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How To Get Attorney-Client Privilege With Your Accountant -- Even IRS Agrees

Even *thinking* about tax filing may make you nervous. How aggressive are you being? Are you claiming something that the IRS may view as over the top? Do you have exposure for past years, and would amending past returns make the situation better or worse? How much can you safely tell your accountant, and how much can you reveal in writing without fear it will be used against you?

The IRS and Justice Department want you to think carefully before you get to the penalties of perjury language on the signature line of your tax return. In the run-up to April 15th, the government wants to remind you to fly right. But even flying right may be somewhat nuanced. Taxes are complex, and the line between creative tax planning and tax evasion can be less clear than you might think. What is good planning, what is over the line? What is fraud, and how long do you have to worry?



You must sign tax returns under penalties of perjury. The numbers you report must be true—they're not an opening offer. During President Obama's years in office, case recommendations brought by the IRS to the DOJ have soared. And

with [non-cash items you must report on your taxes](#), foreign accounts, and many other items, you are bound to be confused. Thanks to attorney-client privilege, if you tell a *lawyer* secrets (say you are hiding money offshore), the IRS cannot make your lawyer talk.

The IRS generally can't even make your lawyer produce documents. The attorney-client privilege is strong precisely so that clients (in both civil and criminal cases) will be forthcoming with their lawyers. Accountants, however, don't have this privilege. If you make statements or provide documents to your accountant, he can be compelled to divulge them no matter how incriminating.

For completeness, it is worth noting that there is a statutory "tax preparation" privilege. It was added in to the tax code (IRC [Section 7525\(a\)\(1\)](#)) in 1998. But it is quite narrow, and is completely inapplicable to criminal tax cases. That makes it of little value. In contrast, attorney-client privilege is worth a great deal and provides enormous protections under the law.

So if you fear exposure under the [Panama Papers or have offshore or other serious tax issues](#), there is only one answer. In sensitive tax matters, the answer to this quandary is the *Kovel* letter, named after [United States v. Kovel](#). You hire a tax lawyer, and your tax lawyer hires an accountant. In effect, the accountant is doing *your* tax accounting and return preparation, but reporting as a subcontractor to your lawyer.

Properly executed, this end run imports attorney-client privilege to the accountant's work and communications. It is reasonably safe too, although it is true that there have been a few IRS lawsuits eroding it. For example, in [United States v. Richey](#), the Ninth Circuit refused to protect an appraisal that a taxpayer, lawyer and accountant were trying to keep from the IRS.

In [United States v. Hatfield](#), the court forced disclosure of discussions between the lawyer and accountant. On the whole, however, the *Kovel* letter has withstood the test of time, and probably will for generations to come. The mere fact that a *Kovel* arrangement in place can make it unlikely that the IRS will push for disclosure around the edges. And having a *Kovel* agreement can make accountants more comfortable and more responsive as well.

Pre-existing relationships between the accountant and the ultimate client can be prickly. A *Kovel* arrangement is premised on the notion that the accountant's communications were "made in confidence for the purpose of obtaining legal advice from the lawyer." See [United States v. Adlman](#). The attorney is the client in a *Kovel* engagement so the accountant should address

all correspondence to the lawyer.

That means information acquired by an accountant under a *Kovel* agreement should be distinguished from information collected by the accountant as an auditor or in some other capacity. Keep things as separate and well-documented as you can. That may include using a different accounting firm for the audit or other work where possible.

Attorney-client privilege is rarely tested in this context. However, you don't want to end up having to fight about disclosure before a judge, especially where the communications may be very revealing.

For alerts to future tax articles, email me at Wood@WoodLLP.com. This article is not legal advice.