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After Michael Cohen Raid, How To Get Attorney Client Privilege For Your Taxes

The government searched the office and home of President Trump’s attorney, Michael Cohen, catapulting attorney client privilege into the daily news. We still do not know exactly what evidence prosecutors are seeking, although Stormy Daniels payment details are surely one area of interest. It is a rare treat for investigators to comb through files in a normally off-limits attorney’s office. Exactly how that combing is being done, how it should be done and by whom, is also a big debate. Michael Cohen made a bid to have his people make the first cut of what was privileged, but that attempt was rejected. It is not clear if prosecutors on the case are reviewing the materials, or if an independent privilege team is doing so.



The latter would involve additional protections for the materials, since some surely are privileged. The exception being discussed that might render some materials fair game is the crime-fraud exception. There is no privilege if the client’s communication was made with the intention of committing or covering

up a crime or fraud. But who decides is another big question. The exception

applies if the client was in the process of committing or intended to commit a crime or fraudulent act, and the client communicated with the lawyer with the intent to further the crime or fraud, or to cover it up.

Many Americans may face legal issues over their taxes, and it is one area where they may encounter attorney client privilege. Everyone over a minimum income threshold must file a federal income tax return each year. In most states, you must file a state income tax return too. And if you are in business, you have tax returns for business entities too, and probably payroll taxes. And like it or not, you must sign all of them under penalties of perjury. Altering the penalties of perjury statement or refusing to sign renders the return invalid. It does not even count to start the IRS statute of limitations (usually three or six years). Plus, if during an audit you lie to the IRS, it is an entirely separate crime. See [26 U.S.C. § 7206](#). In fact, many of the most serious criminal tax cases involve bad moves *during the audit*. If you lie or to create fake documents in the course of an audit, you compound your problems.

As you reflect on these sobering issues, consider attorney client privilege. Thanks to attorney client privilege, if you tell your lawyer that you hid money offshore, the IRS cannot make your lawyer talk. The IRS generally cannot even make your lawyer produce documents. When it comes to taxes, lawyers and accountants are not the same. Accountants do not have attorney client privilege. If you make statements or provide documents to your accountant, he or she can be compelled to divulge them no matter how incriminating they may be. There is a “tax preparation” privilege in [Section 7525\(a\)\(1\)](#) of the tax code, but it does not apply to criminal tax cases so is of little value.

In sensitive civil or criminal tax matters, the answer is the *Kovel* letter, named after [United States v. Kovel](#). This case stands for the proposition that you can get attorney client privilege with your accountant by having your lawyer hire the accountant. In effect, the accountant is doing your tax accounting and return preparation but reporting as a subcontractor to your lawyer. Properly executed, it imports attorney-client privilege to the accountant’s work and communications. The *Kovel* arrangement generally works well. It can be less effective with client-accountant relationships that pre-date the *Kovel* letter, but even there it can help. However, some IRS lawsuits have eroded some parts of the privilege.

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. There have been some other attacks too. In [United States v. Hatfield](#), the court forced disclosure of discussions between the lawyer and accountant. But this is rare, *Kovel* is still good law and the practice remains widespread. For clients with

complex or sensitive tax situation, adding a *Kovel* letter can provide some additional comfort and control.

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