DESIGNING PRIVILEGE FOR THE TAX PROFESSION: COMPARING I.R.C. § 7525 WITH NEW ZEALAND'S NON-DISCLOSURE RIGHT

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I. INTRODUCTION

In 1998, the United States extended the attorney-client privilege in tax matters beyond the legal profession.[1] The extension occurred after extensive lobbying on the part of the accounting profession and resistance from the legal profession.[2] The end result of this process was the inclusion of section 7525 into the Internal Revenue Code through the passage of the IRS Restructuring and Reform Act of 1998, providing for a tax adviser's privilege.[3]

Seven years later, New Zealand enacted legislation to the same end.[4] This statutory extension of legal professional privilege was the product of several years of debate.[5] During this time, the New Zealand government commissioned a number of inquiries considering the merits of an extension and the form such legislation should take.[6] Eventually, the Taxation Act was passed, creating a non-disclosure right by incorporating sections 20B to 20G into the Tax Administration Act 1994.[7]

While the basic premise of both of these statutory measures is the same – that there is a notional extension of the privilege afforded to tax advice from legal practitioners to advice from non-legally qualified members of the tax profession – the means used are very different.[8] In essence, the United States uses the common law attorney-client privilege as the basis from which the

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1. Alyson Petroni, *Unpacking the Accountant-Client Privilege Under IRC Section 7525*, 18 VA. TAX REV. 843, 844 (1999) (discussing how IRC Section 7525 extended common law protections to include privileged information between a taxpayer and "any federally authorized tax practitioner").

2. *Id.* at 847-50.

3. 26 U.S.C.A. § 7525 (West 2004).

4. Tax Administration Act 1994 (NZ).

5. Andrew Maples, *The Non-Disclosure Right in New Zealand- Lessons for Australia?*, 1 JOURNAL OF THE AUSTRALASIAN LAW TEACHERS ASSOC. 351, 351 (2008).

6. *See* New Zealand Law Commission *Evidence* (NZLC R55, 1999) at 143, http://www.lawcom.govt.nz/project/evidence-law-privilege?quicktabs_23=report#node-490 (discussing a proposed extension of the privilege); New Zealand Law Commission *Tax and Privilege: Legal Professional Privilege and the Commissioner of Inland Revenue's Powers to Obtain Information* (NZLC R67, 2000) at vii, http://www.lawcom.govt.nz/ project/tax-and-privilege?quicktabs_23=report#node-464 (addressing whether there should be a modification of the rules protecting disclosure communications between lawyers and their clients).

7. Taxation Act 2005 (NZ).

8. *Compare* United States v. BDO Seidman, 337 F.3d 802, 810 (7th Cir. 2003) (holding that because the scope of the tax practitioner-client privilege depends on the common law protections of confidential attorney-client communications, courts must look to common law when interpreting § 7525), *with* Maples, *supra* note 5 (explaining that in New Zealand the non-disclosure process is strictly prescribed by the Tax Administration Act 1994).

tax adviser's privilege operates.[9] In contrast, the New Zealand statute creates a protection completely distinct from common law legal professional privilege.[10] As a result of these different approaches, the New Zealand statute represents an alternative legislative model to affect the tax adviser's privilege in the United States.

The purpose of this paper is to critically analyze the advantages and disadvantages of the two models. In addition to providing relevant considerations for both the United States and New Zealand in terms of future reform, other common law jurisdictions contemplating extending the privilege to the wider tax profession have two ready alternatives from which they may base their own legislation.[11]

The remainder of this paper is set out as follows: Section II covers the position in the United States. The section begins with a brief overview of the attorney-client privilege, then describes how this doctrine is applied to the tax profession, and finally discusses the content of the tax adviser's privilege in the Internal Revenue Code (IRC). Section III follows a similar structure in relation to New Zealand's non-disclosure right, discussing legal professional privilege generally, describing how the doctrine applies to the wider tax profession and analyzing the statutory non-disclosure right. Section IV provides a comparison of these two statutory rules, critically analyzing the differences to identify strengths and weaknesses between the models adopted. Final comments are made regarding the level of compatibility between these models and how appropriate each would be for other common law jurisdictions considering extending privilege to the wider tax profession.

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9. *See BDO Seidman*, 337 F.3d at 810 (reasoning that courts must look to common law when interpreting § 7525 because the scope of the tax practitioner-client privilege depends on the common law protections of confidential attorney-client communications). Notice that § 7525 contains some important modifications creating significant departures from the common law privilege. *See* John Gergacz, *Using the Attorney-Client Privilege as a Guide for Interpreting I.R.C. § 7525*, 6 HOUS. BUS. & TAX L.J. 241, 248-50 (2006).

10. *Blakeley v Comm'r of Inland Revenue* [2008] 23 NZTC 21,865 at 21,869; *see also* Keith Kendall, *Prospects For A Tax Advisors' Privilege In Australia*, 1 JOURNAL OF THE AUSTRALASIAN TAX TEACHERS ASSOC. 28, 46, 63 (2005); Andrew Maples & Michael Blissenden, *The Proposed Client-Accountant Tax Privilege in Australia: How does it sit with the Common Law Doctrine of Legal Professional Privilege?*, 39 AUSTL. TAX REV. 20, 31-32 (2010).

11. Australian Law Reform Commission *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (ALRC 107, 2008) at 26.

II. UNITED STATES: TAX ADVISER'S PRIVILEGE

A. *Attorney-Client Privilege: An Overview*

The attorney-client privilege is well recognized as one of the oldest privileges in the law of the United States.[12] There are many definitions of the privilege within the United States,[13] largely from the result of codification efforts at the federal and state levels.[14] Notwithstanding the variety of specific definitions on offer,[15] there is substantial uniformity in the privilege's basic tenets.[16] One of the most useful definitions was put forward by the Chief Justice of the Supreme Court to Congress in 1972:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.[17]

There are four central elements underpinning the attorney-client privilege: (1) a communication (2) between privileged persons (3)

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12. Douglas Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN ST. L. REV. 381, 385 (2005); Richard Lavoie, *Making a List and Checking it Twice: Must Tax Attorneys Divulge Who's Naughty and Nice?*, 38 U.C. DAVIS L. REV. 141, 145 (2004).

13. EDNA S. EPSTEIN, ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 3 (5th ed. 2007); *See* Paul Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality should be Abolished*, 47 DUKE L.J. 853, 853 n.1 (1998) (containing a list of state level definitions put forward in both statute and case law).

14. Richmond, *supra* note 12, at 385. Note that this codification process at the Federal level has had something of a chequered history, with a good deal of controversy regarding the need for codification generally and the specifics that any resulting legislation would contain. *See* Kenneth Broun, *Giving Codification a Second Chance – Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 769 (2002); Timothy Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 60 (2002).

15. Glynn, *supra* note 14, at 113 ("[T]here is enormous conflict over what the basic elements actually require."); *see also id.* at 93-121 (noting the differences between state laws).

16. *Id.* at 93 ("[T]here is much consensus . . . with regard to attorney-client privilege.").

17. Rule 503(b), *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 235-40 (proposed Nov. 20, 1972), *reprinted in* EPSTEIN, *supra* note 13, at 3.

made in confidence (4) for the purpose of seeking or obtaining legal assistance.[18]

The common law in the United States recognizes attorney-client privilege in very similar terms. The leading privilege test states:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[19]

The substance of the attorney-client privilege in the United States is similar to legal professional privilege in other common law jurisdictions.[20] This similarity extends to many application specifics. For instance, the client is the holder of the privilege,[21] and the privilege must be asserted to apply.[22] Assertion is required on a document by document basis.[23] While the client needs to formally assert the privilege, the lawyer may do so on

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18. Restatement (Third) of the Law Governing Lawyers § 69 (2000). A "communication" is defined as "any expression through which a privileged person . . . undertakes to convey information to another privileged person and any document or other record revealing such expression." *Id.* at § 69. "Privileged persons" include both the lawyer and client. *Id.* at § 70. A communication is "in confidence" if the communicating person reasonably believes that no one will learn the contents of the communication except another person to whom the privilege applies. *Id.* at § 71. A communication is made "for the purposes of obtaining or providing legal assistance" if it is made to assist a person who is a lawyer or who the client reasonably believes is a lawyer and to whom the client came to for legal assistance. *Id.* at § 72.

19. United States v. United Shoe Machine Corp., 89 F. Supp. 357, 358-359 (D. Mass. 1950).

20. *See infra* Part III.A.

21. Hunt v. Blackburn, 128 U.S. 464, 470 (1888); OXY Res. Cal. LLC v. Superior Court, 115 Cal. App. 4th 874, 901 (2004).

22. Wesp v. Everson, 33 P.3d 191, 197 (Colo. 2001).

23. *Id.*

the client's behalf–even in circumstances that would prevent the client from doing so directly, such as the client's absence.[24]

As the holder of the privilege, the client may waive privilege in respect to particular communications.[25] This may be done either voluntarily or impliedly.[26] Inadvertent disclosures or conduct inconsistent with maintaining confidentiality may result in waiver of the privilege.[27] Privilege that has not been waived survives the death of the client.[28]

There are a number of substantive exceptions to the attorney-client privilege, one of which is the crime-fraud exception.[29] This exception is similar to the principle espoused via dictum in *Cox v. Railton,*[30] which applies elsewhere in the common law world.[31] In the United States, this principle was established by the Supreme Court in *Clark v. United States.*[32] There has been some divergence in subsequent judicial development of this exception in the various courts.[33] For instance, there is some inconsistency as to whether intent is an element that must be proved for the exception to apply.[34] In jurisdictions where intent is not required, the courts tend to require only that a crime or fraud be shown and a nexus established between that crime or fraud and the purported privileged communication.[35]

B. *Attorney-Client Privilege and the Tax Profession*

The International Revenue Service (IRS) has wide ranging powers of access and investigation in order to enable it to enforce

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24. *In re* Grand Jury Subpoena Duces Tecum, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975).

25. *See* United States v. Mass. Inst. of Tech., 129 F.3d 681, 684 (1st Cir. 1997).

26. *Id.*

27. Richard Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1633 (1986).

28. Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998).

29. *Id.* at 409.

30. [1884] 14 Q.B.D. 153 (NZ). The rule arises when a client "either conspire[s] with his [lawyer] or deceives him" and fails to admit to his criminal purpose. *Id.* For example, "If A., proposing to forge a will, says to B., a [lawyer], 'I am C., and I want you to make my will for me,' he . . . commits a gross fraud upon [the lawyer]." *Id.* at 168-69.

31. JONATHAN AUBURN, LEGAL PROFESSIONAL PRIVILEGE: LAW AND THEORY 152 (2000).

32. 289 U.S. 1, 15 (1933). For later applications, see United States v. Zolin, 491 U.S. 554, 556 (1989); *In re* Sealed Case, 107 F.3d 46, 49 (D.C. Cir. 1997); *In re* Grand Jury Proceedings, 417 F.3d 18 (1st Cir. 2005), *cert. denied*, 546 U.S. 1088 (2006).

33. Glynn, *supra* note 14, at 113-15.

34. *Id.* at 114-15.

35. *Id.*

revenue laws.[36] Historically, courts have tended to interpret these powers liberally, with the effect of increasing the IRS's authority.[37] The primary investigatory authority is provided in International Revenue Code (IRC) section 7602, which is expressed in very broad terms.[38] For example, the power of summons in section 7602(a)(2) may be exercised against any person in possession of the documents sought, which may include, but is not limited to, professional advisers.[39]

Courts have held that these powers are subject to the common law attorney-client privilege.[40] Tax advice from a lawyer is now generally accepted as coming within the scope of the provision of legal services; therefore, the privilege shields the advice from compulsory disclosure.[41] The United States, at the federal level, does not recognize a common-law accountant-client privilege.[42] The Supreme Court announced this position in *Couch v. United States.*[43]

Couch questioned whether the IRS could access a taxpayer's records deposited with an external accountant for the purpose of preparing the taxpayer's income tax returns, as had been the taxpayer's usual practice for many years prior to the IRS summons.[44] The taxpayer in question resisted the summons primarily by asserting her Fifth Amendment right against self-incrimination.[45] The accountant surrendered the records to the taxpayer's attorney after being issued with the summons.[46] A subsidiary argument in favor of maintaining privacy that the taxpayer put forward was based around the confidential nature of the accountant-client relationship.[47]

The majority in *Couch* rejected the taxpayer's argument of accountant-client privilege on three grounds.[48] First, no such privilege had previously been recognized at the federal level and

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36. United States v. Cortese, 614 F.2d 914, 920 (3d Cir. 1980).

37. James McNally, *Tax Accrual Workpapers: The Case for an Accountant-Client Privilege*, 21 HOUS. L. REV. 999, 1002-03 (1984).

38. United States v. Joyce, 498 F.2d 592, 594 (7th Cir. 1974).

39. Badger Meter Mfg. Co. v. Brennan, 216 F. Supp. 426, 433 (E.D. Wis. 1962).

40. Upjohn Co. v. United States, 449 U.S. 383, 398 (1981); United States v. Euge, 444 U.S. 707, 714-15 (1980).

41. Martin McMahon & Ira Shepard, *Privilege and the Work Product Doctrine in Tax Cases*, 58 TAX LAW. 405, 407 (2004).

42. Couch v. United States, 409 U.S. 322, 335 (1973).

43. *Id.*

44. *Id.* at 324.

45. *Id.*

46. *Id.* at 325.

47. Couch v. United States, 409 U.S. 322, 335 (1973).

48. *Id.* at 335-36.

none of the state privileges had been applied to federal law.[49] Second, there was no justification for such a privilege where the sought after records were involved in a criminal investigation or prosecution.[50] Third, no expectation of privacy around the records could be claimed since the records had been disclosed for the purpose of the accountant to prepare the taxpayer's income tax return, which would involve the disclosure of much of the information contained in those records.[51] In particular, the decision of what to disclose was largely at the accountant's discretion, rather than that of the taxpayer.[52] This is related to the principle that the attorney-client privilege does not extend to the preparation of tax returns, even when such preparation is performed by an attorney, since there was no intention to maintain confidentiality.[53]

However, some cases have arrived at the same conclusion on the basis that this is more properly regarded as accounting rather than legal work.[54] On this last point, Justice Douglas, in his dissent, indicated that the accountant-client relationship is such that the accountant owes the client certain fiduciary obligations, including "not to use the records given him for any purpose other than completing the returns."[55] His Honor

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49. *Id.* at 335. The state accountant-client privilege is not the topic of this article. The current focus is on federal law, where the majority of income tax is levied in the United States and also due to variations in language used between the state privileges. For a discussion of a sample of state-level privileges, see Robert Tepper, *New Mexico's Accountant-Client Privilege*, 37 N.M. L. REV. 387 (2007); Martin Bartel, *Pennsylvania's Accountant-Client Privilege: An Asset with Liabilities*, 30 DUQ. L. REV. 613 (1992); David Canning, *Privileged Communications in Ohio and What's New on the Horizon: Ohio House Bill 52 Accountant-Client Privilege*, 31 AKRON L. REV. 505 (1998). As of 1998, some 26 states as well as Puerto Rico had an accountant-client privilege on the statute books. Thomas Molony, *Is the Supreme Court Ready to Recognize Another Privilege? An Examination of the Accountant-Client Privilege in the Aftermath of* Jaffee v. Redmond, 55 WASH. & LEE L. REV. 247, 282-283 (1998).

50. *Couch*, 409 U.S. at 329.

51. *Id.* at 333-34.

52. *Id.* at 335. The majority also made the ancillary point that if an accountant assists in the preparation of a false return, they may be liable to criminal sanctions under IRC § 7206(2). *Id.* As such, the accountant requires the right to disclose information provided by the client to defend such charges. *Id.* This ground for denying the privilege to accountants is flawed, though, since lawyers may disclose information obtained from a client under Rule 1.6 of the Model Rules of Professional Conduct when involved in a dispute with the client relating to the provision of their legal services. Daniel Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 9-12 (1998). As such, the Supreme Court was somewhat inconsistent in its reasoning.

53. United States v. Lawless, 709 F.2d 485, 488 (7th Cir. 1983); McMahon & Shepard, *supra* note 41, at 417.

54. McMahon & Shepard, *supra* note 41, at 418-19; *see In re* Grand Jury Investigation, 842 F.2d 1223, 1225 (11th Cir. 1987).

55. Couch v. United States, 409 U.S. 611, 622 (1973) (Douglas, J., dissenting).

concluded that, in such circumstances, the taxpayer could not be regarded as having placed those records in the public domain.[56]

It is not necessary to reconcile the majority's reasoning with Justice Douglas' dissent, to the extent that the majority's logic seems more consistent with the general principle that the attorney-client privilege is waived where the client has disclosed the substance of the advice.[57] In any event, the Supreme Court has since reaffirmed the *Couch* conclusion that no federal accountant-client privilege exists at common law.[58]

C. *The Tax Adviser's Privilege*

As noted, the accounting profession became increasingly vocal during the 1990s in advocating for tax advice from its members to be afforded protection similar to that available for tax advice from attorneys.[59] The culmination of this process was the inclusion of section 7525 into the IRC, which provides for a tax adviser's privilege.[60]

The content of section 7525 has been documented extensively elsewhere.[61] As such, this section provides only a brief overview sufficient for the purposes of comparison with the New Zealand legislation.

In brief, section 7525 provides that a communication constituting tax advice between a taxpayer and a federally authorized tax practitioner (FATP) is to be privileged to the extent that the communication would have been privileged had it been made by an attorney.[62] This general rule is then limited to non-criminal tax matters before the IRS[63] and non-criminal tax proceedings in a Federal court involving the United States as the

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56. *Id.*

57. Long-Term Capital Holdings v. United States, No. 3:01 CV 1290 (JBA), 2002 WL 31934139, at *1 (D. Conn. Oct. 30, 2002).

58. United States v. Arthur Young & Co., 465 U.S. 805, 817 (1984).

59. Petroni, *supra* note 1, at 847-50.

60. *See id.* at 847.

61. *See generally id.*; *see also* Louis Lobenhofer, *The New Tax Practitioner Privilege: Limited Privilege and Significant Disruption*, 26 OHIO N.U. L. REV. 243 (2000); Michael Hindelang, *The Disappearing Tax-Advisor Privilege*, 49 WAYNE L. REV. 861, 864-65 (2003); Michael Wilson, *Careful What You Wish For: The Tax Practitioner-Client Privilege Established by the Internal Revenue Service Restructuring and Reform Act of 1998*, 51 FLA. L. REV. 319, 325 (1999); Therese LeBlanc, *Accountant-Client Privilege: The Effect of the IRS Restructuring and Reform Act of 1998*, 67 UMKC L. REV. 583, 585-86 (1999); Phillip W. Gillet, Jr., *The Federal Tax Practitioner-Client Privilege (IRC Section 7525): A Shield to Cloak Confidential Communication or a Dagger for Both the Practitioner and the Client?*, 70 UMKC L. REV. 129, 130 (2001).

62. I.R.C. § 7525(a)(1) (2006).

63. *Id.* § 7525(a)(2)(A).

counterparty.[64] Written communications that would otherwise qualify for the tax adviser's privilege are excluded if those communications were in connection with the promotion of the direct or indirect participation of any person in a tax shelter.[65] This particular structure in which the general rule is first limited and then other communications are excluded is important in determining the burden of proof for the relevant elements of the tax adviser's privilege.[66] Specifically, the taxpayer has the burden of establishing that the privilege applies to a given communication, including that the limitations in section 7525(a)(2) do not apply, but the counterparty, which is either the IRS or the United States, must prove that the communication falls within the tax shelter exclusion if the privilege otherwise applies.[67]

A number of elements are defined for the purposes of the tax adviser's privilege.[68] Of interest for this discussion is that FATP is defined as any individual authorized under Federal law to practice before the IRS.[69] Such practitioners are identified in Circular 230.[70] Those practitioners include attorneys, certified public accountants, enrolled agents, enrolled actuaries and enrolled retirement plan agents.[71]

There is a second definition of interest as that of tax advice.[72] Aside from activities within the scope of a FATP's authority to practice, no legislative guidance is provided as to the content of this notion. The definition does highlight the term "advice," reinforcing the common law notion that clerical matters, such as tax return preparation, are not included.[73]

Senator Connie Mack, who sponsored the bill introducing section 7525, explained the purpose behind the tax adviser's privilege as affording "uniform confidentiality protection to taxpayers for the advice they receive from federally authorized tax practitioners in noncriminal matters before the IRS and

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64. *Id.* § 7525(a)(2)(B).

65. *Id.* § 7525(b).

66. *See* United States v. BDO Seidman, LLP, 492 F.3d 806, 822 (7th Cir. 2007).

67. *Id.*

68. I.R.C. § 7525(a)(3).

69. *Id.* § 7525(a)(3)(A).

70. Petroni, *supra* note 1, at 861.

71. Department of the Treasury, *Treasury Department Circular No. 230 (Rev 4-2008),* Sept. 26, 2007, at 5-6. Note that enrolled actuaries and enrolled retirement plan agents have their authority restricted to certain elements of the IRC. *Id.* At 5-6. Provision is also made for some other limited categories, such as temporary registrants; *id.* at 8 and self-representing parties; *id.* at 14.

72. I.R.C. § 7525(a)(3)(B).

73. LeBlanc, *supra* note 61, at 595-96.

during subsequent court proceedings."[74] This extension would eliminate the then existing "unfair penalty imposed on taxpayers based on their choice of tax advisor."[75]

The structure adopted presents several problems. The first of these is the vagueness with which tax advice is defined.[76] This leads to uncertainty as to when the privilege applies, with the likely result that taxpayers will not be inclined to disclose all relevant material to their FATP due to the doubt that some, or all, such information may be compulsorily revealed.[77] It is apparent from the language used in section 7525(a)(3)(B) that all communications within a FATP's authority to practice will fall within the notion of protected tax advice.[78] The most obvious source of such uncertainty is the point at which privileged tax advice becomes unprotected business advice.[79] Tax advice that is business advice is not protected under the general rule in section 7525(a).[80] This rule derives from the incorporation of common law privilege in the general rule as well as the aspect of the attorney-client privilege that precludes business advice from a lawyer from protection.[81]

The peculiar problem for tax advisers or, more specifically, FATPs, is that the line between tax advice and business advice is even blurrier than it is between legal advice and business advice. Making this task more difficult for the taxpayer, who must prove that a communication is protected, is the fact that courts have

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74. 144 CONG. REC. S7643, S7667 (daily ed. July 8, 1998) (statement of Sen. Mack).

75. *Id.*

76. Petroni, *supra* note 1, at 861.

77. *Id.*; Lobenhofer, *supra* note 61, at 257; Corby Brooks, *A Double-Edged Sword Cuts Both Ways: How Clients of Dual Capacity Legal Practitioners Often Lose Their Evidentiary Privileges*, 35 TEX. TECH L. REV. 1069, 1097 (2004); *see also* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) (stating that, in the context of the attorney-client privilege, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all").

78. I.R.C. § 7525(a)(3)(B). Excluding tax advice that is also business advice and within a FATP's authority to practice is not inconsistent with the language of section 7525, though. *Id.* § 7525. Under the general rule in section 7525(a), a communication that is tax advice is protected only if it would be privileged under the common law if the communication was made by an attorney. Since business advice from an attorney has never been privileged, excluding business advice from the tax adviser's privilege is consistent with the statutory language. In other words, the definition in section 7525(a)(3)(B) is wider, and therefore it covers more communications than those protected under section 7525(a). *Id.*

79. Brooks, *supra* note 77, at 1097.

80. I.R.C. § 7525(a).

81. *See* Petroni, *supra* note 1, at 861; Brooks, *supra* note 77, at 1097-98.

exhibited a tendency to begin an inquiry from a default premise that advice from a non-lawyer FATP is business advice.[82] This comes about due to the broader nature of services provided by accounting firms compared with law firms and the greater likelihood that a particular document will contain unprivileged communications.[83] As such, the purpose behind implementing section 7525 is undermined, since taxpayers may not be inclined to reveal some information to their FATP that they would be prepared to disclose to an attorney under certain protection of the attorney-client privilege.[84]

The tax shelter exception also represents a significant area of uncertainty, with the same implications as for the uncertainty emanating from the definition of tax advice.[85] The uncertainty here arises, in part, from the derivative definition of "tax shelter," which takes its meaning from IRC section 6662(d)(2)(C)(ii).[86] This definition provides that a tax shelter includes transactions where "a significant purpose . . . is the avoidance or evasion of Federal income tax."[87] There is no guidance as to what is meant by the qualifier "significant purpose."[88] While the legislative history indicates that routine tax advice is unlikely to constitute a tax shelter for these purposes,[89] this is not immediately apparent on the face of the legislation. Senator Mack, sponsor of the bill introducing section 7525, expressed these very concerns regarding this "11th hour" insertion:

> The [tax shelter exception] amendment was meant to target written promotional and solicitation materials used by the peddlers of corporate tax shelters, but appears to me to be vague and unfortunately employs an ambiguous definition of tax shelter that some argue could be read to include all tax planning.[90]

Congress further added to this uncertainty by not excluding all communications associated with tax shelters, but only those

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82. Brooks, *supra* note 77, at 1097.
83. Lobenhofer, *supra* note 61, at 257-58.
84. Brooks, *supra* note 77, at 1097-98.
85. Petroni, *supra* note 1, at 862-64; Lobenhofer, *supra* note 45, at 259.
86. *See* I.R.C. § 7525(a)(3)(B) (2006).
87. I.R.C. § 6662(d)(2)(C)(ii) (2006).
88. *Id.*
89. Lobenhofer, *supra* note 61, at 259.
90. 144 CONG. REC. S7643, 7667 (daily ed. July 8, 1998) (statement of Sen. Mack).

that promote the participation in a tax shelter.[91] The Federal Court of Appeals for the Seventh Circuit was recently required to consider the tax shelter definition and, more specifically, what constitutes the "promotion" of a tax shelter.[92] In rejecting the taxpayer's argument that the tax shelter exception applies only to pre-packaged one-size-fits-all schemes, the Court stated:

> Nothing in [the section 6662(d)(2)(C)(ii)] definition limits tax shelters to cookie-cutter products peddled by shady practitioners or distinguishes tax shelters from individualized tax advice. Instead, the language is broad and encompasses any plan or arrangement whose significant purpose is to avoid or evade federal taxes.[93]

The "promotion" of such tax shelters was held to mean encouraging participation, rather than the provision of passive information pertaining to the tax shelter:

> Promotion . . . limits the exception to written communications encouraging participation in a tax shelter, rather than documents that merely inform a company about such schemes, assess such plans in a neutral fashion, or evaluate the soft spots in tax shelters that a company has used in the past.[94]

The Rhode Island District Court also endorsed the principle in *United States v. Textron Inc. and Subsidiaries*[95] that promotion referred to proposed future transactions, not arrangements that had taken place in the past.[96] Consequently, advice pertaining to the implications of a transaction that has already taken place cannot constitute the promotion of a tax shelter and, therefore, does not fall within the tax shelter exception.[97]

Finally, section 7525 is silent as to waiver.[98] On one level, this causes no major difficulties because the general rule is explicitly based on common law attorney-client privilege, so the

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91. Petroni, *supra* note 1, at 863.

92. Valero Energy Corp. v. United States, 569 F.3d 626, 632-33 (7th Cir. 2009).

93. *Id.* at 632.

94. *Id.* at 632-33.

95. 507 F. Supp. 2d 138, 148 (D.R.I. 2007).

96. *Valero Energy Corp.*, 569 F.3d at 633.

97. *See Textron Inc. & Subsidiaries*, 507 F. Supp. 2d at 148.

98. *Compare* I.R.C. § 7525(a)(3) (2006) (restricting tax advice to advice given by federally authorized tax practitioners), *with* Leblanc, *supra* note 61, at 595-96 (discussing the definition of "tax advice").

rules associated with common law waiver are also imported.[99] For example, communications relating to the preparation of tax returns are generally not regarded as legal advice, and therefore, they do not come within the common law privilege at first instance.[100] Taxpayers normally waive any applicable privilege either on the basis of disclosure through the act of submitting the tax return,[101] or a lack of intention that the information was provided confidentially.[102]

The more restricted scope of section 7525, when compared with the common law privilege, raises the prospect of compulsory waiver.[103] In essence, this is an application of the common law privilege principle that initial disclosure waives the privilege for all other matters.[104] This result seems to follow from the common law privilege's incorporation, including its principles, into the statute through section 7525(a).[105] Therefore, if the taxpayer is required to disclose communications, for example, in proceedings brought by the Securities and Exchange Commission (SEC) as part of securities litigation, then the disclosure could constitute waiver of the tax adviser privilege and the IRS has access to these otherwise privileged documents during a subsequent tax investigation.[106] This was the IRS's expected outcome at the time section 7525 was passed: "If you are practicing in the Tax Court, for privilege waiver purposes, once something is disclosed, it is waived for all purposes."[107]

The concern raised here comes into sharp focus when contrasted with the common law attorney-client privilege. In the previous example, if the attorney-client privilege operated to protect the communication from the IRS, then the communication would have been protected from disclosure to the SEC as well. Had the taxpayer disclosed the information to the SEC, this would constitute a voluntary waiver and behavior that is inconsistent with maintenance of the privilege. Requiring disclosure to the IRS in the subsequent tax investigation is therefore uncontroversial. The problem with respect to the tax adviser's privilege is that the taxpayer does not have a choice

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99. *See Textron Inc. & Subsidiaries*, 507 F. Supp. 2d at 151.

100. United States v. Frederick, 182 F.3d 496, 501-02 (7th Cir. 1999).

101. United States v. Lawless, 709 F.2d 485, 488 (7th Cir. 1983).

102. Colton v. United States, 306 F.2d 633, 638 (2d Cir. 1962).

103. *See Textron Inc. & Subsidiaries*, 507 F. Supp. 2d at 151.

104. *See id.*

105. *See id.*

106. Wilson, *supra* note 61, at 338.

107. *Id.* at 338-39 (quoting Sheryl Stratton, *Accountant-Client Privilege Proposal Sliced and Diced*, 98 TAX NOTES TODAY 103-1 (1998)).

regarding the disclosure to the SEC.[108] The potential for abuse in this context becomes quite clear. The IRS may easily avoid the privilege by coordinating with another government agency to require disclosure as part of a standard investigation before any tax investigation takes place.[109]

The more expansive criminal limitation, which applies to both IRS and federal proceedings, also raises the specter of compulsory waiver.[110] The attorney-client privilege applies to all litigation, whether civil or criminal.[111] The limitation of the tax adviser's privilege to only civil matters is particularly problematic in terms of the privilege's efficacy due to the wide variety of offenses under the IRC that carry criminal penalties, most sharing elements in common with civil offenses.[112] As such, the IRS often has a significant discretion whether to prosecute a particular offense as a civil or criminal matter.[113]

In practice, most investigations begin as civil matters, in which the communication will remain privileged, but are later converted to criminal proceedings.[114] This creates the problem for taxpayers that they need to anticipate which matters are likely to be converted into criminal investigations, requiring "clairvoyant powers to know in what settings tax adviser communications may be sought."[115] Taxpayers may attempt to mitigate this problem by consulting with their non-lawyer adviser initially and then engaging an attorney, thereby having subsequent communications protected under the unrestricted attorney-client privilege once it becomes apparent that the IRS intends to pursue a criminal investigation.[116]

The problem with this approach is that any communications made with the first non-lawyer adviser will not be protected.[117] The potential for abuse, though, by the IRS is apparent. This is even more so than in the previous limitation on the usefulness of the privilege considered in the previous section, since this time, the IRS is in control of the entire process; that is, the forced

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108. Wilson, *supra* note 61, at 339.
109. Petroni, *supra* note 1, at 864.
110. *Id.* at 857-58.
111. *See* Wilson, *supra* note 61, at 339-40.
112. Petroni, *supra* note 1, at 865.
113. *Id.* at 858.
114. *Id.*; *see also* Wilson, *supra* note 61, at 339.
115. Gergacz, *supra* note 9, at 248.
116. *See also* Lobenhofer, *supra* note 61, at 256.
117. *Id.*

waiver is not dependent on the preceding action of another agency.[118]

The final limitation that raises the prospect of compulsory waiver is the restriction to federal matters.[119] Note that the limitation in section 7525(a)(2)(B) to federal matters is specifically speaking to tax proceedings in a federal court.[120] The limitation is not to questions of federal law; it is much more limited.[121] This means that any proceeding in state court, even one that raises questions of federal law, is not covered by the tax adviser's privilege, and any communications with a non-lawyer tax adviser are not covered by section 7525.[122] As Petroni notes, this is the case "even though most tax advice on state law is based on federal law."[123]

This problem is mitigated to a certain extent by the fact that some states have their own tax adviser privileges.[124] This is far from a solution, though, for several reasons. First, not all states have such a privilege. The survey conducted by Molony referred to earlier found that 27 states, including Puerto Rico, out of a possible 51 contain such a privilege.[125] This number varies across contemporaneous surveys.[126] However, the common outcome is that such a rule is not universal. This in itself is enough to demonstrate the inadequacy of relying on state-level privileges to ensure state law and courts cannot be used as an end-run around the federal tax adviser's privilege. In addition, roughly half of these states do little more than codify the accountant's ethical obligation to confidentiality, rather than provide any substantive protection for the taxpayer's communications in litigation.[127] Also, the state privileges normally apply only to CPAs; that is, other non-lawyer tax

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118. Scot L. Kline, United States v. Arthur Young & Co.: *Judicial Death Knell for Auditors' Privilege and Suggested Congressional Resurrection*, 71 CORNELL L. REV. 694, 715-16 (1986).

119. Petroni, *supra* note 1, at 846.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 860.

124. Molony, *supra* note 49, at 282-83.

125. *Id.*

126. Canning, *supra* note 49, at 505 n.4; DENZIL CAUSEY & SANDRA CAUSEY, DUTIES AND LIABILITIES OF PUBLIC ACCOUNTANTS (5th ed. 1995) (noting 16 states); Ronald Friedman & Dan Mendelson, *The Need for a CPA-Client Privilege in Federal Tax Matters*, 27 TAX ADVISER n.3, 155 n.17 (1966).

127. Molony, *supra* note 49, at 282-83. This could go some way to explaining the noted disparity between contemporaneous surveys. *Id.*

advisers are not covered.[128] Consequently, given the lack of coverage across the states and, where coverage is provided, the lack of substantive overlap between the state privilege and section 7525, the potential mitigation of the compulsory waiver problem in the federal limitation context is minimal.[129]

A relevant consideration in the development of the tax adviser's privilege is its legal and historical context in the United States.[130] Unlike most other common law jurisdictions, the United States does seem somewhat more open to recognizing new privileges.[131] The preference, though, is to do this through the common law, which is in some cases facilitated by statute or regulation.[132] The most prominent example of this approach is Federal Rule of Evidence 501, which essentially authorizes the courts to recognize new evidentiary privileges under federal common law where the courts feel it is appropriate to do so.[133] Congress has traditionally demonstrated a preference for courts to recognize new privileges rather than create new statutory rules.[134] An outcome of this process is the relatively new psychotherapist-patient privilege that the Supreme Court recognized in *Jaffee v. Redmond.*[135] The current proposed statutory federal reporter's privilege may be regarded as something of a departure from this general rule.[136] However, much of the application is left to the courts, with the central feature being that the courts are to weigh the public interests involved rather than being a blanket rule.[137] As such, it may be noted that the tradition in the United States is that the courts are granted substantial power in recognizing, applying and developing new evidentiary privileges.[138]

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128. Lobenhofer, *supra* note 61, at 256.

129. Petroni, *supra* note 1, at 860.

130. Molony, *supra* note 49, at 250-59.

131. As demonstrated through the Supreme Court's decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996). See also Keith Kendall, *Privilege and Taxation Advice: New Zealand's Nondisclosure Right Compared with the Tax Adviser's Privilege in the United States*, 24 N.Z. U. L. REV. 338, 343-346 (2011).

132. Kendall, *supra* note 131, at 343-345.

133. *Jaffee*, 518 U.S. at 8-9.

134. *See In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 989 (D.C. Cir. 2005).

135. *Jaffee*, 518 U.S. at 12.

136. Free Flow of Information Act of 2009, H.R. 985 and S. 448, 111th Cong. (2009).

137. *See id.* While the identically entitled House and Senate bills are not identical in content, they do overlap to the extent described here. *Id.*

138. *Jaffee*, 518 U.S. at 8-9.

III. NEW ZEALAND: NON-DISCLOSURE RIGHT

A. *Legal Professional Privilege*

As with all other former British colonies, the common law of legal professional privilege (LPP) was part of the received law of New Zealand.[139] The content of common law LPP in New Zealand is very similar to that of the common law attorney-client privilege in the United States.[140] Direct communications between a client, or his agent, and a legal adviser attract a virtual blanket privilege[141] when the communication is for the purpose of obtaining legal advice or assistance[142] and irrespective of whether the material is sought in civil or criminal proceedings.[143] As with the United States, not all aspects of a solicitor-client relationship are privileged, though, even in the context of the provision of legal advice.[144] For example, observed facts are not protected from disclosure.[145]

B. *Legal Professional Privilege and the Tax Profession*

New Zealand has the distinction of being the first common law jurisdiction to consider the application of LPP in an extra-curial context.[146] One of the first cases for consideration focused on whether the Commissioner of Inland Revenue's information gathering powers operated subject to common law LPP.[147] A 4-1 majority found in the affirmative.[148]

In response, the New Zealand Parliament enacted section 16A of the Inland Revenue Department Act 1952 in 1958.[149] The

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139. *See* English Laws Act 1858 (NZ), http://www.teara.govt.nz/en/law-and-the-economy/1/1. This has been confirmed more recently in the Imperial Laws Application Act 1988 (NZ), to the extent that the common law had not been overridden prior to the enactment of that later statute.

140. *See generally* Maria Italia, *Gentleman or Scrivener: History and Relevance of Client Legal Privilege to Tax Advisors*, 6 INTERNATIONAL REV. OF BUS. RES. PAPERS 391, 391 (2010) (noting that the legal professional privilege "serves to protect from compulsory disclosure all communications of a confidential nature between legal adviser and client").

141. SIR MAURICE CASEY, GARROW AND CASEY'S PRINCIPLES OF THE LAW OF EVIDENCE § 27.12 (8th ed. 1996); *see also R v Secord* [1992] 3 NZLR 570 (AC) at 572.

142. *Rosenberg v Jaine* [1983] NZLR 1 (HC) at 7.

143. *B v Auckland Dist. Law Soc'y* [2004] 1 NZLR 326 (PC) at 346.

144. DONALD MATHIESON, CROSS ON EVIDENCE: 8TH NEW ZEALAND EDITION § 10.21 (2005).

145. *Id.* § 10.32.

146. Auburn, *supra* note 31, at 30.

147. *Comm'r v West-Walker* [1954] NZLR 191 (CA) at 195.

148. *Id.* at 192.

149. New Zealand Law Commission *Tax and Privilege: Legal Professional Privilege and the Commissioner of Inland Revenue's Powers to Obtain Information* (NZLC R67,

effect of this provision was to incorporate the *West-Walker* decision, while excluding its application to trust accounts and financial records.[150] This provision was later replaced by the present section 20 of the Tax Administration Act 1994.[151] In this, New Zealand stands alone in the common law world in terms of legislating LPP as it applies in taxation matters.[152] While section 20 does not completely codify this area of the law, as there are some matters not addressed which leave a residual application for the common law,[153] section 20 does displace common law LPP in the vast majority of cases.[154]

Taxation is not the only area in which the New Zealand Parliament has legislatively intervened in the area of privilege. In addition to section 20 of the Tax Administration Act 1994, which deals with most issues surrounding confidentiality of communications with legal advisers over tax matters, section 54 of the Evidence Act 2006 allows for privilege to attach to communications with a registered patent attorney in the context of advice relating to intellectual property.[155] The Evidence Act also allows for privilege to attach to certain communications with ministers of religion, medical practitioners and clinical psychologists in the context of criminal proceedings and journalists' sources.[156] Section 69 also provides the court with discretion to prevent confidential communications or information, including sources of information, from being compulsorily disclosed.[157] Although this protection appears to be limited to the adducing of evidence in court and does not seem to extend to discovery,[158] Section 67 allows the court to override the statutory privileges in appropriate circumstances, although any information disclosed in such a manner cannot be used against that party in a proceeding in New Zealand.[159]

2000) 2, http://www.lawcom.govt.nz/project/tax-and-privilege?quicktabs_23=report#node-464.

150. *Id.*

151. *Id.*

152. Kendall, *supra* note 130, at 346.

153. Grant Sidnam, *Legal Professional Privilege and Tax Investigations*, N.Z. TAX PLAN. REP. 21, 22 (1992).

154. *Green v Housden* [1992] 14 NZTC 9,025 (HC).

155. Evidence Act 2006 (NZ), s 54.

156. *Id.* The Act provides an in-substance privilege for journalist sources in that, if the relevant criteria are met, the journalist or his employer are not compellable as a witness to disclose any information that would disclose the identity of that source. *Id.*

157. *Id.*, s 69.

158. *ANZ Nat'l Bank v Comm'r of Inland Revenue*, [2008] NZHC 507.

159. Evidence Act 2006 (NZ), s 67.

A series of government-commissioned reports were prepared during the 1990s and early 2000s that analyzed the content and application of legal privileges.[160] While the early stages of this process dealt with evidentiary privileges in general, the focus turned to the intersection of LPP and the provision of tax advice in the wake of the findings of a separate inquiry dealing with off-shore tax avoidance schemes.[161] That inquiry noted difficulties accessing relevant documentation in the course of its investigations.[162] Stating in its recommendations that LPP claims "were a source of delays and frustrations to the IRD on a number of occasions" in the course of investigating the alleged tax avoidance schemes,[163] the Commission finally recommended that LPP be abolished in respect of all tax advice.[164] Subsequent inquiries trended toward not recommending complete abolition, but rather advocated for a restriction on LPP's blanket application in taxation matters.[165]

The final public consultation document in this process was released in May 2002 by the Inland Revenue Department.[166] The central recommendation was to replace the present section 20 of the Tax Administration Act 1994 with "a new and complete code for tax and privilege."[167] Departing from the recommendations of the earlier inquiries, the proposed amendment would apply to opinions on tax law and replicate the existing litigation privilege,

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160. New Zealand Law Commission *Evidence Law: Privilege – A Discussion Paper* (NZLC PP23, 1994), http://www.lawcom.govt.nz/project/evidence-law-privilege?quicktabs_23=preliminary_ paper#node-489; New Zealand Law Commission *Evidence* (NZLC R55, 1999) at vii, http://www.lawcom.govt.nz/project/evidence-law-privilege?quicktabs_23=report#node-490; New Zealand Law Commission *Tax and Privilege: Legal Professional Privilege and the Commissioner of Inland Revenue's Powers to Obtain Information* (NZLC R67, 2000) at vii, http://www.lawcom.govt.nz/project/tax-and-privilege?quicktabs_23=report#node-464.

161. Commission of Inquiry into Certain Matters Relating to Taxation *Report of the Wine-Box Inquiry* (1997); *see also* Adrian Sawyer, *New Zealand: The Wine-Box Inquiry: Never Mind the Findings but What about the Recommendations?*, 52 BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION 58 (1998) (NZ); Adrian Sawyer, *The Wine-Box Inquiry in New Zealand: Round Two – A 'Gutted Report' but no 'Knockout Punch,'* 55 BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION 114, 114 (2001).

162. Commission of Inquiry into Certain Matters Relating to Taxation, *supra* note 161, at 1:5:26-31.

163. *Id.* at 3:1:61.

164. *Id.* at 3:1:63.

165. New Zealand Law Commission *Tax and Privilege: Legal Professional Privilege and the Commissioner of Inland Revenue's Powers to Obtain Information* (NZLC R67, 2000) at 19-20, http://www.lawcom.govt.nz/project/tax-and-privilege?quicktabs_23=report#node-464.

166. Inland Revenue Department *Tax and Privilege: A Proposed New Structure – Government Discussion Document* (2002) at 2.4, http://taxpolicy.ird.govt.nz/publications/2002-dd-privilege/overview.

167. *Id.* at 3.1.

but would be a separate privilege from LPP.[168] Importantly, the new advice privilege would extend to other professional groups, with accountants identified as the primary non-legal adviser group.[169] The role of a strong code of ethics in identifying appropriate non-legal adviser groups was highlighted.[170]

C. *Non-Disclosure Right*

The culmination of this process was the introduction of a non-disclosure right for tax advisors.[171] In essence, the non-disclosure right provides a separate privilege for taxpayers that operates in a similar fashion to common law LPP, but applies to advice obtained from members of an approved advisory group.[172]

The non-disclosure right is contained in sections 20B to 20G of the Tax Administration Act 1994.[173] These provisions were incorporated via the Taxation Act 2005 (Base Maintenance and Miscellaneous Provisions), which was first introduced into Parliament on November 16, 2004,[174] passed on June 15, 2005,[175] and took effect on June 22, 2005.[176] The main operative provision is section 20B, which is very prescriptive, but essentially protects from disclosure a book or document constituting a "tax advice document" under the revenue authority's investigatory powers.[177]

Under section 20B(2), a book or document is eligible to be a tax advice document and, thereby, potentially eligible for protection from disclosure under the non-disclosure right if:

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168. *Id.* at 3.8.

169. *Id.* at 3.6.

170. *Id.*

171. Clarifying the terminology as used, in particular, in this section: the term "adviser" is used in the text to refer to advisers in a general sense. The legislation analyzed in this section, though, utilizes the spelling "advisor" (specifically "tax advisor") when referring to advisers whose communications may fall within the auspices of the New Zealand statute. The term "tax advisor" is therefore used when dealing with the specific concept referred to in the New Zealand legislation. At the time of writing, the New Zealand Institute of Chartered Accountants and the Tax Agents Institute of New Zealand are the only such approved groups. *See* Maples and Blissenden, *supra* note 10, at 28 n.76; Maples, *supra* note 5, at 355. Note that members of the New Zealand legal profession continue to have their client communications privileged under section 20 as discussed above.

172. Tax Administration Act 1994 (NZ) § 20B.

173. Tax Administration Act 1994 (NZ).

174. Michael Cullen "Banks to Pay More Tax Under New Rules" (press release, 16 November 2004).

175. Michael Cullen "Major Tax Bill Passes" (press release, 16 June 2005).

176. Inland Revenue Department *Non-Disclosure Right for Tax Advice Documents* (2005), http://www.ird.govt.nz/technical-tax/standard-practice/general/ sps-gnl-0507-nondisc-rights.html.

177. Tax Administration Act 1994 (NZ).

(a) it is confidential; and
(b) it is created
    i) by the taxpayer for the main purpose of instructing a tax advisor so that the tax advisor can provide advice about the operation and effect of tax laws; or
    ii) by the tax advisor for the main purpose of recording research or analysis that is to be used in providing advice to the taxpayer about the operation and effect of tax laws;[178] or
    iii) by the tax advisor for the main purpose of giving advice or recording advice given to the taxpayer where the advice is about the operation and effect of tax laws;[179] and
(c) the purposes for which the book or document were created do not include committing or promoting the commission of an illegal or wrongful act.[180]

Once eligibility for protection under the non-disclosure right has been established, the taxpayer must claim protection in compliance with the procedure set out in section 20D, which varies depending on the party who created the tax advice document.[181] If the purported tax advice document was created by a tax advisor, the claim for protection must set out the following information:

(a) a brief description of the form and contents of the document;
(b) the name of the tax advisor who created the document;
(c) the approved advisor group to which the tax advisor belonged when creating the document;
(d) the areas of law about which the tax advisor was intending to give advice when creating the document; and
(e) the date on which the document was created.[182]

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178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. Tax Administration Act 1994 (NZ).

Items (c) and (d) do not have to be included in the claim if the taxpayer created the relevant book or document.[183] In addition, the claim must be asserted within the time limit applicable to the context in which the claim arises.[184] If these time limits are not met, then the protection otherwise afforded under the non-disclosure right is lost, notwithstanding the book or document meeting all the other eligibility criteria to qualify as a tax advice document.[185] If the non-disclosure right protection is lost in this fashion, it is lost permanently.[186] In particular, this means that the taxpayer, or tax advisor, cannot later assert the non-disclosure right over the tax advice document, even if it is the subject of a different subsequent request for information.[187]

Sections 20E and 20F set out information associated with tax advice documents that must, despite non-disclosure right protection, be disclosed by the information holder.[188] Books or documents attached to tax advice documents that do not qualify themselves as tax advice documents under section 20B(2) must be disclosed.[189] Further, a description of "tax contextual information" relating to a tax advice document must be disclosed.[190] "Tax contextual information" is defined as:

> (a) a fact or assumption relating to a transaction . . .
> (b) a description of a step involved in a transaction;
> (c) advice that does not deal with the operation and effect of tax laws on the taxpayer[191] (other than advice relating to the collection of tax debts payable to the Commissioner);
> (d) a fact or assumption relating to advice referred to in (c) or (d); or
> (e) a fact or assumption relating to the preparation of the taxpayer's financial statements, or a document that the taxpayer is required to disclose to the Commissioner under a tax statute.[192]

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183. *Id.*
184. *Id.*
185. Inland Revenue Department *Non-Disclosure Right for Tax Advice Documents* (2005), http://www.ird.govt.nz/technical-tax/standard-practice/general/sps-gnl-0507-nondisc-rights.html.
186. *See id.*
187. *Id.*; *see also* Maples, *supra* note 5, at 355.
188. Tax Administration Act 1994 (NZ).
189. *Id.*
190. *Id.*
191. *Id.*

The Commissioner may challenge a claim for non-disclosure right protection by applying for a ruling from either a district court or taxation review authority giving rise to the claim.[193] This challenge includes a request for more specific tax contextual information.[194] The relevant district court judge, court, or taxation review authority may review the book or document that is the subject of the disputed claim.[195]

The stated purpose behind introducing the non-disclosure right was for "accountants [to] be able to give candid and independent advice to their clients, as lawyers do, without the need to disclose that advice to Inland Revenue."[196] The expected gain was that voluntary compliance with the tax system would be increased, with a consequential reduction in compliance and administrative costs.[197] It should be noted, though, that the non-disclosure right was not intended to provide the same protection for advice from non-lawyers compared with advice from legal practitioners, but rather to provide the more modest goal of bringing the respective statuses of the two closer together.[198] The non-disclosure right is explained as follows: "The proposed provisions will provide *a degree of consistency* with the current privilege enjoyed by a lawyer's client, who may refuse to disclose to Inland Revenue confidential communications with the lawyer."[199]

The substance of the non-disclosure right is consistent with this intention of creating a similar yet separate privilege. The positive aspects of the non-disclosure right, the criteria by which a taxpayer can assert the right to refuse to disclose to the Inland Revenue, are clearly modeled on the common law right.[200]

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192. *Id.*

193. Tax Administration Act 1994 (NZ).

194. *Id.*

195. *Id.*

196. The Finance and Expenditure Committee *Commentary, Taxation (Base Maintenance and Miscellaneous Provisions) Bill* (2004) (NZ); *see also* (14 Dec 2004) 622 NZPD 18054 (statement of Hon. Dr. Michael Cullen) [hereinafter Statement of Hon. Dr. Michael Cullen].

197. The Finance and Expenditure Committee *Commentary, Taxation (Base Maintenance and Miscellaneous Provisions) Bill* 2004 (NZ); *see also* Statement of Hon. Dr. Michael Cullen, *supra* note 196.

198. *See also* Statement of Hon. Dr. Michael Cullen, *supra* note 196.

199. Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004 (NZ) (explanatory note) (emphasis added).

200. So much can be taken from section 20B(2), which sets out requirements that the relevant communication be confidential, that the main purpose of the advice be regarding the operation and effect of tax laws, and that the communication come from a restricted group of professional advisers; *see* Tax Administration Act 1994 (NZ) § 20B.

Negative aspects of the non-disclosure right, in which the communication is denied protection in circumstances where the non-disclosure right may otherwise apply, are also clearly taken from the common law privilege. For example, the exclusion for tax advice documents prepared to assist with the commissioning of an illegal or wrongful act contained in section 20B(2)(c) mirrors the crime-fraud exception to common law LPP.[201] The exclusion from protection of tax contextual information bears some similarity to the exclusion from common law privilege for certain factual information.[202]

The one judgment to date that considers the non-disclosure right in detail confirmed that the non-disclosure right is a statutory right completely separate from the common law privilege.[203] In comparison to the common law privilege, the court held that the non-disclosure right is more restricted in scope, stating that "[t]he protection afforded by s[ection] 20B is much more confined than legal professional privilege. It is not . . . a new substantive right of equivalent utility to legal professional privilege."[204] The court then went on to identify a number of specific differences between the non-disclosure right and common law LPP:

- Common law LPP covers all communications, whereas section 20B only includes books and documents in the definition of "tax advice document" that qualify for protection.[205] This is more restrictive than the scope of the revenue authority's investigatory powers, which covers "information."[206] LPP covers the entire ambit of materials that the Commissioner may request, whereas section 20B only covers books and documents;[207]
- Independent of the content of the Commissioner's information gathering powers, the criteria set out in section 20B(2) that a book or document must satisfy for protection under the non-disclosure right represent

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201. *Compare Keep Bros v Birch & Bradshaw, Ltd.* [1928] NZLR 360 (SC) (holding that a letter deemed to be fraudulent could not sustain a claim of privilege), *with* Tax Administration Act 1994 (NZ) (stating that in order for a document to be considered a tax advice document eligible for privilege, it must have been created for a purpose that does not include committing, promoting, or assisting in a crime).

202. Mathieson, *supra* note 145.

203. *Blakeley v Comm'r of Inland Revenue* [2008] 23 NZTC 21,865 (HC).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

another point of distinction from the common law rule.[208] There is no such list of criteria under the common law that potentially privileged communications have to meet to qualify for protection;[209]

- The non-disclosure right must be claimed using the specific procedure, disclose the required information and be done so within the time limits set out in s 20D.[210] There is no equivalent procedure regarding common law LPP. Under the common law, privilege does not need to claimed; rather, "[p]rivilege attaches to a qualifying communication and remains unless waived by the client";[211]
- Facts or assumptions are excluded from the non-disclosure right as tax contextual information under section 20F.[212] Equivalent material relating to legal advice is protected under common law LPP.[213]

Based on these observations, the court concluded that the non-disclosure right is "significantly narrower than the scope of legal professional privilege as to both the information protected from disclosure and the conditions attaching to its application."[214] As such, "there is no reason why the statute should be construed as if it were an extension to legal professional privilege with the constraints that entails."[215]

IV. CRITIQUE AND COMPARISON

There are points of both similarity and distinction between the statutory privileges created for non-legal tax advisers in New Zealand and the United States. Both rules are explicitly designed to provide consistency in treatment between

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208. *Blakeley v Comm'r of Inland Revenue* [2008] 23 NZTC 21,865 (H.C.).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Blakeley v Comm'r of Inland Revenue* [2008] 23 NZTC 21,865 (HC) (noting that the non-disclosure right only applied to books or documents sought under the Commissioner's information gathering powers, compared with common law LPP, which allows for protection in all discovery proceedings); Taxation (International Taxation, Life Insurance, and Remedial Matters) Act 2009 (NZ) (superseding *Blakely* by allowing the scope of the nondisclosure right be extended to all discovery proceedings involving the Commissioner); *see also* Riaan Geldenhuys and Eugen Trombitas, *Blakeley v CIR and the Non-Disclosure Right: A Decision Out of Context*, 14 NZJTLP 303, 311-12 (2008) (quoting Lord Simon of Glaisdale rejecting the proposition that the nondisclosure right cannot be extended).

214. *Id.*

215. *Id.*

communications from legal and non-legal advisers.[216] Also similarly, most of the official commentary focuses on the treatment of accountants compared with lawyers, but both rules have the potential to apply to a wider field of practitioners providing tax advice.[217] The lynchpin for a communication to qualify for protection in both cases is that the adviser must belong to a pre-approved professional group.[218] There is no requirement that such groups be limited to professional accounting bodies and, in any event, it has already been recognized that both rules do actually apply outside the accounting profession, with section 7525 applying to enrolled agents and enrolled actuaries in the United States and section 20B applying to tax agents in New Zealand.[219] None of these recognized professional groups specifically require an accounting qualification for membership, although many members are also qualified accountants.[220] As such, while not explicitly stated, the rules in both the United States and New Zealand may be imputed with a public protection purpose; that is, taxpayers may receive the benefit of protection for their communications with their advisers only if they deal with an adviser who is appropriately qualified.[221] This follows the logic of restricting the sources of tax advice in these jurisdictions to only appropriately qualified professionals.[222]

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216. *See, e.g.*, 144 CONG. REC. S7643, S7667 (daily ed. July 8, 1998) (statement of Sen. Mack) (United States); Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004 (NZ) (explanatory note).

217. *Supra* note 70 (United States); Tax Administration Act 1994 (NZ) § 20B(4), (5).

218. *Compare* I.R.C. § 7525(a)(3)(A) (2006) (defining "federally authorized tax practitioner" as anyone authorized under Federal law to practice before the Internal Revenue Service), *with* Tax Administration Act 1994 (NZ) (stating that a "tax advisor" is a person of an "approved advisor group").

219. Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, Enrolled Retirement Plan Agents, and Appraisers Before the Internal Revenue Service, 31 C.F.R. § 10.3 (2007); Inland Revenue Department *Tax and Privilege: A Proposed New Structure – Government Discussion Document* (2002) http://taxpolicy.ird.govt.nz/publications/2002-dd-privilege/overview.

220. *Compare* I.R.C. § 7525(a)(3)(A) (stating that a "federally authorized tax practitioner" is "any individual" and therefore the individual does not have to be an accountant), *with* Tax Administration Act 1994 (NZ) (stating that the only requirement of a "tax advisor" is that they be subject to the code of conduct and disciplinary process of an approved group).

221. *Compare* I.R.C § 7525(a)(1) (stating that tax advice between a tax payer and a federally authorized tax practitioner will enjoy the same common law protection of confidentiality as tax advice between a taxpayer and an attorney if the tax advice would be considered a privileged communication if it were between a tax payer and an attorney), *with* Tax Administration Act 1994 (NZ) (stating the requirements of a tax advisor and an approved advisor group).

222. *See* Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, Enrolled Retirement Plan Agents, and

Perhaps the most significant difference between these two statutory rules is the role of the common law. Section 7525 explicitly incorporates common law attorney-client privilege as its starting point, with some narrowing of the latter in scope as it applies outside of the legal profession.[223] The New Zealand rule is completely separate from the common law LLP, as confirmed in *Blakeley*.[224] Developments in common law attorney-client privilege are therefore automatically incorporated into the jurisprudence relating to section 7525 to the extent that the attorney-client privilege has actually been incorporated.[225] In contrast, any changes to common law LPP in New Zealand will not affect the development of the non-disclosure right.[226] If such new principles are to be a part of the non-disclosure right, this would require a specific statutory amendment, as the non-disclosure right is a rule completely separate from the common law.

Most of the differences may be explained through the New Zealand Parliament seeking to avoid the problems associated, or at least anticipated, with section 7525. Even the previous difference noted, around the role of the common law, is explicable in the New Zealand Parliament decision to retain complete control over the development of the non-disclosure right.[227] As was noted earlier, this is consistent with previous statutory interventions that the New Zealand Parliament has made in both taxation and evidence matters.[228] In contrast, the traditional preference in the United States is for Congress to facilitate judicial recognition of evidentiary privileges rather than creating separate new rules.[229]

One such difference is the scope of the respective rules. Unlike section 7525, with respect to the IRS, section 20B is not limited only to documents sought by the Inland Revenue Department—the non-disclosure right in section 20B applies to

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Appraisers Before the Internal Revenue Service, 31 C.F.R. § 10.3 (2007) (stating that enrolled actuaries and enrolled retirement plan agents are both authorized to practice, but only with respect to specific parts of the IRC, which are those aspects of the law that could be regarded as coming within those professionals' respective areas of expertise).

223. *See* I.R.C. § 7525(a)(1) (2006); Gergacz, *supra* note 9, at 242-43 (stating section 7525 provides less protection than the common law attorney-client privilege).

224. *Blakeley v Comm'r of Inland Revenue* [2008] 23 NZLR 21,865 (HC).

225. *See* United States v. BDO Seidman, 337 F.3d 802, 810 (7th Cir. 2003).

226. *See Blakeley v Comm'r of Inland Revenue* [2008], 23 NZLR 21,865 (HC).

227. *See supra* note 212 and accompanying text.

228. *See supra* note 156 and accompanying text.

229. *See supra* notes 225-226 and accompanying text.

all counterparties, not only the revenue authority.[230] All that is required is that the relevant book or document meets the definition of "tax advice document."[231] Once this has been established, the treatment of the communication is set out in section 20D, with potential for some contents to be disclosed under section 20F.[232] The central point is that the rule applies generally and not only to the Inland Revenue Department.[233] Similarly, there is no exclusion in the New Zealand rule for communications around criminal matters (which exists in the United States under section 7525(a)(2)(A)), which is discussed further below.[234] These aspects of the non-disclosure right resolve the problem of compulsory waiver that exists in the United States arising from the interaction of the common law rule with the statutory limitations embedded in the tax adviser's privilege.

Another difficulty with the United States legislation that appears to have been dealt with in the New Zealand legislation is the definition of "tax advice."[235] Section 7525(a)(3)(B) defines tax advice as being advice given by a FATP with respect to a matter within their authority to practice, but, as indicated earlier, this definition leaves some degree of uncertainty as to what exactly constitutes "tax advice."[236] The New Zealand legislation does not explicitly define "tax advice," but it does note the requirements for a tax advice document under section 20B(2), thus providing protection from compulsory disclosure.[237]

Specifically, to qualify as a tax advice document, either the client or the tax advisor must have created the document for the main purpose of formulating advice on the operation and effect of tax laws.[238] Any other ancillary purpose, whether or not within the usual scope of the tax advisor's profession, does not appear

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230. *Compare* I.R.C. § 7525(a)(2)(A) (2006) (explicitly indicating the tax adviser privilege is limited to Internal Revenue Service matters), *with* Tax Administration Act 1994 (NZ) (intentionally not naming any counterparties to whom the privilege is limited).

231. Tax Administration Act 1994 (NZ).

232. *Id.*

233. *Compare* I.R.C. § 7525(a)(2)(A) (2006) (explicitly indicating that the tax adviser privilege is limited to Internal Revenue Service matters), *with* Tax Administration Act 1994 (NZ) (intentionally not naming any counterparties to whom the privilege is limited).

234. *Compare* I.R.C. § 7525(a)(2) (2006) (explicitly indicating that the tax adviser privilege is limited to noncriminal matters), *with* Tax Administration Act 1994 (NZ) (intentionally not mentioning any criminal limitations to the tax adviser privilege).

235. *Compare* I.R.C. § 7525(a)(3)(B) (2006) (leaving the definition of "tax advice" open to interpretation), *with* Tax Administration Act 1994 (NZ) (defining specifically what "tax advice" means under the privilege).

236. LeBlanc, *supra* note 65, at 595-96.

237. Tax Administration Act 1994 (NZ).

238. *Id.*

sufficient for the document to qualify for the privilege.[239] This obviates the need to specify what constitutes tax advice under the tax adviser's privilege in section 20B, such as stating that, to come within the non-disclosure right, the book or document needs to satisfy only specified criteria.[240] As for any judicially inferred distinction between tax and business advice similar to that which exists in the United States, this would seem to be resolved by the qualifier in section 20B that the book or document be created for the "main purpose" of advising on the operation and effect of tax laws.[241] While this yardstick is open to judicial interpretation, this is much more objective than the tax, or legal/business advice, distinction that no common law jurisdiction has managed to define properly to date.[242]

Another point of difference is the absence in the New Zealand legislation of an explicit restriction to civil proceedings.[243] While there is an exclusion in section 20B(2)(c) for advice that includes a purpose of committing an illegal act, this is distinct from a proceeding for a criminal offense.[244] This may be explained, in part, by differences in structure and approach between the New Zealand income tax system and that in the United States. The majority of offenses under New Zealand income tax law are pursued as civil offenses and prison is almost never sought as a penalty.[245] In contrast, the IRS in the United States has the ability to pursue tax matters as criminal offenses, even if the investigation was commenced as a civil inquiry.[246] Consequently, concerns regarding potential abuse of ancillary powers, such as the power to pursue a matter as either a criminal or civil offence, by the relevant revenue authority are much less relevant in New Zealand than in the United States.[247] It would appear, however, that even in a

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239. *Id.* The only purpose explicitly permitted by the statute is to give advice on the operation and effect of tax laws. *Id.*

240. *Id.*

241. *Id.*

242. The use of the descriptor "main," however, may cause some difficulties. *See* Maples & Blissenden, *supra* note 10, at 35-36.

243. Tax Administration Act 1994 (NZ).

244. *Id.*

245. *See* Ranjana Gupta, *How Perceptions of Tax Evasion as a Crime and Other Offences Mirror the Penalties*, 13 NEW ZEALAND J. OF TAX'N L. & POL'Y 607, 609 (2007) (noting that New Zealand tax offenses have historically been punishable by monetary penalties and almost never by non-monetary penalties).

246. *See* Petroni, *supra* note 1, at 858.

247. *See* Michael Wilson, *Careful What You Wish For: The Tax Practitioner-Client Privilege Established by the Internal Revenue Service Restructuring and Reform Act of 1998*, 51 FLA. L. REV. 319, 339-40 (1999) (describing the potential for abuse by the IRS when the government pursues a tax matter both criminally and civilly).

criminal proceeding, the tax advice document would still be protected by the non-disclosure right, so long as the book or document did not have as a purpose the promotion or assisting of the commission of any illegal act.[248]

Related to this area is the absence of a limitation in the New Zealand legislation excluding advice regarding tax minimization schemes from the scope of the privilege.[249] This, however, does raise an ambiguity in the New Zealand legislation. As identified above, section 20B excludes advice that has a purpose of the commission of an illegal act.[250] While this exclusion is necessary and consistent with exclusions from the scope of common law LPP, it is not immediately clear where illegality begins and ends in this context, which is an issue shared with the common law privilege.[251] In particular, questions remain regarding whether advice regarding the interpretation of New Zealand tax laws, especially an interpretation that is contrary to Parliament's clear intention, would be considered illegal if it were later rejected in court once challenged by the Commissioner. Another question is whether the illegality question would be any clearer if the advice were covered by any anti-avoidance provisions within the New Zealand tax statutes. The Inland Revenue Department has pointed to tax evasion and fraud of any type as non-exhaustive examples of illegal activity that this exclusion covers.[252]

This leaves open two questions: whether the United States and New Zealand can take anything away from the other's statute for their own purposes and whether other common law jurisdictions should prefer one model over the other, or a hybrid of the two, should they decide to extend evidentiary privileges to the wider tax profession. On one level, the first of these questions can be answered in the affirmative, as it would be foolhardy for any common law jurisdiction to prematurely dismiss the experiences of another in an area of similar interest. To this end, it may be inferred, and has in this paper, that the shape of the non-disclosure right in New Zealand has at least been influenced by the United States' experience in the various aspects noted in this section.

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248. Tax Administration Act 1994 (NZ).

249. *Compare* I.R.C. § 7525(b) (2006) (explicitly not extending the privilege protection to communications "in connection with the promotion of the direct or indirect participation of the person in any tax shelter), *with* Tax Administration Act 1994 (NZ) (making no such explicit limitation).

250. Tax Administration Act 1994 (NZ).

251. Maples, *supra* note 5, at 356-57.

252. *Id.*

On a more contextual level though, sections 7525 and 20B are greater reflections of each jurisdiction's respective approach to recognizing new evidentiary privileges. While some commentators believe that Congress was "premature" in enacting the tax adviser's privilege,[253] the structure of section 7525 is consistent with the United State's history of giving deference to the judiciary in the matter of evidentiary privileges noted earlier.[254] The tax adviser's privilege is merely the statutory extension of common law attorney-client privilege to the wider tax profession. Subject to the restrictions incorporated in the statute, which undermine the purpose for which section 7525 was passed, the judiciary still maintains control over the content of the tax adviser's privilege through its control over common law attorney-client privilege.[255] Matters such as (voluntary) waiver and the extent to which privilege applies to any form of advice are still matters for the courts to determine.[256]

In contrast, the New Zealand Parliament has demonstrated a propensity to control developments in the law of evidentiary privileges primarily through statute.[257] This is reflected in the judicially-confirmed status of the non-disclosure right being a statutory right completely separate from common law LPP.[258] This may have the outcome that the two rules diverge as the courts continue to develop LPP, necessitating Parliament to enact statutory amendments if the non-disclosure right is also to incorporate these developments. This is consistent, though, with Parliament maintaining control over the non-disclosure right and has the related benefit that any judicial developments in LPP that Parliament regards as undesirable featuring in the non-disclosure right will not require legislative amendment to

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253. Petroni, *supra* note 1, at 867.

254. Kendall, *supra* notes 131-32.

255. I.R.C. § 7525(a) (1).

256. I.R.C. § 7525(b) (2006) (the general rule is that "with respect to tax advice, the *same common law protections* of confidentiality" apply to a communication between a taxpayer and a FATP as would apply to a communication between a taxpayer and an attorney)(emphasis added). It should be noted that while concern has been raised in this paper regarding compulsory waiver, which is in line with current understanding of the rule's practical application, it is open to the courts to interpret section 7525 in such a way so that compulsory waiver does not occur. *See supra* Part II.C. For example, the courts may be inclined, in appropriate circumstances, to regard a forced disclosure to another agency as not affecting a taxpayer's rights against the IRS by interpreting the existing law on waiver as being predicated on the taxpayer's *voluntary* actions. *Id.*

257. *See, e.g.*, New Zealand Law Commission *Evidence Law: Privilege – A Discussion Paper* (NZLC PP23, 1994), http://www.lawcom.govt.nz/project/evidence-law-privilege?quicktabs_23=preliminary_paper#node-489 (proposing changes to the codification of privilege).

258. *Blakeley v Comm'r of Inland Revenue* [2008] 23 NZTC 21,865 (HC).

preclude those aspects from applying to the wider tax profession. Consequently, it may be noted that the United States and New Zealand have been true to their respective predilections and, as such, attempts by either to mimic the other too closely would represent a true departure from their established practices.

Further, the two rules have different stated purposes, which are reflected in the respective structures adopted. Senator Mack described the purpose of the tax adviser's privilege to provide "uniform confidentiality protection" that would eliminate the "unfair penalty" taxpayers faced when choosing a non-lawyer tax adviser.[259] In contrast, the non-disclosure right was only ever intended to provide a "degree of consistency" between the two treatments.[260] That is, tax advice from lawyers vis-à-vis non-lawyers was never intended to be treated identically. The observation above that the non-disclosure right's structure could result in a divergence between that right and common law LPP in New Zealand does not undermine the New Zealand Parliament's purpose, whereas such a separation would undermine Congress' objective in passing the tax adviser's privilege. In this light, both jurisdictions have chosen a model that best fits their respective purpose.

Returning to the second and final remaining question, it is this last observation that should influence the model that other common law jurisdictions adopt should they decide to extend evidentiary privileges to the wider tax profession. Of greater importance than the peculiar history for the relevant jurisdiction is the intention underlying the extension. If the purpose is to achieve parity between the groups of tax advisers, then the United States model is most appropriate. The New Zealand model, on the other hand, provides greater protection than the common law, but does not purport to offer equal treatment with legal advice. The one problem with the structure used in the United States, as noted, is the limitations imposed on the general rule and the tax shelter exception. These aspects of the tax adviser's privilege undermine the objective of achieving parity between the adviser groups; as a result of these aspects, there are still large categories of tax advice that are protected if they were provided by an attorney, but not if they came from another duly qualified tax professional.[261] A common law jurisdiction seeking to achieve uniform treatment would be well advised to adopt the general rule as presented in section 7525(a)(1) without

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259. 144 Cong. Rec. S7643, 7667 (daily ed. July 8, 1998) (statement of Sen. Mack).

260. Taxation Act 2004 (NZ), s 10.

261. *See* Petroni, *supra* note 1, at 846, 872.

any of the restrictive elements contained in the remainder of the provision.