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2012

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September 2011

1. Introduction

The protection of information generated and shared in the attorney-client relationship is a fundamental attribute of Anglo-American legal systems. In such systems, otherwise characterized by extensive efforts to increase the information available to courts, regulators and opposing litigants—such as liberal discovery rules and broad subpoena powers—attorneys generally cannot be compelled to disclose either what they have told to or been told by their client (attorney-client privilege) or what facts or ideas they have generated in preparation for litigation (work product doctrine¹); nor, as a result of professional ethics regulation, can they voluntarily choose or threaten to disclose such information against their clients' wishes. (We will refer to these three distinct forms of protection collectively as attorney-client confidentiality.) Protection of the confidentiality of attorney-client communications and legal efforts on behalf of a client has direct effects on the cost and welfare implications of litigation through its impact on the production and sharing of information. It also has substantial indirect effects on the economics of legal markets as a result of the role of confidentiality in the design of legal professional regulation. Protection of attorney-client confidentiality is the core traditional rationale for several distinctive and arguably non-competitive features of legal markets, including regulatory prohibitions on the corporate provision of legal services and non-lawyer ownership, financing or management of legal providers.

In this essay we review the disparate threads in the literature that address attorney-client confidentiality either directly or implicitly, providing a framework that attempts to organize this literature in terms of the costs and benefits of confidentiality.

2. The Existing Literature: Legal Advice and Strategic Revelation

The traditional professional rationale for the protection of attorney-client confidentiality outside of the criminal context (where protection can be seen as an extension of

¹ The attorney-client privilege protects only communications between attorney and client and is generally difficult to overcome unless the advice is in furtherance of a criminal or fraudulent act. The work product doctrine protects, in addition to attorney-client communications, documents or testimony obtained from others in the course of preparing for potential litigation and is generally thought easier to overcome by a showing of necessity.

constitutional rights against self-incrimination and to the effective assistance of counsel) is squarely economic in character: protection is seen as essential to preserve the incentive of clients to seek out legal advice and information about the law and to disclose information to their attorneys.² And yet despite the fact that attorney-client confidentiality is a core tenet of legal ethics and is offered as the central rationale for the distinctive regulatory structure of legal markets, the law and economics literature on attorney-client confidentiality is both thin and disconnected. Rarely is the question of attorney-client confidentiality addressed head on. We attempt here to connect the relevant literatures to a coherent analysis of confidentiality.

The existing literature has largely focused on the impact of confidentiality protections on the incentives to produce or transmit legally-relevant information in several different channels: client disclosures of known facts to an attorney, attorney provision of legal information to clients, attorney investment in research into facts and legal theories, disclosure of information to opposing parties in litigation, and transmission of information to courts or other decisionmaking bodies. From a social welfare perspective there are two basic settings: before potentially sanctionable action is taken and during litigation caused by an action. In the first setting, the question is whether confidentiality, by increasing the quantity and value of information available to actors, induces them to better align their conduct with social welfare. In the second setting the question is whether or not confidentiality improves the efficiency of legal rules by increasing the amount and/or reliability of information reaching courts and thus improving the accuracy of judicial decision-making. In both cases, the social value of confidentiality protections depends on whether more and/or more reliable information flows are generated in these different channels as a result of confidentiality and on the social value of information in these channels. (As we will discuss below, the existing literature by and large does not systematically address the other potential welfare impacts of confidentiality on the cost of litigation, the likelihood of settlement or the dynamic evolution of legal rules.) The multiple steps in the normative chain linking confidentiality with social welfare explains in part why the literature is largely disconnected: researchers have addressed different pieces of the puzzle but few have integrated them systematically and formally to address the ultimate question of the net social effect of confidentiality protection. We see three strands in the existing literature.

a. *Confidentiality of Information Shared between Attorney and Client Prior to a Contemplated Act*

The most sustained attention in the literature has been given to the question of the incentive to acquire legal advice and the social welfare impacts of legal advice. Shavell (1988) presented the first economic analysis of the provision of legal advice to parties before they

² The ABA Model Rules of Professional Conduct in its preamble, for example, states the claim that “a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.”

act and the impact of confidentiality. This analysis focuses explicitly on the information (about legal rules and sanctions) flowing from attorney to client; implicitly it also applies to information flowing from client to attorney about the client's plans and alternatives.

Shavell showed that the social welfare effect of confidentiality in a relatively simple model is not unambiguously positive. There is no effect in the case in which the motivation to acquire legal information is to comply with a legal rule and avoid the risk of an enforcement action: confidentiality has no value to those who act so as to avoid future litigation. The effect is also nil if the party would choose to violate the rule in any event (in which case the party has no incentive to pay for legal information in the first place.) In the case in which legal information is probabilistic and hence even those who seek to conform their conduct to the legal rule and reduce their risk of sanctions contemplate the potential for future litigation, the effect of confidentiality depends on the optimality of the underlying legal rule. If the rule is optimal in the sense that expected sanctions equal expected harms, then improved information about the rule will increase its capacity to produce desired behavior; confidentiality will improve information and thus social welfare. But if legal rules are sub-optimal then increased information may or may not improve behavior. Suppose, for example, that agents believe that expected sanctions are high when in fact they are low relative to expected harms. Then ignorance of the law moves deterrence in a welfare-improving direction. Similarly if the law in fact is over-detering but actors underestimate the legal consequences of their actions, social welfare is not improved by relieving them of their miscalculation. Bundy & Elhauge (1993) emphasized that because of the generality of legal rules, even when they are optimally designed and implemented courts will make both type 1 and type 2 errors, that is, deterring some desirable conduct (overdeterrence) and failing to deter some undesirable conduct (underdeterrence.) Moreover, beliefs about legal rules are heterogeneous: some will overestimate and some will underestimate the true probabilities of sanction. This makes the ambiguity of the welfare implications of legal advice obtained in contemplation of an action, and thus confidentiality of that advice, pervasive. (Bundy & Elhauge, however, argue that empirically the effect is likely to be on net positive.)

Shavell's analysis assumes that if the act of obtaining legal advice or the information disclosed to the attorney (about the range of contemplated acts, for example) is observable to third parties such as potential plaintiffs or enforcement officials, then the expected sanctions for conduct in violation of a rule increase. (This might occur if, for example, plaintiffs, regulators or prosecutors are more likely to investigate potential rule violations if they learn that a putative defendant has sought legal advice. It might also occur if a legal rule explicitly makes a defendant's state of knowledge about legal consequences an element of the rule (knowing infringement of a patent, for example, is subject to greater sanction than inadvertent infringement) or, as will often be the case, as a practical matter judges and juries are more likely to find liability and/or impose harsher penalties if they learn that a defendant

acted knowingly even if the underlying legal rule does not distinguish between knowing and inadvertent violations.) This assumption links the analysis of the impact of confidentiality about advice obtained before acting to the impact of confidentiality in the event of litigation over actions that have been taken.

b. *Confidentiality of Information Shared between Attorney and Client or Generated by an Attorney during Litigation over Completed Acts*

Kaplow & Shavell (1989, 1990) analyze the welfare impact of affording confidentiality to the information shared between attorney and client, or generated by an attorney, during litigation over a completed act. The primary private value for legal advice during litigation, they claim, is found in the ability of the attorney to make expert strategic choices about what information to disclose and what information to withhold from a tribunal. If discovery by opposing parties is otherwise imperfect--meaning that not all the information that a client discloses to an attorney or that the attorney can generate through investigation of third party sources and documents can be obtained at reasonable cost by the other side--then confidential communications between attorney and client and confidential attorney work product must weakly improve expected litigation outcomes for a litigant. Focusing on defendants, they argue that this has a negative impact on social welfare if the expected sanctions in the absence of strategic disclosure to the tribunal would deter undesirable conduct: confidential legal advice reduces expected sanctions and thus diminishes deterrence. Allen et al (1990) counter this conclusion by focusing on defendants who have potentially valid defenses, particularly contingent defenses such as contributory negligence. Such defenses, they claim, require defendants to concede what they might perceive as unfavorable facts, such as their own negligence. Defendants are likely to lie about such facts in court and mistakenly withhold from their attorney unless they believe their communication with their attorney is confidential. Increasing the flow of this information to attorneys can increase its flow to courts. While indeed reducing expected sanctions, this effect is on net welfare-promoting.

Although Kaplow & Shavell draw an important analytical distinction between information exchanged before and after actions are taken—pointing out that confidentiality has different effects depending on whether it changes primary activity decisions or not—Shavell's (1988) analysis undermines the sharpness of the distinction. As we noted above, Shavell's analysis depends on the assumption that information exchanged between attorney and client prior to the client's action will remain confidential during litigation and thus not alter expected sanctions. Thus his result on the positive effect of confidentiality on action choices when legal rules are optimal requires that during litigation parties are able to strategically and effectively withhold information about what advice was obtained or information revealed when they made the decision to act. Suppose for example that a legal rule formally or in practice subjects a knowing violation of a legal rule (such as patent infringement) to higher penalties than an inadvertent violation. Or that the relevant evidence that might be

introduced in litigation includes information known to the client at the time it took an action (such as information about the relative performance of employees who are candidates for a promotion in an employment discrimination suit.) Shavell's (1988) result on the desirability of confidentiality of advice obtained in contemplation of an action depends on the capacity to suppress in later litigation what the client was told by the attorney about the legality of an action (in the first example) or what the attorney was told by the client about the alternatives under consideration at the time an action was taken (in the second example). Kaplow & Shavell's (1989, 1990) analysis, however, would appear to treat the advice to withhold the information obtained prior to acting as litigation advice and hence would conclude that confidentiality is generally undesirable. Moreover, as Bundy & Elhauge (1993) emphasize, in practice and particularly for organizational clients that retain in-house or regular outside legal counsel, the distinction between advice given before a contemplated action is undertaken and later during any litigation generated by that action is difficult to discern. For ongoing activities—such as product design or employment practices or contractual behavior—advice given during litigation over past conduct is also effectively advice about future conduct. In addition, Bundy & Elhauge point out that like primary conduct, evidentiary conduct (compliance with discovery obligations for example) is also subject to legal rules and thus advice during litigation is effectively advice about contemplated actions potentially subject to legal sanction.

What Kaplow & Shavell's distinction does bring to the fore, however, is the recognition that confidentiality affects welfare through its impact on the behavior of multiple actors: clients, attorneys, opposing litigants, and judicial decisionmakers. This helps us to see that an integrated analysis of confidentiality requires incorporating the decisions of all of these actors.

c. Confidentiality and the Strategic Revelation of Information to Courts

Kaplow & Shavell's analysis emphasizes that the private value of expert legal advice during litigation lies in the capacity to make strategic decisions about what information to reveal and notes that the ambiguity of the impact of confidentiality on social welfare arises in some settings because it is difficult to say what the net effect of withholding bad information and revealing good information is on judicial inferences about the facts. They recognize that the welfare implications of attorney-client confidentiality depend on whether the expected sanctions in court are adjusted to take into account the withholding of unfavorable information that is likely to result from strategic legal advice, but they do not expressly model the strategic interaction between litigants and the court. There is a relatively developed literature in economics, however, that analyzes the strategic revelation of information to decisionmakers (Milgrom & Roberts 1986, Froeb & Kobayashi 1996, Shavell 1989, Shin 1998, Daughety & Reinganum 2000), albeit without express attention (with the exception of Che and Severinov 2008, discussed in Section 3, below) to the role of lawyers

and confidentiality protections. These analyses all presume that a litigant who either has information on hand when litigation is initiated or who can search for information during trial preparation can costlessly choose which information to disclose and which information to suppress. These economic models assess the extent to which competitive efforts between adversaries who can suppress information can nonetheless result in accurate inferences about the underlying facts by judges who may or may not be sophisticated Bayesian decisionmakers. Milgrom & Roberts (1986) show, for example, that even in the absence of sophisticated decisionmakers, in some settings competition between symmetrically informed agents vying for a decision in their favor can lead to full revelation of information. (These results build on Milgrom (1981) and Grossman (1981) who show that a sophisticated decisionmaker who implements a skeptical strategy of making the worst inference possible if an interested party not facing competition fails to produce favorable information can thus elicit full disclosure of the information available to the interested party. Relatedly, Shavell (1989) shows that a court can elicit full revelation from an agent by employing a sanctioning function that punishes the failure to provide evidence.) Their model is intended to capture a much wider range of decisionmaking settings than court (including market competition and political lobbying) but in application to judicial settings the information structure raises subtle questions. The fact that full information can be produced by competition between interested parties who are symmetrically informed could, on the one hand, suggest a role for expansive discovery and subpoena power. Attorney-client confidentiality destroys the symmetry discovery would otherwise produce unless all relevant information is obtained from a source other than the attorney or as a result of search at the direction of someone other than the attorney. With attorney-client privilege, then, Milgrom & Roberts basic results about the capacity of competition to induce full revelation of information to a decisionmaker has less relevance to the judicial setting.

Shin (1998) and Daughety & Reinganum (2000) relax the symmetry assumption. Shin (1998) shows that an adversarial procedure in which the parties have the capacity to suppress unfavorable information before a judge is on average more likely to reach the truth than an inquisitorial procedure in which the judge rather than the parties conducts its own investigation, even if the judge has on average a good a chance as the parties do of observing the truth. In this model, a Bayesian judge in an adversarial setting with potential reports from two observers is able to exploit asymmetries in the likelihood that the litigants have evidence of the truth to reduce the cost imposed by strategic suppression of evidence and gain an advantage, on average, over the inquisitorial judge who has only one observation to work with. Daughety & Reinganum (2000) analyze a model of strategic sequential search for evidence from a pool that is available to both sides but where parties can strategically suppress unfavorable search results. They show that asymmetries in search costs, the sampling distribution, stakes and the role of litigants (plaintiffs initiate cases) lead to systematic biases in the capacity of rule-based (non-Bayesian) courts to reach accurate decisions. Other models in this literature, varying such elements as the cost of generating

evidence and the specification of judicial inference (Froeb & Kobayashi 1996, Farmer & Pecorino 2000) reach different results about the capacity of courts to reach accurate results in light of strategic withholding of evidence by adversarial litigants.

The strategic revelation literature thus provides a rich set of results about how suppression of evidence affects judicial accuracy—the issue that animates but is not formally analyzed in the debate in the law literature on the impact of confidential legal advice. But it does so without attention to the role of discovery and attorney-client confidentiality—which the law literature recognizes are policy variables—in establishing the information structure that underpins the strategic revelation game in court. Integrating the strategic revelation literature and the policy-oriented legal advice literature are thus central tasks in evaluating the professional claim that confidentiality ultimately serves social welfare by improving the capacity of courts to reach accurate decisions and for law to more effectively guide behavior.

3. The Welfare Effects of Legal Information Production and Exchange: Analyzing Attorney-Client Confidentiality

In this concluding section we consider how the disparate threads in the law and economics literatures might be connected and what unanswered questions remain if we are to reach a better understanding of the welfare implications of attorney-client confidentiality.

Accuracy and Primary Activity Incentives

The focus of the existing literature is on the impact of confidentiality on the accuracy of judicial decisions and on primary activity incentives. As we have seen, to evaluate the welfare implications of attorney-client confidentiality as a limit to otherwise expansive discovery, however, there is a need for models that analyze the strategic interaction of multiple players: those engaged in primary activities subject to potential liability or sanction, prospective plaintiffs and prosecutors who initiate litigation, attorneys who may advise clients about primary activity decisions and litigation decisions and who may conduct investigations on behalf of clients both before and during litigation, and decisionmakers such as judges and juries. The equilibrium decision whether and how to use legal services with and without attorney-client confidentiality cannot be assessed without more careful modeling of the strategic revelation games in courts; the equilibria of strategic revelation games are informative about the policy question of whether and how much to protect attorney-client confidentiality only if the underlying information structure (who is informed and at what cost) is endogenized.

A recent paper by Che & Severinov (2008) makes some progress in this direction, as the first model to analyze the social welfare impact of lawyers and legal advice on the strategic revelation game in courts. Like the rest of the strategic revelation literature, they assume parties can costlessly suppress unfavorable information, but they also expressly consider the

incentive to hire a lawyer who has better information about the legal significance of a piece of information and hence the capacity to improve the client's decision about what to disclose and what to reveal. They show, however, that when courts respond strategically—whether they are Bayesian or not (their model is general enough to allow the sophistication of the decisionmaker's strategy to vary)—the impact of legal advice in the disclosure decision on social welfare is ultimately nil if advice is costless (the assumption we find in most of the law literature.) This is because even for non-Bayesian judges, the equilibrium inference given the different disclosure strategies of advised and unadvised litigants fully compensates. They then demonstrate that hiring a lawyer can have a positive impact on social welfare if lawyers are costly but not because they improve disclosure decisions through their expert advice but because the availability of costly advice supports a signaling equilibrium in which clients who choose not to hire a lawyer disclose more information (which in some cases turns out to be unfavorable to them). They also show that lawyers can improve results for clients by developing a reputation for withholding *favorable* evidence (which makes the equilibrium judicial inference when no information is disclosed less damaging) but this reduces rather increases social welfare. This paper thus sheds significant light on what comes from integrating the legal advice analysis with strategic revelation analysis. But what this work has not yet done is to incorporate the impact of discovery, allowing us to compare the welfare with and without confidentiality exceptions in discovery.

Other potential directions for this work would include extending the impact of the strategic revelation game with and without legal advice in litigation backwards to the incentive to obtain confidential versus discoverable legal advice prior to acting. Clearly confidentiality reduces the cost of obtaining legal advice about contemplated acts. Whether this will lead to increases in the amount of legal information sought by actors, however, depends on the consequences of remaining uninformed. If the costs of remaining uninformed outweigh the costs of becoming informed (including any increased exposure to legal sanctions) then actors will face no increased incentive to become informed by a reduction in the cost of information. Shavell (1988) investigates this question in a simple model in which actors can only choose whether to act and not how to modify actions that are too costly to completely forego. The presumption of most of the deterrence literature in law and economics, however, contemplates that primary activity decisions are informed by legal rules in the first instance in order to select an optimal action from a continuum of choices, choosing, for example, an optimal level of investment in precautionary activities. If the naïve belief about the risk of choosing actions without legal advice is sufficiently high, then there is no need for the additional incentive of confidentiality.

This issue has been largely ignored in the literature. Wickelgren (2009) presents a model that investigates the incentive of a corporate client to investigate the potential harms of a contemplated act in light of the risks of uncovering information that would be unfavorable in a future civil lawsuit, but focuses on the impact of a right to silence—prohibiting a court

from drawing negative inferences from the failure to provide evidence disproving liability—on the incentives to investigate. Wickelgren's analysis, building on insights from Shavell (1992), highlights the potential for overinvestment in the production of information relative to socially optimal levels because of the private benefit of potentially reducing expected sanctions; a right to silence, by diminishing the cost of remaining uninformed, can offset the incentive to overinvest. The model does not explicitly illuminate the question of attorney-client confidentiality, because he presumes that a defendant can costlessly suppress unfavorable information in litigation, but it makes clear that we cannot simply assume that in the absence of confidentiality there will be underinvestment in information about legal rules to inform primary activity choices.

In a strategic setting, it is also not clear that the risk of discovering unfavorable information will undercut incentives to investigate when litigation is underway. As Bundy & Elhauge (1991) note, for example, if the unfavorable information may be discovered independently by the other side, the incentive to investigate to learn unfavorable information, in order to prepare a defensive response, is enhanced. The strategic revelation models that incorporate the decision to search for information (Froeb & Kobayashi 1996, Farmer & Pecorino 2000, Daughety & Reinganum 2000) do not consider the value of discovering unfavorable information in order to prepare a defense in the event the other side discovers it as well; litigants search only in order to find favorable information. These considerations will be relevant to an analysis of the value of attorney-client confidentiality: if there is an incentive to search for unfavorable information as a defensive strategy, even at risk of increasing the likelihood that unfavorable information reaches the tribunal, protection of attorney-client confidentiality may have less effect on the total production of information than more informal analyses suggest.

None of the existing models address a further complication in the context of corporate or organizational actors, namely that the capacity to conceal information produced by an attorney creates an incentive to channel investigations through lawyers rather than through other agents. In anticipation of litigation (which is a routine event for most corporations of significant size) there is a choice about who will conduct investigations or collect information: the client or the attorney. In many cases, these investigations will be optimally conducted prior to acting—before introducing a new consumer product or establishing a branch office in another tax jurisdiction or completing a merger. If these investigations are conducted by the client (or other agents such as accountants or consultants), the results will be discoverable if litigation ensues; if conducted by the attorney, or at the direction of the attorney, they will (largely³) be protected. It seems reasonable to suppose that much of this

³ The question will be whether early investigations were in fact conducted in anticipation of litigation, at the direction of counsel, and not in the ordinary course of business. In U.S. federal courts, if the testimony or documents contain facts only—and not the opinion of counsel—they may also be discoverable based on a showing of need by the other side. But even factual documents will be protected from discovery if producing them may

information—the safety of a new product, the extent of foreign tax burdens, the impact of a merger on sales and profits, for example—would be conducted whether or not at the direction of counsel and hence work-product immunity only reduces and does not increase the amount of legally-relevant information produced. Moreover, on the advice of counsel, many organizations may adopt document production, management and retention practices that reduce the overall quantity of documentation available—avoiding the use of email or engaging in regular purges of email, for example. This may have an impact not only on the availability of information in litigation but also on the efficiency of organization and information flows generally and the quality of decisionmaking both with respect to profits and with respect to harms caused to others. The implications of the pervasiveness of legal advice in modern corporations with in-house counsel for the welfare effects of attorney-client confidentiality has not yet been explored in the literature.

We now turn to additional welfare implications of attorney-client confidentiality that have largely been ignored in the literature, going beyond the analysis of the accuracy of judicial decisionmaking and primary activity choices.

Litigation Costs

Although some in the literature have taken account of the fact that legal information—whether legal advice or factual investigation—is costly to obtain (Shavell 1988, Froeb & Kobayashi 1996, Farmer & Pecorino 2000, Che & Severinov 2008) the impact of attorney-client confidentiality on the overall costs of litigation has not been explored. But confidentiality generates both direct and indirect costs that need to be counterbalanced against the goals of accuracy and incentives for efficient primary activity choices.

Attorney-client confidentiality directly increases the cost of litigation by requiring opposing parties to duplicate efforts in investigation and legal analysis. In general this increases the overall costs of the legal system. There may be some benefits from costly advice: Posner (1999), for example, argues that requiring duplicative effort could reduce frivolous litigation by requiring plaintiffs to incur costs to frame complaints that adequately allege the facts that support the action. Che & Severinov (2008) assume litigants can use litigation expenditures to signal the quality of a case or the credibility of evidentiary claims but do not do a comparative analysis to assess whether any increased cost due to duplicative efforts in litigation is justified by any welfare gains.

Beyond duplication, however, attorney-client confidentiality may be a significant source of the rapidly increasing costs of discovery in Anglo-American legal systems. Before documents are released in discovery, they are routinely screened to determine whether they are protected by attorney-client privilege or work product immunity. This requires

reveal “the mental impressions, conclusions, opinions or legal theories of a party’s attorney or other representative concerning the litigation.” Fed. R. Civ. Proc. 26(b)(3)(B).

significant and costly legal input. Moreover, disputes about what is and is not covered by attorney-client protections are a rich source of costly discovery disputes and delays. The benefits of these protections—which as we have seen may be ambiguous in terms of judicial accuracy and efficient activity incentives—need to be weighed against these potentially large costs.

Indirectly too attorney-client confidentiality can increase legal costs, in both transactions and litigation. One channel through which this can occur is the distortion in information flows that may be caused in an organization in order to protect confidentiality in the event of litigation. This could include document avoidance or destruction practices and the routing of investigations and analyses through legal departments and costly outside legal providers.

A second indirect and potentially very important channel through which attorney-client confidentiality may increase costs is through the distortion confidentiality creates in the markets for legal goods and services. Because lawyers can offer secrecy benefits to their clients that other potentially competing providers cannot offer, the demand for legal services is enhanced and competition is reduced. (Fischel 1998) More subtly, however, attorney-client confidentiality is a key plank in the justifications offered for the extensive regulation of legal markets by lawyers themselves, regulation that severely limits the potential for competition and cost-reducing innovation in legal markets (Hadfield 2008). Concerns about protecting attorney-client confidentiality motivate in part the American Bar Association's ongoing prohibition of multi-disciplinary practices and non-lawyer ownership or investment in legal providers.

Attorney-client confidentiality may also affect litigation costs by influencing the propensity for and timing of settlement. The effect here is via the impact on the scope of discovery. As the law and economics literature on discovery (Shavell 1989, Cooter & Rubinfeld 1994, Hay 1994, 1995) demonstrates, the exchange of information prior to trial influences the likelihood of trial. By constricting discovery, attorney-client confidentiality thus may reduce the capacity for pre-trial beliefs to converge and thus for settlement negotiations to succeed. Hay (1995) explicitly considers the impact that attorney-client confidentiality—specifically confidentiality of the level of effort expended by attorneys in case preparation—may have on the persistence of asymmetric beliefs and hence the failure of settlement.

Dynamic Quality of Law

Missing entirely from the literature is analysis of the impact of attorney-client confidentiality and information production incentives in litigation on the evolution of legal rules. In all legal systems, but most obviously in common law systems, the evolution of legal rules and their

dynamic quality (as distinct from their static accuracy and efficiency in a given case) depends significantly on the information ultimately supplied to courts by litigants. Litigant presentations are the only source of material available to common law courts in the process of interpreting and adapting rules to changes in the environment. This information accumulates (depending on the institutional attributes, such as opinion writing and publication practices, of the legal regime) as what Hadfield (2008) calls legal human capital. Legal human capital in turn determines judicial error and expertise and thus underpins assumptions about judicial competence, particularly the capacity for judicial inference in the face of incomplete and potentially biased evidence. Moreover, as Hadfield (2007) demonstrates, the incentives of parties to expend resources in collecting and presenting facts and legal analysis depend in part on the rate of judicial error (understood as the likelihood of reaching a socially optimal decision) in interpreting and applying evidence and argument. Nor are these incentives obvious: litigants with information that promotes socially optimal interpretation and adaptation of the law have reduced incentives to invest if little legal human capital has accumulated and judges are thus highly error-prone. Litigants with information that undermines socially optimal decisionmaking—who seek to introduce what is effectively disinformation—are however encouraged by low rates of judicial expertise. The quantity and composition of the information reaching and accumulating in legal systems, should be an element of the economic analysis of attorney-client confidentiality.

The dynamic quality of law also depends on the level of complexity in law. If the information accumulated in litigation is excessive, law may become excessively complex. Complexity in law drives legal costs both directly in terms of the quantity of information and analysis necessary to implement complex rules and indirectly in terms of the potential for the market for legal services to be competitive (Hadfield 2000). Any evaluation of the impact of attorney-client confidentiality on the overall quantity over information produced to lawyers and ultimately to courts, then, must take into account not merely the value of increased information in the adjudication of a given case but also the external effects on the cost and complexity of the legal regime as a whole.

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