

# **Legal advice privilege in the taxation context: disconnected ethical regimes for lawyers and tax advisers in the United States and New Zealand.**

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## **Key Words**

Attorney-client privilege; codes of conduct; legal advice privilege; non-disclosure right; tax practitioner privilege

## **Abstract**

Legal professional privilege requires confidential communications between lawyer and client to remain confidential unless the privilege is waived by or on behalf of the client. Where communications are privileged, the client may legally refuse to disclose documents containing those communications and may refuse to answer questions regarding them and the lawyer is obliged to refuse to disclose such documents or answer such questions. The rationale for legal professional privilege is that it encourages candour between client and lawyer. This candour allows a lawyer to give the most accurate and relevant advice which promotes the wider public interest of compliance with relevant laws and regulations and the administration of justice.<sup>1</sup>

Legal professional privilege encompasses what is known as legal advice privilege. This form of privilege generally applies only to communications between lawyer and client; however, there are jurisdictions where legal advice privilege has been extended, to an extent, beyond lawyers to tax advisers. For both tax lawyer and tax adviser ethical issues emerge because claims that communications are covered by privilege have an ethical dimension to them. Judgements around whether communications are covered by the relevant privilege regime, the advisers' duty to the client and any actual or perceived duty to the tax system all play a role. Provisions in relevant professional codes of conduct and the effect of both the regulatory rules and behaviour of tax agencies also play a large part in informing decisions around privilege claims.

This article critically examines these various themes and their potential impact on ethical behaviour through comparative analysis of the differing approaches and regulatory regimes in the United States and New Zealand. Both are common law jurisdictions where legal professional privilege rules have evolved from English common law principles and where a form of privilege for non-lawyer tax advisers has been created. Comparative analysis between lawyers and non-lawyer tax advisers *within* each jurisdiction and *between* jurisdictions reveals disconnections in the ethical landscape and an area where reform could improve standards of behaviour. A new approach demonstrating improved clarity and coherence is proposed.

## **Introduction**

In English law, legal professional privilege requires that confidential communications between lawyer and client (or between lawyer, client and third party if made in a litigious context) remain so unless privilege is waived, by or on behalf of the client. Where communications are privileged, the client may legally refuse to disclose documents containing those communications and may refuse to answer questions regarding them and the lawyer (or third party) is obliged to refuse to disclose such documents or answer such questions unless the client waives privilege or it is waived on the client's behalf. The privilege takes two forms; legal advice privilege and litigation privilege. Legal advice privilege covers confidential communications between legal adviser and client made for the purpose of obtaining or giving legal advice. In English law, legal advice privilege relates only to communications between lawyer and client. It does not extend to advice given by, for example, a tax accountant, even if identical advice would be covered by legal advice privilege if it came from a lawyer.<sup>2</sup> The meaning of legal advice privilege for this purpose is actually quite broad and goes beyond simply stating the law. It includes advice on a course of action; "what should prudently and sensibly be done" in a particular legal context.<sup>3</sup> Litigation privilege covers confidential communications made for the purpose of actual or contemplated litigation and can encompass third parties such as witnesses of fact and expert witnesses. The rationale for both forms of legal professional privilege is that it encourages candour between client and lawyer, which allows a

lawyer to give the most accurate and relevant advice, thereby promoting the wider public interest of compliance with relevant laws and regulations and the administration of justice.<sup>4</sup>

Many common law jurisdictions, including the United States and New Zealand, have forms of legal professional privilege which have developed from English common law rules. The New Zealand Evidence Act 2006 has largely codified the common law rules which cover both legal advice (or solicitor/client) privilege and litigation privilege<sup>5</sup> where “proceedings” are involved<sup>6</sup> but preserves the common law rules relating to legal professional privilege where a proceeding is not involved.<sup>7</sup> Solicitor/client privilege in relation to the information gathering powers of the Inland Revenue Department has also been codified in the Tax Administration Act 1994.<sup>8</sup> In the United States federal context, attorney-client privilege encompasses both elements of legal professional privilege (supplemented by the work product doctrine in the litigation context) and is based on common law rules.<sup>9</sup> The focus of this article will be on legal advice privilege as it has developed in the United States and New Zealand. Although legal advice privilege generally relates to communications between lawyer and client, in both these jurisdictions this privilege has, to a degree, been extended to encompass certain communications between non-lawyer tax adviser and client.

The candour and compliance justification for privilege becomes particularly interesting in the taxation context and in jurisdictions like the United States and New Zealand where a form of legal advice privilege has been extended beyond lawyers to tax advisers. The question arises, how does the rationale of candour encouraging compliance sit with a tax adviser’s (or indeed a tax lawyer’s) role, if part of that role is to minimise the amount of tax that the client pays? This raises ethical questions around the duty owed by the tax adviser to the client and whether any duty at all is owed by the adviser to the tax system and to the relevant tax collection agency. Advising a client to claim that communications are privileged, for example following receipt of information gathering requests from a revenue collection agency, clearly has an ethical dimension for a number of reasons. The parameters of legal advice privilege are not hard and fast, requiring judgments about the nature of

the advice given to be made. The nature and extent of any duty owed to the tax system and how this sits with the duty owed to the client could influence those judgements, as will the requirements of relevant professional body codes of conduct and, in the case of tax lawyers, their duty to the court. The role played by revenue collection agencies also has an impact, including the approach taken to information gathering and revenue collection, for example whether overly aggressive, and any regulations governing tax practitioners in the context of privilege. This article explores these themes through comparative analysis of the regulatory regimes in the United States and New Zealand and, within each jurisdiction, through comparative analysis of the codes and regulations applying to lawyers and non-lawyer tax advisers.

The article begins by examining the scope of legal advice privilege in the taxation context and the ways in which the privilege has been extended to non-lawyer tax practitioners in both the United States and New Zealand. The ethical dimension to claims of privilege is then considered. This includes consideration of the duty owed to the client and any duty owed to the tax system and the provisions of both professional codes of conduct and any statutory regulations. The article concludes with analysis of the different duties, professional and regulatory regimes which apply to lawyers and non-lawyer tax practitioners and which influence ethical behaviour, and with proposals for optimal regulatory and professional regimes to encourage appropriate ethical behaviour.

## **Legal Advice Privilege in the Taxation Context**

### United States

In the United States, confidential communications between lawyer and client made in order to give or obtain legal advice are protected from disclosure by the attorney-client privilege.<sup>10</sup> What constitutes legal advice in the taxation context can raise some difficult questions. It covers, for example, advice given in relation to tax planning or an opinion letter on a taxation issue.<sup>11</sup> It will not cover an activity such as the preparation of a tax return, this being regarded as something “other than lawyers’ work”.<sup>12</sup> It will also not cover purely business advice,<sup>13</sup> although there are clearly difficult issues around the dividing line between legal and business advice. Attorney-client privilege

is also subject to what is known as the crime-fraud exception. This exception allows claims of privilege to be challenged on the grounds that the advice was obtained “for the purpose of aiding an ongoing or contemplated crime or fraud”.<sup>14</sup> This exception has been of particular interest to the Inland Revenue Service (IRS) in challenging claims of privilege made in relation to documents related to tax planning schemes.<sup>15</sup>

Legislation has extended attorney-client privilege to communications relating to tax advice and made between a federally authorised tax practitioner and their client.<sup>16</sup> As the tax practitioner privilege is an extension of the attorney-client privilege, it is subject to the same requirements and exceptions. This means that the tax advice must constitute legal advice, for example relating to tax planning. If it involves something other than “lawyers work”, it will not be covered. The question of when tax advice is legal advice is perhaps an even thornier one to resolve where tax advice from a tax practitioner is concerned. The same considerations which are relevant to attorney-client privilege covering legal advice in the taxation context apply, but the dividing line between what is legal advice relating to tax planning and what is business or tax advice with no legal element may be even more difficult to establish.<sup>17</sup> Although tax advice is given a legislative definition in the context of the tax practitioner privilege, the definition is advice on a matter within the scope of a federally authorised tax practitioner’s authority to practice.<sup>18</sup> This, arguably, does not provide a helpful clarification.

When enacted, the tax practitioner privilege was also made subject to some exceptions which are additional to those that apply to the attorney-client privilege. In the taxation context, the most notable of these exceptions is a limitation on privilege where what is defined as a tax shelter is involved. Essentially, written communications connected with the promotion of any direct or indirect participation in tax shelters are excluded from the scope of the privilege.<sup>19</sup> Tax shelters are broadly defined in the legislation as any partnership, entity, plan or arrangement a significant purpose of which is the avoidance or evasion of federal income tax.<sup>20</sup> Judicial interpretation of this definition has confirmed its intentional breadth and that individualised tax advice may fall within it.<sup>21</sup>

## New Zealand

The rules in New Zealand relating to legal advice privilege are at common law, other than in the context of proceedings, where legal advice privilege has been codified in the Evidence Act 2006.<sup>22</sup> However, in the context of taxation and specifically in relation to the statutory information gathering powers of the Inland Revenue Department (IRD), provisions in the Tax Administration Act 1994 (TAA) incorporate what is effectively legal advice privilege into the statute and make these information gathering powers subject to legal practitioner-client privilege.<sup>23</sup> Confidential oral and written communications made between legal practitioner and client for the purpose of obtaining or giving legal advice are privileged from disclosure in the TAA, although not those communications made for the purpose of “committing or furthering the commission of some illegal or wrongful act” (essentially the crime-fraud exception).<sup>24</sup> The information gathering powers specifically affected by the privilege include powers to remove and copy documents and to require information or documents to be furnished to the Inland Revenue.<sup>25</sup>

Legislation has extended privilege to tax advisers in New Zealand, although the extension takes a very different form to that in the United States. Rather than bringing tax advisers within the existing legal practitioner-client privilege in the TAA, instead, a more restricted form of privilege for tax advisers and their clients was created in the legislation.<sup>26</sup> The privilege is restricted in the sense that it applies only to tax advice documents, as defined. A tax advice document is one that is confidential and is created for the purpose of giving or obtaining advice on the operation and effect of taxation legislation.<sup>27</sup> It can be created by either the client or the tax adviser. What type of document comes within this definition is clarified to an extent in guidance issued by the IRD.<sup>28</sup> The “advice” component of the definition, unsurprisingly, leads to clarification that documents which simply record decisions are not included. Nor are those created for tax compliance purposes.<sup>29</sup>

The tax advisers’ privilege in New Zealand, or non-disclosure right as it is often referred to, is subject to the same exception that is found in the statutory legal practitioner-client privilege in s 20 where illegal or wrongful acts are concerned.<sup>30</sup> There is no tax shelter style exception akin to that

found in the United States, but the legislation does allow the IRD to require the disclosure of tax-contextual information, even where the non-disclosure right has been asserted in relation to a tax advice document.<sup>31</sup> Tax –contextual information is likely to be required where the IRD lacks factual information about a transaction, such as when it took place and the parties to it.<sup>32</sup> It should be noted that these tax-contextual information provisions do not apply to the statutory solicitor/client privilege.<sup>33</sup> Assertions of legal practitioner-client privilege and tax adviser non-disclosure claims are both subject to challenge through a court (or Taxation Review Authority) order, whereby the validity of the claim is assessed. The Commissioner of Inland Revenue may apply for such a determination to be made.<sup>34</sup>

### **The ethical dimension**

There is clearly an ethical dimension involved when a claim of privilege is asserted. The privilege belongs to the client, to assert or waive as they see fit, but the lawyer or tax adviser is, in theory, far better placed to know in what circumstances such a claim can be asserted and to advise the client accordingly. The specialist knowledge of the adviser is particularly important in the taxation context. The difficulty of the blurred line between business advice and legal tax advice is hard enough where a lawyer is concerned. The additional complexities of the tax adviser privilege in both the United States and New Zealand, with their exceptions and restrictions, makes it that much more crucial that a tax adviser has a sound understanding of both the legal basis for privilege claims and the ethics involved in asserting privilege, for example through guidance (and sanctions) in professional body codes of conduct. The ethical dimension is an important one because of what might be perceived as the danger of dubious or spurious claims which are primarily designed to obfuscate the information gathering efforts of revenue collection agencies. In recent years, in many jurisdictions, these information gathering powers have increased and, as for example in the United States, may include a combination of disclosure requirements and list keeping requirements,<sup>35</sup> with accompanying penalties for failure to comply.<sup>36</sup> Disclosure requirements allow more details of the elements of tax planning schemes to be collected and the list keeping requirements mean that participants in schemes can be easily identified. It has been suggested that, in the United States,

one response to these increased information gathering powers has been more frequent assertions of privilege, for example in response to an IRS summons or in the context of an IRS investigation into a disclosed reportable transaction.<sup>37</sup> Some of these assertions are regarded by the IRS as unmeritorious claims of privilege by promoters of tax planning schemes to try and avoid disclosure of information.<sup>38</sup> The tax shelter limitation is itself a result of concerns around the consequences of the tax practitioner privilege being extended to third party promoters of tax shelter schemes. When the legislation was introduced in the United States in the late 1990's, there was a boom in the design and marketing of generic tax shelter schemes, at the forefront of which were the big accounting firms.<sup>39</sup> In New Zealand, the IRD has cited examples where legitimate investigations into tax affairs have been hindered by privilege claims. These include: claiming privilege for materials "clearly not involving matters of a legal advisory nature"; claiming blanket privilege for a range of mixed documents, some transactional, some containing legal advice, and; including details of transactions in documents containing legal advice in order to conceal information from the IRD.<sup>40</sup>

The suggestion that some advisers may be making spurious privilege claims in the taxation context raises a number of issues connected to what informs claims of privilege and the motivation of lawyers and tax advisers when making such claims. These issues encompass the extent to which a duty is owed to the client and any perceived or actual duty owed to the relevant tax collection agency, the impact of the approach and behaviour of the tax collection agency and any relevant regulations and the role of professional body regulation and sanctions.

### **Tension between duty to the client and duty to the tax system.**

Whether or not some particular duty is owed to the tax system by tax advisers (both lawyers and non-lawyers) arguably must have some bearing upon the circumstances in which claims of privilege are made. If there is no particular duty, then the relationship between tax adviser and revenue collection agency is one of adviser and the "other side", purely regulated by relevant professional body codes of conduct. If on the other hand a particular duty is owed, whether to the



tax system generally and/or to a revenue collection agency, then there is another dimension to the relationship between tax adviser and revenue collection agency; one which might require more of a “partnership” approach, perhaps informing ethical behaviour, whether or not reflected in the relevant professional body codes of conduct. Many commentators suggest that a duty is owed,<sup>41</sup> although there is clearly wide scope for interpreting precisely how that duty is balanced with the duty owed to the client. Jackson and Milliron argue that:<sup>42</sup>

The practitioner’s role lies somewhere along a spectrum with government agent at one end and taxpayer advocate at the other. The IRS and practitioners don’t agree where on the spectrum that role should lie.

Watson refers to a number of general duties described by commentators, which range from protecting the revenue to balancing the client’s interests with that of “the public’s interest in a sound tax system”.<sup>43</sup> Infanti refers to “uncodified norms” imposed by peers which, in the tax lawyer context, include a “duty to the revenue system”, regarded as necessary due to the self-assessment system and the inability of government to audit more than a small number of tax returns.<sup>44</sup>

Dabner and Burton, in the Australasian context, refer to a relationship of collaboration or partnership between the revenue collection agency and the tax agent.<sup>45</sup> This “responsive regulation” model seeks to “maximise voluntary compliance by the bulk of taxpayers whilst focusing limited enforcement resources on the recalcitrant minority.”<sup>46</sup> There are clearly challenges with this model. As acknowledged by Dabner and Burton, the reality of tax practice involves client interests and expectations and difficult questions around the “correct” level of taxation.

Furthermore, unless a duty is owed to the tax system as a whole by the tax practitioner, it is difficult to see how a partnership model really works, given the conflict between the interests of the client and those of the revenue collection agency. Certainly, Dabner and Burton suggest that tax advisers in Australasia do not embrace the idea of a duty to the revenue outweighing their duty to the client.<sup>47</sup> Empirical data supports this conclusion in the Australian context, suggesting that most tax agents regard their sole professional responsibility as being to the client.<sup>48</sup> The same study

refers to the view of the Taxation Institute of Australia, that the interests of the client take priority where there is potential conflict between those interests and that of the tax system.<sup>49</sup> This study is not specific to New Zealand but does reflect the wider Australasian experience, and the responsive regulation model to which Dabner and Burton refer was introduced by the IRD in 2001, following its introduction in Australia.<sup>50</sup>

Regardless of the extent of any theoretical duty owed to the tax system, many commentators come to the view that tax advisers solve ambiguity in the law to the advantage of their client.<sup>51</sup> As illustrated earlier, there are obviously ambiguities in the law regarding claims of privilege in the taxation context. These ambiguities are perhaps more prevalent in the United States context, where there are arguably greater uncertainties, for example due to the extra complexity created by the tax shelter exception. However, in both the United States and New Zealand there are inherent uncertainties around what constitutes legal advice in the context of taxation— a concept at the heart of whether or not legal advice privilege can be claimed.

### **Professional Codes of Conduct**

Provisions in a tax adviser's relevant professional code may have a bearing on both the wider duty to the tax system issue and, more specifically, to the ethical standards involved when claims of privilege are made. Because of the multi-disciplinary nature of tax practice, there are differences in ethical codes regarding these points, which give rise to some interesting comparisons and contrasts.

#### United States

Lawyers who are members of the American Bar Association (ABA) follow ethical codes drawn up by it.<sup>52</sup> Membership of the ABA is voluntary rather than mandatory; lawyers must be registered in the State in which they intend to practice and are subject to the rules of that State's Bar Association. All State Bar Associations but one have ethical rules influenced by and following the format of the ABA model rules.<sup>53</sup> In addition, the Tax Court has adopted both the letter and spirit of

the ABA model rules.<sup>54</sup> For lawyers, ethical rules cover a wide spectrum of practice and so are not specifically tailored to tax practice. Examples in the ABA model rules include duties of confidentiality,<sup>55</sup> diligence<sup>56</sup> and relating to conflicts of interest.<sup>57</sup> In particular, in terms of duties, as an officer of the court the usual position is that a lawyer owes a duty to their client and a duty to the court; this duty is framed in terms of the duty not to mislead a Tribunal (as defined, which includes a court) when representing a client in proceedings before it.<sup>58</sup> This dual duty has given rise to specific issues relating to tax practice, which the ABA has sought to clarify through formal opinions. These opinions state that the IRS is considered an adversary rather than a court or tribunal, meaning that lawyers do not owe any special duty to the IRS but simply the usual duties owed to an adversary.<sup>59</sup> The ABA opinions seem to reflect the approach of liberal individualism and a consequent adversarial relationship between tax practitioners and the IRS. Following this approach, the relationship arises from the differing goals of the tax collection agency and tax practitioners; the former seeking to maximise revenue for government and the latter to minimise tax liability for clients (within the confines of a pro-taxpayer interpretation of the law). The ABA model rules do refer to consideration of wider issues that may be relevant to a client's situation where the lawyer is acting as an advisor, citing "moral, economic, social and political factors".<sup>60</sup> This rule suggests a wider context for legal advice, but the requirement seems to be much more about the client receiving appropriate advice in a wider context rather than any requirement to act in wider interests, such as that of the tax system.

The ABA model rules do not contain explicit provisions regarding ethical and conduct standards when making claims of privilege, other than through a reference in the commentary section to rule 1.6: Confidentiality of Information. Here, the commentary refers to a lawyer asserting all non-frivolous claims to, amongst other things, attorney-client privilege in the face of an order requiring disclosure of information from a court or other tribunal or government entity in the absence of informed consent from the client to do otherwise.<sup>61</sup> The commentary is really about clarifying the lawyers' obligation where the client cannot be consulted rather than amounting to any explicit ethical requirement around assertions of privilege.<sup>62</sup> Clearly the lawyer has a professional

responsibility to limit disclosure of information, using legitimate grounds such as attorney-client privilege, to comply with the overarching confidentiality of information provisions in rule 1.6.<sup>63</sup> However, in the absence of express provisions in the model rules regarding the ethical duties around making claims of privilege, any infringement that may give rise to a disciplinary process would arguably be of more general standards in the rules. The ABA rules do include provisions covering professional misconduct, for example violating the Rules of Professional Conduct<sup>64</sup> and engaging “in conduct that is prejudicial to the administration of justice.”<sup>65</sup> Without a more explicit provision, framed as a prohibitive duty covering claims of privilege, it is much more difficult to establish a breach that would give rise to misconduct proceedings. In addition, it is arguable that the “administration of justice” would not cover, for example, a claim of privilege in response to an IRS summons because this process does not involve the administration of justice. At most this might come later, if the summons is resisted and the IRS then seeks enforcement through the court,<sup>66</sup> at which point the professional responsibility to limit disclosure on legitimate grounds in order to protect confidentiality comes into play.

Other members of the tax practice profession, for example Certified Public Accountants, have ethical standards set by their own professional body and by the relevant State Board where they are licensed to practice. The American Institute of Certified Public Accountants (AICPA) has its own Code of Professional Conduct, setting ethical standards for its members.<sup>67</sup> Like the ABA, membership of AICPA is voluntary, although a number of state boards of accountancy have, either fully or partially, adopted the AICPA code. AICPA members are required to adhere to the provisions of the code. The AICPA code does make explicit reference to the public interest, articulating a principle that “Members should accept the obligation to act in a way that will serve the public interest”.<sup>68</sup> In this context, the public is defined to include “clients ... governments ... and others who rely on the objectivity and integrity of members to maintain the orderly functioning of commerce”<sup>69</sup> and the public interest is defined as “the collective well-being of the community of people and institutions that the profession serves.”<sup>70</sup> The code acknowledges that members may face conflicting pressures from amongst the various groups that form the public, requiring that, in

resolving these conflicts, members act with integrity.<sup>71</sup> The view expressed in the code is that clients' interests are best served when members fulfil their public interest responsibility.<sup>72</sup> This section of the code certainly goes much further than the ABA model rules in articulating a wider group, the interests of which have a bearing upon the manner in which CPA's perform their role. The reference to the government arguably by extension includes the government's revenue collecting function and therefore the IRS. Jackson and Milliron point out that "The American Institute of CPAs has repeatedly said that the role of CPAs includes a dual responsibility to the tax system and to clients."<sup>73</sup> In its Statement on Standards for Tax Services (SSTs) relating to tax return positions, the AICPA refers to a member having a duty to the tax system, in addition to a duty to the taxpayer.<sup>74</sup> The statement goes on to confirm that, as a taxpayer "has no obligation to pay more taxes than are legally owed", a member has a duty to assist the taxpayer in achieving this result.<sup>75</sup> The AICPA's SSTs apply to all its members and are "enforceable tax practice standards".<sup>76</sup>

Whilst not explicitly dealing with claims of privilege, the AICPA code does cover disclosure of confidential client information following service of a summons or subpoena, clarifying that such disclosure does not violate provisions requiring members not to disclose confidential client information without the client's consent.<sup>77</sup> In addition, the SSTs do refer to "applicable confidentiality privileges."<sup>78</sup> The AICPA code suggests that a member may wish to consult legal counsel to verify the validity of a summons or subpoena and the "specific client information required to be provided."<sup>79</sup> This could clearly encompass questions as to whether or not information may be withheld because it is privileged, in the context of the tax practitioner privilege. Given the existence of this privilege, it does perhaps seem odd both that it is not referred to explicitly in the code and that members may need advice from a lawyer around whether privilege can be claimed in the face of, for example, an IRS summons. Unlike lawyers, CPA's do not owe any duty to the court, as they are not officers of the court. How much practical difference this makes in the ethical context of privilege claims is a moot point; tax lawyers and accountants may

well be making claims of privilege in similar circumstances, which do not immediately involve a court or Tribunal and where (for lawyers) the IRS is an adversary.

The AICPA code requires that members adhere to its rules and that compliance is, ultimately, achieved by disciplinary proceedings.<sup>80</sup> This would also be the case regarding compliance with SSTs.<sup>81</sup> Similar to the ABA model rules, the AICPA code does not directly address claims of privilege by its members and ethical duties relating to those claims, despite the tax practitioners privilege being relevant to advice given by CPA's.<sup>82</sup> Members making spurious claims could therefore only be dealt with through violation of more general principles such as those of integrity or due care.<sup>83</sup>

Arguably in response to the multi-disciplinary nature of tax practitioners, as well as relevant professional body rules there are also professional standards applying generally to tax practitioners who may represent clients before the IRS, whatever their profession.<sup>84</sup> These standards are primarily set out in Circular 230 - Treasury Regulations (Regulations) governing practice before the IRS - and apply to both lawyers and CPA's. These Regulations obviously reflect the standards of behaviour and integrity that suit the government, and by extension the IRS. They stop short of articulating any duty owed to the IRS by those practising before it, other than a requirement of best practice that includes "Acting fairly and with integrity in practice before the Internal Revenue Service."<sup>85</sup> They do not, however, necessarily mesh seamlessly with ethical duties to a client found in relevant professional body ethical standards. Watson cites as an example the mismatch between provisions in the 1998 iteration of the Regulations, prohibiting a tax practitioner from advising on a return position that does not have a realistic possibility of being sustained unless it is adequately disclosed, and ABA formal opinion 85-325.<sup>86</sup> The formal opinion concludes that:<sup>87</sup>

... a lawyer may advise reporting a position on a return even where the lawyer believes the position probably will not prevail, there is no "substantial authority" in support of the position, and there will be no disclosure of the position in the return.

Whilst the language in the Regulations has now changed, through use of the “reasonable basis” standard<sup>88</sup> (which aligns with accuracy penalties in the Internal Revenue Code)<sup>89</sup> the difficulties in aligning language in multiple professional codes with the provisions of the Regulations remains. Those wishing to practice before the IRS must comply with the Regulations, even if its requirements are more restrictive, and this is recognised in the AICPA code.<sup>90</sup> The tax practitioners’ privilege (as opposed to attorney-client privilege) is available only to those authorised under federal law to practice before the IRS;<sup>91</sup> which authorisation is controlled by the IRS in the sense that the IRS has the power to disbar individuals from practice before it.<sup>92</sup> Both lawyers and CPA’s are authorised to practice before the IRS.<sup>93</sup> The circumstances in which tax practitioners may be sanctioned are set out in the Regulations. These circumstances include where the practitioner is shown to be incompetent or disreputable.<sup>94</sup> Incompetent and disreputable conduct is further defined to include not only convictions for criminal behaviour in the taxation context, but also giving false or misleading information to the Treasury<sup>95</sup> and “Wilfully ... suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.”<sup>96</sup> In the context of giving false opinions, reference is made to “concealing matters required by law to be revealed”.<sup>97</sup> The Regulations make express reference to privileged information (at para 10.20), in relation to the requirement to respond to lawful requests from the IRS for records or information, which can be resisted if the practitioner “believes in good faith and on reasonable grounds” that the material is privileged.<sup>98</sup> Wilful violation of this requirement is subject to sanction, which could result in a tax practitioner being censured, suspended or disbarred from practice before the IRS.<sup>99</sup>

Whatever the theoretical arguments around where on the spectrum between duty to client and duty to the tax system tax practitioners sit, perhaps this ultimate sanction of disbarment is the real issue. The efficacy of concepts like good faith belief and reasonable grounds does, to an extent, depend upon the ease with which the parameters of privilege can be established. This, coupled with clear guidelines around what constitutes wilful behaviour, which is not defined in the Regulations.<sup>100</sup> These parameters are not clear; there are grey areas at the margins around legal/business advice and in relation to tax shelters (in the tax practitioner privilege context). One strategy that the IRS

could pursue to discourage privilege claims at these margins would be to allege wilful violation of para 10.20 (a) (1) with the consequent risk of disbarment (or lesser sanction). Removal of authority to practice before the IRS from a non-lawyer tax adviser also removes any right to claim privilege and can lead to even more serious consequences, such as state disbarment and removal.<sup>101</sup>

Whilst state disbarment must be a risk for a lawyer whose conduct is sufficiently serious to warrant being disbarred from practice before the IRS, disbarment from practice before the IRS in and of itself does not have any impact on the lawyer's ability and right to claim attorney-client privilege.

Tax practitioners in the United States are clearly subject to a range of ethical rules and codes, whether through mandatory regulation at State level or voluntary membership of a professional body, but the Regulations governing authority to practice before the IRS have a unifying effect on behaviour. The language used in the Regulations falls short of imposing a prohibitive duty not to claim privilege without a good faith belief on reasonable grounds. However, the Regulations do address the issue by requiring tax practitioners to comply with IRS requests for information unless they believe in good faith and on reasonable grounds that material is privileged. This is in marked contrast to both the ABA model rules and the AICPA code. The ultimate sanction of disbarment in the Regulations could mean that a client is not advised to claim privilege in marginal situations, because a practitioner may be concerned about acquiring a reputation for urging what might be regarded by the IRS as spurious privilege claims. Alternatively, if in fact the IRS is unlikely to pursue this sanction and the client faces no censure or risk (reputational or otherwise) where "spurious" privilege claims are made, then the relevant professional body codes are the only means by which ethical standards in this context can be set and enforced.

### New Zealand

Lawyers' ethical behaviour is governed by the rules of conduct and client care for lawyers, found in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.<sup>102</sup> These rules, made by the New Zealand Law Society, are binding on all lawyers.<sup>103</sup> Examples of duties and obligations under these rules include that professional judgement must be exercised solely for



the benefit of the client,<sup>104</sup> a duty to protect confidential information<sup>105</sup> and an overriding duty as an officer of the court.<sup>106</sup> This duty to the court includes a duty not to mislead or deceive the court when acting in litigation.<sup>107</sup> In contrast to the ABA model rules, the rules also explicitly address claims of privilege and require that, as an officer of the court, “A lawyer must not claim privilege on behalf of a client unless there are proper grounds for doing so.”<sup>108</sup> This provision seems to relate to proceedings (not defined) which, in the context of this section of the rules, arguably encompasses litigation privilege but not legal advice privilege. Breaches of the rules may lead to charges of misconduct, unsatisfactory conduct or negligence/incompetence.<sup>109</sup> A variety of orders of a disciplinary nature may be made, including suspending a lawyer from practice or ordering that a person’s name be struck off the roll<sup>110</sup> – meaning that individual cannot practice as a lawyer. In many other respects the rules are similar to the ABA model rules and, like the ABA rules, they do not contain any explicit reference to a wider public interest. They have not been supplemented by any equivalent to the ABA formal opinion on tax practice, so the relationship between lawyers operating in the taxation sphere and the IRD remains less clear, in the sense of the IRD’s status; that is whether it is analogous to a court and a particular duty is therefore owed to it. The key difference to the ABA model rules is the explicit prohibition on making privilege claims without having proper grounds to do so. This is perhaps simply an explicit reflection of this aspect of the overriding duty to the court and arguably is in the context of a proceeding involving a court. Whilst a lawyer could be in breach of this rule and therefore subject to disciplinary measures if he or she is found to have made spurious privilege claims in proceedings involving a court, whether this would be the case in a legal advice context relating to an IRD investigation is more difficult to determine. So, the type of spurious claim identified by the IRD as hindering tax investigations may well not be covered by the conduct rules.

In terms of the non-disclosure right, a tax advisor (as defined) can make the relevant claim of privilege, in the face of an information demand. The term tax advisor is defined in legislation as a natural person, subject to the code of conduct and disciplinary procedures of an approved group.<sup>111</sup> To date, the following organisations have been approved by the Commissioner: New

Zealand Institute of Chartered Accountants (now Chartered Accountants Australia and New Zealand); Accountants +Tax Agents Institute of New Zealand and CPA Australia.<sup>112</sup> In contrast to the United States, where the IRS has the ultimate sanction to disbar from practice before it, in New Zealand greater reliance is placed on the regulations and disciplinary procedures of these groups. The issue of the privilege being abused was considered by the Inland Revenue in the context of giving approval to certain groups. It was felt important that approved groups had “strong disciplinary procedures and a code of professional ethics.” in order that there was “greater likelihood of excluding persons who would abuse the privilege”.<sup>113</sup> The TAA s 81B permits the Inland Revenue to disclose information to an approved advisor group regarding the acts or omissions of a member of that group that are considered by the IRD to be in breach of various responsibilities relating to the non-disclosure right.<sup>114</sup> Guidance from the IRD suggests that disclosure would only be considered in specific circumstances, for example a failure to provide tax contextual information when required to do so.<sup>115</sup>

The approved groups referred to all have professional codes of conduct. Compliance with the New Zealand Institute of Chartered Accountants (NZICA) Codes of Ethics is mandatory for all of its members; non-compliance with the code may lead to disciplinary action,<sup>116</sup> such as suspension or removal from membership.<sup>117</sup> In similar fashion to the AICPA code, the NZICA code contains provisions which explicitly refer to a responsibility to act in the public interest and that, in consequence, the “member’s responsibility is not exclusively to satisfy the needs of an individual client.”<sup>118</sup> Unlike the AICPA code provisions, the NZICA code does not identify specific groups to whom a duty may be owed. The NZICA code sets out fundamental principles, including integrity, objectivity, professional competence and due care and confidentiality.<sup>119</sup> The confidentiality principle includes a requirement not to disclose confidential information without authority “unless there is a legal or professional right or duty to disclose”.<sup>120</sup> In relation to a previous iteration of the code, Dabner and Burton argue that requirements around integrity, objectivity and independence coupled with certain rules around a members’ response to non-disclosure by a client and consideration of the public interest in relation to a right to disclose, could suggest that NZICA

members “do owe some, albeit limited, duty to Inland Revenue/tax system.”<sup>121</sup> NCIZA members have an obligation to act in accordance with any authoritative guidance relevant to a particular area of practice.<sup>122</sup> In terms of tax practice, this would include Guidelines on Ethics in Tax Practice.<sup>123</sup> These guidelines include that, subject to the code’s fundamental principles, chartered accountants are entitled to put forward the best position for their client and resolve doubt in favour of their client.<sup>124</sup> Whilst not referring directly to ethical obligations in exercising the non-disclosure right, they do also contain some housekeeping style recommendations, for example on keeping factual information separate from opinions and advice and clearly identifying items which may allow a privilege claim.<sup>125</sup>

CPA Australia has its own mandatory code of ethics<sup>126</sup> with broadly similar provisions to the NZICA code, including those relating to the public interest and the fundamental principles.<sup>127</sup> This duplication is not surprising as both codes are based on the Accounting Professional and Ethical Standards Board (APESB) code, with the addition of specific provisions relevant to each country. The APESB is an independent body established to develop and issue ethical and professional standards.<sup>128</sup> APES 110 itself incorporates provisions of the Code of Ethics for Professional Accountants issued by the International Ethics Standards Board for Accountants (IESBA).<sup>129</sup> In addition to APES 110, CPA Australia members must comply with mandatory standards, APES 220 being relevant to taxation services. These standards are somewhat lengthier than the NZICA Guidelines on Ethics in Tax Practice but contain no reference to claims of non-disclosure or ethical obligations relating thereto.

One point of particular interest between the NZICA code and the CPA Australia code relates to confidentiality. NZ 140.7.1 is specific to New Zealand and sets out that the disclosure of confidential information provisions in the code do not take account of New Zealand legal and regulatory requirements. This provision also appears in the CPA Australia code (with a reference to Australian legal and regulatory requirements). Although both NZICA and CPA Australia are approved bodies, the CPA Australia code will also apply to tax advisers operating solely in

Australia where, to date, there is no statutory tax advisers' privilege. If, as discussed above, the existence of a code of professional ethics was thought to be an important ingredient of an approved group to exclude those who might make abusive privilege claims, one may have expected to find some specific provisions in the NZICA code dealing with non-disclosure claims, perhaps similar to those found in the Rules of conduct and client care for lawyers.

The absence of any specific provisions in both the NZICA and CPA Australia codes addressing claims of non-disclosure by their members and their ethical duties in relation thereto, including guidance and standards relevant to tax practice, leads to a result similar to that seen with the AICPA code. Namely, that members repeatedly making spurious claims of non-disclosure in relation to tax advice documents can only be disciplined by establishing violation of more general fundamental principles. Unlike the position in the United States, in New Zealand there is no equivalent control to the Regulations, so no extra layer of regulation and, importantly, no stick of disbarment from practice before the IRD.

Unlike NZICA and CPA Australia, the Accountants and Tax Agents institute of New Zealand (ATAINZ) code of ethics does not follow the APESB format. There are similarities in that the provisions of the code include a requirement to practice with integrity, independence and objectivity.<sup>130</sup> The ATAINZ code contains no explicit reference to any responsibility to act in the public interest but does contain confidentiality provisions similar to those found in the NZICA and CPA Australia codes.<sup>131</sup> Likewise, although an approved body for the purposes of the non-disclosure right, there is no explicit reference to such claims in the code or relevant ethical duties relating thereto. As with the other two approved groups, disciplinary proceedings relating to the non-disclosure right would therefore need to be based upon violation of more general principles.

The IRD does not control and regulate practice in a similar way to the IRS, other than through controls on listed Tax Agents. Applications can be made to the Commissioner of Inland Revenue from eligible persons to be listed as a Tax Agent.<sup>132</sup> This listing is not compulsory but does bring

benefits to the agent (and their client), such as an extended period in which to file income tax returns. The IRD is currently consulting on widening the eligibility requirements for listing and, to maintain the integrity of the tax system, widening current powers to delist tax agents to include those intermediaries who deal with the Inland Revenue on behalf of a taxpayer following nomination by that taxpayer (nominated persons).<sup>133</sup> This regime gives the IRD some control but does not come close to the IRS's barring from practice before it – tax agents who are delisted can still practice (subject of course to any professional body disciplinary sanctions). It is also made clear in the consultation that any extension of the eligibility requirements has no effect on privilege claims under section 20B.<sup>134</sup> The listing regime is of interest in that it is an existing mechanism that could be revised to extend the IRD's control over the activities of tax agents if so wished.

The tax adviser non-disclosure right has more limited parameters and is couched in different terms to the statutory legal practitioner–client privilege, so one might have expected to see different terminology in tax adviser professional body codes compared to that of lawyers around claiming the right. What seems clear is that in New Zealand relevant tax adviser codes do not address ethical obligations around claims of non-disclosure at all; this despite the deliberate choice of particular groups to act in the role of gatekeeper for those tax advisers having the ability to make such claims. There is a clear contrast with lawyers, where the rules of conduct and client care explicitly prohibit lawyers from making claims of privilege without proper grounds. This express prohibition arguably relates to proceedings before a court and may not necessarily cover privilege asserted following requests for information from the IRD, but the rules do at least address the duty regarding privilege and in that sense may inform privilege claims in the wider sense. Unlike the situation in the United States, there are no unifying IRD regulations applying to both lawyers and non-lawyer tax advisors to level the discrepancy. The tax adviser codes, in their present form, make it unlikely that “persons who would abuse the privilege” will be excluded when there are no specific grounds for doing so in the relevant codes.

## Global Accountancy Firms – Internal Codes of Conduct

In addition to professional body codes, many global accountancy firms also have their own internal codes of conduct. For example, PwC has both a global code of conduct<sup>135</sup> and a global tax code of conduct.<sup>136</sup> The efficacy of internal codes, and indeed professional body codes of conduct, was highlighted during several sessions of evidence before a House of Commons select committee (Committee) reporting on the role of large accountancy firms in tax avoidance.<sup>137</sup> The evidence given is of interest in indicating attitudes in global accountancy firms towards activities that may be regarded as morally questionable, despite being subject to both internal and external professional body codes, both of which include ethical responsibilities. The evidence given to them by representatives from PwC, Deloitte LLP, KPMG and Ernst and Young led the Committee to conclude that a code of conduct for tax advisers regarding acceptable tax planning activities should be introduced by Government.<sup>138</sup> Following further evidence from PwC, given after documents were leaked which disclosed correspondence between PwC and the Luxembourg tax authorities, the Committee recommended that the introduction of the code of conduct for all tax advisers should be coupled with a consultation on the regulation of the industry and enforcement of the code, including consideration of financial sanctions for non-compliance. The Tax Faculty of the Institute of Chartered Accountants in England and Wales has now issued a revised standard for tax advice for its members, effective from 1 March 2017.<sup>139</sup> The guidance sets out the fundamental principles of behaviour that members working in tax are expected to follow.<sup>140</sup> The guidance acknowledges that acting in the interests of clients will, at times, cause conflict with HMRC, but requires that a member “should serve his clients’ interests as robustly as circumstances warrant whilst applying these principles.”<sup>141</sup> The guidance does explicitly address legal privilege<sup>142</sup> to the extent of briefly explaining its ambit and extent and acknowledging that determining whether or not communications are privileged is a complex issue. In England and Wales there is no tax adviser privilege, other than limited protection given to documents in the hands of a tax adviser.<sup>143</sup> The guidance is interesting in that, despite there being no tax adviser privilege in the wider sense, it does address issues relevant to privilege. As has been shown, in jurisdictions where there actually is a tax adviser privilege, tax standards and professional body codes barely make reference to it.

Although giving evidence in England, the accountancy brands involved are global and operate in jurisdictions with a tax adviser privilege. In addition, many professional body codes are based on international standards, such as those set by the IESBA, which again operate across jurisdictions with and without a tax adviser privilege. This creates a further hurdle for professional body enforcement of ethics codes in the context of spurious claims of privilege as country specific provisions need to be created and inserted into each relevant code.

## **Conclusion**

Claiming privilege in the taxation context clearly has much complexity. Judgements around what constitutes legal advice in the context of taxation, or a tax advice document, have to be made and can be far from easy. There is also an ethical dimension to such claims. In the face of increasing demands for information from revenue collection agencies, it could be tempting to regard claims of privilege or non-disclosure as a shield behind which to hide sensitive information or simply as a delaying or frustrating tactic, particularly if there is little risk of any adverse consequences for adviser or client. Both the IRS and IRD have expressed concern about privilege being abused in the taxation context. The wider question of whether any duty is owed to the tax system as a whole and the provisions of professional body ethics codes both have a role in addressing these ethical issues. Reviewing the various professional body codes shows clear differences between lawyers and non-lawyer tax advisers regarding the extent to which any duty is owed to the wider tax system and regarding explicit ethical rules around privilege claims.

Tax adviser codes in both jurisdictions have emphasis on wider public interests, to a greater or lesser extent, when delineating principles of professional conduct. For example, the AICPA code refers to the obligation to serve the public interest and in its tax standards to a duty to the tax system. Similarly, the NZICA code makes explicit reference to a responsibility to act in the public interest and it has been suggested that the provisions of the code could equate to a duty to the tax system.<sup>144</sup> The parameters of any such duty and its impact on the duty owed to the client is much more difficult to determine. The codes are not explicit about how tension between duty to the tax

system and duty to the client should be resolved, other than in very specific instances where an adviser may decline to act further, for example if evidence of fraudulent or illegal activity has been discovered and the client refuses to comply with legal obligations.<sup>145</sup> It is perhaps the case that a lack of clarity around the interaction between these duties means that, despite principles relating to the wider public interest, the codes fail to prevent examples of behaviour on the margins of ethically acceptable conduct, for example in relation to tax planning schemes. It is also difficult to see how these principles regarding the wider public interest would have any specific impact on ethical standards regarding claims of privilege or non-disclosure, without more specific provisions in the codes.

In contrast, the lawyers' professional body rules in both the United States and New Zealand do not seem to have the same ambiguities regarding duty to the tax system because they are not couched in the same terms and do not refer to the public interest or the tax system in the same way. Clearly, there is plenty of room for academic debate regarding tax lawyers (and tax practitioners) duties to the tax system, but the lawyers' professional body rules at least do not reference or reflect such a duty in the same way as tax adviser codes. This leads to the conclusion that, arguably, a tax lawyer is in a different position to a non-lawyer tax adviser regarding duties owed to the tax system and a revenue collection agency, at least as far as professional body rules are concerned. What, if any, difference this actually makes to claims of privilege by lawyers as opposed to tax advisers is harder to determine. It seems clear that, regardless of any wider duty, tax advisers resolve ambiguity in favour of the client. Whether or not privilege arises can be a judgement call which, in marginal cases, may well be resolved in the client's favour.

The professional body codes applying to tax advisers in both the United States and New Zealand do not contain any explicit references to professional ethics and responsibilities around claiming privilege or exercising the non-disclosure right. The codes all look remarkably similar, unsurprising given their use of international ethics standards, but there appear to have been no provisions created specifically for privilege claims or claiming the non-disclosure right. This seems particularly



notable in New Zealand, where other country specific provisions have been added to the APES based code and where the IRD does not exert the same control over tax advisers as the IRS does over tax practitioners in the United States via the Regulations. The approved groups for the purposes of privilege claims in New Zealand were chosen, in part, for their ethical codes and disciplinary procedures. It was assumed that such codes would be likely to weed out those that might make abusive claims. As the issue was clearly considered and as the equivalent lawyers' rules in New Zealand make explicit reference to members not claiming privilege on behalf of a client unless there are proper grounds to do so (albeit in relation to proceedings involving a court), it would perhaps have been sensible to have a similar explicit section of the code applying to New Zealand tax advisers in the context in which they operate, that is relating to tax advice.

Lawyers and tax advisers in New Zealand can resist disclosure of documents to the IRD, whether by claiming privilege or asserting the non-disclosure right relating to tax advice documents. However, they are subject to different ethical and disciplinary codes. As an officer of the court, a lawyer is expressly prohibited from claiming privilege without proper grounds for doing so. Whilst this prohibition may operate in the litigation context, as an express provision in a regulatory code it is at least possible that it informs wider decisions regarding privilege. In contrast, a tax adviser is subject to no similar express prohibition regarding exercise of the non-disclosure right. Lawyers and tax practitioners in the United States are also subject to different disciplinary and ethical rules and codes. These do not reveal any substantive differences where privilege claims are concerned because neither the ABA model rules nor the AICPA code expressly prohibit privilege claims being made without proper grounds for doing so. Both lawyers and tax practitioners practicing before the IRS are however subject to the same rules and sanctions due to the Regulations. The Regulations do not prohibit claims of privilege without proper grounds, but do require a good faith belief on reasonable grounds when resisting information demands from the IRS. One of the disciplinary sanctions available to the IRS for breach of the Regulations is to disbar from practice before it, a very serious consequence for both tax practitioners and lawyers.

The multi-disciplinary nature of tax practitioners in both the United States and New Zealand inevitably means that there are differences in professional codes relating to issues that are addressed, such as duty to the tax system. There are also gaps in codes and rules regarding ethical duties when claiming privilege or non-disclosure. These gaps make disciplinary action against those abusing privilege more difficult to pursue and arguably do not focus on and reinforce the ethical dimension to making claims of privilege.

Overall, the approach of bodies setting ethical standards and rules to claims of privilege, or non-disclosure, in the taxation context for both tax lawyers and tax advisers in the United States and New Zealand seems opaque and disconnected. For tax advisers, the relevant codes do not address the issue specifically, making it difficult for ethical standards in this respect to be determined by advisers or enforced by disciplinary sanctions. In addition, tax advisers are not officers of the court, so there is no overriding duty that can inform ethical and professional standards around privilege or non-disclosure claims. Although as officers of the court tax lawyers have wider duties not to mislead the court, these are arguably primarily relevant in the context of court proceedings. This seems to be the case both in New Zealand, where privilege is specifically referred to in professional body rules, and in the United States. Guidance from the ABA suggests that the IRS does not have the status of a court, making clear that any wider duty to the court does not apply when dealing with the IRS.

It is clearly the case that an optimal regime for those tax advisers in both the United States and New Zealand who may claim privilege or assert non-disclosure requires that express provisions are inserted into professional body codes of conduct. Including an express provision in a code of conduct prohibiting claiming privilege or asserting the non-disclosure right without having proper grounds highlights that there is an ethical dimension when claims of privilege or non-disclosure are made. An express prohibition also means that advisers who breach these provisions of their code can be sanctioned through the relevant disciplinary process. This avoids any need to rely on more general, opaque provisions regarding a wider public duty and the moot point of to what extent this

equates to a duty owed to the tax system. The way in which legal advice privilege has been extended to tax advisers in the United States and New Zealand is rather different, but the ethical dimension is the same so similar wording should adequately cover the situation in both jurisdictions, with country specific additions in the APES based codes of some of the approved adviser groups in New Zealand. For tax lawyers, the optimal regime in terms of professional conduct rules may be more challenging, given that these rules are much more generic, covering lawyers working in many different practice areas. Professional body rules for lawyers could, however be much clearer regarding legal advice privilege and ethical obligations relating thereto. For example, the rule in New Zealand prohibiting privilege claims without proper grounds could be couched in much more general terms, rather than linked to proceedings involving a court. This would assist in clarifying that there is an ethical dimension relating to legal advice privilege generally and in the taxation context. A similar insertion to the ABA code would do likewise in the United States. In both jurisdictions, this approach also allows disciplinary action to be taken where the specific provisions are breached. The insertion of provisions in the codes of both tax advisers and tax lawyers would also help to resolve the present disconnections and bring a coherence currently lacking to regulation of this area of practice.

Changes to relevant professional body rules and codes in New Zealand would cover all those eligible to claim privilege or assert the non-disclosure right. The New Zealand Law Society rules covering conduct and client care are binding on all lawyers in New Zealand. The device of using membership of groups approved by the IRD for tax advisers to be eligible to assert the non-disclosure right means that changes to the codes of approved groups will encompass all those members. The position is more complex in the United States. Here, the relevant code and model rules are produced by bodies, membership of which is voluntary. Whilst in many respects the terms of the ABA code are mirrored in State Bar ethics codes, this cannot be required. The alternative route, of inserting much more explicit provisions in the Regulations, may lead to a chilling effect on privilege claims, particularly in legitimate but marginal cases, due to the ultimate sanction of being disbarred from practice before the IRS. For both New Zealand and the United States, changes to

relevant codes and rules can be subject to consultation, allowing debate amongst members and, once made, can be accompanied by appropriate education and training.

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<sup>1</sup> *Upjohn Co v United States* 449 US 383 (1981) at 389; *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2 AC 185 at [117]-[118] *per* Lord Sumption.

<sup>2</sup> *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2 AC 185.

<sup>3</sup> Lord Taylor of Gosforth CJ in *Balabel v Air India* [1988] Ch 317.

<sup>4</sup> *Upjohn Co v United States* 449 US 383 (1981) at 389; *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2 AC 185 at [117]-[118] *per* Lord Sumption.

<sup>5</sup> Evidence Act 2006, ss 54, 56.

<sup>6</sup> Evidence Act 2006, s 4 and s 53. Proceeding means a proceeding conducted by a court and any interlocutory or other application relating thereto.

<sup>7</sup> Evidence Act 2006, s 53 (5).

<sup>8</sup> Tax Administration Act 1994, s 20.

<sup>9</sup> Federal Rules of Evidence, Rule 501; C Pease-Wingeter “Does the Attorney-Client Privilege Apply to Tax Lawyers?: An Examination of the Return Preparation Exception to Define the Parameters of Privilege in the Tax Context” (2007 – 2008) 47 Washburn Law Journal 699 at 702.

<sup>10</sup> *Fisher v United States* 425 US 391 (1976) at 403.

<sup>11</sup> Barskey et al “Protecting a client’s confidences: recent developments in privileged communications between attorneys and accountants” (2009-2010) 28 Journal of Law and Commerce 211 at 221.

<sup>12</sup> *United States v KPMG LLP* 237 F Supp 2d 39 (DC Cir 2002), referring to guidance in *United States v Frederick* 182 F 3d 496 (7<sup>th</sup> Cir 1999).

<sup>13</sup> A Petroni “Unpacking the accountant-client privilege under I.R.C. section 7525” (1999) 18 Virginia Tax Review 843 at 861.

<sup>14</sup> C Galanek “The impact of the Zolin decision on the crime-fraud exception to the attorney-client privilege” (1989 – 1990) 24 Georgia Law Review 1115 at 1121.

<sup>15</sup> *United States v BDO Seidman LLP* 492 F 3d 806 (7<sup>th</sup> Cir 2007) at 810.

<sup>16</sup> Internal Revenue Code 26 USC, § 7525.

<sup>17</sup> R Mitchell “Comparative standards of legal advice privilege for tax advisers and optimal reform proposals for English law” (2015) 19(4) International Journal of Evidence and Proof 246 at 250.

<sup>18</sup> Internal Revenue Code 26 USC, § 7525(a)(3)(B).

<sup>19</sup> Internal Revenue Code 26 USC, § 7525(b).

<sup>20</sup> Internal Revenue Code 26 USC, § 6662(d)(2)(C)(ii).

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- <sup>21</sup> *Valero Energy Corp v United States* 569 F3d 626 (7<sup>th</sup> Cir 2009).
- <sup>22</sup> Evidence Act 2006, s 54. Proceeding means a proceeding conducted by a court and any interlocutory or other application to a court connected with that proceeding, s.4.
- <sup>23</sup> Tax Administration Act 1994, s 20.
- <sup>24</sup> Tax Administration Act 1994, s 20(1) (c).
- <sup>25</sup> Tax Administration Act 1994, ss 16-19.
- <sup>26</sup> Tax Administration Act 1994, s 20B. See generally K Kendall “Designing Privilege for the Tax Profession: Comparing I.R.C s 7525 with New Zealand’s Non-Disclosure Right” (2011) 11 *Houston Business & Taxation Law Journal* 74; A Maples and R Woellner “Privilege for accountants’ tax advice in Australia – Brave New World or house of straw?” (2010) 25 *Australian Tax Forum* 143; R Mitchell “Comparative standards of legal advice privilege for tax advisers and optimal reform proposals for English law” (2015) 19(4) *International Journal of Evidence and Proof* 246.
- <sup>27</sup> Tax Administration Act, s 20B (2).
- <sup>28</sup> Inland Revenue Department, 2005, SPS 05/07.
- <sup>29</sup> Inland Revenue Department, 2005, SPS 05/07, paras 33-34.
- <sup>30</sup> Tax Administration Act 1994, s 20(B) (2)(c).
- <sup>31</sup> Tax Administration Act 1994, s 20F.
- <sup>32</sup> Inland Revenue Department 2005, SPS 05/07, para 44 and 77.
- <sup>33</sup> A Maples “The non-disclosure right in New Zealand – lessons for Australia?” (2008) (1) 3 *Journal of the Australasian Law Teachers Association* 351 at 359.
- <sup>34</sup> Tax Administration Act 1994, ss 20 (5), 20G (1).
- <sup>35</sup> Internal Revenue Code 26 USC §§ 6111, 6112.
- <sup>36</sup> Internal Revenue Code 26 USC §§ 6707, 6707A, 6708.
- <sup>37</sup> W Volz and T Ellis “An attorney-client privilege for embattled tax practitioners: a legislative response to uncertain legal counsel” (2009) 38 *Hofstra Law Review* 213 at 230.
- <sup>38</sup> C E Watson “Legislating Morality: the duty to the tax system reconsidered” (2002-2003) 51 *Kansas Law Review* 1197 at 1231 and *Doe v Wachovia Corporation* 268 F Supp 2d 627 (WDNC 2003) at 635-636.
- <sup>39</sup> Mitchell, above n 17, at 249.
- <sup>40</sup> Policy Advice Division of the Inland Revenue Department, Tax and Privilege: a proposed new structure, May 2002, para 2.13 and Tax Compliance – A report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance, December 1998, paras 9.46 – 9.48. Both refer to evidence given by the IRD to the Commission of Inquiry into Certain Matters Relating to Taxation (the Davison Commission), August 1997.
- <sup>41</sup> C E Watson “Tax Lawyers, Ethical Obligations, and the Duty to the System” (1998 – 1999) 47 *Kansas Law Review* 847 at 850; A Infanti “Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar” (2002 – 2003) 22 *Virginia Tax Review* 589 at 605.
- <sup>42</sup> B Jackson V and Milliron “Tax Preparers: Government Agents or Client Advocates?” [May 1989] *Journal of Accountancy* 82.

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<sup>43</sup> Watson, above n 41, at 850 (internal citation omitted).

<sup>44</sup> Infanti, above n 41, at 605-606.

<sup>45</sup> J Dabner and M Burton “The Relationship between Tax Administrators and Tax Practitioners: The Australasian Environment” (2008) 14 New Zealand Journal of Taxation Law and Policy 99 at 100.

<sup>46</sup> At 100.

<sup>47</sup> At 110.

<sup>48</sup> R L Marshall, R W Armstrong, M Smith “The Ethical Environment of Tax Practitioners: Western Australian Evidence” (1998) 17 Journal of Business Ethics 1265 at 1273.

<sup>49</sup> At 1273.

<sup>50</sup> Dabner and Burton, above n 45, at 102. Note that the IRD are now moving towards a broader compliance model, see Inland Revenue, Statement of Intent 2016-20 at 20.

<sup>51</sup> Jackson and Milliron, above n 42, at 82; K Devos “An Investigation into the Ethical Views and Opinions of Australian Tax Practitioners of Different Affiliations” (2014) 20 New Zealand Journal of Taxation Law and Policy 169 at 174.

<sup>52</sup> <[www.americanbar.org/aba.htm](http://www.americanbar.org/aba.htm)> last accessed 14th February 2017. The ABA is a voluntary organization for legal professionals. One of its many activities is establishing model ethical codes.

<sup>53</sup> <[www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html)> last accessed 4th May 2017.

<sup>54</sup> United States Tax Court Rules of Practice, rule 202 (a) (3). The Tax Court hears disputes between a taxpayer and the IRS, for example where the IRS has determined a tax deficiency:

<[www.ustaxcourt.gov/about.htm](http://www.ustaxcourt.gov/about.htm)> last accessed 4th May 2017.

<sup>55</sup> ABA Model Rules rule 1.6.

<sup>56</sup> ABA Model Rules rule 1.2.

<sup>57</sup> ABA Model Rules rule 1.7.

<sup>58</sup> ABA Model Rules rule 3.3.

<sup>59</sup> ABA Comm. On Ethics and Professional Responsibility, Formal Op. 314 (1965).

<sup>60</sup> ABA Model Rules rule 2.1.

<sup>61</sup> ABA Model Rules, Comment on Rule 1.6, para 15.

<sup>62</sup> ABA Comm. On Ethics and Professional Responsibility, Formal Op. 473 (2016).

<sup>63</sup> ABA Comm. On Ethics and Professional Responsibility, Formal Op. 385 (1994).

<sup>64</sup> ABA Model Rules rule 8.4 (a).

<sup>65</sup> ABA Model Rules rule 8.4 (d).

<sup>66</sup> Internal Revenue Code 26 USC, § 7604.

<sup>67</sup> Although there are a range of members of the tax practice profession in the United States, Certified Public Accountants may practice before the IRS, are required to pass a qualifying examination and are subject to State licensing requirements including continuing professional development requirements. They are therefore a useful comparator to lawyers.

<sup>68</sup> AICPA Code of Professional Conduct, 0.300.030.01.

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- <sup>69</sup> AICPA Code of Professional Conduct, 0.300.030.02.
- <sup>70</sup> AICPA Code of Professional Conduct, 0.300.030.02.
- <sup>71</sup> AICPA Code of Professional Conduct, 0.300.030.03.
- <sup>72</sup> AICPA Code of Professional Conduct, 0.300.030.03.
- <sup>73</sup> Jackson and Milliron, above n 42, at 82.
- <sup>74</sup> AICPA Statement on Standards for Tax Services, No. 1 Nov 2009, para 11.
- <sup>75</sup> AICPA Statement on Standards for Tax Services, No.1 Nov 2009, para 11.
- <sup>76</sup> AICPA Statements on Standards for Tax Services, Preface Nov 2009, para 2.
- <sup>77</sup> AICPA Code of Professional Conduct, 1.700.100.
- <sup>78</sup> AICPA Statement on Standards for Tax Services, No 7, Nov 2009, para 11.
- <sup>79</sup> AICPA Code of Professional Conduct, 1.700.100.02.
- <sup>80</sup> AICPA Code of Professional Conduct, 0.100.020.02.
- <sup>81</sup> AICPA Code of Professional Conduct, 1.300.001, 1.310.001.
- <sup>82</sup> *United States v Textron Inc* 507 F Supp 2d 138 (DRI 2007) at 148.
- <sup>83</sup> AICPA Code of Professional Conduct, 0.300.040, 0.300.060.
- <sup>84</sup> Watson, above n 41, at 849.
- <sup>85</sup> Treasury Department Circular No. 230, Rev 6-2014, para 10.33 (4).
- <sup>86</sup> Watson above n 41, at 858-859.
- <sup>87</sup> ABA Commission on Ethics and Professional Responsibility, Formal Opinion 85-352, 1985.
- <sup>88</sup> Treasury Department Circular No.230, Rev 6-2014, para 10.34 (a) (1).
- <sup>89</sup> Internal Revenue Code 26 USC, § 6662.
- <sup>90</sup> AICPA Code of Professional Conduct, 1.110.010.18.
- <sup>91</sup> Internal Revenue Code 26 USC, § 7525 (a) (3) (A). Practice before the IRS covers “all matters connected with a presentation to the IRS”, which includes preparing and filing documents, correspondence and communication with the IRS, tax planning advice and representing clients – Treasury Department Circular No.230, Rev 6-2014, para 10.2 (a) (4).
- <sup>92</sup> Treasury Department Circular No. 230, Rev 6-2014, para 10.50.
- <sup>93</sup> Treasury Department Circular No. 230, Rev 6-2014, para 10.3 (a), (b).
- <sup>94</sup> Treasury Department Circular No. 230, Rev 6-2014, para 10.50 (a).
- <sup>95</sup> Treasury Department Circular No. 230, Rev 6-2014, para 10.51 (a) (4).
- <sup>96</sup> Treasury Department Circular No. 230, Rev 6-2014, para 10.51 (a) (7).
- <sup>97</sup> Treasury Department Circular No. 230, Rev 6-2014, para 10.51 (a) (13).
- <sup>98</sup> Treasury Department Circular No. 230, Rev 6-2014, para 10.20 (a) (1).
- <sup>99</sup> Treasury Department Circular No.230, Rev 6-2014, para 10.52 (a) (1).
- <sup>100</sup> In the taxation context, willful is understood to mean “voluntary, intentional violation of a known legal duty” - *Cheek v United States* 498 US 192 (1991) at 201; *Banister v United States Department of the Treasury* 499 Fed Appx 668 (2012).
- <sup>101</sup> Watson, above n 41, at 882.

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- <sup>102</sup> SR 2008/214.
- <sup>103</sup> Lawyers and Conveyancers Act 2006, s 107 (1), including in-house lawyers and barristers.
- <sup>104</sup> Rules of conduct and client care for lawyers, 5.2.
- <sup>105</sup> Rules of conduct and client care for lawyers, 8.
- <sup>106</sup> Rules of conduct and client care for lawyers, 2.1.
- <sup>107</sup> Rules of conduct and client care for lawyers, 13.1.
- <sup>108</sup> Rules of conduct and client care for lawyers, 13.9.2.
- <sup>109</sup> Lawyers and Conveyancers Act 2006, s 241.
- <sup>110</sup> Lawyers and Conveyancers Act 2006, s 242.
- <sup>111</sup> Tax Administration Act 1994, s 20B (4), (5).
- <sup>112</sup> Inland Revenue Department Approved groups <[www.ird.govt.nz/taxagents/role/advisor-groups/](http://www.ird.govt.nz/taxagents/role/advisor-groups/)> last accessed 14<sup>th</sup> February 2017.
- <sup>113</sup> Policy Advice Division of the Inland Revenue Department (2002), Tax and Privilege: A proposed new structure: a government discussion document, para 3.6.
- <sup>114</sup> Tax Administration Act 1994, s 81B (1).
- <sup>115</sup> Inland Revenue Department, 2005, SPS 05/07, paras 93-94.
- <sup>116</sup> New Zealand Institute of Chartered Accountants code of ethics, 1.2.
- <sup>117</sup> Rules of the New Zealand Institute of Chartered Accountants, May 2015, 13.40 (a), (b).
- <sup>118</sup> New Zealand Institute of Chartered Accountants code of ethics, 100.1.
- <sup>119</sup> New Zealand Institute of Chartered Accountants code of ethics, 100.5.
- <sup>120</sup> New Zealand Institute of Chartered Accountants code of ethics, 140.1.
- <sup>121</sup> Dabner and Burton, above n 45, at 113.
- <sup>122</sup> New Zealand Institute of Chartered Accountants code of ethics, 130.1 (b).
- <sup>123</sup> New Zealand Society of Accountants, Guidelines on Ethics in Tax Practice, EG-2, 07/13.
- <sup>124</sup> New Zealand Society of Accountants, Guidelines on Ethics in Tax Practice, EG-2, 07/13, para 1.
- <sup>125</sup> New Zealand Society of Accountants, Guidelines on Ethics in Tax Practice, EG-2, 07/13, para 4.
- <sup>126</sup> APES 110 Code of Ethics for Professional Accountants.
- <sup>127</sup> APES 110 Code of Ethics for Professional Accountants, 100.1 – 100.5.
- <sup>128</sup> <[www.apesb.org.au](http://www.apesb.org.au)> last accessed 4<sup>th</sup> May 2017.
- <sup>129</sup> <[www.cpaaustralia.com.au/professional-resources/accounting-professional-and-ethical-standards](http://www.cpaaustralia.com.au/professional-resources/accounting-professional-and-ethical-standards)> last accessed 4<sup>th</sup> May 2017.
- <sup>130</sup> Accountants and Tax Agents of New Zealand code of ethics, 1.1.
- <sup>131</sup> Accountants and Tax Agents of New Zealand code of ethics, 2.1.
- <sup>132</sup> Tax Administration Act 1994, s 34B (2), (3).
- <sup>133</sup> Proposals for Modernising the Tax Administration Act: a discussion document, Policy and Strategy, Inland Revenue, December 2016, chapter 5, page 72, 75.
- <sup>134</sup> Proposals for Modernising the Tax Administration Act: a discussion document, Policy and Strategy, Inland Revenue, December 2016, chapter 5, fn 75.



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<sup>135</sup> Living our Purpose and Values, PwC's Code of Conduct, 2016 <[www.pwc.com/codeofconduct](http://www.pwc.com/codeofconduct)> last accessed 4th May 2017.

<sup>136</sup> What we stand for, Tax code of conduct for the global PwC network, 2015 <[www.pwc.com/tax](http://www.pwc.com/tax)> last accessed 4th May 2017.

<sup>137</sup> House of Commons Committee of Public Accounts, Tax Avoidance: the role of large accountancy firms, 44<sup>th</sup> Report of Session 2012-13, HC 870; House of Commons Committee of Public Accounts, Tax avoidance: the role of large accountancy firms (follow-up), 38<sup>th</sup> Report of Session 2014-15, HC 860.

<sup>138</sup> House of Commons Committee of Public Accounts, Tax Avoidance: the role of large accountancy firms, 44<sup>th</sup> Report of Session 2012-13, HC 870, p.5.

<sup>139</sup> Professional Conduct in Relation to Taxation, 1 November 2016.

<sup>140</sup> Professional Conduct in Relation to Taxation, 1 November 2016, Part 2.

<sup>141</sup> Professional Conduct in Relation to Taxation, 1 November 2016, 2.24.

<sup>142</sup> Professional Conduct in Relation to Taxation, 1 November 2016, 6.31 – 6.35.

<sup>143</sup> Mitchell, above n 17, at 262.

<sup>144</sup> Dabner and Burton, above n 45, at 113.

<sup>145</sup> New Zealand Institute of Chartered Accountants code of ethics, 140.10.