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Tax Worries? You Don't Have Attorney Client Privilege With Your Accountant



Taxes are complex, and the line between creative tax planning and tax evasion isn't always clear. How aggressive are you being? Are you claiming something the IRS may view as over the top? Do you have exposure for past years, and

would amending your past tax returns make the situation better or worse? What is good planning, and what is over the line? What is fraud, and how long do you have to worry about audits?

There are many other questions too. And then there is this one: How much can you safely tell your accountant, and how much should you reveal in writing without fear it will be used against you? If you are worried about these and other questions, think carefully, and remember the penalties of perjury language on your tax return. Every year, government press releases about tax convictions, guilty pleas and indictments help remind you to fly right. You may well need professional advice, but you do not have attorney client privilege with your accountant.

In contrast, when you discuss taxes with your lawyer, 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.

In sensitive tax matters, the answer to this disparity 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 imports attorney-client privilege to the accountant's work and communications. It is reasonably safe too, although 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.

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