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The Economics of the Attorney-Client Privilege:A Comprehensive Review and a New Justification

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ABSTRACT

The attorney-client privilege is one of the fundamental aspects of legal professional practice in the United States. Despite this central importance, there have been many calls over the centuries for the privilege's abolition. A relatively recent trend is for such criticisms to be based on an economic analysis of the privilege's mechanics, including incentives for rent seeking behavior, signaling problems faced by clients and incentives to overinvest in litigation. Responses to these criticisms that also utilize economic reasoning center on the economics of information production, recognizing that the privilege serves a useful function, notwithstanding the critiques. In addition to these established arguments, the privilege may also be justified on the grounds that its abolition would cause underinvestment in legal advice. This underinvestment arises since a self-represented litigant would not be required to reveal their full knowledge in many cases due to First Amendment protections. In the absence of the attorney-client privilege, though, litigants would face a strong disincentive to reveal their full knowledge to their attorney, as this would expose them to the risk that the information could be disclosed. Self-representation, therefore, may be seen to occur more frequently when it would be optimal for the litigant to rely on formal legal representation.

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I. INTRODUCTION

The attorney-client privilege[1] is one of the most identifiable and enduring features of the legal profession in the United States.[2] Beginning in medieval England, legal advisers, in particular circumstances, have been exempt from the usual requirement to disclose all relevant facts as part of legal proceedings, including proceedings outside formal in-court litigation proceedings such as discovery and depositions.[3]

The attorney-client privilege is not unique to the United States, but is also a mainstay of all other common law jurisdictions across the world.[4] While there have been some efforts to codify the attorney-client privilege and its non-U.S. equivalents, especially in specific contexts,[5] the privilege continues to be predominantly a common law doctrine. As a result, given Judge Richard A. Posner's efficiency theory of the common law, under which efficient rules are ultimately expected to arise to reduce the costs associated with litigation since inefficient rules tend to result in disputes leading to litigation,[6] one would expect the attorney-client privilege to promote economic efficiency or wealth maximization. This is especially the case given the number of times that the efficacy of the privilege has been argued before the courts.[7] The privilege, however, has been attacked on efficiency grounds on several occasions, primarily in the last twenty years (prior criticisms of the privilege were on non-economic grounds, for example, Jeremy Bentham's well-known objection that the privilege benefits only the guilty, since the innocent have nothing to hide and, therefore, nothing to fear from attorney disclosure).[8]

This paper explores the central criticisms raised on economic grounds. The fundamental issue raised when the value of the attorney-client privilege is questioned is the limit placed on information reaching the fact-finder in a dispute.[9] This problem is often characterized as a tension between the public interest served through ensuring, as far as possible, that all relevant information is presented before the court to enable just decision-making and the competing

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[1] This paper focuses primarily on the attorney-client privilege. As it is the protection of confidentiality that is the aspect of interest, much of the following description applies to the related work-product doctrine as well. For simplicity, only the attorney-client privilege is referred to in the following discussion, although the principles discussed also apply equally to the work-product doctrine (except where noted).

[2] Geoffrey C. Hazard Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1061 (1978); *see also* Fisher v. United States, 425 U.S. 391, 403 (1976); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[3] Hazard, *supra* note 2, at 1069-70. For more recent judicial affirmation of the continued importance of the attorney-client privilege, *see* Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 868-74 (1998).

[4] *See, e.g.*, Greenough v. Gaskell, (1833) 39 Eng. Rep. 618, 621 (Ct. Ch.); Solosky v. Canada, [1979] 105 D.L.R. (3d) 745 (Can.); Grant v. Downs, (1976) 135 C.L.R. 674, 676-77 (Aust.); Comm'r of Inland Revenue v. West-Walker, [1954] N.Z.L.R. 191, 204-05 (New Zeal.).

[5] *See, e.g.*, I.R.C. § 7525(a)(1) (2010); Evidence Act 1995, 2009, c. 3.10 §§ 118-19 (Aust.); Tax Administration Act 1994, 1994 no. 116 § 20(1) (N.Z.).

[6] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 25-26 (7th ed. 2007).

[7] Ronald J. Allen, Mark, F. Grady, Daniel D. Polsby & Michael S. Yashko, *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359, 363-64 (1990). For an earlier account of such challenges, *see generally* Charles A. Miller, *The Challenges to the Attorney-Client Privilege*, 49 VA. L. REV. 262 (1963).

[8] Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 22-23 (1998) (quoting JEREMY BENTHAM, 5 RATIONALE OF JUDICIAL EVIDENCE IX, pt. IV, ch. V at 304 (Garland 1978) (1827)).

[9] For convenience, the fact-finder in a dispute will be referred to as the court, although it is acknowledged that this label is not strictly applicable in all situations where the attorney-client privilege applies.

public interest that clients are encouraged to disclose all relevant facts to their legal counsel.[10] While the specific public interest that the attorney-client privilege serves is sometimes left un-enunciated,[11] the usual justification put forward is that the administration of justice is best served by legal counsel being completely informed of all pertinent facts. As far back as 1833, the English Court of Chancery phrased this justification in the following fashion:

> [I]t is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one [sic] would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.[13]

The concern that the client makes full disclosure to his legal counsel continues to be frequently cited as the justification for the attorney-client privilege.[14] The Court of Appeals for the Sixth Circuit, in *U.S. v. Upjohn Co.*,[15] stated that the "policy of promoting full disclosure to counsel serves to implement the notion . . . that finding the truth and achieving justice in an adversary system are best served by fully-informed advocates loyal to their client's interests."[16]

This last statement highlights the importance of the attorney-client privilege to common law systems generally, given their character as adversary systems. Common law courts traditionally rely on advocates to inform the court of the relevant facts, with each party expected to present his case in the most favorable light (raising the Sixth Circuit's point of an advocate's loyalty to her client's interests). The evident belief is that advocates need to be fully apprised of all pertinent facts, not only to provide appropriate advice and representation for the client specifically, but to fulfill their role properly as an important cog in the adversary system, that is, the administration of justice.[17] As a manifestation of the maxim that a chain is only as strong as its weakest link, the concern underlying the public interest in support of the attorney-client privilege may be regarded as ensuring that advocates are able to perform their role properly, so that the courts may function properly.

While critics of the attorney-client privilege (and its cousins in other common law jurisdictions) have existed for over two centuries, some of the more recent critics have applied the tools of economic analysis in formulating their objections. Traditionally, such criticisms have focused on the flow of information to the court, which is perhaps more consistent with the

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[10] Fisher v. United States, 425 U.S. 391, 403 (1976); Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960); San Francisco v. Superior Court, 231 P.2d 26, 30 (Cal. 1951) (en banc). This balancing of competing interests is also well recognized in other common law jurisdictions. *See, e.g.*, Baker v. Campbell, (1983) 153 C.L.R. 52, 74-75 (Aust.) (Mason, J., dissenting).

[11] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (2003).

[13] *Greenough*, 39 Eng. Rep. at 622.

[14] People v. Gionis, 892 P.2d 1199, 1204-05 (Cal. 1995) (en banc).

[15] 600 F.2d 1223 (6th Cir. 1979), *rev'd on other grounds*, 449 U.S. 383 (1981).

[16] *Upjohn*, 600 F.2d at 1226.

[17] A distinction may be drawn between pre-litigation advice and advice regarding the ex post defense of conduct. This distinction is especially important for the incentive effects discussed in Section II. The concern regarding attorneys being able to advise based on all pertinent information, though, is the same in both cases. The attorney-client privilege provides the same incentives for clients to disclose fully under both conditions, which goes to the focus of those arguments raised in defense of the privilege.

public interest of deciding cases correctly identified in judicial decisions rather than the more philosophical concerns regarding protecting the guilty that have been the traditional domain of commentators. In this sense, these criticisms may be seen as an application of the economics of information.[18] Some more recent criticism also utilizes economic reasoning to argue that the attorney-client privilege serves the interests of the legal profession, rather than clients, at the expense of the public at large.[19]

Some recent defenses of the attorney-client privilege have also utilized economic analysis, although these defenses have largely been in direct response to prior criticisms in the same vein. This paper seeks to build upon these defenses, as well as answer some of the more recent criticisms. A new justification is also put forward, based on the function of the advocate in an adversary system. In essence, this position recognizes that the legal system regards the advocate and client as the same entity, such that the advocate only speaks for the client and serves no other purpose, subject to very specific exceptions. Abolishing the attorney-client privilege would create various anomalies in the legal system, in particular when treatment of information is considered parallel with the Fifth Amendment right against self-incrimination. Further, the complexity of the legal system undermines Fischel's signaling argument that retaining counsel can indicate the strength of a case. This complexity leads to lay people hiring legal representation more commonly than would be the case under Fischel's honest/dishonest dichotomy, since it often takes specialist knowledge to assess accurately the strength of a case under the law. A potential outcome is that self-representation could become more common, with a resultant increase in the costs associated with the conduct of trials and other litigation and without most (if any) of the benefits advocates of abolition put forward. Some adjustments may be necessary to the current manifestation of the attorney-client privilege, all intended to ensure that the attorney-client privilege serves the purpose for which it is intended, which will also resolve the issues that critics rightly identify as indefensible aspects of how the attorney-client privilege is presently implemented. Complete abolition, however, will create more problems than it solves, if, indeed, it would solve any.

II. LITERATURE AGAINST RETENTION

This section presents the existing arguments opposing retention of the privilege. In order to focus on the content of these arguments, this material is presented in an uncritical fashion. Critique, with some summary, is presented in Section IV, so that Section IV represents a coherent case for the retention of the privilege.

A. Rent Seeking and Signaling

Fischel presents the most comprehensive rebuttal, using economic reasoning, to the continued maintenance of the attorney-client privilege.[20] Fischel's arguments can be boiled down to two essential concerns. The first is that the attorney-client privilege exists for the

[18] Issue 4 of Volume 9 of the Journal of Legal Studies (1980) is a special edition focusing on the law and economics of privacy, with a number of articles dealing with the legal applications of information economics. In particular, George J. Stigler, *An Introduction to Privacy in Economics and Politics*, 9 J. LEGAL STUD. 623 (1980), and Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683 (1980), serve as valuable primers in this area.

[19] *See generally* Fischel, *supra* note 8. This article is discussed in significant detail in Section II, *infra*.

[20] Fischel, *supra* note 8, at 9-23.

benefit primarily of the legal profession, specifically that the privilege facilitates rent seeking behavior on the part of the profession.[21] Second, quite apart from this benefit that it confers on the legal profession, the privilege operates to the detriment of clients generally by preventing "honest" clients from signaling their honesty (i.e., the fact that they have nothing to hide) from the court.[22]

B. Rent Seeking Behavior

Fischel presents five means by which the legal profession extracts rents through the attorney-client privilege.[23] These rent seeking behaviors are presented as extracting rents from clients as a whole.[24] As with all forms of rent seeking behavior, however, this behavior also results in a deadweight loss for society due to the inferred misallocation of resources.[25] It should be noted that this analysis is implicitly premised on the client not waiving the privilege, either deliberately or inadvertently.[26]

The attorney-client privilege increases the value of legal advice, since the content of that advice is formally kept secret at the behest of the client.[27] Of course, this secrecy exists only if the client values the element of secrecy, which Fischel acknowledges by qualifying this principle as when clients prefer that the information be kept secret.[28] This is particularly true when the legal advice is designed to confer some sort of advantage on the client that is attainable only with a detailed understanding of the legal system, such as in structuring one's tax affairs.[29] By providing a more valuable service, due to the application of the attorney-client privilege, the attorney is able to charge higher fees.[30] Further, this unique service also increases the demand for an attorney's services, increasing fees on a per unit basis – assuming maintenance of some baseline number of attorneys, thereby fixing the supply of attorney services – as well as increasing fees in the aggregate.[31]

The second category of rent seeking is related to the previously described effect regarding the increased value of attorney services.[32] Assuming that the content of the particular service is held constant, the element of secrecy afforded by the attorney-client privilege promotes a substitution effect.[33] In other words, attorneys have their services substituted in place of the services of other equally competent and qualified professionals, such as accountants for taxation,[34] investment bankers for many corporate transactions, and financial planners for estate

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[21] *See id.* at 5-9.
[22] *See id.* at 15-26.
[23] *Id.* at 5-9.
[24] *See id.*
[25] Fischel, *supra* note 8, at 17,
[26] *Id.* at 21-22. Although, Fischel notes that this is very difficult for a client to do.
[27] *Id.*at 5.
[28] *Id.*
[29] *Id.* at 5-6.
[30] Fischel, *supra* note 8, at 5-6.
[31] *See id.*
[32] *Id.*
[33] *Id.* at 5.
[34] An interesting development with respect to attorneys, accountants, and taxation advice was the introduction of section 7525 into the Internal Revenue Code in 1998. This provision extended the common law attorney-client privilege to approved tax practitioners in respect of taxation matters and represents a Congressional attempt to alleviate the perceived inequality in professional treatment regarding tax matters. *See* I.R.C. §7525.

planning. This substitution leads to an increased demand for legal services, which, with all other things held constant, increases attorney fees.[35]

The third manifestation of this rent seeking behavior is in respect to discovery and other pre-trial procedures.[36] Essentially, the attorney-client privilege results in, at least, the doubling of costly efforts to gather information.[37] For example, a defendant corporation's attorney may interview relevant employees to determine the extent of any potential liability and ascertain the content of particular meetings and the like.[38] As the plaintiff or prosecuting authority's attorney cannot force the disclosure of the records of these interviews, the employees need to be interviewed a second time.[39] The costs associated with this second round of interviewing (over the same material), less any costs that would have been incurred in conferring with the defendant's attorneys in the absence of the attorney-client privilege, represent unnecessary additional costs of litigation.[40] The only beneficiaries from this activity are the attorneys that are able to collect higher fees due to the additional work.[41]

The costs associated with the attorney-client privilege in this regard will, however, often be even higher. The defendant's attorneys, after having the opportunity to review the employees' unvetted testimony, are now able to advise the employees in such a manner that the plaintiff and prosecuting attorneys will not be able to obtain information as easily during subsequent interviews.[42] This situation arises not only from explicit advice provided to the employees, but from the attorneys' presence during the subsequent interviews, allowing for frustration of the plaintiff and prosecuting attorney's efforts. As a result, depositions will either be lengthier, (and hence costly) to obtain the same amount of information, or the plaintiff and prosecuting authority will need to expend resources to obtain the same information through alternative avenues.[43] Further, it should be noted that the physical presence of the defendant's attorneys during the subsequent interviews adds an additional layer to the costs associated with the legal fees of the litigation.[44] Again, the primary, if not sole, beneficiaries of this consequence of the attorney-client privilege are the attorneys involved.[45]

The attorney-client privilege further increases the demand for legal services since the involvement of attorneys in many business research activities brings the documents produced during those processes within the scope of the privilege.[46] For example, manufacturing corporations may conduct research into the safety features of a product about to be introduced

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Section 7525, though, contains a number of limitations in scope that do not affect the common law privilege for attorneys. *See id.* For example, the tax practitioner privilege only applies to non-criminal matters and, where the client is a corporation, does not extend to advice regarding tax shelters. As these are two areas in which clients would be expected to value secrecy very highly, these asymmetric limitations effectively negate much of the parity that § 7525 was intended to introduce. For further discussion, *see, e.g.*, Alyson Petroni, *Unpacking the Accountant-Client Privilege Under IRC Section 7525*, 18 VA. TAX REV. 843 (1999).

[35] Fischel, *supra* note 8, at 5-6.

[36] *Id.* at 6-7.

[37] *Id.*

[38] *Id.* at 6.

[39] *Id.*

[40] Fischel, *supra* note 8, at 7.

[41] *See id.*

[42] *Id.*

[43] *Id.* at 6.

[44] *Id.*

[45] *See* Fischel, *supra* note 8, at 7.

[46] *Id.* at 8.

into the market.[47] By involving their attorneys in the process, ostensibly in anticipation of potential litigation, any negative results may be hidden from the discovery process, with access granted only to positive findings.[48] In the absence of the privilege, it is unlikely that attorneys would be involved in these processes at all.[49] Therefore, the privilege operates to open this new area of work for attorneys.

Finally, the attorney-client privilege also facilitates the legal profession's ability to maintain its own public image.[50] The profession publicizes its own canons of ethics and maintains a high moral public persona, forbidding its members from "knowingly" procuring perjured testimony, soliciting fraud, and otherwise participating in unlawful schemes.[51] The sanctity of the privilege, however, makes it difficult to prove what an attorney actually knows.[52] If it were to become public knowledge that attorneys routinely, or even on more than a very rare basis, engaged in such supposedly prohibited activity, the legal profession's public standing would be impacted significantly.[53] Due to the shield that the privilege provides, however, this information is difficult, if not impossible, to obtain, thereby allowing the legal profession effectively to maintain its own public image.[54]

A separate benefit for the legal profession associated with the attorney-client privilege, but is not a form of rent seeking behavior as discussed above, is the list of exceptions to the privilege's application when its operation imposes costs on the profession. For example, Rule 1.6(b)(5) of the Model Rules of Professional Conduct states:

> A lawyer may reveal information relating to the representation of a client to the extent that the lawyer reasonably believes necessary: . . . (5) to establish a claim on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client[.][56]

Fischel highlights the implications of this exception.[57] After noting that other exceptions do not require, but permit disclosure in cases in which harm to others is deemed sufficiently serious[58] and prohibit disclosure when the information relates to past acts, regardless of the consequences for others, Fischel then somewhat colorfully contrasts the treatment afforded when attorneys are the ones directly affected:

> The same lawyer who is prohibited from disclosing information learned while representing a client to exonerate someone falsely accused of a capital crime, in

[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Fischel, *supra* note 8, at 8-9.
[51] *See id.*
[52] *Id.* at 9.
[53] *Id.*
[54] *Id.*
[56] MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2003) (as amended to Aug. 11, 2003).
[57] Fischel, *supra* note 8, at 10.
[58] MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(3) (dealing with 'reasonably certain death or substantial bodily harm' and Model Rule 1.6(b)(2) and (3) dealing with injury to financial interests and property).

> other words, is perfectly free to disclose confidential information when he or she is the one accused, falsely or not. Nor is there any requirement that the lawyer's liberty be at stake, or even that the lawyer be accused of anything criminal. A simple fee dispute with a client is sufficient grounds to disclose confidential information. The lawyer's interest in collecting a fee is apparently a higher priority than exonerating an innocent defendant about to be convicted of a capital crime or helping a distraught family locate an abducted child. Confidentiality means everything in legal ethics unless lawyers lose money, in which case it means nothing.[60]

C. Signaling Problems for Clients

The previous section describes Fischel's analysis that the attorney-client privilege benefits the legal profession, at the expense of clients specifically and society generally. While this is a substantial criticism in its own right, Fischel then demonstrates how the attorney-client privilege also acts as a detriment to clients, as a class, over and above the additional, monetary costs associated with the increased demand for legal services that the privilege generates.[61]

This detriment is linked to the rent seeking behavior described earlier by demonstrating that litigation is largely a zero-sum game, except with respect to the function of precedent.[62] The attorney-client privilege increases the value of and demand for legal services, especially in a litigation context.[63] Since clients are presumed to be interested only in winning, they are expected to invest in litigation continuously to maximize their chances of prevailing.[64] It is quite likely that this behavior will continue past the point of expected return, if the decision to litigate has been made and investments in litigation have already been made.[65] Since litigation is a winner-takes-all scenario, parties have an incentive to continue investing in legal fees, if this will affect their chance of success, past the point of expected return, since past expenditures become irrelevant.[66] Litigation, therefore, resembles a Chinese auction, with the main beneficiaries being the attorneys involved.[67]

Since litigation is a zero-sum game, however, the outcome represents a mere redistribution of wealth.[68] That is, there is no social benefit arising from litigation from a wealth creation perspective.[69] This further highlights the rent seeking nature of the attorney-client privilege, unless some additional benefit can be shown to accrue to the parties.

Fischel argues, though, that, rather than providing some form of non-monetary benefit to clients that could explain clients' willingness to pay for the privilege, the privilege acts as a further detriment to client interests.[70] By preventing attorneys from disclosing communications and making the privilege very difficult to waive as a practical matter, clients are restricted in

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[60] Fischel, *supra* note 8, at 10 (citations omitted).
[61] *Id.* at 15-26.
[62] *Id.* at 16.
[63] *Id.* at 15-16.
[64] *Id.* at 16-17.
[65] *See* Fischel, *supra* note 8, at 16-17.
[66] *See id.* at 16.
[67] *See id.* at 17.
[68] *See id.*
[69] *See id.*
[70] *See* Fischel, *supra* note 8, at 17.

their ability to signal to the court their honesty and integrity with respect to the matter at hand.[71] In the absence of the privilege, clients would be willing to hire attorneys only if they were confident that no adverse information would be disclosed to their opponent or the court as a result.[72] In such a situation, the hiring of an attorney could act as an effective signal to the court that the party was honest or, more to the point, had nothing to hide.

In addition, the credibility of attorneys could be enhanced by allowing the attorney to make representations to the court regarding her assessment of the virtues of her client's case.[73] The ethical requirement for zealous representation imposed on attorneys, however, discounts any representations so made during argument and is inconsistent with any notion of testifying against the client. As Fischel notes:

> Simply stated, an argument made by someone known to be an advocate is less credible than the same argument made by someone who is expressing their own beliefs after independent investigation. Anyone who is being paid by a party in a legal dispute likely will have his views discounted somewhat. And if the person is known to be acting as an advocate, the discount is greater still. No matter how compelling the claim being made, the rational response of the listener will be skepticism (what does the speaker, whom I know to be a paid advocate, know that he is not telling me?).[75]

In this way, honest clients are penalized.[76] This problem is essentially an application of George A. Akerlof's lemons argument,[77] in which the sellers of good quality second-hand cars have the value of their wares discounted due to the presence of lemons in the market, coupled with the inability to credibly signal the difference in quality.[78] Fischel later states that this

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[71] *Id.* at 18-19.

[72] *Id.* at 4. Fischel quotes from *Whiting v. Barney*, 30 N.Y. 330, 332-33 (1864), showing that one of the original reasons for the development of the privilege was to ensure the employment of attorneys, once litigation had become sufficiently complex to justify the need for specialists in law, is:

> To facilitate the business of the courts, it was important that [attorneys] should be employed. But as parties were not then obliged to testify in their own cases, and could not be compelled to disclose facts known only to themselves, they would hesitate to employ professional men and make the necessary disclosures to them, if the facts thus communicated were within the reach of their opponent. To encourage the employment of attorneys, therefore, it became indispensable to extend to them the immunity enjoyed by the party.

Whiting, 30 N.Y. at 332-33.

[73] *See* Fischel, *supra* note8, at 18.

[75] *Id.*

[76] *Id.* at 18-19.

[77] George A. Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

[78] *Id.* at 488-89. As with Akerlof's market for second hand cars, though, the market for litigation is unlikely to collapse. This expectation, though, should be stronger vis-à-vis the market for litigation, since lay people, both honest and dishonest, are likely to need to retain legal counsel at some stage, due to the specialized nature of legal advice. Akerlof's buyers of second hand cars could leave the second hand car market altogether and find appropriate (albeit more expensive) substitutes in the market for new cars (as well as other forms of transport). No equivalent alternative market exists with respect to the market for litigation (with the possible limited exception of matters that may be resolved through arbitration not involving lawyers). This reasoning, however, leads to the conclusion that honest clients (who may be regarded as innocent parties that have been wronged in some way) may face a disincentive to utilize the litigation process to resolve intractable disputes (intractable as litigation would be expected to arise only in cases where the dispute could not be resolved in some other, less costly fashion).

demonstrates that Bentham's criticism that the attorney-client privilege serves to benefit only the guilty tells but half the story, since the privilege can now be seen also to penalize the innocent.[79]

Fischel addresses some criticisms of this position. For example, Ronald J. Allen et al. criticize Bentham's position, and, by extension, [80] Fischel's, by stating that taking away the attorney-client privilege also harms the "innocent" client who thinks he has something to hide but does not.[81] This criticism is explained in the context of contributory negligence.[82] The client who thinks that he was negligent, but is unaware of the defense available to him, may be disinclined to reveal all facts to the attorney in the absence of the privilege for fear that such disclosures will be revealed to the court.[83] The privilege, though, encourages full disclosure, thereby allowing the client to become aware of this defense.[84] Fischel responds to this argument by claiming that, in the absence of the privilege, attorneys are able to explain the array of potential defenses in the case at hand to the client, which will also encourage disclosure of the relevant facts.[85] As such, the concern that the absence of the privilege will also harm the innocent is overstated, and other means may be put in place to encourage relevant disclosure.[86]

In short, Fischel unequivocally calls for the abolition of the attorney-client privilege, claiming that the privilege clearly benefits the legal profession but is "of dubious value to clients and society as a whole."[87] The incentive effects on clients to make full disclosure are overstated and many of the benefits available to clients are undermined by the difficulty of waiving the privilege and allowing the client to signal his honesty to the court.[88] While there is an explicit private benefit to the client that wishes to keep facts secret from the opposing party to the litigation, the public benefits that advocates of the virtues of the privilege often put forward, such as increased compliance with the law and allowing additional information to reach the court, under appropriate circumstances, because attorneys are fully appraised of all relevant facts, do not hold up under scrutiny.[89]

D. Evidence from Economic Modeling

In a series of papers, Louis Kaplow and Steven Shavell examine the effects of the attorney-client privilege under different conditions using economic modeling.[91] The general

[79] Fischel, *supra* note 8, at 23.
[80] Necessarily, since Allen's paper predates Fischel's.
[81] Allen et al., *supra* note 7, at 371.
[82] *See* Fischel, *supra* note 8, at 24.
[83] *Id.*
[84] *See id.* at 24-25.
[85] *See id.*
[86] *See id.*
[87] Fischel, *supra* note 8, at 33.
[88] *Id.*
[89] *Id.*
[91] *See, e.g.*, Steven Shavell, *Legal Advice about Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUD. 123 (1988); Louis Kaplow & Steven Shavell, *Legal Advice about Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565 (1989) [hereinafter "Kaplow & Shavell (1989)"]; Louis Kaplow & Steven Shavell, *Private versus Socially Optimal Provision of Ex Ante Legal Advice*, 8 J. L. ECON. & ORG. 306 (1992) [hereinafter "Kaplow & Shavell (1992)"].

approach for each study was to assess the privilege's private benefits against the social costs and benefits, if any, arising from its application.[92]

The models employed start out using simplifying assumptions about the world, and the legal system in particular, to examine the effects of both the provision of legal advice itself and, separately, when that advice is protected by a rule of confidentiality.[93] For example, Shavell first analyzes the private and social benefits of obtaining ex ante legal advice, with and without confidentiality, when definitive legal advice is available regarding the imposition of sanctions.[95] In the absence of legal advice, parties are expected to draw their own conclusions regarding the probability that a course of action will attract sanctions; for example, a conclusion that a pollutant dumped into a nearby river is regarded as toxic under the relevant legislation.[96] The party will proceed with the potentially sanctionable conduct if he believes that the sanctions, discounted for the probability that the party's understanding of the law is correct, are outweighed by the expected benefits.[97] For example, if the party will save $10,000 by dumping the pollutant rather than transporting it to an appropriate facility, and the sanction for doing so is $20,000, the party is expected to dump the pollutant unless he believes that the subjective probability of sanctions applicability is at least fifty percent.[98]

The party will then be expected to obtain legal advice if the cost of that advice is less than the resulting benefit.[99] Under the assumptions applying to this model, the effect of the legal advice will be to remove the uncertainty regarding the applicability of sanctions.[100] The private benefit of the advice, therefore, comprises of two elements: (1) the absolute amount of the cost saving, either the cost saving from non-sanctionable conduct that would not have been committed in the absence of advice or the avoidance of penalties if sanctionable conduct would have otherwise been committed; and (2) the benefits associated with certainty of knowledge.[101] The advice will be obtained if these benefits are greater than the cost of the advice.[102] The advice is also regarded as socially desirable if it leads to a change in behavior, including committing non-sanctionable acts that would not have otherwise been undertaken.[103] The unstated justification for characterizing such acts as socially desirable, despite causing harm, is that the costs of the harm are not as great as the benefits realized.[104] This characterization recognizes that the private benefit is a component of the social benefit and also implicitly assumes that the sanctions accurately reflect the social harm that the action causes.[105] If this assumption does not hold, then the private costs of undertaking the action do not align with the social costs, resulting in a non-congruence of the private and social interests at hand, potentially leading to suboptimal social outcomes.[106] Even if the advice does not lead to a change in behavior, obtaining advice is still generally regarded as socially desirable under this model, due

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[92] *See supra* note 92 and accompanying text.
[93] Shavell, *supra* note 38, at 123.
[95] *Id.*
[96] *See id.*
[97] *Id.* at 134.
[98] *See generally id.* at 125-26.
[99] Shavell, *supra* note 38, at 127.
[100] *Id.* at 125.
[101] *See id.* at 127.
[102] *Id.*
[103] *See id.*
[104] *See* Shavell, *supra* note 38, at 128-29.
[105] *See id.*
[106] *See id.*

to the provision of certainty and the alignment of private and social interests.[107] On the whole, then, under these simplifying assumptions, obtaining legal advice is socially desirable.[108]

Shavell also concludes that protecting the advice under a rule of confidentiality will not affect the decision to obtain legal advice.[109] Shavell argues that, even when sanctions are raised upon obtaining legal advice, the analysis is not affected.[110]. If the party is advised that sanctions apply, with certainty, to what was previously thought of as non-sanctionable conduct, the party will not undertake the conduct.[112] A party will only change behavior and undertake a particular action if he is advised that the conduct does not attract sanctions.[113] In the former situation, the resultant increase in sanctions does not affect the party, since he does not ultimately undertake the relevant action.[114] Regarding the latter, if the conduct does not attract sanctions, obtaining legal advice does not change that position.[115] The inclusion of a rule of confidentiality does not affect these outcomes.[116] Since behavior is not changed through the inclusion of confidentiality protection, such protection is irrelevant in the context of the social interest.[117]

When it is no longer assumed that definitive legal advice is available with respect to the applicability of sanctions, but, rather, that legal advisers can advise only with respect to probabilities, the alignment of sanctions with the social costs of the conduct becomes much more important.[118] The protection of confidentiality provides an incentive for parties to obtain legal advice, since, under this model, parties may still undertake potentially sanctionable acts even after obtaining advice.[119] Confidentiality has the effect of reducing or preventing an increase in the probability or size of sanctions for relevant acts and, therefore, raises the value of legal advice to these parties.[120] Increasing the value of the advice in this fashion increases the likelihood that the party will obtain advice.[121] If the relevant sanctions, though, are lower than the social harm caused by the sanctionable conduct, the incentive to obtain legal advice has an ambiguous effect on the social outcome.[122] If the party would have undertaken the conduct in the absence of advice, the effect of confidentiality can only be socially undesirable, since confidentiality prevents the resulting sanction from rising to an appropriate level.[123] For parties

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[107] *See id.*

[108] Shavell's preliminary analysis does not explicitly take into account the elasticity of demand for legal advice. Confidentiality (in the form of the attorney-client privilege) is assumed to increase the incentive to obtain legal advice. Therefore, the absence of the privilege should lead to a concomitant reduction in the demand. The simplified model presented, however, does not attempt to address how the demand curve for legal advice behaves. Specifically, while a small initial reduction in confidentiality protection may result in a steep reduction in the demand for legal advice, the complete abolition of the privilege is unlikely to bring about a collapse in the market for legal advice, *see also* earlier comments, *supra* note 78. The elasticity of demand for legal advice is considered further in Section IV. *See infra* Section IV.

[109] Shavell, *supra* note 38, at 130.

[110] *Id.*

[112] *Id.*

[113] *Id.*

[114] *See id.*

[115] *See* Shavell, *supra* note 38, at 130.

[116] *Id.*

[117] *See id.*

[118] *See id.* at 131-34.

[119] *See id.* at 133.

[120] Shavell, *supra* note 38, at 133.

[121] *Id.*

[122] *See id.* at 134.

[123] *Id.*

who obtain advice only under conditions of confidentiality, the effect is less certain as the outcome depends on whether the party would have undertaken the action absent advice.[124]

Shavell argues that parties face the same incentives as in the last model when they face certainty regarding the applicability of sanctions, but are uncertain as to the magnitude or probability of sanctions being imposed (e.g., arising due to uncertainty regarding detection).[125] Parties will face appropriate incentives to obtain legal advice when the sanctions equal the social harm caused by the conduct, leading to socially desirable outcomes.[126] This outcome is not assured, however, if the sanctions are not properly aligned with the relevant social harm.[127] Shavell also concludes that when parties seek advice to reduce the probability or magnitude of applicable sanctions, legal advice serves only socially undesirable ends.[128] Consequently, confidentiality, in providing an incentive to obtain legal advice, is also socially undesirable for the reasons described earlier.[129]

Shavell, therefore, concludes that the social desirability of the attorney-client privilege depends on the type of advice sought.[130] Conducting a more qualitative analysis, Shavell states that the net effect of the privilege is ambiguous.[131] While the freedom, if not the obligation, to report client plans to commit bad acts may prevent such acts from occurring,[132] encouraging disclosure to attorneys under a rule of confidentiality may result in the attorney successfully discouraging the client from undertaking the bad act.[133]

Building upon this foundation, Kaplow and Shavell consider the effect of advice relating to information to present during litigation.[135] They draw a parallel with Shavell's (1988) earlier analysis regarding advice about contemplated acts.[136] Kaplow and Shavell conclude that advice regarding information to present at trial does not result in changes to behavior that are socially desirable.[137] This is compared to Shavell's earlier conclusions, which stated that under appropriate circumstances, legal advice and potentially the protection of confidentiality can result in socially desirable outcomes.[138] This conclusion is largely premised on the observation that litigation is more a determination of past acts, with little or no impact on future acts outside the litigation context.[139] Advice regarding the evidence to present at trial serves only private ends, such as the desire to maximize the relevant party's chances of prevailing in the dispute. Since litigation tends to serve only a redistribution purpose from a social perspective,[140] socially

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[124] *Id.* at 134.

[125] Shavell, *supra* note 38, at 134-35.

[126] *Id.* at 135.

[127] *See id.* at 136.

[128] *Id.*

[129] *Id.* at 137.

[130] Shavell, *supra* note 38, at 138.

[131] *See id.* at 142.

[132] MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(3) (Of course, attorneys are permitted to report some planned future bad acts that are regarded as sufficiently serious.).

[133] This is a particular application of the argument that the attorney-client privilege results in increased compliance with the law, *see infra* Section III.

[135] Kaplow & Shavell (1989), *supra* note 38, at 568.

[136] *Id.*

[137] *See id.* at 613-15.

[138] *c.f. id.* at 613-15 and Shavell, *supra* note at 137-40.

[139] *Id.* at 614.

[140] Although, compare the analysis from Easterbrook discussed in Section III, *infra*.

desirable ends are not promoted through heavier investment in litigation in the form of seeking advice, which is encouraged only through the protection of confidentiality.[141]

Kaplow and Shavell recognize that, in the absence of legal advice about what evidence to present at trial, the parties are likely to be uncertain as to whether particular information is favorable or unfavorable to their case.[142] This uncertainty is due to their imperfect knowledge of the legal system and, specifically, uncertainty regarding the relationship between a specific piece of evidence and the effect that it will have on the outcome of the case, including the assessment of applicable sanctions.[143] Decisions as to what evidence to present to the court will be based on the party's own subjective assessment of the likelihood of sanctions being imposed, including the probability of an increase or decrease in those sanctions.[144] Obtaining advice, though, allows the party to avoid two kinds of mistakes: the decision not to present favorable evidence and the decision to disclose unfavorable information.[145] A priori, it is impossible to tell whether obtaining advice will result in more (favorable) or less (unfavorable) information reaching the court; the outcome is dependent on the context of the litigation.[146] Consequently, the value of the attorney-client privilege is also ambiguous when looked at from this perspective, since the privilege encourages parties to seek advice.

Kaplow and Shavell assess the social desirability of obtaining the advice, identifying two distinct scenarios.[147] In the first, the party is uncertain as to how the evidence will affect the court's assessment of applicable sanctions.[148] In this case, advice, and the attorney-client privilege, cannot result in socially desirable outcomes, since it is only past acts that are under contemplation. Any promotion of socially desirable ends is coincidental.[149]

The second scenario is one in which the party is uncertain about the effect that evidence will have on the court's inferences in assessing sanctions.[150] It is conceivable that, if properly informed, a party may be able to anticipate how a court would apply sanctions, which are assumed to be set at an appropriate level and which could affect future behavior.[151] The increased information that flows to the court brings about this result. Kaplow and Shavell, however, note that since the parties face ex ante imperfect information as to how the court will assess evidence, this outcome is much less likely to arise:

> Our conclusion differs, of course, because we have assumed that individuals do not understand what information tribunals later will obtain and what the sanctions will be. Therefore, although receipt of more information enables the legal system to link sanctions more closely to acts, it does not enable the system to induce better behavior. On reflection, this should not be surprising, for advice affects the evidence presented to the tribunal only when individuals would have made mistakes – that is, only when, at the time they decide among acts, individuals

[141] *See* Kaplow & Shavell (1989), *supra* note 38, at 613-15.
[142] *Id*. at 578-579.
[143] *Id*. at 579.
[144] *Id*.
[145] *Id*. at 581.
[146] Kaplow & Shavell (1989), *supra* note 38, at 581.
[147] *Id*. at 586.
[148] *Id*.
[149] *Id*. at 588.
[150] *Id*. at 586.
[151] Kaplow & Shavell (1989), *supra* note 38, at 588-589.

> would not know precisely what effect legal advice will have on the tribunal's information and on sanctions.[153]

Analyzing the attorney-client privilege specifically, Kaplow and Shavell explicitly take issue with what they highlight as a common theme from proponents of the privilege: that proponents ascribe a common foundation to all evidentiary privileges.[154] This theme stems from a failure of these advocates to specify the objectives of the legal system, with the result that the distinction between ex ante and ex post legal advice is ignored:

> [T]he effects of legal advice on those contemplating acts and on those before a tribunal for acts already committed are different in kind and thus require separate analysis. Although most commentators draw no distinction in analyzing these issues, when one reaches detailed arguments and illustrations, the particular points offered apply to only one of the two types of advice. For instance, commentators sometimes argue that one should be able to know of the law in order that one can obey it. This argument justifies ex ante legal advice but not ex post. [156]

Kaplow and Shavell also directly contradict the view that the attorney-client privilege represents the strongest case for confidentiality.[157] Rather, it presents the weakest.[158] This conclusion is premised on the observation that other privileges, including the doctor-patient privilege which is highlighted as a contrast, serve some other socially beneficial purpose outside the litigation context that is facilitated by the less constrained flow of information.[159] For example, patients are more likely to receive better health care, and consequently better health, by being frank with their doctor.[160] It is argued that this non-litigation benefit would probably have a lower effect on the flow of information if confidentiality was removed, compared with the attorney-client privilege, since disclosers are unlikely to consider litigation consequences during those other consultations, whereas such concerns would be an important, if not the primary focus of discussions with an attorney.[161]

In their second collaboration, Kaplow and Shavell compare the private and social effects of ex ante legal advice using economic modeling.[162] Initially making a simplifying assumption that the court has sufficient information to impose a penalty equal to an action's social harm, Kaplow and Shavell argue that appropriate incentives to acquire legal advice exist under a strict liability regime.[163] That is, the private incentive to acquire legal advice aligns with the socially

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[153] *Id.* at 589-590 (citations omitted).
[154] *Id.* at 610.
[156] *Id.* at 609 (citations omitted).
[157] *Id.* at 600.
[158] *See* Kaplow & Shavell (1989), *supra* note 38, at 600.
[159] *Id.*
[160] *Id.*
[161] *Id.* & n.84. The combination of lower anticipated effects on the flow of information and the non-litigation benefits that Kaplow and Shavell refer to are often the basis on which the lack of a common law (and federal) doctor-patient privilege is premised, *see* Zechariah Chafee, Jr., *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943); *see also* Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977).
[162] Kaplow & Shavell (1992), *supra* note 38 at 306.
[163] *Id.* at 308.

optimal situation, regardless of whether the individual is informed or uninformed.[164] Not only does the individual face appropriate incentives to acquire the socially optimal level of advice, but the individual is also encouraged to take the appropriate level of care in his activities.

Under a negligence rule, however, individuals are encouraged to overinvest in legal advice. By discovering the relevant duty of care required under the law, parties are able to tailor their conduct so as to avoid liability altogether.[165] The resultant harm is then borne by society, with only the costs of obtaining the legal advice and of adjusting their actions imposed on the party.[166] This situation is potentially especially problematic from a social perspective if the party had originally anticipated that the law imposed a higher duty of care than it actually does.[167] In this situation, the effect of the legal advice is for the party to take less care (assuming that taking care is costly and that the party is seeking to minimize its private costs), while not incurring any of the resultant costs from the harm caused (the expected value of which would be anticipated to increase due to the higher probability of harm occurring from the lower level of care taken.)[168]

Kaplow and Shavell also find that the private incentive to obtain legal advice is socially excessive when the advice focuses on the likelihood of a mistake being made in determining liability.[169] This view holds under both strict liability[170] and negligence rules.[171] In sum, therefore, while parties face socially optimal incentives to acquire legal advice in some circumstances, the private incentive to acquire advice more often exceeds the social benefit, thereby leading to an overinvestment in the production of legal advice. The protection afforded legal advice under the attorney-client privilege serves only to exacerbate this problem.

III. LITERATURE IN FAVOR

A. The problem of contingent claims

Allen et al. propose a new means of viewing the attorney-client privilege by arguing for its retention.[172] Unlike most advocates of retention before them, Allen et al. focus on some of the economic implications of the privilege, specifically the costs associated with the information-gathering process.[173] An important distinction from prior arguments is that Allen et al. start from a point where it is assumed that the privilege must *raise* the costs of gathering information for the opposing party.[174] This is initially set out by demonstrating the flaw in logic underlying the traditional position that the privilege imposes no costs on the parties, yet provides incentives for clients to disclose all information to their attorneys.[175] Allen et al. noted that parties are encouraged to make full disclosure only under circumstances where the costs of the opposing party obtaining that information are raised.[176] Despite these increased costs, Allen et al. argue

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[164] *See id.* at 309.
[165] *See id.* at 311.
[166] *See id.*
[167] Kaplow & Shavell (1989), *supra* note 38, at 311-12.
[168] *Id.* at 307.
[169] *See id.* at 314, 316.
[170] *Id.* at 314.
[171] *Id.* at 316.
[172] Allen et al., *supra* note 7, at 360-61.
[173] *Id.* at 360.
[174] *Id.*
[175] *Id.* at 359-60.
[176] *Id.* at 360.

that the benefits the privilege confers justify these costs only under particular conditions, which tend to accord with how the privilege is implemented in practice.[177]

The theory that Allen et al. put forward to explain the attorney-client privilege is premised on the type of legal dispute at issue. These disputes involve one party conceding a critical aspect of the opponent's case in order to prevail in the dispute; Allen et al. refer to such cases as contingent claims.[178] Affirmative defenses are good illustrations of contingent claims. For example, to make out a defense of contributory negligence, the party must first concede that he was negligent himself.[179] Similarly, to claim lack of capacity to contract, such as in the case of a minor, a party must concede that an otherwise valid contract had been formed.[180] Contingent claims, however, extend beyond affirmative defenses.[181] For instance, a party may seek to rely on promissory estoppel to enforce a contract, but doing so requires the party to acknowledge that there was no recognized consideration during the formation stage of the contract.[182]

In these situations, the concern is that a party may not be aware of the contingent claim and opt to deny (falsely) the opponent's position; that is, in the preceding examples, a party may deny the negligence, deny the existence of a contract, or argue that consideration had been provided.[183] In this fashion, it may be seen that the existence of the privilege serves three purposes. First, in encouraging clients to disclose all information to their attorneys by providing the cloak of secrecy (more specifically, raising the cost for opponents to acquire the relevant information), there is the traditional benefit of having the attorneys fully informed and, consequently, allowing the adversarial court system to function properly.[184] Second, the attorney, having been fully apprised of the case at hand, is better able to apply the law as it stands.[185] This aspect is important since lay people are unlikely to be aware of many contingent claims. Third, the final benefit under this formulation of the attorney-client privilege, the privilege encourages greater honesty by the parties and reduces incidences of perjury.[186] In other words, by encouraging complete disclosure, the attorney is placed in a position where he can advise the client of legitimate claims without involving perjury.

Allen et al. argue that it is the non-recognition of contingent claims by critics of the attorney-client privilege that leads them to conclude that the privilege is socially harmful:

> When a client can get complete legal advice simply by revealing facts that are favorable to his position, the absence of confidentiality will not

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[177] Allen et al., *supra* note 7, at 360-61.

[178] *Id.* at 362.

[179] *Id.* 364-65. Allen et al. do not explicitly address the possibility of arguing in the alternative. Their central point, though, that the attorney-client privilege results in a reduction of perjury is still valid. *Id.* at 365-66. The prospect of raising an alternative argument merely allows the defendant who genuinely believes that he was not, for example, negligent to raise that argument as an alternative. For the defendant that is aware that he was negligent, however, the privilege encourages the defendant to both seek legal advice and then to make full disclosure, enabling the identification of the defense that does not involve perjury. The reduction in perjury occurs since the first category of defendant does not change his testimony, while the second defendant does.

[180] *Id.* at 365.

[181] Allen et al., *supra* note 7, at 366-67.

[182] *Id.*

[183] *See id.* at 367.

[184] *See id.* at 366, 368.

[185] *See id.* at 366.

[186] Allen et al., *supra* note 7, at 368.

> deter him from visiting a lawyer or from making a complete divulgence of information to him. It is in the area of contingent claims where the privilege affects clients' incentives, but this is a broad area of the law indeed. . . . Indeed, we suspect that other theorists – notably Bentham, Kaplow, and Shavell – have found the privilege to be socially harmful precisely because they have inaccurately modeled the legal system . . . we could agree with these theorists if they were correct that litigation is merely a process of charge and denial. In such a legal world, confidentiality might well be socially harmful. It is the existence of contingent claims, which these theorists have neglected to notice, that makes the attorney-client privilege socially beneficial.[188]

As this passage also indicates, the privilege under this model does not cover all communications between an attorney and her client; rather it extends only to those that involve some form of contingent claim.[189] Allen et al. go on to find that the limitations placed on the attorney-client privilege in practice are consistent with this model.[190] They, therefore, conclude that the privilege creates the appropriate incentives for clients to make full disclosure to their attorneys, producing social benefits that outweigh the increased costs of obtaining information.[191]

A similar justification is separately provided for the work product doctrine.[192] This explanation, though, focuses on the incentives faced by attorneys, rather than clients.[193] Specifically, the concern is whether attorneys face appropriate incentives to investigate, such as undertaking depositions, thereby uncovering all relevant information for their client's case.[194] Problems arise in the context of what Allen et al. refer to as joint production situations, in which efforts to create information are just as likely to uncover facts that are harmful to the client's case as those that would be useful.[195] By raising the costs for the opponent to obtain the same information, like the attorney-client privilege does regarding contingent claims, attorneys can feel confident in investigating all relevant avenues, thereby producing sufficient information for their client's purposes without the fear of having to disclose adverse facts.

B. Information flows

In a wider study looking at the effects that lawyers have on the adversary system generally, Stephen Bundy and Einer Elhauge consider the effects of the attorney-client privilege on the level of information reaching the court.[196] Under conditions of strict confidentiality, similar to Allen et al., they argue that the client will be encouraged to make full disclosure of all

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[188] *Id*. at 367-68 (citations omitted).
[189] *Id*.
[190] *See id.* at 368.
[191] *See id.*
[192] Allen et al., *supra* note 7, at 396.
[193] *See id.*
[194] *Id*. at 386-87.
[195] *Id*. at 387.
[196] *See generally,* Stephen McG. Bundy and Einer R. Elhauge, *Do Lawyers Improve the Adversary System?: A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313, 401-13 (1991).

facts, favorable and unfavorable, to the attorney.[197] The attorney is then in a position to make an assessment of the appropriate use of the information for the purposes of promoting the client's interests in the litigation.[198]

Under this analysis, Bundy and Elhauge conclude that the net informational effects of a duty of confidentiality are ambiguous.[199] On one hand, more information may be disclosed to the court. This occurs when a client mistakenly believes information to be unfavorable when it is in fact favorable to his case. An illustration of this would be the affirmative defense of contributory negligence that Allen et al. describe in their paper.[200] Bundy and Elhauge identify Allen et al.'s category of contingent claims as an example of when the attorney-client privilege would result in increased information flow to the court.[201] They argue, however, that Allen et al.'s analysis was too limited and that the privilege is justifiable even outside the context of contingent claims.[202] Inevitably, there will be instances in which an attorney will advise a client to continue to suppress information that the client had correctly identified as unfavorable; however, this does not result in reduced information flow to the court, since that information is very unlikely to have been disclosed to the court in any event.

The flip side of this analysis is that the attorney may identify unfavorable information that the client had formerly regarded as favorable and had intended to disclose. Assuming that the client follows the attorney's advice to suppress, this situation would result in a reduction in the information flow to the court. It is here that the ambiguity regarding the effect of the attorney-client privilege on information flow becomes apparent. Whether the privilege results in a net increase or decrease in information reaching the court will depend on the specific circumstances of the case at hand. In particular, the outcome depends on whether the client had incorrectly identified more information as favorable or unfavorable, with the former resulting in a decrease in information flow and the latter resulting in an increase.

It may be expected, however, that under this analysis the vast majority of cases would result in an increase of information reaching the court. Assuming that clients are conservative in their assessment of the usefulness of information to their case, a mischaracterization of information as unfavorable would be expected. That is, if the client is unsure whether a particular fact is useful or harmful, he would be expected to choose not to disclose the fact to his attorney, absent the protection of the attorney-client privilege. If parties inform their attorneys only of information that they are very certain is favorable (under conditions of non-confidentiality), the likelihood of the attorney identifying such information as unfavorable is minimized. Consequently, under conditions of confidentiality, it is much more likely that parties will be encouraged to disclose information that they had previously believed to be unfavorable (or were uncertain and were therefore disinclined to disclose) than be advised to suppress information that they had mistakenly believed to be favorable. Under Bundy and Elhauge's characterization of the processes, this theory suggests that the attorney-client privilege will more often result in increased information flow to the court.

Bundy and Elhauge also directly criticize the Kaplow and Shavell model advocating abolition of the attorney-client privilege.[203] They primarily attack the Kaplow and Shavell

[197] Bundy et al., *supra* note 69, at 403.
[198] *Id.* at 403.
[199] *See id.* at 405.
[200] Allen et al., *supra* note 7, at 364-65.
[201] Bundy et al., *supra* note 69, at 403.
[202] *Id.* at 403-04 n.230.
[203] Bundy et al., *supra* note 69, at 408 n.238.

conclusion that the justification for the attorney-client privilege is weakest compared with other evidentiary privileges (highlighting the comparison drawn with the doctor-patient privilege), and their argument that, while all privileges restrict the flow of information to the courts, the attorney-client privilege is the only one without a clear social benefit to counter this cost.[204] This critique has two elements. First, it is claimed that Kaplow and Shavell conflate their analysis of the effects of litigation advice with the effects of legal advice generally.[205] Bundy and Elhauge acknowledge that litigation advice generally has an ambiguous effect on information flow, but the confidentiality element can result in an increase in information without any corresponding decrease.[206] In other words, the privilege itself may result in increased, but never decreased information reaching the court.[207]

The second criticism stems from the presumption that other evidentiary privileges, particularly the doctor-patient privilege, always promote socially beneficial outcomes.[208] Three scenarios are identified in which medical advice does not necessarily lead to a desirable end.[209] The first concern is that "[m]edical care is often wasteful or excessively costly and can cause injury."[210] The second is that medical care may restore the health of individuals who may then commit bad acts, resulting in the inference that incapacitation from a lack of medical care would have prevented the harm from those bad acts.[211] Finally, medical advice may be used directly for socially undesirable purposes, such as fraudulent personal injury claims.[212] In this last scenario, the medical practitioner would face a very strong disincentive to participate in the fraud absent a confidentiality requirement.

C. Information production

In a broader study that recharacterizes several common legal issues that are traditionally treated as discrete matters as information production problems, and thereby properly subject to a common analytical framework, Judge Frank Easterbrook examines the effects of the attorney-client privilege.[213] At the outset, the privilege is explained as conferring a property right in the relevant information.[214] Importantly, the character of the right is proprietary, since it is a right of confidentiality against the world

Judge Easterbrook identifies three functions that judicial decisions serve: (1) a rule creation function, through the establishment of precedents; (2) a rule enforcement function, through which existing rules are applied accurately so as to influence future behavior; and (3) a settlement function, in which case resources are distributed according to the manner in which the court resolves the dispute.[215] While society's interest is primarily in the first two functions, the redistributive (as opposed to wealth creation) character of the third means that society is much

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[204] *Id*.
[205] Bundy et al., *supra* note 69, at 408 n. 238.
[206] *Id*. at 408, n. 238.
[207] *Id*.
[208] *Id*.
[209] *Id*.
[210] Bundy et al., *supra* note 69, at 408, n. 238.
[211] *Id*.
[212] *Id*.
[213] *See generally*,, Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309 (1981).
[214] Easterbrook, *supra* note 75, at 309-10.
[215] *Id*. at 359.

less interested in this function, at least compared to the first two.[216] It is the third, however, that the parties to a dispute find most important.[217] This case is, therefore, one in which the private interest does not completely align with the social interest (although, as Judge Easterbrook notes, the two are not diametrically opposed since the private interest is a component of the social interest). [218]

The concern, therefore, stems from the parties' desire to win the litigation. Assuming that access to more, rather than less, information increases the chances of winning, and vice versa, the parties to a dispute have a strong incentive to invest in creating information. The attorney-client privilege, though, removes the tempering effect that the risk of disclosing unfavorable information would have on this process. Since the privilege increases the other party's costs of obtaining information (reducing their chances of winning), parties have an incentive to overinvest in information (increasing their chances of winning).[219] As this investment is focused on the redistributive third identified function of the judicial process, such investment is wasteful from society's perspective.[220]

This conclusion, however, is not obvious under this framework. A full assessment needs to incorporate the attorney-client privilege's effects on the first two functions of the judicial process. Only then can a proper determination as to the social value of the privilege be made.

Based on this approach, Judge Easterbrook suggests that the attorney-client privilege should be drawn to encourage activities that promote the first two functions, while restricting the privilege regarding matters relating only to the third.[221] Therefore, records of, for example, courtroom strategy are privileged, since these matters can potentially affect both the rule creating function and the rule enforcement function. Documents recording purely factual occurrences, however, are not privileged, since this goes only to the resolution of the instant dispute.[222]

But this approach does not provide a comprehensive analysis. Judge Easterbrook also points out that the attorney-client privilege provides social benefits outside the litigation context.[223] By encouraging full disclosure, attorneys are able to give higher quality advice to their clients as to their obligations under the law. Consequently, the privilege promotes compliance with the law, a social benefit in itself, and reduces the costs associated with enforcement (not the least of which are litigation costs, because the greater the rate of compliance with the law, the less the need for authorities to enforce and monitor the law through the courts).

As such, the net effect of the attorney-client privilege is ambiguous. Judge Easterbrook comes down on the side of retaining a privilege with appropriately drawn boundaries.[224] The information production framework developed throughout his paper, considering the privilege and other legal contexts, informs where those boundaries ought to be drawn.[225]

IV. RETAINING THE ATTORNEY-CLIENT PRIVILEGE – A NEW JUSTIFICATION

[216] *Id.* at 360.
[217] *Id.*
[218] *Id.* at 360-61.
[219] *See* Easterbrook, *supra* note 75, at 361.
[220] *See id.*
[221] *Id.*
[222] *Id.*
[223] *See id.* at 360.
[224] *See* Easterbrook, *supra* note 75, at 364-65.
[225] *See generally id.*

As the preceding review demonstrates, there are economic arguments that can support both abolition and retention of the attorney-client privilege. Abolitionists highlight the incentive effects of overinvesting in legal advice, especially since litigation[226] rarely serves any purpose other than to redistribute wealth. Therefore, it is socially optimal to minimize the costs associated with litigation. Kaplow and Shavell use economic modeling to show that the confidentiality that the privilege affords to communications with a legal adviser provides incentives for parties to invest more in legal advice than they otherwise would.[227] This is particularly true when a defendant's liability is determined under a negligence (rather than strict liability) standard, as a defendant is able to avoid liability completely if due care has been taken.[228] Under strict liability, the defendant faces incentives to take the socially optimal amount of care, as he would, under the rational actor model, choose that level of care that minimizes harm (and hence liability) for the least cost.[229] These figures are equal from the perspectives of both the party and society.[230]

Under a negligence standard, though, the defendant is able to escape liability completely by taking the appropriate level of care.[231] Assuming that the level of care has an inverse relationship with the level of harm caused, obtaining legal advice may even result in an increase in the overall level of harm that occurs.[233] This would arise if the defendant had originally overestimated the level of care necessary to meet the relevant legal standard.[234] Advice that liability can be avoided through a lower and, hence, less costly level of care will result in the rational defendant reducing the level of care taken to minimize the cost of liability-avoidance (though the level of liability does not change, as it is avoided entirely under both scenarios).[235]

Kaplow and Shavell argue that the presence of confidentiality exacerbates this problem, since parties are induced to obtain legal advice when confidentiality is protected.[236] As defenders of the attorney-client privilege acknowledge that the privilege acts as an incentive to obtain legal advice, this inducement would be an uncontroversial conclusion.[237] In fact, such proponents hold up this consequence of the privilege as a virtue.[238]

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[226] Litigation is the relevant context to consider these effects, since the vast majority of legal advice would be obtained with at least the prospect (perhaps significantly into the future) of litigation occurring. For example, formal contracts may be drawn up even between parties that deal with each other frequently, so that rights and obligations are stated as clearly as possible. In the event of an unexpected dispute, even if no litigation arises, the aggrieved party is still able to threaten filing a lawsuit to force an informal resolution.

[227] Kaplow & Shavell (1992), *supra* note 38, at 306.

[228] *See id.* at 307.

[229] *Id.*

[230] *Id.*

[231] *Id.*

[233] Kaplow & Shavell (1992), *supra* note 38, at 307. Perhaps more appropriately, the expected level of is harm caused due to the higher probability of harm occurring. It is possible, however, that a lower level of care may result in a higher resulting harm, for example, a more serious accident occurring as a result of less care. For example, a traffic accident resulting in death rather than temporary physical injury due to the injurer speeding. Not only does exceeding the speed limit increase the chance of an accident occurring at all, but, if an accident occurs regardless of the level of care, the impact caused by excessive speed often results in more significant damage than occurs if drivers adhere to speed limits. *See id.*

[234] *Id.*

[235] *Id.*

[236] *Id.* at 311.

[237] Allen et al., *supra* note 7, at 367-68.

[238] *See id.*

Fischel follows Kaplow and Shavell, arguing that the attorney-client privilege not only provides incentives for parties to overinvest in legal advice, but also encourages socially suboptimal activity through the it facilitation of rent seeking by the legal profession.[239] Confidentiality not only provides an incentive to seek out legal advice in the first place, thereby increasing the fees for lawyers (due to the increase in demand for legal services, holding rates constant), but also increases the value of legal services.[240] This is particularly apparent when lawyers are compared with other professionals, such as accountants in the realm of taxation, who are able to provide, (in many cases), an identical service.[241] Confidentiality either allows lawyers to charge higher rates for what is the same service in substance, or it provides lawyers with a competitive advantage, (with the likely consequence that the other professionals would lower their rates, resulting in the same outcome).[242]

This contention, that the attorney-client privilege is largely designed to facilitate the legal profession's rent seeking, is supported by evidence that the privilege, while strictly applied in most situations, is relaxed when the doctrine imposes costs on the legal profession.[243] Fischel provides the juxtaposition of a lawyer provided with confidential information that will exonerate a third party facing capital charges and that will assist in resolving a fee dispute; the lawyer is not permitted to disclose the former, but he is entitled to use the latter for his own benefit, regardless of the effect on the client.[244]

Fischel takes his analysis further, arguing that the attorney-client privilege not only facilitates the legal profession's rent seeking, but it actively disadvantages clients as a class.[245] Not only are clients the source of the rents that the legal profession is able to extract, but the privilege blocks clients' ability to signal information to the court that is otherwise difficult to reveal in a credible fashion.[246] In the absence of confidentiality, the hiring of an attorney would be one signal, (since clients with something to hide would be less likely to hire legal representation due to the prospect of revealing unfavorable information to the court).[247] Further, without the restrictions of the privilege, the court could rely on the attorney's representations as accurately reflecting his assessment of the client's case. Since the attorney and the court are repeat players, but the client may deal with the attorney on only a one-time basis, the attorney may be expected to be open with the court, even to the detriment of the client's position.[248] By requiring that confidences be maintained and that, within certain limits, client interests are to be promoted ahead of all other concerns, honest clients are at a disadvantage because the court will ultimately regard them in the same light as dishonest clients.[249]

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[239] Fischel, *supra* note 8, at 33.

[240] *Id.* at 5.

[241] *See id.*

[242] *See id.*

[243] *Id.* at 9-10.

[244] Fischel, *supra* note 8, at 10. It should be noted that these exceptions do not form part of the equivalent privileges in all common law jurisdictions. This at once both supports Fischel's criticism of the present state of the attorney-client privilege in the United States and undermining his call for the privilege's abolition, since these other-jurisdiction examples prove that the adversary system may function effectively with a privilege that does not include these exceptions.

[245] *Id.* at 17.

[246] *Id.* at 18.

[247] *Id.*

[248] *See* Fischel, *supra* note 8, at 20.

[249] *See id.* 18-19.

Arguments in favor of retaining the attorney-client privilege focus primarily on the incentive the privilege creates for clients to disclose all facts to their attorneys. While critics highlight the negative social effects of this incentive, advocates argue that full disclosure facilitates the administration of justice (the traditional label used in judgments) by allowing attorneys to present a fully-informed case to the court (thereby presenting the client's case in the best possible light, a central feature of the adversary system) and increasing the flow of information to the court.[250] Allen et al.'s contingent claim model explains how legal advice not only improves the quality of how the law is applied, (possible only if the legal adviser is fully apprised of all facts) but it also results in a lower incidence of perjury, since parties are able to put forward legal arguments based on the facts as they happened, rather than fabricating the chain of events in a misguided attempt to serve their self-interest.[251]

Kaplow and Shavell's economic modeling approach is deliberately simplistic and, hence, would be easy to criticize on normative grounds. To do so, however, would be to ignore the intent behind the model. As with all economic models that attempt to represent real world phenomena, a level of simplification is necessary to isolate some underlying principles. One potential flaw in Kaplow and Shavell's analysis, however, is the automatic equating of any costs that the defendant avoids as an undesirable social cost.[252] This flaw is especially evident to obtaining legal advice regarding an area of law that determines liability based on a negligence standard.[253] There is no reason to automatically assume that it is more efficient to completely absolve the defendant of liability under a negligence standard if due care has been taken, (although it should be noted that taking due care is a costly exercise, so it is not correct to claim that the defendant has been able to cause harm costlessly).

Admittedly, it is difficult for a court to determine accurately the efficient level of care that is required.[254] Given the persistence of negligence standards, however, the availability of strict liability standards, and the efficiency theory of the common law, it is difficult to argue that there is no merit to applying a negligence standard in relevant cases.[255] Kaplow and Shavell appear to adopt a position that any transfer of costs from the defendant to society is detrimental to society.[256] This position, though, raises the question: If that is the case, why is this situation tolerated? The answer is likely to be that the socially optimal position requires parties to adopt an appropriate amount of care; the incentive to do so is greatest when this results in absolution of liability. There is the potential that a strict liability standard, even though it may be classically irrational to do so, may induce some parties not to undertake any level of activity for fear of incurring the liability. This could lead to a suboptimal level of activity taking place, an eventuality that Kaplow and Shavell do not address. The fact that a strict liability standard concentrates on the defendant whatever harm is caused highlights this problem. If there is some

[250] Allen et al., *supra* note 7, at 362.

[251] *Id*.

[252] *See* Kaplow & Shavell (1992), *supra* note 38, at 319.

[253] *Id*.

[254] POSNER, *supra* note 6, at 178.

[255] While it may be impractical to expect a court to impose a strict liability standard, legislatures have proven more than willing in the past to impose strict liability where they feel appropriate. Considering that the economic evidence relating negligence to strict liability standards has been around for a substantial amount of time, yet the fact that legislatures have seen fit to retain negligence standards suggests that there are efficiency gains in doing so. At a minimum, perhaps the costs of switching are too high. These costs, however, are unlikely to be too high so as to lead to this result, unless negligence standards are at least approximating the efficient outcome in the majority of cases.

[256] *See*, Kaplow & Shavell (1992), *supra* note 38, at 318-19.

socially desirable level of an activity (for example, driving motor vehicles) that will inevitably result in some harm (traffic accidents), then it may be more efficient to absolve the defendant of any liability if sufficient care is taken (not exceeding the speed limit) to induce the activity. In appropriate cases, the harm caused can be dispersed, rather than borne entirely by the victim, through private insurance or a victim compensation scheme if insurance is not available or not feasible. This example can be extended to most other legal situations imposing a negligence standard for liability.

Kaplow and Shavell also highlight the apparent problem of reducing the level of care under a negligence standard after obtaining legal advice.[257] This problem is framed as the defendant's ability to avoid liability entirely (as would be the case had the original intention been to take less than the required due care) while actually reducing the private costs that he incurs.[258] The implication is that this situation is particularly socially undesirable, given that private actors are able to impose a higher social cost while reducing private costs and avoiding any liability other than costs of care.[259] This implication, however, does not take into account that the level of due care has been set a particular level for what is likely to be solid reasons, especially in the case of established rules – the most likely scenario in which an attorney would advise a client with confidence of reducing his care and still avoiding liability. This would imply that the socially optimal level of care is that which the client is advised to take, as set out in the legal rule. If the analysis presented above is accepted, given that it is socially optimal not to impose any liability on the defendant when due care has been taken, taking any additional amount of care over and above due care is socially suboptimal, since this will not affect the distribution of the burden of the harm caused but it will increase costs. Even if the reduction in care taken results in a higher level of damage caused (as opposed to merely a higher probability of any damage occurring), the presumption, particularly for an established legal rule, is that the level of due care at least approximately represents the socially optimal cost-benefit trade off.[260] Any significant departure from this situation necessarily represents a departure from the preferred state of affairs, since the extra costs of additional care must outweigh the incremental benefit from the reduction in harm.[261]

Fischel's critique does not attempt to simplify the application of the attorney-client privilege.[262] Rather, his criticisms are based on the specific content of the doctrine, making these conclusions at once both more robust but also open to specific counter-criticisms.[263] In particular, Fischel's strongly asserted conclusion that the privilege should be entirely abolished is not supportable on the arguments he presents.[264]

The clear counter to Fischel's rent seeking thesis is that clients would not pay for the confidentiality that the attorney-client privilege provides if they did not value it. While Fischel attempts to address this concern by arguing that the privilege confers a private benefit yet really acts to the detriment of clients as a class (essentially becoming a variant on his argument that dishonest clients are benefiting at the expense of honest clients through the blocking of the

[257] *See id.* at 309.
[258] *Id.* at 310.
[259] *See id.* at 310-11.
[260] *See id.* at 309-11.
[261] For the purposes of this analysis, it is especially important to note that all private costs are a component of the social cost.
[262] *See generally* Fischel, *supra* note 8.
[263] *See generally id.*
[264] *See id.* at 33.

ability to signal private information), this reasoning is somewhat circular.[265] Applying the rational actor model, clients as a class should not value the privilege if it does not add anything to the service received. If clients as a class are disadvantaged by confidentiality, one would expect the price paid for legal services to be discounted. At a minimum, some form of price discrimination should be observed, with dishonest clients paying a premium over the fees charged to honest clients. Since legal engagements are often individually negotiated, it is not unreasonable to expect that price discrimination could occur, although discrimination based on whether the client is honest or dishonest is difficult to envisage. In any event, due to a lack of empirical evidence, no firm conclusion can be drawn on this matter.

The fact that Fischel raises the concern that other professionals offering equivalent services are at a competitive disadvantage indicates that clients are not paying a premium for the confidentiality that lawyers offer, weakening this hypothesis.[267] One should observe in the area of comparable services that lawyers are charging clients a premium for confidentiality. Alternatively, other professionals may compete on price by reducing rates. If there is no scope for others to reduce rates, half of the sources of Fischel's rent seeking behavior are eliminated. Lawyers will not be able to raise rates above the incremental value that clients place on confidentiality, since there are substitutable services that differ only by this confidentiality. Further, it is no problem if the legal profession exhibits monopoly behavior, being the only supplier of confidential professional advice. Since there are other substitutable services that do not differ in the substance of advice (merely in the form relevant to confidentiality), clients may switch to lower cost providers and receive the same advice.[269] As such, the deadweight loss normally associated with monopoly power does not eventuate, or is at least reduced.

The circularity in Fischel's argument should now be clear under the rational actor model: clients are being disadvantaged by the attorney-client privilege, yet are paying for this aspect of legal advice. Thisis most evident when substitutable services are available. If lawyers are charging too much for the confidentiality aspect of legal advice, which, under Fischel's analysis, should result in a discount, one should observe a shift in client preferences to receiving unprivileged advice from other professionals. Under Fischel's model, there are only three possible explanations that could resolve this apparent circularity, since clients are prepared to pay for the privilege: that clients, as a class, are behaving irrationally (in which case all the analysis emanating from the rational actor theory is questionable); that lawyers provide legal advice only when substitutable services are available to dishonest clients (an unlikely scenario);

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[265] *See id.* at 16-17.

[267] *See id.* at 19-20. This weakness is demonstrated through the following comparison: there are only two possible scenarios: either lawyers charge the same rates as other equivalent professionals or they do not. It is important to remember that the services provided are identical in all respects, except that the lawyers' communication is confidential, whereas the other professionals' is not. If the respective rates charged are the same, then the other professionals may reduce their rates to regain whatever lost competitiveness Fischel is concerned about. *See* Fischell, *supra* note 8, at 19-20. An inability to reduce rates suggests that the other professional's services are priced at marginal cost. In which case, the lawyer is not charging a premium for confidentiality, suggesting that clients do not value this aspect of the service, undermining the claim that confidentiality provides lawyers with a competitive advantage vis-à-vis other professions. The more likely scenario though, is that lawyers do charge higher fees than other professions. This suggests that clients are paying a premium for the added protection confidentiality affords. Charging different rates for differentiated services is behavior more consistent with a competitive market (for professional services) than a situation in which one actor has an unjustified competitive advantage. In either case, Fischel's assertion that confidentiality provides lawyers with a competitive advantage compared with other equivalent professionals is difficult to support. *See id.*

[269] Necessarily lower cost, because legal advice in this scenario is priced under monopoly conditions.

or that clients, as a class, do in fact value the confidentiality associated with legal advice above the apparent costs that Fischel identifies. The last explanation sits most comfortably with all descriptions of the market for legal advice; however, it significantly undermines Fischel's contention that the privilege should be abolished as the rent seeking problem has been overstated.[270]

Fischel does, though, cite specific aspects of the attorney-client privilege as it applies in the United States in support of this rent seeking contention.[271] Most of these examples are difficult to rebut by a justification for retaining these features. For example, the exception that a lawyer may reveal client confidences in the event of a fee dispute, especially in light of the restriction that the same confidence cannot be revealed if it exonerates a party facing capital charges, is difficult to justify.[273] Such features, however, do not then justify Fischel's call for an abolition of the privilege.[274] This is akin to arguing that, because the privilege is not perfectly designed or implemented, it has no place in the legal system. It would be difficult to find any aspect of any legal system that did not produce anomalous results or undesirable outcomes in some specific situation.

Rather, Fischel's arguments represent a case for modifying the privilege from its present form. The areas that Fischel identifies, particularly the exceptions for serving the legal profession's self-interest and the ability to hide what is substantively business advice, justify narrowing the privilege.[275] The exceptions identified for the legal profession, particularly that in Model Rule 1.6(b)(5), which deals with disclosures so that the attorney may defend himself, should be removed.[276] This would simplify the privilege as embodied in the Model Rules, since it reduces the number of exceptions to the general rule. Fischel highlights the concerns, originally raised by the Court of Appeals for the Second Circuit in *Meyerhofer v. Empire Fire & Marine Insurance Co.*,[277] such as defending the attorney's professional reputation, can be resolved through the introduction of a presumption in favor of the attorney.[279] The client can get around this presumption only by waiving the privilege over the communication. The alternative for the client is not to enter into a dispute with the attorney. In any event, the problems associated with such a structure for the client should be minimal; enforcing confidentiality against the world reduces the uncertainty that a client may face absent the privilege regarding the source of a requested disclosure. The exception and, by extension, the proposed presumption, affects the client only in a limited and predictable fashion. Therefore, this approach should not disproportionately affect the client's incentives to seek legal advice in an adverse fashion. In any event, such an exception does not exist in most other common law jurisdictions, even absent a presumption, such as the one proposed here, without any apparent intractable problems. Consequently, it would appear that such an exception is not especially necessary for the continued effective functioning of a competent legal profession.

The problems regarding the hiding of substantive business advice behind the veil of confidentiality may be resolved by a stronger delineation between "legal advice" and "business advice." Fischel acknowledges that restrictions currently exist in this area, particularly when

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[270] *See* Fischel, *supra* note 8, at 33.
[271] *See e.g.*, *id.* at 9-12.
[273] *Id.* at 9-10.
[274] *See id.* at 33.
[275] *See id.* at 9-10, 19-20.
[276] *See* Fischel, *supra* note 8, at 9-10.
[277] 497 F.2d 1190, 1194-95 (2d Cir. 1974).
[279] Fischel, *supra* note 8, at 11-12 (citing *Meyerhofer*, 497 F.2d at 1194-95).

substitutable services are available.[280] Fischel also correctly notes that drawing such a distinction is not without its difficulties.[281] The area of product liability provides an excellent illustration of the difficulties that arise in this regard. Manufacturers conduct safety tests on new products to determine their suitability for market. While this may be regarded as prudent business practice to maintain brand value, it is also equally plausible that the manufacturer undertakes such testing in anticipation of future litigation. Consequently, it is perfectly legitimate to argue that advice from its attorney was necessary to ensure that the testing would be, for example, in line with court expectations as to method and is sufficiently extensive for the court's expectations of adequacy. However, it is unclear whether such testing should be excluded from confidentiality protection, and if it is, then how should this be done in a sufficiently predictable manner. Much of this would depend on how the court or legislature decides to define business advice as distinct from legal advice, which is not necessary to explore here. This difficulty, however, as with the self-interest exceptions discussed earlier, does not justify the complete abolition of the privilege.

The argument that the attorney-client privilege blocks an honest client's ability to signal his status to a court is also faulty. The flaw in Fischel's logic is that he assumes that clients, regardless of whether they are honest or dishonest, will always disclose all facts to their attorneys.[282] It is difficult to see the basis for this assumption. As has been noted, both critics and supporters of the privilege generally acknowledge that the privilege encourages full disclosure, which would most likely not occur in its absence. The debate is whether this leads to the right incentives. Fischel appears to approach this matter from a different angle, however, assuming that full disclosure will occur regardless of whether the communication is protected by confidentiality.[283] Fischel argues that confidentiality blocks the ability of honest clients to signal their status, as dishonest clients are able to mimic these signals as well.[284] Therefore, honest clients are unable to signal their status credibly.[285] This position, however, is the same in the absence of confidentiality. The privilege does not dictate what types of clients have access to legal advice; it merely prevents the contents of communications from being revealed. Therefore, even without the privilege, dishonest clients can still easily mimic the signal given by honest clients (i.e., hiring an attorney). In this case, however, they will be aware that their communications are not privileged and, consequently, will be guarded in what they disclose to their lawyer. Therefore, the signaling advantage that Fischel anticipates will be present in the absence of the privilege is unlikely to eventuate, resulting only in less informed attorneys.

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[280] *Id.* at 5 n.14.

[281] *See id.* at 5, n.14.

[282] *See generally id.*

[283] *See generally* Fischel, *supra* note 8. This is also the major weakness of those arguments against the attorney-client privilege that characterize the tension as one being between protecting client confidences and allowing the court access to all available information. As these arguments are never put forward using economic reasoning, they have not been reviewed in this paper. They do, however, reflect a lack of recognition that the privilege is designed to encourage full disclosure on the part of clients to their attorneys; in the privilege's absence, clients would be expected not to disclose all information to their attorneys, thereby not producing information that may reach the court. The same amount of information is available to the court, but a reduced information set is available to the attorney. Therefore, the result from this perspective is a less informed attorney, with no change for the court. This demonstrates that the apparent tension between protecting confidences and allowing all information to reach the court is a fallacy.

[284] *Id.* at 19.

[285] *Id.*

This matter leads into the next weakness of Fischel's position, which seems to adopt a strict dichotomy as to client classification. Fischel only ever describes honest and dishonest clients, the latter being those clients with something to hide.[286] Allen et al.'s description of contingent claims, however, demonstrates that there are many situations in which clients have legitimate legal claims, but based on what appear to be unfavorable facts.[287] Fischel briefly addresses this position, regarding Allen et al.'s position as "very much overstated."[288] The counterargument states that this apparent dilemma can be resolved by the lawyer informing the client of the relevant law, including the availability of relevant affirmative defenses, which should then sufficiently inform the client to confidently reveal information that he originally believed to be unfavorable (and, therefore, worth hiding).[289] This position suffers from two weaknesses. First, it relies on the attorney correctly anticipating the client's needs and realizing that that area of law is relevant to the case at hand. Given the premise that the client would not be disclosing all information to the attorney at first instance, this assumption is very significant and one that is difficult to justify. Second, even if the attorney is able to correctly anticipate the client's needs and identify the relevant law (or cover a wider ground than would be necessary if fully informed, to try to ensure that the relevant area is covered in the advice), Fischel's position requires that the attorney explain the law to the client, who is then required to understand the explanation to a sufficient degree to realize that some additional information needs to be disclosed. Given that the entire reason that many clients seek legal advice is due to the complex nature of the law, which requires specialized skills to apply the law, this presents an additional problem. If the client is unable to make the connections between facts and the law that a lawyer should recognize as a specialist, the lawyer will remain ill-informed and the resulting advice will be of lower quality.

Fischel's signaling thesis goes much further, however, to an issue that is at the core of the adversary system and a principle that Fischel appears eager to turn on its head. This is the principle that the attorney is meant to be the representative of the client and only the client, within the bounds of the law.[290] The adversarial system is premised on the notion that the correct result will be achieved through litigation if each party presents its own case in the most favorable light. Competent attorneys, acting with full information (demonstrating the necessity in this context for the privilege) are expected to navigate a client's case through the complex web of law to argue on behalf of the client. All other things bring equal (notably the attorney's competence and client cooperation in disclosing all information), the strongest case under the contemporary law should prevail. Fischel, though, advocates that the lawyer play a different role than that of advocate.[291] Indeed, he is very disparaging of an attorney's role as paid advocate, since any representations made to the court will be discounted due to the knowledge that the attorney is a deliberately biased representative of a vested interest in the dispute.[292] Rather, Fischel argues in favor of the attorney adopting something akin to a gatekeeper role, in which the client's case is vetted, the attorney forms her own personal opinion as to the merits of the case, and these beliefs are revealed to the court upon interrogation.[293] Not only is this a radical change from the role

[286] *See id.*
[287] Allen et. al., *supra* note 7, at 362.
[288] Fischel, *supra* note 8, at 24.
[289] *Id.* at 24-25.
[290] *See id.* at 17-19.
[291] *See generally id.*
[292] *See id.* at 18.
[293] *See generally id.*

that an attorney plays in an adversarial system, but it also calls into question the necessity for the role of judge, if cases are effectively pre-judged prior to the trial stage.[295] Meetings with an attorney will effectively become ex parte hearings in which the client is self-representing. Unless the client can pass this hurdle, he is unlikely to have access to the courts to resolve the dispute. While the clear benefit from this approach would be that fewer cases would reach trial stage, it is not clear from Fischel's paper whether this radical change in the role of the attorney, with the resultant significantly increased burden placed on the (lay) client in formulating his case (without legal assistance), has been taken into account in the calculus performed in deriving this preferred model of litigation.

So far, this discussion has established that the net benefit of the attorney-client privilege is at least ambiguous. While it is argued that the weaknesses identified in the criticisms of the privilege ought to tip the analysis in favor of retention, if not in its current form then at least in a slightly modified form, an independent argument will now be presented in favor of retention.

As noted above, the adversary system is established to test each party's own biased account of the facts and evidence under the present state of the law. The account that best stands up to scrutiny under the relevant standard of proof, all else being equal, ought to coincide with that case that should prevail as the preferred outcome. Given the complex nature of the law as it now stands, there is a strong incentive for parties to engage specialists to handle their cases for them, namely attorneys. In cases dealing with the attorney-client privilege and its equivalents, both in the United States and other common law jurisdictions, this expanding complexity of the law has been identified as giving rise to the necessity for the legal profession.[298] Therefore, it may be seen that attorneys are really an extension of the parties themselves, rather than independent actors cooperating to resolve disputes.

This equivalence of the attorney and her client is reflected in various aspects of the regulation of the legal profession in the United States. For example, the Restatement of the Law Governing Lawyers ("the Restatement") section 23 reserves to the attorney, vis-à-vis the client, only positive powers (that is, the power to act while maintaining the attorney-client relationship) when required to act in accordance with the law or an order of a tribunal.[299] Aside from this power, all other powers reserved to the attorney are negative powers, such as the right to refuse to act on behalf of the client (when the attorney believes such acts to be contrary to law). All other positive powers are reserved to the client as a result of section 22, which specifically reserves some powers, such as authority to settle claims and the decision to appeal, and section 16 which, inter alia, requires an attorney to take action calculated to advance a client's lawful objectives.[300] Attribution is more explicitly dealt with in sections 26 to 28.[301] An attorney's

[295] The change described here differs from the role that lawyers currently play in weeding out weak claims. In the present situation, lawyers are able to perform this function by either refusing to represent the client entirely (advising, for example, that they have no case) or advising that a particular line of argument is ill-advised. This scenario, however, still leaves the client with options, including self-representation. Fischel's suggestion, though, takes these options away from the client, as the lawyer now makes a positive representation to the court that her client's case is weak, which is not permissible under the current system. Note that this would not result in the role of judge being eliminated entirely, since there is still strong scope under Fischel's preferred legal system for disagreement between the attorneys for both parties. The role of judge, however, will be greatly diminished, since the judge may effectively rely on attorney assessments rather than their own evaluation of the arguments presented.

[298] *See e.g.*, Whiting v. Barney, 30 N.Y. 330, 332-33 (1864); *see also e.g.*, *Baker v. Cambell*, (1983) 153 C.L.R. 52, 120 (Aust.); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. B (2000).

[299] Restatement, *supra* note 298, § 23(1).

[300] *See id.* §§ 16, 22.

[301] *See generally id.* §§ 26-28.

actions are attributed to the client, as if those actions were those of the client, both when the attorney is acting under her actual and apparent authority.[302] For many purposes, an attorney's knowledge, acquired in the course of her representing the client, is also attributed to the client as if he had personally acquired the knowledge.[303] The cumulative effect of these regulations is that, as far as the legal system is concerned, there is no difference between the identities of the client and the attorney; in other words, the attorney *is* the client.

This attribution of attorney actions to the client and, therefore, the equating of the attorney with the client is also supported in case law dealing with the attorney-client relationship. There are numerous cases whereby the attorney's actions, including incompetence, have led to adverse consequences for the party on the basis that the lawyer's actions are considered to be those of the client.[304] Of course, the client may have a cause of action against the attorney for malpractice, but such findings demonstrate the lengths that the courts will take in attributing attorney actions to the client.

An interesting application of this principle took place in the decision in *Dave v. Cavanaugh*.[305] In that case, a client sued his attorney for malpractice on the basis that his instructions were not precisely followed.[306] The client had instructed his attorney not to file an answer and special defense that would have limited the client's liability (but would have resulted in a larger insurance payout to the client's father who had been injured while on the client's premises).[307] Contrary to these instructions, the attorney lodged the filing.[308] In prevailing, the attorney argued that he had acted in his client's interests and in accordance with the broad objectives that the client had originally set out.[309] At first blush, this would appear to be inconsistent with the notion that the lawyer is meant to act for the client; however, this outcome is entirely consistent with the principles laid out in the Restatement and the notion that the attorney's actions are those of the client. If left to his own devices, the client is expected to act in his own self-interest. This expectation is reflected in many other areas of the common law,[310] such as the general lack of a duty in contract law to disclose unfavorable features of a product held out for sale (especially when the purchasing party may discover those features with a reasonable amount of effort). Given that the law is complex and intricate, however, lay clients cannot be expected to understand fully both the legal ramifications of specific decisions or how best to achieve a particular result under the law. Consequently, the attorney-client relation is structured such that the client tends to set the broad parameters of the representation, but the attorney is expected to utilize her specialist skill and expertise to achieve those objectives. By acting consistently with the client's overall objectives, including minimizing the client's personal liability, the attorney acted in accordance with his ethical and professional responsibilities to the client.[312] If acting on his own account and fully apprised of the ramifications of his actions, it

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[302] *See id.* §§ 26-27.

[303] *See id.* § 28.

[304] *See, e.g.*, Taylor v. Illinois, 484 U.S. 400 (1988); *see also, e.g.*, Boogaerts v. Bank of Bradley, 961 F.2d 765 (8th Cir. 1992); *see also* Cotto v. United States, 993 F.2d 274 (1st Cir. 1993).

[305] No. 30-35-16, 1992 Conn. Super LEXIS 717 (March 12, 1992).

[306] *Id.* at *5.

[307] *Id.*

[308] *Id.*

[309] *Id.* at *5-6.

[310] Although, this position is modified from time to time by statute.

[312] *Cavanaugh*, 1992 Conn. Super LEXIS 717, at *4-5. The specifics of this case are complicated by the fact that the attorney had in fact been retained by the client's insurance company, but was required to handle the client's affairs in this matter directly.

would be difficult to conceive of any legitimate reason why a client would desire to increase his personal liability, regardless of a specific instruction that would achieve that result.[313] While there may be the suspicion in this particular case that the desire was to increase the insurance payout to the client's father (an understandable if not altogether legitimate motive), the court chose to remain silent on that matter, preferring to characterize the instruction as an incidence of the client not appreciating the legal consequences of his actions and illustrating the need for specialist legal representation.[314]

Given this equality between the attorney and the client, it becomes apparent that requiring the attorney to testify as to her private consultations with the client is tantamount to requiring the client to reveal all information that he privately holds. In this fashion, the attorney-client privilege may be justified on the same grounds as the privilege against self-incrimination contained in the Fifth Amendment to the Constitution of the United States. Indeed, many of the criticisms leveled at the attorney-client privilege, such as that it benefits only the guilty since the innocent have nothing to hide, may also be targeted at the privilege against self-incrimination.

It should be noted, however, that this equating of the attorney-client privilege with the privilege against self-incrimination is not designed to elevate the former to the status of a constitutionally protected right. Rather, it is intended to demonstrate that, functionally at least, the existence of a privilege against self-incrimination raises particular incentives, which need to be taken into account when dealing with the attorney-client privilege. This argument should also not be used to elevate the attorney-client privilege, since this is only a functional equivalency, not an actual equivalency. It needs to be remembered that the attorney-client relationship is still a form of agency, which may change over time. A person's relationship with himself is unlikely to fundamentally change over even a significant amount of time, whereas the same cannot be assumed of any form of agency. By not attributing constitutional protection to the attorney-client privilege, the privilege should be easier to modify according to any future changes in the attorney-client relationship.

As mentioned above, the privilege against self-incrimination creates a set of incentives that need to be taken into account when considering the attorney-client privilege. Absent attorney confidentiality, many parties are, admittedly, still likely to retain legal counsel due to the complex nature of the legal system. There is likely to be a significant number of such parties that will be reluctant to divulge all information to their legal advisers for the reasons discussed throughout this paper. More importantly for this analysis, however, these problems are likely to be exacerbated by a significant number of parties choosing to self-represent. This problem arises since, assuming that disclosure of at least some undesirable information to counsel will be necessary (or at least anticipated), the party is faced with a decision to confide in a third party (the attorney), and risk later disclosure, or to self-represent and protect the information. If the client is sufficiently confident in his ability to undertake the requisite legal tasks, such that the expected costs of compulsory disclosure outweigh the expected benefits associated with retaining specialist legal counsel, the party would be expected to choose to self-represent. This choice is likely, to have a detrimental effect on the administration of justice generally and the court system specifically. First, a large number of self-representing lay parties substantially undermines the adversarial ideal, which posits that the best outcome will be achieved if each party is able to present their case in the best light under the present state of the law. Whether a party who self-represents and lacks prior experience with the law is capable of attaining this

[313] *See id.* at *5-6.
[314] *See generally id.*

standard of representation is a debatable point. This uncertainty goes not only to the substance of the arguments presented, but also to ancillary matters, such as procedural requirements and evidentiary rules, with which a lay party is unlikely to be familiar. There are also clear concerns arising in the context of Allen et al.'s contingent claim model; the advantage of the attorney-client privilege under that model is that it enables attorneys to apply legal arguments to facts that the client thought likely to be unfavorable. Such arguments, by definition, are unlikely to be presented by a self-representing party. Second, lay party unfamiliarity with the various ancillary matters is likely to increase the costs that the court incurs, as the system attempts to adapt to an increased number of parties self-representing who are unfamiliar with the rules designed to streamline the litigation process.

V. CONCLUSION

The literature presents a number of forceful arguments utilizing economic reasoning both in favor of retaining the attorney-client privilege and in favor of its abolition. The economic criticisms of the privilege tend to be misplaced, however, since they are largely based on a mischaracterization of the legal system and do not allow for competing economic forces. At best, these critiques establish a case only for modification, usually a narrowing, although such modifications can lead to the protection of particular information that may be exposed under current law, such as a dispute between the attorney and client.

An alternative characterization of the attorney-client privilege has been presented here, drawing a parallel between this privilege and the privilege against self-incrimination on functional grounds. The incentives that the privilege against self-incrimination creates ought to be a guide as to how the attorney-client privilege should be developed or modified. This model may assist in some matters that may be contentious either in the United States jurisdictions and other common law nations, such as whether the privilege ought to extend to corporations and, if so, in what context. For example, not extending the privilege would create a disincentive to incorporate, since operating through a sole trader or partnership structure should attract the privilege against self-incrimination. Such a ramification represents an important consideration in deciding which course of action to take on this issue.