

# How Attorney-Client Privilege And The Work Product Doctrine May Apply To Third Parties In Tax Law

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wishes to express her gratitude to John Barrie of Bryan Cave LLP for his helpful comments on this article. This is another in a continuing series of articles written by members of the ABA Tax Section in which a member of the section teams up with a member from the section's Young Lawyers Forum.

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**Sometimes the only correct answer is, “Actually, no — you can’t see it.”**

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**THE ATTORNEY-CLIENT PRIVILEGE** is vital to representing a client effectively in legal matters. Its purpose is to encourage clients to be forthcoming and candid with their legal counsel. As a result, the attorney is well informed and can provide sound legal advice based on this communication. In addition to this privilege, a client also has the benefit of the work product doctrine, which protects materials that were created in anticipation of litigation from discovery. Both the attorney-client privilege and the work product doctrine have special applications in tax law, and for this reason, it is important to understand the scope of these protections as the court's interpretation and administration of these rules can dramatically impact the outcome of a case.

## **ATTORNEY-CLIENT PRIVILEGE, GENERALLY**

- The attorney-client privilege prohibits an attorney from disclosing confidential communications obtained from the client during the course of professional consultations. There are five elements of attorney-client privilege:

- The person asserting the privilege must be a client or an individual trying to establish an attorney-client relationship;
- At the time of the communication, the person with whom the client communicated is an attorney and acting in the capacity as an attorney;
- The communication must be between the attorney and client exclusively;
- The communication must be for the purpose of securing a legal opinion, legal services, or assistance in some legal proceeding, and not for the purpose of committing a crime or fraud; and
- The privilege may only be claimed or waived by the client.

*United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950).

Generally, the privilege only covers the communications between a client and an attorney. Nothing in the policy of the privilege suggests that the practice of placing accountants, scientists, or investigators on the payroll of the law firm and maintaining them in their offices ought to extend its application to cover third parties. However, given the complexity of cases in modern day law, the help of others is often required to effectively handle clients' affairs. *United States v. Kovel*, 296 F.2d 918 (1961). Privilege must include all persons who act as the attorney's agents, 8 John Henry Wigmore, *Evidence in Trials at Common Law* §2301 (Little, Brown 1961); Annotation, 53 A.L.L. 369 (1928), and should not be limited to ministerial or menial employees. *Kovel*, supra, 296 F.2d at 921.

**THE KOVEL DOCTRINE** • Under limited circumstances, attorney-client privilege may extend to cloak communications involving third parties when the purpose is to assist the attorney in rendering legal advice to the client, particularly those where an accountant is used. *Id.* at 922. The *Kovel* doctrine holds that experts engaged by a law firm or attorney

to assist in rendering tax advice and representation to a taxpayer fall under the attorney-client privilege and are not subject to discovery. However, it is insufficient that an attorney interviews an accountant to gain information so to better advise his or her client. In other words, communications between attorney and a third party do not become shielded by the attorney-client privilege solely because the communication proves to be essential to the attorney's ability to represent the client. *United States v. Ackert*, 169 F.3d 136 (1999); see also, *Hickman v. Taylor*, 329 U.S. 495, (U.S. 1947). What is necessary to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the attorney. Therefore, if the communication is not legal advice but only accounting services, or if the advice sought is that of the accountant and not the attorney, the privilege does not apply. *Kovel*, 296 F.2d at 922.

The *Kovel* ruling compared an accountant to a language interpreter. To some attorneys, accounting concepts are a foreign language and the service of an accountant is necessary or highly useful for the effective consultation between the client and the attorney. Therefore, a communication should be privileged if an attorney directs the client to tell his or her story to an accountant engaged by the law firm, who subsequently interprets the information to the attorney so that he or she may be in a better position to provide good legal advice to the client. *Kovel* recognizes that the inclusion of a third party in attorney-client communications does not destroy the privilege if the purpose of the third party's participation is to improve the understanding of the communications between the attorney and client. However, when an attorney seeks out a third party to provide information rather than to act as a translator for client communications, the communications between the attorney and the third party are not privileged. *Eprova v. Gnosis S.p.A.*, 2010 U.S. Dist. LEXIS 101215 (S.D.N.Y. Sept. 24, 2010). Furthermore, there is no privilege where the client communicates to his or her own accountant even if an

attorney is consulted on the same matter. *Garipey v. United States*, 189 F.2d 459, 463-64 (6th Cir. 1951).

As with attorney-client privilege, the burden is on the party claiming the third-party privilege unless it is a criminal matter, at which point the burden is placed on the Government to show the defendant's guilt. *Kovel*, supra, 296 F.2d at 923. The *Kovel* doctrine can also apply to tax planning or tax return advice being given by an attorney, but it cannot serve to cloak an attorney or other tax professional regarding return preparation. Note that some state appellate courts have adopted the *Kovel* doctrine in state criminal proceedings.

### Practical Use Of A *Kovel* Letter

A *Kovel* letter is used to place an accountant or other non-attorney under the attorney-client privilege. However, if the attorney requires both a tax preparer and a tax "interpreter" for effective representation, it is generally good practice to retain two individuals, each designated to perform separate roles. Taking this approach may provide another layer of protection to help shield the communication from discovery, which may not otherwise be protected if the information is determined to have been learned while the accountant was performing accounting services, rather than acting as an interpreter for legal purposes. If the accountant is the client's usual accountant, counsel should ensure that the accountant is not providing any other non-litigation services to the client while working with the attorney in order to eliminate taxpayer-advisor uncertainty. If the tax professional might be contacted to compel to testify against taxpayer in the future, contact should cease once a criminal tax investigative team is involved.

To invoke attorney-client privilege so that it extends to the tax professional, the attorney should have an agreement in writing in the form of a *Kovel* letter. The *Kovel* letter should:

- State that the attorney or law firm is retaining the tax professional to assist in his or her legal work for the client;
- Generally specify that the tax professional will bill the law firm directly;
- State that the project workpapers are the property of the law firm; and
- Instruct the tax professional about the specific tasks to be performed and to maintain the confidentiality of all information received or created.

An attorney may also choose to use a formal engagement letter. The engagement letter should:

- Define the terms of the arrangement, state the purpose of the tax professional's services, and state the tax professional was hired in anticipation of litigation, if appropriate;
- Indicate that all of the work product created by the accountant or tax professional is prepared at the direction of the attorney, and that all supporting workpapers belong to the attorney's law firm and must be surrendered to the firm at its request;
- Assert that any communication is incidental to rendering legal services and are intended to remain confidential;
- State that the client and professional may communicate outside the attorney's presence as long as it is done at the attorney's discretion. The nature or content of any communications or work product should not be disclosed to any outside party, including government officials, or privilege likely will be deemed waived; and
- Provide that the accountant or tax professional is prohibited from maintaining copies of any work product.

**WAIVER OF ATTORNEY-CLIENT PRIVILEGE** • Waiver of some communications generally waives the privilege of all communications related to the same subject matter. But waiver only occurs when the protected material is disclosed in a man-