

## ***Exploring Privilege in an Estate Planning Context***

***Southern Arizona Estate Planning Council  
Tucson, Arizona  
February 19, 2020***

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## **Anticipate Your Potential Audience**

- Documents prepared by
  - Estate planning lawyer
  - Client
  - Accountant, financial advisor, insurance agent, MD
  - Any other person involved
- May be reviewed by
  - IRS examining agent
  - Appeals Officer
  - District Counsel
  - Judge
  - Jury

## Understand IRS's Broad Summons Power

- Purpose
  - Ascertain return's correctness
  - Determine whether return should have been filed
  - Determine liability of *any* person for *any* internal revenue tax
- Effect
  - May examine books, papers, records, or other data
  - Summons:
    - person liable for tax
    - officer or employee
    - any person having possession, custody, or care
    - any other person the IRS may deem proper
- Subject to privileges
  - Query whether subject to Federal Rules of Evidence

I.R.C. § 7602(a).

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## Preserve All Privileges

- Attorney/Client Privilege
- Work Product Doctrine
- Medical Privileges
- Tax Practitioner Privilege

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## Attorney/Client Privilege

- Purpose is to encourage complete exchange of all sensitive information
- What the privilege covers:
  - Wigmore's Definition:
    - communication
    - made in confidence
    - for purpose of securing legal advice
    - from legal advisor
    - including any document or other record revealing such a communication
- Privilege is client's to waive

## Whose Communications are Privileged?

- ***Lawyer as counselor or planner***
- ***Third parties – secretary, accountant, or financial advisor***  
***IF***  
***communicated for purpose of facilitating rendition of legal advice***
- ***Even prospective clients who reasonably believe that they are seeking legal advice***
  - ***Courts define “client” broadly***

## What is Privileged?

- confidential communications
- between privileged persons (attorney and client)
- for purpose of facilitating rendition of legal advice

## What the Privilege May Not Cover

- *non-client family members*
- *stock brokers, accountants, and other third parties*
  - *if not made to “assist the attorney in rendering advice to the client”*
- *work papers of the attorney (But see work product doctrine)*
- *correspondence with third parties*
- *underlying facts*
- *bills and invoices*
- *business advice*
- *dual purpose advice*
- *tax opinions*
- *attorneys as tax return preparers, return preparation materials*

## Attorney as Tax Return Preparer

- Advice rendered in connection with tax return preparation **may not be covered**
  - “Dual purpose” documents prepared for tax return and litigation may not be privileged
    - due to relationship to tax return
  - If “verifying the accuracy of a return,” representation is “accountant’s work”
    - whether done by an accountant or a lawyer
  - If lawyer deals “with issues of statutory interpretation or case law that the revenue agent may have raised” in audit, “lawyer is doing lawyer’s work and the attorney-client privilege may attach”

See, e.g., *Neuder v. Battelle Pac. Nw. Nat’l Lab.*, 194 F.R.D. 289, 292 (D.D.C. 2000);  
*Pippenger v. Gruppe*, 883 F. Supp. 1201, 1207 (S.D. Ind. 1994).

*United States v. Frederick*, 182 F.3d 496 (7th Cir. 1999).

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## Beware Waiver

- Beware:
  - even if document is privileged, privilege can be waived
  - In Tax Court, party asserting privilege has burden to prove no waiver
  - Inadvertent waiver may be imputed to client
    - Electronic file sharing service (The Cloud)
  - Subject matter waiver
- When to waive?
  - § 2036
  - Defense of reasonable cause and good faith
    - reliance on advice of tax advisors
    - e.g., tax opinion letter
  - IRS’s recent argument in *Morrisette*
    - When claiming safe harbors/exceptions
      - IRS posits doing so is putting subjective intent at issue, resulting in wholesale waiver

See *Estate of Morrisette v. Comm’r*, T.C. Docket No. 4415-14.

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## Attorney Work Product Doctrine

- Definition
  - Materials prepared “in anticipation of litigation”
    - different standards for “anticipation”
      - real possibility
      - communicated “with an eye toward litigation”
      - in anticipation of “foreseeable” litigation
      - because of prospect of litigation
      - likely to lead to litigation
      - as long as primary purpose “was to aid in possible future litigation”
  - By a party or the party’s representative

*See, e.g., Hickman v. Taylor*, 329 U.S. 495 (1947); Fed. R. Crim. P. 16(b)(2); Fed. R. Civ. P. 26(b)(3).  
*Energy Capital Corp. v. United States*, 45 Fed. Cl. 481, 485 (2000).  
*A. Michael’s Piano, Inc. v. Fed. Trade Comm.*, 18 F.3d 138, 146 (2d Cir. 1994).  
*Schiller v. N.L.R.B.*, 964 F.2d 1205, 1208 (D.C. Cir. 1992).  
*United States v. Rockwell Int’l*, 897 F.2d 1255, 1266 (3d Cir. 1990).  
*Binks Mfg. Co. v. Nat’l Presto Indus., Inc.*, 709 F.2d 1109, 1119-20 (7th Cir. 1983).  
*United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981).

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## Attorney Work Product Doctrine (cont'd)

- Purpose
  - Creates a zone of privacy for strategic litigation planning
  - Prevents one party from piggybacking on another’s work
- Difficult to argue that estate planning attorney’s internal memos or work papers are prepared “in anticipation of subsequent litigation”
  - But see areas of IRS focus (limited partnerships)

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## Attorney Work Product Doctrine (cont'd)

- Two types
  - Opinion "core" work product, not subject to discovery
  - Factual work product, subject to discovery only upon showing of:
    - substantial need
    - Inability to secure elsewhere without undue hardship

F.R.C.P. § 26(b)(3)(ii).

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## Attorney Work Product Doctrine (cont'd)

- IRS's position in *Morrisette*
  - 2036/38 & 2703
  - Wholesale waiver, even of work product!

*Estate of Morrisette v. Comm'r*, T.C. Docket No. 4415-14.

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## Medical Privileges

- Federal versus state privileges
  - Doctor versus Psychotherapist privilege
    - *Jaffee v. Redmond*
      - Psychotherapy is “rooted in the imperative need for confidence and trust”
      - Physical illness – Requires physical examination, objective information supplied by patient, and diagnostic test results

*Jaffee v. Redmond*, 518 U.S. 1 (1996).

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## Tax Practitioner Privilege

- I.R.C. § 7525
  - Extends the *attorney-client* privilege to confidential communications between taxpayers and tax practitioners
  - Same “communication[s] between taxpayer and an attorney”
  - in non-criminal matters brought by or against the U.S. government
- Exceptions:
  - criminal matters
  - tax shelters
  - non-federal matters (such as bankruptcy)

I.R.C. § 7525.

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## Tax Practitioner Privilege (cont'd)

- **WARNING:** § 7525 privileged communication loses privilege protection if IRS commences criminal investigation

## Production of Client File

- ***Put client in position to produce file if in client's best interest***
- ***Best evidence of transaction's purpose often comes from correspondence prepared in connection with transaction***
  - ***Correspondence outlining business and financial (non-tax) reasons***

## Privileges and Appraisers

- *Kovel*

- Attorney should hire consultant
- Consultant is working at attorney's direction
- Work is not pure return preparation
- Work of consultant belongs to attorney
- Purpose of engagement is to assist attorney in rendering legal advice to client
- Beware use of pre-existing relationship between appraiser and client
  - Pre-*Kovel* communications likely are **not privileged**

*See, e.g., United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961);  
*United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977);  
*Cavallaro v. United States*, 284 F.3d 236, 246 (1st Cir. 2002).

## Privileges and Appraisers (cont'd)

- But what does *Kovel* really say?
  - Facts
  - Accounting is:
    - “Foreign language to some lawyers in all cases
    - AND
    - To almost all lawyers in some cases.”
- Can appraiser communications be privileged?
  - At return preparation stage and appraisal included in return, likely not
  - At trial stage, mostly yes

## Effect of Asserting Privilege on Burden of Proof

- I.R.C. § 7491
  - Where taxpayer has:
    - kept all records required by Code
    - cooperated with reasonable requests by Secretary for witnesses, information, documents, meetings, and interviews
  - And taxpayer is not partnership, corporation, or trust
- Request for privileged materials should NOT be considered reasonable request
- Filing Motion to Quash Summons does not necessarily indicate lack of cooperation

*Estate of Kohler v. Comm'r*, T.C. Memo 2006-152.

## Anticipate Your Audience