

Focus | Probate, Trusts & Estates Law and Tax Law

Maintaining Privilege with Non-Lawyer Experts Under *Kovel*

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The backbone of most tax litigation is the preservation of attorney-client privilege and other protections. The dynamics of a dispute with the IRS can drastically change if communications intended to be protected are disclosed to the IRS. Tax attorneys commonly engage the help of accountants, investment bankers, financial advisers, and other experts in responding to information discovery requests, developing legal positions, evaluating settlement alternatives, and preparing for litigation. Judge Friendly recognized in *United States v. Kovel*, that the “complexities of modern existence prevent attorneys from effectively handling client’s affairs without the help of others.” The Second Circuit consequently extended attorney-client privilege to a third-party professional acting as an agent of an attorney in providing legal advice. If proper steps are taken, a third-party’s assistance could be protected from disclosure through the *Kovel* extension of attorney-client privilege.

In this article, we explain requirements for the *Kovel* extension of attorney-client privilege and provide best practices for maintaining privilege with third-party professionals.

Kovel and Attorney-Client Privilege

Fundamentally, attorney-client privilege protects communications where legal advice is sought from a professional adviser in his or her capacity as an attorney.

The communications made in confidence with the client are permanently protected from disclosure unless the client waives that privilege.

In *Kovel*, the Second Circuit extended the attorney-client privilege to include “all persons who act as the attorney’s agents.” That ruling opened the door to an extension of privilege to communications between a client or attorney and third-party professionals and experts. For the privilege to apply, communications between the expert, the attorney, and the client must meet the requirements of traditional attorney-client privilege. In determining whether *Kovel* protection applies, courts consider several factors, including:

- Whether the third party assisted the attorney in providing legal advice;
- Whether the third party served as a “translator” on complex subject matter or merely supplied facts; and
- Whether the attorney directed the actions of the third party.

Best Practices

When establishing a *Kovel* relationship, parties should make clear that the expert is working for the attorney and furthering the attorney’s provision of legal services. Best practices for delineating the relationship between the expert and attorney include:

- ***Kovel* Engagement Letter.** Parties should execute an engagement letter that memorializes the relationship between the attorney, the expert, and the client. While an engagement letter is not required to extend privilege, it is an effective way of communicating the

expectations of the relationship. The letter also serves to support the privilege if challenged. Engagement letters should include language that indicate that the engagement of the expert by the attorney is to assist the attorney in rendering legal advice to its client and that the expert reports to the attorney. The language included by many accounting firms in standard engagement letters and terms of service can be problematic for supporting a *Kovel* arrangement. Often, negotiating the terms of an engagement is necessary.

- **File Segregation.** To ensure an expert’s work is privileged, any work product prepared by the expert should be segregated from other documents or files. Where the expert has a pre-existing relationship with the client, it is imperative that the expert maintain separate files for all documents, correspondence, notes, memoranda, and other materials relied upon, used by, or created in connection with the *Kovel* engagement. For example, return preparation files and other tax advice that an accountant previously provided to the client should be segregated.

- **Privilege Labels.** All work product prepared by the expert at the direction of the attorney should be appropriately labeled. Documents, correspondence, advice, and opinions may be subject to the attorney-client and attorney work product protections. Accordingly, legends stating “Privileged and Confidential”, “Attorney Work Product”, and “Attorney-Client Communication”

should be appropriately placed on all written materials. Remember, labels ultimately do not control whether a document is privileged. Thus, blindly labeling all communications as privileged is not a best practice and can be detrimental in a privilege fight. Communications that are solely ministerial in nature do not need to bear such labels. If it is determined by the attorney that a report or study will be used to serve as documentation or otherwise be disclosed to the IRS to advance a taxpayer position, then the final document is not privileged and should not be labeled as such. Along these lines, the expert and the attorney should be in close coordination as the analysis progresses towards a final document.

- **Correspondence.** The expert should address all correspondence and work product to the attorney rather than to the client, if possible. If the expert needs to communicate with the client, it should copy the attorney on all communications.

- **Billing.** If the expert works with the client on other matters, the expert should conduct the *Kovel* project under a separate client-matter number and should issue separate billing statements. Because the *Kovel* doctrine requires the expert to work as the lawyer’s agent, the expert should bill the attorney directly for work, even if the client is ultimately responsible for paying the invoices. **HN**

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a career in the law, Sean served as the director of marketing for a medical supply company in Sherman, Texas. Sean received his law degree from SMU Dedman School of Law in 2017. After law school, Sean joined the boutique commercial litigation firm of Shamoun & Norman, LLP, gaining extensive litigation and trial experience across a wide range of practice areas. Sean and his wife Jennifer live in Plano, Texas.

Please welcome Sean to the Firm by reaching out to him at sean@theholmesfirm.com or (469) 916-7700, Ext. 117.

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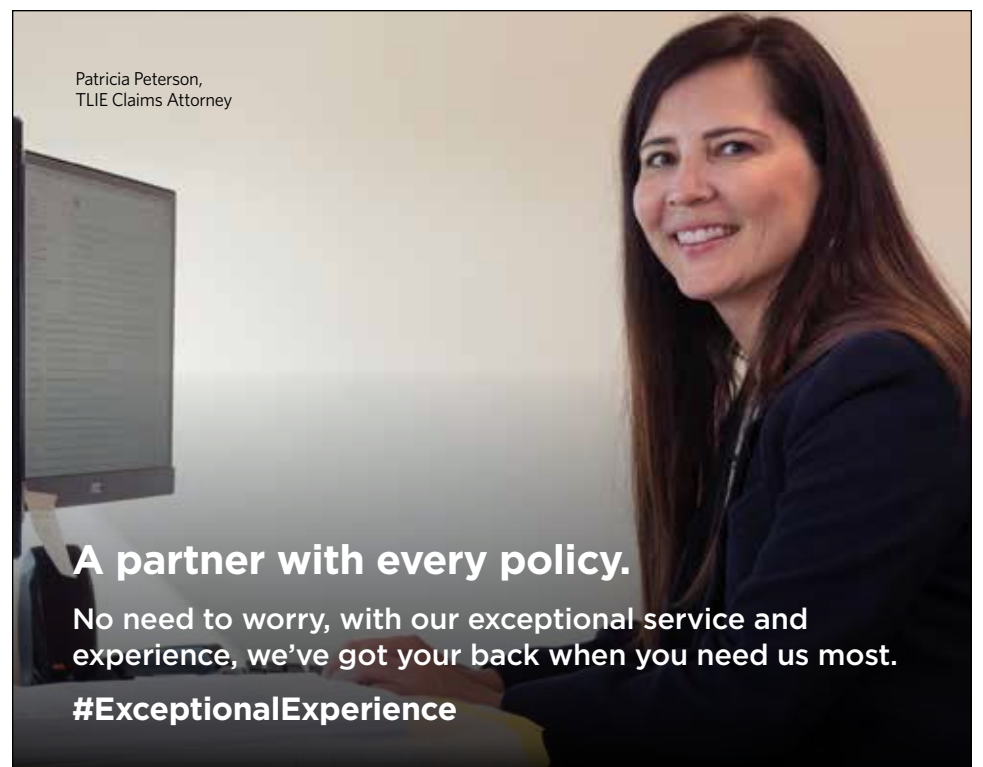
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