Privilege is fundamental to the rule of law

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More from Vern Krishna

Parliament, not the courts, should determine w hether legal privilege should expand to include accountants, the U.K. Supreme Court ruled Toby Melville/AP

Courts not keen to expand privilege to include accountants

The administration of justice requires disclosure of information in tax litigation and enforcement by the Canada Revenue Agency. However, the federal government's recent proposals requiring tax advisors to red flag aggressive tax arrangements to the CRA, financial rewards for whistle blowers, and release by the media of bank records stolen from tax havens are changing the landscape of professional relationships, banking secrecy and information protection in financial planning.

Accountants and financial advisors cannot claim legal advice privilege (LAP) in respect of tax and financial advice that they give to their clients [*Prudential* [2013] UKSC 1]. LAP is a common law principle, developed in the 16th century, which promotes uninhibited communications between clients and their lawyers so that they can obtain legal advice without fear of disclosure of the advice. There are limits, however, to the extent of the protection. The U.K. Supreme Court would not extend the principle to accountants, preferring to leave the matter to parliament.

LAP is founded on the rule of law that one should be secure against the police, the executive branch of government, business competitors and inquisitive busybodies. The House of Lords characterized legal privilege as a fundamental human right. The term "legal professional privilege" is actually a misnomer. The privilege does not belong to the profession; it belongs exclusively to the client, who can breach or waive it by divulging the information to third parties. This raises difficult issues when the client receives or divulges privileged communications to his or her accountants in connection with tax planning.

Prudential, for example, concerned a notice from the tax authorities to a company to produce documents in connection with advice

that it received in connection with a tax avoidance scheme from its accountants. The company refused to comply with the demand and claimed legal advice privilege on behalf of its clients.

The purpose of LAP is to ensure "full and frank communication between attorneys and their clients," which "promote[s] broader public interests in the observance of law and administration of justice" (per Justice Rehnquist in *Upjohn Co v United States* (1981) 449 US 383, 389.) Hence, privilege requires a balancing of the community's interest in access to legal services and the proper administration of justice, a matter best addressed by the legislative branch of government on a comprehensive analysis, rather than through piecemeal common law development.

To be sure, communications between accountants and clients are also confidential and relate to important matters in commerce. However, that does not mean that they should not be available to the tax authorities, securities regulators, or other law enforcement agencies. Accountants have long argued that, in light of their special relationship with clients and the sensitivity of the advice that flows between the parties in such relationships, their communications with clients should have the same stature as legal privilege.

Accountants argue that since LAP is a common law right created by judges, the courts could, if necessary, extend it so as to accord with the principles that underlie and justify the right. Their arguments, logical and persuasive, were not enough to convince the U.K. Supreme Court. Quoting Oliver Wendell Holmes Jr., the court preferred experience to logic:

"While I accept that it would accord with its underlying logic to extend LAP as *Prudential* contend, "[t]he life of the [common] law has not been logic," as Oliver Wendell Holmes, Jr. observed on the first page of *The Common Law* (1881). As he went on to say, the life of the common law "has been experience."

Thus, courts reject any class privilege for accountants and other professionals. The policy reason for permitting privilege is to protect communications between lawyers and clients so that clients can obtain frank and candid advice from their lawyers. The price of privilege is that it can be a shield from getting to the truth. Extending privilege to other groups would broaden the shield, which would not necessarily be in the best interests of the community.

There are limited circumstances in which courts will protect confidential relationships on a case-by-case basis even if there is no class privilege. For example, the courts sometimes protect doctor-patient, psychologist-patient, journalist-informant and religious communications if they satisfy stringent criteria. These criteria concern the manner in which the information arises and a balancing of the need for confidentiality against the public interest of having full disclosure.

The burden is on the person claiming privilege to establish that the private interest outweighs the public interest of full disclosure in litigation. Accountants would have to persuade parliament that the community considers their communications as warranting zealous protection. This will be difficult given the financial debacles of the last decade arising from financial statement preparation and disclosures of aggressive offshore tax planning. Indeed, the trend is in the opposite direction, where parliament is removing privilege pertaining to certain tax communications and asking advisors to notify the authorities of their clients aggressive transactions. Thus, clients should consider the nature of their correspondence with accountants and the storage of such communications on computer hard drives and cloud services.

The purpose of privilege is to ensure free and uninhibited communications between individuals and their legal counsel so that lawyers can render services in an effective manner. There is a limit, however, to the extent of shielding information that may be essential to the administration of justice.