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Legal professional privilege in the 21st Century: identifying failures to develop this evidential rule to meet the challenges of modernity and presenting solutions aligned to its rationale.

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A commentary submitted in partial fulfilment of the requirements of the University of Northumbria at Newcastle for the degree of Doctor of Philosophy by Published Work.

September 2022

Declaration

I declare that no outputs submitted for this degree have been submitted for a research degree of any other institution. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

I declare that the Word Count of this Commentary is 9,240 words

Signed:

Date: 15th September 2022

Contents

Abstract	**4**
List of publications	**5**
Introduction	**6**
Methodology	**11**
Outputs Narrative	**15**
Conclusion	**20**
Appendix 1: Co-author declaration forms (i) Michael Stockdale (ii) Edward Imwinkelried	**25**
Appendix 2: Publications (i) Rebecca Mitchell, Edward Imwinkelried & Michael Stockdale, 'Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege: English and US Experience Compared' (2021) 8 J Int'l & Comp L 283. (ii) Michael Stockdale & Rebecca Mitchell, 'Legal Advice Privilege and Artificial Legal Intelligence: Can Robots Give Privileged Legal Advice?' (2019) 23 Int'l J Evidence & Proof 422. (iii) Rebecca Mitchell 'Legal advice privilege in the taxation context: disconnected ethical regimes for lawyers and tax advisers in the United States and New Zealand' (2018) 24 NZJTLP 63. (iv) Michael Stockdale & Rebecca Mitchell, 'Legal Professional Privilege in Corporate Criminal Investigations: Challenges and solutions in the modern age' (2018) 82 J Crim L 321 (v) Rebecca Mitchell & Michael Stockdale, 'The Crime-Fraud Exception to Legal Professional Privilege in the Taxation Context: Comparative Anglo-American Contextualisation and Optimal Reforms' (2017) 1 B T R 109. (vi) Rebecca Mitchell, 'Comparative Standards of Legal Advice Privilege for Tax Advisers and Optimal Reform Proposals for English Law' (2015) 19 Int'l J Evidence & Proof 246.	

Abstract

Legal professional privilege has a significant and far-reaching impact on society and is of fundamental importance to all lawyers.

Individuals, businesses, professions, regulatory bodies and Government are all affected by the operation of legal professional privilege, the vagaries of its application in certain contexts and situations where it is effectively undermined. They are also significantly affected where this evidential rule fails to stay true to its rationale through stagnation or circumscription rather than benefitting from inventive, modern, judicial interpretation or legislative change.

The publications which form the basis of this submission span six years and form a significant, coherent and original contribution to knowledge and understanding of legal professional privilege. Using a combination of doctrinal, comparative and socio-legal methodological approaches as appropriate, these important and timely articles advance the field of study by identifying uncertainties and anomalies in the parameters of legal professional privilege in a range of contexts, both domestic and international and in relation to both its limbs: legal advice privilege and litigation privilege. The uncertainties and anomalies identified coalesce around the theme of a failure to develop this evidential rule to address effectively developments in both modern legal and regulatory practice, in alignment with its rationale. Each publication makes an original contribution and taken together as a whole provides a unique lens into the operation of legal professional privilege in the 21st Century, offering valuable insight into the challenges posed by its operational parameters and proposing suitable solutions.

List of publications

(i) Rebecca Mitchell, Edward Imwinkelried & Michael Stockdale, 'Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege: English and US Experience Compared' (2021) 8 J Int'l & Comp L 283.

(ii) Michael Stockdale & Rebecca Mitchell, 'Legal Advice Privilege and Artificial Legal Intelligence: Can Robots Give Privileged Legal Advice?' (2019) 23 Int'l J Evidence & Proof 422.

(iii) Rebecca Mitchell 'Legal advice privilege in the taxation context: disconnected ethical regimes for lawyers and tax advisers in the United States and New Zealand' (2018) 24 NZJTLP 63.

(iv) Michael Stockdale & Rebecca Mitchell, 'Legal Professional Privilege in Corporate Criminal Investigations: Challenges and solutions in the modern age' (2018) 82 J Crim L 321

(v) Rebecca Mitchell & Michael Stockdale, 'The Crime-Fraud Exception to Legal Professional Privilege in the Taxation Context: Comparative Anglo-American Contextualisation and Optimal Reforms' (2017) 1 B T R 109.

(vi) Rebecca Mitchell, 'Comparative Standards of Legal Advice Privilege for Tax Advisers and Optimal Reform Proposals for English Law' (2015) 19 Int'l J Evidence & Proof 246.

Introduction

This commentary accompanies the six peer reviewed, published outputs which form my PhD by published work. Read together, these outputs illustrate a journey through the landscape of legal professional privilege, domestic and international. Each piece considers an aspect of legal professional privilege and conducts analysis through a particular prism, whether that be taxation, ethics or corporate practice. This commentary complements the outputs, provides an explanation behind the key concepts explored in each piece and identifies the links between them.

The rationale for legal professional privilege comprises the bedrock of all the publications which form part of this submission. Understanding this rationale and the tensions within it is crucial to examining the way in which legal professional privilege has developed and the challenges to its operation in a modern, complex and evolving world. Although PhD's by published work do not usually begin with an overarching research question, on my research journey each published piece raised related questions which naturally led to a consequent output. For example, my first published piece concerning the extension of privilege beyond lawyers to tax advisers led me to consider the role that professional ethics codes could play in ameliorating concerns regarding disingenuous privilege claims. This in turn led to consideration of the existing crime-fraud (or iniquity) exception to legal professional privilege and how this operates in the taxation context. Seen as a whole, these outputs coalesce around a theme of a failure to develop legal professional privilege to address effectively developments in both modern legal and regulatory practice, in alignment with its rationale. No other writers have developed their contribution to the academy in this area in the same way or with the same focus. Each published piece has undergone peer review prior to acceptance for publication in well-respected, established legal journals.

To establish a shared frame of reference, the first element of this commentary is a summary of the rationale for legal professional privilege and an explanation of its component parts. I then explain how my research journey began and summarise each consequent development in this process, covering: ethics and exceptions; the corporate context; and robot lawyers. Discussion of the methodological approaches taken to my research follows, including giving context to both the co-authoring and peer review processes. The outputs narrative section of the commentary contains a more detailed explanation of each output with supporting pin-point references to each piece. I end with a conclusion, identifying the core themes and originality of my work and including a summary of future projects being undertaken to further explore some of the themes and elements present in the outputs forming this PhD by published work.

The rationale for legal professional privilege.

Legal professional privilege is an evidential rule developed at common law which at its essence preserves the confidentiality of communications between lawyer and client. It has two limbs: litigation privilege and legal advice privilege, each with its own underpinning rationale. The rule of law rationale which underpins legal advice privilege is that it is in the public interest that legal advice is sought and given so that clients may arrange their affairs in an orderly manner and in accordance with the law. To achieve this end, clients must put all the facts before their lawyers. If disclosure of legal adviser/client communications could be required in the absence of consent by the client, then the client would not always be prepared to put the facts before their lawyer. This rationale underpins the assertion of legal advice privilege by individuals and corporations, from small to large multi-nationals. The fundamental tension within this rationale is between, on the one hand, the effective administration of justice and on the other the public interest in encouraging compliance with legal rules through preserving the confidentiality of communications between legal adviser and client.

Where litigation privilege is relied on and legal advice privilege does not arise, its rationale is founded upon the adversarial nature of litigation; so that each party has the freedom to prepare its case without other parties having access to preparatory material. As litigation becomes more case managed and less adversarial this rationale may become increasingly less relevant. Where legal advice privilege and litigation privilege overlap, the rationale for legal advice privilege could apply equally to both.

The beginning of my research journey.

I came to academia from commercial practice as a trainee and then as an assistance solicitor in the corporate tax department of a commercial firm in the City of London. I was obviously aware of privilege through professional examinations and, to an extent, ethical codes. In the “real world” setting outside the litigation and disclosure context lawyers tend to think about privilege largely in terms of confidentiality. It is not clear what assumptions clients make about privilege – whether they even think about it or understand its parameters in communications with their lawyer. Are they even aware that, in English law, legal professional privilege in its legal advice limb will not apply to advice from a non-lawyer (such as an accountant), even if legal advice is being given? Legal and regulatory practice has changed significantly since I was in practice. There is far greater variety in the nature of the professions providing legal advice and much greater complexity in corporate structures and activity. There are also new approaches from regulators who may require waiver of privilege as the “price” of doing deals to avoid prosecution. Judicial response suggests a timid, piecemeal, ad hoc approach to all these advances, against the backdrop of no legislative change. This fails to take proper account of the bedrock of the legal advice privilege limb – the rule of law rationale – and in the litigation context has seen a restrictive approach taken to litigation privilege.

My academic interest in legal professional privilege was piqued through curiosity about the rationale for its legal advice privilege limb and whether, in practice, lawyers' clients really do behave in the way in which the rationale anticipates. My research into this question led to the realization that there is very little published on this point and certainly nothing recent, the last empirical study taking place in the United States between 1986 and 1988. My original plan was to conduct empirical research on this question of client behaviour, to test the validity of the rationale for legal advice privilege. This research would involve both lawyers and non-legal professionals who give legal advice, to tease out any differences in interactions with clients and their candour in situations where legal professional privilege is not available.

During my initial research into construction of a suitable survey, I became increasingly aware of the apparent contradiction between the rule of law rationale and the limitation in English law of legal advice privilege to lawyer/client communications. This seemed to be very much a case of the English approach to privilege not keeping pace with modern developments, where specialist advice of a legal nature may well be given by a non-lawyer – accountants being the most obvious example. This position is out of step with other common law jurisdictions such as the United States and New Zealand and lags behind more diverse modern mechanisms of delivering legal advice. There had not, however, been extensive critical analysis of the different legislative mechanisms used to extend legal professional privilege in these jurisdictions or distillation of an optimal regime for English law. I therefore undertook research into the approaches taken in jurisdictions where privilege has been extended beyond lawyers, to examine both why it was thought appropriate to do so and how the extension has been achieved through legislative intervention. This analysis led to recommendations for changes in English law, to extend legal professional privilege to fit modern practice in the provision of legal advice and give the rule of law rationale its full effect across a broader spectrum of legal advisers.

Consequent developments – ethics and exceptions.

The implications for the administration of justice where privilege is asserted are significant. Relevant material that would otherwise be available to a court or tribunal is legitimately withheld. The ethical dimension to a claim of legal professional privilege is therefore of considerable importance. Although privilege belongs to the client, so the choice of whether to assert it is with the client, the advice of the client's lawyer on whether privilege can and should be claimed is likely to be definitive. The range and extent of ethical duties have also been raised in discussion around whether legal professional privilege should be extended beyond lawyers. Do lawyers' ethical rules and related duties make them particularly suitable gatekeepers and the only profession safe to be trusted with privilege? Does the crime-fraud (or iniquity) exception to legal professional privilege operate effectively to alleviate any concerns around it being abused if expanded beyond lawyers? To address these previously unanswered questions, I researched relevant professional body codes of conduct in jurisdictions where legal professional privilege has been extended to tax practitioners. Analysis of the efficacy of these codes and their comparison to lawyers' professional codes

informed recommendations for best practice and a means of establishing benchmark standards for lawyers and other professionals when advising a client on asserting privilege.

The crime-fraud exception to legal professional privilege clearly plays a role in maintaining the integrity of claims for privilege and in that sense minimising its impact on the administration of justice. The exception operates in quite limited circumstances: where a client consults a lawyer for legal advice in connection with the perpetration of a criminal or fraudulent act, before or during its commission. Where legal professional privilege has been extended beyond lawyers to tax advisers, legislative tools have been used to either limit that extension through express reference to illegal acts (to an extent the crime-fraud exception) or to exclude certain types of tax planning vehicle. So, what role has the crime-fraud exception to play in this sphere and is it an effective gatekeeper against abusive claims of privilege in the taxation context? This important question had not been considered or answered. Research was therefore undertaken into the operation of the exception in England and Wales (where there has been no extension of privilege to tax advisers) and the United States (where there has). This research showed how differences in judicial practice can help or hinder the effective use of the exception to counter abuse of legal professional privilege and suggested that the exception lacks efficacy as an effective means of tackling tax avoidance in the English context.

Consequent developments – the corporate context.

The fundamental tension between the effective administration of justice and legal professional privilege, and modern more complex business structures is particularly evident in the corporate context. Here, my research revealed challenges in the operation of both limbs of legal professional privilege because they have failed to keep pace with developments in the way corporate entities operate and with the investigatory practices of regulatory bodies. Common law precedents, originating in the Victorian age, have not been developed and applied effectively to present day situations. This may, in part, be due to judicial reluctance to widen the parameters of legal professional privilege. Widening does, of course, have implications for the effective administration of justice. However, the difficulty with prioritising the administration of justice is its conflict with the rationale for both limbs of privilege. I would argue that the issue is not a question of whether to widen the parameters of legal professional privilege, but simply one of how best to adapt and apply it to complex and novel present-day situations, bearing in mind its rationale.

This analysis is also relevant to the activities of investigatory authorities like the Serious Fraud Office. In a similar vein to the judicial tendency to a narrow interpretation of privilege, the Serious Fraud Office seem to regard legal advice privilege as a hindrance to its activities rather than being cognisant of the rule of law rationale: the resulting greater likelihood of compliance with legal rules being something that the Serious Fraud Office should value. My research into the United States experience with Deferred Prosecution Agreements, a novel and under researched addition to English law, and

comparative analysis between England and the United States revealed positive developments for both jurisdictions and made recommendations for bilateral transference of good practice. In the United States an improved evidential and procedural landscape and in England a much clearer and more satisfactory way of preserving privilege.

Consequent developments – Robot lawyers.

My research suggests that, despite the changes and challenges of the modern world, the courts are reluctant to extend the privilege regime through precedent, arguing that this is an issue for legislative reform. On the other hand, they seem inclined to adopt a narrow interpretation of the parameters of privilege when its application to present day complexities raises questions. The guide for judicial and regulatory practice when dealing with legal professional privilege should be the rule of law rationale.

The significant and original research that I have undertaken demonstrates how future advances in the delivery of legal services are likely to bring these various strands together: rationale; ethics; and a narrow or wide application. The increasing use by legal firms of artificial intelligence adds a new dimension to the question of whether legal advice privilege is or should be available when such resources are utilised. The introduction of “robot lawyers” presents challenges that are likely to require both professional ethics interventions and a creative judicial approach to privilege.

Methodology

This section of the commentary explains the development of the methodology employed in the researching and writing of these pieces. It examines my working methods both as an individual author and when engaged on joint authorship and my approach to peer review.

Starting out

My first piece,‘**Comparative Standards of Legal Advice Privilege for Tax Advisers and Optimal Reform Proposals for English Law’**, published in 2015, was sole authored and adopted a doctrinal methodological approach to the law in England to "...describe a body of law and how it applies."[1] A legal doctrinal approach is appropriate to subject "essential features of the legislation and case law" to rigorous and creative analysis and then to combine or synthesise "all the relevant elements … to establish an arguably correct and complete statement of the law on the matter in hand."[2] This research process then led to the formulation of proposals for law reform, informed by both a doctrinal approach to and functional comparison with the legal rules in the United States, New Zealand and Australia, all jurisdictions with forms of legal professional privilege that have developed from English common law rules. Comparative law "is an ‘ecole de verite’ which extends and enriches the ‘supply of solutions’ […] and offers the scholar of critical capacity the opportunity of finding the ‘better solution’ for his time and place".[3] Finding a ‘better solution’ for English law made comparative analysis most suitable to use for my first major piece of solo research, as the common law foreign jurisdictions considered had either already implemented or considered implementation of legislation extending legal professional privilege to tax advisers. The failure of English law to develop privilege to address successfully modern legal practice is very effectively illustrated through functional comparison, the "classic form of comparative law."[4], with legislative reform in other common law jurisdictions.

The extension of privilege to tax advisers in both the United States and New Zealand provided useful case studies through analysis of legislation, case law and journal articles which then informed proposals for reform of English law. In New Zealand, the Tax Administration Act 1994 was amended to give a person the right to withhold tax advice documents from the Inland Revenue Department following an information demand[5]. The non-disclosure right applies to documents created by a client to instruct a tax adviser or created by the tax adviser to advise the client. The route taken in the United States was to amend the Internal Revenue Code to extend lawyer/client privilege

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[1] Dobinson and Francis Johns, ‘Qualitative Legal Research’ in Mike McConville and Wing Hong Chui (eds), Research Methods for Law (Edinburgh University Press, 2nd ed 2017) 21

[2] Hutchinson T, ‘Doctrinal research’ in Dawn Watkins and Mandy Burton (eds), Research Methods in Law (Routledge, 2nd ed, 2018) 13

[3] Konrad Zweigert and Hein Kotz ‘An Introduction to Comparative Law’ (Oxford University Press, 3rd ed, 1998) 15.

[4] Uwe Kischel, ‘Comparative Law’, (Oxford University Press, 2019) 88

[5] Tax Administration Act 1994 s. 20B

to tax advice communications between client and tax practitioner[6]. In both jurisdictions there are different starting points in terms of the objectives of the changes and carve outs which constrain the privilege to an extent not seen where it is operating between lawyer and client. These carve outs were to address concerns raised prior to statutory change. Although legislation had not been enacted to create a similar extension in Australia, proposals similar to those in New Zealand had been considered. There were therefore very useful comparisons to be made between jurisdictions and the opportunity to distil best practice recommendations, allowing the most effective methods to be proposed for English law.

Subsequent approach

The methodology adopted for this first piece proved successful. Following a peer review process it was accepted for publication in a well-respected law journal. I have adopted the same methodological approach of doctrinal and functional comparison in three of the five subsequent pieces: **'The Crime-Fraud Exception to Legal Professional Privilege in the Taxation Context: Comparative Anglo-American Contextualisation and Optimal Reforms'; 'Legal advice privilege in the taxation context: disconnected ethical regimes for lawyers and tax advisers in the United States and New Zealand'**; and **'Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege: English and US Experience Compared'**. In each piece, I formulate optimal solutions to the issues raised. These solutions involve adopting changes in process, making changes to professional body regulatory codes and changing the practice and guidance of a statutory regulator. A doctrinal methodological approach enabled me to first establish "a correct and complete statement of the law"[7] from analysis and creative synthesis of myriad legal sources. I could then use a comparative methodological approach to identify and propose better solutions in each context.

As demonstrated in the outputs narrative (below), each publication picks up themes and threads from an earlier piece. This being the case, there were further relevant comparisons to be made with and between those jurisdictions where privilege had already been extended to tax advisers. For example, in **'Legal advice privilege in the taxation context: disconnected ethical regimes for lawyers and tax advisers in the United States and New Zealand'**, a doctrinal and comparative approach was applied when considering the ways in which codes of professional ethics in the United States and New Zealand operate for both lawyers and tax advisers. This analysis provided insight into the 'gatekeeper' element of restricting legal professional privilege to lawyers and informed proposals for greater coherence and standardisation amongst professions where privilege has been extended to non-lawyers.

[6] Inland Revenue Code s. 7525

[7] Hutchinson T, 'Doctrinal research' in Dawn Watkins and Mandy Burton (eds), Research Methods in Law (Routledge, 2nd ed, 2018) 13

For '**Legal Professional Privilege in Corporate Criminal Investigations: Challenges and solutions in the modern age'** the subject matter suggested that the most appropriate methodology was a purely doctrinal approach. This piece required analysis of legal professional privilege in two specific instances in the corporate context considering only English law – litigation privilege in criminal investigations conducted by regulatory bodies and legal advice privilege. The purpose of this piece was to analyse English case law concerning the ambit of litigation privilege and give practical guidance for corporations wishing to optimise the circumstances in which legal advice privilege can be claimed within its current parameters. Although a comparative methodological approach can be taken to legal advice privilege in English law (and has been subsequently in Stockdale M and Mitchell R 'Legal Advice Privilege: The legacy of Three Rivers (No.5) and the challenge of providing consistent protection to all client types' The International Journal of Evidence and Proof, 26, 2, 157-177), this piece had a different purpose.

In **'Legal Advice Privilege and Artificial Legal Intelligence: Can Robots Give Privileged Legal Advice?'** a doctrinal and socio-legal approach "an interface with a context within which law exists …" [8] was adopted. This horizon scanning piece considered the ethical interventions which might be required in English law should fully or partially automated legal advice become more sophisticated and more common. The approach taken reflected the subject matter of this piece. A doctrinal approach was required to establish both the legal and regulatory rules which are apposite to the question posed in this piece. A socio-legal approach was taken to examine the practical consequences for consumers who may choose to use low cost, unregulated services giving legal advice in non-reserved areas of law.

Generally, the research process has involved assembling and then analysing relevant case law and legislation, supported by secondary material such as articles in legal journals and professional body codes of practice where relevant. Legislation features heavily throughout the publications. This is inevitable both because it is clear that any extension of legal professional privilege in English law must come from Parliament and because, for comparative purposes, extensions to legal professional privilege have been made through legislative change. Case law features heavily when considering the ways in which English law has responded to modern developments in the provision of legal advice and present day regulatory practices, in the absence of legislative intervention.

Co-authoring

My second piece, **'The Crime-Fraud Exception to Legal Professional Privilege in the Taxation Context: Comparative Anglo-American Contextualisation and Optimal Reforms'**, published in 2017, was my first major piece of co-authored

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[8] Cownie F and Bradney A 'Socio-legal studies' in Dawn Watkins and Mandy Burton (eds), Research Methods in Law (Routledge, 2nd ed, 2018) 42

research. As explained above, the methodological approach adopted with this piece was the same as for the first piece - doctrinal and comparative - with two common law jurisdictions, England and the United States, considered. This piece required a greater depth of focus than previous articles that I have written collaboratively, both in terms of content and in the academic decisions that needed to be made . However, my previous experience of co-authoring was invaluable in informing both practice and approach to writing this piece. The idea for this output arose out of research conducted into the extension of legal professional privilege beyond lawyers to tax advisers. In these instances, legislative tools have been used to either limit the extension through express reference to illegal acts (to an extent the crime-fraud exception) or to exclude certain types of tax planning vehicle. I could find no consideration in academia of the role that the long established crime-fraud exception could play in this sphere.

I approached my co-author, a well-established evidence lawyer with an academic background and expertise in legal professional privilege, who I felt could bring valuable insight into the operation of the crime-fraud exception in English law. I could build on the research that I had already conducted into legal professional privilege in the United States to establish the operation of the crime-fraud exception in that jurisdiction. We agreed on an appropriate methodological approach, scoped out the coverage of the piece and initially began researching and writing our respective parts. Our method was (and is) to then take the whole piece through numerous iterations as a team. This approach leads to truly collaborative decision making with respect to the inclusion and exclusion of material and produces a coherent whole.

In addition to the above piece, two more of the six pieces forming this PhD by published work have been a collaboration with the same co-author: '**Legal Professional Privilege in Corporate Criminal Investigations: Challenges and solutions in the modern age'**, and **'Legal Advice Privilege and Artificial Legal Intelligence: Can Robots Give Privileged Legal Advice?'** leading to a well-established researching and writing relationship. This collaborative approach is enhanced by our different backgrounds of pure academic and academic with a practitioner background.

Peer Review

I have been very fortunate in the external peer review process, having never needed to make major revisions to pieces submitted for publication. This is, in part, due to a strength of the co-authoring process: that two people write and rigorously review the entire article over numerous drafts. I also take advantage of opportunities to have drafts considered by an experienced internal reviewer prior to submission to the relevant journal. Overall, internal and external peer review "…for most legal scholars, the least controversial method of evaluation of the quality of scientific publications."[9] has undoubtedly improved the quality of my published outputs and I have approached suggested revisions very much in that spirit.

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[9] Van Gestel R and Vranken J 'Assessing Legal Research: Sense and Nonsense of Peer Review versus Bibliometrics and the Need for a European Approach' German Law Journal Vol. 12 No.03, 901 -929, 902.

Outputs narrative

This section of the commentary provides a more detailed discussion of the publications forming this PhD by published work. The narrative critically locates each piece, focussing on key ideas, themes and conclusions, with pin-point references used for guidance. The narrative also contextualises each piece and, in its running order, follows research themes rather than publication date.

The rationale for legal professional privilege comprises the bedrock of all the publications which form part of this submission. Understanding this rationale and the tensions within it is crucial to examining the way in which privilege has developed and the challenges to its operation in a modern, complex and evolving world.

One significant anomaly that is self-evident on analysis of the rule of law rationale is that legal advice privilege does not extend beyond lawyer/client communications. This, even though members of other professions may now routinely give what is legal advice to clients. The sphere where the latter occurs most frequently and where there have been both legal challenges and academic commentary on the position is that involving accountants giving their clients fiscal legal advice. If the importance of the rule of law rationale trumps the needs of the effective administration of justice, then how is limiting the parameters of legal advice privilege to only lawyer/client communications justified (**(2015) 19 Int'l J Evidence & Proof 246, 247**)? Doing so does not serve the public interest in encouraging compliance with legal rules through preserving the confidentiality of advice which relates to those legal rules, albeit given by an accountant rather than a lawyer. Here, the law has not kept pace with the changing landscape in both the nature of legal advice on fiscal issues and the professionals best equipped to give such advice.

My first output (numbered (vi)), **Rebecca Mitchell,** '**Comparative Standards of Legal Advice Privilege for Tax Advisers and Optimal Reform Proposals for English Law' (2015) 19 Int'l J Evidence & Proof 246** explores these issues from an original comparative and doctrinal perspective, by examining the approaches taken in the United States, New Zealand and Australia, jurisdictions where legal professional privilege has either been extended to cover aspects of fiscal legal advice from a tax adviser (**(2015) 19 Int'l J Evidence & Proof 246, 247-252 and 252-257**) or where law reform proposals have been made to do so (**(2015) 19 Int'l J Evidence & Proof 246, 257-262**). This piece was the first to comprehensively examine the development of the legislative regimes in these various jurisdictions, to compare their respective approaches and, through this comparative analysis, to distil best practice to inform proposals for a new, better solution in England and Wales (**(2015) 19 Int'l J Evidence & Proof 246, 262-266**). That a new regime can only be statute led is clear from the landmark decision of the Supreme Court in R (on the application of Prudential plc) v Special Commissioner of Income tax [2013] UKSC 1.

The above published piece also involved consideration of the legislative devices used in jurisdictions where legal advice privilege has been extended to fiscal legal advice from a tax adviser, to try and minimise the risk of privilege being used to obfuscate tax avoidance schemes. In the United States, there is the tax shelter limitation (**(2015) 19 Int'l J Evidence & Proof 246, 248-250**). In New Zealand, the protection given to tax advice documents does not apply where those documents are created in connection with illegal or wrongful acts (**(2015) 19 Int'l J Evidence & Proof 246, 254-255**). As in England and Wales, both the United States and New Zealand have a crime fraud exception (or iniquity exception) to the operation of legal professional privilege.

These observations led to research into the intersection between the crime fraud exception and fiscal legal advice, both from lawyers and tax advisers, and the production of my second output (numbered (v)), **Rebecca Mitchell & Michael Stockdale, 'The Crime-Fraud Exception to Legal Professional Privilege in the Taxation Context: Comparative Anglo-American Contextualisation and Optimal Reforms' (2017) 1 B T R 109**. This original piece explores the operation of the iniquity exception (the crime-fraud exception) to legal professional privilege in the context of advice relating to taxation and, in particular, tax avoidance schemes. The exception has seen greater jurisprudential development in the United States (**(2017) 1 B T R 109, 121-122**) which is therefore a very useful "supply of solutions"[10]. The use of the crime fraud exception by the Inland Revenue Service in the United States to uncover information relating to tax shelters (**(2017) 1 B T R 109, 124-125**) is contrasted with the approach taken by HMRC in England and Wales (**(2017) 1 B T R 109, 114, 120-121**). The piece highlights the impact of procedural differences between the United States (**(2017) 1 B T R 109, 128-130)** and England and Wales (**(2017) 1 B T R 109, 117 – 120)**. The much more extensive use of in camera review of documents by the courts in the United States when disputes relating to claims of privilege arise, together with a lower threshold test to be met for review to take place, opens up increased likelihood of the iniquity exception being found relevant and being used to tackle tax avoidance schemes (**(2017) 1 B T R 109, 132)**.

In considering the extension of legal professional privilege to fiscal legal advice given by tax advisers, one of the pertinent issues relates to defining which tax advisers come within the ambit of the extended privilege (**(2015) 19 Int'l J Evidence & Proof 246, 250 -251, 255**). That in turn leads to consideration of professional and ethical standards. An argument which has been raised in support of limiting legal advice privilege to lawyers is premised on there being something distinctive in their education, training, professional codes of conduct, duty owed to the court and disciplinary regime (((**(2015) 19 Int'l J Evidence & Proof 246, 260**). My leading-edge research suggests that the latter three distinctions between lawyers and other professions can be addressed. First, through analysis of the relevance of the duty owed to the court by lawyers in the taxation context

[10] Konrad Zweigert and Hein Kotz 'An Introduction to Comparative Law' (Oxford University Press, 3rd ed, 1998) 15.

(**(2018) 24 NZJTLP 63, 70-71 and 75**) and second through examination of and recommended additions to relevant professional body requirements.

The output (numbered (iii)), **Rebecca Mitchell 'Legal advice privilege in the taxation context: disconnected ethical regimes for lawyers and tax advisers in the United States and New Zealand' (2018) 24 NZJTLP 63** articulates these themes through analysis of relevant statutory provisions, taxation authority regulations/codes and professional body codes of conduct in New Zealand and the United States, both of which have seen the extension of legal professional privilege to tax advisers. The picture that emerges is not a coherent one. In particular, the provisions regarding privilege in ethics codes relating to lawyers and tax advisers are opaque (**(2018) 24 NZJTLP 63**,**70-73 and 75-78**) despite there being concerns in both jurisdictions regarding abuse of the privilege rules in the taxation context (**(2018) 24 NZJTLP 63, 67-68**). Tax authority regulations can operate as an additional layer of compliance, through containing broad ethical standards pertinent to claims of privilege and the ability to sanction if these are not observed. However, this may result in an over cautious approach to legitimate privilege claims because of the potentially adverse consequences for the tax adviser should the revenue authority take the view that the regulations have not been complied with (**(2018) 24 NZJTLP 63, 73-75 and 78)**. The article concludes with recommendations for additions explicitly referencing privilege to relevant professional body codes of conduct for tax advisers. For tax lawyers, changes to professional body codes which de-couple the link between legal professional privilege and court proceedings would give clarity to the broader application of ethics to claims of privilege (**(2018) 24 NZJTLP 63, 81-82)**. These recommendations also aim to bring some coherence and commonality amongst practitioners to the current ethical picture.

The output (numbered (ii)), **Michael Stockdale & Rebecca Mitchell, 'Legal Advice Privilege and Artificial Legal Intelligence: Can Robots Give Privileged Legal Advice?' (2019) 23 Int'l J Evidence & Proof 422** conducts a horizon scanning view of the potential for intersection between artificial intelligence and privilege. Once again the rationale for legal advice privilege informs the argument for extending it to cover advice given by automated legal software (robots), either with or without any human intervention. This piece builds on some of the ethical issues mentioned in the previous paragraph, the duty to the court argument for limiting privilege to lawyers and the content of professional body codes of conduct (**(2019) 23 Int'l J Evidence & Proof 422**, **425-426**) and explores the legal and practical challenges of extending privilege to robots.

Whilst the rule of law rationale would suggest that privilege should extend to a much broader range of people/professions who give legal advice, the English courts are not willing to make this extension (**(2019) 23 Int'l J Evidence & Proof 422, 426**). As this piece illustrates, there are practical difficulties in drafting legislation to encompass any such extension in the automated legal advice context due to the rapidly evolving nature of legal advice software (**(2019) 23 Int'l J Evidence & Proof 422, 431**). It is also the case that automated software related solutions are often used to provide a low cost

offering for consumers looking for legal advice (**(2019) 23 Int'l J Evidence & Proof 422, 431-433**). Analysis suggests that robots can give what would be classified as legal advice for the purpose of legal professional privilege (**(2019) 23 Int'l J Evidence & Proof 422, 427-428**). The key sticking point is that, under current rules, a robot is unlikely to be regarded as a member of the legal profession and this is required in order for their communications with a client to be privileged (**(2019) 23 Int'l J Evidence & Proof 422, 429-430**). This piece also considers challenges should legal advice software become increasingly embedded in legal practice. A particular concern is the scenario where a member of the legal profession signs off advice that has been generated by software and in relation to which the relevant lawyer has had no meaningful input and has no knowledge of how the software arrived at the given advice (**(2019) 23 Int'l J Evidence & Proof 422, 433-435**). The article suggests that this is a situation where professional body codes of conduct could fill a gap by requiring effective supervision where technology is used to the extent envisaged and potentially rules around transparency in relation to how the software operates (**(2019) 23 Int'l J Evidence & Proof 422, 438**).

The tension in the rationale for legal professional privilege is examined in the corporate context in the output (numbered (iv)), **Rebecca Mitchell & Michael Stockdale, 'Legal Professional Privilege in Corporate Criminal Investigations: Challenges and solutions in the modern age' (2018) 82 J Crim L 321**. This piece examines the application of both limbs of legal professional privilege - litigation privilege and legal advice privilege - and the extent to which their application is being narrowed by the judiciary where companies are involved. It also illustrates the challenges of applying privilege in an evolving regulatory landscape, with changes in approach to corporate criminal investigations, most notably the use of Deferred Prosecution Agreements (**(2018) 82 J Crim L 321, 322**).

This judicial narrowing of application manifests itself in the litigation privilege context through a restrictive interpretation of which proceedings are adversarial in nature and when litigation is in contemplation (**(2018) 82 J Crim L 321, 323-324**). This approach does not keep pace with the investigatory practices and attitude to prosecution of external regulators such as the Serious Fraud Office (**(2018) 82 J Crim L 321, 325-327**). The second half of this piece explores the ambit of legal advice privilege in the corporate context and the uncertainty that it creates for large corporate bodies with complex internal structures and with their need to conduct internal investigations involving numerous employees and both in-house and external lawyers. The judicial approach to narrowing here revolves around the decision not to regard the entire corporation as the lawyer's client, but to confine the client to a person or persons within the company who are authorised to seek and receive legal advice (**(2018) 82 J Crim L 321, 330-334**). Determining who these people are in fast moving internal investigations can be challenging and there are implications for privilege where information relevant to the legal advisors is held by a wide group, well beyond those authorised to seek and receive legal advice (**(2018) 82 J Crim L 321, 331, 334**). Practical guidelines are suggested for corporate clients to optimise the availability of both legal advice and litigation privilege (**(2018) 82 J Crim L 321, 335).** Circling back to the rationale for legal

professional privilege, encouraging compliance with legal rules through the confidentiality that privilege gives to lawyer/client communications should surely apply in the same way to all types of business structure and should not be interpreted in a narrow manner just because a corporation is involved. This point is picked up in a later piece[11] which, although not forming part of this PhD, was engendered by it.

The most recently published output which constitutes part of this PhD by published work identifies Deferred Prosecution Agreements as an area involving some difficult questions relating to legal advice privilege. The intersection between legal professional privilege and a Deferred Prosecution Agreement is the focus for the output (numbered (i)), **Rebecca Mitchell, Edward Imwinkelried & Michael Stockdale, 'Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege: English and US Experience Compared' (2021) 8 J Int'l & Comp L 283**.

This leading-edge comparative piece discusses the current tension in England between an assertion of privilege by a company and the Serious Fraud Office's requirement of cooperation for the company to be eligible for a Deferred Prosecution Agreement. Analysis of operational guidance, codes of practice and public statements point to a disconnect between the practical approach of the Serious Fraud Office equating waiver of legal professional privilege with cooperation and the explicit requirements of relevant written guidance (**(2021) 8 J Int'l & Comp L 283, 288-290**). Although the role of the court in approving Deferred Prosecution Agreement's in England is a positive aspect of the English regime (**(2021) 8 J Int'l & Comp L 283, 287-288**), the references in hearings to waiver of privilege in the context of cooperation perpetuates the perception that waiver equals cooperation (**(2021) 8 J Int'l & Comp L 283, 290-292**). Analysis of the Deferred Prosecution Agreement regime in the United States reveals a superior approach with greater clarity where waiver of privilege and cooperation are concerned (**(2021) 8 J Int'l & Comp L 283, 310-311**). The relevant guidance is explicit that providing information to the Department of Justice through a waiver of privilege garners no greater cooperation credit than providing information where privilege has not been waived (**(2021) 8 J Int'l & Comp L 283, 297 -301**). Areas where the United States regime may benefit positively through consideration of the English regime relate to limited waiver of privilege (**(2021) 8 J Int'l & Comp L 283, 294-296, 303-306**) and judicial oversight (**(2021) 8 J Int'l & Comp L 283, 297, 306-310**). In both cases, the Deferred Prosecution Agreement context is a small part of a broader procedural and evidential picture in the United States concerning these substantive and procedural points. In the Deferred Prosecution Agreement context in the United States, adoption of partial waiver (whilst recognising its practical limitations) and judicial oversight would be beneficial developments (**(2021) 8 J Int'l & Comp L 283, 312**).

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[11] Stockdale M and Mitchell R 'Legal Advice Privilege: The legacy of Three Rivers (No.5) and the challenge of providing consistent protection to all client types' The International Journal of Evidence and Proof, 26, 2, 157-177

Conclusion

The research journey upon which these six publications have taken me began with a mixture of curiosity about client behaviour and the rationale for legal advice privilege, and awareness of the various professions giving fiscal legal advice. In this conclusion, I identify core themes running through these publications and highlight the novel findings and proposals made therein. I also demonstrate how, as a whole, these pieces form a significant, coherent and original contribution to knowledge and understanding of legal professional privilege.

My research shows that, in jurisdictions where the justification for some form of extension of legal professional privilege to tax advisers giving fiscal legal advice is accepted, the methods used to do so do not fully accord with the rule of law rationale. My rigorous, significant and original analysis of the various approaches taken allows a novel 'better solution' to be proposed for English law. This 'better solution' is largely based on the legislative approach taken in the United States, leaving aside the sub-optimal elements which I identify. My proposed approach is in full accord with the rule of law rationale and recognises recommendations for change to the English law position which have been made but not pursued.

I demonstrate that the crime-fraud, or iniquity exception, can play a role in aiding tax collection agencies to collect evidence through defeating claims of privilege made in the taxation context. However, through an original doctrinal and comparative approach I illustrate that the adequacy of the exception for this purpose is hampered in England in the civil and criminal context by a key procedural issue – the reluctance of the courts to examine allegedly privileged documents. The United States experience is one of a lower evidentiary threshold requirement for conducting in camera review, coupled with a much greater willingness on the part of the courts to do so. Whilst a change to this approach in English law might be welcomed by HMRC, it is accepted that the time and cost implications are such that it conflicts with policy objectives and is unlikely to be feasible. Anomalies are identified in the process in the English First-Tier Tribunal (Tax) regarding examination of allegedly privileged documents and in this respect a novel, better approach based on United States jurisprudence is proposed.

Following rigorous and creative analysis of national and international professional body codes of conduct, I synthesise the key elements of each and deduce that in both the United States and New Zealand these codes have sub-optimal efficacy in regulating the ethical duties of tax advisers and lawyers when claiming privilege in the taxation context. The point is not specifically addressed in tax advisor codes. In lawyers' codes, I demonstrate that the wider duty not to mislead the court has limited relevance in the taxation context. There is a disconnect between professions' codes, even though both lawyers and tax advisers in these jurisdictions can claim privilege. I propose an original, optimal regime of relevant express provisions for codes in both the United States and New Zealand for tax advisors and lawyers, designed to require those asserting privilege to have proper grounds for doing so and, for lawyers, de-coupling ethical duties in relation to privilege claims from court proceedings.

My original and distinctive research on legal advice privilege and artificial intelligence offers novel perspectives and solutions to the challenges posed by the encroachment of technology into this area. I show that the rule of law rationale is perfectly applicable in this context and that a ‘robot’ is capable of giving legal advice, although not at present of being a legal adviser. Legislative intervention to extend privilege to robots giving legal advice is not recommended, to preserve greater choice for consumers in the legal services market and with the challenges of drafting precise legislation in an environment of constant technological advances in mind. Amendments to the professional body code of conduct applying to lawyers are recommended, to pre-empt the question of whether legal advice privilege applies in the scenario where a lawyer merely rubber stamps legal advice generated by artificial intelligence. Requiring a minimum level of supervision and knowledge of how legal advice generating software works are proposed.

Research into litigation privilege in the context of corporate criminal investigations reveals the challenges to the rationale for this privilege if the courts adopt a policy of confinement. Novel, present day, optimal approaches are suggested to adapt the scope of litigation privilege to modern corporate practice when faced with criminal investigation. These are that confidential communications between the company and its legal advisers made for the purposes of avoiding criminal litigation and concerning the desirability of or enhancing the likelihood of entering into a Deferred Prosecution Agreement should fall within the ambit of litigation privilege. Where litigation privilege is not available but legal advice privilege may be, practical solutions are offered regarding the identification of the client group within the company who will seek and receive legal advice on its behalf. Situations regarding the client group which might lead to loss of legal advice privilege are highlighted.

Through a rigorous and original doctrinal and comparative methodological approach, I distil substantive and procedural aspects of Deferred Prosecution Agreements in England and the United States. Limited waiver of privilege and judicial oversight are identified as positive aspects of the relatively new English approach to Deferred Prosecution Agreements. The United States comes to the fore with its sensible attitude towards the intersection between claiming privilege and cooperating sufficiently with regulators for an agreement to be entered into, a position which aligns to a far greater degree with the rule of law rationale.

The research and writing undertaken for the outputs forming this PhD by published work led in a variety of directions, all linked by the same theme: the underpinning bedrock of the rationale for legal professional privilege and the failure to develop legal professional privilege to address effectively developments in both modern legal and regulatory practice and stay true to that rationale. This failure is characterised by a lack of creativity when faced with novel present day situations and an insistence on legislative rather than judicial intervention. When faced with these novel situations, my research suggests that the courts seem reluctant to adapt the parameters of privilege to give full effect to the rule of law rationale.

The natural development of the pieces forming this PhD by published work, one leading to another and examined with this underlying theme in mind, has resulted in a contribution to the academy in this sphere that is original, significant and rigorous. Throughout, trends in judicial response to novel developments involving the application of legal professional privilege are highlighted. The conclusions and recommendations made in each published piece cover a range of mechanisms to effect positive change whilst staying true to, and giving full efficacy to, the rationale underlying legal professional privilege.

Legislative change in England is recommended to extend common law legal advice privilege to identified groups of tax advisers. Analysis suggests that anxieties around disingenuous claims of privilege in the taxation context can be allayed through revised professional body codes of conduct – a recommendation equally relevant to lawyers operating in this sphere. In addition, in England the use of the iniquity exception to tackle such claims in the taxation context is identified as lacking efficacy, unless the English courts are prepared to make greater use of their power of in camera review and are properly resourced to do so.

Where corporations are concerned, an apparent judicial narrowing of the parameters of litigation privilege is identified. This approach is critiqued as a sub-optimal response to new developments in regulatory investigative practice and a better view is proposed. Adopting a more developmental, realistic approach to litigation privilege would allow a range of communications, such as those made for the purpose of avoiding criminal litigation and those made in the context of considering a Deferred Prosecution Agreement, to come within the parameters of legal professional privilege. A practical response to the narrow parameters of legal advice privilege in the corporate context is also made, proposing practical guidelines for companies to follow to reduce the risk of communications falling outside the privilege.

With Deferred Prosecution Agreements, analysis of regulatory practice and case law reveals a practical undermining of legal professional privilege in English law, due to the regulatory and judicial interpretation of cooperation. Functional comparison with the United States, a more mature jurisdiction where such agreements are concerned, allows best practice in each jurisdiction to be identified and recommended.

Analysis of technological developments in the way in which legal advice is delivered and consumer choice in accessing legal advice led to a recommendation that statutory intervention is not recommended in this sphere. Change to professional body codes of conduct was recommended, to be clear on the level of supervision required where automated advice systems are used for the advice to fall within the parameters of legal advice privilege.

Future developments

My research into important aspects of legal professional privilege continues to go from strength to strength and to generate high quality outputs, published in peer reviewed journals.

One further piece[12], published recently and building on judicial confirmation of a dominant purpose test for legal advice privilege, proposes a new approach to legal advice privilege in the corporate context. This piece is the first significant attempt to consider the interaction between the dominant purpose test and the current agency-based control mechanism which restricts legal advice privilege in the corporate context. It proposes optimum solutions allowing legal advice privilege to apply consistently across client types, giving full effect to the rule of law rationale.

Two further articles are in production. One considers the assertion of legal professional privilege by the Executive against the Legislature where the latter calls for the publication of unredacted legal advice given to it by Law Officers, in both the United Kingdom and Scottish contexts. The other examines the way in which privilege is protected and asserted where search warrants are used to search material held in electronic form.

In addition to these works in progress, in January 2022 funding was awarded by the **Modern Law Review** to hold a seminar titled **Legal Professional Privilege: a human right or a barrier to justice?** which took place on 19th July 2022. This seminar explored the theoretical underpinning of legal professional privilege and its place in and impact on the modern world: in particular the status of legal professional privilege and the consequences of its assertion on the administration of justice. The seminar engaged with various disciplines and stakeholders, both academics and practitioners, in analysis and discussion of the rationale for legal professional privilege, its status as a fundamental human or constitutional right, the financial costs of its assertion and tensions for the effective administration of justice and the particular challenges to the operation of privilege in two important contexts. One of these contexts, the assertion of legal advice privilege by the Executive against the Legislature, forms the basis of the first 'in production' piece referred to above.

Building on the above seminar, I am preparing a major collaborative funding bid to explore the validity of the rule of law rationale and the conflict between privilege, the administration of justice and regulatory intervention.

Summary

In summary, the outputs forming this PhD by published work illustrate a journey through the landscape of legal professional privilege, domestic and international. Each piece

[12] Stockdale M and Mitchell R 'Legal Advice Privilege: The legacy of Three Rivers (No.5) and the challenge of providing consistent protection to all client types' The International Journal of Evidence and Proof, 26, 2, 157-177

considers an aspect of legal professional privilege and conducts analysis through a particular prism, whether that be taxation, ethics or corporate practice. Taken together, these six published, peer reviewed outputs form a coherent, significant and original contribution to knowledge and understanding of legal professional privilege and make recommendations for best practice. Using a variety of appropriate methodological approaches, these important and timely articles advance the field of study by identifying uncertainties and anomalies in the parameters of legal professional privilege in a range of contexts and in relation to both its limbs: legal advice privilege and litigation privilege. The uncertainties and anomalies identified coalesce around the theme of a failure to develop this evidential rule in order to address effectively developments in both modern legal and regulatory practice and to stay true to its rationale. As a whole they make a contribution to the academy in this sphere that is original, significant and rigorous.

Appendix 1: Co-author declaration forms

1. Michael Stockdale and Edward Imwinkelried

‘Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege: English and US Experience Compared’ (2021) 8 J Int'l & Comp L 283.

2. Michael Stockdale

‘Legal Advice Privilege and Artificial Legal Intelligence: Can Robots Give Privileged Legal Advice?’ (2019) 23 Int’l J Evidence & Proof 422.

3. Michael Stockdale

‘Legal Professional Privilege in Corporate Criminal Investigations: Challenges and solutions in the modern age’ (2018) 82 J Crim L 321

4. Michael Stockdale

‘The Crime-Fraud Exception to Legal Professional Privilege in the Taxation Context: Comparative Anglo-American Contextualisation and Optimal Reforms’ (2017) 1 B T R 109.

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Rebecca Mitchell

Name of co-author: Edward Imwinkelried and Michael Stockdale

Email address of co-author: ejimwinkelried@ucdavis.edu; m.w.stockdale@northumbria.ac.uk

Full bibliographical details of the publication (*including authors*)**:**

Rebecca Mitchell, Edward Imwinkelried & Michael Stockdale, 'Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege: English and US Experience Compared' (2021) 8 J Int'l & Comp L 283.

Section B
DECLARATION BY CANDIDATE (*delete as appropriate*)

I declare that my contribution to the above publication was as:

(ii) joint author

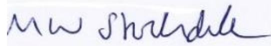
My specific contribution to the publication was (*maximum 50 words*):

Parts I, II, IV and V jointly with Michael Stockdale. Both authors of these parts shared research and reviewed all text. All authors reviewed the final text and were involved in all aspects of the final piece.

Signed: .
..(candidate) **....6.01.22........................**(date)

Section C
STATEMENT BY CO-AUTHOR (*delete as appropriate*)

Either **(i) I agree with the above declaration by the candidate**



Signed: ....(co-author)
........06.01.2022........................ (date)

Section C
STATEMENT BY CO-AUTHOR (*delete as appropriate*)

Either **(i) I agree with the above declaration by the candidate**

Signed:. (co-author) **........07.01.2022.......** (date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
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Full bibliographical details of the publication (*including authors*)**:**

Michael Stockdale & Rebecca Mitchell, 'Legal Advice Privilege and Artificial Legal Intelligence: Can Robots Give Privileged Legal Advice?' (2019) 23 Int'l J Evidence & Proof 422.

Section B
DECLARATION BY CANDIDATE (*delete as appropriate*)

I declare that my contribution to the above publication was as:

(ii) joint author

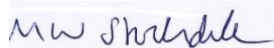
My specific contribution to the publication was (*maximum 50 words*):

Both authors shared research, reviewed all text and were involved in all aspects of the final piece.

Signed: ..
....(candidate) ......**6.01.22**.......................(date)

Section C
STATEMENT BY CO-AUTHOR (*delete as appropriate*)

Either **(i) I agree with the above declaration by the candidate**

Signed:  ....(co-author) ....**06.01.2022**.................
(date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Rebecca Mitchell

Name of co-author: Michael Stockdale

Email address of co-author: m.w.stockdale@northumbria.ac.uk

Full bibliographical details of the publication (*including authors*)**:**

Michael Stockdale & Rebecca Mitchell, 'Legal Professional Privilege in Corporate Criminal Investigations: Challenges and solutions in the modern age' (2018) 82 J Crim L 321.

Section B
DECLARATION BY CANDIDATE (*delete as appropriate*)

I declare that my contribution to the above publication was as:

(ii) joint author

My specific contribution to the publication was (*maximum 50 words*):

Both authors reviewed all text, were jointly involved in underpinning research and in all aspects of the final text.

Signed: ....
..(candidate) **....6.01.22.........................**(date)

Section C
STATEMENT BY CO-AUTHOR (*delete as appropriate*)

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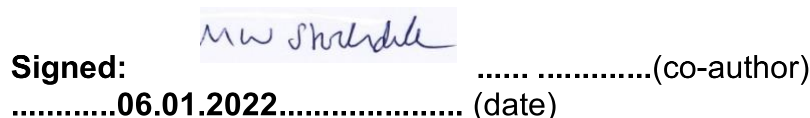


Signed: **...... ....**(co-author)
............06.01.2022..................... (date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Rebecca Mitchell

Name of co-author: Michael Stockdale

Email address of co-author: m.w.stockdale@northumbria.ac.uk

Full bibliographical details of the publication (*including authors*)**:**

Rebecca Mitchell & Michael Stockdale, 'The Crime-Fraud Exception to Legal Professional Privilege in the Taxation Context: Comparative Anglo-American Contextualisation and Optimal Reforms' (2017) 1 BTR 109.

Section B
DECLARATION BY CANDIDATE (*delete as appropriate*)

I declare that my contribution to the above publication was as:

(ii) joint author

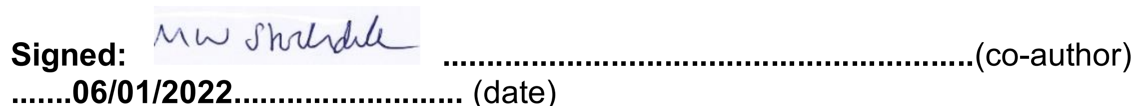
My specific contribution to the publication was (*maximum 50 words*):

Both authors shared research, reviewed all text and were involved in all aspects of the final piece.

Signed: .
..(candidate) **..6.01.22..........................**(date)

Section C
STATEMENT BY CO-AUTHOR (*delete as appropriate*)

Either **(i) I agree with the above declaration by the candidate**



Signed: **...**(co-author)
.......06/01/2022......................... (date)

Appendix 2: List of Publications

(i) Rebecca Mitchell, Edward Imwinkelried & Michael Stockdale, ‘Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege: English and US Experience Compared’ (2021) 8 J Int'l & Comp L 283.

(ii) Michael Stockdale & Rebecca Mitchell, ‘Legal Advice Privilege and Artificial Legal Intelligence: Can Robots Give Privileged Legal Advice?’ (2019) 23 Int’l J Evidence & Proof 422.

(iii) Rebecca Mitchell ‘Legal advice privilege in the taxation context: disconnected ethical regimes for lawyers and tax advisers in the United States and New Zealand’ (2018) 24 NZJTLP 63.

(iv) Michael Stockdale & Rebecca Mitchell, ‘Legal Professional Privilege in Corporate Criminal Investigations: Challenges and solutions in the modern age’ (2018) 82 J Crim L 321

(v) Rebecca Mitchell & Michael Stockdale, ‘The Crime-Fraud Exception to Legal Professional Privilege in the Taxation Context: Comparative Anglo-American Contextualisation and Optimal Reforms’ (2017) 1 B T R 109.

(vi) Rebecca Mitchell, ‘Comparative Standards of Legal Advice Privilege for Tax Advisers and Optimal Reform Proposals for English Law’ (2015) 19 Int’l J Evidence & Proof 246.

Article (i)

Rebecca Mitchell, Edward Imwinkelried & Michael Stockdale, ‘Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege: English and US Experience Compared’ (2021) 8 J Int'l & Comp L 283.

DEFERRED PROSECUTION AGREEMENTS AND LEGAL PROFESSIONAL PRIVILEGE/ATTORNEY–CLIENT PRIVILEGE: ENGLISH AND US EXPERIENCE COMPARED

Rebecca Mitchell,[*] Edward Imwinkelried[**] and Michael Stockdale[***]

Abstract: The ability to assert legal professional privilege is recognised in English law as a fundamental human right. In the United States, attorney–client privilege is one of the most sacrosanct privileges. The use of deferred prosecution agreements (DPAs) in the United States and England and part that corporate cooperation plays raise the concern that if cooperation requires waiver of privilege, privilege is effectively otiose in this context. In the United States, DPAs rekindle evidential and procedural issues of selective waiver and judicial oversight. We contrast the role of the English courts in providing judicial oversight of DPAs with the more limited degree of judicial involvement in the United States. We analyse the intersection of privilege and DPAs, evaluating the requirements for cooperation with the prosecutor and the impact on the entity's ability to assert privilege. We consider whether waiver of privilege forms an essential constituent of cooperation and the possibility and consequences of limited/selective waiver. The optimum position is that waiver should not be perceived as a prerequisite to cooperation for the purpose of obtaining a DPA. The US approach to the relationship between cooperation and waiver of privilege comes closer to the

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[(2021) 8:1 JICL 283–314]

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optimum position than does the English approach. In contrast, active judicial oversight in England is preferable to the more limited exercise in the United States, and the availability of limited waiver in England provides a degree of protection to the corporation that corporations lack when waiving privilege or considering whether to do so.

Keywords: *deferred prosecution agreements; legal professional privilege; attorney–client privilege; waiver of privilege; limited waiver; Upjohn warnings; judicial oversight*

I. Introduction

Deferred prosecution agreements (DPAs) are a tool whereby, following negotiations with the prosecuting authority, an agreement can be reached such that a prosecution for economic crime (such as fraud, money laundering or bribery) will not take place, provided that agreed conditions are satisfied. These conditions might include, for example, financial penalties and compensation to victims. A prosecution may still take place if the conditions of the DPA are not satisfied.

Legal professional privilege attaches to communications between legal adviser and client for the purposes of giving or receiving legal advice (legal advice privilege) or to communications between legal adviser and client for the purposes of adversarial litigation (litigation privilege). The US equivalents are attorney–client privilege and the work product protection. The significance of privilege in the context of DPAs is that cooperation with the prosecuting authority is important in both jurisdictions, giving rise to the question whether privilege must be waived (ie relinquished) in order for negotiations for a DPA to be concluded successfully. A related issue is the extent to which this may be achieved by a limited waiver of privilege (ie where privileged material is disclosed to the prosecutor but the use to which it can be put is restricted by the terms of the waiver).

DPAs have been in general use in the United States since the early 1900[1] but are a relatively recent phenomenon in English law. This explains the relative paucity of academic comment in the United Kingdom in comparison to the much wider range of commentary available in the United States and is particularly so as regards the interface between waiver of privilege and cooperation. We fill this lacuna in the academic literature and provide a comparative perspective with law, guidance and practice in the United States.

Although similar in a number of ways, the United States and English DPA regimes differ in two key respects: the more limited judicial oversight of the terms of the DPA in the United States and the ability of a company to waive privilege

1 Andrea Amulic, "Humanizing the Corporation while Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States" (2017) 116 *Mich L Rev* 123, 127.

21501-0012-010-r1.indd 284 6/11/2021 8:49:23 PM

on a limited/selective basis over material relevant to the investigation being conducted by the enforcement agency in England. In both jurisdictions, cooperation is an essential requirement for the approval of a DPA. The desire of an enforcement agency to access materials such as interviews with corporate employees has led some to conclude that cooperation equates with or at least requires waiver of privilege. In the United States, the response to this conclusion has resulted in a rather different approach to cooperation and waiver to that in England.

This article examines the DPA regimes in England and the United States in terms of cooperation, waiver of privilege and judicial oversight and provides recommendations based on our comparative analysis. Section II introduces the DPA regime in England. We begin by considering the role of the court in providing judicial oversight of DPAs. We then analyse the intersection between cooperation and legal professional privilege, with reference to the Deferred Prosecution Agreement Code of Practice, the Serious Fraud Office Operational Handbook and the approach of the courts in relation to this issue. We conclude Section II by examining the implications of waiver for the corporation and its employees and the nature and significance of limited waiver.

Section III adopts a broadly similar structure to Section II but concerns the DPA regime in the United States. We commence by recognising how the role of the court in the United States is much more limited than that in England. We again analyse the intersection between cooperation and privilege but this time in the context of the approach taken in the Justice Manual. We conclude Section III by examining the implications of waiver of privileges for employees and the company in the United States, including the limited scope for selective waiver.

In Section IV, we contrast the substantive and procedural positions in England with that in the United States. In Section V, we present our conclusions. Informed by our comparative analysis and identification of the strengths and weaknesses in the approaches adopted in the United States and England, we significantly advance knowledge and debate in this area by offering solutions to the substantive and procedural problems encountered in the two jurisdictions, each learning from the other.

II. DPAS in England

DPAs, which in England may be used by corporate bodies only, were introduced in English law by s.45 of the Crime and Courts Act 2013.[2] In the United States, where DPAs and non-prosecution agreements (NPAs[3]) were originally developed as methods of dealing with individuals for the purpose of discouraging recidivism,[4]

2 Which came into force on 24 February 2014.

3 In contrast to a DPA, where charges are filed but prosecution is deferred, in an NPA the prosecutor agrees not to file charges provided that the relevant agreement is complied with. NPAs are not considered further in this article.

4 A Amulic, “Humanizing the Corporation” (n.1), 125.

DPAs are extensively used in the corporate context—a practice that became much more common, if highly controversial, after the conviction of Arthur Andersen in the early 2000's led to its collapse and significant job losses. The subsequent, increased use of DPAs arguably reflects a desire on the part of all the players to avoid this sort of disastrous outcome for other corporates[5] as well as the collateral fall out for shareholders, employees, customers and the general public.

The rationale for the introduction of DPAs in England is that they give prosecutors "an extra tool" in tackling economic crime with the objective of allowing organisations to be held "to account for their wrongdoing in a focused way without the uncertainty, expense, complexity or length of a criminal trial".[6] DPAs reflect a pragmatic approach to the particular difficulties of prosecuting corporate entities, where a directing mind and will with the necessary *mens rea* must be shown.[7] To date, there have only been nine DPAs in England[8] compared to many hundreds in the United States.[9] The Director of Public Prosecutions and the Director of the Serious Fraud Office are the designated prosecutors for the purposes of DPAs.[10] So far, only the Director of the Serious Fraud Office has entered into DPAs in England. A range of common law and statutory offences, although covering only financial crimes, can be disposed of through a DPA.[11]

The Serious Fraud Office and the Crown Prosecution Service have produced a Deferred Prosecution Agreements Code of Practice (the Code).[12] The Code sets out a two-stage test which prosecutors must apply in considering whether a DPA is an appropriate way to dispose of the case, as an alternative to prosecution, comprising an evidential stage[13] and a public interest stage. The public interest stage requires the prosecutor to consider factors such as the seriousness of the offence and the risk of harm to stakeholders and the general public. The Code lists factors both in

5 *Ibid*., 131–132.

6 Ministry of Justice, *Deferred Prosecution Agreements. Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (Cm 8463, 23 October 2012).

7 Eoin O'Shea and Emma Shafton, "DPAs: Time to Extend the Regime?" [2019] *NLJ* 7. The Government has asked the Law Commission to examine the issue of corporate criminal liability for economic crime and present reform options.

8 The first, heard in 2015, being *Serious Fraud Office v Standard Bank* [2016] Lloyd's Rep FC 102 (CC).

9 The Department of Justice has entered into around 400 NDA's or DPAs since 2002: Cindy A Schipani, "Trends in Prosecutions for Corporate Crime in the US" (2018) 39(2) *Comp Law* 43, 44–45; and see "2019 Year-End Update on Corporate Non-prosecution Agreements and Deferred Prosecution Agreements" (*Gibson Dunn survey*) (Gibson Dunn, 8 January 2020), available at https://www.gibsondunn.com/2019-year-end-npa-dpa-update/ (visited on 20 November 2020); between 2000 and 2019, there have been over 500 corporate NPAs and DPAs in the United States.

10 Crime and Courts Act 2013 Sch.17, Part 1, para.3.

11 *Ibid*., Part 2, paras.15–28.

12 Deferred Prosecution Agreements Code of Practice, Crime and Courts Act 2013 V1 11.2.14 (The Code), available at https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf (visited 23 March 2021).

13 The evidential stage is based in part on stage of the Full Code Test in the Code for Crown Prosecutors, CPS (October 2018), available athttps://www.cps.gov.uk/sites/default/files/documents/publications/Code-for-Crown-Prosecutors-October-2018.pdf> (visited 23 March 2021).

favour of and against prosecution that may be taken into account.[14] One factor is the level of cooperation shown by the company.[15] Despite the existence of the public interest test, disposal by way of DPA is clearly possible in even the most serious cases of criminal conduct. For example in *Serious Fraud Office v Rolls-Royce plc*[16], the conduct involved was described as "the most serious breaches of the criminal law in the areas of bribery and corruption".[17] Similarly, in *Serious Fraud Office v Airbus SE*[18], the court acknowledged that "[t]he seriousness of the criminality in this case hardly needs to be spelled out. As is acknowledged on all sides, it was grave".[19] In both cases, the cooperation by the companies in question was described as, respectively, "extraordinary"[20] and "exemplary";[21] and in both cases there was a limited waiver of privilege. In *Airbus*, what was described as a cooperative position to privilege was taken (although some documents were withheld)[22] with privilege being waived on a limited basis over interviews with employees, which took place as part of *Airbus*' internal investigation.[23] Similarly, with *Rolls Royce*, privilege was waived on a limited basis over all interviews with employees conducted as part of its internal investigation.[24]

A. The role of the court

Schedule 17 of the Crime and Courts Act 2013 sets out the role of the court in the DPA process.[25] After DPA negotiations have begun, an application to the court must be made, in private, for a declaration that entering into a DPA is likely to be in the interests of justice and that the proposed terms are fair, reasonable and proportionate.[26] In due course, a second application to the court must be made for a declaration that the final, agreed terms of the DPA are in the interests of justice and are fair, reasonable and proportionate.[27] This declaration, the terms of the DPA and the initial private declaration are made public although reporting restrictions may be imposed where a criminal trial of individuals involved with the company is to take place.[28] As Sir Brian Leveson has observed, "In contra-distinction to the

14 The Code (n.12) ss.2, 2.8.1 and 2.8.2.
15 *Ibid*., s.2.8.2(i).
16 [2017] Lloyd's Rep FC 249 (CC).
17 *Ibid*., [4].
18 [2021] Lloyd's Rep FC 159 (CC).
19 *Ibid*., [64].
20 *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep FC 249, [22].
21 *Serious Fraud Office v Airbus SE* [2021] Lloyd's Rep FC 159, [73].
22 *Ibid*., [74].
23 *Ibid*., [36].
24 *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep FC 249, [19]–[20].
25 Crime and Courts Act 2013 ss.7, 8.
26 *Ibid*., Sch.17, s.7.
27 *Ibid*., s.8.
28 For example see *Serious Fraud Office v XYZ Ltd* [2016] Lloyd's Rep FC 517 (CC), where the DPA was agreed in July 2016, but reporting restrictions were not lifted until July 2019, see "Sarclad Ltd" (Serious Fraud Office, 7 May 2019) https://www.sfo.gov.uk/cases/sarclad-ltd/ (visited 16 November 2020).

United States. . .",[29] a key feature of the DPA scheme in England is that the court is involved at two stages, first, to scrutinise the proposal and, second, to consider whether or not to approve the DPA.

B. Cooperation and legal professional privilege—The Deferred Prosecution Agreement Code of Practice, the Serious Fraud Office operational handbook and the approach of the courts

When considering whether prosecution is in the public interest, a key question is what corporate behaviour amounts to sufficient cooperation to weigh against prosecution and in favour of entering into a DPA. This is the critical point at which the assertion of privilege and the DPA regime intersect. The relationship between waiver of privilege and cooperation is an issue that has been significantly more high profile in the United States because of various iterations of the Justice Manual[30] (the Manual) and memoranda released by the Department of Justice (DOJ). In the United States, their combined effect resulted in a widespread perception that privilege must be waived for a company to be regarded as cooperating with the DOJ to be eligible for a DPA,[31] the response to which is analysed in Section III.

The English Code does not explicitly make waiver of privilege a requirement for cooperation. It acknowledges that it cannot change the law on legal professional privilege.[32] The Code's guidance on cooperation does include reference to the "considerable weight" given to the corporation's "genuinely proactive approach" including disclosure of witness accounts and providing a report of any internal investigation with source documents.[33] Witness accounts may well be covered by an entirely legitimate claim for litigation privilege, but the Code does not adequately clarify the nature of the relationship between asserting privilege and being sufficiently cooperative. In this respect, it is unfortunate that provisions proposed in the Ministry of Justice consultation on DPAs[34] "for the protection of legal professional privilege . . . to deal with organisations' concerns about the treatment of internal investigations . . ." were not included. Alongside the Code sits published internal guidance from the Serious Fraud Office (SFO) in its operational handbook (the Handbook). As there is significant judicial scrutiny prior to approval of DPAs

29 *Serious Fraud Office v Standard Bank* [2016] Lloyd's Rep FC 102, [2].

30 The United States Department of Justice, "Justice Manual" (The Justice Manual), available at https://www.justice.gov/jm/justice-manual (visited 23 November 2020).

31 See, for example comments in The Justice Manual (n.30), 9–28.000–Principles of Federal Prosecution of Business Organisations—9–28.710—Attorney-Client and Work Product Protections; and Wulf A Kaal and Timothy A Lacine, "Effect of Deferred and Non-prosecution Agreements on Corporate Governance: Evidence from 1993–2013" (2014) 70 *Bus Law* 61, 73–78.

32 The Code (n.12) s.3.3.

33 *Ibid*., s.2.8.2(i).

34 Ministry of Justice, Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements (Consultation Paper CP9/2012 May 2012) para.95.

21501-0012-010-r1.indd 288 6/11/2021 8:49:23 PM

in English law, the approach taken by the courts to cooperation and waiver must also be analysed.

The Handbook's corporate cooperation guidance[35] (the Guidance) states that "legal advisers well understand the type of conduct that constitutes true co-operation." and that good practice includes providing "relevant material gathered during an internal investigation".[36] The Guidance states that a schedule of documents withheld on the basis of privilege should be provided[37] and that when privilege is claimed, it is expected that this claim will be supported by certification from independent counsel.[38] The Guidance refers to the Code provisions regarding cooperation and states that "an organisation that does not waive privilege and provide witness accounts does not attain the corresponding factor against prosecution that is found in the DPA Code . . . but will not be penalised by the SFO". In addition, the section of the Handbook covering DPAs states that "waiving privilege over any LPP material . . ." is an indicator of cooperation in the Code.[39] As noted earlier, the Code does not mention waiver of privilege in the context of cooperation. What the Code does, though, is give examples of what cooperation includes, such as the disclosure of witness accounts. Such accounts may be covered by privilege but will not necessarily be privileged, depending on the purpose for which they were produced.[40] Consequently, treating disclosure of witness accounts as cooperation is not identical to saying that in order for a corporation to be seen as cooperating, the corporation must waive any privilege that could legitimately be claimed over witness accounts. It would be far better if the Code expressly stated that while it may be necessary to reveal relevant factual information in order to cooperate, that revelation does not inherently require disclosure of privileged information, that is where relevant factual information can be revealed without recourse to privileged documents. While the Code acknowledges that it cannot change the law of privilege and that there is no obligation on a corporation either to negotiate a DPA or to accept a specific term,[41] the reality is that in some situations, a corporation may have to choose between waiving privilege or providing inadequate cooperation. For instance a corporation may face that choice where the only viable source of the requisite factual information is privileged communications.

The SFO's interpretation of the Code clearly equates waiver of privilege with cooperation. This is unsurprising, given reported statements from various SFO personnel. In *R(AL) v Serious Fraud Office*,[42] the court concluded that "there is evidence that the SFO [treats] waiver . . . as relevant to the duty of disclosure

35 SFO Operational Handbook, Corporate Co-operation Guidance (August 2019).
36 *Ibid*., Preserving and Providing Material s.1(v)(c).
37 *Ibid*., s.1(x).
38 *Ibid*., Witness Accounts and Waiving Privilege.
39 SFO Operational Handbook, Deferred Prosecution Agreements, Co-operation (October 2020).
40 *Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2019] 1 WLR 791, [123] (CA).
41 The Code (n.12) s.3.3.
42 [2018] 1 WLR 4557.

21501-0012-010-r1.indd 289 6/11/2021 8:49:23 PM

under a DPA. . .".[43] In 2019, the current Director acknowledged that privilege is a fundamental right but expressed the view that companies wishing to cooperate with the SFO could waive privilege and that waiving privilege over initial investigative material would be "a strong indicator of cooperation".[44]

So far, there has been no clear guidance from the courts regarding whether waiver of privilege over first witness accounts is necessary to meet the cooperation component of public interest factors against prosecution (and therefore in favour of a DPA). However, as is shown later in this article, in a number of cases waiver is referred to as an example of cooperation. In contrast, in the US context, Passmore refers to judicial criticism of previous DOJ memoranda in which waiver was equated with cooperation.[45] To date, there have been nine DPAs in England. Six of the DPAs[46] have included limited waiver of privilege by the company, and there are differences in the scope and extent of the limited waiver where it has occurred. Based upon analysis of the first four DPAs approved, Laird suggests that a DPA is unlikely to be approved if the company neither self-reports its discovery of the relevant criminality to the SFO nor waives privilege.[47] In *Serious Fraud Office v Standard Bank* (*Standard Bank*)[48] and *Serious Fraud Office v XYZ Ltd* (*Sarclad*),[49] DPAs were approved where the companies self-reported promptly even though neither waived privilege. Cheung notes that in *Sarclad*, Leveson P regarded the "assertion of privilege as being consistent with its full and genuine cooperation".[50] *Rolls-Royce* did not self-report but did make a limited waiver of privilege and a DPA was approved.[51] Whether Laird's view is correct has not yet been tested, since the one subsequent DPA where there was no limited waiver of privilege, *Serious Fraud Office v Guralp Systems Ltd*,[52] involved a self-report. What does seem clear is that since the first two DPAs, Standard Bank and Sarclad, there is a trend for limited waiver of privilege, as demonstrated in six of the subsequent seven cases.

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43 *Ibid*., [121]. Note that this case did not concern the approval of a DPA.

44 Speech by Lisa Osofsky, Director of the SFO at the Royal United Services Institute (3 April 2019), available at https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/ (visited 16 November 2020).

45 Colin Passmore, *Privilege* (London: Sweet and Maxwell, 4th ed., 2019) 1–084.

46 Namely, *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep FC 249; *Serious Fraud Office v Tesco Stores Ltd* [2019] Lloyd's Rep FC 283 (CC); *Serious Fraud Office v Serco Geografix Ltd* [2019] Lloyd's Rep FC 518 (CC); *Serious Fraud Office v Airbus SE* [2021] Lloyd's Rep FC 159; *Serious Fraud Office v G4S Care and Justice Services (UK) Ltd* [2021] Crim LR 138 and *Director of the Serious Fraud Office v Airline Services Ltd* [2020] Lexis Citation 335 (CC).

47 Karl Laird, "Deferred Prosecution Agreements and the Interests of Justice: A Consistency of Approach?" [2019] *Crim LR* 6, 486, 492.

48 [2016] Lloyd's Rep FC 102.

49 [2016] Lloyd's Rep FC 517.

50 Rita Cheung, "Deferred Prosecution Agreements: Cooperation and Confession" [2018] *The Cambridge Law Journal* 12, 14.

51 *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep FC 249, [19]–[20].

52 [2020] Lloyd's Rep FC 90 (CC).

21501-0012-010-r1.indd 290 6/11/2021 8:49:23 PM

The cases involving limited waiver demonstrate variation with regard to its scope and extent. In *Rolls-Royce*[53] and *Serious Fraud Office v Tesco Stores Ltd* (*Tesco*),[54] the agreements included SFO access to digital content and mailbox accounts unfiltered for potential privilege, with an understanding that privilege issues would be resolved using independent counsel. Limited waiver in *Tesco* concerned material predating a statement in which profits were overstated.[55] In *Rolls-Royce*, *Airbus*, *G4S* and *Airline*, limited waiver concerned records of employee interviews collected during internal investigations.[56] In *Serious Fraud Office v Serco Geografix Ltd* (*Serco*), the company waived privilege in respect of accounting material and granted unrestricted access to relevant email accounts.[57]

The limited waivers concerning records of internal investigation interviews with employees are particularly significant.[58] The SFO regards this type of material as very valuable. For example speaking in 2016, General Counsel of the SFO commented on the importance of witness first accounts and asserted that the SFO does not regard itself as "constrained from asking for them even if they are privileged. . .".[59] He indicated that asserting privilege over them would not be held against the company though waiver of such a claim would be regarded as a "significant mark of co-operation".[60] In what Passmore describes as the Court of Appeal having ". . . quietly approved this practice",[61] the court did observe that when examining the conduct and cooperation of a company to determine whether to approve a DPA, the willingness of the company to waive any privilege over documents produced during any internal investigation, in order to share this material with the SFO, will be considered.[62] However, the importance of companies feeling able to investigate allegations internally without the fear that they would be forced to disclose privileged information to a prosecuting authority was also recognised, as was

53 [2017] Lloyd's Rep FC 249, [19(ii)].

54 [2019] Lloyd's Rep FC 283, [38].

55 *Serious Fraud Office v Tesco Stores Ltd* [2019] Lloyd's Rep FC 283, [38(ii)].

56 *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep FC 249, [20(ii)]; *Serious Fraud Office v Airbus SE* [2021] Lloyd's Rep FC 159, [36]; *Serious Fraud Office v G4S Care and Justice Services (UK) Ltd* [2021] Crim LR 138, [23]; *Director of the Serious Fraud Office v Airline Services Ltd* [2020] Lexis Citation 335, [72].

57 [2019] Lloyd's Rep FC 518, [24].

58 Such records are potentially protected by the litigation privilege limb of legal professional privilege, see *Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2019] 1 WLR 791.

59 Speech to compliance professionals given by Alan Milford, General Counsel of the SFO (29 March 2016), available at https://www.sfo.gov.uk/2016/03/29/speech-compliance-professionals/ (visited 16 November 2020). Alan Milford recognised in his speech that unlike the SFO, the DOJ is so constrained.

60 *Ibid*.

61 C Passmore, *Privilege* (n.45), 1–102.

62 *Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2019] 1 WLR 791, [117]. This observation is footnoted in the Guidance: "The Court of Appeal has not ruled out a court's consideration of the effect of an organisation's non-waiver over witness accounts as it determines whether a proposed DPA in in the interests of justice . . ." but must be considered obiter; *Eurasian* did not involve the approval of a DPA.

21501-0012-010-r1.indd 291 6/11/2021 8:49:23 PM

the potential result of such fear being a reluctance to initiate an internal investigation in the first place.[63]

The Code does not mention waiver of privilege, either in its examples of cooperation or elsewhere. What causes uncertainty is the fact that the Code does explicitly identify the disclosure of accounts of relevant witnesses as an example of cooperation favouring a DPA (and cutting against prosecution). Since such accounts can be covered by privilege, the perception is that waiver of privilege is required for the company to be seen as cooperative.

In its practice note on legal professional privilege, the Law Society of England[64] (the Law Society) considers any pressure on clients to waive privilege as undermining the absolute nature of the privilege. Such pressure includes "suggesting that if the client does not waive LPP they will not be regarded as cooperative".[65] The Law Society also considers as "equally improper" any pressure on a client to structure their internal affairs in such a way as not to attract privilege at all.[66] It is, however, evident from comments made by the SFO's General Counsel[67] that the SFO regards the latter as a sign of cooperation. In *Serco*, the SFO requested that the company not conduct witness first account interviews during the criminal investigation—a request with which the company fully complied and which was referred to in court as one of a number of examples of "very substantial co-operation".[68]

The ability to assert legal professional privilege is recognised as a fundamental right in English law. In the context of DPAs, this right appears to have been seriously eroded by the SFO's interpretation of what amounts to cooperation under the Code. Although not explicit on waiver, the provisions of the Code cite the furnishing of witness accounts as an example of cooperation; and the SFO has been clear about the importance of these accounts to them. To conclude, as the Guidance does, that failure to waive privilege over these accounts equates to a failure to meet this example of cooperation in the Code, results in a detrimental inference being placed on a corporate's failure to waive what is a fundamental right. The trajectory of the recent cases suggests that limited waiver is becoming the norm.[69] A concern is that in future a court being asked to approve a proposed DPA in a case involving serious misconduct may rule that a refusal to waive privilege automatically precludes a finding of sufficient cooperation.[70] A refusal to

63 *Ibid*., [116].

64 The Law Society is the independent professional body for solicitors, available at https://www.lawsociety.org.uk/ (visited 16 November 2020).

65 Legal Professional Privilege, "Law Society Practice Note" (November 2019), para.10.1, available at https://www.lawsociety.org.uk/support-services/advice/practice-notes/legal-professional-privilege/ (visited 16 November 2020).

66 *Ibid*. This would be the result if, for example, interviews were not conducted by in-house or external lawyers.

67 A Milford, "Speech to Compliance Professionals" (n.59).

68 *Serious Fraud Office v Serco Geografix Ltd* [2019] Lloyd's Rep FC 518, [24].

69 Although the limited waiver did not relate to witness accounts in every case.

70 Assuming that the SFO were prepared to offer a DPA in such circumstances, which may itself be unlikely.

21501-0012-010-r1.indd 292 6/11/2021 8:49:23 PM

waive a fundamental right should not be interpreted in this way.[71] Nor is that approach justified by the purpose of and rationale for a DPA. At times, waiving privilege may provide a corporation with a convenient and low-stakes way of demonstrating cooperation, for example, where relevant factual information is available from other unprivileged sources and would be disclosable in legal proceedings in any event. But this does not mean that a corporation should be put in a position such that waiver of privilege is regarded by prosecuting authorities or the courts as an essential prerequisite to cooperation.

C. Waiver of privilege over first witness accounts—The implications for employees of the company

Employees of a corporate conducting an internal investigation into suspected criminal conduct are likely to be placed in an invidious position. Witness accounts frequently form an important part of such an investigation and are particularly attractive to the SFO. A corporate may waive privilege in them to gain credit for cooperation in the hope of achieving a DPA.

In England, legal professional privilege arising in the conduct of a company's internal investigation belongs to the company. Employees should be warned that this is the case and that the corporate may choose to waive privilege in first witness accounts—such warnings are often called *Upjohn* warnings in the United States.[72] The potential jeopardy for employees is that they could be charged with criminal offences related to the conduct uncovered by an internal investigation. To date in England, charges have been brought against individual employees (or former employees) in five out of the nine agreed DPAs. The SFO has not yet obtained a conviction in any of the cases that have gone to trial,[73] but the risk remains. The Guidance requires potential witnesses to be identified and that the corporation make employees available for interview.[74] These requirements do not go so far as the US Manual provisions that, following the 2015 Yates Memo,[75] explicitly require a corporation to investigate, determine which individuals within the company were responsible for the relevant misconduct and disclose "all relevant facts" relating to

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71 K Laird, "Deferred Prosecution Agreements and the Interests of Justice" (n.47), 493.

72 See, eg, *R(AL) v Serious Fraud Office* [2018] 1 WLR 4557, [19].

73 *Serious Fraud Office v Guralp Systems* [2020] Lloyd's Rep FC 90; *Serious Fraud Office v Tesco Stores Ltd* [2019] Lloyd's Rep FC 283 and *Serious Fraud Office v XYZ Ltd* [2016] Lloyd's Rep FC 517, all saw the relevant individuals acquitted of all charges: "Three Individuals Acquitted as SFO Confirms DPA with Güralp Systems Ltd", available at https://www.sfo.gov.uk/2019/12/20/three-individuals-acquitted-as-sfo-confirms-dpa-with-guralp-systems-ltd/ (visited on 16 November 2021);'No Case to Answer' Ruling in Case against Former Tesco Executives, available at https://www.sfo.gov.uk/2018/12/06/no-case-to-answer-ruling-in-case-against-former-tesco-executives/ (visited on 16 November 2021); Sarclad Ltd, available at https://www.sfo.gov.uk/cases/sarclad-ltd/ (visited on 16 November 2021).

74 SFO Operational Handbook (The Guidance) (n.35), 6(ii) and (iv).

75 United States Department of Justice, Office of the Deputy Attorney General, "Individual Accountability for Corporate Wrongdoing" (9 September 2015), available at https://www.justice.gov/archives/dag/file/769036/download (visited on 16 November 2020).

the misconduct in order to gain any credit for cooperation with the DOJ.[76] Many American commentators have characterised those provisions as an attempt by the DOJ to force waiver of attorney–client privilege.[77]

The provisions of the Code and its interpretation by the SFO create a powerful incentive for the company to waive privilege over witness accounts. The end result is a potentially adverse effect on both the integrity of any investigation and the employees themselves. Assuming that an employee fully understands the ramifications of an *Upjohn* warning, a lower level employee will realise that they have no power over any decision regarding waiver of privilege over witness accounts. For that reason, they may justifiably feel cautious about being candid in an interview. Hengemuhle suggests that this risks an internal investigation "that is not entirely accurate",[78] which undermines the rationale for legal professional privilege. Passmore suggests that employees may become less willing to consult corporate counsel and be less candid when doing so for fear of privilege in such communications being waived.[79]

D. Limited waiver of privilege in a DPA—The consequences for the company

Limited waiver of privilege has become a feature of DPAs in English law. Limited waiver occurs when privilege is waived for a limited purpose rather than being waived generally.[80] Its basis is that there are circumstances in which it is in the interests of justice to permit limited waiver by a party who would not be prepared to undertake a general waiver.[81] For example it may be in the interests of justice that a party can disclose documents for criminal proceedings but can still assert privilege in civil proceedings[82] or can disclose privileged documents to a regulator without a general waiver of privilege.[83]

The degree of control that the disclosing party has over the use of the documents disclosed via a limited waiver depends on its terms. Thus, it is vital to identify the terms of the limited waiver. The limited purpose and scope of the waiver may be communicated expressly or by implication. The court, in determining whether waiver is limited and, if so, the ambit of the waiver, must take all relevant circumstances into account, including express and implied communications between the parties sending and receiving the documents and "what they must or

76 The Justice Manual (n.30), 9–28.000—Principles of Federal Prosecution of Business Organisations, 9–28.700—The Value of Cooperation.

77 Leah Hengemuhle, "Mea Culpa: Why Corporate Waivers of Attorney-Client Privilege Have Not Increased the Prosecution of Corporate Executives" (2019) 60 *BC L Rev* 1415, 1426.

78 *Ibid*., 1415, 1447.

79 C Passmore, *Privilege* (n.45), 1–107.

80 See Green LJ in *R(AL) v Serious Fraud Office* [2018] 1 WLR 4557, [114].

81 See Lord Millett in *B v Auckland District Law Society* [2003] 2 AC 736, [68] (NZ).

82 See, eg, *British Coal Corp v Dennis Rye* [1988] 1 WLR 1113 (CA).

83 See, eg, *B v Auckland District Law Society* [2003] 2 AC 736.

ought reasonably have understood".[84] In *Citic Pacific Ltd v Secretary for Justice*,[85] privileged documents were handed to the Securities and Futures Commission (SFC) without a contemporaneous written document specifying the terms of the waiver. The Hong Kong Court of Appeal, applying English authority,[86] cautioned that waiver of what is in Hong Kong a right guaranteed by the Constitution should not be inferred lightly. The court found that:

> what reasonably ought to have been understood . . . when the . . . documents were given to the SFC for inspection was that Citic was prepared to waive its privilege in those documents for the only purpose then known to Citic, namely, the SFC investigation, but would inevitably have adopted a very different approach in respect of the issue of privilege if faced with a criminal investigation.[87]

The Court of Appeal held that there had been a limited waiver of privilege for the purposes of the SFC's investigation only.

Where privilege is waived on a limited basis, there remains the risk that the subsequent use of privileged documents under the terms of a limited waiver may result in a general loss of confidentiality, and thus a general loss of privilege, if the documents come into the public domain. This was the case in *PCP Capital Partners LLP v Barclays Bank plc*.[88] In *PCP*, Barclays provided the SFO with privileged documents under a limited waiver, the terms of which were as follows:

> You have agreed to accept these documents on the basis that they are being provided to the SFO for the sole purpose of your criminal investigation and pursuant to a limited waiver of privilege for this limited purpose. The SFO will of course be able to use the documents for the purpose of its investigation, prosecution and SFO related criminal proceedings and to disclose them to a third party in accordance with its statutory functions, including under the Criminal Justice Act 1987.[89]

Under the terms of the limited waiver, the SFO deployed some of the documents in open court at trial, privilege in these documents being lost when they were deployed.[90]

When a company is considering waiving privilege, the crucial issues are as follows. First, will waiver be general or limited? Second, if limited, for what purposes

84 *Berezovsky v Hine* [2011] EWCA Civ 1089, (Lord Neuberger MR) [29] (CA).
85 [2012] 2 HKLRD 701.
86 *Berezovsky v Hine* [2011] EWCA Civ 1089, (Lord Neuberger MR) [29].
87 Hartmann JA in *Citic Pacific Ltd v Secretary for Justice* [2012] 2 HKLRD 701, [73].
88 [2020] Lloyd's Rep FC 460.
89 See *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2016] 1 WLR 361, [10] (Waksman J).
90 *Ibid*., [11].

will privilege be waived (and do the limited waiver terms entitle the recipient of the documents to use them in ways that could result in a general waiver?). The company should specify the terms in writing and obtain the agreement to those terms by the party to whom disclosure is being made.[91] It may be that to comply with its statutory duties, a regulator will insist on terms including "carve outs" entitling it to use the documents disclosed in compliance with those duties, though the mere existence of a carve out will not prevent the party disclosing the documents from asserting privilege under the terms of the limited waiver, unless the documents are actually deployed under the carve out.[92]

III. DPAs in the United States

DPAs have become a high-visibility topic in the United States because of the risk that a prosecutor's decision to charge or a regulator's decision to file a formal enforcement proceeding against a corporation can impose a "death sentence" on the company. The horror story of the Arthur Anderson prosecution in the United States is the often-cited example. The federal government filed obstruction of justice charges against the corporation, once one of the world's largest accounting firms, in relation to its work for Enron.[93] Arthur Anderson was convicted in 2002. The corporation's stock plummeted, and it essentially ceased to exist.[94] Even the Supreme Court's 2005 reversal of the conviction could not resurrect the firm.[95] And Arthur Anderson's fate is not an isolated incident; as a result of federal charges, companies such as Drexel Burnham Lambert and Daiwa Bank have either ceased to exist or ceased operating within the United States.[96] The perception grew that the filing of charges against a company could amount to a "death sentence".[97]

91 See C Passmore, *Privilege* (n.45), 7–067 and 7–068.

92 *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2016] 1 WLR 361.

93 David Z Seide and Jonathan J Walsh, "A New SEC Manual: A Welcome Addition" (2009) *Nat'l LJ*; SEC Issues Manual for Enforcement Division Barring Waiver Requests, Setting Probe Rules, 77 USLW (BNA) 2292 (18 November 2008).

94 Earl J Silbert and Demme Doufekias Jannou, "Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System" (2006) 43 *Am Crim L Rev* 1125, 1229.

95 *Ibid*.

96 See generally Edward J Imwinkelried, *The New Wigmore: Evidentiary Privileges* (New York: Wolters Kluwer, 3rd ed., 2016) 1128, §6.12.5.b; note, Andrew Gilman, "The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy" (2008) 35 *Fordham UrbLJ* 1075. More recently, the Justice Department filed criminal charges against Purdue Pharma related to its aggressive marketing of the addictive painkiller OxyContin. Jan Hoffman and Katie Benner, "Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales" *The New York Times* (21 October 2020, available at https://www.nytimes.com/2020/10/21/health/purdue-opioids-criminal-charges.html (visited on 30 November 2020). The Department and Purdue have entered into an $8 billion settlement, the largest penalty ever levied against a pharmaceutical manufacturer in the United States. The charges and parallel civil suits have forced Purdue into bankruptcy.

97 A Gilman, "The Attorney-Client Privilege Protection Act" (n.96), 1090. See J Hoffman and K Benner, "Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales" (n.96).

Even DOJ representatives acknowledged that the government's decisions whether to charge a corporation or grant the corporation cooperation credit "will sometimes make the difference between life and death for a corporation".[98]

A. The role of the court

A major difference between English and US law in relation to DPAs is procedural in nature. In English law, Sch.17 of the Crime and Courts Act 2013 sets out the two-step process for judicial approval of a DPA. The US approach is fundamentally different. At one time, the McNulty Memorandum imposed general procedural requirements for approval of waiver requests by Main Justice officials in Washington.[99] In the case of DPAs involving money-laundering prosecutions, the current Manual for US attorneys still requires approval of proposed DPAs by Criminal Division (Money Laundering and Asset Recovery Section) (MLARS) in Main Justice,[100] although the approval agencies are administrative rather than judicial. There is no formal judicial oversight of the approval of DPAs. Further, the US Manual provisions are not legally enforceable.[101] The Manual does not constitute a true administrative code.[102] Thus, even if a local prosecutor blatantly violates a Manual provision, the corporation cannot cite the violation as a basis for dismissing charges.

B. Cooperation—The Manual

The intersection between the assertion of privilege and corporate cooperation for DPA purposes has been significantly more contentious in the United States, perhaps due to the evolution of DOJ practice over a longer period, reflected in a series of changes in the Manual for prosecutors.[103] The practices of administrative regulators have also evolved. At one time, the Sentencing Commission adopted a guideline that a privilege waiver could establish a corporate defendant's "thorough" cooperation warranting leniency.[104] In addition, the Securities and Exchange Commission (SEC) took the position that in deciding whether to initiate an enforcement action against a corporation, its regulators should consider whether the corporation was

98 EJ Silbert and DD Jannou, "Under Pressure to Catch the Crooks" (n.94), 1228–1229, quoting Christopher A Wray, Assistant Attorney General, DOJ Criminal Division.

99 See generally, EJ Imwinkelried, *The New Wigmore* (n.96), 1094–1095. Note, A Gilman, "The Attorney-Client Privilege Protection Act" (n.96). Main Justice is the Criminal Division of the US Justice Department headquarters in Washington DC.

100 The Justice Manual (n.30), 9–105.300.

101 See generally, EJ Imwinkelried, *The New Wigmore* (n.96), 1099; Darryl K Brown, "Judicial Power to Regulate Plea Bargaining" (2016) 57 *Wm & Mary L Rev* 1225, 1260.

102 *Ibid*.

103 The original provisions were vague—perhaps intentionally so to give prosecutors the maximum flexibility and discretion. DOJ began clarifying the provisions only after it began receiving criticism.

104 EJ Imwinkelried, *The New Wigmore* (n.96), 1306.

willing to waive its privileges.[105] A widespread belief emerged that the best way to avoid the death sentence associated with proceedings being filed against a company was to waive the attorney–client privilege and the work product protection for the material reflecting the corporation's internal investigation into the suspected misconduct. In numerous surveys of in-house and outside corporate counsel, by wide margins the respondents indicated that by routinely requesting or demanding that the corporation surrender such material to obtain cooperation credit, government prosecutors and regulators had created a culture of waiver.[106] In the words of one commentator, this widespread belief created "near-hysteria" among many corporate executives and their counsel[107] and resulted in complaints that the widespread use of DPAs was creating a "culture of waiver" inconsistent with the law's strong commitment to the attorney–client privilege and the work product protection.

In response to this criticism, in a short period of time, the DOJ released several memoranda providing federal prosecutors with varying guidance on the use of DPAs and the solicitation of waivers and also revised its guidelines.[108] Under the 2003 Thompson Memorandum, federal prosecutors could request waivers and consider a corporation's willingness to waive in deciding whether to defer prosecution.[109] In 2006, however, the McNulty Memorandum not only required prosecutors to establish a "legitimate" need for protected material but also sometimes required the local prosecutor to obtain approval from Main Justice before requesting the waiver.[110] These changes did not satisfy the government's critics. Many organisations of businesses and attorneys vehemently objected to the procedures outlined in the McNulty Memorandum and lobbied Congress in 2006–2008 to prescribe restrictions on DPAs and waiver requests.[111] To prevent the enactment of such legislation[112] and perhaps also out of a growing realisation that the explicit stress on waiver was making it more difficult to conduct internal corporate investigations that would be of use to the DOJ, in the 2008 Filip Memorandum[113] and the more

105 Securities and Exchange Act of 1934 Release No. 44969 (23 October 2001) (the so-called Seaboard Release).

106 EJ Imwinkelried, *The New Wigmore* (n.96), 1307–1310, citing surveys conducted by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, the Coalition to Preserve the Attorney-Client Privilege and Corpedia Inc; A Gilman, "The Attorney-Client Privilege Protection Act" (n.96), 1080.

107 Michael L Siegel, "Corporate America Fights Back over Waiver of Attorney-Client Privilege" (2008) 49 *BCLRev* 1, 52–54.

108 See generally EJ Imwinkelried, *The New Wigmore* (n.96), and A Gilman, "The Attorney-Client Privilege Protection Act" (n.96).

109 Memorandum from Deputy Attorney General Larry D Thompson to United States Attorneys, Subject: Principles of Federal Prosecution of Business Organizations (20 January 2003), §VI.

110 DOJ Revises Thompson Memorandum to Limit Consideration of Privilege Waivers, 75 USLW (BNA) 2355 (19 December 2006).

111 EJ Imwinkelried, *The New Wigmore* (n.96), 1099–1103.

112 N Richard Jamies, "The Filip Memo: DOJ's Latest Gambit" (2008) *National Law Journal* (online).

113 EJ Imwinkelried, *The New Wigmore* (n.96), 1314.

21501-0012-010-r1.indd 298 6/11/2021 8:49:23 PM

recent 2015 Yates Memorandum,[114] the DOJ changed the tone of its guidance to prosecutors.

The new guidance is set out in § 9–28.710 of the Manual. With two exceptions, the Manual now forbids prosecutors from demanding or even seeking privilege waivers. The two exceptions are situations in which the defendant raises an "advice of counsel" defence[115] and those in which the communications fall within the crime/fraud exception to the attorney–client privilege.[116] In the former situation, the prosecutor has a special need to review the allegedly privileged material. When the client pleads an "advice of counsel" defence, the client argues that he or she lacked *mens rea* because they innocently relied on the attorney's advice. If the client elects to use a privilege waiver as a sword, it would be unfair to permit the client to simultaneously assert the privilege as a shield to deny the prosecution access to the attorney's advice. In the latter situation, the material is unprotected. The privilege does not attach because the client illegitimately sought the attorney's advice to help the client further a crime or fraud. In all other cases, prosecutors may accept voluntary waivers by corporate defendants, but they may neither insist on nor request them. Section 9–28.710 elaborates that in deciding whether to award cooperation credit, the prosecutor must inquire only whether the corporation has provided "the facts known to the corporation about the putative criminal misconduct under review". Section 9–28.720 states that "a corporation should receive the same [cooperation] credit for disclosing facts contained in materials that are not protected by the attorney–client privilege or attorney work product as it would for disclosing identical facts contained in material that are so protected".

Of course, if the corporation provides the government with an employee witness statement reflecting an interview conducted by in-house or outside counsel, the corporation would implicitly waive any privilege covering the statement. However, § 9–28.720 plainly states that a corporation disclosing facts collected by counsel in an investigation covered by privilege receives exactly the same credit as a corporation disclosing facts that were not collected in a manner that would trigger the attorney–client privilege or the work product protection.[117] The government's evident hope was that this new guidance would simultaneously encourage corporations to provide relevant factual information while reducing the emphasis on waiver that had been making corporate employees fearful of cooperating in internal investigations.

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114 *Ibid*., § 6.12.5.b (2019 Cum Supp).

115 EJ Imwinkelried, *The New Wigmore* (n.96), § 6.12.4.b(2).

116 The Justice Manual (n.30), § 9–28.720. The Manual cites cases such as *Pitt v District of Columbia* 491 F 3d 494 (District of Columbia CA, DC Cir, 2007) and *United States v Wenger* 427 F 3d 840 (CA, 10th Cir, 2005) as cases involving the advice of counsel defence. The Manual also references *United States v Zolin* 491 US 554 (SC, 1989), the leading Supreme Court precedent on the crime/fraud exception.

117 EJ Imwinkelried, *The New Wigmore* (n.96), 1098, 1123 (both corporations receive the identical "equal cooperation credit"; the author describes this result as "perverse" because the corporation surrendering privileged material has arguably surrendered more but receives no additional *quid pro quo*).

The changes made by the government were not restricted to changes to the Manual. For its part, the Sentencing Commission voted in 2006 to delete the prior language referring to privilege waiver.[118] In 2008, the SEC revised its enforcement manual and directed its staff not to seek privilege waivers.[119] Despite these changes, Hengemuhle argues that the language in the Yates Memorandum linking cooperation credit with the requirement to "disclose all facts related to the individuals responsible or involved in the corporate misconduct" in effect forces companies to waive attorney–client privilege.[120]

The DOJ has countered with data indicating that the concern is overblown. Although the McNulty Memorandum was not as restrictive as the Filip Memorandum, the McNulty Memorandum appeared to make federal prosecutors less eager to seek DPAs and waivers.[121] For example in 2007, the DOJ reported only 29 DPAs; and of those 29, only 3 contained waiver provisions.[122] One 2007 article reported that "since the so-called McNulty memo went into effect in December 2006, DOJ has not approved any requests by prosecutors to ask companies for privileged attorney–client communications and has approved only four requests for privileged documents".[123] According to the Gibson Dunn survey cited earlier,[124] in 2016 the DOJ entered into 40 DPAs, 17 in 2017, 24 in 2018, and 31 in 2019[125]—compared to 170,487 federal prosecutions in 2019.[126]

In this light, it is untenable to claim that federal prosecutors "routinely" request privilege waivers or seek DPAs with corporate defendants. Yet, the experience with Arthur Anderson, Drexel Burnham Lambert and Daiwa Bank is cautionary. In a rare case, the allegations of corporate misconduct can be so significant that a corporation resisting the government's overtures for cooperation runs a grave risk that its reputation will be destroyed, its stock value will drop, it will be debarred from certain types of business, it will incur massive legal expenses and it will lose its most valued employees.[127] In such cases, the corporation must engage in a careful cost–benefit analysis: does the potential short-term benefit of receiving cooperation credit (eg perhaps avoiding prosecution) outweigh the potential long-term costs,

118 Vote by US Sentencing Commission Said to Stem Erosion of Attorney-Client Privilege, 74 USLW (BNA) 2598 (11 April 2006).

119 DZ Seide and JJ Walsh, "A New SEC Manual: A Welcome Addition" (n.93); SEC Issues Manual for Enforcement Division Barring Waiver Requests, Setting Probe Rules (n.93).

120 L Hengemuhle, "Mea Culpa" (n.77).

121 EJ Imwinkelried, *The New Wigmore* (n.96), 1313.

122 *Ibid*.

123 Justice Department Tells Judiciary Panel No Need to overturn Corporate Waiver Policy, 76 USLW (BNA) 2164 (25 September 2007).

124 Gibson Dunn survey (n.9).

125 Gibson Dunn survey (n.9); Note, A Gilman, "The Attorney-Client Privilege Protection Act" (n.96), 1112 (*the low number*).

126 Stephen Gandel, "White-collar Crime Prosecutions Hit Lowest Level in 33 Years" *CBS News* (26 September 2019), available at https://www.cbsnews.com/news/white-collar-crime-prosecutions-have-hit-lowest-level-in-33-years/?intcid=CNM-00–10abd1h (visited on 20 November 2020).

127 EJ Silbert and DD Jannou, "Under Pressure to Catch the Crooks" (n.94), 1229. See also J Hoffman and K Benner, "Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales" (n.96).

21501-0012-010-r1.indd 300 6/11/2021 8:49:23 PM

including the incurral of legal expenses and the subsequent use of the privileged information by private third parties filing civil lawsuits against the corporation? Despite the possible costs, if in an extreme case the corporation concludes that the consequence of non-cooperation might well be suffering "the death sentence", the corporation may feel compelled to waive.[128]

C. Waiver of privilege—The implications for employees of the company

Like the corporate employer and employee, the government must conduct a cost/benefit analysis. In the best of all possible worlds, if under the governing law, both the corporation and the natural person employees have committed crimes, the government would obtain convictions of all offenders. But in the real world, the government has limited funding for investigations; and its prosecutors can often save considerable expense by "piggy backing" onto the corporate's internal investigation.[129] Moreover, as § 9.28.210 of the Manual explains, the government's priority is conviction and deterrence of the natural person offenders.

In many respects, it is a useful legal fiction to treat the entity as a person; but any realistic prosecutor realizes that the entity acts only through human beings. In the words of the Manual, "imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing".[130] Given that priority, it makes sense for the government to trade concessions to the entity for an increased ability to identify and prosecute the natural person criminals. A sophisticated prosecutor ought to appreciate the point that if it becomes a popular belief among corporate employees that their employer will almost automatically transfer the results of any internal investigation to government investigators, the quality and thoroughness of such investigations will decline; and, in turn, even if a waiver permits the government to "piggy back", the internal investigation will be of less value to the government. In short, the government faces the challenging task of obtaining corporate cooperation without causing the typical corporate employee to assume that the corporate counsel questioning him or her is in reality a deputised government investigator.[131] The natural person employees of corporations under investigation find themselves in a similar situation in England and the United States.

As in England, in the United States the privilege belongs to the corporation. More specifically, there is general consensus on the propositions that corporate counsel represent the entity rather than its employees; in certain circumstances both the attorney–client privilege and the work product protection can apply to the corporation's internal investigations into alleged misconduct; and the holder of both

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128 Despite the current Manual provisions, the pressure exists so long as the key evidence of essential "facts" takes the form of privileged material.

129 EJ Silbert and DD Jannou, "Under Pressure to Catch the Crooks" (n.94), 1228.

130 The Justice Manual (n.30), § 9.28.210.

131 EJ Silbert and DD Jannou, "Under Pressure to Catch the Crooks" (n.94), 1240.

21501-0012-010-r1.indd 301 6/11/2021 8:49:23 PM

the privilege and the protection is the corporation itself, not its employees. All those propositions follow as logical consequences of the Supreme Court's 1981 decision in *Upjohn Co v United States*.[132] *Upjohn* can place corporate employees in a difficult position. If they divulge misconduct during an internal investigation conducted by corporate counsel, the privilege and protection may attach to those revelations; but they do not hold the privilege or protection. Consequently, after conducting its own cost–benefit analysis to avoid prosecution, the corporation can decide to waive its privilege and protection by providing the government with its internal investigation, including the written memorials of the employees' statements. An employee who does not understand that risk is at special peril; he or she may reveal misconduct during the internal investigation on the mistaken assumption that like his or her employer, the corporate employee can invoke the privilege or protection. That element of unfairness explains why many US jurisdictions now require corporate investigators to administer an "*Upjohn* warning" to the employees being questioned.[133] The warning informs the employee that the employer holds any privilege applicable to the interview and that over the employee's objection, the employer may later decide to reveal the divulged information to third parties such as government prosecutors and regulators.

Although the administration of such warnings reduces the risk of unfairness to the employee, such warnings simultaneously threaten the internal investigation. Knowing the risk of a subsequent waiver by his or her corporate employer, the employee may be tempted to be less cooperative during the investigation. The employee may either lie during the interview or be less candid and withhold relevant information.[134] Like the Government and the corporate employer, the employee must engage in a cost–benefit analysis before deciding whether to cooperate in the internal investigation. The employee must balance the benefits of cooperation (perhaps avoiding termination by the employer)[135] against the potential costs, including their subsequent prosecution by the government or civil liability to third parties injured by the corporate conduct. If the employee realises that he or she has personally engaged in serious misconduct, the employee may well strike the balance in favour of refusing to cooperate in the investigation and invoke the privilege against self-incrimination during any government interrogation.[136]

132 449 US 383 (1981).

133 Note A Gilman, "The Attorney-Client Privilege Protection Act" (n.96), 1086; EJ Silbert and DD Jannou, "Under Pressure to Catch the Crooks" (n.94), 1231.

134 EJ Silbert and DD Jannou, "Under Pressure to Catch the Crooks" (n.94), 1231.

135 *Ibid*.

136 In English law, the privilege against self-incrimination is subject to a variety of statutory exceptions. In various contexts, statute has abrogated the privilege both expressly and by necessary implication. Some statutory provisions that abrogate the privilege against self-incrimination in the context of civil proceedings expressly give the person who is obliged to answer the incriminating question an alternative statutory protection, preventing his answers from being used against him in subsequent criminal proceedings. Examples are provided by Theft Act 1968 s.31(1) and Fraud Act 2006 s.13.

21501-0012-010-r1.indd 302 6/11/2021 8:49:23 PM

D. *Waiver of privilege in a DPA—The consequences for the company*

In theory, an American corporation's decision-making about the advisability of entry into a DPA can be a much more complicated calculus than that facing an English company. The DPA rules must be considered in the context of other relevant American privilege doctrines. As noted earlier, when a corporation contemplating a DPA engages in its cost–benefit analysis, it must weigh the short-term benefits against the long-term potential costs, including the risk that private third parties will later use the disclosed material in litigation against the corporation. In England, if the corporation enters into a sufficiently explicit DPA, the corporation can be protected against the risk because a long line of English precedents recognises the concept of limited/selective waiver. The terms of the limited waiver can effectively provide that the corporation waives its privilege only for a specific purpose. After entering into such an agreement with English prosecutors, the corporation could be relatively confident that it may still assert the privilege against private third parties suing the corporation, though as was seen above this is subject to the possibility that subsequent deployment of privileged materials in the course of legal proceedings could result in a loss of privilege. Thus, the distinction between the position in the two jurisdictions may be less significant than would appear to be the case at face value. In England, much will depend on the terms of the limited waiver.

In most US jurisdictions, no matter how explicit the terms of the DPA, the corporation cannot have the same assurance as a limited, selective, waiver might, at least in theory, provide in England. In the United States, only a distinct minority of jurisdictions endorse the concept of selective waiver. In federal court, only the Court of Appeals for the Eighth Circuit and a few district courts in other circuits recognise the concept.[137] An early version of Federal Rule of Evidence 502 included a provision authorising selective waiver, but that authorisation was deleted before Congress enacted the rule.[138] In the United States, the prevailing view is that the privilege

137 Note A Gilman, "The Attorney-Client Privilege Protection Act" (n.96), 1088. *Diversified Industries, Inc v Meredith* 572 F 3d 596 (8th Cir, 1977) is the leading precedent recognising selective waiver, but it is a distinct minority view. EJ Imwinkelried, *The New Wigmore* (n.96), § 6.12.4.a(2).

138 Note A Gilman, "The Attorney-Client Privilege Protection Act" (n.96), 1089; Adv Comm Note, Fed R Evid. 502(d) ("this subdivision does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking the information"). Despite this note, some have argued that in limited circumstances, there can be a valid selective waiver order under r.502(D). Edward J Imwinkelried, "The Debate over the Permissibility of Selective Waiver orders under Federal Rule of Evidence 502(D): The Crucial Scope Issues" (2020) 73 *SMU L. Rev*. 779, 798–802 (2020). The key is understanding that r.502 protects against only waivers effected by disclosure; the rule does not extend to other acts that can result in waiver such as advancing an "advice of counsel" defence:—assume that the court approves of a DPA agreement with a narrow scope providing only that disclosure to the government will not effect a waiver. Here, the scope of the agreement and order coincide with the scope of r.502. Assume further that after the disclosure, the parties settle and that the holder performs no other acts that would otherwise effect a waiver. In that situation, under the terms of 502(d), the holder can certainly argue that

holder may not "pick and choose"; once the holder has disclosed to any third party outside the original circle of confidence, the privilege terminates as against all third parties. When faced with the decision whether to cooperate and waive, an American corporation must weigh the possible civil liability exposure in later actions filed against the corporation. Unless the fact situation is a rare case in which the corporation is facing "the death penalty", the civil exposure (caused by the lack of selective waiver) could easily prompt the corporation to decide against entry into a DPA.

IV. Evidential and Procedural Issues: The Position in England and the United States Contrasted

A. Limited waiver and cooperation

At first blush, the US approach appears more protective of the corporation's interests in relation to privilege than English law. In England, based on public statements by several of its officers, the SFO clearly equates waiver of privilege with cooperation. Moreover, the Code cites the disclosure of witness accounts as an example of cooperation. Such accounts can clearly be covered by a legitimate claim to litigation privilege. In addition, the trend in recent English cases indicates that limited waiver is becoming the norm. The reality seems to be that without careful thought, the terms of a limited waiver may not always prevent the deployment of material in legal proceedings and the subsequent loss of privilege. If a corporation feels pressured to make a limited waiver, deployment in ensuing criminal litigation in line with the terms of the limited waiver may have the practical consequence that privilege will be lost.

In contrast, in most instances the DOJ Manual now forbids federal prosecutors from demanding or requesting a waiver. The Manual also announces that a prosecutor must award the same cooperation credit to a company providing factual material unprotected by any privilege as he or she would accord a corporation furnishing material covered by the attorney–client privilege or work product protection. Thus, the Manual purports to announce clear guidance that can make it a straightforward matter for a corporation to conduct its cost–benefit analysis.

Appearances can be deceiving, however. Again, the provisions of the Manual are not legally enforceable.[139] They are in the nature of internal "housekeeping"

it can still assert the privilege in subsequent litigation against third parties—in effect a valid selective waiver. Alternatively, assume that the court approves a DPA agreement with a broader scope in which the holder agrees not only to disclosure but also that the other party may use the disclosed material as evidence in the pending proceeding. Here the scope of the order and agreement exceed the scope of r.502. The holder's failure to object to the use of the material as evidence would effect a waiver. Since r.502 applies only to waivers resulting from disclosure, the order's provision purporting to prevent that failure from effecting a waiver is nugatory.

139 Note, A Gilman, "The Attorney-Client Privilege Protection Act" (n.96), 1099; DK Brown, "Judicial Power to Regulate Plea Bargaining" (n.101).

21501-0012-010-r1.indd 304 6/11/2021 8:49:23 PM

guidance[140] enforced at the discretion of the Attorney General.[141] In addition, to qualify for any cooperation credit, the corporation must provide the DOJ with "all relevant facts relating to the individuals responsible for the misconduct".[142] Although the Manual stresses that the eligibility for cooperation credit does not require waiver of attorney–client privilege, a company that "does not disclose such facts . . . will not be entitled to receive any credit for cooperation".[143] These Manual provisions may result in a company disclosing materials that could be protected by attorney–client privilege or conducting its internal investigation in such a way that privilege does not arise—a pressure that has been decried as "improper" in England. Moreover, even if the provisions were enforceable, while English courts uphold limited waivers, most US courts reject selective waiver.

The controversy over DPAs gives US courts an opportunity to take a new look at the issue.[144] There is nothing inherent in the logic of waiver that precludes recognising the concept of selective waiver, a waiver effective against one party but not effective as against third parties. In some respects, US courts already recognise several species of "selective" waiver. Suppose, for example, that a patient is involved in personal injury litigation. The patient has separately consulted multiple medical professionals; the professionals do not jointly consult on the patient's condition. There is substantial authority that even if the patient discloses his or her communications with one professional, the patient retains the medical privilege protecting their communications with the other professional.[145] The courts have extended this reasoning to the attorney–client privilege.[146] Likewise, there is precedent that a holder may waive a privilege in one proceeding but assert the privilege in a later, separate proceeding.[147] There is no insuperable logical barrier to recognising selective waiver. The notion of a selective waiver is not self-contradictory. Moreover, while only a minority of federal courts have approved of the concept, it enjoys respectable support. For instance in 2006, Congress amended the Federal Deposit Insurance and Federal Credit Union Act to permit selective waiver under specified circumstances.[148] In 2012, the Consumer Financial Protection Bureau finalised a rule that purported to allow selective waiver with respect to documents submitted to the CFPB.[149] Some states such as Oklahoma have enacted legislation codifying a

140 DK Brown, "Judicial Power to Regulate Plea Bargaining" (n.101), 1260.

141 *Ibid*.

142 US Department of Justice, Office of the Deputy Attorney General, Individual Accountability for Corporate Wrongdoing, 9.9.2015 and The Justice Manual (n.30), 9–28.700.

143 The Justice Manual (n.30), 9–28.720.

144 Note, A Gilman, "The Attorney-Client Privilege Protection Act" (n.96), 1131.

145 EJ Imwinkelried, *The New Wigmore* (n.96), § 6.12.7.b.

146 *United States v Gasparik* 141 F Supp 2d 361, 371 (SDNY, 2001).

147 EJ Imwinkelried, *The New Wigmore* (n.96), § 6.12.7.c.

148 12 USC §§ 1785(j) and 1828(x)(1); Audrey Strauss, "White Collar Crime" White Collar Crime; Selective Waiver for the Banking Industry; Corporate Update (2007) *New York Law Journal* (online).

149 Note, Jacob M Gerber, "Silence Isn't Golden: The CFPB's Privilege Rule and the Risk of Failure under *Chevron* Step One" (2013) 17 *NC Banking Inst* 275, 276; Confidential Treatment of Privileged Information, 77 Fed Reg 39,617 (5 July 2012).

21501-0012-010-r1.indd 305 6/11/2021 8:49:23 PM

general selective waiver principle.[150] In all these settings, the principle has proved to be workable.

Most importantly, there is a strong policy argument for recognising the principle in the DPA setting. In this setting, selective waiver can be "a valuable palliative".[151] In the words of one commentator, without the benefit of a selective waiver doctrine:

> corporate counsel [confront] the [harsh] choice of refusing to cooperate [with the government] and thereby involve the corporate client in a formal investigative or enforcement action—or cooperating and risking the loss of the privilege. Agency budgets are limited, so cooperative regulation through corporate self-policing should be encouraged in the interest of economy and efficiency. The strict waiver cases discourage this corporate policing activity.[152]

Unless the fact situation is the rare case in which the corporation faces "the death penalty", the lack of a selective waiver doctrine may induce the corporation to refuse to cooperate with the government investigators. Especially if the maximum fine authorised by the relevant penal statute is modest, the fine may be dwarfed by the corporation's potential exposure in a subsequent civil suit filed by private third parties. In many cases, the lack of a selective waiver doctrine can pose a serious obstacle to the successful implementation of the DPA program. The controversy over selective waiver both precedes the current debate over DPAs and transcends the DPA context, but the DPA debate may bring that controversy to a head in the United States.

B. Judicial oversight

Another aspect of English practice from which the US system could learn is that of judicial oversight. While English law interposes the courts to review the propriety of DPAs, in the United States the only oversight is internal administration by the DOJ; and even the purported administrative constraints are not enforceable in court.

Like the controversy over selective waiver in the DPA setting, the controversy over judicial oversight of DPAs is a microcosm of a larger dispute. The "Take Care Clause" of the United States Constitution assigns the executive the duty to "take Care that the Laws be faithfully executed".[153] That clause has led some federal

150 Robert A Brown, "The Amended Attorney-Client Privilege in Oklahoma: A Misstep in the Right Direction" (2011) 63 *OklaL Rev* 279, 301.

151 Liesa Richter, "Corporation Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver" (2007) 76 *Fordham LRev* 129.

152 John W Gergacz, *The Attorney-Corporate Client Privilege* (Garland Law Pub, 2nd ed., 1990) pp 5–48.

153 US Constitution Art.II, § 3.

21501-0012-010-r1.indd 306 6/11/2021 8:49:23 PM

courts to sweepingly declare that decisions as to charges and pleas are the "special province of the Executive branch",[154] including the DOJ. The Supreme Court has asserted that the national Constitution gives "the Executive Branch . . . exclusive authority and absolute discretion to decide whether to prosecute a case".[155] Those decisions have been described as "quintessentially executive" in nature.[156] On that assumption, it would arguably be inappropriate—perhaps even unconstitutional—to permit courts to second guess DOJ decisions as to DPAs.

On closer examination, that language is hyperbolic. There is no constitutional or practical impediment to permitting judicial oversight of DPAs in the United States. In fact, there are solid policy reasons for allowing such oversight. There is no constitutional barrier. Federal Rule of Criminal Procedure 11 gives the courts extensive authority over plea bargains. Rule 11(a)(1) requires the court's consent to the entry of a nolo contendere plea, 11(a)(2) similarly requires the court's consent to a conditional plea preserving the defendant's right to appeal a reserved issue and 11(c) allows the courts to review plea agreements between the prosecution and the defendant. Rule 11(a)(2) grants the courts absolute discretion to decide whether to approve a conditional plea,[157] under 11(a)(1) the court has broad discretion over nolo pleas,[158] and the court similarly enjoys a measure of discretion in deciding whether to approve a plea agreement negotiated between the parties.[159] Although this discretion constrains prosecutors' authority, the courts have uniformly concluded that r.11 does not violate separation of powers.[160] For its part, r.48 is a break from the traditional common-law rule that a prosecutor has sole discretion whether to enter a *nolle prosequi*.[161] Rule 48 provides that the government may dismiss a charge only "with leave of court". On the one hand, the cases recognise that the prosecutor has a more complete command of the facts and is usually in a superior position to decide whether dismissal serves the interests of justice.[162] The courts have, however, construed r.48 as forbidding the judge from merely rubber stamping

154 *Greenlaw v United States* 554 US 237, 246 (SC, 2008).

155 *Ibid*. See also *People v Alaybue* 51 CalApp5th 207, 264 CalRptr 3d 876, 887 (California CA, 2020).

156 *Morrison v Olson* 487 US 654, 706 (SC, 1988) (Scalia J, dissenting). See also *Re Wild*, 955 F 3d 1196, 1216 (CA, 11th Cir, 2020) ("the Executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case". *United States v Nixon* 418 US 683, 693 (SC, 1974) (citing Confiscation Cases, 74 US (7 Wall) 454 (1869)); DK Brown, "Judicial Power to Regulate Plea Bargaining" (n.120), 1273 (unregulated prosecutorial discretion).

157 *United States v Davis* 900 F 2d 1524 (10th Cir, 1990) (for any reason or no reason), *cert denied*, 498 US 856 (CA, 1990).

158 *United States v Dorman* 496 F 2d 438 (4th Cir, 1974), *cert denied,* 419 US 945 (1974); *United States v Soltow* 444 F2d 59 (CA, 10th Cir, 1971) (sole discretion).

159 *United States v Pimentel* 932 F 2d 1029 (CA, 2d Cir, 1991); *United States v Adams* 634 F 2d 830 (CA, 5th Cir, 1981).

160 *United States v Kuchinski* 469 F 3d 853 (CA, 9th Cir, 2006).

161 Adv Comm Note, Fed R Crim P 48.

162 *United States v Salinas* 693 F 2d 348 (CA, 5th Cir, 1982); *United States v Cowan* 524 F 2d 504 (5th Cir, 1975), *cert denied*, 425 US 971 (CA, 1976).

21501-0012-010-r1.indd 307 6/11/2021 8:49:23 PM

the prosecutor's assessment of the public interest.[163] Like r.11, r.48 limits the authority of prosecutors in the executive branch; and like r.11, r.48 has withstood a constitutional, separation of powers challenge.[164] Subject to Congressional veto, the Supreme Court proposes amendments to the Federal Rules of Criminal Procedure pursuant to statutory authority, namely, the Rules Enabling Act,[165] and Congress has the authority to authorise the courts to oversee the charging and plea practices of prosecutors in the Executive branch.[166]

Just as constitutional considerations do not preclude assigning courts a role overseeing DPAs, practical workload considerations would not foreclose doing so. In the outlier year of 2015, federal prosecutors entered into 102 DPAs with corporations.[167] But in the typical year, there are only a few tens of such agreements—for instance 17 in 2017, 24 in 2018, and 31 in 2019.[168] In 2019, nationwide the federal courts handled over 170,000 prosecutions.[169] Giving the courts oversight over DPAs would hardly overburden them.

Nor is it plausible to contend that the courts are incompetent to make the sorts of judgments entailed in oversight role. In the past, it has sometimes been generalised that courts are "ill suited" to make decisions relating to charging and plea practices.[170] But the experience under rr.11 and 48 is to the contrary. Under those rules, the courts have grappled with such questions as the relative culpability of potential defendants,[171] the difficulty of gathering evidence without a potential defendant's cooperation,[172] the extent to which a natural person employee has deceived the corporate employer,[173] the effectiveness of a punishment in providing sufficient deterrence[174] and whether in the long term a dismissal exposed a defendant to a substantial risk of unfair harassment.[175] This case law demonstrates that the courts are capable of making the sorts of evaluative decisions needed to oversee DPAs.

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163 *United States v Ammidown* 497 F 2d 615 (CA, DC Cir, 1973); *United States v N V Nederlandsche Combinatiae Voor Chemische Industrie* 428 F Supp 114 (SDNY), *reconsid Denied,* 75 FRD 473 (SDNY, 1977); *United States v Bettinger Corp* 54 FRD 40 (D Mass, 1971).

164 *United States v Cowan* 524 F 2d 504 (5th Cir, 1975), *cert denied*, 425 US 971 (CA, 1976).

165 28 USC § 723.

166 DK Brown, "Judicial Power to Regulate Plea Bargaining" (n.101) 1254, 1264–1266.

167 Gibson Dunn survey (n.9).

168 *Ibid*.

169 S Gandel, "White-collar Crime Prosecutions Hit Lowest Level in 33 Years" (n.126) (170,487 prosecutions).

170 DK Brown, "Judicial Power to Regulate Plea Bargaining" (n.101), 1236, quoting a passage from *Wayte v United States* 470 US 598, 607 (SC, 1985).

171 *United States v Brighton Bldg & Maintenance Co* 431 F Supp 1118 (ND Ill, 1977).

172 *United States v BP Products* 610 F Supp 2d 655 (SD Tex, 2009).

173 *United States v Florida West Int'l Airways Inc* 282 FRD 695 (SD Fla, 2012).

174 *United States v Viren* 828 F 3d 535 (7th Cir, 2016), *cert denied*, 137 S Ct 702, 196 L Ed 2d 576 (CA, 2017); *United States v Bean* 564 F 2d 700 (CA, 5th Cir, 1977); *United States v Munroe* 493 F Supp 134 (ED Tenn, 1980).

175 *United States v Salinas* 693 F 2d 348 (CA, 5th Cir, 1982); *United States v Cox* 311 F 2d 417 (8th Cir, 1963), *cert denied*, 373 US 913 (CA, 1963); *United States v Rossoff* 806 F Supp 200 (CD Ill, 1992); *United States v Fields* 475 F Supp 903 (DDC, 1979); *United States v N V Nederlandsche Combinatiae Voor Chemische Industrie* 428 F Supp 114 (SDNY), *reconsider Denied,* 75 FRD 473 (SDNY 1977).

21501-0012-010-r1.indd 308 6/11/2021 8:49:23 PM

Finally and perhaps most importantly, especially at this juncture in American legal history, there is a strong policy argument that assigning the courts an oversight role will decrease the danger that political considerations will influence prosecutors' decisions with respect to DPAs.

As previously stated, Criminal Procedure r.48(a) requires the "leave of court" for a prosecutor to dismiss charges. The original 1944 Advisory Committee Note to Rule 48 cites *United States v Woody*[176] as an example of the evils that the imposition of the leave requirement was intended to eliminate. In that case, the defendant, a federal tax collector in Montana, was charged with embezzling federal funds. Woody was well connected politically; his grandfather had been Missoula's first mayor and a judge, and his father was a close friend of the Governor and had served as the state's Assistant Attorney General.[177] The federal prosecutor's stated reason for dismissal was that the defendant "is of a prominent . . . family, . . . young, [and] . . . studying law in a California university".[178] The district court judge protested that the government's "reasons . . . savour altogether too much of some variety of prestige and influence (family, friends, or money) that too often enables their possessors to violate the laws with impunity; whereas persons lacking them must suffer all penalties".[179] Yet, the judge felt compelled to follow the common-law rule that the prosecutor "has absolute discretion over criminal prosecutions and can dismiss or refuse to prosecute, any of them at his discretion". On the record, the judge stated that the dismissal was "abhorrent to justice", but the judge thought that he had no choice but to grant the prosecutor's dismissal motion "albeit reluctantly".[180]

It would be naive to think that giving courts an oversight role in the DPA process will completely eliminate any possibility of political influence compromising legitimate law enforcement interests. Creating an oversight system would reduce that risk. While judges in many states are elected, federal judges are appointed. Moreover, unless in an exceptional case the hearing was closed to the public, an oversight hearing would be a more public forum than a DOJ decision whether to enter into a DPA with a corporate defendant. In the United States, DPA cases do not involve run-of-the-mill prosecutions; rather, they tend to involve high-visibility allegations of major misconduct by large corporations—situations in which the monetary and reputation stakes could tempt the defendants to seek political favours. Just as *Wood* made the case for requiring "leave of court" for government dismissals under Criminal Procedure r.48(a), the recent allegations by both sides of political influence in cases such as the prosecution of Michael Flynn, President

176 Adv Comm Note, Fed R Crim P 48, citing *United States v Woody* 2 F 2d 262 (D.Mont., 1924).

177 Thomas Ward Frampton, "Why Do Rules 48(a) Dismissals Require 'Leave of Court'" (2020) 73 *Stan L Rev Online* 2, 11.

178 *Ibid*.

179 *United States v Woody* 2 F 2d 262 (D.Mont., 1924).

180 *Ibid*., 263.

21501-0012-010-r1.indd 309 6/11/2021 8:49:23 PM

Trump's former National Security Advisor,[181] cut in favour of judicial oversight in DPA cases.

V. Conclusion

Based on the analysis we have undertaken concerning the intersection of legal professional privilege and DPAs in England and the United States, it is clear that the approaches in each jurisdiction have advantages and disadvantages. In the United States, the DOJ's approach to cooperation and waiver is preferable to that of England. The US experience illustrates a troublesome journey, ending with the more satisfactory solution of the current Manual. This journey could be truncated in England through a judicial approach to waiver aligned to the actual requirements of the Code. In England, the availability of limited waiver and judicial oversight are positive aspects of DPAs from which the US system could benefit.

A. Substantive aspects

In both jurisdictions, there is or has been either an expectation or a perception that waiver of privilege is required in order to gain credit for cooperating in the context of a DPA. In England, the SFO clearly regards limited waiver over first witness accounts as very important and therefore interprets the Code accordingly. As illustrated, the provisions of the Code are opaque, giving the SFO latitude in its interpretation of waiver and cooperation. In addition, judicial oversight of DPAs, where the courts include and comment on waiver when listing examples of cooperation, has been unhelpful. Whatever the SFO's interpretation of the Code, the Code itself does not explicitly require waiver of privilege. Furthermore, the Code is clear that it does not and cannot change the law on privilege. It is therefore arguable that when considering cooperation for the purposes of approving a DPA, the court should not take waiver into account at all—it should be irrelevant, since a company is undeniably entitled to assert privilege where the facts support a privilege claim. This does not mean that it will always be possible to cooperate in the absence of waiver—but the key should be whether a corporation has cooperated by revealing enough relevant factual information to the SFO, not whether in the course of this process there has or has not been a waiver of privilege.

In the United States, the Manual is much closer to this sensible position; the Manual both negatively prohibits prosecutors from demanding or seeking privilege waivers and affirmatively focuses on the corporation's revelation of the pertinent facts. The combination of the lack of enforceability of the Manual provisions, the backdrop of past DOJ practice and the lack of judicial oversight continues to

181 Critics claimed that the prosecution of Flynn for making false statements to the FBI about relations between the Trump administration and the Russian government was politically inspired. Byron Tau, "Government Misconduct Asserted in Flynn Case" *The Wall Street Journal* (11 June 2020), A3.

21501-0012-010-r1.indd 310 6/11/2021 8:49:23 PM

perpetuate, in some quarters, the popular perception that waiver is required in the United States. The bottom line is that the Manual makes it clear that cooperation neither equates with nor always requires a privilege waiver to qualify for cooperation credit. There will often be a variety of ways to establish facts other than by the disclosure of privileged material. If the corporation can meet the government's need for reliable evidence of the relevant facts in other ways, there should not be an invariable requirement for privilege waiver. At times, a corporation may find it necessary to waive privilege to make an adequate disclosure of relevant factual information. However, it exceeds the government's legitimate needs and can chill the cooperation of employees in useful internal investigations to announce that corporations must always waive privilege to be deemed cooperative. A corporation may feel that a privilege waiver is an easy way of demonstrating cooperation; but neither the corporation nor its employees should be told that waiver is a sine qua non for cooperation.

Where the corporation needs to disclose privileged information to satisfy the Government's factual needs or the corporation simply deems waiver a convenient way for the corporate to obtain cooperation credit, the scope of the waiver can be restricted in a manner that protects the company's legitimate interests. In the United States, the majority view rejecting limited/selective waiver puts a company in potential jeopardy where possible third-party civil suits are concerned. Unless the case is a rare one in which the corporation faces a realistic prospect of suffering "the death penalty", the lack of a selective waiver option in most US jurisdictions could prompt a corporation to reject a prosecutor's overture for a DPA and refuse to cooperate with the prosecutor. The notion of limited waiver seems especially apt for the DPA setting, since the interests of federal law enforcement authorities are readily distinguishable from those of private parties interested in filing civil lawsuits against the corporation. Adopting selective waiver at least in this limited context would allow the courts to accumulate additional experience with such waivers and put them in a better position to decide the larger question whether they should extend the selective waiver practice to other settings. Even if the US courts change their stance on selective waivers, as seen in the English context, in any DPA agreement a corporation must take care to explicitly limit the scope of the limited waiver.

B. Procedural aspects

While this is not current practice in the United States, neither constitutional nor practical caseload considerations preclude assigning federal courts a meaningful role in overseeing the formation and administration of DPAs. Past experience establishes that the courts are fully competent to make the sort of judgments entailed in such oversight, and the institution of judicial oversight would reduce the troubling spectre of political influence in charging and disposition practices that can lead to entrenched perceptions regarding waiving privilege. There is, however, a risk that the requirement for judicial oversight could become a mere rubber-stamping exercise. For example to date in England, the courts have approved the terms of DPAs

even where serious criminal conduct has occurred. The treatment by the English courts of limited waiver as a cogent example of cooperation gives rise to the danger that even where very serious criminal conduct has occurred, a court might treat the mere fact that privilege has been waived as a major factor warranting judicial approval of a DPA. The better approach is to have judicial oversight of the terms of the DPA but with the nuanced understanding that waiver of privilege does not equate to the cooperation necessary for a DPA, and, standing alone, waiver is insufficient to justify approval of a DPA.

C. *Best practice*

The ongoing controversy over DPAs in the United States has renewed interest in two long-standing issues in American evidence and procedural law. Those issues are selective waiver and judicial oversight. On both fronts, the United States should seriously consider moving in the direction of English practice. Doing so could improve the administration of DPAs in the United States and would give US legislatures and courts additional experience to evaluate the broader issues of the wisdom of limited waiver and more extensive judicial involvement in criminal justice administration. Decades ago, one of the pioneers of American administrative law, the late Professor Kenneth Culp Davis, argued that American prosecutors and police wielded excessive discretion in the justice system.[182] In advancing his argument, Professor Davis appealed to the experience of other nations' legal systems that have structured meaningful constraints to control that discretion. In contrast, on another front, England ought to consider moving in the direction of American practice. The DOJ's approach to factual disclosure and waiver is to be admired and achieves a more appropriate balance between the fundamental rights of the company and the needs of prosecutors than is achieved in England. Whether the assessment of the level of cooperation is made by a prosecuting authority or a court, in the assessment the question of waiver of privilege should be entirely disaggregated from the issue of the requisite level of cooperation. The dispositive question should be whether the information provided by the corporation satisfies the Government's factual needs, not whether the corporation has made a waiver.

Unlike the position in England, the DOJ Manual makes explicit that eligibility for cooperation credit does not require waiver of attorney–client privilege. In addition, the Manual forbids prosecutors from demanding or seeking privilege waivers whereas the SFO does not regard itself as so constrained. The DOJ clearly—and quite correctly—believes that it can often get the information it needs without requiring the disclosure of privileged communications. Of course, it is an entirely distinct issue whether the corporate's assertion of privilege is valid or "dubious". It is thus defensible for the Manual to allow prosecutors to seek information that

182 DK Brown, "Judicial Power to Regulate Plea Bargaining" (n.101), 1255; citing Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) p 188, pp 207–208.

21501-0012-010-r1.indd 312 6/11/2021 8:49:23 PM

was either unprivileged to begin with by virtue of the crime/fraud exception or is now unprivileged because of the corporation's assertion of an "advice of counsel" defence.

De-coupling waiver and cooperation (which the current version of the Manual seems to achieve in the United States) is in the interests of employees. If employees in both jurisdictions no longer feared that their statements to corporate counsel would always come into the possession of prosecutors investigating corporate misconduct, their statements would tend to be more truthful. That would improve the veracity and utility of any internal investigation conducted by the company. In the final analysis, the privilege will still belong to the company. But if appropriate *Upjohn* warnings are given to employees interviewed as part of an internal investigation, and the employees come to realise that waiver is not an invariable requirement in the DPA process, employees will feel more comfortable participating in any internal investigation. The end result would be internal investigation reports that are more useful both to the corporation and, if subsequently disclosed, to Government investigators.

A comparative law analysis of the DPA regimes in the two systems is revealing. In some respects, the US system has developed superior substantive standards for approving DPAs. In contrast, the procedural approach to DPAs in England of judicial oversight and selective waiver seems preferable.

Article (ii)

Michael Stockdale & Rebecca Mitchell, ‘Legal Advice Privilege and Artificial Legal Intelligence: Can Robots Give Privileged Legal Advice?’ (2019) 23 Int’l J Evidence & Proof 422

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Legal advice privilege and artificial legal intelligence: Can robots give privileged legal advice?

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Abstract

Legal professional privilege entitles parties to legal proceedings to object to disclosing communications. The form of legal professional privilege that is now commonly known as 'legal advice privilege' attaches to communications between a client and its lawyers in connection with the provision of legal advice. The provision of legal advice increasingly involves the use of technology across a wide spectrum of activities with varying degrees of human interaction or supervision. Use of technology ranges from a lawyer conducting a keyword search of a legal database to legal advice given online by fully automated systems. With technology becoming more integrated into legal practice, an important issue that has not been explored is whether legal advice privilege attaches to communications between client and legal services provider regardless of the degree of human involvement and even if the 'lawyer' might constitute a fully automated advice algorithm. In essence, our central research question is: If a robot gives legal advice, is that advice privileged? This article makes an original and distinctive contribution to discourse in this area through offering novel perspectives on and solutions to a question which has not previously been investigated by legal academics.

Keywords

Algorithms, legal advice privilege, robot, legal technology, professional regulation

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Introduction

Legal professional privilege entitles parties to legal proceedings to object to disclosing written or oral communications. The privilege has two limbs. Litigation privilege, which is capable of encompassing confidential communications between legal adviser or client and third parties, such as expert and non-expert witnesses, is not considered further in this article. The focus of this article is on legal advice privilege, which attaches to confidential communications between client and lawyer made for the purpose of giving or receiving legal advice.

The form of legal professional privilege that is now commonly known as 'legal advice privilege'[1] has its origins in the 16th century, with the rationale for its existence being fully developed during the 19th century.[2] The privilege attaches to 'communications passing between a client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice'.[3] Where it arises, it entitles the client to object to disclosing the communication, the right to claim or waive the privilege belonging to the client,[4] not to the legal adviser. In order for the privilege to arise, the communications must be confidential, though the preservation of confidentiality does not, in itself, justify the existence of the privilege.[5] Rather, its underlying rationale is that:

> in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; . . . the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; . . . [I]n order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and . . . unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent.[6]

It is possible to identify statutory formulations of legal advice privilege for specific purposes.[7] Statute may abrogate the privilege expressly or by necessary implication[8] and has extended similar protections to clients of specified types of non-lawyer legal services provider.[9] Even so, the privilege remains a creature of the common law.[10]

This article makes an original and distinctive contribution to discourse in this area through offering novel perspectives on and solutions to the question whether this common law privilege (developed in an age when lawyers and clients communicated either orally or via documents written using quill or dip pen and ink) can and should attach to communications between a client and a robot.

In answering this question, the following areas are investigated. First, whether the rationale underlying the existence of legal advice privilege encompasses communications between clients and robots. Secondly, whether legal advice privilege at common law may be applicable to such communications. Thirdly, whether robots may be capable of giving advice that qualifies as legal advice for the purposes of legal advice privilege. Fourthly, whether a robot is capable of being a legal adviser for the purposes of

1. For what appears to be the earliest example of the use of the expression 'legal advice privilege' by the English courts see *Re Highgrade Traders Ltd* [1984] BCLC 15 *per* Oliver LJ, para. 164.
2. See Lord Taylor of Gosforth CJ in *R* v *Derby Magistrates' Court, Ex parte B* [1996] AC 487 at 504–506.
3. *R (Prudential plc and another)* v *Special Commissioner of Income Tax* [2013] UKSC 1 *per* Lord Neuberger of Abbotsbury PSC, para. 19.
4. See, for example, Lord Neuberger of Abbotsbury in *R (Prudential plc and another)*, above n. 3 at para. 22.
5. *Three Rivers District Council and others* v *Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 *per* Lord Scott of Foscote, para. 24.
6. *Three Rivers District Council and others*, above n. 5 *per* Lord Scott of Foscote, para. 34.
7. See, for example, Police and Criminal Evidence Act 1984, s. 10(1)(a).
8. See *Regina (Morgan Grenfell & Co Ltd)* v *Special Commissioner of Income Tax and Another* [2003] 1 AC 563.
9. See, for example, s. 190 of the Legal Services Act 2007.
10. *R (Prudential plc and another)*, above n. 3 *per* Lord Neuberger of Abbotsbury PSC at para. 23.

legal advice privilege. Fifthly, if legal advice privilege is not applicable to robot/client communications, whether statutory intervention extending the privilege to such communications would be desirable. Finally, if legal advice privilege cannot attach to communications between a client and an unsupervised robot providing legal advice, what are the consequences for legal advice privilege where robots are deployed by human legal advisers in circumstances in which the level of human lawyer supervision and/ or understanding of the relevant algorithms is minimal? Answering this latter question also involves consideration of the adequacy of relevant professional conduct rules. Underpinning our consideration of these questions is analysis of the approach adopted by the Supreme Court in *R (Prudential plc and another)* v *Special Commissioner of Income Tax*[11] when considering whether communications between accountants and their clients for the purposes of giving or obtaining legal advice were privileged. We regard consideration of the analogy between accountants and robots providing legal advice as being of significant relevance as a predictor of the likely response of the Supreme Court to an assertion that the privilege should attach to robot/client communications.

For the purposes of this article, the term ‘robot’ is used in two different senses. First, to describe software enabling a client to give instructions and receive legal advice based on those instructions without the intervention of a human lawyer. Instructions could for example be given and advice received through a question and answer decision tree type mechanism.[12] Secondly, to describe the situation where a client gives instructions and receives legal advice based on those instructions from a human lawyer who has made use of software in formulating that advice, for example increasingly sophisticated natural language processing self-learning software.[13]

This article is written based upon the assumption that we will reach a time in which robots will be able to provide increasing varieties of legal advice to clients without engagement with (or with no more than nominal supervision by) a human legal adviser. Marcus (2009: 273–281) speculates on the challenges to be overcome for the computer to become lawyer; for example, whether legal reasoning and analysis, particularly at the most creative end of the spectrum, is beyond replication by computer. However, as Marcus suggests, ‘most lawyers spend most of their time doing legal analysis that is more the “fill the blanks” variety. That sort of activity might be done with some frequency by a computer’ (Marcus 2009: 275). It is accepted that as the human legal adviser/robot relationship evolves, the giving of legal advice (and the nature of legal advice) may encompass a developing spectrum of possibilities with variable forms and levels of robot/human interaction and the article seeks to take account of this. In addition to the types of software mentioned in the preceding paragraph, areas currently identified in relation to which robots are predicted to play an ever-increasing role in the provision of legal services include, ‘discovery, legal search, generation of documents, creation of briefs and memoranda, and predictive analytics’ (McGinnis & Pearce, 2014: 3065).

Does the rationale underlying the existence of legal advice privilege encompass communications with robots providing legal advice?

At one time it was believed that the rationale underlying the existence of legal advice privilege ‘was that a lawyer ought not, in honour, to be required to disclose what he had been told in confidence’.[14] If this was still regarded as the justification for legal advice privilege it could be argued that the position of human legal adviser and robots so far as legal advice privilege was concerned could be distinguished on the basis that, unlike that of a human legal adviser, the ‘honour’ of a robot cannot be impugned. Oxford Dictionaries defines ‘honour’ as ‘the quality of knowing and doing what is morally right’.[15] If the

11. [2013] UKSC 1.
12. See for example donotpay.com, www.donotpay.com/parking/.
13. See for example Ross Intelligence, www.ibm.com/blogs/watson/2016/01/ross-and-watson-tackle-the-law/.
14. See Lord Taylor of Gosforth CJ in *R* v *Derby Magistrates’ Court, Ex parte B*, above n. 2 at 504.
15. https://en.oxforddictionaries.com/definition/honour.

existence of legal advice privilege was still justified in terms of impugning honour, whether this is a concept that is or potentially could be applicable to a robot might have provoked an interesting debate. A similar debate, relating to ethical awareness, is encountered below when considering whether a robot is capable of being a legal adviser.

As was seen above, the existence of legal advice privilege is now justified upon the basis that 'the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest'.[16] The argument that revealing confidential communications would amount to 'a breach of honour, and [a] great indiscretion' on the part of a human legal adviser was defeated long ago on the basis that there is no such indiscretion when disclosure is required by law (i.e. by an order of the court).[17] Thus, it has long been clear that the privilege is a right belonging to the client, not to the legal adviser, the client being entitled to claim or to waive it.[18] As the rationale for legal advice privilege is that it is in the public interest to enable clients to arrange their affairs in an orderly way, this objective would seem to be satisfied whether legal advice was given by a lawyer, by a non-lawyer human professional with appropriate expertise (such as an accountant) or by a robot. In *R (Prudential plc and another)* v *Special Commissioner of Income Tax*, the Supreme Court considered whether documents were covered by legal advice privilege when the legal advice in them was given by accountants rather than lawyers.[19] The majority decided that at common law the privilege did not attach to legal advice given by professionals other than lawyers, any extension of privilege to non-lawyers requiring statutory intervention. However, when considering whether the rationale for legal advice privilege could encompass communications with robots, Lord Sumption's dissenting judgment in *Prudential* is of particular interest. He held that legal advice given by accountants should be privileged because:

> [o]nce it is appreciated (i) that legal advice privilege is the client's privilege, (ii) that it depends on the public interest in promoting his access to legal advice on the basis of absolute confidence, and (iii) that it is not dependent on the status of the adviser, it must follow that there can be no principled reason for distinguishing between the advice of solicitors and barristers on the one hand and accountants on the other.[20]

A justification put forward for restricting legal advice privilege to legal advice given by lawyers was that accountants did not currently have non-disclosure obligations under professional rules that equated to those applying to lawyers. Lord Sumption rejected this argument.[21] In his view, if legal advice privilege attached to communications with accountants then the law of privilege would impose such duties upon them. In the same way it could be argued that if the law of privilege applied to communications between robot and client, legal services providers would be obliged to ensure that the programming of such robots took account of the non-disclosure requirements imposed by legal advice privilege. For a number of reasons, Lord Sumption also rejected the argument that lawyers 'have a unique relationship with the courts'. Whether a claim is made by a lawyer or by an accountant, the court can equally examine the legal and factual basis of a privilege claim. Privilege can attach to communications with foreign lawyers, or in circumstances in which the client erroneously believes the person providing advice is a lawyer, yet the English courts have no interest in or authority over the training or discipline of such persons. The privilege developed during a period when the professional standards of lawyers were

16. *Three Rivers District Council and others*, above n. 5 at *per* Lord Scott of Foscote, para. 34.
17. *Duchess of Kingston's Case* [1775–1802] All ER Rep 623 *per* Lord Mansfield CJ at 625–626. The case concerned the position of a surgeon who was compelled to give evidence but was regarded by Lord Taylor of Gosforth CJ in *R* v *Derby Magistrates' Court, Ex parte B*, above n. 2 at 504 as the case that disposed of the honour based rationale for the existence of the privilege.
18. See Lord Taylor of Gosforth CJ in *R* v *Derby Magistrates' Court, Ex parte B*, above n. 2 at 504 and Baroness Hale of Richmond in *Three Rivers District Council and others*, above n. 5 at para. 61.
19. *R (Prudential plc and another)*, above n. 3 *per* Lord Neuberger at para. 1.
20. *R (Prudential plc and another)*, above n. 3. *per* Lord Sumption at para. 122.
21. *R (Prudential plc and another)*, above n. 3. *per* Lord Sumption at paras 124–125.

very low with little or no supervision of their practices by the courts.[22] Again, these arguments would seem to be equally applicable when one is considering whether the rationale underlying the existence of legal advice privilege is to communications between a client and a robot.

The obvious difficulty in deploying Lord Sumption's judgment in *Prudential* in support of the proposition that legal advice privilege could potentially attach to legal advice provided by a robot is that it was a dissenting judgment. The majority of the Supreme Court decided that the privilege did not attach to legal advice given by professionals other than lawyers. However, four of the six Supreme Court judges in *Prudential* did accept that, logically, the rationale underlying legal advice privilege was applicable to confidential legal advice given by professionals other than lawyers. For example, Lord Neuberger accepted that:

> LAP is based on the need to ensure that a person can seek and obtain legal advice with candour and full disclosure, secure in the knowledge that the communications involved can never be used against that person. And LAP is conferred for the benefit of the client, and may only be waived by the client; it does not serve to protect the legal profession. In light of this, it is hard to see why, as a matter of pure logic, that privilege should be restricted to communications with legal advisers who happen to be qualified lawyers, as opposed to communications with other professional people with a qualification or experience which enables them to give expert legal advice in a particular field.[23]

It is therefore arguable that if their Lordships in *Prudential* could have been persuaded that a robot had 'experience which [enabled it] to give expert legal advice', they might have been persuaded that, as a matter of logic, communications between it and a client were capable of falling within the rationale for legal advice privilege. Marcus (2009: 294) points out that it can be argued that privilege should apply 'to encourage customers to be candid in making entries on TurboTax type programs designed to provide legal advice'. But, as is demonstrated immediately below, this does not mean that the majority in the Supreme Court would have regarded such communications as privileged.

Might legal advice privilege at common law be applicable to communications with robots providing legal advice?

The majority in *Prudential* held that a decision to extend the ambit of legal advice privilege to encompass legal advice given by non-legal professionals was a matter for Parliament. The issue was regarded as one of policy which was best left to Parliament and Parliament had already chosen to legislate in the area of legal advice privilege, for example, by extending privilege to other professions.[24] In addition, there was a risk of uncertainty regarding which professions would be encompassed by legal advice privilege had the appeal been allowed.[25] So, legal advice privilege can only be applicable to communications between a client and a robot provided that this does not amount to an extension to the common law privilege which, following *Prudential*, would require statutory intervention. In other words, the circumstances must be such that a robot could properly be regarded as a legal adviser at common law. This seems to be so even though Lord Sumption (using words that on their face would appear to be as applicable to developments in legal technology as to accountants) suggested that courts should be wary

22. *R (Prudential plc and another)*, above n. 3. *per* Lord Sumption at paras 124 and 126.
23. *R (Prudential plc and another)*, above n. 3. at para. 39.
24. Such as Patent Agents, under s. 280 of the Copyright, Designs and Patents Act 1988.
25. See Lord Neuberger in *R (Prudential plc and another)*, above n. 3 at paras 47–72. In relation to the validity of the latter justification, Lord Walker of Gestingthorpe has pointed out, with reference to *Prudential*, that '[b]oth parliamentary activity and parliamentary inactivity have been relied on from time to time as a reason for restraint in judicial development of the common law' ('How far should judges develop the common law' (2014) 3(1) CJICL 124 at 130).

of leaving matters to Parliament where decisions can be made at common law which reflect Parliament's intentions in the light of modern developments.[26]

In order to determine whether communications with a robot may fall within legal advice privilege (i.e. whether the common law privilege is applicable to such communications) it is necessary to consider two matters. First, whether robots are capable of giving legal advice for the purposes of the common law privilege. Secondly, even if they are so capable, whether it is feasible that robots might be admitted to the legal professions, membership of which, the decision of the House of Lords in *Prudential* made clear, is a necessary requirement for privilege to attach.

Can a robot give advice that qualifies as legal advice for the purposes of legal advice privilege?

Communications between robot and client would only be privileged if they comprised the giving or receiving of legal advice. So, what constitutes 'legal advice' in this context and is a robot capable of giving it? The nature of legal advice for the purposes of legal advice privilege was considered by the House of Lords in *Three Rivers District Council and others* v *Governor and Company of the Bank of England (No 6) (Three Rivers).*[27] The case essentially required the court to determine what sort of communications between client and lawyer are protected by legal advice privilege and whether this might include what was described as 'presentational advice'. In *Three Rivers*, the parameters of legal advice privilege are quite widely drawn. Referring to judgments from *Balabel* v *Air India*,[28] their Lordships considered that legal advice is not limited to 'telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context'.[29] As there must be a relevant legal context, legal advice privilege does not apply to all solicitor/client communications whatever their nature. For example, where a lawyer advises a client about business or financial matters, a relevant legal context may be lacking with the result that legal adviser/client communications will not be privileged.[30] There will be situations where it is difficult to determine whether or not the advice has a relevant legal context. In *Three Rivers*, Lord Scott suggested that the question to ask was 'whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law'.[31] If it did not so relate, then the communications would not be privileged, but if it did, then a secondary question was whether the communication had taken place in circumstances which came within the policy justification for privilege. [32] Baroness Hale referred to the relevant legal context as being '... one in which it is reasonable for a client to consult the special professional knowledge and skills of a lawyer, so that the lawyer will be able to give the client sound advice as to what he should do [or] not do, and how to do it ... '.[33] Lord Carswell expressed the view that 'all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged ... provided that they are directly related to the performance by the solicitor of his professional duty as a legal adviser of his client.'[34]

Considering the meaning of legal advice suggested in *Three Rivers*, the question that arises is whether the product of an automated process can come within these parameters and constitute legal advice for the purposes of legal advice privilege. Currently, automated legal services are delivered in a variety of ways.

26. *R (Prudential plc and another)*, above n. 3 at para. 134.
27. [2005] 1 AC 610.
28. [1988] 1 Ch 317.
29. *Three Rivers District Council and Others*, above n. 5 at paras 38, 62, 111.
30. *Three Rivers District Council and Others*, above n. 5 at para. 38.
31. *Three Rivers District Council and Others*, above n. 5 at para. 38.
32. *Three Rivers District Council and Others*, above n. 5 at para. 38.
33. *Three Rivers District Council and Others*, above n. 5 at para. 62.
34. *Three Rivers District Council and Others*, above n. 5 at para. 111.

At one end of the spectrum is the no-cost, decision tree type automated offer, that uses a fixed menu of options and directs the user to a relevant form or process they can then use to try and resolve their legal problem.[35] At the more sophisticated end of the spectrum, there are the increasingly complex systems that can process huge amounts of data to respond to questions phrased in natural language.[36] In between, there are hybrid offers, combining some purely online document creation services with access (at a cost) to a network of lawyers giving advice online.[37]

Does the way in which automated technological processes work preclude them from giving what is regarded as legal advice for the purposes of privilege? For example, the IBM Watson type model relies on brute force processing to analyse data using word association and then calculate the probability of an answer being accurate (The Law Society of New South Wales, 2017: 42). At the lower end of the spectrum in terms of complexity is the decision tree style process. Considering the judgments in *Three Rivers*, the key component of legal advice is the existence of a relevant legal context. Essentially, the communications must relate to private or public law rights, liabilities, obligations or remedies and must have been made in circumstances in which it was reasonable to seek the 'special professional knowledge and skills of a lawyer', the communications being directly related to the performance of the lawyer's 'professional duty as a legal adviser'. If the output of the automated process enabled the client to regulate their affairs in accordance with the law, then the underlying policy justification for legal advice privilege would be met. This could be the case with both a decision tree limited options process and a more sophisticated natural language model, provided that the circumstances were such that it would be reasonable to consult a lawyer's special knowledge and skills and the communications between the client and the robot were such as would fall within the ambit of performance of the duties of a legal adviser.

As is true of a human legal adviser, the fact that a robot does not explicitly provide legal advice to the client would not mean that the interaction between it and the client in a relevant legal context would not implicitly amount to the provision of legal advice for the purposes of legal advice privilege. For example, in a conveyancing process, presenting the client with a contract to sign amounts to implicit legal advice that the contract is correctly drafted and complies with instructions.[38] The position would appear to be the same where a robot, upon the basis of information provided by the client, drafts a document for the client to sign.

Whether the automated software can perform a solicitor's 'professional duty' or possesses the professional skills of a lawyer is unclear. Professional duty in this context may mean duty to the client in accordance with relevant professional body codes of conduct or simply encompass the work that a solicitor normally carries out in a professional capacity. What is meant by the professional skills of a lawyer could simply encompass the skills required to perform the work that a solicitor normally carries out rather than relate to, for example, the specific skills required in order to qualify as a solicitor. Software could be programmed to comply with codes of conduct and, arguably, skills relevant to a particular area of practice are already demonstrated by legal advice software in order to adequately perform and advise on that area.

The parameters of legal advice for the purposes of legal advice privilege are not framed by human reasoning, analysis and application. They are framed by context and underlying rationale. It should therefore be possible for automated legal advice software to give what constitutes legal advice for the purposes of legal advice privilege. The problem is that whilst the context in which advice is sought may be a relevant legal one, and the advice itself may qualify as legal advice, if the advice is sought from a robot it, like advice sought from an accountant, will not be privileged unless the robot is a lawyer.

35. donotpay is an example of this type of offer: https://www.donotpay.com/parking/.
36. ROSS Intelligence developed software to aid legal research, built on IBM's Watson: https://www.ibm.com/blogs/watson/2016/01/ross-and-watson-tackle-the-law/.
37. For example RocketLawyer, https://rocketlawyer.co.uk.
38. In *C* v *C* [2006] EWHC 336 (Fam), para. 32.

Can a robot be a legal adviser for the purposes of legal advice privilege?

Is it conceivable that their Lordships in *Prudential* might have been persuaded that there were circumstances in which a robot could properly have been classified as a legal adviser at common law and (unlike an accountant) fall within the ambit of the common law privilege without the need for statutory intervention? Lord Neuberger suggested that legal advice privilege 'only applies to communications in connection with advice given by members of the legal profession, which, in modern English and Welsh terms, includes members of the Bar, The Law Society, and the Chartered Institute of Legal Executives . . . (and, by extension, foreign lawyers)'.[39]

For a robot to be classified as a legal adviser would require professional bodies to open their membership to robots of the relevant type. As The Law Society has recognised, the debate about replacing human lawyers with artificial intelligence gives rise to 'questions about what the core values of the legal profession are and what they should or could be in the future' (The Law Society of England and Wales, 2018: 13). But is it likely that a robot would ever be able to emulate the essential attributes of a practising lawyer such that it could potentially satisfy all of the prerequisites to qualification as a solicitor, barrister or legal executive? For example, qualification as a solicitor currently involves meeting the 'day one outcomes' through completion of prescribed academic and vocational training, including a period of work based learning.[40] Even if it were possible for a robot to evidence completion of the required elements of assessment and training, it seems unlikely that a robot could demonstrate all the day one outcomes. Although a robot may arguably be able to demonstrate knowledge, analytical and practical skills such as drafting, the day one outcomes include, for example, the ability to recognise personal and professional strengths and weaknesses, to develop strategies to enhance professional performance and to work effectively as a team member. In addition, the ability to behave professionally and with integrity and to identify issues of culture, disability and diversity are required. It seems unlikely that a robot could effectively participate in the elements of training designed to meet these outcomes or indeed demonstrate these attributes. It may, within the foreseeable future, be impossible to design a robot that could meet all of the relevant prescribed characteristics to qualify as a lawyer. Remus and Levy make the point that the complexity of some legal tasks, such as human interaction where skills of emotional intelligence are involved, is such that they are unlikely to be reduced successfully to a set of coded instructions:

> Unscripted human interaction falls into this category because it often depends on formulating responses to unanticipated questions and statements. This, in turn, requires recognizing the broader context in which words are being used-not only the surrounding words . . . but the identity and motivation of the speaker and the purpose of the communication. (Remus and Levy, 2017:512)

Even if it were possible to classify a robot as a legal adviser such that it could be admitted to the Roll of Solicitors or called to the Bar, this would then create significant challenges in terms both of reforming relevant professional bodies' codes of practice, and in the programming of technology to interpret, apply and abide by such codes. Indeed, this last attribute is crucial if a robot is to be admitted to the legal profession. For example robots would need to possess the ability to refuse to act where ethical rules (or relevant statutory provisions, such as anti-money laundering) would be contravened. Consequently, '[i]t may be necessary to develop AI systems that disobey human orders, subject to some higher-order

39. *R (Prudential plc and another)*, above n. 3 at para. 29.

40. https://www.sra.org.uk/documents/SRA/news/229.pdf. From 2021, qualification as a solicitor will require the candidate to: pass two stages of the new Solicitors Qualifying Examination (the first concerning legal knowledge, the second practical legal skills; have a degree or equivalent qualification; pass character and suitability requirements and have substantial work experience. https://www.sra.org.uk/home/hot-topics/Solicitors-Qualifying-Examination.page.

principles of safety and protection of life' (The Law Society of England and Wales, 2018: 13).[41] With regard to professional body codes of practice, the Solicitors Regulation Authority (SRA) proposed changes under which regulated solicitors could operate in unregulated firms, which recognised that legal advice privilege may not attach to such communications (Solicitors Regulation Authority, 2017: paras 63–64).[42] The reason appears to be that the retainer would be with the unregulated firm rather than with the regulated solicitor (The Law Society, 2016:36). Presumably the same problem would arise if a robot was admitted as a solicitor but was deployed by an entity other than a regulated law firm.

In considering whether a robot could potentially be a member of one of the legal professions, another issue that would require resolution under the current state of the law is whether a robot is capable of being a 'person'. A similar problem was encountered when women first applied to be solicitors, even though women, unlike robots, have clearly always been persons within the normal usage of that term and undoubtedly possess the same professional attributes as their masculine counterparts. In 1919, the Court of Appeal held that a woman could not be admitted as a solicitor. Section 2 of the Solicitors Act 1843 referred to a 'person [being] admitted and enrolled and otherwise duly qualified as an Attorney or Solicitor, pursuant to the Directions and Regulations of this Act.' Section 48 provided that 'every word importing the Masculine Gender only shall extend and be applied to a Female as well as Male . . . unless . . . there by something in the Subject or Context, repugnant to such Construction'. The Court of Appeal held that, 'the Act of 1843 confers no fresh and independent right, because it does not destroy a pre-existing disability'.[43] The position was rectified by The Sex Disqualification (Removal) Act 1919, which provides that

> A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society (whether incorporated by Royal Charter or otherwise), . . .

So far as the potential for a robot to become a solicitor in the 21st century is concerned, s. 1 of the Solicitors Act 1974 provides that

> No person shall be qualified to act as a solicitor unless— (a) he has been admitted as a solicitor, and (b) his name is on the roll, and (c) he has in force a certificate issued by the Society in accordance with the provisions of this Part authorising him to practise as a solicitor (in this Act referred to as a 'practising certificate')

It seems that a new statutory provision conferring personhood upon robots would be required in order for a robot to fall within the ambit of s. 1 of the 1974 Act. An alternative approach would be a statute which perhaps for specific areas of legal practice gave certain types of robot the status of a person.

The Law Society recently posed the question, 'Far enough into the future, will AI/robots be sufficiently advanced to deserve "personhood"?' and suggested that 'the Common Law approach allows judges to evolve the law and, for some, it is an overreach to call for new laws when existing ones can be applied in, or transitioned to, new contexts' (The Law Society of England and Wales, 2018: 14). In view of the reluctance of the Supreme Court to extend the ambit of legal advice privilege, it is suggested that this is an area where legislation would be required if robots were to be treated as persons.

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41. Referring to Briggs and Scheutz (2017).
42. The SRA regarded the issue of whether legal advice privilege was applicable in such circumstances as one for the courts or Parliament.
43. *Bebb* v *Law Society* [1914] 1 Ch 286 *per* Cozens-Hardy MR at 292.

Is it desirable to extend legal advice privilege by statute to encompass legal advice provided by a robot?

Upon the assumption that, for the foreseeable future, it will not be possible for robots to qualify as members of one of the legal professions (thus preventing legal professional privilege at common law from encompassing legal advice provided by robots), the next question is whether statute should extend legal professional privilege to such advice. It is suggested that there are two reasons why such legislation might not be desirable. First, in a rapidly evolving environment of automated legal and other professional services, it would be extremely difficult to draft a provision which provided an adequate degree of certainty concerning which form of automated service benefitted from the protection of legal advice privilege. This equates with a point made by Lord Neuberger in *Prudential* when declining to extend the ambit of the privilege at common law to accountants. In his dissenting judgment, Lord Sumption distinguished between persons 'whose profession ordinarily includes the giving of legal advice' and 'other advisory professions whose practitioners although not lawyers require some knowledge of law'.[44] Lord Neuberger regarded this distinction as 'carry[ing] with it an unacceptable risk of uncertainty and loss of clarity in a sensitive area of law'.[45] He believed that requiring the courts to draw this distinction would require them 'to delve into the qualifications or standing, and maybe into the rules and disciplinary procedures, of a particular group of people to decide whether the group constitutes a profession for the purpose of LAP'.[46] Similarly, he pondered whether the issue of whether a profession ordinarily included the giving of legal advice '[s]hould.be judged by reference to the profession generally, a particular branch of the profession or the practice of the particular member of the profession . . . ' and 'suspect[ed] that much of the advice given by most members of those professions could not infrequently be characterised as "legal" in nature by some people but not by others'.[47] The difficulties identified by Lord Neuberger would equally be encountered by: Parliament in attempting to draft a provision extending legal professional privilege to robots; providers of automated services in attempting to determine whether the relevant statutory provision applied to some of the services that they provided; and potentially the courts when required to determine whether communications with an automated service fell within the ambit of the statutory provision. It is suggested that in order to provide certainty, statute would be required to legislate in terms of specific forms of automated advice (as it has done in the past when extending the ambit of legal professional privilege to specific professions such as patent attorneys, trade mark attorneys and licensed conveyancers)[48] but that an attempt to legislate by adopting a more general formulation, such as that which Lord Sumption's approach to human advisers might suggest, would result in significant uncertainty. In the ever-changing environment referred to above, even that would be problematic, as technological change potentially outpaces legislative definition.

The second reason why legislation to confer legal advice privilege upon legal advice provided by robots might not be desirable concerns the relationship between the rationale for legal advice privilege and the ability of consumers to instruct specialist, cheap or free forms of legal advice. Some clients may not know of or care about the existence of legal advice privilege or may be prepared to forego it in order to obtain the service they want at the price they prefer. As Lord Scott observed in *Three Rivers*,[49] in 'many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure'.[50]

44. *R (Prudential plc and another)*, above n. 3 at para. 137.
45. *R (Prudential plc and another)*, above n. 3 at para. 54.
46. *R (Prudential plc and another)*, above n. 3 at para. 56.
47. *R (Prudential plc and another)*, above n. 3 at para. 57.
48. See, respectively: Copyright, Designs and Patents Act 1988, s. 280; Trade Marks Act 1994, s. 87; Administration of Justice Act 1985, s. 33.
49. *Three Rivers District Council and Others*, above n. 5.
50. *Three Rivers District Council and Others*, above n. 5 at para. 34.

Some consumers already choose to consult other professionals for legal advice, such as accountants providing fiscal legal advice, even though their communications are not protected by privilege. Moreover, as was indicated above, recent reform proposals by the SRA, approved by the Legal Services Board (LSB),[51] will authorise solicitors to work in unregulated firms even though the SRA appears to accept that whether or not legal advice privilege will arise in relation to communications with such a person is uncertain (Solicitors Regulation Authority, 2017: 62–66). The SRA does not intend 'to provide a commercial advantage to any type of firm' and believes that 'regulated firms employing solicitors will continue to provide a strong "brand"; the difference is the ability to provide the full range of legal services (including reserved activities), the availability of legal professional privilege (LPP), and a range of consumer protections that are unrivalled by any other profession, either in the UK or internationally' (Solicitors Regulation Authority, 2017: 59). Thus, the SRA and, by approving its proposals, the LSB, both seem to accept that consumers are entitled to choose to instruct legal service providers even though it is uncertain whether legal advice privilege will attach to communications with those providers. Legislating to extend legal advice privilege to encompass communications with robots providing legal advice would go against the trend of supporting increased consumer choice in the provision of legal services and would not reflect the reality that markets commonly include a variety of product at different pricing levels that possess different attributes. For this reason, legislative change to this effect does not appear to be desirable and the drafting issues referred to above would seem to suggest that it is not practicable.

Upon the assumption that legislation to extend legal advice privilege to robots providing legal advice is not desirable, it could be argued that a proportionate response to the provision of legal services by robots would be to impose a requirement for a clear health warning concerning the absence of legal advice privilege. This would enable the consumer to make an informed choice whether to obtain traditional legal services or whether, at reduced cost, to use a robot even though privilege would not be applicable. In England and Wales, not all areas of legal practice are reserved to lawyers. A commercial undertaking may currently offer legal services in unreserved areas in a number of ways: through an unregulated human adviser or entirely via automated software. For example, accountants regularly give tax advice which, if given by a lawyer, would be privileged. In either case, as a lawyer is not involved in giving advice then privilege will not arise. However, in the former case there is still contact between non-legal adviser and client and the opportunity for a client to ask or the adviser to explain that legal advice privilege is not available. (This does not guarantee, of course, that such a question will be asked and/or that such guidance will be provided.) Where an entirely automated process is used to give advice, legal advice privilege will not be available and a consumer using this type of service may well have no idea that this is the case.

Whether a client makes use of a human non-legal adviser or an automated system, it may be that, as has already been suggested, for the expertise that the non-legal human adviser (e.g. an accountant) can provide or the convenience and benefit that a low-cost online advice service can offer, the consumer is happy to trade off having the protection of legal advice privilege. Sheppard points out that both LegalZoom and Rocket Lawyer include disclaimers on their websites advising customers that communications are not protected by attorney-client privilege. He suggests that 'At this price point, there appears to be consumer demand for the product. LegalZoom claims to have had over three million customers. Rocket Lawyer, another online legal documents creator, claims to have created over three million documents for customers . . . ' (Sheppard, 2015: 1840). This means that clients using such services, for example to assist when forming a business or drafting an employment agreement, would not be able to rely on legal advice privilege. Provided that they have both read the disclaimers and have understood what it is that they are giving up, they have made an informed choice. It may be that in the context of

51. https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2018/20181106_LSB_Approves_SRAs_Looking_To_The_Future_Rule_Change_Application.html.

communications with a robot for such purposes there will often be little disadvantage to the client in not being able to claim the privilege, given the limited nature of the communications that are likely to take place in the context of the current level of sophistication of such robots.

A counter-argument to the imposition of a mandatory warning requirement where robots give unprivileged legal advice is that no such requirement is currently imposed upon human non-legal advisers, such as accountants, when they give legal advice. Indeed, in relation to its proposals concerning solicitors in unregulated firms, the SRA has suggested that:

> [i]t is down to the individual solicitor to make it clear to their clients what level of protection that client has and where such protections would be appropriate and/or relevant. In most circumstances this will not be an issue, but there may be occasions when a solicitor working in a non LSA regulated firm should advise their client on the benefits of privilege. This may include advising them of the option to seek advice from a solicitor in a regulated firm in order to make sure that this attracts privilege. (Solicitors Regulation Authority, 2017: 66)

This does not suggest that the SRA believe that the giving of such a warning by a solicitor in an unregulated form should be mandatory.

There is currently no mandatory warning where legal advice is given by a human non-legal adviser. It seems that such a warning will not be required when, in future, such advice is given by solicitors in unregulated firms. It would seem anomalous to require such a warning where legal advice was given by a robot. One argument might be that such a mandatory warning requirement should be imposed both on robots and on humans. Yet accountants, for example, would undoubtedly regard it as wholly unfair were they required to add to the illogical commercial disadvantage of legal advice privilege not attaching to communications with their clients, made for the purposes of giving or obtaining legal advice, a requirement that they were required to spell this out. Indeed, in areas where the non-existence of privilege might be little or no disadvantage to the client, could the imposition of such a health warning potentially chase clients away from specialist, efficient, low-cost or free services, either towards more expensive services that provide them with no tangible advantage or even discourage them from using any service, which would act contrary to the rationale underlying the existence of the privilege? If the existence of a specialist, cheap or free automated system results in clients utilising the system to arrange their affairs in accordance with the law, then the rationale underlying the existence of the privilege is achieved by another means. Moreover, an attempt to legislate to impose mandatory health warnings would give rise to the same problems of legislative drafting etc that were identified above, i.e. the issue of how to define the forms of automated legal services (or indeed human service providers) to which such a warning requirement would apply. Consequently, the imposition of such a mandatory health warning requirement does not appear to be desirable or practicable.

What are the consequences for legal advice privilege where robots are deployed by human legal advisers in circumstances in which the level of human lawyer supervision is minimal?

Upon the assumption that robots will not be admitted to membership of one of the legal professions in the foreseeable future, does the use of a robot by a law firm to deliver legal services have the potential to defeat a claim of privilege in circumstances in which the level of human supervision of the robot and/or understanding of how the robot performs its tasks is minimal? Clearly, lawyers regularly use databases such as Lexis or Westlaw as research tools and it seems unlikely that this, equating with the use of the traditional paper-based law library, has potential to negate the existence of legal advice privilege. Equally, paralegals and trainee solicitors, acting under the supervision of qualified solicitors, are frequently involved in the provision of legal services, and it has never been suggested that their

involvement provides a threat to the existence of legal professional privilege.[52] Conversely, legal advice privilege does not attach to communications where a human other than a legal adviser (e.g. an accountant) does not merely act as a conduit for communications between legal adviser and client but is required to bring material into existence.[53]

What would the position be if a robot, deployed by a law firm and supervised by a human lawyer, was so sophisticated that it was capable of receiving the client's instructions in their original form and of providing full legal advice based on those instructions without the intervention of a human legal adviser? If such a robot was merely used as a tool by a human legal adviser, who considered its recommendations and then made a decision relying on them, on any other relevant information and on the human legal adviser's own expertise, the position would seem to equate with the use by a lawyer of a sophisticated version of traditional legal databases. There would seem to be no reason why the use of the robot in this way would prevent legal advice privilege from arising. What, however, if legal advice produced by such a robot was merely rubber stamped by a human legal adviser through whose hand the instructions and the advice had passed? It may be that the legal adviser had little or no understanding of how the robot had reached its conclusions (and perhaps, if inexperienced, had little or no understanding of the instructions or the advice). This would appear to give rise to ethical/professional conduct issues and, we would assert, should also prevent legal advice privilege from attaching to communications with the robot.

In its report on The Future of Law and Innovation in the Profession, a Commission of Enquiry established by The Law Society of New South Wales posed the following questions:

> [w]here a lawyer provides a legal service that has been supported by technology . . . can [the duty to deliver legal services competently] be discharged if the lawyer does not have, at the very least, a basic understanding of how that technology works? . . . [T]o what extent should [the] lawyer be required to understand the workings of the algorithms and the integrity of the data used to produce the legal work? . . . [T]o what extent should [the] lawyer be required to understand the technologies used . . . to ensure data security? (The Law Society of New South Wales, 2017: 41)

These comments suggest that it is necessary to question the ability of lawyers to deliver legal services competently in circumstances in which they do not understand the technology that supports their work. They are clearly applicable to robot-generated legal advice where human intervention is low-level, limited and does not involve applying professional skill and judgment to assess the advice that has been given. The 'supervising' lawyer in this scenario has no knowledge of the workings of the software used to generate the advice, may not know what data sources have been accessed to do so, or indeed how secure these data sources are at any given time, and may have had little or no meaningful engagement with the client's instructions.

Is there a point at which advice provided by a robot under the nominal supervision of a human lawyer should not be regarded as being privileged at common law because, to paraphrase Lord Neuberger, it could not properly be said to be 'given by a member of the legal profession'?[54] Upon the assumption that the robot has not been admitted to one of the legal professions, we would assert that legal advice privilege should not attach in circumstances in which there is no effective supervision of its work by a member of the legal profession. The use of an identical robot by an accountancy firm would not attract privilege even if the accountant understood the workings of the robot and contributed their own skill and knowledge to the ultimate advice given. For privilege to attach in circumstances where there is no

52. For example, where a large team reviewing documents held by the Serious Fraud Office to check for relevance, public interest immunity, statutory disclosure prohibitions, legal professional privilege and third party rights 'included junior barristers, trainee solicitors, contract lawyers and paralegals' (see *Rawlinson and Hunter Trustees SA (as trustee of the Tchenguiz Family Trust) and another* v *Director of the Serious Fraud Office* [2014] EWCA Civ 1129, para. 3), it was not suggested either by the parties or by the court that this would threaten the existence of legal professional privilege.

53. See *Price Waterhouse (a firm)* v *BCCI Holdings (Luxembourg) SA* [1992] BCLC 583 at 588–589.

54. *R (Prudential plc and another)*, above n. 3 at para. 29.

effective supervision by a lawyer, merely because the robot is deployed by a law firm, would seem to provide law firms with a commercial advantage which the decision of the Supreme Court in *Prudential* does not appear to justify.

Potential objections to the existence of legal advice privilege based upon the lack of supervision of robots by lawyers could be countered by modification of the professional conduct code for solicitors so as to explicitly cover required minimum levels of supervision where technology is heavily used in a law firm to give almost entirely automated advice. A more difficult issue is how such rules should deal with the issue of lack of understanding of what the technology being supervised is actually doing and how it is doing it. As was suggested above, a point may presumably be reached at which such lack of understanding renders supervision by a lawyer purely nominal. This lack of understanding may also affect those who develop systems. For example 'networks are often "black boxes", in which the (decision making) processes taking place can no longer be understood and for which there are no explanatory mechanisms' (van den Hoven van Genderen, 2018: 50–51). Perhaps the rules should require that systems make clear to lawyers what they are doing, it having been suggested that 'where algorithms do not provide causal accounts, the ethics of decision-making become opaque' (Devins et al., 2017: 398). And/or, it may be that such requirements should relate to the provision of services by lawyers and IT service providers in a holistic manner, ensuring that the provision of technological legal services is safeguarded by an adequate combination of legal and IT expertise, working in conjunction. This could be in accordance with agreed methodologies that safeguard the competent delivery of legal services, including professional obligations related to legal professional privilege. Rob van den Hoven van Genderen (2018: 51) suggests that a mechanism which allows some degree of transparency regarding how artificial intelligence systems work could become a legal requirement.

In relation to the suggestion that conduct rules could be amended to deal with the impact of legal technology, two particular issues arise as regards the position of solicitors, by far the largest of the legal professions,[55] in England and Wales. First, the SRA intends to introduce distinct codes for solicitors and for firms,[56] so one issue would be which provisions should ideally be in which code. For example, it might be that provisions concerning the interaction between a legal service provider and its IT service providers should be in the code relating to firms, with requirements relating to the competence of solicitors in relation to IT being in both codes. The second issue presents the greater problem, however. It is that the SRA intends to take a shorter, sharper, less prescriptive approach to regulation (Solicitors Regulation Authority, 2018: 21, 23). In its consultation response to the SRA, The Law Society suggested that:

> [t]he codes are shorter and simpler and the overarching Principles have been reduced from 10 to 6, losing the principle 'provide a proper standard of service' amongst others. This is both a standards and client protection issue. Furthermore the language in the codes is so lacking in specificity that firms will spend more time trying to establish what will comprise compliance; there will also clearly be a wide margin of discretion for the regulator to decide what constitutes compliance (The Law Society, 2016: 22).

55. On July 31 2017 there were 139,624 solicitors with practising certificates in England and Wales. The Law Society, Annual Statistics Report 2017 https://www.lawsociety.org.uk/support-services/research-trends/annual-statistics-report-2017/. In contrast, there were 16,435 barristers in practice in England and Wales in 2017, Bar Standards Board, Practising Barrister Statistics https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/. The Chartered Institute of Legal Executives has approximately 20,000 members, of whom about 7,500 are qualified Chartered Legal Executive Lawyers Chartered Institute of Legal Executives, Facts, Figures, Statistics https://www.cilex.org.uk/media/interesting_facts/facts__figures.
56. The SRA's application for approval of changes relating to its Looking to the Future proposals was approved by the Legal Services Board on November 6th 2018 https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2018/20181106_LSB_Approves_SRAs_Looking_To_The_Future_Rule_Change_Application.html.

It seems unlikely that the SRA will contemplate more detailed provision in its codes of the type that we considered above. Conversely, in New South Wales, the Law Society Commission of Inquiry recommended that The Law Society establish a centre for legal innovation projects. It suggested that the centre should, inter alia, 'conduct and present research into the ethical and regulatory dimensions of innovation and technology, including solicitor duties of technological competence, in close collaboration with The Law Society's Professional Standards Department and Legal Technology Committee' (The Law Society of New South Wales, 2017: 43).

It could be argued that, so far as developing technology is concerned, the SRA's less prescriptive approach to regulation does make sense, given that 'increases in the power of computing are exponential rather than linear' (McGinnis and Pearce, 2014: 3046). Thus, requirements regulating the nature of the relationship between robots and human lawyers could easily be obsolete as soon as (or even before) they came into force. This could result in regulations concerning the operation of older technologies rapidly becoming ineffective as new technologies develop. Alternatively, the creation of such regulations could hinder the development and/or implementation of new technologies since 'unnecessary regulation [can] chill additional innovation' (American Bar Association, 2016:41). The likelihood is that the limits of legal advice privilege as it does or does not exist in the context of varying degrees of robot/human legal adviser interaction will need to be explored by the courts. It may be that regulatory body action will only be catalysed, if at all, if future judicial decisions make clear that developments in the technology underlying the provision of legal services by solicitors operating in regulated law firms threatens the existence of the privilege to the detriment of the public.

Conclusion

This article makes an original and distinctive contribution to discourse in this area through offering novel perspectives on and solutions to the previously unexplored question of whether common law legal advice privilege can and should attach to communications between a client and a robot. In answering this question, the following areas have been investigated.

First, whether the rationale underlying the existence of legal advice privilege encompasses communications between clients and robots. Applying the decision of the Supreme Court in *Prudential*, it is clear that the rationale underlying legal advice privilege is capable of applying to communications between a client and a robot giving legal advice. Allowing a client to arrange its affairs in accordance with relevant legal provisions is strongly in the public interest and, in this respect, complete candour is promoted by the ability to keep communications between client and legal adviser confidential. This rationale is equally applicable to legal advice given by a human non-legal professional or by a robot.

Secondly, whether legal advice privilege at common law may be applicable to communications between clients and robots. Again, by analogy with the decision in *Prudential*, which concerned the position of accountants, it seems to be clear that the courts would be unlikely to extend the privilege in this way and would regard such a decision as one for Parliament, unless it is possible for a robot to be classified at common law as a member of one of the legal professions and to give advice that qualifies as legal advice for the purposes of the privilege.

Thirdly, whether robots may be capable of giving advice that qualifies as legal advice for the purposes of legal advice privilege. The parameters of legal advice for the purposes of legal advice privilege are not framed by human reasoning, analysis and application. They are framed by context and underlying rationale. As concluded above, it seems clear that the rationale underlying legal advice privilege is capable of applying to communications between a client and a robot giving legal advice. In terms of relevant legal context, the judgments in *Three Rivers* and other authorities referred to therein suggest that this requires that the communications must relate to private or public law rights, liabilities, obligations or remedies and must have been made in circumstances in which it was reasonable to seek the 'special professional knowledge and skills of a lawyer', the communications being directly related to the performance of the lawyer's 'professional duty as a legal adviser'. No matter how unsophisticated the

software, the client is clearly consulting the automated system in the relevant legal context, for the purposes of receiving legal advice. If the output of the automated process enabled the client to regulate their affairs in accordance with the law, then the underlying policy justification for legal advice privilege would be met and the output could amount to legal advice even if it did not patently take the form of advice.

Fourthly, whether a robot is capable of being a legal adviser for the purposes of legal advice privilege. Extrapolating the judgement in *Prudential*, if a fully autonomous robot can be regarded as a qualified lawyer, then legal advice privilege could attach to communications between client and robot. It is also clear from *Prudential* that, despite recognising the irrationality of restricting legal advice privilege to advice from qualified lawyers, at common law the privilege will not be extended to cover communications with other professionals. So, if a fully automated robot cannot be regarded as a qualified lawyer, despite being programmed to give legal advice, then legal advice privilege will not attach to communications with the client. At present, legal technology does not appear to be capable of producing a robot that possesses the combination of knowledge, skills and ethical awareness that would enable it to qualify as a member of one of the legal professions. In addition, in order for a robot to qualify as a solicitor, statutory intervention would be required either to amend section 1 of the Solicitors Act 1974 to encompass machines as well as persons or to give robots the status of persons. Moreover, if robots were to be admitted to membership of a legal profession, this would presumably require amendment of relevant professional conduct rules.

Fifthly, we considered, if legal advice privilege is not applicable to communications between clients and robots, whether statutory intervention extending the privilege to such communications would be desirable. Prospective users of legal services may choose to instruct a non-lawyer for what is essentially legal advice in order to take advantage of specialist expertise with (or without) the knowledge that communications are not protected by legal advice privilege—for example, instructing an accountant for fiscal legal advice. Consumers using free or low-cost fully automated legal advice services are likewise making a choice, trading receiving a low or no-cost service against the protections that come with instructing a lawyer, including the benefit of legal advice privilege. Again, the choice may or may not be an informed choice. There seems to be no reason why consumers should not be entitled to choose to access free or cheap unprivileged automated legal advice. Moreover, attempting to draft statutory provisions identifying the types of automated advice to which privilege would attach would appear to give rise to issues of uncertainty similar to those that Lord Neuberger identified in *Prudential* when he indicated that if legal advice privilege was extended beyond lawyers there was a risk of uncertainty regarding which professions would be encompassed. Thus, attaching legal advice privilege to legal advice provided by robots is arguably unnecessary, potentially problematic and, unless statute also extended the privilege to human non-legal advisers, would put the latter at an unfair competitive disadvantage.

An alternative would be to require providers of automated legal services to make clear that their services are unprivileged. Whether this would result in consumers having a full understanding of the significance of this fact is unclear. The disclaimers on the relevant websites might not be read at all or, if they were read, might not be understood. Where a human non-legal professional is instructed to give legal advice, they may not even provide the client with information concerning the non-existence of legal advice privilege (the non-legal adviser may not even be aware of the issue). Requiring providers of automated legal advice to give such warnings would logically suggest that similar requirements should be imposed on human non-legal advisers who might well protest at being required to publicise what they could properly regard, post *Prudential*, as an unfair competitive advantage possessed by lawyers. Again, it could also result in significant uncertainty in identifying which types of automated or non-professional human advice should be classified as legal advice which falls within the ambit of such a warning requirement. It is suggested that whether legal advice privilege should attach to robots that give legal advice without human supervision and/or whether unprivileged services provided by robots should come with an appropriate health warning are both issues that, post *Prudential*, should be considered by

Parliament, if at all, in line with equivalent reforms directed at human non-legal professionals who give legal advice.

Finally, we considered the consequences for legal advice privilege of the use by a human legal adviser of a robot to provide legal advice in circumstances in which the level of supervision by a human legal adviser is at most nominal and where the understanding of relevant algorithms is minimal. Legal advice from a human legal adviser who, relying upon their professional skills and knowledge, utilises technological resources in formulating that advice, is and should be covered by legal advice privilege. This is currently the case where legal databases are used, for example to research the law and should continue to be the case where more sophisticated legal technology is utilised, provided that the lawyer is deploying their professional skill and judgment.

If, however, a robot that was not a member of the legal profession, received client instructions and formulated legal advice with no more than nominal supervision from a human legal adviser, we assert that communications should not be protected by legal advice privilege. In these circumstances the lawyer is not using his or her professional skill and judgment to give advice, but is simply a conduit through whom the advice flows from the robot to the client. To allow privilege to apply in these circumstances would be to give law firms an unfair competitive advantage over other professions using similar technology to give legal advice.

To counter suggestions of unfair competitive advantage in the above circumstances, relevant professional body codes of conduct could be amended to require minimum levels of supervision by a lawyer where technology is very heavily used by a law firm to give legal advice. Codes could also require prescribed levels of cognisance relating to how software works at a holistic level involving IT professional and lawyers so that the supervision that does take place is meaningful. The current trend towards less prescriptive regulation by the SRA makes such changes unlikely. Limited regulatory intervention is not necessarily a bad thing, both because in a rapidly evolving technological environment regulations might become obsolete virtually as soon as they are drafted and because overregulation might have the consequence of stifling desirable technological innovation. It remains for the courts to determine the extent to which variations in the level of robot/human lawyer interaction might threaten the existence of legal advice privilege, with detailed regulatory intervention being catalysed, if at all, depending upon the nature of such judicial determination.

The fundamental question must be whether at some time in the future we reach a point at which the bulk of legal service provision to individuals and corporations is by technology which provides a relatively cheap and reliable service in an environment that does not give rise to legal advice privilege. If and when that point is reached, it may become clear that the presence or absence of the privilege is not a key factor either when potential clients are determining whether to obtain legal advice or when they are determining what information to disclose to their legal advisers. Consequently, it may be that the rationale underlying the very existence of legal advice privilege is eroded to such an extent that the necessity for its continued existence comes into doubt.

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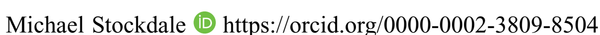
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Article (iii)

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Legal Advice Privilege in the Taxation Context: Disconnected Ethical Regimes for Lawyers and Tax Advisors in the United States and New Zealand

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; 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.[1]

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 advisors. For both tax lawyer and tax advisor, ethical issues emerge because claims that communications are covered by privilege have an ethical dimension to them. Judgments around whether communications are covered by the relevant privilege regime, the advisor's 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 advisors has been created. Comparative analysis between lawyers and non-lawyer tax advisors 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.

1.0 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 ***64** 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; 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 advisor 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.[2] 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, eg, "what should prudently and sensibly be done" in a particular legal context.[3] 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.[4]

Many common law jurisdictions, including the United States and New Zealand, have forms of legal professional privilege that 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[5] where "proceedings" are involved,[6] but preserves the common law rules relating to legal professional privilege where a proceeding is not involved.[7] Solicitor/client privilege in relation to the information-gathering powers of Inland Revenue has also been codified in the Tax Administration Act 1994.[8] 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.[9] 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 advisor 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 advisors. The question arises: how does the rationale of candour encouraging compliance sit with a tax advisor'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 advisor to the client and whether any duty at all is owed by the advisor to the tax system and to the relevant tax collection agency. Advising a client to claim that communications are privileged--for ***65** 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 judgements to be made about the nature of the advice given. 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 advisors.

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 an analysis of the different duties, and professional and regulatory regimes that influence ethical behaviour and apply to lawyers and non-lawyer tax practitioners. The article also concludes with proposals for optimal regulatory and professional regimes to encourage appropriate ethical behaviour.

2.0 LEGAL ADVICE PRIVILEGE IN THE TAXATION CONTEXT

2.1 United States

In the United States, confidential communications between lawyer and client that are made in order to give or obtain legal advice are protected from disclosure by the attorney--client privilege.[10] 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

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taxation issue.[11] It does not cover an activity such as the preparation of a tax return; this is regarded as something "other than lawyers' work".[12] It also does not cover purely business advice, although there are clearly difficult issues around the dividing line between legal and business advice.[13] 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".[14] 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.[15]

***66** Legislation has extended attorney--client privilege to communications relating to tax advice made between a federally authorised tax practitioner and their client.[16] 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 that 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.[17] 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.[18] This, arguably, does not provide a helpful clarification.

When enacted, the tax practitioner privilege was 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 the definition of 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.[19] 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.[20] Judicial interpretation of this definition has confirmed its intentional breadth and that individualised tax advice may fall within it.[21]

2.2 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.[22] However, in the context of taxation, and specifically in relation to the statutory information gathering powers of Inland Revenue, provisions in the Tax Administration Act 1994 (TAA 1994) incorporate what is effectively legal advice privilege into the statute and make these information-gathering powers subject to legal practitioner-- client privilege.[23] Confidential oral and written communications between legal practitioner and client for the purpose of obtaining or giving legal advice are privileged from disclosure in the TAA 1994, 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).[24] 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 Inland Revenue.[25]

Legislation has extended privilege to tax advisors in New Zealand, although the extension takes a very different form to that in the United States. Rather than bringing tax advisors within the existing legal ***67** practitioner--client privilege in the TAA 1994, instead, a more restricted form of privilege for tax advisors and their clients was created in the legislation.[26] 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.[27] It can be created by either the client or the tax advisor. What type of document comes within this definition is clarified to an extent in guidance

issued by Inland Revenue.[28] 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.[29]

The tax advisors' 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 of the TAA 1994 where illegal or wrongful acts are concerned.[30] There is no tax shelter-style exception akin to that found in the United States, but the legislation does allow Inland Revenue to require the disclosure of tax-contextual information, even where the non-disclosure right has been asserted in relation to a tax advice document.[31] Tax-contextual information is likely to be required where Inland Revenue lacks factual information about a transaction, such as when it took place and the parties to it.[32] It should be noted that these tax-contextual information provisions do not apply to the statutory solicitor--client privilege.[33] Assertions of legal practitioner--client privilege and tax advisor 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.[34]

3.0 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 advisor 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 advisor 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 advisor privilege in both the United States and New Zealand, with their exceptions and restrictions, makes it that much more crucial that a tax advisor 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 that 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 ***68** requirements,[35] with accompanying penalties for failure to comply.[36] 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.[37] 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.[38] 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 1990s, there was a boom in the design and marketing of generic tax shelter schemes, at the forefront of which were the big accounting firms.[39] In New Zealand, Inland Revenue 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 Inland Revenue.[40]

The suggestion that some advisors 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 advisors 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; any relevant regulations; and the role of professional body regulation and sanctions.

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4.0 TENSION BETWEEN DUTY TO THE CLIENT AND DUTY TO THE TAX SYSTEM

Arguably, whether or not some particular duty is owed to the tax system by tax advisors (both lawyers and non-lawyers) 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 advisor and revenue collection agency is one of advisor 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 advisor 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 ***69** suggest that a duty is owed, although there is clearly wide scope for interpreting precisely how that duty is balanced with the duty owed to the client.[41] Jackson and Milliron argue that:[42]

> 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".[43] 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.[44]

Dabner and Burton, in the Australasian context, refer to a relationship of collaboration or partnership between the revenue collection agency and the tax agent.[45] This "responsive regulation" model seeks to "maximise voluntary compliance by the bulk of taxpayers whilst focusing limited enforcement resources on the recalcitrant minority".[46] 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.[47] 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 advisors in Australasia do not embrace the idea of a duty to the revenue agency outweighing their duty to the client.[48] Empirical data supports this conclusion in the Australian context, suggesting that most tax agents regard their sole professional responsibility as being to the client.[49] The same study refers to the view of the Taxation Institute of Australia, which is that the interests of the client take priority where there is potential conflict between those interests and that of the tax system.[50] This study is not specific to New Zealand, but does reflect the wider Australasian experience. The responsive regulation model to which Dabner and Burton refer was introduced by Inland Revenue in 2001, following its introduction in Australia.[51]

Regardless of the extent of any theoretical duty owed to the tax system, many commentators come to the view that tax advisors solve ambiguity in the law to the advantage of their client.[52] 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 ***70** 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.

5.0 PROFESSIONAL CODES OF CONDUCT

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Provisions in a tax advisor'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.

5.1 United States

Lawyers who are members of the American Bar Association (ABA) follow ethical codes drawn up by it.[53] 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.[54] In addition, the Tax Court has adopted both the letter and spirit of the ABA model rules.[55] 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,[56] diligence[57] and relating to conflicts of interest.[58] 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.[59] 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.[60]

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”.[61] This rule suggests a wider context for legal advice, but the requirement seems to be ***71** 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.[62] 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.[63] 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.[64] 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[65] and engaging “in conduct that is prejudicial to the administration of justice”.[66] 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;[67] at which point the professional responsibility to limit disclosure on legitimate grounds in order to protect confidentiality comes into play.

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Other members of the tax practice profession--for example, certified public accountants (CPAs)--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.[68] 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 "[m]embers should accept the obligation to act in a way that will serve the public interest".[69] In this context, the public is defined to include "clients ... governments ... and others who rely on the objectivity and integrity of members to ***72** maintain the orderly functioning of commerce".[70] The public interest is defined as "the collective well-being of the community of people and institutions that the profession serves".[71] 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.[72] The view expressed in the code is that clients' interests are best served when members fulfil their public interest responsibility.[73] 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 CPAs 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 "[t]he American Institute of CPAs has repeatedly said that the role of CPAs includes a dual responsibility to the tax system and to clients".[74] In its Statement on Standards for Tax Services (SSTSs) 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.[75] 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.[76] The AICPA's SSTSs apply to all its members and are "enforceable tax practice standards".[77]

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.[78] In addition, the SSTSs do refer to "applicable confidentiality privileges".[79] 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".[80] 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, CPAs 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.[81] This would also be the case regarding compliance with the SSTSs.[82] 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 ***73** by CPAs.[83] Members making spurious claims could therefore only be dealt with through violation of more general principles, such as those of integrity or due care.[84]

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.[85] These standards are primarily set out in Circular 230: *Treasury Regulations (Regulations) Governing Practice*

before the Internal Revenue Service, and apply to both lawyers and CPAs.[86] 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 "[a]cting fairly and with integrity in practice before the Internal Revenue Service".[87] 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.[88] The formal opinion concludes that:[89]

> 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[90] (which aligns with accuracy penalties in the Internal Revenue Code),[91] 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. This is recognised in the AICPA code.[92] The tax practitioner privilege (as opposed to attorney--client privilege) is available only to those authorised under federal law to practice before the IRS.[93] This authorisation is controlled by the IRS in the sense that the IRS has the power to disbar individuals from practice before it.[94]

Both lawyers and CPAs are authorised to practice before the IRS.[95] 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.[96] Incompetent and disreputable conduct is further defined to include not only convictions for criminal behaviour in the taxation context, but also giving false ***74** or misleading information to the Treasury[97] and "[w]ilfully ... suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof".[98] In the context of giving false opinions, reference is made to "concealing matters required by law to be revealed".[99] 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.[100] 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.[101]

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 is coupled with clear guidelines around what constitutes wilful behaviour, which is not defined in the Regulations.[102] 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 advisor also removes any right to claim privilege and can lead to even more serious consequences, such as state disbarment and removal.[103] 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.

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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.

***75 5.2 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.[104] These rules, made by the New Zealand Law Society, are binding on all lawyers.[105] Examples of duties and obligations under these rules include that professional judgement must be exercised solely for the benefit of the client,[106] a duty to protect confidential information[107] and an overriding duty as an officer of the court.[108] This duty to the court includes a duty not to mislead or deceive the court when acting in litigation.[109] 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".[110] 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.[111] 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-- meaning that the individual cannot practice as a lawyer.[112]

In many other respects, the rules are similar to the ABA model rules and, like the ABA rules, 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 Inland Revenue remains less clear, in the sense of Inland Revenue'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 Inland Revenue investigation is more difficult to determine. So, the type of spurious claim identified by Inland Revenue 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.[113] 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.[114] 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 Inland Revenue in the context of giving approval to certain groups. It was felt important that approved groups ***76** 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".[115] Section 81B of the TAA 1994 permits Inland Revenue to disclose information to an approved advisor group regarding the acts or omissions of

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a member of that group that are considered by Inland Revenue to be in breach of various responsibilities relating to the non-disclosure right.[116] Guidance from Inland Revenue suggests that disclosure would only be considered in specific circumstances, for example, a failure to provide tax contextual information when required to do so.[117]

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,[118] such as suspension or removal from membership.[119] In similar fashion to the AICPA code, the NZICA code contains provisions that 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".[120] 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.[121] 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".[122]

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 member's 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".[123] NZICA members have an obligation to act in accordance with any authoritative guidance relevant to a particular area of practice.[124] In terms of tax practice, this would include the Guidelines on Ethics in Tax Practice.[125] 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.[126] 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.[127]

CPA Australia has its own mandatory code of ethics with broadly similar provisions to the NZICA code,[128] including those relating to the public interest and the fundamental principles.[129] This duplication is not ***77** 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.[130] APES 110 itself incorporates provisions of the Code of Ethics for Professional Accountants issued by the International Ethics Standards Board for Accountants (IESBA).[131] 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. NZ140.7.1 in the NZICA code 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.[132] 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 advisors operating solely in Australia where, to date, there is no statutory tax advisor 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 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

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

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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 Inland Revenue.

Unlike NZICA and CPA Australia, the Accountants & 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.[133] 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.[134] 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.

Inland Revenue does not control and regulate practice in a similar way to the IRS, other than through controls on listed tax agents. Applications to be listed as a tax agent can be made to the Commissioner ***78** of Inland Revenue from eligible persons.[135] 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. Inland Revenue 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 Inland Revenue on behalf of a taxpayer following nomination by that taxpayer (nominated persons).[136] This regime gives Inland Revenue 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 s 20B of the TAA 1994.[137] The listing regime is of interest in that it is an existing mechanism that could be revised to extend Inland Revenue's control over the activities of tax agents if so wished.

The tax advisor 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 advisor professional body codes compared to that of lawyers around claiming the right. What seems clear is that in New Zealand relevant tax advisor codes do not address ethical obligations around claims of non-disclosure at all; this is despite the deliberate choice of particular groups to act in the role of gatekeeper for those tax advisors 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 Inland Revenue, 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 Inland Revenue regulations applying to both lawyers and non-lawyer tax advisors to level the discrepancy. The tax advisor 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.

5.3 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[138] and a global tax code of conduct.[139] 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.[140] 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 the Committee by representatives from PwC, Deloitte LLP, KPMG and EY led the Committee to conclude that a code of conduct for tax advisors regarding acceptable tax planning activities ***79** should be introduced by the government.[141]

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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 advisors 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.[142] The guidance sets out the fundamental principles of behaviour that members working in tax are expected to follow.[143] 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".[144] The guidance does explicitly address legal privilege to the extent of briefly explaining its ambit and extent and acknowledging that determining whether or not communications are privileged is a complex issue.[145]

In England and Wales there is no tax advisor privilege, other than limited protection given to documents in the hands of a tax advisor.[146] The guidance is interesting in that, despite there being no tax advisor privilege in the wider sense, it does address issues relevant to privilege. As has been shown, in jurisdictions where there actually is tax advisor 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 tax advisor 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 tax advisor 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.

6.0 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, must 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 advisor or client. Both the IRS and Inland Revenue have expressed concern about privilege being abused in the taxation context. The provisions of professional body ethics codes and the wider question of whether any duty is owed to the tax system as a whole both have a role in addressing these ethical issues. Reviewing the various professional body codes shows clear differences between lawyers and non-lawyer tax advisors regarding the extent to which any duty is owed to the wider tax system and regarding explicit ethical rules around privilege claims.

***80** Tax advisor 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 the tax standards refer to a duty to the tax system. Similarly, the NZICA code makes explicit reference to a responsibility to act in the public interest; it has been suggested that the provisions of the code could equate to a duty to the tax system.[147] 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 advisor 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.[148] It is perhaps the case that a lack of clarity around the interaction of 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.

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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 advisor codes. This leads to the conclusion that, arguably, a tax lawyer is in a different position to a non-lawyer tax advisor 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 advisors is harder to determine. It seems clear that, regardless of any wider duty, tax advisors resolve ambiguity in favour of the client. Whether 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 advisors 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 Inland Revenue does not exert the same control over tax advisors as the IRS does over tax practitioners in the United States via the Regulations. For the purposes of privilege claims in New Zealand, approved groups 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 advisors in the context in which they operate (that is, relating to tax advice).

Lawyers and tax advisors in New Zealand can resist disclosure of documents to Inland Revenue, 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 ***81** 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 advisor 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 practising 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 advisors in the United States and New Zealand seems opaque and disconnected. For tax advisors, the relevant codes do not address the issue specifically, making it difficult for ethical standards in this respect to be determined by advisors or enforced by disciplinary sanctions. In addition, tax advisors 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

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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 advisors 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 advisors 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 advisors in the United States and New Zealand is rather different, but the ethical dimension is the same. Therefore, similar wording should adequately cover the situation in both jurisdictions, with country-specific additions in the APES-based codes of some of the approved advisor 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 ***82** 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 advisors 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 Inland Revenue for tax advisors 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; 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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Footnotes

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1 *Upjohn Co v United States* 449 US 383 (1981) at 389; and *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.

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

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

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4 *Upjohn Co v United States* 449 US 383 (1981) at 389; and *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.

5 Evidence Act 2006, ss 54 and 56.

6 Evidence Act 2006, ss 4 and 53. Proceeding means a proceeding conducted by a court and any interlocutory or other application relating thereto.

7 Evidence Act 2006, s 53(5).

8 Tax Administration Act 1994, s 20.

9 Federal Rules of Evidence 2018, r 501; Claudine Pease-Wingenter "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.

10 *Fisher v United States* 425 US 391 (1976) at 403.

11 Noah P Barsky and others "Protecting a Client's Confidences: Recent Developments in Privileged Communications Between Attorneys and Accountants" (2010) 28 Journal of Law and Commerce 211 at 221.

12 *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 (7th Cir 1999).

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

16 Internal Revenue Code 26 USC § 7525.

17 Rebecca Mitchell "Comparative standards of legal advice privilege for tax advisers and optimal reform proposals for English law" (2015) 19 International Journal of Evidence and Proof 246 at 250.

18 Internal Revenue Code 26 USC § 7525(a)(3)(B).

19 Internal Revenue Code 26 USC § 7525(b).

20 Internal Revenue Code 26 USC § 6662(d)(2)(C)(ii).

21 *Valero Energy Corp v United States* 569 F 3d 626 (7th Cir 2009).

22 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: Evidence Act 2006, s 4.

23 Tax Administration Act 1994, s 20.

24 Tax Administration Act 1994, s 20(1)(c).

25 Tax Administration Act 1994, ss 16-19.

26 Tax Administration Act 1994, s 20B. See generally Keith Kendall "Designing Privilege for the Tax Profession: Comparing I.R.C § 7525 with New Zealand's Non-Disclosure Right" (2011) 11 Houston Business and Tax Law Journal 74; Andrew Maples and Robin Woellner "Privilege for accountants' tax advice in Australia--brave new world, or house of straw?" (2010) 25 Australian Tax Forum 143; Mitchell, above n 17.

27 Tax Administration Act, s 20B(2).

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28 Inland Revenue *Non-disclosure right for tax advice documents* (SPS 05/07, July 2005).

29 Inland Revenue, above n 29, at [33]-[34].

30 Tax Administration Act 1994, s 20(B)(2)(c).

31 Tax Administration Act 1994, s 20F.

32 Inland Revenue, above n 29, at [44] and [77].

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36 Internal Revenue Code 26 USC §§ 6707, 6707A and 6708.

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43 Watson, above n 41, at 850 (internal citation omitted).

44 Infanti, above n 41, at 605-606.

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47 Dabner and Burton, above n 45.

48 Dabner and Burton, above n 45, at 110.

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52 Jackson and Milliron, above n 42, at 82; and Ken Devos “An Investigation into the Ethical Views and Opinions of Australian Tax Practitioners of Different Affiliations” (2014) 20 NZJTLP 169 at 174.

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54 American Bar Association “Model Rules of Professional Conduct” (2018) <www.americanbar.org>.

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57 ABA Model Rules, r 1.2.

58 ABA Model Rules, r 1.7.

59 ABA Model Rules, r 3.3.

60 American Bar Association Standing Committee on Ethics and Professional Responsibility “Formal Opinion 314” (1965) <www.americanbar.org>.

61 ABA Model Rules, r 2.1.

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63 American Bar Association Standing Committee on Ethics and Professional Responsibility “Formal Opinion 473: Obligations Upon Receiving a Subpoena or Other Compulsory Process for Client Documents or Information” (2016) <www.americanbar.org>.

64 American Bar Association Standing Committee on Ethics and Professional Responsibility “Formal Opinion 94-385: Subpoenas of a Lawyer's Files” (1994) <www.americanbar.org>.

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78 American Institute of Certified Public Accountants Inc, above n 69, at [1.700.100].

79 American Institute of Certified Public Accountants Inc, above n 75, at No. 7, [11].

80 American Institute of Certified Public Accountants Inc, above n 69, at [1.700.100.02].

81 American Institute of Certified Public Accountants Inc, above n 69, at [0.100.020.02].

82 American Institute of Certified Public Accountants Inc, above n 69, at [1.300.001] and [1.310.001].

83 *United States v Textron Inc* 507 F Supp 2d 138 (DRI 2007) at 148.

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85 Watson, above n 41, at 849.

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90 Department of the Treasury and Internal Revenue Service, above n 86, at [10.34(a)(1)].

91 Internal Revenue Code 26 USC § 6662.

92 American Institute of Certified Public Accountants Inc, above n 69, at [1.110.010.18].

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94 Department of the Treasury and Internal Revenue Service, above n 86, at [10.50].

95 Department of the Treasury and Internal Revenue Service, above n 86, at [10.3(a)] and [10.3(b)].

96 Department of the Treasury and Internal Revenue Service, above n 86, at [10.50(a)].

97 Department of the Treasury and Internal Revenue Service, above n 86, at [10.51(a)(4)].

98 Department of the Treasury and Internal Revenue Service, above n 86, at [10.51(a)(7)].

99 Department of the Treasury and Internal Revenue Service, above n 86, at [10.51(a)(13)].

100 Department of the Treasury and Internal Revenue Service, above n 86, at [10.20(a)(1)].

101 Department of the Treasury and Internal Revenue Service, above n 86, at [10.52(a)(1)].

102 In the taxation context, wilful is understood to mean "voluntary, intentional violation of a known legal duty": *Cheek v United States* 498 US 192 (1991) at 201; and *Banister v United States Department of the Treasury* 499 Fed Appx 668 (2012).

103 Watson, above n 41, at 882.

104 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

105 Lawyers and Conveyancers Act 2006, s 107(1), including in-house lawyers and barristers.

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106 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, sch, ch 5, r 5.2.

107 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, sch, ch 8.

108 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, sch, ch 2, r 2.1.

109 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, sch, ch 13, r 13.1.

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119 New Zealand Institute of Chartered Accountants *Rules of the New Zealand Institute of Chartered Accountants* (May 2015) at [13.40(a)] and [13.40(b)].

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134 Accountants and Tax Agents Institute of New Zealand, above n 133, at [2.1].

135 Tax Administration Act 1994, ss 34B(2) and 34B(3).

136 Michael Woodhouse *Making Tax Simpler--Proposals for Modernising the Tax Administration Act: A Government Discussion Document* (Policy and Strategy, Inland Revenue, Wellington, December 2016) at 72 and 75.

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138 PwC "Living our purpose and values: PwC's code of conduct" (2016) < www.pwc.com>.

139 PwC "What we stand for: Tax code of conduct for the global PwC network" (2015) <www.pwc.com>.

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142 The Institute of Chartered Accountants in England and Wales *Professional Conduct in Relation to Taxation* (Tech 11/16 tax, November 2016).

143 The Institute of Chartered Accountants in England and Wales, above n 142, at pt 2.

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146 Mitchell, above n 17, at 262.

147 Dabner and Burton, above n 45, at 113.

148 New Zealand Institute of Chartered Accountants, above n 118, at [140.10].

24 NZJTLP 63

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Article (iv)

Michael Stockdale & Rebecca Mitchell, ‘Legal Professional Privilege in Corporate Criminal Investigations: Challenges and solutions in the modern age’ (2018) 82 J Crim L 321

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Legal professional privilege in corporate criminal investigations: Challenges and solutions in the modern age

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Abstract

This article considers two areas that arise in the context of corporate criminal investigations relating to claims of legal professional privilege: the extent to which litigation privilege may attach to communications made in the context of such investigations and the difficulty of identifying the client for the purposes of legal advice privilege. These issues are of particular significance where a company is or may be the subject of an investigation by specialist prosecuting authorities, such as the Serious Fraud Office. We identify the policy considerations justifying litigation privilege and whether they continue to explain the current ambit of the privilege. With particular reference to the extent to which the privilege is capable of attaching to communications made for the purpose of working towards a potential settlement, we consider how the constraints upon its ambit operate in the context of corporate criminal investigations. In relation to legal advice privilege, we demonstrate that it is possible to give a coherent explanation of the jurisprudence in this area which, while accepting that decisions are fact-specific, should enable corporations and the courts to identify the client within the corporation with a greater degree of confidence.

Keywords

Legal professional privilege, legal advice privilege, litigation privilege, corporate criminal investigations

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Introduction

Companies are becoming potentially criminally liable for an increasing number of offences. Examples include failure to prevent bribery[1] and more recently failure to prevent the facilitation of tax evasion.[2] Concerns about potential criminal liability can lead to internal investigations by a company, whether in response to an investigation by bodies such as the Serious Fraud Office (SFO) or due to concerns that the company has been doing something it should not in this context, which might, for example, result in a decision to self-report in order to potentially avoid prosecution.[3] Similarly, internal corporate investigations may take place in the context of preparing for and presenting evidence to an external inquiry. Internal investigations, interactions with investigating bodies and legal advice taken in relation thereto may all produce communications which may be the subject of claims of legal professional privilege, both litigation privilege and legal advice privilege.

The ambit of litigation privilege is subject to three significant constraints, namely, that litigation must be in reasonable contemplation, that it must be at least the dominant purpose of the communication and that the litigation must be adversarial. When determining whether litigation privilege attaches to communications made in the context of a corporate criminal investigation, the crucial issue is whether the 21st-century courts will apply these constraints narrowly so as to limit the ambit of a privilege which had its origins in the adversarial litigation of an earlier age. The criminal process is now less adversarial/more case managed. Further, companies and the courts are now grappling with very different regulatory and investigatory regimes which lead to increasingly blurred lines around when litigation will be in contemplation. Where litigation privilege is not available, for example, because litigation was not in reasonable contemplation at the time when an internal investigation took place, then the availability of legal advice privilege is crucial to protect communications with lawyers from disclosure. In the corporate context, legal advice privilege may be unavailable if communications with the company's legal advisers are not made by a person or body within the company designated as the client. In addition, the type of communications taking place between the client and the lawyer impacts on the availability of legal advice privilege.

This article begins by exploring the ambit of litigation privilege in corporate criminal investigations. It identifies the policy considerations that traditionally underlie the existence of the privilege. It considers the extent to which the ambit of the privilege has been the subject of a more recent 'policy of confinement' by the judiciary. It also considers how the constraints upon the ambit of the privilege impact on its operation in the context of corporate criminal investigations. In assessing the potential scope of the privilege, it takes into account the fact that the role of lawyers in such scenarios goes beyond preparation for litigation and encompasses communications for purposes such as avoiding contemplated criminal litigation, perhaps by entering into a civil settlement or considering the merits of entering into a Deferred Prosecution Agreement (DPA).

The identification of the client for the purposes of claiming legal advice privilege in the corporate context is then discussed. The major issue is that while the authorities require the court to identify a client within the corporation, they provide limited guidance on how to do so. Based on consideration of attribution theory and the nature of delegated authority as it operates in the corporate context, and with reference to the membership of, and actions performed by, the client group within the corporation, we demonstrate that it is possible to give a coherent explanation of the jurisprudence in this area which, while accepting that decisions are fact-specific, should enable corporations and the courts to identify the client within the corporation with a greater degree of confidence.

1. Section 7 of the Bribery Act 2010, see, for example, 'CPS secures first conviction for failure to prevent bribery' Law Society Gazette, 9 March 2018.
2. Sections 45, 46 of the Criminal Finances Act 2017.
3. For example, under the SFO guidance on Corporate self-reporting. Available at: https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/ (accessed 18 April 2018).

The final section of the article provides advice for corporations on maximising the protection provided by litigation and legal advice privilege in the corporate context.

Litigation Privilege and Corporate Criminal Investigations

In considering how the courts should approach a claim of litigation privilege arising from a corporate criminal investigation, it is important to identify the policy considerations underlying the existence of the privilege and to consider whether they are applicable in the context of the 21st-century English and Welsh criminal process.

Unlike legal advice privilege,[4] protecting the confidentiality of communications between the legal adviser and the client does not form the sole policy justification underlying the existence of litigation privilege.[5] Rather, litigation privilege (which, arguably, can arise where proceedings are conducted by a litigant in person, with no legal adviser involved[6]) is fundamentally a creature of the adversarial trial process rather than one of the lawyer and client relationships. As Lord Rodger of Earlsferry explained, it

> is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the winner. In such a system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations.[7]

Reference to the leading authorities that catalysed the development of what is now known as litigation privilege in the context of 19th-century adversarial litigation confirms that it has long formed part of the concept of an adversarial trial.[8] They make clear that a party, 'is not bound to communicate evidence . . . obtained for the purpose of litigation'[9] and that just as a party has 'no right to see [an] adversary's brief' a party also has 'no right to see that which comes into existence merely as the materials for the brief'.[10]

A Trend of Confinement?

In *The Director of the Serious Fraud Office* v *Eurasian Natural Resources Corporation Ltd*, Andrews J identified a trend of confining the scope of litigation privilege.[11] The essence of such confinement is the existence of three constraints that the courts have imposed upon its operation, namely, that (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial.[12]

4. In relation to the underlying policy rationale of which see *Regina (Prudential plc and another)* v *Special Commissioner of Income Tax* [2013] UKSC 1 at 21.
5. See Charles J in *S. County Council* v *B* [2000] Fam 76 at 83–4.
6. See *Ventouris* v *Mountain* [1991] 1 WLR 607 at 611; *S. County Council* v *B* [2000] 2 FLR 161 at 169, though see, also, *Dadourian Group International Inc* v *Simms* [2008] EWHC 1784 (ch.) at para. 91, which suggests that the question of whether a litigant in person can rely on litigation privilege remains open.
7. In *Three Rivers District Council and Others* v *Governor and Company of the Bank of England (No. 6)* [2005] 1 AC 610 at para. 52.
8. See, in particular, *Anderson* v *Bank of British Columbia* (1876) 2 ch. D 644; *Southwark and Vauxhall Water Co* v *Quick* (1878) 3 QBD 315; *Wheeler* v *Le Marchant* (1881) 17 ch. D 675. The early cases did not adopt the 'legal advice privilege'/'litigation privilege' terminological dichotomy to distinguish between the two subcategories of legal professional privilege. The first example of its use seems to be in *In Re Highgrade Traders Ltd* [1984] BCLC 151.
9. *Anderson* v *Bank of British Columbia* (1876) 2 Ch. D 644 per Mellish LJ at 658.
10. Ibid. per James LJ at 656 and see, also, Brett LJ in *Southwark and Vauxhall Water Co* v *Quick* (1878) 3 QBD 315 at 320.
11. [2017] EWHC 1017 (QB) at para. 54. See, also, *Visx Inc.* v *Nidex Co. and Others* [1999] FSR 91.
12. Above n. 7 per Lord Carswell at para. 52.

The trend of confinement had commenced in the 19th-century jurisprudence which restricted the ambit of the privilege to material ‘obtained for the purpose of litigation’[13] and indicated that it only arose where ‘litigation [was] existing or contemplated between the parties’.[14] In justifying the imposition of the dominant purpose test, Lord Edmund-Davies in *Waugh* v *British Railways Board* believed that ‘the public interest is, on balance, best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld [because] [j]ustice is better served by candour than by suppression’.[15] When determining that the operation of the privilege is confined to adversarial proceedings, Lord Jauncey of Tullichettle in *In Re L (A Minor) (Police Investigation: Privilege)* indicated that, ‘in . . . proceedings . . . which are primarily non-adversarial and investigative as opposed to adversarial, the notion of a fair trial between opposing parties assumes far less importance’.[16]

Regarding the trend of confinement, in *Eurasian*, Andrews J referred to the speech of Lord Scott of Foscote in *Three Rivers District Council and Others* v *Governor and Company of the Bank of England (No. 6)*, in which Lord Scott had opined that ‘[c]ivil litigation conducted pursuant to the current Civil Procedure Rules (CPR) is in many respects no longer adversarial’ and that ‘[t]he decision in *In re L* warrants . . . a new look at the justification for litigation privilege’.[17] It is suggested that contrary to Lord Scott’s view, while *In Re L*, like *Waugh*, is clearly a decision that confirms the limits of litigation privilege, it, again like *Waugh*, is not a decision that is inconsistent with the underlying rationale of litigation privilege as a creature of adversarial proceedings. Indeed, neither the decision in *In Re L* nor the fact that civil proceedings conducted under the CPR are less adversarial than was the case in the 19th century warrant a new look at the justification for litigation privilege. What is warranted is an examination of the nature of specific types of proceedings for the purposes of which communications were made in order to determine whether the adversarial justification for litigation privilege is applicable in their specific context (which it was held not to be both in the context of the care proceedings that *In Re L* concerned and in that of the private, non-statutory, inquiry which *Three Rivers No. 6*[18] concerned). For example, where disclosure of communications with expert witnesses is sought in the context of care proceedings but the communications were made for the purposes of criminal proceedings, the communications are privileged because they were made for the purposes of adversarial litigation.[19] Moreover, in order for litigation to qualify as adversarial for the purposes of the privilege, it is not necessary for proceedings to possess all of the adversarial features of the traditional 19th-century criminal or civil trial. Rather, as the Upper Tribunal (Administrative Appeals Chamber) indicated when deciding that the privilege attached to communications made for the purposes of proceedings before the First-tier Tribunal,[20]

> [l]itigation privilege was available for the old prerogative order proceedings and applies to modern judicial review proceedings, although many of the features of a fully contested adversarial contest would be absent in such cases. We see no basis for not regarding proceedings before the First-tier Tribunal as litigation for the purposes of legal professional privilege in both of its aspects

Criminal Proceedings, Criminal Investigations and Attempts to Settle

So far as criminal proceedings are concerned, the Criminal Procedure Rules (CrimPR) impose a variety of case management duties and confer a variety of case management powers upon the court. The

13. *Anderson* v *Bank of British Columbia* 2 Ch. D 644 per Mellish LJ at 658.
14. Cotton LJ in *Wheeler* v *Lemarchant* (1881) 17 Ch. D 675 at 685.
15. [1980] AC 521 at 543.
16. [1997] AC 16 at 27.
17. [2005] 1 AC 610 at para. 52.
18. Above n. 7.
19. See *S. County Council* v *B* [2000] Fam 76.
20. *LM* v *London Borough of Lewisham* [2009] UKUT 204 (AAC) per Mark Rowland, Judge of the Upper Tribunal at para. 30.

Criminal Procedure and Investigations Act 1996 imposes disclosure obligations upon both the prosecution and, to a lesser but still significant extent, the defence. Even so, there is no doubt that the modern English and Welsh criminal trial remains, in essence, an adversarial contest in which the defence is entitled to rely upon the traditional adversarial safeguard of litigation privilege. In his report, which catalysed the creation of the CrimPR,[21] Auld LJ took 'as given . . . a continuation of a trial procedure that is in the main adversarial . . . '. Specifically, when considering whether the defence should be required to disclose unused experts' reports as a means of combatting 'expert shopping', he opined that,

> [s]o long as our system remains adversarial, I can see no proper basis upon which the defence should be required to disclose material of this or any sort that is unfavourable to their case. There is undoubtedly a lack of parity between the prosecution and the defence in this respect, but that is a necessary consequence of where the burden of proof lies.[22]

Having accepted that criminal proceedings themselves continue to qualify as adversarial, this does not mean that either a criminal investigation or an internal investigation so qualify. Consequently, in *Eurasian*, Andrews J declined to accept that an SFO criminal investigation amounted to adversarial litigation and also refused to equate the avoidance of such an investigation with defending a criminal prosecution.[23]

A related issue not considered in *Eurasian* is whether the process of agreeing and approving a DPA amounts to adversarial litigation. In *Serious Fraud Office* v *Rolls-Royce PLC*,[24] Levison P, considering an application for approval of a DPA, did not appear to question the view of Rolls-Royce that legal professional privilege could arise in relation to the interview transcripts produced during an internal investigation. Given that privilege had been waived by Rolls-Royce, there was no analysis by Levison P of the merits of the claim. Since the process of obtaining a DPA, under Schedule 17 to the Crime and Courts Act 2013, is, essentially, one of the agreements between the prosecutor and the person whose prosecution is under consideration followed by an application to the court by the prosecutor for approval of the DPA, it is submitted that the process via which a DPA is obtained does not amount to adversarial litigation. It is suggested, however, that communications made for the purpose of considering whether it is desirable to attempt to follow a DPA route rather than defend a prosecution, or for the purpose of avoiding prosecution by enhancing the likelihood that a DPA might be obtained, should properly be classified as falling within the ambit of the privilege.

In *Eurasian*, Andrews J[25] treated the avoidance of adversarial litigation as a purpose that fell outside the ambit of the privilege, though she did accept that

> [i]n theory, it is conceivable that documents could be generated for the purpose of assisting a company to persuade the SFO not to prosecute but also, if that failed, to help it mount a defence to criminal proceedings; but the evidence in this case does not establish such a dual purpose, let alone that the latter purpose was the dominant one.

While it is accepted that communications made for the purpose of avoiding a criminal investigation are not made for the purposes of adversarial litigation, Andrews J's treatment of communications made for the purpose of avoiding adversarial litigation (as opposed to avoiding criminal investigation) is more

21. Lord Justice Auld 'A Review of the Criminal Courts of England and Wales', September 2001, ch. 11 at para. 77. Available at: http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk (accessed 27 April 2018).
22. Ibid. at para. 149.
23. Above n. 11 at paras 150 and 166.
24. 17 January 2017 Case No: U20170036.
25. Above n. 11 at para. 168.

difficult to justify. Baer recently suggested that the approach from *Eurasian* that documents created to avoid litigation are not privileged would surprise experienced litigators.[26] In *Re Highgrade Traders,*[27] the Court of Appeal held that,

> 'if litigation is reasonably in prospect, documents brought into being for the purpose of enabling the solicitors to advise whether a claim shall be made or resisted are protected by privilege, subject only to the caveat that that is the dominant purpose for their having been brought into being.

Thus, their Lordships believed that the approach that 'it was only if the documents were brought into existence for the dominant purpose of actually being used as evidence in the anticipated proceedings that privilege could attach' was one which would 'confine litigation privilege within too narrow bounds'.[28] Subsequently, in *The Sagheera*, in which *Highgrade* was relied upon, Rix J held that while

> in the first instance the hope [may well have been] that litigation would be unnecessary [it was not] possible to distinguish between the purpose of taking legal advice concerning one's rights or obligations, where that necessitates acquiring information from third parties, and the additional purpose of using that information in aid of litigation, should litigation be necessary, as long as litigation is reasonably in prospect. That is not . . . an example of a dual purpose which prevents the purpose of using information in aid of litigation from being dominant.[29]

Based on *Highgrade* and in line with the approach adopted by Rix J in *The Sagheera*, it is suggested that communications made for the dominant purpose of enabling a company's legal advisers to advise whether the best course of action was either to try to persuade the SFO not to prosecute and agree a civil settlement/enter into a DPA or to defend a criminal prosecution which was reasonably in contemplation would fall within the ambit of litigation privilege. To the extent that this approach appears to be in conflict with that of Andrews J in *Eurasian*, it is worth noting that the Chancellor of the High Court, in reaching a decision in which he relied upon *Highgrade*, recognised that there is 'something of a tension' between *Eurasian* (a first instance decision) and *Highgrade* (a decision of the Court of Appeal, which was not cited in *Eurasian*).[30] He indicated that it is necessary 'to take a realistic, indeed commercial, view of the facts' and did not believe it is proper to 'draw a general legal principle' from Andrews J's decision on the facts of the case before her that attempts to settle had prevented litigation from being the dominant purpose of the communications with which she was concerned.[31]

Andrews J in *Eurasian* held[32] that documents created for the purpose of showing them to the other party are not privileged, and that this is so whether they are created to persuade the other party to settle or to persuade the other party not to commence proceedings. Based upon the arguments immediately above, it is suggested that litigation privilege would attach to documents created for the dominant purpose of enabling the legal advisers to advise whether to try to persuade the SFO to follow a civil settlement route (or enter into a DPA), even though it was also intended that if this route were followed, privilege would be waived and they would be disclosed to the SFO. Indeed, Hanna suggests that where documents are created for the purpose of showing them to the other party, they may still be created for the purposes of

26. J. J. Baer, 'Legal Advice Privilege: A Search for Clarity?' (2017) 167 NLJ 7772 18.
27. [1984] BCLC 151 per Oliver LJ at 172.
28. Oliver LJ at 174.
29. [1997] 1 Lloyd's Rep 160 at 166.
30. *Geoffrey Vos C in Bilta (UK) Ltd (in Liquidation) & Ors.* v *Royal Bank of Scotland Plc, Mercuria Energy Europe Trading Limited* [2017] EWHC 3535 (ch.) at para. 58.
31. Ibid. at para. 66.
32. Above n. 11 at para. 170.

litigation and thus litigation privilege may still attach to them, with privilege being waived if and when they are disclosed to the other party.[33] It is certainly arguable that such documents should be regarded as privileged if they were created at a stage when the legal advisers and client were still deciding whether to go down a civil settlement or DPA route with the intention that they would be taken into consideration when making that decision and only disclosed (with consequent waiver of privilege) if the ultimate decision was to follow a civil settlement or DPA route.

An issue that has the potential to give rise to significant practical problems when determining whether litigation privilege attaches to communications made prior to the commencement of criminal litigation is at what stage prior to such commencement criminal litigation may properly be said to be in contemplation. To adopt a commonly applied formulation of this test, the question is when is criminal litigation 'reasonably in prospect'?[34] The Court of Appeal in *United States of America* v *Philip Morris Inc and others,* recognising that '[s]ome concepts are difficult to express in words', considered that the judge in the instant case had correctly concluded that litigation privilege does not attach where there is a '"mere possibility" of litigation', 'a distinct possibility that sooner or later someone might make a claim' or 'a general apprehension of future litigation', but also accepted that the judge had not suggested that in order for litigation to be reasonably in prospect 'there must [be] a greater than 50% chance of litigation'.[35] In confirming its view that litigation had not been reasonably in prospect at the relevant time, the Court of Appeal had recourse to 'the traditional justification for litigation privilege', concluding that the retainer that the case concerned 'had nothing to do with the preparation of the brief for a trial'.[36]

In *Eurasian*, Andrews J rejected the submission that once an SFO criminal investigation is in reasonable contemplation, then a criminal prosecution will also be in reasonable contemplation on the basis that the two do not necessarily equate.[37] She accepted that there may be circumstances in which the two do equate (where there is an awareness of circumstances that will make a prosecution likely once they are discovered) but treated the question as one which is fact specific and which must be considered 'on a case by case basis'. She suggested that knowledge of accusations only raises a real prospect of prosecution once it is discovered that there is some truth in the accusations or at the very least that there is some material to support the allegations of corrupt practices.[38] She distinguished criminal from civil proceedings on the basis that the only inhibition on the commencement of civil proceedings that lacks a foundation is the imposition of a retrospective sanction,[39] whereas the commencement of criminal proceedings is subject to the satisfaction of a test that has an evidential limb and a public interest limb.[40]

The Significance of Eurasian

Carter regards the 'alarm' caused by Andrews J's decision in *Eurasian* as 'substantially overstated' and its encroachment upon the protection provided by the privilege as not serious, because her decision was one that was dependent upon the specific facts of the case before her.[41] He suggests that this fact-specific

33. A. Hanna, 'The Conundrum of the Corporate Client: Deciphering the Scope and Application of Legal Professional Privilege in the Corporate Context: Re RBS (Rights Issue Litigation) [2016] EWHC 3161 (Ch.); Director of the Serious Fraud Office v Eurasian Natural Resources Corp' (2018), CJQ, 37(2) at 172–85, 184–85.
34. See *Re Highgrade Traders Ltd* [1984] BCLC 151 per Oliver LJ at 172.
35. [2004] EWCA Civ 330 per Brooke LJ at para. 68.
36. Ibid. at 70.
37. Above n. 11 at para. 154.
38. Ibid. at para. 155.
39. For the rules of court relating to the giving of summary judgment against a claimant or a defendant, see CPR Part 24.
40. Above n.11 at para. 160. For the evidential stage and the public interest stage, see the Code for Crown Prosecutors. Available at: https://www.cps.gov.uk/sites/default/files/documents/publications/code_2013_accessible_english.pdf (accessed 17 April 2018).
41. P. Carter, 'Discovery: Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd. Queen's Bench Divisional Court: Andrews J: 8 May 2017; [2017] EWHC 1017 (QB)' [2018] Crim LR 63 at 66.

treatment of *Eurasian* is one that might commend itself to the Court of Appeal. That *Eurasian* is a case that can readily be distinguished on its facts was effectively confirmed by the Chancellor of the High Court, in a case in which litigation privilege was claimed and *Eurasian* was cited but was not regarded as 'determinative', the Chancellor, accepting that the application of the dominant purpose test required him to make a fact-specific determination and also the fact-specific nature of the question whether litigation had been in reasonable contemplation, recognised that he had to focus on the facts of the case before him and not those of *Eurasian*.[42] In a more recent decision of the criminal division of the Court of Appeal, *R* v *Jukes,*[43] the court agreed with Andrews J's view from *Eurasian* concerning the nature of those circumstances in which criminal prosecution is in reasonable contemplation. Their Lordships held that litigation privilege did not attach to communications in circumstances in which there was no evidence that, at the time when the statement was made, the company 'had enough knowledge of what the investigation would unearth' such that 'it could be said that they appreciated that it was realistic to expect the Health and Safety Executive to be satisfied that it had enough material to stand a good chance of securing convictions'.[44] They indicated that the mere fact that the Health and Safety Executive normally prosecutes, 'where there is a death and on the face of it a breach of duty', did not compensate for 'the critical absence of evidence'. Moreover, the fact that the statement had taken the form of a s. 9 statement[45] was, in itself, not sufficient to establish reasonable contemplation of prosecution.

The approach in *Jukes* and *Eurasian* has, most recently, been endorsed by the Divisional Court, though in circumstances in which its views upon the issue of privilege clearly did not form part of the ratio of the court's decision.[46] Conversely, in giving leave to appeal in *Eurasian* itself, the Civil Division of the Court of Appeal had previously indicated that the appeal in Eurasian had a 'real prospect of success'.[47] It is worth noting that in *Jukes*, the Criminal Division of the Court of Appeal made no reference to previous jurisprudence of the Court of Appeal or the House of Lords/Supreme Court concerning the ambit of litigation privilege, merely relying on the first instance decision in *Eurasian*. Nor did they refer to the subsequent decision of the High Court in which *Eurasian* was not regarded as determinative.[48] It also held that the party attempting to rely on privilege in that case (not the company), who had never been the client of the legal adviser, had not been entitled to claim privilege on his own behalf (the company had not attempted to claim it). Thus, even if the statement in *Jukes* was privileged, the claim of privilege in that case would have failed. Fundamentally, post J*ukes* it still appears to be open to the Court of Appeal in *Eurasian* to treat the decisions in *Eurasian* and *Jukes* as not being 'determinative' but at most as being decisions on the specific facts of the two cases, with the possibility of arguing that *Jukes* was decided *per incuriam* and/or could be distinguished on its facts.

The area of Andrews J's judgment that Carter regarded as being 'open to possible question' (while recognising that the fact-specific nature of that judgment limited the extent to which it was necessary to question it) concerned the relationship between criminal investigations and reasonable contemplation of criminal proceedings. He asserted that, a criminal investigation, or the reasonable expectation of a criminal investigation, can give rise to a reasonable expectation of litigation. That litigation might be by way of challenge to the lawfulness of a search warrant, or of the conduct of a search, or of a notice requiring production of material. A belief that a thorough investigation will result in a decision not to

42. Above n. 30 at paras 59 and 61.
43. [2018] EWCA Crim 176 at para. 23.
44. Ibid. at para. 24.
45. That is, a statement complying with the witness statement requirements of s. 9 of the Criminal Justice Act 1967.
46. *R (on the application of AL)* v *Serious Fraud Office* [2018] EWHC 856 (Admin) at paras 105–10 and 125.
47. M. Walters, 'Legal Privilege Battle Heads to Court of Appeal' Law Society Gazette 11 October 2017. Available at: http://www.lawgazette.co.uk/law/legal-privilege-battle-heads-to-court-of-appeal/5063169.article (accessed 29 May 2018).
48. I.e. to *Bilta (UK) Ltd (in Liquidation) & Ors.* v *Royal Bank of Scotland Plc, Mercuria Energy Europe Trading Limited* [2017] EWHC 3535 (ch.).

prosecute does not preclude a reasonable expectation that litigation of some sort will arise. One example is the fact that sometimes prosecutions are instituted but then abandoned.[49]

Moreover, Hanna questions Andrews J's implicit assumption that a party who lacked an arguable case would proceed with civil proceedings on the basis that 'it is a questionable empirical assumption [which] seems to ignore the opportunity costs'.[50] He also points out that where the basis upon which a criminal investigation is in reasonable contemplation is that there is 'verifiable or substantiated evidence . . . of wrongdoing', it is arguable that criminal proceedings will also be in reasonable contemplation.[51]

As was seen above, the Criminal Division of the Court of Appeal indicated that the mere fact that the Health and Safety Executive normally prosecutes in particular circumstances is not in itself sufficient to justify the conclusion that relevant communications were made in reasonable contemplation of litigation.[52] It is suggested, however, that there will be circumstances in which it is proper to treat a suspect who knows or believes herself to be innocent as having a reasonable contemplation of criminal prosecution once, for example, an arrest has been made or a search warrant has been issued. The fact that the suspect knows or believes herself to be innocent does not inherently make such contemplation unreasonable since it must be common knowledge that persons who are subsequently found not guilty of criminal offences have still been prosecuted in the first place. Why should this be any different for a corporation/its directors or employees who are faced with an SFO investigation, even if they believe that they are not guilty of any offences? The SFO's Annual Report and Accounts 2016–17 indicates during 2013–17 average conviction rates of 70.3% when calculated by defendant and 82.6% when calculated by case.[53] In 2016–17, the SFO had 'around 70' active criminal investigations, with 25 defendants being charged, 16 prosecutions concluded or in progress, 3 investigations concluded without charge, 33 defendants awaiting trial and 2 DPAs secured. Thus, given the number of prosecutions that arise out of a relatively limited number of SFO investigations and the fact that the conviction rate is not 100%, once such an investigation commences there must be potential for suspects who know or believe that they are innocent to still be in reasonable apprehension of prosecution which might result in a not guilty verdict.

Legal Advice Privilege and Corporations—Identifying the Client Group and Preserving Privilege

It is well demonstrated that there are difficulties surrounding the identification of the client for legal advice privilege purposes in the corporate context.[54] These difficulties are clearly significant where legal advice is sought in the context of a corporate criminal investigation/an internal investigation, particularly where litigation privilege does not attach to the communications. Difficulties primarily arise because a corporate body must inevitably act through agents. Whether legal advice privilege attaches to communications may depend upon the particular authority of these agents to instruct/communicate with the company's lawyers and the types of activities undertaken by the agents. Unless employees of the company possess the requisite authority and therefore constitute 'the client', legal advice privilege will not attach to communications between them and the corporation's legal advisers. If litigation privilege does not apply, the communications will therefore not be protected by legal professional privilege

49. Above n. 41 at 66.
50. Above n. 33 at 184.
51. Ibid. at 183.
52. Above n. 43 at para. 24.
53. HC 277 at 4.
54. See, for example, J. Loughrey, 'Legal Advice Privilege and the Corporate Client' 2005 9(3) *International Journal of Evidence and Proof* 183–203; H. Liu and H. Wong, 'The Scope of Legal Advice Privilege in Hong Kong: Citic Pacific Limited v Secretary for Justice and Commissioner of Police [2015] HKEC 1263' 1(68) *Common Law World Review* 45. This context will obviously include Limited Liability Partnerships but could also encompass other organisations acting through agents, such as Universities and Local Authorities.

at all.[55] The approaches taken by the courts to determine which agents of the company constitute the client can seem lacking in clarity and certainty. Using attribution theory and considering the nature of delegated authority, it is possible to rationalise these approaches and draw conclusions regarding the delegation of authority within a company to a client group, and the actions of that group and the company's legal advisers, to ensure that communications between them benefit from legal advice privilege.

Identifying the Client

The starting point in answering the question 'who is the client?' in the corporate context will normally be the board of directors, as the body within the company having authority to seek legal advice on behalf of the company.[56] Hildyard J refers to the 'attribution' argument,[57] referring to the judgment of Aikens J in *Winterthur Swiss Insurance Company and Others* v *AG (Manchester) Limited (in liquidation) and others.*[58] As expressed by Aikens J, the argument goes that, in the corporate context, legal advice privilege cannot attach to communications made by employees to the legal adviser, where those employees are not themselves part of the directing mind and will of the corporate client. The status of communications made by such employees as far as legal advice privilege is concerned is analogous to that of communications by or to other independent third parties who are not the client, which would equally not be covered by legal advice privilege.[59] Hildyard suggests that the restrictions of the attribution argument will often reflect reality, as a corporation is likely to restrict the authority to seek or receive legal advice on its behalf to 'an individual or body', that is its directing mind and will.[60] However, the board can usually delegate its authority[61] so to what extent can the authority to instruct legal advisers (i.e. the authority to form part of the directing mind and will of the corporate client for the limited purpose of preparing and communicating instructions) be delegated effectively within the company without losing privilege.

The decision in *Three Rivers District Council & Others* v *The Governor & Company of the Bank of England (No. 5)*[62] (*Three Rivers*) indicates that a designated person or body can be the client for legal advice privilege purposes. It was conceded in *Three Rivers* that the body established by the Bank of England (the Bingham Inquiry Unit (BIU)) to deal with communications between the Bank and the Bingham Inquiry, and in that context to seek and receive advice from the lawyers, was the client.[63] There was therefore no further analysis of the position that the BIU held in the Bank and the attribution theory was not explored. However, it could be argued that the BIU represented the directing mind and will of the Bank for the purpose of instructing/communicating with the Bank's lawyers. The position was that three officials of the Bank of England were appointed by the Governor to deal with all communications between the Bank and those conducting the Bingham Inquiry. In connection thereto, the BIU sought and received legal advice from the Bank's solicitors. It is not apparent that the authority delegated to them by the Governor meant that they and *they alone* made decisions regarding presentation of evidence to the Bingham Inquiry. In essence, 'The preparation and communication of information and instructions to the bank's legal advisers to enable them to advise pursuant to their retainer was the central role performed by the BIU'.[64] So, the BIU appears to have been given authority to create information and communicate with the lawyers, which included giving them instructions.

55. *Three Rivers District Council & Ors* v *The Governor & Company of the Bank of England* [2003] EWCA Civ 474.
56. See *Eurasian* above n. 11 at para. 92.
57. *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch.) at para. 94.
58. [2006] EWHC 839 (Comm)
59. Ibid. at para. 69.
60. See *RBS*, above n. 57 at para. 96.
61. For example, through provisions in its Articles of Association—Companies Act 2006, Schedule 1, Part 2, Article 5 (1).
62. Above n. 55.
63. Above n. 55 at para. 31.
64. *Three Rivers Council and Others, Bank of Credit and Commerce International SA (In Liquidation)* v *The Governor and Company of the Bank of England (No. 3)* [2002] EWHC 2730 (Comm), para. 9.

It could be argued that the restrictive approach adopted in *Three Rivers* of requiring the court to identify a specific client within the company was a consequence of the court applying public policy considerations in order to impose a constraint on the ambit of the privilege. Higgins suggests that in *Three Rivers,* there were public policy issues at play in the court's decision-making, to prevent large amounts of information being withheld from disclosure.[65] It is certainly true that reference was made to a national institution gathering evidence for a Government inquiry, although this was in the context of assessing the dominant purpose for the preparation of documentary material,[66] rather than in relation to restricting the client to the BIU. However, it is not such a stretch to suggest that the public nature of the Bank[67] may have been some incentive to restrict privilege to communications from and to the BIU rather than encompassing a wider group.[68] It is possible that such an approach could be taken as a way to keep the ambit of the privilege within reasonable bounds where a company had chosen to delegate authority to a wide group, designated as the client, in order that as many communications as possible benefit from privilege. Such an approach might well be attractive to a court, faced with privilege issues where a large number of employees are within a group designated to communicate with the company's lawyers, and the court suspects that this is a contrived device intended to attach privilege to as wide a variety of communications as possible.[69] The public interest concerns around courts having access to as much relevant material as possible upon which to base their judgments, and the effect of privilege, apply quite generally.[70] Whether the nature of the organisation asserting privilege brings some secondary public interest issue with it is yet to be seen. For example, this secondary issue is unlikely to apply to most companies or limited liability partnerships but may apply to quasi-public bodies such as Universities. The question is, does the nature of these organisations mean that privilege is more likely to be restricted through a narrow reading of who within the organisation represents the client? *Three Rivers* perhaps hints that this might be the case.

It seems clear that different persons within the company may meet the requirements of being the directing mind and will of a company for different purposes.[71] It may seem surprising that, in *Three Rivers*, the court stated that the Governor of the Bank of England was not the client.[72] However, the decision was fact specific 'for the purposes of this application', and the point arose in the context of a hypothetical question concerning the position had the Governor noted his recollection of relevant events and passed them to the BIU for transmission to the legal advisers.[73] The Court of Appeal had previously recognised that the Governor had appointed the BIU to deal with the legal advisers[74]; presumably the Governor could, had he wished, have decided to perform that function himself. Indeed, where a board delegates authority to instruct a legal adviser, it seems that both the Board and the agent will be clients for the purposes of legal professional privilege.[75] Thus, it seems that the client may have multiple personalities, represented not only by the board but also by each person or group which the corporation

65. A. Higgins, 'Legal Advice Privilege and its Relevance to Corporations' (2010) 73(3) MLR 371–398, 397.
66. Above n. 55 at para. 35.
67. A corporation wholly owned by the UK government and overseen by a board of directors. Available at: www.bankofengland.co.uk/about/Pages/default.aspx. Accessed May 29, 2018.
68. H. L. Ho 'Legal Advice Privilege and the Corporate Client' (2006) *Singapore Journal of Legal Studies* 240.
69. Ibid. at 241.
70. Above n. 55 at para. 26.
71. *El Ajou* v *Dollar Land Holdings plc & Anor* [1994] B.C.C.143 at paras 154, 159.
72. See Loughrey, above n. 54 at 190.
73. Above n. 55 at para. 31.
74. Above n. 55 at para. 3.
75. For example, in *Eurasian* above n. 11 at para. 84, the court recognised that privilege might attach where an agent was authorised to instruct a legal adviser even though the advice was to go directly to the Board. See also *BBGP Managing General Partner Ltd and others* v *Babcock & Brown Global Partners* [2011] Ch. 296, in which Global had the authority of General to enter into relations with the legal adviser, the contract of retainer was with General but General was not the sole client because it had entered into the contract as Global's agent.

authorised to instruct the lawyers for particular purposes.[76] In *Menon and others* v *Herefordshire Council,*[77] Lewis LJ held that communications between employees of a Local Authority and the Authority's in-house legal team were covered by legal advice privilege because he accepted that all employees of the Local Authority were authorised to obtain legal advice from the in-house team in relation to the work they carried out as and when necessary. In *AB* v *Ministry of Justice*,[78] Baker J held that, in the absence of evidence of specific delegation to another entity, a head of department had implicit authority to seek legal advice from the department's in-house lawyers, which was covered by legal advice privilege. In these cases, the legal advice sought did not concern potential criminal liability; however, the position would clearly be the same if it had.

Ho suggests that there are two tenable interpretations of the rationale underlying the decision in *Three Rivers*. Ho regards the Bank of England as the client and the BIU as either communicating with the lawyers '*as* the client (being employees who personified the BOE for purposes of privilege) or *on behalf of* the client (as employees authorised by the BOE to conduct privileged communications on its behalf with Freshfields').[79] Given that the BIU was not merely acting as a conduit, communicating instructions from the Bank of England to its legal advisers, but was itself preparing those instructions, it is the former rather than the latter interpretation that appears to reflect the reality of the situation in *Three Rivers* and is consistent with the attribution principle. Loughrey suggests that the crucial point in determining whether communications between an employee of a company and a lawyer are privileged is the kind of authority the employee is exercising on behalf of the company.[80] This is important because, as Loughrey points out, 'a company can be said to act or communicate through all of its employed agents for one purpose or another'.[81] What is the appropriate extent of delegated authority that is required in order to confer 'client' status? The crucial distinction is between an intermediate agent authorised to communicate instructions prepared by the client to the client's legal advisers (who in our view would not form part of the directing mind and will of the corporate client for the purpose of preparing and communicating instructions) and an agent authorised by the client to prepare instructions to the lawyers on the client's behalf (who would, via delegation of authority, form part of the directing mind and will of the corporate client for that purpose).[82] Although legal advice privilege can attach to communications between the client and the lawyer where they are made through 'an intermediate agent of either',[83] this does not apply where such an agent goes beyond being a channel of communication, for example, by bringing material into existence.[84] In contrast, where an agent is authorised to prepare and communicate instructions, it seems that communication of those instructions to the client's legal advisers is privileged even if the legal advice is to be communicated back to the client itself and not to the agent.[85]

76. This would seem to be the best explanation for the final paragraph of Gatehouse J's judgment in *Re British & Commonwealth Holdings Plc; Samuel Montagu & Co Ltd; Quadrex Holdings Inc* [1990] Lexis Citation 2710.
77. [2015] EWHC 2165 (QB).
78. [2014] EWCA Civ 474.
79. Above n. 68 at 246.
80. Above n. 54 at 191.
81. Ibid.
82. Hanna, above n. 33 at 182 appears to suggest that client status depends upon case by case authorisation by the corporation to seek or obtain legal advice and that persons constituting the corporation's directing mind and will inherently fall within this category. This approach would seem to suggest that there are two categories of client: those who form part of the directing mind and will and those who do not. We would argue that the delegation of such authority renders the person or group to which such authority is delegated part of the directing mind and will rather than there being two categories of client.
83. *Price Waterhouse (a firm)* v *BCCI Holdings (Luxembourg) SA* [1992] BCLC 583 at 588.
84. Ibid. at 589; see also *Re Highgrade Traders Ltd* [1984] BCLC 151 at 164. In *AB* v *Ministry of Justice* [2014] EWHC 1847 (QB), a copy of instructions to legal advisers was not privileged where it had been sent to a non-legal adviser.
85. Above n. 11 at para. 84. In *RBS*, above n. 57 at para. 96, it was suggested that the agent had to be authorised to seek and receive legal advice. There are suggestions from *Price Waterhouse*, above n. 83 at 591 and *Three Rivers,* above n. 64 at para. 32 that the scope of a committee's terms of reference (and the width of the solicitors' retainer) may be analysed when assessing whether privilege can be claimed. However, this analysis appears to be in the context of assessing the purpose for which

An additional distinction is between authority of the two types mentioned immediately above and authority merely to provide information to the client or the client's legal advisers or merely to conduct preparatory work in compiling such information. Authorising an employee to provide factual information/evidence to the company's legal advisers or to the designated client within the corporation does not make that employee the client for the purposes of legal professional privilege.[86] Similarly, where the purpose of a committee or group set up by the company is merely to produce such material to be used by the client in instructing legal advisers, communications from it to the corporation or its legal advisers will not be covered by legal advice privilege.[87] In addition, documents of a factual nature, where the dominant purpose for preparation is not deemed to be that of obtaining legal advice, do not fall within the ambit of legal advice privilege.[88]

A possibility is that in establishing a designated client group, a corporation might include employees whose activities in reality amounted to evidence gathering or evidence provision. This could potentially result in communications by the group not being covered by legal advice privilege. This could be the case whether or not such inclusion was a device to artificially extend the ambit of the privilege. The device of enlarging this group to absorb as many employees as possible may therefore partially fall at this hurdle, before a court has to consider any artifice in the designation of the client. An analysis of these sorts of activities in *Three Rivers* was not undertaken in relation to the BIU; however, it would seem that such an analysis would be relevant within the group designated by the corporation as the client. The wide nature of the group might make it more likely that a court will examine this point in more detail. *Property Alliance Group Ltd* v *Royal Bank of Scotland plc*[89] provides an example of an order for inspection being made by the court following uncertainty around the precise nature and role of an internal committee (the Executive Steering Group or ESG) and therefore whether a claim to legal advice privilege in relation to ESG documents was correctly made out. The ESG was set up within the Royal Bank of Scotland (RBS) in response to regulatory investigations into the rigging of LIBOR currencies. Following examination of the relevant documents, the court concluded that they formed 'part of "a continuum of communication and meetings" between Clifford Chance and RBS, the object of which was the giving of legal advice as and when appropriate'.[90]

Following *Three Rivers*, it seems that a company is free to decide, in any given situation, who within the company the client actually is for the purposes of legal advice privilege. The Model Articles for Private Companies Limited by Shares[91] allows the board of directors to delegate any of the powers conferred on them under the articles to 'such person or committee . . . to such extent; in relation to such matters . . . as they think fit'.[92] In the Model Articles, the powers conferred on the directors constitute exercise of all the powers of the company,[93] which would include the power to instruct lawyers and

documents were prepared; that is, whether the dominant purpose is obtaining legal advice, or for some other purpose and where the terms of reference are 'manifestly contrived for the specific purpose of attracting legal professional privilege'. See *Price Waterhouse* above n. 83 at 591.

86. Above n. 11 at paras 67, 82, 87, 88.
87. Above n. 83 at 591.
88. Above n. 55 at paras 35–7.
89. [2015] EWHC 1557 (ch.).
90. Ibid. at para. 28.
91. The Companies (Model Articles) Regulations 2008, Schedule 1.
92. Ibid. at Schedule 1, Part 2, Article 5 (1). Similar provisions are found in the Model Articles for Public Companies, Schedule 3 of the 2008 Regulations, Part 2, Article 5(1). In terms of a limited liability partnership, the same principles regarding designating who is the client should apply (M. Stockdale and R. Mitchell, 'Who is the client? An exploration of legal professional privilege in the corporate context' (2006) 27(4) *Company Lawyer* 110 at 117. Although there are no provisions equivalent to Model Article 5, the members of an Limited Liability Partnership (LLP) may regulate their internal affairs by agreement (Limited Liability Partnership Regulations 2001, (SI 2001 No. 1090), regulation 7) and can therefore include provisions similar to Model Article 5. Arguably, the same result can therefore be achieved, allowing the LLP to designate a particular group within it, made up of members and employees, as the client for legal advice privilege purposes.
93. Ibid. at Schedule 1, Part 2, Article 3.

receive their advice. Therefore, there is no requirement that this delegation be solely to a director or committee of directors—delegation can include employees who are not members of the board, either individually (such person) or as part of a committee. The board of directors could decide that a particular group within the company should have the delegated power to instruct lawyers and therefore be designated as personifying the directing mind and will of the client for this specific purpose, or could delegate to a specific officer or employee. The effect would be to make communications to and from the lawyer to members of that group or to that person subject to legal advice privilege. Alternatively, adopting a more restrictive approach to delegation, the board could choose to prepare instructions itself and merely delegate to an intermediate agent the authority to communicate those instructions to the legal advisers.[94] The mere fact that a committee charged with preparing information to be communicated to a corporation's legal advisers forms an internal organ of the corporation does not in itself mean that the committee is the client for the purposes of legal advice privilege.[95] Whether the committee possesses delegated authority to instruct the legal advisers on behalf of the corporation will be a question to be resolved on the facts.

Membership of the Client Group

In general, in terms of day-to-day activities, it may well be that a company is content to leave instructing a lawyer to a director or directors, who *prima facie* will represent the directing mind and will of the company[96] and will constitute the client. However, in the context of particular matters, including where internal investigations into potential criminal liability are being undertaken, it may be useful for practical purposes to establish a delegated group within the company, perhaps beyond the directors, to instruct the lawyers and thus possess the appropriate degree of delegated authority to ensure that communications with the lawyer are covered by legal advice privilege. It may be that if the membership of this group is established at the outset in such a way as to ensure that communications between it and the legal adviser are privileged, subsequent changes in membership, if managed properly, will not result in a loss of privilege. In *Three Rivers (No. 3)*, it was apparent that the composition of the BIU was increased by other Bank officials from time to time during the process of responding to the Bingham Inquiry to enable the *BIU* to 'carry out speedily and efficiently the various research and analysis tasks that were required to furnish information and accurate instructions to the Bank's legal advisers'.[97] Although employees of the Bank outside the BIU, including the Governor, were deemed analogous to third parties from outside the Bank, these changes in composition did not appear to have had any effect on the privileged status of communications between the BIU and the solicitors. It appears that privilege existed not in consequence of the specific offices held by these employees but because of their temporary incorporation into the committee to which the power to instruct had been delegated, that is, the BIU. It is suggested that the key issue is why the specific employee has been seconded into the committee. If the purpose is to prepare instructions, then privilege would appear to attach. If the true purpose is to provide the committee with factual information possessed by the employee and the secondment is contrived to provide a cloak of privilege to communications not otherwise privileged, the danger is that some communications within or by the committee might not be privileged. Arguably, it may be possible to include an external third party, such as an accountant, as a member of such a committee. However, similar concerns will arise. If the accountant is included to provide factual information or legal or accountancy advice, then privilege may not attach.[98]

94. A very restrictive approach to the attribution argument, as perhaps expressed in *RBS Rights Issue Litigation* (above n. 57) and *Winterthur Swiss Insurance Company and Others* v *AG (Manchester) Limited (in liquidation) and others* (above n. 58), would be that only the board of directors can be the directing mind and will for this purpose.
95. Above n. 83 at 589.
96. Above n. 71 at 154.
97. Above n. 64 at para. 9.
98. Above n. 83 and *R (on the application of Prudential plc and another)* v *Special Commissioner of Income Tax and another* to *another* above n. 4.

Practical Guidelines

Do current suggestions for corporate clients grappling with issues of who is likely to be designated as the client for the purposes of privilege work? For example, Fortnam and Lobo advise establishing 'at the outset, before giving instructions and receiving advice, the nominated body/representative who is to deal with the external lawyers'.[99] They suggest that the retainer letter can be used to document who the nominated body or individual is,[100] a point echoed by Preston-Jones and Paterson.[101] Arguably, it may not be sufficient merely to identify a person or body as having authority to communicate with the legal advisers, as this might merely authorise communication of instructions as an intermediate agent for communication or gathering of evidence. What would seem to be desirable is identification of the person or group that is specifically authorised to create and communicate instructions to the legal adviser. In addition, is the retainer letter enough to guarantee that the nominated body is regarded as the client for privilege purposes? Should this be supplemented by, for example, an appropriate board minute or partners meeting minute, to record the delegation of authority to the relevant body and, perhaps crucially, the ambit of that delegated authority? It would seem that the safest approach in terms of delegated authority is to ensure that the client group has the authority to create information and communicate with the lawyers, including giving them instructions. It does not appear to be necessary to give only this group authority to make decisions following receipt of legal advice. Legal advice received by the client group can be disseminated within the company (e.g. to the board of directors) without losing its privileged status.[102] Attention must also be paid to the actions of members of the client group. Where a group is accepted as the client, it seems less likely that the actions of members of the group will be minutely scrutinised, but it is not impossible that this may happen. Care should be taken to ensure that actions taken by members of the group, such as the preparation of factual records, are taken for the purpose of obtaining legal advice. Moreover, it may be that the retainer letter is itself created by the designated client if that person or body falls in a category of persons or bodies who have been authorised by the company to instruct legal advisers, whether in-house or external, as and when required in appropriate circumstances relating to that person's portfolio within the organisation. In such circumstances, it will presumably be other evidence, such as a board minute, rather than the retainer letter itself that will be crucial to evidencing authority to act as the client.

So far as litigation privilege is concerned, where documents are prepared for the purposes of contemplated litigation, they should be marked as such.[103] While the designation will not be determinative, because the court is not required to accept the evidence of a party as to its intention at the relevant time, the test applied is an objective test and the evidence the court will consider in deciding whether the privilege arose includes evidence of the parties' intentions at the relevant time.[104] In addition, marking documents in this way seems particularly desirable where automated software is used to scan large numbers of documents for legally privileged content.[105]

Conclusion

The policy basis of litigation privilege is found in the concept of adversarial trial, that is, the right of a party not to disclose to an adversary either the party's brief or materials that came into existence for the brief. The ambit of the privilege is subject to three major constraints, restricting its operation to

99. J. Fortnam and J. Lobo, 'Three Rivers: comfort or missed opportunity?' (2004) 154 NLJ 1750.
100. Ibid.
101. R. Preston-Jones and J. Paterson, 'Three Rivers run deep?'(2004) 154 NLJ 1709.
102. The Good Luck [1992] Vol. 2 Q.B. (Com. Ct.), 540.
103. M. Gunnyeon, 'Erosion of legal privilege: Should insolvency practitioners be concerned?' (2017) 6 C.R. &I 216.
104. Above n. 89 at paras 32, 33.
105. Available at: https://www.sfo.gov.uk/2018/04/10/ai-powered-robo-lawyer-helps-step-up-the-sfos-fight-against-economic-crime/ (accessed 17 April 2018).

adversarial litigation, to circumstances in which litigation has commenced or is in reasonable contemplation and to communications made for the purposes of litigation (dominant rather than sole purpose sufficing). While it might be argued that changes in the nature of criminal proceedings justify the adoption of a 'policy of confinement' in relation to the application of litigation privilege, it is suggested that criminal proceedings remain primarily adversarial and that the policy rationale underlying the existence of the privilege remains valid in their context (though it is accepted that existence of contemplation of a criminal or internal investigation does not, in itself, justify the application of the privilege). There is first instance authority for the proposition that litigation privilege does not attach to communications for the purpose of avoiding criminal litigation but it is suggested that the better view is that such communications (unlike communications for the purpose of avoiding a criminal investigation) do fall within the ambit of litigation privilege. Similarly, it is suggested that litigation privilege should potentially attach to communications for the purpose of considering the desirability of following a DPA or to communications made for the purpose of enhancing the likelihood of obtaining a DPA. The fact that a criminal or internal investigation is contemplated or in progress does not in itself mean that criminal litigation is in reasonable contemplation. A recent first instance civil authority, followed without citation of other authorities by the Criminal Division of the Court of Appeal, suggests that criminal litigation may only be in reasonable contemplation if the client is aware of the circumstances that make a prosecution likely—that is, where there is at least knowledge of material supporting the truth of the allegations. It is suggested that the better view is that the questions that the court has to determine are fact specific and that even where a client believes on the information available to it that it is innocent, this does not mean that the client cannot reasonably contemplate prosecution if the relevant prosecuting authority tends to prosecute in circumstances of the type that the client finds itself in.

The approach taken by the courts when considering claims for legal advice privilege in the corporate context involves identifying, within the company, a client, either an individual or a client group. The consequence of this approach is that only communications between this client and the company's lawyers will be protected by legal advice privilege and then only if the communications from the client are of a particular type, that is, those communications that relate to instructing the lawyers and creating information relevant to those instructions.

When identifying a client within the company, attribution theory enables the company to create a directing mind and will for the purpose of communicating with the company's lawyers and with delegated authority to do so. In this context, if a designated group within the company only has authority to act as a conduit for instructions from, for example, the board of directors to the lawyers, then this group is not the client—it does not have the necessary characteristics for directing mind and will to be so. If the group has the authority to prepare instructions for the lawyers on behalf of the company, then the group has the necessary characteristics to be the directing mind and will of the company and is therefore the client, for this specific purpose. It seems also to be the case that there can be more than one client within the company for legal advice privilege purposes, so, for example, both the group with delegated authority to instruct the lawyers and the board could constitute the client. Similarly, various employees within a company might all have the authority to instruct the company's in-house or external lawyers for purposes relevant to their respective portfolios. In terms of the evidence needed to establish both the nature of delegated authority and to whom it has been delegated, it seems that an appropriately drafted letter of retainer and a board minute giving the group the authority to create information and communicate with the lawyers, including giving them instructions, are the optimal approach.

Although it may seem attractive to designate a very wide group of people within the company as the client, with authority to communicate with the company's lawyers, there do seem to be dangers with this approach. This device may encourage the court to look much more closely into the activities of members of the group, particularly if artifice is suspected. If a member of the group is essentially simply providing factual information possessed by him or her, and inclusion in the client group is contrived to try and provide a cloak of privilege to communications not otherwise privileged, the risk is that some communications from the client group to the lawyers may not be covered by privilege. Even where artifice is not

suspected, the point remains that the wider the client group, the more likely it is that some members of it are not in fact engaged in communications of the sort that would ordinarily be covered by privilege. Rather than creating a very wide client group at the outset, a better approach may be to second employees to the group as required, something that clearly took place in *Three Rivers*, subject to the caveat regarding artifice.

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The crime-fraud exception in Anglo-American jurisprudence: comparative dimensions and optimal reform proposals in the taxation context

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B.T.R. 109 **Abstract**

The crime-fraud exception to legal professional privilege is both well established and widespread in common law jurisdictions. The exception generally arises in circumstances where the client consults a lawyer for legal advice in connection with the perpetration of a criminal or fraudulent act before or during the commission of that act. This article analyses the crime-fraud exception to claims of privilege by lawyers in England, and by lawyers and tax practitioners in the US. It considers the significance of the exception in the taxation context, contrasts its limited use in this context in England and Wales compared to the US and discusses the markedly different approach taken in the English and Welsh First-tier Tribunal (Tax) in relation to information notices when compared to appeals to the tribunal and other judicial proceedings. Following comparative analysis and consideration of the barriers to greater use of the exception in the taxation context in England, proposals are made for a revised approach in English law.

Introduction

The crime-fraud exception to claims of legal professional privilege is well established and is found in many common law jurisdictions. The exception generally arises in circumstances where the client consults a lawyer for legal advice in connection with the perpetration of a criminal or fraudulent act either before the commission of that act or during its commission. For the exception to apply, the lawyer need not be complicit in the crime or fraud—the key issue is the client's behaviour and knowledge (or sometimes that of a third party on whose behalf the client has instructed the lawyer). In the taxation context, the crime-fraud exception can be used by tax collection agencies to try and defeat claims of privilege, and can therefore be regarded as an aid to the relevant agency in uncovering activity characterised as tax evasion, or iniquitous forms of tax avoidance. In the US, the Internal Revenue Service (IRS) has adopted this approach in the context of both attorney-client privilege and tax practitioner/client privilege. The authors believe that the process by which the English and Welsh courts currently consider challenges to legal professional privilege makes a similar approach by HMRC much less viable, other than in relation to information notices.
B.T.R. 110

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The article begins by discussing the nature of the crime-fraud exception (now often referred to as the iniquity exception) in England and Wales. The operation of the exception in the taxation context and the barriers to its use potentially imposed by article 8 of the European Convention on Human Rights (ECHR) are then considered. The nature of those circumstances in which the courts and the Tax Tribunal will be prepared to order inspection of allegedly privileged material under the exception and the limited extent to which they will be prepared to conduct in camera review of allegedly privileged documents are reviewed.

The nature of the crime-fraud exception in the US, where arguably greater development has taken place and where the exception seems to be used more frequently in the taxation context, is then discussed. The exception is considered in relation to both lawyers and tax practitioners and in circumstances involving an IRS summons. Finally the circumstances and threshold tests for in camera review of material under the exception are considered.

The article concludes with a comparison of the position in England and Wales with that in the US, identifying reasons why the exception is less likely to be relied on by HMRC. Proposals that would potentially allow wider use of the exception in the taxation context in England and Wales are made, including suitable safeguards derived from US practice, to strike the appropriate balance between the information gathering powers of tax enforcement bodies and the rights of taxpayers.

The crime-fraud exception in England and Wales (the iniquity exception)

The crime-fraud exception to legal professional privilege (now commonly referred to in both civil and criminal proceedings as the iniquity exception[1]) encompasses both communications that are themselves criminal and communications that are intended to further a criminal or fraudulent purpose.[2] A rare example of a communication falling into the former category is provided by a threat to "rip someone's throat out" made during a telephone conversation to his solicitors by a client dissatisfied with a quotation for conveyancing who sought the identity of the conveyancer who had given the quotation.[3] An example of communications falling into the much more commonly encountered latter category is provided by communications between a client and his solicitor for the purpose of effecting a share purchase which to the client's knowledge was intended to defraud the Revenue by resulting in the evasion of capital transfer tax.[4]

Under the crime-fraud exception, communications which are intended to further a criminal or fraudulent purpose are not privileged even though the legal adviser is not aware that the client has such a purpose.[5] Similarly, such communications will not be privileged even though the client is unaware of the criminal or fraudulent purpose and is merely the innocent tool of a third ***B.T.R. 111** party who intends to achieve it.[6] Indeed, it is possible for the operation of the crime-fraud exception to prevent legal professional privilege attaching to communications between legal adviser and client even though neither of them is aware that they are being used to further the criminal or fraudulent purpose of a third party.[7]

The crime-fraud exception may apply to communications whether or not litigation had commenced by the time they were made. The exception may apply whether the form of legal professional privilege that is relied upon is legal advice privilege or is litigation privilege.[8] The exception will not apply so as to prevent a client from obtaining legal advice, either to determine the legitimacy of an intended course of conduct or to determine how best to defend pending or contemplated allegations of fraud or criminality. It will not apply merely because the client intends to put forward a defence to allegations which the client knows to be untrue.[9] It may apply to communications made during the commission of criminal or fraudulent activity (if made, for example, for the purpose of covering up or stifling criminal or fraudulent activity). It may also apply to communications made after such activity has taken place (if made, for example, for the purpose of "salting away" the proceeds of such activity). [10]

Arguably, the crime-fraud exception should not be regarded as an exception to legal professional privilege.[11] The basis of this argument is that, when it operates, the effect of the "exception" is that privilege does not arise in the first place.[12] This is so because communications in furtherance of crime or fraud do not fall within the normal ambit of a legal adviser's professional employment as the legal adviser must either have conspired to further the criminal or fraudulent purpose or must have been deceived into so doing.[13] The operation of the crime-fraud exception is based on a provisional finding of criminality or fraud, and where disclosure takes place under the exception privilege will effectively be lost, even though it subsequently transpires that the allegations of criminality, or fraud, were unfounded.[14] Thus, Thanki[15] has propounded the attractive proposition that the crime-fraud exception should be regarded as a "procedural exception" to the privilege. The basis of this proposition is that, if the allegations of criminality or fraud are subsequently shown to have been unfounded after disclosure has been ordered under the crime-fraud exception, it is inaccurate to say that privilege never attached to the ***B.T.R. 112** communications even though the operation of the exception resulted in the frustration of the privilege.

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The iniquity exception

The operation of the crime-fraud exception is not restricted to fraud in the criminal sense, but is applicable whether the fraud is criminal or civil in nature.[16] Indeed, whilst it has been held that the ambit of the exception is not so wide as to encompass, "any act or scheme which is unlawful in the sense of giving rise to a civil claim",[17] and that fraud for this purpose must involve dishonesty and not merely disreputability or poor ethical standards,[18] "fraud" is currently given a relatively broad meaning in this context.[19] Adopting this broad approach, the Court of Appeal in *Barclays Bank plc v Eustice* (*Eustice*)[20] held that "iniquity" in the form of entering into transactions at an undervalue for the purpose of prejudicing the interests of a creditor was sufficient to bring the exception into operation. This was so even if there was no dishonesty and even if the client and the legal adviser had misunderstood the law such that they did not believe that the transactions were at an undervalue, and/or did not believe that a court would find that the purpose of the transactions had been to prejudice the creditor's interests.[21]

In reaching its decision, the Court of Appeal in *Eustice* [22] considered whether public policy required that the allegedly privileged documents should not be disclosed, or whether the purpose of the defendants in entering into the transactions was sufficiently iniquitous that public policy required disclosure. It concluded that the defendants' purpose had been sufficiently iniquitous to require disclosure.[23] Accepting that its decision might discourage persons considering engaging in sharp practice from consulting legal advisers who might have dissuaded them from adopting an iniquitous course of conduct, the Court of Appeal believed that the absence of legal assistance would make it more difficult for such persons to implement their iniquitous schemes, and that its decision would not discourage "straightforward citizens" from consulting their legal advisers.[24] The iniquity exception is applicable both to legal advice privilege and to litigation privilege.[25]

The breadth of the approach adopted by the Court of Appeal in *Eustice* [26] has a number of possible consequences, which are explored further below. These include both its potential to encompass not only tax evasion, but also forms of tax avoidance, and the possibility that its uncertain ambit could result in violation of article 8 ECHR in circumstances in which its ***B.T.R. 113** application would require the disclosure of otherwise privileged material. It is also suggested below that the breadth of the *Eustice* approach may be nullified in practice by the reluctance of the courts to engage in in camera review of privileged material.

The Court of Appeal in *Eustice* identified the existence of a conflict between the desirability of the court having access to all relevant documents prior to reaching its decision and the rationale underlying the existence of legal professional privilege.[27] This rationale is essentially that legal advisor/client confidentiality "must be protected if proper legal advice is to be obtained". [28] The Court of Appeal's decision that the defendant's purpose was sufficiently iniquitous to require disclosure, to the extent to which it broadened the ambit of the crime-fraud exception, has potential to erode this rationale. It is arguable that this rationale is less easy to justify in cases where the litigation privilege form of legal professional privilege is relied upon, because not all communications to which litigation privilege attaches would "disclose the seeking or giving of legal advice". [29] *Eustice* [30] itself concerned legal advice privilege to which the rationale is inherently applicable.

Whilst it has been suggested that the decision in *Eustice* may not have been correct,[31] it has been relied upon on a number of occasions.[32] The crime-fraud exception in its modern post *Eustice* guise as the "iniquity exception" applies not just where communications are made in furtherance of a criminal purpose but also where there is a purpose which breaches a duty of good faith, is contrary to public policy or is contrary to the interests of justice.[33] Conduct capable of amounting to iniquity for the purpose of the crime-fraud exception includes, for example

"sharp practice, something of an underhand nature where the circumstances required good faith [and] something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy". ***B.T.R. 114** [34]

An example is provided by circumstances in which legal advice relating to plans which favoured the interests of limited partners in a group of companies rather than those of the managing partner (also a company) was obtained via a breach of a duty of fidelity (honesty and good faith). The advice came via a director of the managing partner, who was also a director of other companies in the group, and who had failed to disclose the various plans to the managing partner.[35]

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In determining whether the crime-fraud exception is applicable, the fundamental question is whether in the context of the iniquity the communications fall outside the normal ambit of a legal adviser's professional engagement or amount to an abuse thereof.[36]

The crime-fraud exception in the taxation context

It has long been recognised that the court will exercise considerable care before ordering the disclosure of allegedly privileged communications under the crime-fraud exception and will only do so in highly exceptional circumstances.[37] Passmore[38] believes that the increased ambit of the crime-fraud exception, via the iniquity case law referred to above, has the potential to make examples of its successful invocation "much less exceptional". Indeed, whilst it is clear that legal advice privilege can encompass legal advice concerning the efficacy of a tax avoidance scheme,[39] Higgins and Zuckerman have suggested that it is "reasonably arguable" that the iniquity exception is sufficiently broad to encompass "very many cases" of legal advice concerning such schemes.[40] It is also clear that the concept of tax avoidance is a "grey area", subject to ambiguity, which encompasses a spectrum of activity from normal, sensible, and acceptable tax planning at one end, to conduct with no genuine commercial purpose, which the public regard as being "unacceptable or illegitimate and unfair", at the other.[41]

The question to which there does not currently appear to be a clear answer is to what extent conduct which does not amount to tax evasion, but falls towards the latter end of the spectrum of tax avoidance, may potentially amount to iniquity for the purposes of the crime-fraud exception. Moreover, whilst it has been said that the border between tax avoidance and tax evasion is crossed when false statements are deliberately and dishonestly made to the Revenue,[42] it is important to note that statutory intervention may result in adjustments to the positioning of this borderline. This means that conduct which previously did not fall within the remit of the criminal justice system may do so as new or modified criminal offences are created (such as the introduction by **B.T.R. 115* the Government in the Finance Act 2016 of a new offence which removed the need to prove intent in the context of serious examples of failure to declare offshore income and offshore gains[43]). The consequence of such statutory intervention, so far as the crime-fraud exception is concerned, is that legal adviser/client communications concerning such conduct will be brought within the ambit of the exception via its criminality element whether or not they would previously have been regarded as iniquitous for the purposes of the exception.

A problem arising from the uncertain ambit of the crime-fraud exception in its iniquity guise, identified by Thanki,[44] is that whilst it may not be difficult for legal advisers to determine whether the conduct in which a client seeks to engage is criminal or fraudulent, it may be more difficult for them to determine whether a client's proposed course of conduct is iniquitous, as this may depend upon whether the legal adviser's view of the law at the time when the advice is given differs from that which is subsequently taken by the court. Legal advice requested, and given to keep the client's conduct within the ambit of the law, may not be sufficient to prevent the successful invocation of the crime-fraud exception if the court subsequently regard's the client's conduct as iniquitous.[45] Consequently, if communications concerning certain forms of tax avoidance do potentially fall within the ambit of the crime-fraud exception it may be difficult, or impossible, for legal advisors and their clients to determine in advance of legal proceedings seeking disclosure whether communications between them for the purpose of achieving tax avoidance are subject to legal professional privilege.

The crime-fraud exception, taxation and article 8 ECHR

It has been suggested that, to the extent to which the exception now encompasses imprecisely defined iniquity, its operation may have the potential to result in violation of article 8 (right to privacy) ECHR .[46] This suggestion relies upon jurisprudence of the House of Lords concerning proceedings in which disclosure was sought in the context of tax avoidance (although the crime-fraud exception was not invoked). [47]

It is clear that article 8 ECHR gives "strengthened protection" to legal adviser/client communications,[48] and that any interference with this right may only be justified if, in the words of article 8(2) , it is

"in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention **B.T.R. 116* of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". [49]

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In order to be in accordance with the law, the existence of a legal basis for interfering with the article 8 right is not in itself sufficient, rather, the legal basis for interfering must be both "accessible" and "foreseeable". [50]

As was recognised above, a consequence of the uncertain ambit of the exception is that legal adviser and client may well face difficulty in attempting to work out whether a proposed course of conduct is iniquitous in advance of the invocation of the exception in subsequent legal proceedings. There would appear to be a cogent argument that the operation of the crime-fraud exception upon the basis of iniquity in the context of tax avoidance could give rise to a violation of article 8 ECHR . The court amounts to a public authority for the purposes of section 6 of the Human Rights Act 1998 (HRA 1988),[51] and it is thus unlawful for it to act incompatibly with a Convention right.[52] Therefore, the legality of the operation of the crime-fraud exception must be in doubt in circumstances in which, when communications took place, legal adviser and client would not have been able to predict with accuracy whether or not communications between them would fall within the ambit of legal professional privilege, due to the uncertain ambit of the exception.

Even if the definition of the crime-fraud exception is sufficiently precise to avoid article 8 ECHR violations, another article 8 issue falls to be considered in this context. The question is to what extent could it be said that requiring the disclosure of communications relating to different forms of non-criminal tax avoidance, which fall at different points along the spectrum referred to above, is "necessary in a democratic society in the interests of … the economic well-being of the country"? [53] In order for interference with the article 8 right to be necessary, it must correspond to a pressing social need and must be proportionate to the legitimate aim that is being pursued.[54]

When the crime-fraud exception in its iniquity guise was recently considered judicially, the court recognised[55] that proportionate interference with the article 8 right may be justified in circumstances in which there has been an abuse of the legal adviser/client relationship[56] and held that the interference on the facts of the case could be justified both on the basis of protecting the private law rights of the applicant for disclosure and upon that of "upholding the efficacy of the administration of justice and the rule of law". [57] The case was not one which concerned tax avoidance but, rather, concerned an application by a bank for disclosure of documents relating to the assets of its former chairman who it alleged had fraudulently misappropriated its funds.

It would presumably be considerably more difficult to establish that it was necessary to interfere with article 8 rights in the context of tax avoidance that fell towards the tax planning end of the ***B.T.R. 117*** spectrum as opposed to that of tax avoidance that fell at the tax evasion end of that spectrum. Interference with the article 8 right may potentially, however, be justified where there is reasonable cause to believe that legal professional privilege is being abused (that is, in the context of facts or information that would satisfy a reasonable observer that this was so). [58] Moreover there may be forms of tax avoidance which would otherwise appear sufficient to amount to iniquity for the purposes of the crime-fraud exception but would not justify classification as an abuse of the legal adviser-client relationship for the purposes of article 8 ECHR .

Whilst the arguably vague and apparently increasing ambit of the crime-fraud exception may have the scope to encompass forms of tax avoidance as well as tax evasion, the operation of article 8 ECHR , in conjunction with section 6 HRA 1998 , would appear to limit the extent to which judicial extension of the ambit of the common law exception to encompass forms of tax avoidance would be lawful. This is one reason why the authors assert that Passmore's view that successful invocation of the crime-fraud exception may become much less exceptional is unrealistic. The other reason, considered below, is the reluctance of the courts to conduct in camera review of privileged material.

What is required in order to invoke the crime-fraud exception and what material will the court be prepared to consider in reaching its decision?

In order to invoke the crime-fraud exception it is not necessary to persuade the court either to the criminal or to the civil standard of proof that the exception is applicable.[59] Rather, in order to obtain inspection of documents under the crime-fraud exception, the party seeking inspection must make out a prima facie case of the truth of the party's allegations which "has some foundation in fact" and which rests "on solid grounds". [60] It has been suggested on a number of occasions that what is required in order to obtain inspection under the crime-fraud exception is evidence which discloses "a strong prima facie case of iniquity". [61] It appears, however, that the strength of the prima facie case that is required may vary with the circumstances of the case. It seems that if the alleged fraud is itself an issue in the proceedings a strong or very strong prima facie case will be required, whereas if there is freestanding evidence of fraud the evaluation of which does not require the court to reach a judgment in

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relation to an issue in the proceedings, a prima facie case may be sufficient to enable the court to determine whether the crime-fraud exception is applicable.[62]

There does not appear to be a defined list of the material which may be relied upon to support the existence of a prima facie case for the purposes of the crime-fraud exception.[63] The authorities do, however, provide a degree of guidance. They demonstrate that such material might include, for example, "[e]vidence, admission, inference from circumstances which are common ground, ***B.T.R. 118*** or 'what not'". [64] Indeed, in determining whether a prima facie case has been established it seems that the court is entitled to consider "the whole chronology of events". [65] The material may also, potentially, include the allegedly privileged communications themselves.[66] There is authority for the proposition that the court can examine the documents where this is necessary in order to determine whether the crime-fraud exception applies[67] and, consequently, that "the court may look at the position in the round including the contents of the document(s) of which disclosure is sought". [68]

The most recent authorities suggest that the court will only exercise its power to examine the allegedly privileged documents "very sparingly"[69] and that it will only do so if this is justified by an "exceptional factor of real weight". [70] The justification for the court's unwillingness to examine privileged documents where the existence of privilege is disputed is that when the court exercises its power, a judge other than the trial judge will be required to examine the relevant documents out of context and to receive submissions from one party in the absence of the other. Consequently, the court will be reluctant to inspect the documents in the absence of "credible evidence" that the legal advisers of the party claiming privilege have either misunderstood their duty to the court, or that they cannot be trusted.[71]

It seems that the fact that the other material before the court does not establish a prima facie case does not in itself amount to an exceptional factor of real weight.[72] The requirement for such an exceptional factor in the context of the crime-fraud exception is derived from case law which does not relate to the operation of the crime-fraud exception but, rather, concerns those circumstances in which the court is determining whether a claim of privilege has been made out.[73] Current practice when the court is considering whether a claim of privilege has been established in such circumstances is that it will only examine the allegedly privileged documents as "a solution of last resort" and only if there is credible evidence that the lawyers claiming privilege have not understood their duty to the court, or cannot be trusted or in the absence of a reasonably credible alternative.[74]

Thanki, et al.[75] assert that requiring the existence of an exceptional factor of real weight in the context of the crime-fraud exception, based upon case law drawn from a different context, is "controversial" and "puts the test too high". Similarly, Hollander[76] asserts that it is wrong to suggest that the existence of an exceptional factor of real weight forms a condition precedent to the ability of the court to examine the privileged documents in camera in the context of an ***B.T.R. 119*** allegation of iniquity. In particular, he questions why the court should not view the allegedly privileged documents in circumstances in which, in consequence of mistaken disclosure by legal advisers acting for the party claiming privilege, legal advisers who have specially been instructed by the party relying on the crime-fraud exception to make submissions under the exception have also seen them.[77] Even in this situation, the current judicial approach is that it would be exceptional for the court to view the communications.[78] The fact that the courts impose such a high bar before conducting in camera review provides the second justification for the authors' view that successful invocations of the crime-fraud exception in England and Wales are unlikely to become less exceptional in the near future.

Hollander[79] suggests that where the court is prepared to examine allegedly privileged documents to determine whether the crime-fraud exception applies, and rules that the documents are privileged, the judge will normally be able to put the material out of his or her mind. He accepts that there may be circumstances in which such an application should be heard by a different judge. In a recent case which did not concern the crime-fraud exception in which the court ordered that allegedly privileged documents be produced under rule 31.19(6) of the Civil Procedure Rules (CPR)[80] in order to enable the court to determine whether they were privileged, counsel suggested that a different judge should inspect the documents. The original judge indicated that he would hear submissions from the parties as to whether the task of inspecting the documents should be undertaken by a different judge.[81] Subsequently, the original judge directed that the task should be undertaken by a different judge who, having inspected the documents, held that they were privileged.[82] The second judge noted that his ability to review the documents was in "marked distinction" to the difficulties that the first judge had faced when attempting to determine whether the documents were privileged, in the absence of the ability to inspect them.[83]

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The current judicial reluctance to examine allegedly privileged documents in camera, both when the crime-fraud exception is relied upon and, more generally, when objections to the status of allegedly privileged communications are made for other reasons, clearly makes it much more difficult for parties seeking to rely upon the exception to establish a prima facie case of iniquity. Higgins and Zuckerman, with reference both to the reluctance of the courts to examine privileged documents in camera, and also to the difficulties faced by tax authorities in identifying privilege claims that have not been properly made out because they are not aware of the contents of the allegedly privileged communications, believe that judicial scrutiny of claims of legal professional ***B.T.R. 120*** privilege is unlikely to be effective in tax cases.[84] The authors agree with this as a general proposition. They believe that one area in which there is currently potential for increased successful invocations of the crime-fraud exception is where privilege is asserted before the First -tier Tribunal (Tax) in the context of an information notice.

Examination of allegedly privileged documents by the First-tier Tribunal (Tax)

So far as judicial reluctance to examine allegedly privileged documents in order to determine whether they are privileged is concerned, it seems that a distinction may be drawn between those cases in which legal advice privilege is relied upon in the context of appeals to the First-tier Tribunal (Tax) (the Tribunal) and those in which it is relied upon when the Tribunal is required to resolve a privilege dispute which arose following the giving of an information notice by an officer of HMRC.

Appeals to the Tribunal are governed by The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the 2009 Rules). [85] Rule 27(3) makes clear that the duty to allow inspection of certain documents which it imposes upon the parties does not encompass "any documents which are privileged". [86] In one appeal before the Tribunal, the parties were agreeable to it inspecting documents in camera in order to determine whether a waiver of privilege in relation to other documents had given rise to an implied waiver of privilege in relation to the documents in question. The judge, in determining that there had not been an implied waiver, did not find it necessary either to inspect the documents or to decide whether it would have been appropriate for her to have done so.[87] It may be that, in the light of the civil authorities referred to above, judges who are required to determine issues of privilege in the context of tax appeals will only be prepared to undertake in camera inspections of documents to which claims of privilege relate in exceptional circumstances.

Privilege disputes arising out of the giving of information notices (that is, notices requiring a person to provide information or produce documents which an officer of HMRC reasonably requires to enable that officer to check a person's tax position[88]) are governed by the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (the 2009 Regulations),[89] which were made under Schedule 36 to the Finance Act 2008 (FA 2008). [90] Paragraph 23(1) of Schedule 36 FA 2008 provides that an information notice neither requires a person to provide privileged information nor to produce any part of a privileged document. Where a person who has been given an information notice during the course of correspondence with an officer of HMRC applies to the Tribunal to have a privilege dispute resolved, the Regulations require the person to include copies of the disputed documents with the application. ***B.T.R. 121*** [91] If the information notice was given during an inspection of premises under Part 2 of Schedule 36 FA 2008 , the documents are given to the officer in a sealed, labelled, signed and countersigned container which the officer delivers to the Tribunal with the seal intact together with an application to have the dispute resolved.[92] In either case the Tribunal determines whether and to what extent the documents are privileged, and directs which parts must be disclosed, but must ensure that neither the documents nor copies thereof are inappropriately disclosed prior to the Tribunal determining their status.[93]

Reported decisions of the Tribunal relating to claims of privilege in the context of information notices demonstrate that the Tribunal does inspect the privileged documents when determining whether all or part of them are privileged.[94] Whether, as the Tribunal becomes accustomed to inspecting allegedly privileged documents in camera in the context of disputes arising out of the giving of information notices, it will also expect to conduct such inspections when privilege disputes arise in the context of tax appeals remains to be seen. A distinction that might be drawn in attempting to justify a divergence in practice is that in the former context the Tribunal's role is that of determining an issue of privilege under regulations that specifically require the applicant to provide the Tribunal with copies of the allegedly privileged documents, whereas in the latter context the issue of privilege will arise via a disclosure hearing in the context of a tax appeal under rules that do not impose such a specific requirement. Logically, it would not seem to make sense for the information available to a Tribunal, which is required to determine whether communications are privileged (that is, whether that information does or does not include an inspection of the relevant documents themselves), to differ depending upon the procedural route via which the privilege dispute arrived before the Tribunal.

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The crime-fraud exception in the US for lawyers and tax practitioners

The crime-fraud exception to claims of attorney-client privilege is well established in the US.[95] The exception applies to both legal advice privilege and attorney-client work product privilege.[96] In tracing the history of the crime-fraud exception, Fried considered the origins of the exception in English law and observed that:

"The subsequent development of the future crime or fraud exception to the attorney-client privilege has taken place almost entirely in the United States." [97]

In reaching this conclusion, Fried referred to: "The paucity of cases in Great Britain …". [98] To put his trans-Atlantic comparison in context, it is important to note that Fried was writing in ***B.T.R. 122** 1986, that is prior to the expansion of the English doctrine through development of the concept of iniquity.

It is argued by a number of commentators, including Fried, that the exception has expanded significantly in the US through a combination of the increasing criminalisation of corporate wrongdoing or breaches of administrative law in situations that would not amount to civil fraud, coupled with a lowering of the evidentiary standard required to establish the exception.[99] This expansion may, in part, explain the greater utilisation of the exception in the US. As was indicated above, the authors' primarily attribute the limited utility of the exception in England and Wales to judicial reluctance to engage in in camera review of privileged material. In contrast, as is demonstrated below, the US courts are much more ready to examine allegedly privileged material in camera. This approach must clearly encourage greater use of the crime-fraud exception by the IRS than by HMRC.

The exception does not encompass past wrongdoing—it is limited to ongoing or future illicit activities.[100] When considering the operation of the exception, the importance of the client's intent when seeking legal advice is difficult to pin down. One could argue that, where a client sought legal advice and *at the time* had no intent to commit a crime or fraud but later did so, then the exception should not apply. This would be the case even though the advice may in some way be relevant to the crime or fraud later committed. A similar hypothetical point was made in *In Re: Grand Jury Subpoena*.[101] However, establishing the intent of the client when advice is sought is particularly difficult because of what Gerson and Gladieux describe as the "inherent *post-hoc* nature"[102] of the exception. Inevitably, the obvious difficulty in establishing intent is solved by finding sufficient evidence that a crime has been committed or a fraud perpetrated in order to meet the threshold for further enquiry into the application of the exception. Arguably, a range of approaches towards intent are evident. It has been suggested that the exception has expanded to include situations where, although the client may not have had criminal intent when seeking legal advice, a crime was later committed.[103] Conversely, in *Marc Rich & Co A.G. v United States of America* (*Marc Rich*), the court's view was that: "The crime or fraud need not have occurred for the exception to be applicable; it need only have been the objective of the client's communication."[104] In *In Re: Grand Jury Investigation, Glen J. Shroeder, Jr.* (*Shroeder*)[105] the court identified, as the second part of a test used to decide if the crime-fraud exception applies, that it must be shown "that the attorney's assistance was obtained in furtherance of the criminal ***B.T.R. 123** or fraudulent activity or was closely related". [106] The court's view was that this "related" requirement should not be interpreted in too restrictive a fashion.[107] In the 3rd Circuit, the requirement seems to be that the legal advice must be used "in furtherance" of the crime or fraud and that "a more relaxed 'related to' standard…. " has been rejected.[108]

The range of approaches adopted by different Circuits in relation to the question of intent in general is one result of the greater development that has taken place in the US regarding the operation of the crime-fraud exception. Arguably, different approaches might result in some "activity" being caught in one Circuit but not another. For example, the more relaxed "related to" standard evidenced in the 11th Circuit in *Shroeder* [109] might catch activity that would not be caught under the 3rd Circuit's requirements. As will be shown later, intent can be particularly relevant in the taxation context.

With regard to the breadth of activity covered by the exception in the US and whether it covers iniquitous conduct, as is the case in England, it has been suggested that activity amounting to abuse of the attorney-client relationship might come within the exception. In relation to opinion work product there is dicta to support the view that such work product cannot be privileged if work "was performed in furtherance of a crime, fraud or other type of misconduct fundamentally inconsistent with the basic premises of the adversary system". [110]

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This perhaps suggests a move towards an English iniquity style exception, covering cases where the client abuses the attorney-client relationship.[111] However, if as Fried suggests there has been a significant expansion of criminalisation, to the extent that in both the civil and criminal context "it is almost always possible to allege that the defendant has consulted an attorney in furtherance of a federal crime",[112] is the extension of crime-fraud in the US to situations involving iniquitous conduct even necessary?

The crime-fraud exception in the taxation context

Unlike the position in English law, in the US there is a tax practitioners' privilege, found in section 7525 Internal Revenue Code (IRC), that is based on the attorney-client privilege, although it is narrower in scope and subject to a number of limitations.[113] Claims that communications are protected by the tax practitioner privilege in section 7525 IRC are subject to challenge, both under the tax shelter exception found in that section[114] and under the crime-fraud exception.[115] In ***B.T.R. 124** *United States v BDO Seidman, LLP* (*BDO*), the court upheld a District Court's ruling that, following in camera review of a number of documents, one document was not protected by privilege because it was a communication made in furtherance of a crime or fraud.[116] The litigation arose from an IRS summons issued in connection with an investigation into the involvement of BDO in potentially abusive tax shelters.[117]

In the context of enforcement proceedings relating to the IRS summons, clients of BDO intervened to try and protect their identity and prevent the disclosure of documents to the IRS. In the District Court, the IRS failed to establish a prima facie case that BDO and the intervenors were engaged in fraudulent or criminal activity. The complexities and uncertainties of the tax code and related regulations and the consequent determination of whether BDO had or had not complied with the code and regulations was regarded as "one of the ultimate questions for this litigation". [118]

The court in *BDO* did go on to consider the crime-fraud exception in its in camera review of individual documents and, as part of this process, considered some indications of fraud in the tax shelter context that might be sufficient to establish the prima facie showing of fraud required in the Seventh Circuit. The court identified eight non-exclusive indicators of fraud including, for example: the marketing of pre-packaged transactions; communication from the intervenors to BDO, the purpose of which was to engage in a pre-arranged transaction having the sole purpose of reducing taxable income; attempting to conceal the true nature of the transaction and knowledge that the intervenors lacked a legitimate business purpose for entering into the transaction.[119] These indicators of fraud are simply "guideposts" and must be considered with all the other circumstances surrounding the relevant documents to determine whether there is enough evidence to give sufficient "colour" to the charge of crime-fraud.

The position of the IRS regarding application of the crime-fraud exception in cases involving tax shelters was made clear throughout the *BDO* litigation. The IRS clearly regard a failure to register or report a potentially abusive tax shelter "the likely effect of which would be to mislead or conceal an avoidance of tax" as an indicator of fraud, sufficient to bring such communications within the crime-fraud exception.[120] They argue that:

"If an in-camera inspection of the documents discloses that the taxpayer-investor's purpose in seeking 'advice' was to enter into a sham transaction or a transaction which otherwise could give rise to the imposition of a civil fraud penalty, then any right to confidentiality is voided under the crime-fraud exception." [121]

The IRS must obviously establish a prima facie case of fraud to succeed and, from *BDO*, it is clear that this requires more than simply describing transactions as pre-packaged, abusive tax shelters. ***B.T.R. 125**

It may be that guideposts such as those provided in *BDO* would be of value if the crime-fraud exception is relied upon in England in the tax shelter context. How valuable some of these guideposts would be might depend upon the willingness of the English and Welsh courts or the Tribunal to conduct in camera review.

Considerations around intent and identified crime or fraud referred to earlier are particularly relevant in the taxation context and, within that context, particularly in relation to tax planning schemes. The fluid nature of what is or is not an abusive tax scheme and, more importantly, what becomes regarded as an abusive scheme makes the clients' intent when consulting their lawyer about the scheme particularly important. Gerson and Gladieux make a similar point in the medical context.[122] Volz and Ellis identify tax shelter cases as having a "special importance as illustrations of the IRS's attempts to assert the crime-

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fraud exception to the attorney client privilege"[123] and note that, although legal commentators "have indicated that the IRS is unlikely to pursue the crime-fraud exception to the privilege in tax planning or shelter cases", there are plenty of examples of the government raising the exception.[124] Faced with burgeoning information gathering powers, taxpayers inevitably respond by more frequent assertions of attorney-client privilege,[125] and promoters of schemes have clearly been regarded by the IRS as making unmeritorious claims of privilege to avoid disclosing both investor lists and details of transactions.[126] In response, as one of a number of arguments used to challenge claims of privilege, the IRS raises the crime-fraud exception.

In the taxation context, it is clear that the exception covers a range of activities involving what is described in the case law as tax evasion. In *Shroeder*, the court noted that "tax evasion undoubtedly qualifies as a crime sufficiently serious to justify overriding the attorney-client privilege". [127] There is some evidence that activities characterised as tax limitation or planning do not come within the ambit of the crime-fraud exception. In *Marc Rich*, documents relating to tax advice sought in connection with forms of employee compensation plans and a proposed corporate reorganisation were not covered by the exception—it was concluded that the advice was not being sought in furtherance of a crime or fraud.[128] As in England and Wales, the difficulty is in establishing at what point legitimate advice on tax strategy or relating to tax planning schemes, such as those referred to in *Marc Rich*,[129] begins to stray into the realms of potentially abusive tax avoidance or tax evasion. This is particularly problematic given that reportable transactions for tax purposes include those having a *potential for tax avoidance*.[130] In this context, the tax practitioner privilege and the tax shelter exception to it provide an interesting comparison. ***B.T.R. 126**

As has already been discussed, the tax practitioner privilege[131] is modelled on the attorney-client privilege and is, therefore, subject to the same exceptions as that privilege, obviously including crime-fraud.[132] The legislators included a specific limitation to the tax practitioner privilege by excluding written communications connected with the promotion of participation in tax shelters from the privilege.[133] For this purpose, "tax shelter" covers arrangements having the significant purpose of avoiding or evading Federal income tax.[134] Therefore, it would appear that arrangements characterised as tax avoidance, rather than tax evasion, can come within the tax shelter exception to the tax practitioner privilege, leading to the denial of privilege for related written communications.[135] In contrast, communications relating to arrangements characterised as tax avoidance rather than as tax evasion are in less danger of losing privileged status under the crime-fraud exception to attorney-client privilege, because a prima facie case of fraud would have to be established in these circumstances. So, where tax advice is received from a tax practitioner, the crime-fraud exception and the tax shelter exception can both be used to try and set aside tax practitioner privilege claims in cases of tax evasion.[136] In addition, the tax shelter exception explicitly covers tax avoidance and therefore can be used to try to set aside such privilege claims in tax avoidance cases. If tax advice is given by a lawyer, attorney-client privilege claims can only be challenged using the crime-fraud exception regardless of whether tax evasion or tax avoidance is asserted and will only be set aside if a prima facie case of crime or fraud is established.

Unfortunately, during Congressional debate when the addition of the tax shelter exception to the tax practitioner privilege was proposed, it does not appear that any consideration was given as to whether or not the crime-fraud exception already covered similar situations.[137] It is therefore difficult to draw conclusions from this approach concerning the extent to which the ambit of the then proposed tax shelter exception was regarded as exceeding that of the crime-fraud exception. In Australia, where this question has been specifically considered during a review of proposals for a tax advisers' privilege, the Australian Law Reform Commission concluded that a tax shelter style exception would not be desirable because "this kind of advice already should be covered by the general fraud or crime exception (which is not a feature of the US model)". [138] The point was not considered further by the Commission and it is not clear why the exception was referred to as not being "a feature" of the US model. On the contrary, the exception has been raised in US cases involving both attorney-client privilege and tax practitioner privilege.

IRS summons and the crime-fraud exception

Under provisions in the Internal Revenue Code, a summons can be issued to "examine any books, papers, records, or other data which may be relevant or material" to an inquiry into the accuracy ***B.T.R. 127** of a tax return, to the making of a return where none has been filed and to the determination of tax liability.[139] Oral examination of the taxpayer and his/her adviser is also provided for.[140] Where documents requested in a summons are not produced, a petition can be made to a federal district court for an order compelling compliance with the summons.[141] Under the requirements set out in *United States v Powell*,[142] to obtain such an order the IRS must establish that the investigation, pursuant to which the summons is being sought, has a legitimate

purpose and that the inquiry or the materials sought may be relevant to that purpose, that this information is not already within the possession of the IRS and that relevant administrative steps have been taken. A prima facie case can be made that these requirements have been met on the face of the summons and by supporting affidavits. It is clear that "the obligation imposed by a tax summons remains 'subject to the traditional privileges and limitations'". [143] Therefore, as illustrated in *BDO*,[144] attorney-client privilege can be claimed but the crime-fraud exception can be raised by the IRS.

The examination regime in the English Tribunal in the context of information notices is in clear contrast to the process followed in the US regarding an IRS summons. Privilege disputes relating to material required by information notices issued by HMRC are dealt with by an apparently automatic delivery up to and review by the Tribunal of the relevant material. In contrast, material required by an IRS summons can be withheld pursuant to a claim of privilege. The IRS is then obliged to petition the court, at which point the court may choose to conduct an in camera review of the material. Where a claim of privilege is challenged using the crime-fraud exception, this review will not take place simply at the request of the IRS. Instead, a threshold evidential test must be met.

This contrast is particularly striking given the apparent reluctance of English courts in other contexts to examine allegedly privileged documents at all, and then only where justified by an exceptional factor of real weight. The very different regime in the English Tribunal in the context of information notice disputes would seem to disadvantage the party claiming privilege, because documents are routinely reviewed, and no threshold test must be met for review to take place. Although the threshold applied in the US for in camera review to take place is, arguably, quite low,[145] there is at least some evidential standard to be met. This seems to strike a more appropriate balance between the investigatory function and information gathering powers of tax enforcement bodies and the rights of taxpayers vis a vis the ability to claim privilege.

Quantum of proof and process—crime-fraud exception

Assuming that the required elements for establishing attorney-client privilege have been met, the burden of proof is placed on the party opposing the privilege to establish that the crime-fraud ***B.T.R. 128** exception applies.[146] In *Clark v United States*, the Supreme Court referred to the requirement that prima facie evidence is needed to support allegations of fraud in order to set aside the attorney-client privilege.[147] This requirement has not been further clarified in terms of quantum of proof; in the most recent Supreme Court case concerning crime-fraud, *United States v Zolin et al* (*Zolin*), the court chose to duck this issue whilst acknowledging that the use of the phrase "prima facie" had caused some confusion.[148] Galanek observes that:

"the quantum of evidence necessary to defeat the attorney-client privilege is unsettled at best. Inherent in each formulation is a great deal of judicial discretion as to whether the required threshold has been reached;" [149]

It is suggested by Lipman that at least three versions of the prima facie standard have been adopted by lower courts amongst the various circuits. These range "from 'probable cause' to a 'reasonable basis to suspect' to 'evidence that if believed by the trier of fact' would establish the exception."[150] In *BDO*, the court confirmed that the 7th Circuit had rejected the view of some circuits that, to invoke the exception, enough evidence to support a verdict of crime or fraud is required.[151] Instead, the court required that the party seeking to invoke the exception bring forward sufficient evidence to "'give colour to the charge' by showing 'some foundation in fact'". [152] Of course, as Lipman points out,[153] it is in question whether this differing language leads to different results—whether the crime-fraud exception is more easily established in some circuits than in others. There would certainly seem to be a practical difference between a standard that requires enough evidence to support a verdict of crime or fraud to establish the exception (the standard in the D.C. Circuit[154]) compared to evidence sufficient to give "colour to the charge".

If there is sufficient evidence to persuade the court of a prima facie case, in civil cases due process considerations determine that the other party should be given the opportunity to provide a satisfactory explanation in order for the privilege to remain.[155] In the criminal context in grand jury proceedings, although the court has a wide discretion around how in camera review is conducted,[156] this opportunity is unlikely to be given; a practice justified by the need to maintain secrecy, the court relying only on ex parte submissions.[157] Lipman argues that this differential approach between criminal and civil proceedings justifies the use of a preponderance of the evidence standard in criminal proceedings, to "allow for a more critical assessment of the government's evidence"[158] when assessing whether a prima facie case has been established. ***B.T.R. 129***

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There are certainly similarities of language between the English and US courts when considering the evidence required to establish that the crime-fraud exception applies. Both refer to prima facie evidence, albeit that the English courts require more when fraud is a central issue in the proceedings, in which case the *strength* of the case is considered an important element in establishing whether the exception applies. Some US courts seem closer to this requirement than others. For example, the District of Columbia (D.C.) Circuit's standard seems close to the "strong" or "very strong", prima facie case standard, although this does not seem to be based on whether or not fraud is a central issue. In contrast, the 7th Circuit uses language more similar to the "foundation in fact" language in assessing whether a prima facie case has been established. In the absence of Supreme Court authority on the point there is clearly scope for a divergence in approaches to the threshold required to establish a prima facie case amongst the various Circuits.

In contrast to the reluctance of the English and Welsh courts to conduct in camera review of allegedly privileged communications, the US approach seems to be for the trial judge to hold in camera review.[159] The court in *Zolin* [160] provided guidance on the use of in camera review as part of the process of establishing whether the exception applies. In *Zolin*, the court held that in camera review of privileged communications was appropriate to help the court determine if the crime-fraud exception to privilege applies.[161] In camera review can be of written materials and oral communications and can involve the oral examination of an attorney.[162] On the question of the circumstances in which in camera review would take place, the court held that such review should not take place simply at the request of the party asserting that the communications were not privileged due to the crime-fraud exception. There should be some evidence produced by the party challenging the claim of privilege and this evidence must meet a threshold test. The test set out by the court required evidence of a "factual basis adequate to support a good faith belief by a reasonable person". [163] It was made clear that "a lesser evidentiary showing is needed to trigger in camera review than is required ultimately to overcome the privilege". [164]

The guidance in *Zolin* [165] also covered the type of evidence that could be used towards meeting the evidentiary threshold required for both in camera review to take place and to establish a prima facie case. Any relevant evidence, whether or not "independent" of the privileged communications in issue, can be used both to meet the in camera review threshold test and as prima facie evidence that the exception applies.[166] Previous case law had suggested that evidence independent of the privileged communications was required to establish a prima facie case of crime-fraud.[167]

The approach to the type of evidence that the court will consider in assessing whether a prima facie case has been established seems consistent between English and US courts, but there is an ***B.T.R. 130** entirely different approach to in camera review. This difference relates both to the frequency of the practice and the threshold test to be met for review to take place. The factual basis adequate to support a good faith belief threshold test in the US is much lower than the exceptional factor of real weight test in English courts. The exception is the English Tribunal where there is no threshold test at all in the context of disputes arising out of the giving of information notices. Criticisms of the very high threshold test applied by the English courts could be met by adopting the US approach, before both the courts and the Tribunal. This might increase the potential success rate of such challenges and, thus, their frequency. Arguably, the demands on judicial time, consequent delays in the civil process and increased expense for the parties which could potentially result if in camera reviews of voluminous documents became the norm rather than the exception in England and Wales in the context of privilege disputes could conflict with the overriding objective of the CPR , namely, that of "enabling the court to deal with cases justly and at proportionate cost". [168]

Conclusion

Anglo-American legal systems have clearly seen the ambit of the crime-fraud exception broaden in recent decades. In the US, this broadening is seen through the low evidentiary standard required to establish the exception and through increasing criminalisation of wrongdoing that would not amount to civil fraud. There is also some evidence of the exception extending to activity amounting to abuse of the attorney-client relationship. In England and Wales, the broadening is seen through the development of the iniquity exception, encompassing breaches of a duty of good faith or purposes contrary to the interests of justice or public policy. It may also result from statutory intervention which criminalises conduct that formerly would not have fallen within the ambit of the exception.

Despite this broadening of the exception, in both the US and in England and Wales, the range of tax related behaviours covered by it is still somewhat opaque. It seems clear that activity amounting to tax evasion is encompassed by the exception. What is much less certain is how far activity characterised as tax avoidance falls within its ambit. In this context, the US tax practitioner privilege with its tax shelter exception offers an interesting comparator, although the circumstances of its introduction do not assist in drawing conclusions as to the extent to which the crime-fraud exception in the US was regarded by the legislature at

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that time as encompassing tax avoidance. It is certainly arguable that, in the US, the exception is now applied in a sufficiently broad manner to catch, potentially, some activities characterised as tax avoidance where the relevant evidentiary threshold is met. In England and Wales, whilst the iniquity exception may also be sufficiently broad to catch forms of tax avoidance, the potential for HMRC deploying it in this way may be limited by the reluctance of the courts to conduct in camera review of privileged documents. Moreover, the lack of precision in defining iniquity has potential consequences under article 8 ECHR where the exception is used in the taxation context, and it may be that interference with the taxpayer's article 8 rights is difficult to justify in the context of some forms of tax avoidance. The US system in contrast is not faced with challenges similar to those imposed by article 8 . ***B.T.R. 131***

Similar language is used in both jurisdictions when considering the evidence required to establish that the crime-fraud exception applies, that is prima facie evidence, although there is a lack of precision and consistency between and within both jurisdictions. The key difference between the two jurisdictions regarding the crime-fraud exception relates to the circumstances in which, and the frequency with which, in camera review of allegedly privileged material takes place. The English courts are reluctant to conduct in camera review of such material, requiring "an exceptional factor of real weight" before they will do so. In contrast, in the US there seems to be a relatively low evidentiary threshold for conducting in camera review—the factual basis adequate to support a good faith belief by a reasonable person—and, therefore, much greater use of this process.

In marked contrast to the approach in the English criminal and civil courts, when the English Tribunal deals with privilege claims in the context of information notices, it will view the allegedly privileged material. The rules which govern appeals to the Tribunal do not make equivalent provision. Given the public disquiet relating to many forms of tax avoidance, HMRC might, like their US counterparts, be tempted to make greater use of the broad iniquity exception to challenge claims of privilege made in the taxation context. In order for this to become a viable approach, one possibility would be to make amendments to the 2009 Rules [169] which govern tax appeals to bring them in line with the 2009 Regulations [170] which govern privilege disputes in the context of information notices. This would mean that in camera review would become a matter of routine with no threshold test being imposed by the 2009 Rules .[171] An alternative, arguably more attractive and balanced approach, would be to amend both the 2009 Rules and the 2009 Regulations to impose a threshold test and right of rebuttal, similar to that encountered in the US, in relation to all proceedings before the Tribunal. Such a test would impose a lower threshold than that currently applied in English law and would arguably strike the appropriate balance between the investigatory function and information gathering powers of tax enforcement bodies and the rights of taxpayers vis-à-vis the right to claim legal professional privilege. Without such changes, Higgins and Zuckerman[172] may be correct when they suggest that the judicial scrutiny of privilege claims is unlikely to be effective in tax cases.

Even if the rules governing proceedings before the Tribunal are amended in this way, this does not guarantee that a more generous approach to in camera review will be adopted by the criminal and civil courts. Factors mitigating against the adoption of such an approach might include conflict with the rationale for the privilege, increased delays and expense and the court being required to view documents out of context and in the absence of submissions from one of the parties. Indeed, in *Zolin*, the US Supreme Court recognised concerns that the blanket use of in camera review in the context of the crime-fraud exception would conflict with the policy underlying attorney-client privilege and place unduly onerous burdens upon the courts.[173]

The development of US style guideposts, whether via case law or by statutory reform, would be helpful in circumstances in which the courts or the Tribunal are required to consider the ***B.T.R. 132*** operation of the crime-fraud exception in the context of alleged tax avoidance or tax evasion. In particular, more specific guidance, whether judicial or statutory, concerning the ambit of the iniquity exception would be desirable in order to mitigate against the possibility of challenges based upon alleged article 8 violations. Such guidance should not be too specific or exhaustive in nature as it would need to encompass both the fluid nature of tax planning schemes and the wide range of potential forms of iniquitous activity that may be devised by tax planners. Ideally it would be formulated so as to provide the courts/the Tribunal with a reasonable degree of assistance when they are attempting to apply the borderline between those forms of tax avoidance which amount to iniquity and those which do not bring the exception into play. Such guidance should also safeguard article 8 rights by enabling lawyers to determine with a greater degree of precision whether the advice they are giving to their clients falls within the ambit of the privilege. Ideally, it would also be formulated in such a way as to reduce the possibility that the use of the exception in relation to tax avoidance activities that fall well away from the tax evasion end of the spectrum might result in a disproportionate interference with the taxpayer's article 8 rights.

The low threshold test for, and greater readiness with which, the US courts conduct in camera review of allegedly privileged material where the crime-fraud exception is raised would seem to make the exception a useful tool that the IRS can utilise in

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gathering information about both tax avoidance and tax evasion in the US. The wide iniquity exception in England arguably covers a range of tax related behaviour and could be used in a similar fashion to aid HMRC in gathering more information about tax avoidance and evasion, but this is subject to the reluctance of the courts to utilise in camera review and the potential for article 8 challenges if the exception is deployed more often. The continuing high public profile of activities perceived as tax avoidance would seem to suggest that revenue collection agencies need as many weapons in their armoury as possible to combat any such iniquitous arrangements. It is clear that the current regime in England and Wales relating to in camera review would require significant changes in approach if the application of the exception was to become more commonplace, thus enabling HMRC to follow the lead of the IRS.

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Michael Stockdale

Footnotes

1 For example, Lord Phillips of Worth Matravers in *Re McE (McE) [2009] UKHL 15; [2009] 4 All ER 335* at [11] and also, *R. v Brown [2015] EWCA Crim 1328; [2015] 2 Cr App R 31* at [29] and [33] and Popplewell J in *JSC BTA Bank v Ablyazov (Ablyazov) [2014] EWHC 2788 (Comm)* at [63].

2 *R. v Cox and Railton (Railton) (1884) 14 QBD 153* (CCR).

3 *C v C (C) [2001] EWCA Civ 469; [2001] 3 WLR 446* . The telephone message amounted to an offence under the Telecommunications Act 1984 s.43 .

4 *Jobson v Johnson (Jobson) [1986] Lexis Citation 889* (CA).

5 *Railton* , above fn.2, *(1884) 14 QBD 153* (CCR), and also, for example, *Jobson* , above fn.4, *[1986] Lexis Citation 889* (CA).

6 *R. v Central Criminal Court Ex p. Francis & Francis (A Firm) (Francis) [1989] AC 346 (HL)* .

7 See, for example, *Owners and/or Demise Charterers of the Kamal XXVI and Kamal XXIV v Owners of the Ship Ariela [2010] EWHC 2531 (Comm); [2011] 1 All ER (Comm) 477* .

8 *Kuwait Airways Corp v Iraqi Airways Co (No 6) (Kuwait) [2005] EWCA Civ 286; [2005] 1 WLR 2734* and Popplewell J in *Ablyazov* , above fn.1, *[2014] EWHC 2788 (Comm)* at [69].

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9 See, respectively, Lord Sumner in *O'Rourke v Darbishire (O'Rourke) [1920] AC 581 (HL)* at 613, Lord Parmoor in *O'Rourke* at 621–622 and Popplewell J in *Ablyazov* , above fn.1, *[2014] EWHC 2788 (Comm)* at [71].

10 See, respectively, Stephen J in *Railton* , above fn.2, *(1884) 14 QBD 153* (CCR) at 175, Dillon LJ in *Finers v Miro [1991] 1 WLR 35 (CA)* at 40 and Lord Goff of Chieveley in *Francis* , above fn.6, *[1989] AC 346 (HL)* at 393–394 and also, *B. Thanki, et al., The Law of Privilege, 2nd edn (Oxford: OUP, 2011), para.4.51*.

11 *C. Passmore, Privilege, 3rd edn (London: Sweet and Maxwell, 2013), para.8-063*.

12 Stephen J in *Railton* , above fn.2, *(1884) 14 QBD 153* (CCR) at 167–168 and also Viscount Finlay in *O'Rourke* , above fn.9, *[1920] AC 581 (HL)* at 604, Lord Carswell in *McE* , above fn.1, *[2009] UKHL 15; [2009] 4 All ER 335* at [82] and Popplewell J in *Ablyazov* , above fn.1, *[2014] EWHC 2788 (Comm)* at [68].

13 See Stephen J in *Railton* , above fn.2, *(1884) 14 QBD 153* (CCR) at 167–168 and also Popplewell J in *Ablyazov* , above fn.1, *[2014] EWHC 2788 (Comm)* at [93].

14 See Lord Phillips of Worth Matravers in *McE* , above fn.1, *[2009] UKHL 15; [2009] 4 All ER 335* at [11].

15 Thanki, et al., above fn.10, para.4.40.

16 See Kekewich J in *Williams v Quebrada Railway, Land and Copper Co [1895] 2 Ch 751 (Ch)* at 756.

17 See Goff J in *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd (Crescent) [1971] 3 All ER 1192 (Ch)* at 1199–1200.

18 See Goff in *Crescent* , above fn.17, *[1971] 3 All ER 1192 (Ch)* at 1200 and the extract from Goff LJ's judgment in *Gamlen Chemical Co (UK) Ltd v Rochem Ltd (No 2) unreported 7 December 1979* , set out in *Barclays Bank plc v Eustice (Eustice) [1995] 4 All ER 511 (CA)* at 522.

19 *Brent LBC v Estate of Owen Kane, Deceased (Brent LBC) [2014] EWHC 4564 (Ch)* .

20 *Eustice* , above fn.18, *[1995] 4 All ER 511 (CA)* .

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21 *Eustice* , above fn.18, *[1995] 4 All ER 511 (CA)* (see, in particular, Schiemann LJ at 523–525).

22 *Eustice* , above fn.18, *[1995] 4 All ER 511 (CA)* .

23 See Schiemann LJ in *Eustice* , above fn.18, *[1995] 4 All ER 511 (CA)* at 524.

24 See Schiemann LJ in *Eustice* , above fn.18, *[1995] 4 All ER 511 (CA)* at 525.

25 See *Kuwait* , above fn.8, *[2005] EWCA Civ 286; [2005] 1 WLR 2734* ; *Ablyazov* , above fn.1, *[2014] EWHC 2788 (Comm)* .

26 *Eustice* , above fn.18, *[1995] 4 All ER 511 (CA)* .

27 See Schiemann LJ in *Eustice* , above fn.18, *[1995] 4 All ER 511 (CA)* at 521.

28 *R. (on the application of Prudential plc) v Special Commissioner of Income Tax [2013] UKSC 1; [2013] 2 AC 185* , per Lord Sumption at [114].

29 Lord Scott of Foscote suggested in *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6) [2004] UKHL 48; [2005] 1 AC 610* at [29] that, given the rationale for the existence of legal professional privilege, the reason why communications that are made for the purposes of litigation but do not "disclose the seeking or giving of legal advice" is not easy to understand.

30 *Eustice* , above fn.18, *[1995] 4 All ER 511 (CA)* .

31 See Lord Neuberger In *McE* , above fn.1, *[2009] UKHL 15; [2009] 4 All ER 335* at [109]. Passmore regards *Eustice* , above fn.18, *[1995] 4 All ER 511 (CA)* as "pushing at the boundaries" of the crime-fraud exception (Passmore, above fn.11, para.8-063) and Thanki believes that it is a pity that the case was not reviewed by the House of Lords and recognises that it is yet to be reviewed by the Supreme Court (Thanki, et al., above fn.10, para.4.47).

32 For example: *Nationwide Building Society v Various Solicitors [1998] All ER (D) 26* (Ch); *Dubai Aluminium Co Ltd v Al-Alawi [1999] 1 All ER 703 (QB)* ; *Owners of the cargo lately laden on board the ship 'David Agmashenebeli' v Owners of the 'David*

Agmashenebeli' [2000] All ER (D) 2324 ; *C v C [2008] 1 FLR 115 (Fam)* ; *BBGP Managing General Partner Ltd and others v Babcock & Brown Global Partners (BBGP) [2010] EWHC 2176 (Ch); [2011] Ch 296* ; *Brent LBC* , above fn.19, *[2014] EWHC 4564 (Ch)* . Zuckerman supports its correctness, apparently on the basis that, as the Court of Appeal had suggested, discouraging those who wish to embark on iniquitous schemes from consulting legal advisers will make the implementation of such schemes more difficult (*A. Zuckerman, Civil Procedure Principles of Practice, 3rd edn (London: Sweet and Maxwell, 2013), para.16.109*).

33 Popplewell J in *Ablyazov* , above fn.1, *[2014] EWHC 2788 (Comm)* at [68].

34 Norris J in *BBGP* , above fn.32, *[2011] Ch 296* at [62].

35 *BBGP* , above fn.32, *[2011] Ch 296* .

36 See Popplewell J in *Ablyazov* , above fn.1, *[2014] EWHC 2788 (Comm)* at [93].

37 See Stephen J in *Railton* , above fn.2, *(1884) 14 QBD 153* (CCR) at 176 and Vinelott J in *Derby & Co Ltd and others v Weldon and others (No. 7) [1990] 1 WLR 1156 (Ch)* at 1173.

38 Passmore, above fn.11, para.8-063.

39 *R. (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax (Morgan) [2003] 1 AC 563 (HL)* .

40 A. Higgins and A. Zuckerman, "Re Prudential Plc [2013] UKSC 1: the Supreme Court leaves to Parliament the issue of privilege for tax advice by accountants, what Parliament should do is restrict privilege for tax advice given by lawyers" (2013) 32(3) CJQ 313, 318.

41 See Sales J in *R. (on the application of Ingenious Media Holdings plc) v HMRC [2013] EWHC 3258 (Admin)* at [10].

42 See Stanley Burnton J in *R. (on the application of Inland Revenue Commissioners) v Crown Court at Kingston [2001] EWHC Admin 581* at [2].

43 *HM Treasury, Policy paper, Spending review and autumn*

statement 2015 (2015), available at: www.gov.uk/government/publications/spending-review-and-autumn-statement-2015-documents/spending-review-and-autumn-statement-2015 [Accessed 18 January 2017], para.12.2 "Public Spending—Avoidance and Evasion"; FA 2016 s.163 and Sch.21 .

44 Thanki, et al., above fn.10, para.4.50.

45 Indeed, Passmore, above fn.11, para.8-063, suggests that the defendant in *Eustice* , above fn.18, *[1995] 4 All ER 511 (CA)* had acted on legal advice given to him in order that he might regulate his conduct in accordance with the law.

46 *R. Glover, Murphy on Evidence, 14th edn (Oxford: OUP, 2015), para.14.14*.

47 *Morgan* , above fn.39, *[2003] 1 AC 563 (HL)* . This may become a moot point if the UK withdraws from the ECHR , see 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 & Proof 246, 266.

48 See *Michaud v France (2013) (application no 12323/11)* at 118.

49 ECHR art.8(2) .

50 *Foxley v United Kingdom (Foxley) (2000) 8 BHRC 571 (ECtHR)* at [34].

51 Human Rights Act 1998 s.6(3)(a) .

52 Human Rights Act 1998 s.6(1) .

53 ECHR art.8(2) .

54 *Campbell v United Kingdom (Campbell) (1993) 15 EHRR 137 (ECtHR)* at [44].

55 With reference to the decision of the European Court of Human Rights in *Campbell* , above fn.54, *(1993) 15 EHRR 137* .

56 See Popplewell J in *Ablyazov* , above fn.1, *[2014] EWHC 2788 (Comm)* at [94].

57 See Popplewell J in *Ablyazov* , above fn.1, *[2014] EWHC 2788 (Comm)* at [94]–[95].

58 See *Campbell* , above fn.54, *(1993) 15 EHRR 137 (ECtHR)* at [48] and also *Foxley* , above fn.50, *(2000) 8 BHRC 571 (ECtHR)* at [44].

59 See Potter LJ in *R. v Gibbins (Gibbins) [2004] EWCA Crim 311* at [49].

60 See *O'Rourke* , above fn.9, *[1920] AC 581 (HL)* per Viscount Finlay at 604 and Lord Wrenbury at 632.

61 For example, Norris J in *BBGP* , above fn.32, *[2011] Ch 296* at [68] and also *Kuwait* , above fn.8, *[2005] EWCA Civ 286* ; and *Ablyazov* , above fn.1, *[2014] EWHC 2788 (Comm)* .

62 See Longmore LJ in *Kuwait* , above fn.8, *[2005] EWCA Civ 286* at [37] and [42] and Rose LJ in *R. (on the application of Hallinan) and others v Middlesex Guildhall Crown Court and another [2005] 1 WLR 766* (QB) at [25].

63 See *O'Rourke* , above fn.9, *[1920] AC 581 (HL)* per Lord Sumner at 614.

64 See *O'Rourke* , above fn.9, *[1920] AC 581 (HL)* per Lord Sumner at 614.

65 See Mr S Monty QC in *Brent LBC* , above fn.19, *[2014] EWHC 4564 (Ch)* at [50].

66 See *Railton* , above fn.2, *(1884) 14 QBD 153* (CCR), per Stephen J at 176; *R. v Governor of Pentonville Prison Ex p. Osman (Pentonville) (1990) 90 Cr App R 281 (QB)* ; *Gibbins* , above fn.59, *[2004] EWCA Crim 311* .

67 See *Pentonville* , above fn.66, *(1990) 90 Cr App R 281 (QB)* at 311.

68 *Gibbins* , above fn.59, *[2004] EWCA Crim 311* per Potter LJ at [43].

69 Munby J in *C* , above fn.3, *[2001] EWCA Civ 469* at [67].

70 For example, Norris J in *BBGP* , above fn.32, *[2011] Ch 296* at [72].

71 *National Westminster Bank plc v Rabobank Nederland [2006] EWHC 2332 (Comm)* per Simon J at [53]–[60].

72 Munby J in *C* , above fn.3, *[2001] EWCA Civ 469* at [72].

73 See Norris J in *BBGP* , above fn.32, *[2011] Ch 296* at [71]–[72].

74 Beatson J in *West London Pipeline & Storage Ltd v Total UK Ltd [2008] EWHC 1729 (Comm)* at [86].

75 Thanki, et al., above fn.10, para.4.66.

76 *C. Hollander, Documentary Evidence, 11th edn (London: Sweet and Maxwell, 2012), para.25-20.*

77 Hollander, above fn.76, paras 25-19–25-21.Where solicitors

realise that the documents have been disclosed by mistake but suspect that the crime-fraud exception is applicable the instruction of distinct legal-advisers to deal with the crime-fraud exception issue becomes desirable, as was the case in *BBGP* , above fn.32, *[2011] Ch 296* . Special counsel was also appointed in *Stiedl v Enyo Law LLP and others [2011] EWHC 2649 (Comm)* , though in *Stiedl* the crime-fraud exception was not relied upon and the issue was whether solicitors could act in the proceedings and could make use of privileged documents that had come into their possession.

78 See Norris J in *BBGP* , above fn.32, *[2011] Ch 296* at [72].

79 Hollander, above fn.76, para.25-21.

80 In civil proceedings a claim of privilege is made under CPR r.31.19(3) and the court, under CPR r.31.19(6)(a) , may require the person who seeks to withhold inspection of the allegedly privileged documents to produce them to the court.

81 *Property Alliance Group Ltd v The Royal Bank of Scotland plc [2015] EWHC 1557 (Ch)* see Birss J at [40].

82 *Property Alliance Group Ltd v The Royal Bank of Scotland plc (Alliance) [2015] EWHC 3187 (Ch)* see Snowden J at [2] and [46].

83 *Alliance* , above fn.82, *[2015] EWHC 3187 (Ch)* see Snowden J at [6].

84 Higgins and Zuckerman, above fn.40, 318.

85 The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273 (L.1)) .

86 The 2009 Rules , above fn.85, r.27(3) "A party which has provided a list of documents under paragraph (2) must allow each other party to inspect or take copies of the documents on the list (except any documents which are privileged). "

87 See Judge Barbara Mosedale in *Fisher v HMRC [2012] UKFTT 335 (TC)* at [91].

88 Finance Act 2008 Sch.36, paras 1 and 2 .

89 Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (SI 2009/1916) .

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90 The 2009 Regulations , above fn.89, were made under FA 2008 Sch.36, para.23(3) – (4) .

91 The 2009 Regulations , above fn.89, reg.5(5) .

92 The 2009 Regulations , above fn.89, reg.6(3) – (5) .

93 The 2009 Regulations , above fn.89, regs 8 – 9 .

94 See *Behague v HMRC [2013] UKFTT 596 (TC)* ; *Behague v HMRC [2013] UKFTT 647 (TC)* and *Lewis v HMRC [2013] UKFTT 722 (TC)* .

95 S. Jennison, "The Crime or Fraud Exception to the Attorney-Client Privilege: Marc Rich and the Second Circuit" (1984–1985) 51 Brooklyn Law Review 913, 916.

96 A. St. Peter Griffith, "Abusing the Privilege: The Crime-Fraud Exception to Rule 501 of the Federal Rules of Evidence" (1993) 48 University of Miami Law Review 259, 261.

97 D.J. Fried, "Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds" (1986) 64 North Carolina Law Review 443, 460.

98 See Fried, above fn.97, fn.82.

99 For example Fried, above fn.97, 445 and A. Daily and S. Britta Thornquist, "Has the Exception Outgrown the Privilege?: Exploring the Application of the Crime-Fraud Exception to the Attorney-Client Privilege" (2003) 16 Georgetown Journal of Legal Ethics 583, 591.

100 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, 1121.

101 *In Re: Grand Jury Subpoena 745 F.3d 681 (3rd Cir. 2014)* at 692.

102 S. Gerson and J. Gladieux, "Advice of counsel: eroding confidentiality in federal health care law" (1999–2000) 51 Alabama Law Review 163, 190.

103 See Gerson and Gladieux, above fn.102, citing a trend noted by the 10th Circuit, and also Daily and Thornquist, above fn.99, 586.

104 *Marc Rich & Co A.G. v United States of America, 731 F.2d 1032 (2nd Cir. 1984)* at 1039.

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105 *In Re: Grand Jury Investigation, Glen J. Shroeder, Jr. 842 F.2d 1223 (11th Cir. 1987)*.

106 *Shroeder*, above fn.105, *842 F.2d 1223 (11th Cir. 1987)* at 1226. The first part of the test required a "showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice."

107 *Shroeder*, above fn.105, *842 F.2d 1223 (11th Cir. 1987)* at 1227.

108 *In Re: Grand Jury Subpoena*, above fn.101, *745 F.3d 681 (3rd Cir. 2014)* at 692.

109 *Shroeder*, above fn.105, *842 F.2d 1223 (11th Cir. 1987)*.

110 *In Re: Sealed Case 676 F.2d, 793 (7th Cir. 1982)* at 812.

111 See Gerson and Gladieux, above fn.102, 190.

112 See Fried, above fn.97, 478. Fried also cites an example where the crime-fraud exception was applied without the wrongdoing being characterised as either crime or fraud.

113 See Mitchell, above fn.47, 247–248. The privilege applies to any individual authorised under federal law to practice before the IRS—U.S. Internal Revenue Code, Title 26, Subtitle F, Chapter 77, §7525(a)(3)(A).

114 Internal Revenue Code §7525(b).

115 *United States v BDO Seidman, LLP (BDO) 492 F.3d 806 (7th Cir. 2007)* at 818.

116 *BDO*, above fn.115, *492 F.3d 806 (7th Cir. 2007)* at 820.

117 Internal Revenue Code §6112(a) (2000). The relevant provisions have since been amended to refer to "reportable transactions".

118 *United States v BDO Seidman, LLP 2005 U.S.LEXIS 5555, (N.D.ILL 2005)* at 30.

119 *United States v BDO Seidman*, above fn.118, *2005 U.S.LEXIS 5555, (N.D.ILL 2005)* at 41.

120 W. Volz and T. Ellis, "An attorney-client privilege for embattled tax practitioners: a legislative above response to uncertain legal counsel" (2009) 38 Hofstra Law Review 213, 224, fn.68.

121 See Volz and Ellis, above fn.120, 224, fn.68.

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122 See Gerson and Gladieux, above fn.102, 191.
123 See Volz and Ellis, above fn.120, 242.
124 See Volz and Ellis, above fn.120, 224 (citations omitted) and, for example, *BDO*, above fn.115, *492 F.3d 806 (7th Cir. 2007)*.
125 See Volz and Ellis, above fn.120, 230.
126 C.E. Watson, "Legislating Morality: The duty to the tax system reconsidered" (2002–2003) 51 Kansas Law Review 1197, 1231 and *Doe v Wachovia Corp 268 F. Supp. 2d 627, 635-636 (W.D.N.C. 2003)*.
127 *Shroeder*, above fn.105, *842 F.2d 1223 (11th Cir. 1987)* at 1227.
128 *Marc Rich*, above fn.104, *731 F.2d 1032 (2nd Cir. 1984)* at 1039.
129 *Marc Rich*, above fn.104, *731 F.2d 1032 (2nd Cir. 1984)*.
130 Internal Revenue Code §6707A.
131 Internal Revenue Code §7525.
132 Mitchell, above fn.47, 247.
133 Internal Revenue Code §7525(b).
134 Internal Revenue Code §6662(d)(2)(c)(ii).
135 *Valero Energy Corp v United States (Valero) U.S. Dist. LEXIS 105609 (N.D. Ill 2008)* at 40.
136 *BDO*, above fn.115, *492 F.3d 806 (7th Cir. 2007)* at 810.
137 See Mitchell, above fn.47, 249.
138 *Australian Law Reform Commission, Privilege in Perspective: Client Legal Privilege in Federal Investigations (ALRC Report 107, 2007)*, available at: http://www.alrc.gov.au/report-107 [Accessed 19 January 2017], para.6.285.
139 Internal Revenue Code §7602(a)(1).
140 Internal Revenue Code §7602(2), (3).
141 Internal Revenue Code §7604.
142 *United States v Powell 379 U.S. 48 (U.S. 1964)*.
143 *Upjohn Co Et Al v United States 449 U.S. 383, 398*.
144 *BDO*, above fn.115, *492 F.3d 806 (7th Cir. 2007)*.
145 C. Bricker, "Revisiting the crime-fraud exception to the attorney-client privilege: a proposal to remedy the disparity in protections for civil and criminal privilege holders" (2009–2010) 82 Temple Law Review 149, 154.

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146 K. Rolandelli, "Confidentiality and the Crime-Fraud Exception" (1989–1990) 3 Georgetown Journal of Legal Ethics 139, 143.

147 *Clark v United States 289 U.S. 1 (U.S. 1933)* at 14.

148 *United States v Zolin et al 491 US 554 (U.S. 1989)* at 565.

149 See Galanek, above fn.100, 1127.

150 B. Lipman, "Invoking the crime fraud exception: why courts should heighten the standard in criminal cases" (2015) 52 American Criminal Law Review 595, 598 (footnotes/citations omitted).

151 *BDO*, above fn.115, *492 F.3d 806 (7th Cir. 2007)* at 819.

152 *BDO*, above fn.115, *492 F.3d 806 (7th Cir. 2007)* at 819.

153 Lipman, above fn.150, 606–607.

154 *In re Sealed Case 754 F.2d 395 (D.C.Cir. 1985)* at 399.

155 *In Re: Grand Jury Subpoena 223 F.3d 213 (3rd Cir. 2000)* at 218.

156 Lipman, above fn.150, 619.

157 *In Re: Grand Jury Subpoena*, above fn.155, *223 F.3d 213 (3rd Cir. 2000)* at 219.

158 Lipman, above fn.150, 620.

159 See Bricker, above fn.145, 154.

160 *Zolin*, above fn.148, *491 US 554 (U.S. 1989)* at 565.

161 *Zolin*, above fn.148, *491 US 554 (U.S. 1989)* at 564.

162 *In Re: Grand Jury Subpoena 745 F.3d 681 (3rd Cir. 2014)* at 688–689.

163 *Zolin*, above fn.148, *491 US 554 (U.S. 1989)* at 572.

164 *Zolin*, above fn.148, *491 US 554 (U.S. 1989)* at 572.

165 *Zolin*, above fn.148, *491 US 554 (U.S. 1989)*.

166 *Zolin*, above fn.148, *491 US 554 (U.S. 1989)* at 574.

167 K. Dunson, "The crime-fraud exception to the attorney-client privilege" (1995–1996) 20 The Journal of the Legal Profession 231, 237.

168 CPR r.1.1(1) .

169 The 2009 Rules , above fn.85.

170 The 2009 Regulations , above fn.89.

171 The 2009 Rules , above fn.85.

172 Higgins and Zuckerman, above fn.40.

173 *Zolin*, above fn.148, *491 US 554 (U.S. 1989)* at 571.

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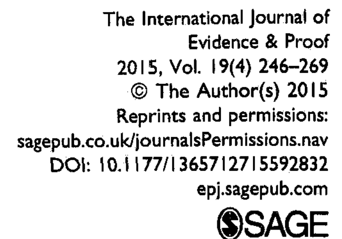
Article (vi)

Rebecca Mitchell, ‘Comparative Standards of Legal Advice Privilege for Tax Advisers and Optimal Reform Proposals for English Law’ (2015) 19 Int’l J Evidence & Proof 246

Article



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Comparative standards of legal advice privilege for tax advisers and optimal reform proposals for English law

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Abstract

The widely accepted rationale for legal advice privilege between client and lawyer applies equally to tax advisers giving their clients fiscal legal advice. This article undertakes a comprehensive comparative analysis of standards of legal advice privilege for tax advisers in the United States, New Zealand and Australia. It then reviews the current limited tax advisers' privilege found in Sched. 36 to the Finance Act 2008. Based on evaluation of these comparative models, optimal proposals are made for a tax advisers' privilege in English law.

Keywords

legal advice privilege, non-disclosure right, tax advice, tax advisers' privilege

Introduction

The widely understood rationale for legal professional privilege is to encourage candour from clients when discussing their affairs with their lawyer, which better enables the lawyer to give accurate legal advice and which therefore makes it more likely that the client will conduct their affairs in accordance with laws and regulations.[1]

Whether or not the latter part of this rationale is true is debatable, given the activities of some transactional lawyers in large law firms. According to Loughrey, 'it is certain that at least some of transactional lawyers' work involves creative compliance, which involves lawyers adopting strained and technical interpretations of the law in order to defeat its purposes' (2014a: 740).

1. *Upjohn Co* v *United States* 449 US 383 at 389 (1981); *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 at [143] *per* Lord Clarke.

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However, the privilege does exist in English law and can extend to legal advice relating to tax avoidance schemes, provided that advice has been given by a lawyer. So, if the above rationale is accepted, why limit the privilege to lawyers? Surely the public good is equally served by extending the privilege to fiscal legal advice given by tax advisers, such as accountants. Other jurisdictions have accepted this argument and, recognising the inherent unfairness of limiting legal advice privilege to the clients of lawyers in these circumstances, have extended privilege, to various extents, to tax advisers. Due to the underlying goals of the relevant legislation and the historical approach taken to extending privilege to non-lawyers in the relevant jurisdictions, the methods of doing so vary. In each case limits have been imposed due to particular concerns around tax collection and the position of tax collection agencies. The extension of a more comprehensive legal advice privilege to tax advisers in English law has been considered on a number of occasions but, to date, legislation has not been introduced and the courts are unwilling to plug the gap via developments in the common law.

This article explores the different approaches to this issue that have been considered, or adopted, by legislatures in the United States, Australia and New Zealand and considers the limited tax advisers' privilege currently in place in English law. The extent of the protection given in these jurisdictions, and the relative merits of the different approaches taken, will be evaluated. It will be argued that a more comprehensive tax advisers' privilege should be introduced into English law and an appropriate model for legislation in this area will be proposed.

The article begins with consideration of the legislative provisions introduced at federal level in the United States in 1998 to extend common law legal advice privilege to tax advisers. The rather different legislative approach taken by New Zealand, introduced in 2005 with the creation of a separate non-disclosure regime for tax advice documents, is then explored. Consideration of proposals in Australia for a tax advisers' privilege follows, together with an examination of the scope of the currently available accountants' concession. The limited tax advisers' privilege in English law, found in Sched. 36 to the Finance Act 2008, is examined and consultations around extending legal advice privilege to tax advisers are considered. The article concludes with optimal proposals for a tax advisers' privilege in English law, based on evaluation of comparative law.

The legislative provisions in the United States at federal level

There has been a form of privilege with respect to tax advice for communications between a client and their tax adviser since 1998 at federal level in the United States. Section 7525 of the Internal Revenue Code applies to communications between federally authorised tax practitioners and their clients.[2] Forming part of the background to the introduction of s. 7525 was a desire to level the playing field between tax advisers and attorneys in relation to giving tax advice, to avoid unfairness to the taxpayer. In Congressional debate Senator Connie Mack (R., Fla), sponsor of the Bill which introduced s. 7525,[3] described the current law as imposing an unfair penalty on taxpayers depending on their choice of tax adviser.[4] Petroni also refers to Congressional concern regarding the 'competitive atmosphere between the two primary tax practitioner groups: accounting firms and law firms' (1999: 845).

The section did not create and define a new type of privilege: the legislators chose instead to give such communications the same level of confidentiality which would apply if the communications were between a taxpayer and an attorney. This approach therefore means that the privilege is subject to the same limitations as the attorney/client privilege. For example, it can be waived by the client in the same way that attorney/client privilege can be waived, voluntarily or through disclosure of relevant communications to third parties (Glynn, 2002: 116). It covers only communications that would be covered by

2. Internal Revenue Code, § 7525(a)(1).
3. Internal Revenue Service (Service) Reform Bill, enacted as the Internal Revenue Restructuring and Reform Act 1998.
4. 144 Congressional Record S7643, S7667 (daily ed., July 8 1998).

attorney/client privilege, for example those relating to tax planning and opinion letters but not those relating simply to the preparation of a tax return (Barsky et al., 2010: 221). It does not apply to communications made in furtherance of a crime or fraud (the crime-fraud exception) (Gillet, 2001: 136–137). The legislative approach taken in extending privilege to tax practitioners has much to commend it; however, the section also created limitations to the privilege which are considered below. These and some unfortunate drafting have arguably resulted in a less than ideal provision which achieves the result that was originally intended only to a limited extent.

The tax shelter limitation

One of the most distinctive limitations in s. 7525 is the exclusion from the scope of the privilege of written communications connected with the promotion of any direct or indirect participation in what are defined as 'tax shelters'.[5] A tax shelter is any partnership, entity, plan or arrangement a significant purpose of which is the avoidance or evasion of federal income tax.[6] There have been criticisms of the last-minute addition to the legislation of the tax shelter limitation. Petroni argues that the uncertainty created by the use of such a broadly defined term as 'tax shelter' and in connection thereto of undefined terms such as 'promotion' leads to such unpredictability as to risk making the privilege lose its primary purpose of protecting the taxpayer (Petroni, 1999: 873). This criticism is echoed by other authors such as Kendall, who cites the 'significant area of uncertainty... ' created by the tax shelter exception that 'arises, in part, from the derivative definition of "tax shelter," ... ' (2011: 85).

There has been some judicial consideration of the ambit of the tax shelter limitation in s. 7525(b). In *US* v *Textron Inc Subsidiaries (Textron)*,[7] the tax shelter limitation was relied on by the Internal Revenue Service (IRS) to try and defeat a claim of privilege under s. 7525(a) made in relation to tax accrual work papers, which included advice on tax liability. In this case, the court considered that the tax shelter limitation did not apply because it was aimed at external promoters of tax shelters for sale, citing comments from Senator Mack,[8] and was not intended to affect the routine relationship between tax adviser and client, referring to the Conference Report to Accompany HR 2676.[9] However, when the tax shelter limitation on tax adviser/client privilege was further considered in *Valero Energy Corp* v *United States (Valero)*,[10] the court considered that the definition of tax shelter was intentionally broad and covered any plan or arrangement with the significant purpose of avoiding or evading federal taxes. Although Senator Mack's comments were considered once again, the court's view was that the section was not intended only to cover packaged products promoted and sold by 'shady' third parties and that individualised tax advice also fell within the definition.[11] The individualised tax advice in *Valero* related to a series of transactions entered into shortly after a major acquisition and which resulted in considerable tax-deductible losses.

These cases also considered the scope of the requirement that, in relation to tax shelters, written communications must 'promote' participation. In *Textron*, the court concluded that promotion involved activity in relation to future transactions and would therefore not cover advice in relation to arrangements already entered into.[12] In *Valero*, the court agreed with the conclusion in *Textron* that 'you can't promote participation in something once the deed is already done'.[13] Subject to that, the court regarded

5. Internal Revenue Code, § 7525(b).
6. Internal Revenue Code, § 6662(d)(2)(C)(ii).
7. 507 F Supp 2d 138 (D.R.I. 2007).
8. See Congressional Record, above n. 4.
9. See *Textron*, above n. 7 at 149.
10. 569 F3d 626 (7th Cir. 2009).
11. Ibid. at 632, 634.
12. Above n. 7 at 148.
13. Above n. 10 at 633.

the requirement for promotion as applying to those written communications encouraging participation in tax shelters (in the broader sense), excluding communications giving information about a scheme or evaluating a scheme using neutral language.[14]

Both cases highlight the uncertainties created by the imposition of limits on the tax adviser/client privilege regarding the promotion of tax shelters. *Valero* in particular does little to assuage fears, such as those expressed by Lobenhofer (2000: 258), that 'Because the definition of tax shelter is so broad, arguably almost any tax-saving strategy might fall within the definition and lose the FATP privilege.'

Perhaps equally important, the tax shelter limitation arguably does not create the level playing field between tax advisers and attorneys which formed part of the background to the introduction of s. 7525. This is because for attorneys there is no equivalent of the tax shelter limitation. In contrast, the tax practitioner privilege is subject to both the crime-fraud exception (Gillet, 2001: 136) and the tax shelter limitation. Although an attorney falls within the definition of 'federally authorised tax practitioner', so in theory their advice could be caught by the provisions of s. 7525(b), the tax shelter limitation is to the s. 7525(a) tax practitioner privilege, not to the attorney/client privilege, so an attorney is not affected in the same way as a tax practitioner.[15] When introducing the tax shelter limitation, the question of whether the crime-fraud exception would adequately cover advice concerning whether to enter into a tax shelter (as defined) does not appear to have been considered. Case law indicates that the crime-fraud exception to attorney/client privilege can apply in cases of tax evasion,[16] a purpose which is included in the derivative definition of a tax shelter in s. 7525. What is less clear is the extent to which tax avoidance, also covered in the definition of a tax shelter, comes within this exception. For the crime-fraud exception to apply, the conduct must be future or ongoing and the communications made in furtherance of the crime or fraud, albeit that the attorney may be innocent as to this motive. The application to future conduct is a relevant point when considering the s. 7525 tax shelter 'promotion' requirement. Tax advice about the effect of a tax shelter scheme already entered into would not seem to be caught by either s. 7525(b) (or under the crime-fraud exception). Where a client is only *considering* entering into a scheme or arrangement, tax advice requested in connection thereto may fall foul of the 7525(b) limitation or the crime-fraud exception. The key question is whether this advice is more likely to be protected by privilege if it comes from a lawyer rather than a tax adviser. In this context, both the arguably narrower ambit of the crime-fraud exception and the broad interpretation given to words such as 'tax shelter' and 'promotion' are important. To promote does appear to require more than simply advising in neutral language on the pros and cons of a scheme, although if a tax adviser has designed a scheme or arrangement for a particular tax payer, as in *Valero*, then it seems that it is bound to be caught as promotion. If the advice falls within the definition of promotion where it comes from a tax adviser but the same advice would not be caught under the crime-fraud exception if coming from a lawyer, then the position is clearly unfair and does not result in a level playing field. Of particular interest are those cases where the activity relating to tax evasion is ongoing and the adviser becomes somehow involved in this activity. This situation can be caught by the crime-fraud exception to attorney/client privilege,[17] but it is not clear whether it would fall within the definition of 'promotion' under s. 7525(b).

The resulting less favourable regime for tax practitioners and their clients may simply be the result of the prevailing climate when the legislation was introduced. The late 1990s saw a boom in the design and marketing of generic abusive corporate tax shelters and, according to Rostain (2006: 88), 'Although they were not the only promoters of tax shelters, the big accounting firms were at the forefront of developing the shelter market.' Some law firms clearly did get involved and, where not a party to designing and selling schemes, tax lawyers would often be involved in writing opinion letters relating to tax shelter

14. Ibid.
15. *United States* v *BDO Seidman LLP* 492 F3d 806, 828 (7th Cir. 2007).
16. *United States* v *Tai Fu Chen; The Sunrider Corporation* 99 F3d 1495 (9th Cir. 1996).
17. Ibid at 1504.

participation. These letters were an attempt, at the time, to mitigate against the imposition of certain tax penalties (Rostain, 2006: 92–93). Obviously, as the purpose of such letters was to be used in this way, these opinions were not intended to remain confidential.

The tax shelter limitation is undoubtedly an unfortunate element of s. 7525 in two key respects. First, its apparent breadth, and secondly, its uncertain scope. These aspects mean that much of the advice that clients of a tax practitioner would find most useful will either not be covered by privilege or may be covered, but there is an element of uncertainty. The limitation seems to be very much a reflection of its time, but the way in which it has been drafted arguably casts the net far wider than was originally intended. It can be argued that mass-marketed tax shelter schemes are of particular concern because: 'The relatively public nature of tax shelters thus means that they have more potential for inflicting extensive damage to the tax system than do private conversations between clients and advisors that result in lower tax burdens for single taxpayers' (Regan, 2013: 349).

However, as illustrated in *Valero*, individualised tax advice can fall within the definition. Should tax shelters be excluded from the privilege at all, given that similar constraints are not placed on attorney/client privilege? Lawyers are just as capable of setting up tax shelter schemes, which clearly include individual advice, and it is not certain that this advice would be caught by the crime-fraud exception. If the same concerns exist in relation to lawyers and tax advisers, it seems illogical to extend the tax shelter limitation only to tax advisers.

What is tax advice and who is a tax practitioner?

What constitutes tax advice was also considered in *Textron* and *Valero*. Tax advice is, perhaps unhelpfully, defined in s. 7525(a)(3)(B) as advice on a matter within the scope of a federally authorised tax practitioners authority to practice. It is widely understood that tax advice will not include information given in the preparation of a tax return. It will also clearly not cover what is classed as business advice, on the basis that this type of advice would not be covered by the attorney/client privilege (Petroni, 1999: 861). As Petroni identifies, the difficulties caused by the definition arise when considering whether tax advice is legal advice—an apposite question given that a tax adviser is not a lawyer and, therefore, does not give legal advice: 'Treasury Associate Tax Legislative Counsel Christopher S. Rizek noted that this interpretation of the rule poses a 'circularity problem' because 'accountants don't provide legal advice. If they did, they'd be practicing law'' (Petroni, 1999: 861).

In *Valero*, it is recognised that the line can be blurred between what is general accounting advice and what is legal advice where a large, broad-based accounting firm like Arthur Anderson is involved,[18] a point made previously by Petroni (1999: 862). But these comments relate more closely to the legal advice/business advice demarcation line than to the question of when tax advice is legal advice and is therefore covered under s. 7525(a) because it would be considered privileged if it were between a taxpayer and an attorney. Kendall (2011: 84) suggests that the definition of tax advice potentially covers a wide range of communications which is then limited by s. 7525(a)(1). In *Textron* and *Valero*, communications that came within the privilege, being tax advice, covered advice on tax liability where the law is uncertain and estimations of risk in connection with litigation (both regarded as lawyers' work).[19] There was a requirement for more than a discussion of federal tax issues. Worksheets containing financial data, estimates of tax liability and calculations of gains and losses were not covered, even where some legal analysis was included.[20] These uncertainties around what constitutes tax advice, together with comments of the court in *United States* v *BDO Seidman*,[21] referring to dicta in

18. Above n. 10 at 630.
19. *Textron*, above n. 7 at 148.
20. *Valero*, above n. 10 at 631.
21. 337 F3d 802 at 810 (7th Cir. 2003).

United States v *Frederick*[22] that there is nothing in s. 7525 which suggests that tax advisers are entitled to privilege when they are doing other than lawyers' work, raises a question. Was it sensible to use (and define) 'tax advice' at all in the legislation? If in fact only legal advice relating to tax issues is covered, arguably the extra layer of confusion in what is already an area lacking clarity ought to have been avoided. The difficulty arises because of the point made earlier that federally authorised tax practitioners who are not lawyers in theory do not give legal advice.

The s. 7525 privilege applies to any individual authorised under federal law to practice before the IRS,[23] although it is clear that not all of the activities involved in practice before the IRS are covered by the privilege. Federal regulations govern the recognition of practitioners representing taxpayers before the IRS.[24] Under these regulations, those with authority to practice include attorneys, certified public accountants (CPAs) and enrolled agents. For attorneys and CPAs, in the main reliance seems to be placed on admission requirements, codes of conduct and the disciplinary procedures of the relevant professional body to deal with disciplinary, ethical and knowledge issues around claims for privilege. Unlike enrolled agents, neither attorneys nor CPAs are subject to any continuing education requirements found in the regulations.[25] The IRS is not, however, entirely dependent on professional body disciplinary procedures, having the power to disbar individuals from practice before the IRS,[26] so retaining the ultimate sanction—removal of the right to practice before the IRS necessarily removes the right to claim privilege under s. 7525.

Using the term 'tax advice' in the legislation has caused uncertainty. Its use seems to have been predicated on the assumption that only lawyers give advice about the law, its interpretation and application, so a term other than 'legal advice' had to be used to describe advice given by non-lawyers. Attorneys and tax advisers are both giving clients advice on the legal implications of tax legislation on that client's activities, whether past or future. Unless a CPA or other agent is prevented from giving legal advice of this nature by the relevant professional body rules, whether explicitly or via competence requirements, or by their professional indemnity insurance, then there seems to be no reason why the legislation should not refer to the privilege as relating to 'fiscal legal advice' or 'legal advice on tax matters'. If it is accepted that non-lawyers can give legal advice, the limits of privileged communications can be defined more accurately by professional qualifications and membership of professional bodies, coupled with a requirement that the communication involves giving legal advice related to the activities of the body in question. If there are concerns that the activities of the professional body are wider than those currently covered by legal advice privilege (or could expand in the future), then the scope of the privilege can be restricted, for example by some reference to fiscal legal advice. The key is to use the term 'legal advice' as a starting point and then circumscribe if necessary, rather than begin with terminology having less clarity.

The federal civil proceedings limitation

A further limitation on the s. 7525 tax practitioner privilege is that it only extends to non-criminal tax proceedings in a federal court brought by or against the United States and non-criminal tax matters before the IRS.[27] Concerns arise in relation to the limitation because the IRS has some discretion in choosing whether to pursue tax-related matters as civil or criminal (Petroni, 1999: 858). Clearly where a matter involves criminal proceedings from the outset, then the tax practitioner/client privilege will not apply at all, although the attorney/client privilege will be available if an attorney is instructed. Particular difficulties arise where a matter begins as civil but later becomes criminal, because it is not clear whether communications between tax practitioner and client that were made prior to the matter becoming

22. 182 F3d 502 (7th Cir. 1999).
23. Internal Revenue Code, § 7525(a)(3)(A).
24. Treasury Department Circular No. 230, Rev 6-2014.
25. Ibid. at para. 10.6(e).
26. Ibid. at para. 10.50.
27. Internal Revenue Code, § 7525(a)(2).

criminal remain protected under s. 7525 (Petroni, 1999: 859). Cocoran suggests that all such communications would be subject to disclosure:

> once a non-criminal matter is in the hands of the Justice Department for a criminal investigation, the accountant-client privilege is abolished and the information that was protected prior to referral or request becomes subject to exposure because Congress specifically limited the accountant-client privilege to non-criminal matters. (2000: 715–716)

Recommendations to instruct a tax attorney at the first sign of criminal investigation (see Lobenhofer, 2000: 256), to benefit from the attorney/client privilege, do not solve this uncertainty, which arguably undermines the position of tax adviser vis-à-vis tax attorney as far as a client is concerned.

The limitation of the s. 7525 privilege to tax proceedings in a federal court also raises concerns that a client may essentially be forced to waive privilege by having already disclosed confidential information in the context of an investigation by another government agency or in state proceedings (Petroni, 1999: 859), neither of which fall within the ambit of the s. 7525 protection. Because attorney/client privilege is not limited in the same way, there is much less likelihood of privilege being waived due to disclosure of confidential information in the context of other proceedings. It is true that, as far as state proceedings are concerned, a number of states have enacted a form of tax adviser/client privilege; however, the legislative provisions at state level vary widely and do not necessarily cover the range of tax advisers who are protected under s. 7525 (see Lobenhofer, 2000: 256). Mata and Smith (2012: 42) identify various categories of approach at state level, which range from those states having no legislative provisions at all that protect communications between client and accountant to those that have adopted a 'classic evidentiary privilege' with statutory protection for accountant/client communications comparable to that of attorney/client privilege. In between there are those states where legislation requires that accountants must keep communications with their clients confidential. Mata and Smith (2012: 42) point out that in the latter example there is no explicit statement that the *client* can claim privilege to withhold documents from disclosure (a problem that also arises in the context of the limited tax advisers' privilege in English law) and that, within these categories, the nature of the protection given can vary significantly.

The approach taken to extending attorney/client privilege to tax practitioners in the United States has the appeal of being achieved in a relatively simple way. There is much merit in aligning the extended privilege to established common law rules and the method allows future developments in attorney/client privilege to apply equally to the tax practitioner privilege. Where the legislation is much less successful is in the uncertainties created both through the tax shelter limitation and the use of the term 'tax advice' in the drafting. Anxieties around the IRS being hampered in investigating abusive tax shelters by assertions of privilege are understandable, particularly at the time the tax shelter limitation was introduced. However, these concerns apply equally to tax attorneys, and aligning the s. 7525 privilege to common law attorney/client privilege allows the crime-fraud exception to privilege to apply where relevant. The cumulative effect of these provisions, coupled with the limitation of the privilege to civil proceedings in a federal court, undermines the stated purpose of the legislation and limits its effect. The very limited empirical evidence to date reflects uncertainties and lack of confidence around the effect and extent of the provisions: 'Moreover the majority do not believe that the addition of this statutory provision has enhanced their firm's ability to 'grow its practice' by levelling the playing field between accountants and attorneys' (Bauman and Fowler, 2002: 55).

The legislative provisions in New Zealand

The approach taken by the New Zealand legislature to creating a tax adviser/client privilege differs from the approach taken by the United States legislature in two key ways. First, arguably the intent was never to put tax advisers on the same footing as lawyers in terms of claims of privilege (Kendall, 2011: 97), so

the level playing field rationale which formed a large part of the background to the United States legislation was not present. The New Zealand approach was much more about getting tax advisers closer to the position of lawyers with regards to privilege in relation to tax advice. The Explanatory Note to the Taxation (Base Maintenance and Miscellaneous Provisions) Bill refers to the proposed amendments to the Tax Administration Act 1994 (TAA) that give taxpayers the right to withhold documents from disclosure to the Inland Revenue as providing a degree of consistency with the privilege enjoyed by lawyers' clients.[28] In promoting the bill to the House, the Minister of Revenue, Dr Michael Cullen, referred to the statutory privilege as placing 'communications from non-legal tax advisers, such as accountants, closer to that of the tax advice provided by lawyers ...'.[29] Dr Cullen refers to the rationale that tax advisers should be able to give candid advice to their clients, without fear of disclosure to the Inland Revenue, which in turn promotes compliance—one of the classic justifications for privilege, albeit flipped to the point of view of the adviser rather than that of the client (Maples & Blissenden, 2010: 31). Secondly, as a natural consequence of the above, the New Zealand approach necessarily involved creating a new, defined statutory privilege for certain communications with tax advisers.

The position in New Zealand was already slightly different to that in the United States when the non-disclosure right was first considered. There had already been a codification of lawyer/client privilege in relation to the powers of the Inland Revenue to gather information, provisions now found in s. 20 of the TAA. This codification makes clear that, subject to some exceptions, the Inland Revenue's powers to remove, copy and retain documents, require documents or information to be furnished and require attendance before the Commissioner (found in ss. 16–19 of the TAA) are exercised subject to the rules of privilege. Section 20 covers confidential oral or written communications between a lawyer acting as such and his or her client provided the communication relates to legal advice and is not made for the purpose of 'committing or furthering the commission of some illegal or wrongful act'.[30]

The tax advice privilege that was eventually introduced and has been effective since June 2005 is found in a new section, 20B, of the TAA. This section gives a person the right, following an information demand under ss. 16–19 of the TAA, to withhold from disclosure to the Inland Revenue Department a document or documents that fall within the definition of tax advice documents.[31] The departure from the codified s. 20 legal privilege standard is already apparent through the restriction of s. 20B to documents only. In contrast, the s. 7525 extension of privilege in the United States extends to communications generally.[32] So from the outset, the extension of privilege to tax advisers in New Zealand is on a very different, much more restricted, basis than the approach taken in the United States. This sits with the stated intention behind the introduction of the legislation but does mean that the provisions only go so far in encouraging the behaviour referred to by Dr Cullen.

Restriction to tax advice documents

Because the New Zealand tax advice privilege, or non-disclosure right as it is often referred to, is restricted to tax advice documents, the ambit of the privilege is easier to determine than under s. 7525. There is no need to refer to tax advice as a distinguishing element of the privilege. Instead, s. 20B(2) defines what constitutes a tax advice document, in relation to which non-disclosure can be claimed. Essentially, a tax advice document is a confidential document created for the purpose of giving or obtaining advice on the operation and effect of taxation legislation.[33] The document can be created by either the client, in order to instruct a

28. Taxation (Base Maintenance and Miscellaneous Provisions) Bill, explanatory note, part 3.
29. New Zealand Parliament, Taxation (Base Maintenance and Miscellaneous Provisions) Bill, Hansard, Cullen M (2004) volume 622, 18054.
30. Tax Administration Act 1994, s. 20(1)(c).
31. Tax Administration Act 1994, s. 20B(1).
32. See Internal Revenue Code, §. 7525(a)(1).
33. Tax Administration Act 1994, s. 20B(2).

tax adviser, or by the tax adviser in the context of recording analysis and research for the client or giving advice to the client.[34] In all cases the main purpose of creation of the relevant documents must be the purpose of giving or obtaining advice on the operation and effect of taxation legislation. Kendall (2011: 103) comments that the use of the word 'main' in s. 20B resolves issues connected with determining whether a tax advice document constitutes legal advice on tax law or business advice, although clearly there will be judicial interpretation of how extensive the advice on the operation and effect of taxation legislation has to be in a document to make this its 'main' purpose. In contrast, the s. 20 lawyer/client privilege simply refers to legal advice,[35] suggesting that the legal or business advice distinction is relevant for lawyers giving tax advice in New Zealand (see also Maples, 2008: 354 n. 19).

There has been guidance issued by the Inland Revenue Department to clarify further what is and is not included within the ambit of a tax advice document for the purposes of s. 20B. The clarification is similar in some respects to the position in the United States, where it seems accepted through principles developed by case law that information given in connection with tax return preparation is not regarded as legal advice. This principle applies in the context of both attorney/client privilege and tax advice for the purposes of s. 7525. The guidance given in New Zealand in SPS 05/07 (Inland Revenue Department, 2005) clarifies that documents which simply record decisions, summarise acts or are completed for the main purpose of meeting tax compliance requirements are not tax advice documents for the purposes of s. 20B (Inland Revenue Department, 2005: para. 33). Other examples of documents falling outside the category in the guidance are tax calculations and worksheets, financial statements and reports on factual matters in support of tax returns (Inland Revenue Department, 2005: para. 34). Even where the document falls within the non-disclosure right, there may be a requirement to disclose what is described as tax-contextual information.[36] This is information required by the Inland Revenue to establish factual details relating to a transaction, such as whether and when the transaction took place, the parties to it and the purpose of the transaction (see Inland Revenue, 2005: para. 44). Tax-contextual information is likely to be required where there are gaps in available information, inconsistencies in information already supplied or in cases involving considerable factual complexity (Inland Revenue Department, 2005: para. 77). Similar disclosure requirements do not apply to the s. 20 lawyer/client privilege (see Maples, 2008: 359).

Documents created in connection with assisting or promoting illegal or wrongful acts are excluded from the definition of tax advice documents.[37] A similar provision is found in the codified lawyer/client privilege in s. 20.[38] In both cases the exclusion follows the pattern of the crime-fraud exception and, as in the United States, seems to apply to advice relating to continuing or future activity. This approach does create parity in this respect between lawyers and tax advisers and avoids some of the uncertainties arising in the United States through the creation of the tax shelter limitation. Some commentators point out that there are grey areas, arguably for both lawyers and tax advisers in New Zealand, due to the terminology used in both sections. Maples refers to suggestions that the inclusion of the word wrongful might take the exclusion beyond illegal tax evasion activities into the realms of tax avoidance: 'Unlike tax evasion, tax avoidance is not illegal; rather it "is often within the letter of the law but against the spirit of the law." For this reason, it may be viewed as "wrong", ... ' (Maples, 2008: 356 (citations omitted)). The Inland Revenue guidance, as one would expect, specifically refers to tax evasion as an example of activity falling within the illegal and wrongful act category (Inland Revenue Department, 2005: para. 31) but goes on to include tax advice given as part of other fraudulent or criminal activity as potentially falling within the exclusion. Kendall (2005: 62) questions whether advice given on an interpretation of tax laws, which was later successfully challenged by the Inland Revenue, might therefore be regarded as illegal. In

34. Tax Administration Act 1994, s. 20B(2)(b).
35. Tax Administration Act 1994, s. 20(1)(b).
36. Tax Administration Act 1994, s. 20F.
37. Tax Administration Act 1994, s. 20B(2)(c).
38. Tax Administration Act, s. 20(1)(c).

Blakeley v *Commissioner of Inland Revenue*[39] (*Blakeley*), where the ambit of s. 20B was considered, advice relating to transactions which the Inland Revenue considered to be void tax avoidance arrangements was involved: the case concerned a notice requiring a tax adviser to provide the Inland Revenue with the names of taxpayers who had been given similar advice. The court decided that the names of taxpayers were not covered under s. 20B, because they did not fall within the definition of a tax advice document.[40] So, although it was accepted that there was no criminal offending implied in the tax avoidance arrangements,[41] the point was not taken further to consider if this activity fell within the wrongful act category.

The judgement in *Blakeley* also gives some insight into judicial interpretation of the statutory tax document non-disclosure right which, perhaps unsurprisingly, is narrowly construed as protecting 'defined parts of a limited category of written communications'.[42] This narrow construction is illustrated by the conclusion in *Blakeley* that the non-disclosure right did not extend to cover tax payers names, whereas at common law and presumably under the codified s. 20 lawyer/client privilege, there are limited circumstances where a client's name can be withheld.[43] In contrast to the position in New Zealand, in the United States the same principles apply to both attorney/client privilege and the tax practitioner privilege where revealing client identity is concerned.[44] This is due to the broader aims of the s. 7525 privilege which are reflected in its drafting.

Who is a tax advisor?

Adopting a similar approach to that taken in s. 7525, the New Zealand legislation uses and defines the term 'tax advisor' to identify the group of people who, along with the client, potentially fall within the ambit of the privilege. This definition is not used to delineate the activities covered by the privilege, as it is in the United States. The restriction of the non-disclosure right to tax advice documents (as defined) removes the need to do so. A tax advisor is defined as a natural person, subject to the code of conduct and disciplinary procedures of a group approved as such by the Commissioner.[45] To date, the following three organisations have been approved: New Zealand Institute of Chartered Accountants; Accountants + Tax Agents Institute of New Zealand and CPA Australia (Inland Revenue, 2015). The approval of groups, rather than individuals authorised to practice being subject to regulations (as in the United States), means that more reliance has to be placed on the disciplinary procedures of these groups. The criteria of a professional body having 'strong disciplinary procedures and a code of professional ethics' was thought to be important because 'there is a greater likelihood of excluding persons who would abuse the privilege . . . ' (Policy Advice Division of the Inland Revenue Department, 2002: para. 3.6). The privilege belongs to the client and can be asserted by the client, despite them not belonging to a professional body with a strong disciplinary and ethical code. Nonetheless, the reality is that most clients will rely on their tax adviser to indicate to them whether privilege can be claimed. The prospect of suffering disciplinary action if claims are made erroneously should incentivise tax advisers to act appropriately.

How is the non-disclosure right asserted?

The creation of the new, statutorily defined privilege in New Zealand also required the creation of a method of asserting the privilege over tax advice documents. Section 20D sets out the process for

39. HC AK CIV 2007-404-7017.
40. Ibid. at [15].
41. Ibid. at [19].
42. Ibid. at [18].
43. Ibid. at [10].
44. See 337 F3d 802, above n. 21 at 812.
45. Taxes Management Act 1994, s. 20B(4), (5).

asserting privilege following the issue of an information demand and requires that specified information is given about the relevant document.[46] The non-disclosure right can be asserted by either the taxpayer or the tax advisor. In each case, information about the form and content of the document, the name of the tax advisor to whom it was sent or who gave the advice and its date of creation is required.

The section also sets out the time periods within which a claim of non-disclosure must be made—these vary depending under which section of the TAA the Inland Revenue has issued an information demand.[47] It is clear from the guidance in SPS 05/07 that failure to comply with the process in s. 20D within the required time period following an information demand being issued results in the right of non-disclosure for an eligible tax advice document being lost, both in relation to the relevant information demand and in relation to any future demands concerning the same document (Inland Revenue Department, 2005: para. 36). In contrast, the lawyer/client privilege in s. 20 simply makes any information or document that meets the requirements of the section privileged from disclosure. There is no statutory process to follow for a claim to be made and no time limits in place. This difference is unsurprising given that s. 20 reflects a codification of common law legal professional privilege in the tax context, whilst s. 20B creates an entirely new statutory non-disclosure regime for a limited type of document.

The difference between the two provisions is particularly noticeable when waiver is considered. Clearly, and as required by s. 20B, a document must be confidential to be eligible to be a tax advice document. Subject to this, because the right of non-disclosure must be claimed following the process in s. 20D, before this claim is made there can be no question of waiving the non-disclosure right, because it does not exist until claimed[48] (although the SPS05/07 guidance does refer to waiver of the right to claim non-disclosure on a number of occasions) (Inland Revenue Department, 2005: paras. 70 and 89). Once claimed, can the non-disclosure right be waived by the client, either expressly or inadvertently? The New Zealand legislation does not suffer from the same issues regarding forced disclosure and consequent loss of privilege caused by the United States legislature restricting the privilege in s. 7525 to non-criminal tax proceedings before a federal court or the IRS. There is no similar restriction in the TAA which, Kendall argues, means that once the non-disclosure right has been successfully claimed in relation to a particular document, that right can be asserted generally against all-comers, 'the non-disclosure right in s. 20B applies to all counterparties, not only the revenue authority' (2011: 101–102). Even if one accepts this argument—which seems to be based on the explicit restrictions found in s. 7525 not appearing in the New Zealand legislation rather than any positive drafting in the TAA, s. 20B of which does seem to limit the non-disclosure right to circumstances where an information demand is served under the Act—it is not clear whether a taxpayer could waive the non-disclosure claim by disclosing the material in it to a third party. The key question is whether the status of the document is set once the Inland Revenue accept a non-disclosure claim under s. 20D, or whether this acceptance depends upon the tax advice document continuing to retain the characteristics that it had when the claim was successfully made. This uncertainty is simply a natural consequence of the method employed in New Zealand to create the tax advice document non-disclosure right, which works almost in reverse to that of the lawyer/client privilege. Because this right does not exist automatically, even once a document meets the eligibility requirements for a tax advice document, but must be claimed, arguably the eligibility status of the document is a continuing obligation which must be monitored and met. In contrast, under s. 20 a document is automatically privileged once the required criteria are met and this protection will only be lost if the privilege is subsequently waived.

The New Zealand legislative provisions relating to the non-disclosure right for tax advice documents, unlike the United States' provisions, do not restrict the ambit of the protection to tax advice documents in the context of civil proceedings only. Kendall (2011: 103) points out that this difference between the two

46. Taxes Management Act 1994, s. 20D(2), (3).
47. Taxes Management Act 1994, s. 20D(4).
48. Above n. 39 at [22].

regimes can be largely explained by the way in which the New Zealand Inland Revenue service operates compared to the IRS in the United States. In New Zealand, most tax offences are pursued in civil rather than criminal proceedings, although it is the case that, in criminal proceedings, the non-disclosure right could still be claimed for an eligible tax advice document (Kendall, 2011: 104). In the United States, the extension of the protection to criminal proceedings appears not to have been contemplated even during the early stages of relevant legislation before both the House of Representatives and the Senate (LeBlanc, 1999: 586).

The introduction of lawyer/client privilege to tax practitioners in New Zealand was underpinned by much more limited goals and the legislation reflects this. It is certainly true that the legislation has placed communications from tax advisers closer to those from lawyers where tax advice is concerned. The legislative provisions in New Zealand generally have more clarity and certainty than those in the United States, perhaps because of their more limited nature. But, if one accepts the rationale for extending legal advice privilege to tax advisers giving fiscal legal advice, it seems odd to then limit the privilege to this extent, almost as though to encourage candour and compliance, but not too much. Concerns around the New Zealand Inland Revenue being impeded in its tax collection activities are understandable but surely apply equally to tax advice from lawyers. The codified lawyer/client privilege in s. 20 arguably makes it simpler for the New Zealand legislature to impose restrictions, for example around tax-contextual information, on the lawyer/client privilege. It is interesting that various reports and discussions papers produced in the late 1990s and early 2000s accepted this point, recommending amending s. 20 to give either: no privilege for tax advice up to the point of submission of a tax return but thereafter a form of litigation privilege, which would extend to non-lawyers (New Zealand Law Commission, 2000: para. 23); or the same statutory privilege regime for both lawyers and other tax advisers, limited to opinions on tax law and excluding factual information (see Policy Advice Division of the Inland Revenue Department, 2002: paras. 3.1, 3.4 and 3.5). Ultimately, although the latter regime was brought in for tax advisers, the opportunity to extend this more limited regime to lawyers was not taken. The different treatment may well reflect a perception that tax advisers do far more tax work than lawyers and therefore legislation to similarly limit legal advice privilege for lawyers and their clients was not a priority.

The legislative proposals in Australia

Australia has not yet enacted legislation providing a form of privilege for communications between tax adviser and client, but has for some time had a non-statutory accountants' concession which gives to certain documents limited protection from disclosure. It is useful to see what sort of regime has been proposed by a jurisdiction having the opportunity to consider and evaluate the different approaches of the United States and New Zealand.

In 2007 the Australian Law Reform Commission produced a final report (Australian Law Reform Commission, 2007) which, in Chapter 6, considered the extension of legal professional privilege beyond lawyers to other professionals who provide legal advice (Australian Law Reform Commission, 2007: para. 6.203). The position in Australia relating to fiscal legal advice arguably has much more clarity than elsewhere due to the provisions of the Tax Agents Services Act 2009 (similar provisions previously appeared in the Income Tax Assessment Act 1936, s. 251(L)). The Tax Agents Services Act 2009 (TASA) imposes civil penalties for unregistered tax agents (which includes lawyers preparing or lodging tax returns) providing a tax agent service for a fee.[49] Tax agent services are defined in s. 90–5 TASA and include a range of activities connected with tax matters, from ascertaining liabilities to giving advice about liabilities, obligations and entitlements under taxation law which the client could reasonably be expected to rely on and representing a taxpayer in dealings with the revenue. Crucially, there is no requirement for a legal qualification to be registered as a tax agent. The relevant regulations covering registered tax agents cover a range of qualifications and pair these with requirements for additional

49. Tax Agents Services Act 2009, s. 50–5.

training and minimum periods of work experience.[50] As under the previous legislative provisions, legal practitioners providing tax agent services as legal services do not need to register as tax agents, other than as noted above in relation to preparing or lodging tax returns (Tax Practitioners Board, 2014). The statutory regime around tax agent services, which clearly includes advice about taxation law and which can be given by a non-lawyer registered tax agent, has led some commentators to argue that in relation to tax advice and planning, registered tax agents and lawyers are essentially providing the same service (Wilson-Rogers et al., 2014: 11) and that:

> As it is not a prerequisite to be a member of the legal profession to provide advice to clients on matters involving the interpretation of tax legislation, as it is in most other areas of legal practice, extending legal professional privilege only to members of the legal profession and not other persons qualified to advise on taxation law, even where the advice would be identical, is anomalous. (Kendall, 2005: 53)

Though there are restrictions in Australia around only qualified lawyers undertaking legal work or being involved in legal practice, these provisions at state level are subject to exceptions regarding legal practice engaged in under the authority of Commonwealth law, which includes advice on taxation law given by registered tax agents (Australian Law Reform Commission, 2011: 2). The recognition that tax agents give clients advice about taxation law arguably makes drafting a tax advisers' privilege that much easier because there need be no squeamishness around using the term 'legal advice' in the context of framing the privilege.

The accountants' concession

There is a very limited form of protection from disclosure for certain documents under guidelines issued by the Australian Tax Office (ATO) (Australian Taxation Office, 2010). The stated purpose of the guidelines is to encourage candour on the part of taxpayers by allowing certain documents passing between the client and their professional accounting adviser to remain confidential. The documents that benefit from protection under the guidelines are categorised as restricted source and non-source documents (Australian Taxation Office, 2010: paras. 2.2 and 2.3). Restricted source documents include advice papers created before or at the same time as a transaction or arrangement is entered into. Non-source documents include advice papers provided in relation to transactions or arrangements which were contemplated but have not been entered into or which relate to a transaction that has already taken place and do not affect the way in which that transaction is recorded, for example in a tax return. Source documents, which have no protection under the guidelines, are essentially those documents which record a transaction or arrangement entered into by the taxpayer (Australian Taxation Office, 2010: para. 2.1). The protection given to documents falling within the restricted source and non-source categories is limited because the guidelines do not impose a blanket prohibition on ATO officers seeking access to these documents. Instead, the guidelines provide that access to these categories of document will only be sought in exceptional circumstances (Australian Taxation Office, 2010: para. 5). These circumstances include where there are grounds to believe that fraud or tax evasion has taken place or where sufficient factual details cannot be ascertained from other source documents and/or the taxpayer to establish the facts surrounding a transaction or arrangement.

Whilst this concession is better than nothing, it does have well documented shortcomings and gives nowhere near the same level of protection as that given to lawyer/client communications under legal advice privilege. The status of the guidelines is one area of concern, because they can only lead, at most, to a legitimate expectation on the part of the taxpayer that they will be followed (Kendall, 2005: 54). The exceptional circumstance exception also comes in for criticism, both due to its breadth and because: 'The anti-avoidance provisions in Part IVA are frequently invoked by the Commissioner and this means the accountants' concession is frequently lifted because the potential application of Part IVA constitutes an exceptional circumstance' (Wilson-Rogers et al., 2014: 6).

50. Tax Agent Services Regulations 2009, Sched. 2, Part 2.

Part IVA of the Income Tax Assessment Act 1936 contains the general anti-avoidance rule for income tax. The Institute of Chartered Accountants in Australia report their members' view that ATO officers are increasingly using allegations around Part IVA as grounds for lifting the concession (2011: para. 3.1.1(ii)). In contrast, although the lawyer/client privilege is subject to the crime-fraud exception, it would seem that similar allegations around Part IVA would not be enough for a communication to lose the benefit of privilege (Australian Taxation Office, 2013: ch. 7). In addition, lawyer/client privilege would clearly not be lost where the ATO wanted privileged documents because they could not get the information that they needed elsewhere (Department of the Treasury, 2011: para. 16). Criticism is also levelled at the restriction of the concession to documents prepared by an external accountant independent of the taxpayer, meaning that documents prepared by the taxpayer in communication with their accountant are not covered (see The Institute of Chartered Accountants in Australia, 2011: para. 3.1.1(i)). The concession also only applies to restricted source and non-source documents prepared solely to advise the client on tax matters or relating solely to transactions or arrangements which were not entered into. This test is in contrast to that used in the context of lawyer/client legal advice privilege, which is a dominant purpose test (see Kendall, 2005: 54).

Recommendations for a tax advisers' privilege

The Australian Law Reform Commission (ALRC) recommended in its final report that a new form of statutory privilege be enacted to extend privilege to tax advice documents created by an independent professional accounting adviser (who must be a registered tax agent) for the dominant purpose of providing the client with advice relating to tax law. Source documents, such as books or records recording transactions entered into by a client, are excluded from the definition of tax advice documents and, as in the New Zealand legislation, tax-contextual information is not protected. Documents created in relation to the commission of a fraud or offence or an act leading to a civil penalty are not protected from disclosure. The ALRC felt that the latter was sufficient to cover tax avoidance schemes and were not in favour of incorporating a United States-style tax shelter limitation, despite representations from the ATO (ALRC, 2007: para. 6.285). A prescribed process must be followed to claim protection from disclosure for a tax advice document (ALRC, 2007: para. 6.6). The proposals were, to a large extent, based on the New Zealand non-disclosure right in s. 20B, but there is one notable difference. Like the accountants' concession, the proposed legislation appears to extend only to tax advice documents created by an accounting adviser—the recommendations do not appear to include within the non-disclosure right documents created by the taxpayer for the purpose of obtaining tax advice from an accounting adviser. Such documents are included within the non-disclosure right in New Zealand.[51] Submissions were made to the ALRC that such documents should be included within the definition of tax advice documents (ALRC, 2007: para. 6.252), however, the definition of tax advice documents in the final recommendation does not include this extension, which is unfortunate. Presumably, protection from disclosure will extend to relevant documents in the hands of either the taxpayer or the accountant, as is currently the case with the accountants' concession (Australian Taxation Office, 2010: para. 3.2). Otherwise, the proposals risk falling into one of the key deficiencies of provisions found in Sched. 36 to the Finance Act 2008 (see below).

The ALRC also explicitly addressed the question of how far the non-disclosure right extends to other government agencies, an issue that can lead to involuntary waiver of privilege through forced disclosure of documents. The ALRC's view was that the tax advice privilege should only be available in the context of the information-gathering powers of the Commissioner of Taxation. The ALRC supported this view by reference to similarly restricted regimes in the United States, the United Kingdom and New Zealand (ALRC, 2007: para. 6.283), although it may be arguable that the drafting of the New Zealand provisions does not actually lead to this limitation and allows the non-disclosure right to be asserted more widely.

51. Tax Administration Act 1994, s. 20B(2)(b).

Wilson-Rogers et al. (2014: 40) argue that for the privilege to be effective 'it would need to apply in relation to any Commonwealth or State regulatory agency... ', citing the example of joint task force operations involving a number of different Commonwealth agencies where the ATO might obtain information that would otherwise be protected, either directly from these other agencies or by virtue of the fact that privilege would be lost once the document in question had been disclosed to another agency. A later Treasury Department discussion paper on privilege in relation to tax advice in 2011 (Treasury Department Paper) specifically asks for responses on this question of how far the tax advice document privilege should apply (Department of the Treasury, 2011: 2).

It was recognised in the Treasury Department Paper that one of the concerns around extending privilege to tax advisers relates to the prescribed ethical and professional standards and requirements which apply to lawyers and which may not apply in the same way to accountants. The Treasury Department Paper refers to provisions of the TASA that create a clearer ethical regime for registered tax agents and more oversight of their activities through the creation of the Tax Advisory Board, but it is acknowledged that there are still wide discrepancies in education and training amongst those eligible to be registered as tax agents under the TASA (Department of the Treasury, 2011: paras. 70–71). This point is taken further by Wilson-Rogers et al., who argue for additional education and training requirements to be satisfied, under the oversight of the Tax Advisory Board, before a registered tax agent and their client can benefit from the tax advice privilege:

> Given the diverse qualifications of tax agents, some registered tax agents may not have received any tertiary or formal training on the law of LPP or even may not have received any training in relation to the application of basic legal principles. On this ground it is argued that privilege should not be extended merely on the basis of registration as a tax agent alone. (Wilson-Rogers et al., 2014: 20)

The focus of these proposed additional education and training requirements is to ensure that registered tax agents have sufficient knowledge of the ethical dimension around claims of privilege, as well as understanding the principles of when privilege can be claimed and what documents are covered. In addition, continuing professional education is recommended in order to keep abreast of developments in the law of privilege (Wilson-Rogers et al., 2014: 21–25). These suggestions seem sensible and perhaps have greater relevance in Australia given the wide variations in education and training referred to earlier, if the intention is to extend privilege to all registered tax agents. Presumably, the continuing professional education requirement has more application to what Wilson-Rogers et al. (2014: 25–30) describe as the linked regime—legislative provisions that link a tax advice privilege to common law legal professional privilege, where developments in lawyer/client privilege at common law can affect the statutory tax advisers' privilege, than would be the case if a stand-alone statutory privilege is enacted.

The ALRC recommendations recognise that the accountants' concession should be replaced with a statutory regime extending privilege to some categories of tax advice document. The recommended regime is largely based on the New Zealand rather than the United States approach and reflects a desire to retain control over whether developments in common law lawyer/client privilege should extend to tax advisers. The apparent exclusion from the recommendations of documents created by the taxpayer for the purpose of obtaining tax advice from an accounting adviser seems an unnecessary further restriction on an already limited privilege. It is also interesting that the ALRC recommendations do not tackle the problems highlighted in the United States of involuntary waiver through disclosure to other agencies. This problem is likely to be far more acute in Australia with its state and Commonwealth agencies than in New Zealand, so it is much more likely that similar difficulties to those identified in the United States will arise. The Treasury Department Paper rightly raises this issue for further consideration. As in New Zealand, the question of creating an identical, restricted regime of privilege in tax matters was also raised in Australia via the later Treasury Department Paper. Therein it was acknowledged that both the rationale for legal professional privilege and competition principles support the argument that the same regime should apply to both lawyers and tax advisers giving tax advice (Department of the Treasury, 2011: paras. 88–90). This 'same

regime' could include restrictions deemed necessary to allow the ATO to go about its business effectively, for example by excluding certain documents from the non-disclosure protection.

The position of in-house tax advisers

In Australia, the question of whether any new form of privilege should extend to in-house tax advisers was raised in the later Treasury Department Paper (Department of the Treasury, 2011: para. 95B(f)). The earlier ALRC recommendations were to extend privilege to tax advice documents created by an independent professional accounting adviser, which presumably excludes in-house accountants. It is the case that the current accountants' concession does not apply to documents created by in-house accounting advisers (see Australian Taxation Office, 2010: para. 1). It would seem illogical not to include this group in any new legislative provisions extending privilege to tax advisers generally, given the arguments around candour and compliance with legal obligations which are so often advanced to support the case for extending privilege beyond communications with members of the legal profession. It should also be noted that, in Australia, privilege can generally be claimed for legal advice from in-house lawyers.[52]

Maples (2008: 354) suggests that, in the context of the New Zealand legislation, the term 'tax advisor' will include those with in-house positions: 'The term "tax advisor" will also include professionals holding in-house positions, who are involved in tax advisory work for their employer', and it does appear that the relevant legislation does not exclude this group of tax advisors, provided that they are members of an approved advisor group. This extension is consistent with the position of in-house lawyers in New Zealand, whose advice is covered by privilege (Kalderimis & Dobson, 2011: 83), and there is nothing to indicate that the s. 20 codified lawyer/client privilege would not also extend to fiscal legal advice from an in-house lawyer.

The United States s. 7525 extension of privilege as drafted does not exclude in-house tax practitioners from its ambit, although it has been suggested that in practice the s. 7525 privilege can never apply to in-house accountants, either due to the operation of the tax shelter exception or due to provisions in the professional code of conduct for accountants which prevent an employer being regarded as a client (Lynam, 2008). The former argument revolves around the width of the tax shelter exception and the contention that the work of in-house accountants will inevitably involve tax advice around reducing liability to federal income tax, which constitutes promotion of a tax shelter. As already seen, it is true that both the terms 'tax shelter' and 'promotion' have been given wide interpretations in case law, so it may be that this argument has some merit, although it is unlikely to catch all tax advice work undertaken by in-house accountants and in *Textron* did not catch advice from in-house CPAs because that advice related to transactions which had already taken place. Because the s. 7525 tax practitioner privilege is based on common law attorney/client privilege, the rules around the application of attorney/client privilege where in-house lawyers are involved are clearly relevant in considering the question of how the tax practitioner privilege applies to in-house accountants. In the United States the attorney/client privilege does apply to communications with in-house lawyers in relation to legal advice,[53] although there may still be uncertainty around the test to be used to determine whether communications from particular groups within a corporation are covered by privilege (Cummings, 2008: 10). This uncertainty must arguably also apply to communications with in-house tax advisers. In addition, the more difficult to gauge dividing line between business and legal advice faced by corporate general counsel (Cummings, 2008: 11) applies equally to in-house accountants in the context of tax advice/business advice. In *Textron*, there was no argument from the IRS that communications from in-house CPAs could not come within the ambit of

52. *Archer Capital 4A Pty Ltd (as trustee for the Archer Capital Trust 4A (ACN123463749)) and Others* v *Sage Group Plc (No2)* [2013] FCA 1098 at [73].
53. *Upjohn Co*, above n. 1.

s. 7525 at all. The issue was whether the advice given by the in-house CPAs could be regarded as advice that would be protected were it given by an attorney, as required by s. 7525(a).

The legislative position in England

There is currently a very limited statutory protection from disclosure for communications between tax adviser and client concerning the client's tax affairs and for documents which are the tax adviser's property.[54] The antecedents of this section have been described as a 'curious provision' apparently designed to protect the proprietary interests of tax accountants in their working papers[55] and it has been suggested that at one time there was an intention to put lawyers and tax advisers on the same footing in relation to rights of non-disclosure following the service of information notices by the Inland Revenue.[56] The protection is given in the context of HM Revenue & Customs' (HMRC) powers to serve information notices on taxpayers and/or third parties for the purposes of checking a taxpayer's tax position.[57] The provisions only relate to a situation where the information notice is served on the tax adviser. They do not give protection from disclosure for tax advice documents in the hands of the taxpayer. This is unlike the provisions relating to privileged communications between professional legal adviser and client found in para. 23 of Sched. 36 to the Finance Act 2008, where protection from disclosure is given to documents in the hands of both. The anomaly was raised in the Pubic Bill Committee debate on the Finance Bill when these provisions were considered, but no further amendments were made.[58] The fact that this anomaly in the legislation had been fairly recently highlighted, debated and not changed was cited as evidence that Parliament did not intend to extend legal advice privilege beyond its current limits to include tax advisers in the leading case on this point, *R (on the application of Prudential plc)* v *Special Commissioner of Income Tax (Prudential)*.[59] The *Prudential* case involved information notices served by HMRC on Prudential plc relating to the disclosure of documents, including some containing legal advice from PricewaterhouseCoopers (PWC) relating to a tax avoidance scheme. Lawyers for Prudential plc failed to persuade the Supreme Court to extend the parameters of legal advice privilege to tax advisers giving fiscal legal advice. Because the documents in question were in the hands of the taxpayer, the application of the limited protection from disclosure was not considered.

The provisions in para. 25 of Sched. 36 (or their antecedents in the Taxes Management Act 1970) have been cited as an example of a statutory tax advisers' privilege in the United Kingdom (see for example Department of the Treasury, 2011: para. 27). They are in fact so limited as to hardly serve this function at all. It could be argued, from comments made in *R (Morgan Grenfell & Co Ltd)* v *Special Commissioners of Income Tax (Morgan Grenfell)* as noted above, that their purpose was never to create a tax advisers' privilege. The shortcomings of the provisions were highlighted by respondents to the consultation paper *In the Public Interest?*, issued in July 2002 by the Lord Chancellor's Department. The consultation concerned competition in the provision of legal services and included a series of questions around whether legal professional privilege distorted the market in legal advice, in particular in relation to accountants and tax advisers (Lord Chancellor's Department, 2002: ch. 4). One question concerned the provisions in the Taxes Management Act 1970 (TMA) and their effectiveness in levelling the playing field between lawyers and accountants/tax advisers. A number of respondents to this question identified the limitation of the privilege to documents whilst in the hands of the tax adviser; that the same documents in the hands of the taxpayer receiving the advice are not protected from disclosure (Lord

54. Finance Act 2008, Sched. 36 para. 25.
55. *R (Morgan Grenfell & Co Ltd)* v *Special Commissioners of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 *per* Lord Hoffman at [19].
56. *A plc* [2008] STC (SCD) 358 at [8].
57. Finance Act 2008, Sched. 36 para. 1.
58. Finance Bill Deb 10 June 2008, cols 606–608.
59. Above n. 1.

Chancellor's Department, 2003: paras. 218–220). This limitation would seem to make the provisions largely worthless in practice. Some respondents to the 2002 consultation felt that a simple extension to provisions in s. 20B(9) and (10) of the TMA would be enough to remove any perceived disadvantage suffered by accountants and tax advisers (Lord Chancellor's Department, 2003: para. 218). Others felt that the relevant provisions in the TMA generally did not create a coherent regime in relation to protecting documents from disclosure and that for them to work depended to some extent on Inland Revenue practice and procedure around information gathering (Lord Chancellor's Department, 2003: para. 220). Maples and Woellner pick up this latter point and also refer to the exception in s. 20B(11) of the TMA (now found in para. 26 of Sched. 36 to the Finance Act 2008) that excludes documents that contain explanations of information, returns or accounts which the accountant has assisted in preparing for submission or delivery to the Inland Revenue. Referring to responses by the Institute of Chartered Accountants in England and Wales to the 2002 consultation, they make the point that: 'This exclusion significantly erodes "the protection given by subsection (9) [because] it would be most unusual for any letter giving advice not to set out the facts on which that advice is based"' (Maples & Woellner, 2010: 171 (citations omitted)).

It is also the case that, as currently drafted, difficulties in interpretation and application would arise if the provisions in para. 25 were simply extended to include documents in the hands of the taxpayer. For example, the use of terms such as 'tax affairs', which is undefined in the section and arguably goes wider than the equivalent legal advice requirement for legal advice privilege and 'tax adviser', which simply means a person appointed to give advice about the tax affairs of another person.

Proposals for reform in England

It is clear from the majority judgement of the Supreme Court in *Prudential* that legislation will be required to extend legal advice privilege to tax advisers in a more complete form than the current provisions in para. 25 of Sched. 36.[60] The point has been made for some time and in a variety of contexts that there seems to be no overwhelming justification for limiting legal advice privilege to the lawyer/client relationship where fiscal legal advice is concerned. In their report, the Committee on Enforcement Powers of the Revenue Departments (the Kinkel Committee)[61] by majority recommended that privilege should be extended to 'duly appointed tax agents, who have been admitted members of an incorporated society of accountants or of the Institute of Taxation'; privilege would relate only to advice given by the agent and not to working papers involved in the production of accounts or tax computations; privilege would not extend to in-house tax agents.[62] Even if at the time this extension was based on the premise that, both for lawyers and tax advisers, the privilege extended only to documents in their hands,[63] the recommendation to put both in the same position as far as privilege was concerned was clear. There followed a 2001 report from the Office of Fair Trading which concluded that the regime was anti-competitive and favoured an extension of legal advice privilege beyond communications with lawyers, either based on the profession of the adviser or the nature of the advice, although the limited tax adviser's privilege in the TMA was not considered in this report (Lord Chancellor's Department, 2002: paras. 106, 114 and 119). Even some of their Lordships in *Prudential* accepted that it was difficult to justify the current restricted nature of legal advice privilege where fiscal legal advice is concerned[64] and of course the minority felt that the court should extend the ambit of legal advice privilege as requested.[65]

60. Finance Act 2008.
61. Cm 8822 (1983).
62. Ibid. at para. 26.6.13.
63. See *A plc*, above n. 56 at [11].
64. Above n. 1 at [79].
65. Ibid. at [138] and [149].

So, the sticking point throughout has been the reluctance of Parliament to consider making legislative changes that would extend the ambit of legal advice privilege. This reluctance was explicitly expressed in 2003 in the Government response to the 2001 Office of Fair Trading report where, citing a lack of evidence of any distortion in the market in favour of lawyers (Department for Constitutional Affairs, 2003: para. 61), it was concluded not to alter the scope of legal professional privilege. As acknowledged in *Prudential*, it is certainly the case that things have moved on significantly since 2003, with both the coming into force of the Legal Services Act 2007 and in it the acknowledgment that legal advice is given by persons other than solicitors or barristers (as it is not a reserved legal activity) and the extent to which legal tax advice now provided by accountants.[66]

What might a new statutory regime extending legal advice privilege to tax advisers look like?

The optimal statutory regime depends to a large extent on the aims behind the extension of privilege to tax advisers. Arguably, levelling the playing field and giving a client identical protection regardless of whether they choose a lawyer or accountant for fiscal legal advice should be the goal. In this case, the optimal approach is to adopt a United States s. 7525 style provision that extends legal advice privilege to fiscal legal advice given by a defined set of tax advisers, to the extent that the communication is one which would have been privileged if made between a lawyer and their client. It is recommended, however, that the limitations introduced into s. 7525 should not be replicated in a new statutory regime. This 'linked' approach allows the tax adviser privilege to benefit from future developments in the common law, something that is more difficult to achieve where a separate statutory regime is created, as in New Zealand. It also allows the established common law exceptions to legal advice privilege which apply to legal adviser-client communications, for example the crime-fraud exception and the rules around waiver, to apply in the same way to tax advisers. In this context, the omission of any s. 7525 style restrictions making privilege available in certain proceedings only should remove concerns around involuntary waiver. To create true parity and certainty, the privilege must work in the same way for tax advisers and lawyers so, as in New Zealand, the privilege should extend to both civil and criminal proceedings.[67]

Extending the privilege to a defined set of tax advisers, as proposed by the Kinkel Committee and as is the case in both the United States and New Zealand, rather than to particular types of advice, allows any concerns around deficiencies in education, training, professional codes of conduct and disciplinary regimes to be resolved through additions to relevant professional body requirements. Kendall suggests this model also serves a public interest requirement: 'while not explicitly stated, the rules in both the United States and New Zealand may be imputed with a public protection purpose; that is, taxpayers may receive the benefit of protection for their communications with their advisers only if they deal with an adviser who is appropriately qualified' (2011: 100).

In particular, training around privilege and ethics for those bodies whose members and their clients would benefit from an extended privilege was raised by respondents to the 2002 consultation (Lord Chancellor's Department, 2003: paras. 221–223). Referring to Lord Sumption's judgment in *Prudential*, Loughrey points out that where standards of confidentiality are concerned, these anxieties may be erroneous:

> The argument that lawyers adhere to stricter professional standards of confidentiality than other professionals was irrelevant, since if LAP attached to a document, then, as a matter of law and not professional standards, only the client could permit disclosure, irrespective of which professional had advised. (Loughrey, 2014b: 67)

66. Above n. 1 at [40], [144].
67. In any event, HMRC policy is to use civil fraud investigation procedures 'wherever appropriate': see HMRC (2006).

One potentially problematic area in any extended privilege relates to defining tax advice. As discussed, there have been criticisms of the lack of definition of what constitutes tax advice in s. 7525. The New Zealand approach gets around this issue by defining which documents are covered under s. 20B TAA rather than trying to define tax advice. This approach comes with the limitation that only documents are covered, rather than communications generally, and there are still the uncertainties created by the 'main purpose' requirement in s. 20B. Once it is recognised that non-lawyers can give legal advice—and there is nothing in the Legal Services Act 2007 to prevent them from doing so other than in the reserved areas—then the limits of privileged communications can be defined more accurately by membership of a prescribed professional body coupled with a requirement that the communication involves giving legal advice related to the activities of the body in question. If there are concerns that the activities of some professional bodies could expand in the future beyond taxation matters, a reference to fiscal legal advice could be included. Although the grey area of determining what is legal advice (and protected) as opposed to what is business advice (and not protected) remains, this is already the case for lawyers and the linked approach means that any case law developments in this respect would apply to both types of advisers.

Despite the recommendations of the Kinkel Committee, there seems to be no logical reason not to include in-house accountants and advisers within the ambit of any new privilege, provided that the relevant professional body requirement is satisfied. The legislative provisions in both the United States and New Zealand do not include this restriction and English law clearly recognises that legal advice privilege can apply to relevant advice from an in-house lawyer.[68] There is an added dimension to the position of in-house lawyers where European Commission competition investigations are concerned, because they are not regarded as sufficiently independent from their employer for their legal advice to be privileged in this context.[69] Any new privilege extending to in-house tax advisers would arguably be subject to the same rules relating to competition investigations, which are currently a topical issue in the tax context with recent investigations, by competition rather than tax officials, into the tax regimes of Luxembourg, Ireland and the Netherlands in the context of arrangements with four companies, respectively Fiat Tax & Trade and Amazon, Apple and Starbucks (Gilleard, 2014).

There are clearly concerns around extending privilege in the context of advice on tax—this is arguably one of the key reasons why limitations were introduced to s. 7525 and why the New Zealand provisions are limited to tax advice documents as defined. Undoubtedly a strong argument exists that there should be different treatment for legal advice on tax issues because of the difficulties faced by HMRC in investigating a taxpayer's affairs and that some information, in the nature of the s. 20B TAA tax-contextual information, should not be protected from disclosure. The Kinkel Committee made this point back in 1983[70] and the difficulties faced by HMRC, in its position of 'involuntary creditor', have been highlighted elsewhere (Dixon, 2010: 88). Whilst these arguments have some force, the point is that they apply equally to fiscal legal advice from lawyers. If restrictions ought to be made, they should be made across the board, not used as an excuse to preserve legal advice privilege in all respects between a taxpayer and their lawyer but not to extend it to tax advisers giving exactly the same advice to their clients. Instead of separate regimes for the same advice depending on who provides it, the same regime should apply in all cases. This could be based on common law legal advice privilege extended to both, with any concerns around tax shelter schemes dealt with via the crime-fraud exception to privilege (the latter is consistent with the approach proposed by the ALRC in Australia regarding tax avoidance schemes) and existing disclosure requirements where privilege is claimed (HMRC, 2013: para. 3.10). Alternatively, a new more limited privilege could apply in cases of tax advice generally, with carve-outs, for example,

68. *Alfred Crompton Amusement Machines Ltd* v *Customs & Excise Comrs (No 2)* (1972) 2 QB 102.

69. Case C-550/07 P *Akzo Nobel Chemicals Limited and Akcros Chemicals Limited* v *Commission of the European Communities* [2010] ECR 0.

70. Above n. 61 at para. 26.6.5.

for tax-contextual information. The point was made, *obiter*, in *Morgan Grenfell* that the effect of art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms may be to curtail parliamentary freedom to cut down the privilege currently enjoyed by clients of lawyers;[71] however, this point has not been tested and ought not to be used as a reason to do nothing. It may in any event become a moot point in due course.[72]

Conclusion

The question of whether there should be a form of legal advice privilege for fiscal legal advice given by non-lawyers to taxpayers has been the subject of attention and debate in a number of jurisdictions around the world. Both the catalysts for beginning these debates and the approaches adopted or suggested vary to some extent amongst the jurisdictions covered in this article. In all cases, the rationale of encouraging candour between adviser and client and thereby encouraging compliance with laws and regulations is reflected in arguments for extending legal advice privilege beyond lawyers to tax advisers, together with some concerns around there being an unfair competitive advantage for certain professions if privilege is not extended.

The extension of common law legal advice privilege to tax practitioners in the United States avoids the need to create a new legislative regime, with consequent issues around creating procedures for claiming privilege. The stated goal of the legislation in the United States was to put a client in the same position vis-à-vis privilege whether receiving fiscal legal advice from a lawyer or a tax practitioner. The limitations inserted into s. 7525 significantly undermine this goal, however, primarily by creating uncertainty around when the privilege can be successfully claimed and the circumstances in which its benefit may be lost. The creation of a distinct legislative privilege for tax advice documents in New Zealand—a model largely followed in the Australian proposals in this context to date—has the advantage of greater clarity and therefore greater certainty compared to the United States approach, but has resulted in a privilege that is significantly limited when compared to lawyer/client privilege. Although the result does reflect the intention of the legislature to put communications from non-legal tax advisers closer to those of lawyers, if one accepts the rationale for extending privilege to tax advisers and their clients at all, these provisions arguably do not go anywhere near far enough to truly take advantage of the wider benefits to society of candour and compliance.

Kendall speculates that the headline difference in the approaches taken by the United States and New Zealand reflects to some extent the historical preference of the different legislatures when dealing with extensions to privilege. The trend in New Zealand has been to achieve such extensions through new legislative provisions independent of the common law whilst the opposite approach has been taken in the United States (Kendall, 2011: 101). Where legal advice privilege has been extended in English law, for example in s. 280 of the Copyright, Designs and Patents Act 1988, the chosen model has been to extend common law legal advice privilege rather than create a distinct and separate regime for particular types of professions and particular types of advice. All the jurisdictions considered, through legislation in the United States, New Zealand and England to the accountants' concession and proposed legislation in Australia, accept the justification for some form of protection from disclosure for fiscal legal advice given by a non-lawyer. The issue is always around how far this protection should go and whether true parity with lawyers and their clients should be achieved.

As illustrated, since 1983 a number of reports have indicated that changes to the current regime in England ought to be made and have recommended the extension of legal advice privilege to tax advisers. Though the Office of Fair Trading report focused on competition issues, the underlying rationale for extending legal advice privilege to the clients of tax advisers is as much present in English law as

71. Above n. 55 *per* Lord Hoffman at [39].
72. HC Deb 27 May 2015, vol. 596, col. 32.

elsewhere; the privilege, after all, belongs to the client and for the benefit of the client consistency ought to be achieved in relation to fiscal legal advice regardless of the type of adviser. In this respect the limited protection in para. 25 of Sched. 36 to the Finance Act 2008 is not adequate.

Once the rationale for extension of privilege to tax advisers is accepted, there seems to be little point in half measures. The United States model, minus its limitations and drafting issues, best suits the goal of giving clients the same protection whether they choose to receive fiscal legal advice from a lawyer or a tax adviser. Any perceived differences in ethical or educational standards between lawyers and tax advisers can be tackled by limiting the availability of the privilege to a defined set of practitioners and setting appropriate rules. Anxieties about the privilege affecting the ability of tax collection agencies to operate effectively apply equally to specialist tax lawyers, who may be just as likely to design tax minimisation schemes as accountants. There are clearly concerns about abusive tax shelter schemes in the United Kingdom, which whilst not illegal have been described by the Chancellor of the Exchequer as morally repugnant (Blackhurst, 2014). This, coupled with the amount of tax advice work undertaken by accountants as opposed to lawyers, may explain the reluctance to extend privilege to tax advisers. However, it would be ironic if one effect of the decision in *Prudential* was to highlight this issue to the point where more clients are pushed towards using lawyers for their tax advice, particularly where tax shelters are concerned, because of the availability of legal advice privilege. This would arguably make tax investigations more difficult for HMRC unless privilege can be set aside using the crime-fraud exception.

The comprehensive comparative analysis of legal advice privilege for tax advisers undertaken in this article is essential to enable the current position in English law to be fully assessed and evaluated in an international context. This analysis has revealed that the law in England and Wales is out of step with established international trends and has informed the development of an appropriate optimal model for legislative reform.

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