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Neat Trick? Attorney-Client Privilege From An Accountant

Thanks to attorney-client privilege, if you tell your **lawyer** you are hiding money offshore, the IRS can't make your lawyer talk. The IRS generally can't even make your lawyer produce documents. See [Latest Foreign Account Prosecution Fuels Fears](#). The privilege is strong so clients (in both civil and criminal cases) will be forthcoming with their lawyers.



Image credit: mindtools

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. Although a statutory "tax preparation" privilege was added in 1998 ([IRC Section 7525\(a\)\(1\)](#)), it is inapplicable to criminal tax cases so is of little value.

In sensitive tax matters, the answer to this quandary is the *Kovel* letter, named after [United States v. Kovel](#). 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, it imports attorney-client privilege to the accountant's work and communications. However, recent IRS lawsuits are 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.

Pre-existing relationships between the accountant and the ultimate client are especially 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.

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