. 47.

## LEGAL ADVICE ABOUT ACTS ALREADY COMMITTED

Louis Kaplow and Steven Shavell\*

This paper will consider a model of the provision of information about legal rules to parties when they have *already* committed acts to which the rules apply.<sup>1</sup> The provision of advice about legal rules in these circumstances is, of course, one of the main tasks of lawyers in the setting of litigation. (Such advice is to be distinguished from advice that is given *before* parties act, on which we shall comment in our conclusion.)

We begin in section 1 by observing that advice has no clear influence on the information received by a tribunal: advice may lead to the presentation either of more or of less information. We also note that advice can only reduce the sanction imposed on a person; it thus tends to reduce expected sanctions.

We then consider how the *prospect* of being able to obtain legal advice if a person comes before a tribunal will affect his choice among possible acts. Because the future availability of legal advice reduces expected sanctions, advice tends to encourage the commission of acts subject to sanctions.

Indeed, this consequence of advice led Bentham (1827) to argue that legal advice is socially undesirable. We find, however, that advice may be socially irrelevant or desirable, as well as undesirable. An important reason for our conclusion is that the level of sanctions can be raised to offset the diluting effect of legal advice. Our analysis is illustrated with an example in section 2.

In the course of our analysis, we make two additional observations bearing on the social value of legal advice. First, even if advice does result in a

---

\*Both of Harvard Law School and the National Bureau of Economic Research. Shavell acknowledges support from the National Science Foundation (grant SES-8420226). We thank Lucian Bebchuk and A. Mitchell Polinsky for comments.

<sup>1</sup> While we will speak of the rules as "legal" and of providers of information as lawyers, the analysis here will apply with respect to provision of information from any source to those who have acted about any rules determining payoffs as a function of their acts.

tribunal receiving more (or less) information, this need not be socially beneficial (or detrimental) because it does not clearly enhance the tribunal's ability to induce parties to behave better. Second, legal advice provided after parties act should not be thought, a priori, to channel behavior in accordance with legal rules; only advice provided before parties decide how to act should have this general tendency.<sup>2</sup>

Our conclusion in section 3 comments on differences between the legal advice we study and legal advice offered before parties act, why it often is rational for individuals to obtain legal advice after they act rather than beforehand, and several other issues.

## 1. The Model

Individuals, who may differ from one another, choose among acts. The act chosen by an individual will determine an evidence set. The individual will then come before a tribunal and select from the evidence set an evidence vector to present to the tribunal. This evidence vector, together with a sanctioning function, will determine the sanction the individual bears. The sanctioning function, which is to be interpreted as encapsulating legal rules,<sup>3</sup> is assumed to be known perfectly by lawyers, but not by individuals: individuals have a probability distribution over possible sanctioning functions.<sup>4</sup> We will consider two regimes, one in which the individual expects to receive legal advice when before a tribunal (such advice is assumed to be costless) and one in which the individual does not expect to receive advice.

---

<sup>2</sup> It will be clear that the social welfare problem examined in this paper differs from the general incentive problem for which the "revelation principle" applies. See section 1C2, note 15, and remark (d) in section 3.

<sup>3</sup> The sanctioning function embodies not only rules of liability, but also rules of legal procedure (concerning, for example, the admissibility of evidence and burdens of proof).

<sup>4</sup> The framework of evidence sets and the choice of evidence vectors to submit to a tribunal is introduced in Shavell (1989) (which, however, assumes that parties have perfect knowledge of the sanctioning function, rendering legal advice irrelevant).

## A. The Selection of Evidence

We consider first an individual's choice of what evidence to present. It should be noted that the subject of legal advice about acts already committed can be of interest only where parties possess evidence that they can elect whether to reveal to tribunals. If parties do not possess such private knowledge (if tribunals are able to "observe" all that is relevant), then tribunals merely will apply legal rules using observables, and any advice given to parties about the rules will be irrelevant.

Define the following notation.

- $e$  = an evidence vector that an individual might provide to the tribunal;
- $\xi$  = the evidence set available to an individual; the set is comprised of different evidence vectors;
- $s_i(\cdot)$  = a possible sanctioning function,  $i = 1, \dots, m$ ;  $s_i$  is a function from evidence vectors to the real numbers (sanctions);<sup>5</sup>
- $q_i$  = an individual's subjective probability that  $s_i$  is the sanctioning function.<sup>6</sup>

Each component  $e_j$  of an evidence vector  $e = (e_1, \dots, e_n)$  will represent some type of information (for example, an individual's whereabouts). If a component is written as  $\phi$ , the interpretation will be that the individual is silent about the value of the component.

An evidence set typically will contain evidence vectors that differ in the components about which an individual is silent. Suppose, for instance, that a criminal defendant is deciding whether or not to establish his whereabouts and to provide the name of an accomplice. Then (abstracting from other types of evidence) the evidence set would consist of four vectors:  $(\phi, \phi)$ , complete silence;  $(\phi, \text{name})$ , silence only about whereabouts;  $(\text{whereabouts}, \phi)$ , silence only about the accomplice;  $(\text{whereabouts}, \text{name})$ , complete information. Note that if the defendant is unable to establish his whereabouts, the evidence set

---

<sup>5</sup> It will not matter whether or not the true sanctioning function actually is one of the  $s_i$ .

<sup>6</sup> The  $q_i$  and  $s_i$  may vary among individuals.

would consist of only two vectors:  $(\phi, \phi)$  and  $(\phi, \text{name})$ .<sup>7</sup> Alternatively, if the defendant is unable to conceal the accomplice's name, the evidence set would consist of  $(\phi, \text{name})$  and  $(\text{whereabouts}, \text{name})$ . Thus, our framework implicitly allows for the tribunal to observe certain information independently of what the defendant reveals.

For simplicity, we assume that an individual's utility is some function of his act, minus the sanction (see section B), so that he dislikes sanctions and cares only about their expected value.

If an individual has the advice of a lawyer -- who knows the sanctioning function -- the individual will be able to present to the tribunal the (an) evidence vector from the evidence set that minimizes the sanction. (For convenience, we assume throughout that a minimum exists.) Hence, if the sanctioning function turns out to be  $s_i$ , the sanction the individual will bear will be  $\min_{e \in \xi} s_i(e)$ . Thus the expected sanction is

$$(1) \quad \sum_{i=1}^m q_i \min_{e \in \xi} s_i(e).$$

If an individual does not have the advice of a lawyer, the individual must choose an evidence vector based on his imperfect information about the sanctioning function, so the expected sanction is

$$(2) \quad \min_{e \in \xi} \sum_{i=1}^m q_i s_i(e).$$

Hence, the expected sanction will be at least as high if an individual does not have legal advice and will be strictly higher unless there exists  $e \in \xi$  that minimizes  $s_i$  for all  $i$  for which  $q_i > 0$ . That is, if there is a positive probability that the lawyer would strictly prefer to choose a different evidence vector from the vector the individual would choose, legal advice has positive value.

---

<sup>7</sup> The tribunal may not know whether the party before it is able to offer evidence of any particular type. See note 15.

An example will illustrate the foregoing. Suppose that the evidence set is  $\xi = \{(\phi, \phi), (A, \phi), (\phi, B), (A, B)\}$ , and that a person thinks there are two possible sanctioning functions,  $s_1$  and  $s_2$ , where

$$\begin{array}{ll} s_1((\phi, \phi)) = 10 & s_2((\phi, \phi)) = 10 \\ s_1((A, \phi)) = 2 & s_2((A, \phi)) = 8 \\ s_1((\phi, B)) = 8 & s_2((\phi, B)) = 3 \\ s_1((A, B)) = 6 & s_2((A, B)) = 6 \end{array}$$

and  $q_1 = .9$  and  $q_2 = .1$ . If the person receives legal advice indicating that  $s_1$  is the true sanctioning function, he will provide the evidence vector  $(A, \phi)$  -- he will reveal A and keep silent about B -- and bear a sanction of 2; if advised that  $s_2$  is the true function, he will provide  $(\phi, B)$  and bear a sanction of 3. The person's expected sanction if he will receive advice is thus  $.9 \times 2 + .1 \times 3 = 2.1$ . By contrast, if the person does not receive legal advice, he will provide  $(A, \phi)$  and bear an expected sanction of  $.9 \times 2 + .1 \times 8 = 2.6$ . The expected value of advice is .5: advice will make a difference when  $s_2$  is the sanctioning function, which is expected to be true with probability .1; in that event, it will be preferable to reveal B rather than A, which will reduce the sanction by  $8 - 3$ .

From this example, it can also be seen that there is no necessary relationship between the information the tribunal will obtain when individuals receive legal advice and when they do not. In the example, if  $s_1$  is the true sanctioning function, the tribunal will receive the same information (namely, A) whether or not the person has a lawyer; and if  $s_2$  is the true sanctioning function, the tribunal will receive different information (B rather than A) if the person has a lawyer. The example can easily be modified so that the person would supply at least as much information to the tribunal without a lawyer as with a lawyer<sup>8</sup> or so that the person would supply at least as much information with a lawyer as without a lawyer.<sup>9</sup>

---

<sup>8</sup> Suppose  $s_1((A, B)) = 1$ . Then, without a lawyer,  $(A, B)$  would minimize the expected sanction (which would be 1.5). With a lawyer, while  $(A, B)$  would be supplied if  $s_1$  were the sanctioning function, only  $(\phi, B)$  would be supplied if  $s_2$  were the function.

<sup>9</sup> If  $s_1((\phi, \phi)) = 1$ , then, without a lawyer,  $(\phi, \phi)$  would minimize the expected sanction (which would be 1.9). But, with a lawyer, while  $(\phi, \phi)$  would be presented if  $s_1$  were the sanctioning function,  $(\phi, B)$  would be supplied if  $s_2$  were the function.



More generally, given any evidence set  $\xi$  and any two evidence vectors  $e$  and  $\hat{e}$  in  $\xi$ , there exist beliefs about sanctioning functions and a true sanctioning function such that  $e$  will be supplied without a lawyer and  $\hat{e}$  will be supplied with a lawyer. (For example, let an individual assign high probability to a sanctioning function  $s_1$ , where  $s_1(e) = 0$  and  $s_1$  is very large otherwise, and let the true sanctioning function be minimized at  $\hat{e}$ .)

We may summarize as follows: (1) Without legal advice, an individual may mistakenly reveal unfavorable information or fail to reveal favorable information. (2) An individual will place positive value on legal advice unless he expects that legal advice would never alter the evidence he would present to a tribunal. (3) An individual may reveal to a tribunal more information or less information, or more of some types of information and less of other types, when he has legal advice than when he does not. (This follows because, for any two evidence vectors, it is possible that one will be revealed with legal advice and the other without legal advice.)

## B. The Choice of an Act

Knowing how an individual will choose evidence to present to a tribunal and thus his expected sanction given an evidence set, we can calculate the expected utility associated with possible acts and thus can determine behavior. Define

$a$  = an act, in the set of possible acts;

$\xi^a$  = the evidence set that will be available to an individual  
who chooses act  $a$ ;<sup>10</sup>

$u(a)$  = utility from committing act  $a$ .

The expected sanction if  $a$  is chosen is derived as explained in the previous section, with  $\xi^a$  replacing  $\xi$ . Of course, the expected sanction depends on whether legal advice will be available (as described in (1) and (2)),

---

<sup>10</sup> Although we assume that the choice of an act determines the evidence set with certainty, it would be easy to consider the case where an act determines only a probability distribution over evidence sets that will be available to a person when coming before a tribunal. This case corresponds to the situation in which there is only a probability that an individual will be able to establish some fact (such as an alibi); see Shavell (1989) on this case.

something that individuals are presumed to know. The expected utility associated with choosing act  $a$  is  $u(a)$  minus the expected sanction.

Let us now make two observations. First, we know that the expected sanction associated with an act will be at least as low if legal advice will be available than if not, and will be strictly lower if there is a positive probability that advice will influence the evidence vector presented (point 2 in section A). In other words, the prospect of obtaining legal advice will tend to encourage acts subject to sanctions about which there is uncertainty as to sanctions.

Second, although with advice individuals will be informed of the true sanctioning function, they will not be led to act in accordance with the true sanctioning function (that is, to maximize utility minus the true sanction) for the simple reason that advice is provided after individuals choose acts. Hence our remark in the introduction that advice will not serve well to channel behavior among acts subject to sanctions. The only way that legal advice received after individuals select acts can affect their prior choices among acts is by reducing expected sanctions more for some acts than for others. (If, without advice, act  $a_1$  is preferred to act  $a_2$ , then, with advice,  $a_2$  will be preferred to  $a_1$  if and only if the reduction in the expected sanction for  $a_2$  is sufficiently larger than that for  $a_1$ .)

To summarize: (1) The prospect of obtaining legal advice will tend to encourage acts subject to sanctions about which there is uncertainty as to sanctions (and for which there is a positive probability that advice will alter the evidence presented to a tribunal). (2) Individuals with advice will not be led to act in accordance with the true sanctioning function, because they choose acts before they obtain advice. Only the reduction in expected sanctions due to advice will affect the choice among acts.

### **C. The Social Desirability of Legal Advice**

Suppose that social welfare is measured by the sum of the utilities individuals obtain from their acts, less the harm done by their acts. (We assume for simplicity that sanctions are costless to apply and, recall, that

legal advice is costless to provide.) We will now ask whether legal advice promotes social welfare, considering first the case of a given (true) sanctioning function  $s$  and then that of an optimally chosen sanctioning function. We assume that the choice of a sanctioning function  $s$  may influence an individual's probabilities over possible sanctioning functions and these functions themselves. Thus, in general,  $q_i = q_i(s)$  and  $s_i(\cdot) = s_i(\cdot; s)$ .<sup>11</sup>

1. *When the sanctioning function is given.* It is obvious that, given a sanctioning function, and thus given the  $q_i$  and  $s_i$ , the availability of legal advice may, and generally will, affect social welfare. Suppose, for example, that without legal advice individuals are barely deterred from committing a socially undesirable act (an act for which the harm done exceeds the utility enjoyed). In this case legal advice will lower social welfare since, by reducing expected sanctions, advice will create a problem of inadequate deterrence. For analogous reasons, legal advice may raise social welfare if, without advice, individuals are deterred from committing a socially desirable act.

It is also apparent that, given a sanctioning function, the effect of legal advice on the information obtained by a tribunal is not related in a clear way to social welfare. For instance, suppose that, without advice, the tribunal will obtain complete information -- because individuals mistakenly think that silence about anything will be very likely to result in a high sanction -- whereas with advice the tribunal will obtain no information -- because in fact the sanction will be minimized if individuals are silent. Suppose in addition that the availability of advice will be socially desirable, because without advice a socially desirable act will be discouraged. Then the availability of legal advice will be socially beneficial even though it will result in suppression of information to the tribunal. It is also easy to construct examples in which the availability of advice will be socially undesirable even though it will result in greater information reaching the tribunal.<sup>12</sup>

---

<sup>11</sup> Two polar cases are that an individual's beliefs are correct ( $q_i = 1$  where  $s_j$  is the true sanctioning function) and that his beliefs are fixed (the  $q_i$  and  $s_i$  are independent of  $s$ ).

2. *When the sanctioning function is chosen optimally.* Now consider the effect of the availability of legal advice on social welfare when the sanctioning function  $s$  may be varied, thus affecting the  $q_i$  and  $s_i$ . In particular, it is of interest to consider the optimal sanctioning function for regimes with and without advice and to determine whether social welfare is higher in one regime than in the other. We assume that the social authority knows the probability distribution of individuals' types, where an individual's type is comprised of his set of possible actions  $a$ , the evidence set  $\xi^a$  associated with each action, and his beliefs about the law embodied in  $q_i(s)$  and  $s_i(\cdot; s)$ . The social authority chooses  $s$  (which can be a function only of the evidence vector  $e$  revealed) and whether legal advice is to be available. For any  $s$  and a decision about the presence or absence of legal advice, the social authority can determine the action of each type of individual and thus compute social welfare. (In what follows, however, we will need to say very little about what characterizes the optimal  $s$ . In particular, although the optimal  $s$  will reflect the inferences a tribunal should make and the effect of sanctions on the incentive to reveal information, it will not be necessary to characterize these aspects of the sanctioning function to establish our results.<sup>13</sup>)

When the sanctioning function is chosen optimally, the availability of legal advice may matter less to social welfare than one might think because (as was suggested in the introduction) it may be possible to compensate for the reduction in expected sanctions due to legal advice by increasing the level of sanctions. Indeed, for this reason legal advice may have no effect on social welfare. A sufficient condition for that to be the case obviously is that if  $s$  is the optimal sanctioning function without (with) legal advice, there exists a sanctioning function  $\hat{s}$  such that, for all individuals, the expected sanction under  $\hat{s}$  with (without) advice is the same as under  $s$  without

---

<sup>12</sup> Suppose that without advice individuals reveal no information because they mistakenly think that this will be likely to result in the least sanction, whereas with advice they will reveal information. Suppose also that advice will be socially undesirable because without advice a socially undesirable act will be barely deterred.

<sup>13</sup> See also note 15.

(with) advice. This condition clearly implies that individuals can be induced to behave in the same, optimal way when legal advice is available as when it is not. In the next section, an example will be provided that satisfies this condition.

The condition will not hold if individuals' beliefs are not sufficiently responsive to changes in actual sanctions. In the simple case of fixed beliefs, changing actual sanctions has no influence on beliefs, so that the consequences of legal advice for social welfare will be as described in subsection 1, where sanctions were taken as given. In this case, legal advice may be desirable or undesirable.

Moreover, even if individuals' beliefs are responsive to changes in actual sanctions, the sufficient condition generally will not hold if individuals' beliefs differ. There will not exist a sanctioning function  $\hat{s}$  that will, for *all* individuals, produce the same behavior when legal advice is available as is produced under  $s$  when advice is unavailable. Hence, in general, the presence or absence of legal advice will matter to social welfare.

A particular reason (which we believe to be important in fact) why the availability of legal advice may matter to social welfare is that the need to control the behavior of individuals who know the relevant legal rules places constraints of sorts on the sanctioning function. Suppose, to illustrate, that the fraction in the population of such informed individuals (for whom, note, legal advice has no effect) is large, and let  $s^*$  be the optimal sanctioning function for controlling them. Then the optimal sanctioning function for controlling the entire population -- including the small minority of uninformed individuals -- will tend to be close to  $s^*$ . Hence, the situation with regard to the uninformed individuals will be like that described in subsection 1, with the sanctioning function in effect fixed at  $s^*$ , in which case the availability of legal advice will matter.<sup>14</sup>

---

<sup>14</sup> The point discussed in this paragraph can, on reflection, be seen to involve the type of failure of the sufficient condition noted in the preceding paragraph: Given any  $s$  applying when advice is unavailable, the same  $s$  must be employed to induce the informed group to behave identically when advice is available, but a different sanctioning function must be employed to induce the

Finally, it should be stated that, for essentially the reasons discussed when the sanctioning function was taken as given, there is no clear connection between the information supplied to the tribunal as a consequence of legal advice and social welfare. This is illustrated in the example in section 2, in which the optimum can be achieved when, as a consequence of legal advice, no information is supplied to the tribunal, partial information is supplied, or complete information is supplied. That the revelation of information due to legal advice does not necessarily affect social welfare, and that the optimum does not generally involve revelation of all information which individuals possess, should not be surprising.<sup>15</sup> After all, legal advice alters the information individuals reveal only when individuals' beliefs about *s* were such that they would have made mistakes about what evidence to present. As a result, if legal advice causes more or less evidence to be revealed, this has no obvious effect on the extent to which individuals will choose acts in accordance with the true sanctioning function and thus no obvious effect on social welfare.<sup>16</sup>

In summary, our conclusions with respect to social welfare are: (1) The availability of legal advice may be socially desirable or detrimental when the sanctioning function is taken as given, since the reduction in expected sanctions due to advice may beneficially or disadvantageously affect behavior.

---

uninformed to behave identically (if, indeed, such a sanctioning function exists).

<sup>15</sup> While in our example in section 2 an optimum can be achieved without full revelation of information, it can also be achieved with full revelation. But in general full revelation will not characterize the optimum. An important reason -- independent of individuals' uncertainty concerning the true sanctioning function -- is that the tribunal will not necessarily know what evidence set is available to an individual. Therefore, high sanctions for failure to reveal some type of information would sometimes result in such sanctions being imposed on those unable to reveal the information. This would generally be suboptimal, as explored in Shavell (1989). Moreover, the ability to induce revelation at trial *in the context we examine* has no direct connection to the efficiency of *ex ante* behavior, which determines social welfare. See remark (d) in section 3.

<sup>16</sup> Stated alternatively, social welfare is determined solely by individuals' decisions about how to act, decisions that are made based on their *beliefs* about *s*. To the extent that individuals do not know *s*, they do not know how their sanction will be affected by the information they reveal. Of course, revelation often will be relevant in determining the optimal *s*, as individuals' beliefs typically have some relationship to the true *s*, but the effect of legal advice on information presented has no direct bearing on achievable social welfare.

(2) While it is possible that the availability of legal advice will have no effect on behavior when the sanctioning function is chosen optimally (because the reduction in expected sanctions due to legal advice can be offset perfectly by a change in sanctions), this will not generally be so. (3) Whether tribunals receive more or less information as a result of legal advice has no clear effect on behavior and thus no necessary relationship to social welfare.

## 2. An Example

Acts:	$a_0$	$a_1$	$a_2$	
Utility:	0	$u_1$	$u_2$	$u_1, u_2 \in [0, u']$
Harm:	0	$h_1$	$h_2$	$0 < h_1 < h_2 < u'$
Evidence sets:	$\{a_0\}$	$\{\phi, a_1\}$	$\{\phi, a_2\}$	

That is, an individual may do nothing,  $a_0$ , in which case he obtains no utility, produces no harm, and is in effect observed by the tribunal to have done nothing (the only evidence vector indicates that he engaged in act  $a_0$ ). Or an individual may select  $a_1$  or  $a_2$ , with utilities  $u_1$  and  $u_2$  that, while known to him when he chooses, are drawn for each act and for each individual independently from the same distribution, described by a positive density function over  $[0, u']$ . Which of  $a_1$  and  $a_2$  an individual chooses will not be known to the tribunal unless the individual reveals it.

If an individual chooses  $a_0$ , the tribunal will be assumed to impose no sanction,<sup>17</sup> and individuals will be presumed to know this. If an individual chooses  $a_1$  or  $a_2$  and reveals his choice, the sanction will be  $\sigma_1$  for  $a_1$  and  $\sigma_2$  for  $a_2$ ; and if the individual does not reveal his act, the sanction will be  $\sigma_\phi$ . It will be supposed that individuals know  $\sigma_\phi$  but not the sanctions for  $a_1$  and  $a_2$ : for each, they think that the sanction will be  $\sigma_1$  with probability .5 and  $\sigma_2$  with probability .5.<sup>18</sup>

<sup>17</sup> In the cases we consider, it can be shown (and will be obvious) that imposing no sanction for  $a_0$  is an optimum.

<sup>18</sup> That is, individuals believe one of two sanctioning functions is correct,  $s_1$  or  $s_2$ , where  $s_1(\phi) = \sigma_\phi$ ,  $s_1(a_1) = \sigma_1$ ,  $s_1(a_2) = \sigma_2$ ;  $s_2(\phi) = \sigma_\phi$ ,  $s_2(a_1) = \sigma_2$ ,

Before going further, let us consider the first-best and second-best solutions to this example. Clearly, the first-best solution is for an individual to choose the  $a_i$  ( $i = 1, 2$ ) for which  $u_i - h_i$  is higher, provided this higher quantity is non-negative; otherwise, he should choose  $a_0$ . The second-best solution is for an individual to choose  $a_1$  or  $a_2$ , whichever he prefers, if and only if the higher  $u_i$  exceeds  $\bar{h} = .5(h_1 + h_2)$ .<sup>19</sup>

Now consider the situation assuming that  $\sigma_1 < \sigma_\phi < \sigma_2$ . An individual who will not have legal advice and who commits acts  $a_1$  or  $a_2$  will bear an expected sanction  $\bar{\sigma} = .5(\sigma_1 + \sigma_2)$  if he reveals his act and  $\sigma_\phi$  if he does not. Hence, an individual who commits  $a_1$  or  $a_2$  will reveal his act if and only if  $\sigma_\phi > \bar{\sigma}$ , and his expected sanction will be

$$(3) \quad \min(\sigma_\phi, \bar{\sigma}).$$

Therefore, an individual will commit  $a_1$  or  $a_2$ , whichever has higher utility, if this utility exceeds (3); otherwise, he will commit  $a_0$ . If an individual will have legal advice, he will reveal his act if and only if the sanction for it is lower than  $\sigma_\phi$ . The expected sanction for acts  $a_1$  and  $a_2$  will be

$$(4) \quad .5\sigma_1 + .5\sigma_\phi,$$

which is less than (3). With legal advice, therefore, an individual's choice is made in the same way as without advice, except that the higher utility need only exceed (4) to lead him to commit  $a_1$  or  $a_2$  rather than  $a_0$ . Thus, more individuals will commit  $a_1$  and  $a_2$  if legal advice is available than if not.

---

$s_2(a_2) = \sigma_1$ ; and  $q_1 = q_2 = .5$ . Note here that the  $q_i$  do not depend on the true sanctioning function but the  $s_i$  do.

<sup>19</sup> More precisely, the second-best problem in which we shall be interested is maximization of social welfare, where the social authority gives individuals a rule to follow in choosing how to act, but the rule cannot state directly that act  $a_1$  or  $a_2$  be chosen; rather, the rule can state only that  $a_0$  or the act with the smaller or with the larger utility be chosen. Formally, the social authority can employ a rule  $f(u_1, u_2)$  determining an individual's act, where the range of  $f$  is  $\{a_0, \underline{a}, \bar{a}\}$ , where  $\underline{a}$  is the act  $a_1$  or  $a_2$  for which the utility is smaller and  $\bar{a}$  is the other act (if  $u_1 = u_2$ , let  $\underline{a}$  be either of the acts with probability .5).

The solution is as claimed since, when an individual commits an act other than  $a_0$ , it is equally likely that the act will be  $a_1$  as that it will be  $a_2$ . (Given that  $u_1$  and  $u_2$  are drawn independently from the same distribution, it is equally likely that  $a_1$  and  $a_2$  will be chosen.) Thus, the expected harm will be  $\bar{h}$ .



(This illustrates point 1 in B.) However, the availability of legal advice will not influence an individual's choice *between*  $a_1$  and  $a_2$ : if an individual commits one of these two acts, he will commit whichever act yields the higher utility regardless of the availability of advice. (This illustrates point 2 in B.)

Consider how advice affects the information individuals reveal. Without advice individuals may fail to reveal a favorable fact (the case where they keep silent, because  $\sigma_\phi < \bar{\sigma}$ , and commit the act  $a_1$  with an actual sanction of  $\sigma_1$ ) or may reveal an unfavorable fact (the case where they commit the act  $a_2$  with an actual sanction of  $\sigma_2$  and reveal it because  $\sigma_\phi > \bar{\sigma}$ ). With advice, individuals avoid making both of these errors. (This illustrates points 1 and 2 in A.)

Next, examine how advice affects social welfare. Given the sanctioning function, the availability of legal advice could be socially desirable or undesirable. If, in the absence of advice, (3) is less than or equal to  $\bar{h}$  -- that is, too many individuals commit the acts  $a_1$  and  $a_2$  -- then advice will be undesirable since it will lead even more individuals to commit these acts. If, however, (3) and (4) both exceed  $\bar{h}$ , then advice may be socially desirable since it will result in a desirable increase in the number of individuals committing these acts. (This illustrates point 1 in C.)

If the sanctioning function is optimally chosen, the second-best optimum can be achieved, and, in particular, it can be achieved whether or not legal advice is available; thus the availability of advice will not affect social welfare. Specifically, in the absence of advice, let  $\sigma_\phi = \bar{h}$ , and choose  $\sigma_1 < \sigma_\phi < \sigma_2$  such that  $\sigma_\phi < \bar{\sigma}$ . Then individuals who choose  $a_1$  or  $a_2$  will keep silent and face an expected sanction of  $\sigma_\phi = \bar{h}$ , so the second-best optimum will be achieved. Or choose  $\sigma_1 < \sigma_\phi < \sigma_2$  such that  $\bar{\sigma} = \bar{h} < \sigma_\phi$ . Then individuals who choose  $a_1$  or  $a_2$  will reveal their acts and again face an expected sanction of  $\bar{h}$ . If advice will be available, choose  $\sigma_1 < \sigma_\phi < \sigma_2$  such that  $.5\sigma_1 + .5\sigma_\phi = \bar{h}$ , so that individuals who choose  $a_1$  or  $a_2$  will reveal their acts if and only if the actual sanction is  $\sigma_1$  (which will be the case when they have chosen  $a_1$ , although individuals will not know this at the time they

choose); they will face an expected sanction of  $\bar{h}$ .<sup>20</sup> (This illustrates the first part of point 2 in C.)

Note that the second-best level of social welfare is achievable with quite different information reaching the tribunal: everything revealed to the tribunal (the case in the absence of advice if  $\bar{\sigma} < \sigma_\phi$ ); nothing revealed to the tribunal (the case in the absence of advice if  $\sigma_\phi < \bar{\sigma}$ ); and only the favorable information revealed to the tribunal (the case if advice is available). (This illustrates point 3 in C.)

Next consider the situation assuming that  $\sigma_1 < \sigma_2 < \sigma_\phi$ .<sup>21</sup> Here an individual without legal advice will reveal whichever act he commits, so the expected sanction if he commits  $a_1$  or  $a_2$  will be  $\bar{\sigma}$ . Moreover, since he believes a lawyer would always advise that he reveal his act, legal advice will have no value to him -- and obviously will not affect behavior or social welfare. Also, the second-best optimum can be achieved by choosing  $\sigma_1$  and  $\sigma_2$  such that  $\bar{\sigma} = \bar{h}$ .

In this example, it is thus possible to alter sanctions to offset perfectly the effect of legal advice (in cases where it has any effect). Had we introduced either limitations on the responsiveness of individuals to changes in the true sanctioning function or other types of individuals who responded differently to changes in sanctions, legal advice would affect achievable welfare, as indicated in section C.

---

<sup>20</sup> Observe that sanctions that are optimal in the absence of advice will be too low when advice is available. For example, suppose that, in the absence of advice,  $\sigma_1 = h_1$ ,  $\sigma_2 = h_2$ , and  $\sigma_\phi = h_1 + (2/3)(h_2 - h_1)$ . Thus  $\bar{\sigma} = \bar{h} < \sigma_\phi$ , and the second-best optimum will be achieved. However, since  $.5\sigma_1 + .5\sigma_\phi = h_1 + (1/3)(h_2 - h_1) < \bar{h}$ ,  $\sigma_1$  or  $\sigma_\phi$  must be raised when legal advice is available.

<sup>21</sup> It will not be necessary, and would be tedious, to consider other cases (such as  $\sigma_2 = \sigma_\phi > \sigma_1$ ).

### 3. Concluding Remarks

(a) We have seen that while legal advice obtained after acts have been committed generally has positive private value, it is unclear whether it has positive social value. One result of this possible divergence between private and social values is that in some areas of litigation lawyers may be in high demand even though their services are socially counterproductive.<sup>22</sup> (But how to identify such areas and what policies to employ with respect to them are difficult questions.)

(b) Whereas advice about legal rules does not tend to be socially valuable when provided after acts have been committed, advice does tend to be socially valuable when it is provided ex ante. In that case, if individuals know what legal rules will apply and the rules are properly enforced, their behavior will be affected by these rules rather than by their subjective beliefs about the rules.<sup>23</sup> (However, a complicating factor is that ex ante legal advice will affect individuals' ability to select evidence when before a tribunal, raising the issues associated with ex post advice.)

(c) It is of interest to ask why individuals do not always obtain complete legal advice ex ante. After all, legal advice obtained ex ante is more valuable to individuals than advice obtained after they act, because ex ante advice allows them to choose their acts in accordance with true expected sanctions as well as to select what evidence to present when they come before a tribunal. Ex post advice enables individuals to do only the latter. An important reason why individuals may forgo ex ante advice is that the *expected* cost of ex post advice may be lower because it often is needed only with a probability. This is true because many acts are sanctionable only if they produce harm and because, even if an act is sanctionable, it may not be detected or result in a suit. Moreover, even if the likelihood is substantial that individuals will come before tribunals and it therefore is rational for

---

<sup>22</sup> It is also possible that the social value of legal advice would exceed its private value.

<sup>23</sup> See Shavell (1988).

them to obtain ex ante advice about the level of expected sanctions, it may also be rational for them to defer answering most questions about the actual conduct of litigation: ex ante, there will be a range of situations that a person may later confront, and only one ultimately will be realized. It therefore is not surprising that a substantial portion of all legal advice is provided after acts have been committed.

(d) The value to a tribunal of information about individual behavior in the context studied in this paper should be contrasted with the value of information about behavior in the usual context studied by economists -- in which those affected by rules know the rules ex ante. In that context, information about individual behavior generally is socially valuable. With more information, the tribunal has greater opportunity to affect behavior. If a variable describing acts can be observed and thus used in a rule to affect punishments or rewards, and individuals know this rule (and that the variable will be observed) ex ante, their choice of acts will be affected: they will have an incentive to select acts that result in levels of the variable that lower their punishment or raise their reward.

As emphasized here, the situation is different when individuals are uncertain about rules ex ante and only learn about rules ex post. In this case, information about the variable made available as a result of legal advice does not allow the tribunal to influence ex ante behavior in any obviously beneficial way. This is because individuals will not know what information will become available to the tribunal as a result of legal advice and what sanctions will follow as a function of the information that is made available. Thus, there is no clear value to the tribunal in being able to observe the variable as a result of legal advice.

(e) In an elaborated informal treatment of the subject of this paper (Kaplow and Shavell, 1988), we consider a variety of issues that were omitted here. One issue concerns the availability of legal advice to plaintiffs (as opposed to defendants). This increases plaintiffs' expected recoveries, which amounts to increasing defendants' expected sanctions. Thus, making advice available to both types of parties will have opposing effects that might, but

need not, offset each other. Another issue involves the use of nonmonetary, socially costly sanctions (such as imprisonment). In this case, the sanctions actually imposed -- not just the effect of expected sanctions on ex ante behavior -- are relevant to social welfare.

## References

Bentham, Jeremy. *The Rationale of Judicial Evidence*, Book 5. 1827.

Kaplow, Louis and Shavell, Steven. "Legal Advice about Information to Present in Litigation: Its Effects and Social Desirability." *Harvard Law Rev.* 102 (January 1989): 565-615.

Shavell, Steven. "Legal Advice about Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality." *J. Legal Studies* 17 (January 1988): 123-150.

\_\_\_\_\_. "Optimal Sanctions and the Incentive to Provide Evidence to Legal Tribunals." *Int'l Rev. L. & Econ.* (forthcoming 1989).