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. This was done after extensive lobbying on the part of the accounting profession and resistance from the legal profession.1 The end result of this process was the inclusion of § 7525 into the Internal Revenue Code through the passage of the IRS Restructuring and Reform Act of 19982 though Congress, providing for a tax adviser’s privilege.

Seven years later, New Zealand enacted legislation to the same end. As with the United States, the statutory extension of legal professional privilege3 was the product of several years of political lobbying, with the New Zealand Government commissioning a number of inquiries considering the merits of an extension and the form such legislation should

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1 See Alyson Petroni, Unpacking the Accountant-Client Privilege Under IRC Section 7525, 18 VA. TAX REV. 843, 847-850 (1999).
3 In New Zealand, the equivalent of the attorney-client privilege is known as legal professional privilege, the name by which the doctrine is known in most other common law jurisdictions.
take. Eventually, the Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005 was passed in June 2005, creating a non-disclosure right by incorporating sections 20B to 20G into the Tax Administration Act 1994.

While the basic premise of both of these statutory measures is the same, being the 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. In essence, the United States uses the common law attorney-client privilege as the basis from which the tax adviser’s privilege operates, whereas the New Zealand statute creates a protection completely distinct from common law legal professional privilege. As a result of these different approaches, the New Zealand statute represents an alternative legislative model to that employed to effect the tax adviser’s privilege in the United States.

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

The remainder of this paper is set out as follows. Section II covers the position in the United States, beginning with a brief overview of the attorney-client privilege, then describing how this doctrine is applied to the tax profession and then discussing the content of the tax adviser’s privilege in the IRC. Section III follows a similar structure in relation to New Zealand’s non-disclosure right, discussing legal professional privilege

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generally, describing how the doctrine applies to the wider tax profession before 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.

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. There are a large number of definitions within the United States, largely from the result of codification efforts at the Federal and State levels. Notwithstanding the variety of specific definitions on offer, there is substantial uniformity in the privilege’s basic tenets. Epstein identifies as the most useful that put forward by the Chief Justice of the Supreme Court of the United States 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

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9 Edna Epstein, ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 3 (5th ed. 2007). A sample of the State level definitions put forward in both statute and case law is provided in Paul Rice, Attorney-Client Privilege: The Eroding Concept of Confidentiality should be Abolished, 47 DUKE L. J. 853, n 1 (1998).
10 Richmond, supra note 8, 385. Note that this codification process at the Federal level has had something of a chequered history, with a good deal of controversy about the need for codification generally and the specifics that any resulting legislation would contain; Kenneth Broun, Giving Codification a Second Chance – Testimonial Privileges and the Federal Rules of Evidence, 53 HASTINGS L. J. 769 (2002); Timothy Glynn, Federalizing Privilege, 52 AM. U. L. REV. 59 (2002).
11 Some of the differences, particularly between States, are set out in Glynn, supra note 10, 93-121. Glynn summarizes the position in the United States as “while the basic elements of the privilege are largely undisputed, there is enormous conflict over what the basic elements actually require” at 113.
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.

§ 68 of the Restatement (Third) of the Law Governing Lawyers\textsuperscript{13} (hereafter “the Restatement”) identifies four central elements underpinning the attorney-client privilege: (1) a communication\textsuperscript{14} (2) between privileged persons\textsuperscript{15} (3) made in confidence\textsuperscript{16} (4) for the purpose of seeking or obtaining legal assistance.\textsuperscript{17}

The common law in the United States recognizes attorney-client privilege in very similar terms. Richmond cites\textsuperscript{18} the US District Court for the District of Massachusetts decision in United States v. United Shoe Machine Corp as the leading privilege test,\textsuperscript{19}

The privilege applies only if (1) the asserted holder of the privilege is or sought to be come 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.

The substance of the attorney-client privilege in the United States is similar to legal professional privilege in other common law jurisdictions. This similarity extends to many application specifics. For instance, the client is the holder of the privilege\textsuperscript{20} and the privilege must be asserted to apply.\textsuperscript{21} Assertion needs to be on a document by document basis.\textsuperscript{22} While formally the client needs to assert the privilege, the lawyer may do so on the client’s behalf even in circumstances that would prevent the client from do so directly (such as absence).\textsuperscript{23}

\textsuperscript{13} \textit{Restatement (Third) of the Law Governing Lawyers} (2000).
\textsuperscript{14} \textit{Restatement} § 69.
\textsuperscript{15} This includes both the lawyer and the client; \textit{Restatement} § 70.
\textsuperscript{16} \textit{Restatement} § 71.
\textsuperscript{17} \textit{Restatement} § 72.
\textsuperscript{18} Richmond, \textit{supra} note 8, 385.
\textsuperscript{21} Wesp v. Everson, 33 P.3d 191, 197 (Colo. 2001).
\textsuperscript{22} Ibid.
As the holder of the privilege, the client may waive privilege in respect of particular communications.\textsuperscript{24} This may be done either voluntarily or impliedly. Inadvertent disclosures or conduct inconsistent with maintaining confidentiality may result in waiver of the privilege.\textsuperscript{25} Privilege that has not been waived survives the death of the client.\textsuperscript{26}

As with other common law jurisdictions, there are a number of substantive exceptions to the attorney-client privilege. The most significant of these is the crime/fraud exception, similar to the \textit{Cox and Railton}\textsuperscript{27} principle that applies elsewhere in the common law world. In the United States, this principle was established in the Supreme Court’s decision in \textit{Clark v. United States}.\textsuperscript{28} Glynn notes, though, that there has been some divergence in subsequent judicial development of this exception in the various courts.\textsuperscript{29} For instance, there is some inconsistency as to whether intent is an element that needs to be proved for the exception to apply.\textsuperscript{30} 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.\textsuperscript{31}

\textbf{B. Attorney-Client Privilege and the Tax Profession}

The IRS has wide ranging powers of access and investigation in order to enable it to enforce the revenue laws. Historically, the courts have tended to interpret these powers liberally, with the effect of increasing the IRS’s authority.\textsuperscript{32} The primary investigatory authority is provided in IRC § 7602, which is expressed in very broad terms. For example, the power of summons in § 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.

These powers, though, have been held to be subject to the common law attorney-client privilege.\textsuperscript{33} Tax advice from a lawyer is now generally accepted as coming within

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\item \textsuperscript{24} United States v. Massachusetts Institute of Technology, 129 F.3d 681, 684 (1st Cir. 1997).
\item \textsuperscript{26} Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998).
\item \textsuperscript{27} R v. Cox and Railton, (1884) 14 Q.B.D. 153.
\item \textsuperscript{29} Glynn, supra note 10, 113-115.
\item \textsuperscript{30} Id. at 114-115.
\item \textsuperscript{31} Id.
\end{itemize}
the scope of the provision of legal services, so, when the advice emanates from a lawyer, attorney-client privilege shields the advice from compulsory disclosure.\textsuperscript{34}

The United States does not recognize an accountant-client privilege at common law (at the federal level). The primary authority on this point is the Supreme Court’s decision in \textit{Couch v. United States.}\textsuperscript{35}

\textit{Couch} involved whether the IRS could access a taxpayer’s records deposited with an external accountant for the purposes of preparing the taxpayer’s income tax returns (this had been the taxpayer’s usual practice for many years prior to the IRS summons). The taxpayer primarily resisted the summons by asserting her Fifth Amendment right against self-incrimination (the accountant surrendered the records to the taxpayer’s attorney after being issued with the summons). A subsidiary argument in favor of maintaining privacy that the taxpayer put forward was based around the confidential nature of the accountant-client relationship.

The majority in \textit{Couch} rejected the taxpayer’s argument around accountant-client privilege on three grounds.\textsuperscript{36} First, no such privilege had previously been recognized at the federal level and none of the state privileges\textsuperscript{37} had been applied to federal law. Second, the Court stated that there was no justification for such a privilege where the sought after records were involved in a criminal investigation or prosecution. 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). In particular, the decision of what to disclose and not was largely at the accountant’s discretion, rather than that of the taxpayer.\textsuperscript{38} This is related to the

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\item 409 U.S. 322 (1973).
\item \textit{Id.} at 335.
\item A number of states have created an accountant-client privilege through statute. These are not discussed here, with the focus being 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, \textit{New Mexico’s Accountant-Client Privilege}, 37 N. M. L. REV. 387 (2007); Martin Bartel, \textit{Pennsylvania’s Accountant-Client Privilege: An Asset with Liabilities}, 30 DUQ. L. REV. 613 (1992); David Canning, \textit{Privileged Communications in Ohio and What’s New on the Horizon: Ohio House Bill 52 Accountant-Client Privilege}, 31 AKRON L. REV. 505 (1998). Moloney notes that, as of 1998, some 26 states as well as Puerto Rico had an accountant-client privilege on the statute books; Thomas Moloney, \textit{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).
\item 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). As such, the
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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, although some cases have arrived at the same
conclusion on the basis that this is more properly regarded as accounting rather than
legal work. On this last point, Douglas J dissented holding 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.” His Honor held that, in such circumstances, the taxpayer could not be
regarded as having placed those records in the public domain.

It is not necessary to reconcile the majority’s reasoning with Douglas J’s dissent, suffice
to say that the majority’s logic does seem to be more consistent with the general
principle that the attorney-client privilege is waived where the client has disclosed the
substance of the advice. In any event, the Supreme Court has since reaffirmed the
Couch conclusion that no federal accountant-client privilege exists at common law in
Arthur Young.

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. The culmination of this process was the
inclusion of § 7525 into the IRC, which provides for a tax adviser’s privilege.

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

accountant requires the right to disclose information provided by the client to defend such
charges; 409 U.S. 322, 335 (1973). 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 being somewhat inconsistent in its reasoning.

39 United States v. Lawless, 709 F.2d 485 (7th Cir. 1983); McMahon and Shepherd, supra note 34,
417.
40 In re Grand Jury Investigation, 842 F.2d 1223 (11th Cir. 1987); McMahon and Shepard, supra
note 34, 418-419.
41 409 U.S. 322, 340.
44 Petroni, supra note 1, 847-850.
45 See generally Petroni, supra note 1; Louis Lobenhofer, The New Tax Practitioner Privilege:
Limited Privilege and Significant Disruption, 26 Ohio N. U. L. Rev. 243 (2000); Michael Hindelang,
In brief, § 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.\(^{46}\) This general rule is then limited to non-criminal tax matters before the IRS\(^ {47}\) and non-criminal tax proceedings in a Federal court involving the United States as the counterparty.\(^ {48}\) 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.\(^ {49}\) 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.\(^ {50}\) Specifically, the taxpayer has the burden of establishing that the privilege applies to a given communication, including that the limitations in § 7525(a)(2) do not apply, but the counterparty (which will be either the IRS or the United States) must prove that the communication falls within the tax shelter exclusion if the privilege otherwise applies.\(^ {51}\)

A number of elements are defined for the purposes of the tax adviser’s privilege. Of interest for the discussion here is that FATP is defined as any individual authorized under Federal law to practice before the IRS.\(^ {52}\) Such practitioners are identified in Circular 230,\(^ {53}\) which replicates Subtitle A, Part 10 of Title 31 of the Code of Federal Regulations, and includes attorneys, certified public accountants, enrolled agents, enrolled actuaries and enrolled retirement plan agents.\(^ {54}\)

The second definition of interest is that of “tax advice”, contained in § 7525(a)(3)(B). Aside from activities coming within the scope of a FATP’s authority to practice, no

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\(^{46}\) § 7525(a)(1).
\(^{47}\) § 7525(a)(2)(A).
\(^{48}\) § 7525(a)(2)(B).
\(^{49}\) § 7525(b).
\(^{50}\) See United States v. BDO Seidman, 492 F.3d 806, 822 (7th Cir. 2007).
\(^{51}\) Id.
\(^{52}\) § 7525(a)(3)(A).
\(^{53}\) Petroni, supra note 1, 861.
\(^{54}\) Treasury Department Circular 230 (Rev 4-2008) reproducing 31 CFR § 10.3 (September 26, 2007). Note that enrolled actuaries and enrolled retirement plan agents have their authority restricted to certain elements of the IRC. Provision is also made for some other limited categories, such as temporary registrants and self-representing parties.
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.55

Senator Connie Mack, who sponsored the bill introducing § 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 during subsequent court proceedings.”56 This extension would eliminate the (then) existing “unfair penalty imposed on taxpayers based on their choice of tax advisor.”57

The structure adopted presents several problems. The first of these is the vagueness with which tax advice is defined. 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.58 It is apparent that, despite the language used in § 7525(a)(3)(B), not all communications within a FATP’s authority to practice will fall within the notion of (protected) tax advice.59 The most obvious source of such uncertainty is the point at which privileged tax advice becomes unprotected business advice. Tax advice that is business advice is not protected under the general rule in § 7525(a), which is derived from the incorporation of common law privilege in the general rule and that aspect of the attorney-client privilege that precludes business advice from a lawyer from protection.

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 bears the

55 LeBlanc, supra note 45, 595-596.
57 Id.
58 Petroni, supra note 1, 861; Lobenhofer, supra note 45, 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) (in the context of the attorney-client privilege), (I)f 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.
59 Excluding tax advice that is also business advice and within a FATP’s authority to practice is not inconsistent with the language of § 7525, though. Under the general rule in § 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 § 7525(a)(3)(B) is wider and, therefore, covers more communications than those protected under § 7525(a).
burden of proving that the communication is protected tax advice) is that courts have exhibited a tendency to begin an inquiry from a default premise that advice from a non-lawyer FATP is business advice.60 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.61 As such, the purpose behind implementing § 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.

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.62 The uncertainty here arises, in part, from the derivative definition of “tax shelter”, which takes its meaning from IRC § 6662(d)(2)(C)(ii).63 This definition provides that a tax shelter includes transactions “a significant purpose (of which) is the avoidance or evasion of Federal income tax.”64 There is no guidance as to what is meant by the qualifier “significant purpose.” While the legislative history indicates that routine tax advice is unlikely to constitute a tax shelter for these purposes,65 this is not immediately apparently on the face of the legislation. Senator Mack, as sponsor of the bill introducing § 7525, expressed these very concerns regarding this “11th hour” insertion, stating,

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.66

Congress further added to this uncertainty by excluding not all communications associated with tax shelters, but only those that promote the participation in a tax shelter.67 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.68 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 § 6662(d)(2)(C)(ii)) definition limits tax shelters to cookie-cutter products peddled by shady practitioners or distinguishes tax shelters from individualized tax

60 Brooks, supra note 58, 1097.
61 Lobenhofer, supra note 45, 257-258.
62 Petroni, supra note 1, 862-864; Lobenhofer, supra note 45, 259.
63 § 7525(a)(3)(B).
64 § 6662(d)(2)(C)(ii).
65 Lobenhofer, supra note 45, 259.
67 Petroni, supra note 1, 863.
68 Valero Energy Corp. v. United States, 569 F.3d 626 (7th Cir. 2009).
advice. Instead, the language is broad and encompasses any plan or arrangement whose significant purpose is to avoid or evade federal taxes.\textsuperscript{69}

The “promotion of” such tax shelters was held to mean encouraging participation in, 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.\textsuperscript{70}

The Court also endorsed the principle in the Rhode Island District Court’s decision in United States v. Textron Inc. and Subsidiaries\textsuperscript{71} that promotion referred to proposed future transactions, not arrangements that had taken place in the past.\textsuperscript{72} Consequently, advice pertaining to the implications of a transaction that had already taken place cannot constitute the promotion of a tax shelter and, therefore, does not fall within the tax shelter exception.

Finally, § 7525 is silent as to waiver. On one level, this does not cause too many difficulties, since the general rule is explicitly based on common law attorney-client privilege, the rules associated with common law waiver are also imported. For example, communications relating to the preparation of tax returns, while generally not regarded as legal advice and, therefore, not coming within the common law privilege at first instance,\textsuperscript{73} are normally considered to have any applicable privilege waived either on the basis of disclosure (through the act of submitting the tax return)\textsuperscript{74} or a lack of intention on the part of the taxpayer that the information was provided confidentially.\textsuperscript{75}

The more restricted scope of § 7525 when compared with the common law privilege, though, raises the prospect of compulsory waiver. In essence, this is an application of the common law privilege principle that initial disclosure waives the privilege for all other matters. This result would seem to follow from the common law privilege’s incorporation, including its principles, into statute through § 7525(a). Therefore, if the taxpayer is required to disclose communications, for example, in proceedings brought by the Securities and Exchange Commission as part of securities litigation, then this disclosure could constitute waiver of the tax adviser privilege and the IRS has access to these otherwise privileged documents during a subsequent tax investigation. This,

\textsuperscript{69} Id. at 632.
\textsuperscript{70} Id. at 632-633.
\textsuperscript{71} 507 F.Supp 2d 138 (D. R.I. 2007).
\textsuperscript{72} Valero Energy Corp. v. United States, 569 F.3d 626, 633 (7th Cir. 2009).
\textsuperscript{73} United States v. Frederick, 182 F.3d 496, 502 (7th Cir. 1999).
\textsuperscript{74} United States v. Lawless, 709 F.2d 485 (7th Cir. 1983).
\textsuperscript{75} Colton v. United States, 306 F.2d 633 (2d Cir. 1966).
indeed, was the IRS’s expected outcome at the time that § 7525 was passed: “(i) if you are practicing in the Tax Court, for privilege waiver purposes, once something is disclosed, it is waived for all purposes”.  

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 form 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 in respect of the tax adviser’s privilege, though, is that the taxpayer does not have a choice regarding the disclosure to the SEC. The potential for abuse in this context becomes quite clear; the IRS may easily avoid the privilege by co-ordinating with another government agency to require disclosure as part of a standard investigation before any tax investigation takes place.

The more expansive criminal limitation, which applies to both IRS and federal proceedings, also raises the specter of compulsory waiver. The attorney-client privilege applies to all litigation, whether civil or criminal. 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 offences under the IRC that carry criminal penalties, most sharing elements in common with civil offences. As such, the IRS, therefore, often has a significant discretion whether to prosecute a particular offence as a civil or criminal matter.

In practice, most investigations begin as civil matters, in which the communication will remain privileged, but are later converted to criminal proceedings. This creates the problem for taxpayers that they need to anticipate which matters are likely to be converted into criminal investigations, requiring, as Gergacz states, “clairvoyant powers to know in what settings tax adviser communications may be sought”. Taxpayers may attempt to mitigate this problem by consulting with their (presumably usual) 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.

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76 Wilson, supra note 45, 338-339 quoting Deborah A Butler, IRS Assistant Chief Counsel (Field Service) as reproduced in Sheryl Stratton, Accountant-Client Privilege Proposed Sliced and Diced, 98 TAX NOTES TODAY 103-1 (1998).
77 Petroni, supra note 1, 858.
78 Ibid; Wilson, supra note 45, 339.
79 Gergacz, supra note 5, 248.
80 See also Lobenhofer, supra note 45, 256.
The problem with this approach is that any communications made with the first non-lawyer adviser will not be protected from disclosure. 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 waiver is not dependent on the preceding action of another agency.

The final limitation that raises the prospect of compulsory waiver is the restriction to federal matters. Note that the limitation in § 7525(a)(2)(B) to federal matters is specifically to tax proceedings in a federal court. The limitation is not to questions of federal law; it is much more limited. 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 § 7525. As Petroni notes, this is the case “even though most tax advice on state law is based on federal law”.

This problem is mitigated to a certain extent by the fact that some states have their own tax adviser privilege. This is far from a solution, though, for several reasons. Firstly, not all states have such a privilege; the survey conducted by Moloney referred to earlier found 27 (including Puerto Rico) out of a possible 51. While this number varies across contemporaneous surveys, 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. Secondly, roughly half of these states (13 in Moloney’s survey) 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. Thirdly, the state privileges normally apply only to CPAs; that is, other non-lawyer tax advisers are not covered. Consequently, given the lack of coverage across the states and, where coverage is provided, the lack of substantive overlap between the state privilege and § 7525, the potential mitigation of the compulsory waiver problem in the federal limitation context is minimal.

81 Id.
82 Petroni, supra note 1, 860.
83 Moloney, supra note 37, 282-283.
84 Canning, supra note 37 (24 states); DENZIL CAUSEY & SANDRA CAUSEY, DUTIES AND LIABILITIES OF PUBLIC ACCOUNTANTS, (5th ed, 1995) (16 states); Ronald Friedman & Dan Mendelson, The Need for a CPA-Client Privilege in Federal Tax Matters, TAX ADVISER 154 (March) (1996) (36 states).
85 This could go some way to explaining the noted disparity between contemporaneous surveys; id.
86 Lobenhofer, supra note 45, 256.
A relevant consideration in the development of the tax adviser’s privilege is the legal and historical context in the United States. Unlike most other common law jurisdictions, the United States does seem somewhat more open to recognising new privileges. The preference, though, is to do this through the common law, which is in some cases facilitated by statute (or regulation). 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. Congress has traditionally demonstrated a preference for courts to recognize new privileges rather than create new statutory rules. An outcome of this process is the relatively new psychotherapist-patient privilege that the Supreme Court recognized in Jaffee v. Redmond. The current proposed statutory federal reporter’s privilege may be regarded as something of a departure from this general rule, 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. 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.

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. 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. Direct communications between a client (or their agent) and a legal adviser attract a virtual blanket privilege where that communication is for the purpose of obtaining legal advice or assistance and irrespective of whether the material is sought in civil or criminal proceedings. As with the United States, not all aspects of a

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87 See In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 989 (D.C. Cir. 2005).
88 518 U.S. 1, 13 (1996).
90 While the identically entitled House and Senate bills are not identical in content, they do overlap to the extent described here.
91 For New Zealand, this occurred in 1840; English Laws Act, 1858, s 1. This has been confirmed more recently in the Imperial Laws Application Act, 1988, s 5, to the extent that the common law had not been overridden prior to the enactment of that later statute.
solicitor-client relationship are privileged, though, even in the context of the provision of legal advice. For example, observed facts are not protected from disclosure.\textsuperscript{95}

\textbf{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.\textsuperscript{96} The Court of Appeal’s judgment in \textit{Commissioner of Inland Revenue v. West-Walker}\textsuperscript{97} focused on whether the Commissioner of Inland Revenue’s information gathering powers\textsuperscript{98} operated subject to common law LPP; a 4-1 majority (Stanton J in dissent) found in the affirmative.

In response to the Court of Appeal’s finding, the New Zealand Parliament enacted s 16A of the \textit{Inland Revenue Department Act 1952} in 1958. The effect of this provision was to incorporate the \textit{West-Walker} decision, while excluding its application to trust accounts and financial records.\textsuperscript{99} This provision was later replaced by the present s 20 of the \textit{Tax Administration Act 1994}. In this, New Zealand stands alone in the common law world in terms of legislating LPP as it applies in taxation matters. While s 20 does not completely codify this area of the law as there are some matters not addressed leaving a residual application for the common law,\textsuperscript{100} s 20 does displace common law LPP in the vast majority of cases.\textsuperscript{101}

Taxation is not the only area in which the New Zealand Parliament has legislatively intervened in the area of privilege. In addition to s 20 of the \textit{Tax Administration Act 1994} dealing with most issues surrounding confidentiality of communications with legal advisers over tax matters, s 54 of the \textit{Evidence Act 2006} allows for privilege to attach to communications with a registered patent attorney in the context of advice relating to intellectual property.\textsuperscript{102} The \textit{Evidence Act 2006} also allows for privilege to attach to certain communications with ministers of religion,\textsuperscript{103} medical practitioners and clinical psychologists in the context of criminal proceedings\textsuperscript{104} and journalists’ sources.\textsuperscript{105}

\textsuperscript{95} \textit{DONALD MATHIESON}, \textit{CROSS ON EVIDENCE: 8TH NEW ZEALAND EDITION}, (10.32) (2005).
\textsuperscript{96} \textit{JONATHAN AUBURN}, \textit{LEGAL PROFESSIONAL PRIVILEGE: LAW AND THEORY}, 30 (2000).
\textsuperscript{97} (1954) N.Z.L.R. 191.
\textsuperscript{98} Currently contained in ss 16 to 19 of the Tax Administration Act, 1994.
\textsuperscript{102} As defined in s 54(3).
\textsuperscript{103} Section 58.
\textsuperscript{104} Section 59.
Section 69 also provides the court with a discretion to prevent confidential communications or information (including sources of information) from being compulsorily disclosed, although this protection appears to be limited to the adducing of evidence in court and not extending to discovery.\footnote{106} 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.\footnote{107}

A series of government-commissioned reports was prepared during the 1990s and early 2000s analyzing the content and application of legal privileges.\footnote{108} While the early stages of this process dealt with evidentiary privileges generally, the focus turned on 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.\footnote{109} That inquiry noted difficulties accessing relevant documentation in the course of its investigations,\footnote{110} 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,\footnote{111} finally recommending that LPP be abolished in respect of all tax advice.\footnote{112} Subsequent inquiries tended not to recommend complete abolition, but did advocate for a restriction on LPP’s blanket application in taxation matters.\footnote{113}

\footnote{105} Section 68. This provision provides an in-substance privilege for journalist sources in that, if the relevant criteria are met, the journalist or their employer are not compellable as a witness to disclose any information that would disclose the identity of that source.


\footnote{107} Section 67(3).


\footnote{110} Commission of Inquiry into Certain Matters Relating to Taxation, supra note 111, 1:5:26-1:5:31.

\footnote{111} Id. at 3:1:61.

\footnote{112} Id. at 3:1:63.

\footnote{113} See New Zealand Law Commission, Tax and Privilege, supra note 70, (23).
The final public consultation document in this process was released in May 2002 by the Inland Revenue Department.\textsuperscript{114} The central recommendation was to replace the present s 20 of the \textit{Tax Administration Act 1994}\textsuperscript{115} with "a new and complete code for tax and privilege".\textsuperscript{116} Departing from the recommendations of the earlier inquiries, the proposed amendment would apply to opinions on tax law as well as replicate the existing litigation privilege (modified to accord with the, at that time, incoming Evidence legislation, now contained in the \textit{Evidence Act 2006}), but would be a separate privilege from LPP.\textsuperscript{117} Importantly, the new advice privilege would extend to other professional groups, with accountants identified as the primary non-legal adviser group.\textsuperscript{118} The role of a strong code of ethics in identifying appropriate non-legal adviser groups was highlighted.\textsuperscript{119}

\textbf{C. Non-Disclosure Right}

The culmination of this process was the introduction of a non-disclosure right for tax advisors (as defined).\textsuperscript{120} 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 (at the time of writing, the New Zealand Institute of Chartered Accountants and the TaxAgents Institute of New Zealand are the only such approved groups;\textsuperscript{121} note that members of the New Zealand legal profession continue to have their client communications privileged under s 20 as discussed earlier).

The non-disclosure right is contained in ss 20B to 20G of the \textit{Tax Administration Act 1994}. These provisions were incorporated via the \textit{Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005}, which was first introduced into Parliament on

\begin{itemize}
  \item [115] Which ultimately was not altered.
  \item [116] Inland Revenue Department, supra note 114, (3.1).
  \item [117] \textit{id.} at (3.8).
  \item [118] \textit{id.} at (3.6).
  \item [119] \textit{id.}
  \item [120] A note on 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.
  \item [121] Maples and Blissenden, supra note 6, 28; Andrew Maples, \textit{The Non-Disclosure Right in New Zealand – Lessons for Australia?}, 1 J. AUSTRALASIAN L. TCHR. ASS’N 351, 355 (2008).
\end{itemize}
November 16, 2004\textsuperscript{122} and passed on June 15, 2005,\textsuperscript{123} with effect from June 22, 2005 (inclusive).\textsuperscript{124} The main operative provision is s 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.\textsuperscript{125}

Under s 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:

(a) it is confidential;\textsuperscript{126} 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;\textsuperscript{127} 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;\textsuperscript{128} 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;\textsuperscript{129} and
(c) the purposes for which the book or document were created do not include committing or promotion the commission of an illegal or wrongful act.\textsuperscript{130}

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 s 20D, which varies depending on the party who created the tax advice document. If the purported tax advice document was created by a tax advisor, the claim for protection must set out the following information:\textsuperscript{131}

(a) a brief description of the form and contents of the document;
(b) the name of the tax advisor who created the document;

\begin{footnotesize}
\textsuperscript{122} Minister of Revenue, \textit{Banks to Pay More Tax Under New Rules}, Media Statement (16 November 2004).
\textsuperscript{123} Minister of Finance, \textit{Major Tax Bill Passes}, Media Statement (16 June 2005).
\textsuperscript{124} Inland Revenue Department, Standard Practice Statement SPS 05/07: Non-disclosure right for tax advice documents, (1).
\textsuperscript{125} Tax Administration Act, 1994, s 20B(1).
\textsuperscript{126} Tax Administration Act, 1994, s 20B(2)(a).
\textsuperscript{127} Tax Administration Act, 1994, s 20B(2)(b)(i).
\textsuperscript{128} Tax Administration Act, 1994, s 20B(2)(b)(ii).
\textsuperscript{129} Tax Administration Act, 1994, s 20B(2)(b)(iii).
\textsuperscript{130} Tax Administration Act, 1994, s 20B(2)(c).
\textsuperscript{131} Tax Administration Act, 1994, s 20D(3).
\end{footnotesize}
(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.

Items (c) and (d) do not have to be included in the claim if the taxpayer created the relevant book or document. In addition, the claim must be asserted within the time limit applicable to the context in which the claim arises. 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. If the non-disclosure right protection is lost in this fashion, the Commissioner of Inland Revenue argues that it is lost permanently. 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.

Sections 20E and 20F set out information associated with tax advice documents that must, despite non-disclosure right protection, be disclosed. Books or documents attached to tax advice documents that do not qualify themselves as tax advice documents under s 20B(2) must be disclosed. Further, a description of “tax contextual information” relating to a tax advice document must be disclosed. “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 (other than those tax laws relating to the collection of tax debts);
(d) a fact or assumption relating to advice referred to in (c); or

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132 Tax Administration Act, 1994, s 20D(2).
133 Tax Administration Act, 1994, s 20D(4).
134 Inland Revenue Department, supra note 114, (63).
135 Id.; see also Maples, supra note 121, 355.
136 Tax Administration Act, 1994, s 20E.
137 Tax Administration Act, 1994, s 20F(1).
138 Tax Administration Act, 1994, s 20F(3)(a).
139 Tax Administration Act, 1994, s 20F(3)(b).
140 Tax Administration Act, 1994, s 20F(3)(c).
141 Tax Administration Act, 1994, s 20F(3)(d).
142 Tax Administration Act, 1994, s 20F(3)(e).
(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.\textsuperscript{143}

The Commissioner may challenge a claim for non-disclosure right protection by applying for a ruling from the District Court,\textsuperscript{144} including a request for more specific tax contextual information.\textsuperscript{145} The relevant District Court Judge may review the book or document that is the subject of the disputed claim.\textsuperscript{146}

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.”\textsuperscript{147} The expected gain was that voluntary compliance with the tax system would be increased, with a consequential reduction in compliance and administrative costs.\textsuperscript{148} 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 the more modest goal of bringing the respective statuses of the two closer together.\textsuperscript{149} The Explanatory Note to the bill introducing the non-disclosure right explained the parallel nature of the rules more explicit by stating “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.”\textsuperscript{150}

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. So much can be taken from s 20B(2), which sets out (in common with common law LPP) a requirement 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 must come from a restricted group of professional advisers.

\textsuperscript{143} Tax Administration Act, 1994, s 20F(3)(f).
\textsuperscript{144} Tax Administration Act, 1994, s 20G(1).
\textsuperscript{145} Tax Administration Act, 1994, s 20G(1)(c).
\textsuperscript{146} Tax Administration Act, 1994, s 20G(2).
\textsuperscript{147} Commentary, Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004, 44. See also First Reading Speech, Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004.
\textsuperscript{148} Commentary, Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004, 44. See also First Reading Speech, Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004.
\textsuperscript{149} First Reading Speech, Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004.
\textsuperscript{150} Explanatory Note, Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004, 10 (emphasis added).
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 s 20B(2)(c) mirrors the crime-fraud exception to common law LPP.\footnote{151 Keep Brothers v. Birch and Bradshaw, (1928) N.Z.L.R. 360.}

The exclusion from protection of tax contextual information bears some similarity to the exclusion from common law privilege for certain factual information.\footnote{152 Mathieson, supra note 95.}

The one judgment to date to consider the non-disclosure right in detail confirmed that the non-disclosure right is a statutory right completely separate from the common law privilege.\footnote{153 Blakeley v. Comm'r of Inland Revenue, (2008) N.Z.H.C. 223.}\footnote{154 Id. at (12).} In comparison to the common law privilege, his Honor held that the non-disclosure right is more restricted in scope, stating “The protection afforded by s 20B is much more confined than legal professional privilege. It is not … a new substantive right of equivalent utility to legal professional privilege.”\footnote{Id.} His Honor 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 s 20B only includes books and documents in the definition of “tax advice document” that qualify for protection. This is more restrictive than the scope of the revenue authority’s investigatory powers, which covers “information.” LPP covers the entire ambit of materials that the Commissioner may request, whereas s 20B only covers books and documents;\footnote{155 Id.}

- Independent of the content of the Commissioner’s information gathering powers, the criteria set out in s 20B(2) that a book or document must satisfy for protection under the non-disclosure right represent another point of distinction from the common law rule. There is no such list of criteria under the common law that potentially privileged communications have to meet to qualify for protection;\footnote{156 Id.}

- 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. There is no equivalent procedure regarding common law LPP. Under the
common law, privilege does not need to claimed; rather, “Privilege attaches to a qualifying communication and remains unless waived by the client”;\(^{157}\)

- Facts or assumptions are excluded from the non-disclosure right as tax contextual information under s 20F. Equivalent material relating to legal advice is protected under common law LPP.\(^{158}\)

Based on these observations, Hansen J concluded that the non-disclosure right is “significantly narrower than the scope of legal professional privilege both as to the information protected from disclosure and the conditions attaching to its application.”\(^{159}\) 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.”\(^{160}\)

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 communications from legal and non-legal advisers. 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. The lynchpin for a communication to qualify for protection in both cases is that the adviser must belong to a pre-approved professional group. 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 § 7525 applying to enrolled agents and enrolled actuaries in the United States and s 20B applying to tax agents in New Zealand. None of these recognized professional groups specifically require an accounting qualification for membership (although many members are also qualified accountants). As such, while not explicitly stated, the rules in both the United States and New Zealand may be imputed with a public protection.

\(^{157}\) Id.
\(^{158}\) Id. Justice Hansen also noted 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; ibid. This observation is now superseded, since the non-disclosure right’s scope has now been extended to all discovery proceedings involving the Commissioner; Taxation (International Taxation, Life Insurance, and Remedial Matters) Act, 2009, ss 596 and 600. See also Riaan Geldenhuys and Eugen Trombitas, Blakeley v CIR and the Non-Disclosure Right: A decision out of context, 14 N. Z. J. TAX’N L. POL’Y 303, 312 (2008).
\(^{160}\) Id.
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. This follows the logic of restricting the sources of tax advice in these jurisdictions to only appropriately qualified professionals.\footnote{161}

Perhaps the most significant difference between these two statutory rules is the role of the common law. § 7525 explicitly incorporates common law attorney-client privilege as its starting point, with some narrowing of the latter’s scope as it applies outside of the legal profession. The New Zealand rule, though, is a completely separate rule, as confirmed in \textit{Blakeley}. Developments in common law attorney-client privilege are, therefore, automatically incorporated into the jurisprudence relating to § 7525, to the extent that the attorney-client privilege has actually been incorporated. Any changes to common law LPP in New Zealand, though, will not affect the development of the non-disclosure right. 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 § 7525. Even the previous difference noted, around the role of the common law, is explicable as the New Zealand Parliament deciding to retain complete control over the development of the non-disclosure right. As was noted earlier, this is consistent with previous statutory interventions that the New Zealand Parliament has made in both taxation and evidence matters and may be contrasted with the traditional preference in the United States for Congress to facilitate judicial recognition of evidentiary privileges, rather than creating separate new rules.

One such difference is the scope of the respective rules. Unlike § 7525 in respect of the IRS, s 20B is not limited only to documents sought by the Inland Revenue Department; that is, the non-disclosure right applies to all counterparties, not only the revenue authority. All that is required is that the relevant book or document meets the definition of “tax advice document”. Once this has been established, the treatment of the communication is set out in s 20D, with some contents possibly being required still to be disclosed under s 20F. The important point, though, is that the rules applies generally and not only to the Inland Revenue Department. Similarly, there is no exclusion in the New Zealand rule for communications around criminal matters (which exists in the United States under § 7525(a)(2)(A)), which is discussed further below. These aspects of

\footnote{161 This aspect is best illustrated by the categories of practitioners authorized to practice in the United States under Circular 230. For example, 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; see Circular 230, §§ 10.3(d)(2) and 10.3(e)(2).}
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”. § 7525(a)(3)(B) defines tax advice as being advice given by a FATP with respect to a matter within their authority to practice, however, as indicated earlier, there is some degree of uncertainty as to what is exactly constitutes tax advice. The New Zealand legislation does not explicitly set out a definition for “tax advice”, however, it does set out in s 20B(2) the requirements for a document to be a tax advice document (and, therefore, eligible for protection from compulsory disclosure). 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. Any other ancillary purpose, whether or not within the usual scope of the tax advisor’s profession, does not appear sufficient for the document to qualify for the privilege. This obviates the need to specify what constitutes tax advice in the sense required under the tax adviser’s privilege, as, to come within the non-disclosure right, the book or document needs to satisfy only specified criteria. 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 s 20B that the book or document be created for the “main purpose” of advising on the operation and effect of tax laws. While this yardstick is open to judicial interpretation, this is much more objective than the tax (or legal advice/business advice distinction that no common law jurisdiction has managed to defined properly to date.162

Another point of difference is the absence in the New Zealand legislation of an explicit restriction to civil proceedings. While there is an exclusion in s 20B(2)(b) for advice that includes a purpose of committing an illegal act, this is distinct from a proceeding for a criminal offence. This may be explained, in part, by differences in structure between the New Zealand income tax system and that in the United States. The majority of offences under New Zealand income tax law are civil offences, whereas criminal offences are much more numerous under the United States. 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. It would appear, however, that, even in a 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.

162 Although the use of the descriptor “main” may cause some difficulties; see Maples and Blissenden, supra note 6, 35-36.
Related to this area is the absence of a limitation in the New Zealand legislation excluding advice regarding tax minimization schemes (tax shelters in the United States) from the scope of the privilege. This, however, does raise an ambiguity in the New Zealand legislation. As identified above, s 20B excludes advice that has a purpose of the commission of an illegal act. While this exclusion is necessary, and is consistent with exclusions from the scope of common law LPP, it is not immediately clear where illegality begins and ends in this context, an issue shared with the common law privilege. In particular, would advice regarding the interpretation of New Zealand tax laws, especially an interpretation that is contrary to Parliament’s clear intention, be considered illegal if it were later rejected in court once challenged by the Commissioner? Would the illegality question be any clearer if the advice was covered by any anti-avoidance provisions within the New Zealand tax statutes? The Inland Revenue Department has noted that tax evasion and fraud (of any type) as non-exhaustive examples of illegal activity that this exclusion covers.163

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) 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 dismiss out of hand 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.

On a more contextual level, though, § 7525 and s 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,164 the structure of § 7525 is consistent with the United State’s history of giving deference to the judiciary in the matter of evidentiary privileges. 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 do undermine the purpose for which § 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; matters such as (voluntary) waiver165 and the extent to which privilege applies to any form of advice are still matters for the courts to determine.

163 Maples, supra note 121, 356-357.
164 Petroni, supra note 1, 867.
165 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
In contrast, the New Zealand Parliament has demonstrated a propensity to control developments in the law of evidentiary privileges primarily through statute. This is reflected in the judicially-confirmed status of the non-disclosure right being a statutory right completely separate from common law LPP. 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 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, should either attempt to mimic the other too closely would represent a true departure from their established practices.

Further, the two rules have different stated purposes and the respective structures adopted reflect these varying objectives. 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. In contrast, the non-disclosure right was only ever intended to provide a “degree of consistency” between the two treatments; 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

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the courts to interpret § 7525 in such a way so that compulsory waiver does not occur. For example, the courts may be inclined, in appropriate circumstances, to regard a forced disclosure to another agency does not affect a taxpayer’s rights as against the IRS by interpreting the existing law on waiver as being predicated on the taxpayer’s voluntary actions.

168 Id.
advisers, then the model used in the United States is most appropriate, whereas the New Zealand model 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. A common law jurisdiction seeking to achieve uniform treatment would be well advised to adopt the general rule as presented in § 7525(a)(1) without any of the restrictive elements contained in the remainder of the provision.