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Waiver of Privilege - Disturbing Trends

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Agenda

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Introduction

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- Role of privilege in state and federal tax planning.
  - Protecting the road map.
- Establishing privilege is the first step, but must also avoid waiving privilege through disclosure.
- Tax authorities have begun to focus on waiver in their pursuit of transparency.
- Taxpayer must prove both that the communication is protected by privilege and the privilege has not been waived.
- Several recent court cases have expanded the scope of waiver.

Attorney-Client Privilege

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- Protects confidential communications
- Made by a client,
- To an attorney,
- In order to obtain legal advice.
- Also includes an attorney's advice in response to such disclosures.

A Communication

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- Privilege protects communications (oral and written) from client to attorney and attorney to client.
- Privilege does not protect all facts.

Confidential Communications

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- The communication is not intended to be confidential if a third party is present.
- The communication is not intended to be confidential if the intent is to disclose to a third party.
  - *Long-Term Capital Holdings v. U.S.*, 2003-1 USTC para. 50,304 (D. Conn. 2003), disclosure of tax basis opinion did not waive privilege with respect to other documents relating to the same transaction because the tax basis opinion was never intended to be confidential.
- There are exceptions for certain third parties.

The Client

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- Top management,
- Middle or lower level employees,
- Independent contractors or consultants working as an agent.

The Attorney

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- Outside counsel – presumption that the purpose of the communication is to obtain legal advice.
- In-house counsel – no presumption that the purpose of the communication is to obtain legal advice.

Exception for Third Party Participation – *Kovel Engagement*

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- U.S. v. Kovel, 296 F.2d 918 (2d Cir. 1961)
- Generally, the presence of a third person negates confidentiality of attorney-client communications.
- Exception where third party is assisting the attorney to understand the company's facts (e.g. books and records).
- Does not apply when the third party is providing its independent analysis.
  - *U.S. v. Adlman*, 68 F.3d 1495 (2nd Cir. 1995), *Kovel* is limited to translator function.
- In Kovel, the court held that the attorney-client privilege applies to communications with accountant acting as translator of client's financial records.
- Utilize Kovel engagement letters when an expert advisor is necessary to assist the attorney in rendering legal advice.

Types of *Kovel* Engagements

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- *In re: Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003), *Kovel* engagement protected conversations between attorneys and public relations firm.
- *U.S. v. Bell*, 1994 U.S. Dist. LEXIS 17408 (N.D. Cal. 1994), economist's transfer pricing report was protected where the economist was retained by the attorney to assist attorney in providing tax advice.

Exception for Third Party Participation – Working at the Direction of In-House Counsel

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- In order to provide legal advice, in-house counsel may request company personnel to assist in gathering and interpreting factual information.
- Attorney-client privilege protects the communications between in-house counsel and personnel who are assisting in-house counsel to provide legal advice.
- Communications between company personnel and the expert advisor retained under a *Kovel* engagement are protected as part of the request for legal advice.

Exception for Third Party Participation – Common Interest Doctrine

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- Common interest doctrine extends the attorney-client privilege to otherwise non-confidential communications with third parties, where the parties undertake a joint effort with respect to a common legal interest.
  - *U.S. v. BDO Seidman, LLP, 492 F.3d 806 (7th Cir. 2007), common interest doctrine protected memorandum shared by counsel to a joint venture in tax matter.*
  - *U.S. v. United Technologies Corp., 979 F. Supp. 108 (D. Conn. 1997), consultations and negotiations to minimize tax consequences on formation of JV company held privileged because the parties were "collaborators" regarding the tax structure for the joint venture.*
  - But *see Schaeffler v. United States*, 113 AFTR2d (S.D. NY 2014), appeal pending, common interest doctrine requires the same legal interest not a common economic interest. ''A coordinated legal strategy is insufficient where there is only a common commercial interest and no identity of legal interests.''

Waiver of Attorney-Client Privilege

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- Express waiver – disclosure to a third party.
  - Showing, describing and providing a copy of the document to a third party.
  - Production to a government agency.
  - Production to an outside auditor.
- Implied waiver – client places counsel's advice in issue.
  - *In re: G-I Holdings, Inc.* , 2003 TNT 148-7 (D. N.J. 2003), implied waiver resulted by raising the reasonable cause and good faith defense to proposed accuracy related penalties.

Waiver Exception for Inadvertent Disclosure

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- Inadvertent disclosure - may not result in waiver if the privilege holder made efforts "reasonably designed" to protect and preserve the privilege. *U.S. v. De Lara*, 973 F.2d 746 (9th Cir. 1992).
- Federal Rule of Evidence (FRE) 502(b) (in effect after September 2008) provides that when an inadvertent disclosure is made in a federal proceeding or to a federal agency, the disclosure does not operate as a waiver in a federal or state proceeding if the party (1) took reasonable steps to prevent disclosure; and (2) promptly took reasonable steps to rectify the error.

Scope of Waiver

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- If a privilege holder waives the attorney-client privilege with respect to a particular communication, that waiver then applies to "all other communication relating to that same subject matter." *Fort James Corp. v. Solo Cup Co.,* 412 F.3d 1340, 1349 (Fed Cir. 2005).
- Fairness is typically used determine how broadly the "same subject matter" should be construed.
  - Was there a selective waiver made to adversary?
  - Should waiver be limited to contemporaneous documents?
- FRE 502 imposes limits on subject-matter waiver of attorney-client privilege in a federal proceedings or to a federal agency. Subject matter waiver only applies if the waiver is intentional and fairness requires additional disclosure to prevent selective and misleading presentation of evidence.

Tax Practitioner Privilege – IRC Sec. 7525

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- Statutory privilege enacted by Congress in Code section 7525.
- Applies the common-law attorney-client privilege to communications between a taxpayer and a "federally authorized tax practitioner."
- A federally authorized tax practitioner is one who is "eligible to practice" before the Internal Revenue Service (IRS) under Circular 230, including attorneys, CPAs, enrolled agents and enrolled actuaries.
  - Tax practitioner privilege applies to a taxpayer's in-house tax advisors who are "eligible to practice" under Circular 230. *United States v. Eaton Corp.*, 110 AFTR2d 5638 (N.D. Ohio 2012).

Limitations on Tax Practitioner Privilege

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- Unlike attorney-client privilege, in that it is not absolute in its application.
- Restricted to noncriminal tax matters before the IRS, and noncriminal tax proceedings in a Federal court brought by or against the United States.
- Does not prevent disclosures, for example to state tax authorities, or Securities Exchange Commission (SEC).
  - If the SEC or state tax authority obtains information that is otherwise protected by the tax practitioner privilege, such disclosure may operate as a waiver of the privilege if the IRS later sought the same information.

Tax Practitioner Privilege – Tax Shelter Exception

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- The tax practitioner privilege does not apply to written communications made "in connection with the promotion of" a "tax shelter."
  - A tax shelter is defined as a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement if a *significant purpose* of the partnership or other entity, investment plan or arrangement is the *avoidance or evasion* of federal income tax. Sec. 7525(b), sec. 6662(d)(2)(C)(iii).
- Scope of "promotion of" –
  - *Valero Energy Corp. v. United States*, 569 F.3d 626 (7th Cir. 2009), broadly defines "promotion of" as *furtherance or encouragement* of a tax shelter.
  - *Countryside Ltd. P'ship v. Comm'r*, 132 T.C. 347 (2009), limits tax shelter exception and holds the exception inapplicable to routine relationships between advisors and taxpayers and individualized tax advice.
  - *Salem Financial Inc. v. United States*, 102 Fed. Cl. 793 (Fed. Cl. 2012), excludes post-transaction communications with its tax advisors from the tax shelter exception.

Waiver of Tax Practitioner Privilege

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- Rules for waiver for attorney-client privilege apply to waiver of tax practitioner privilege.
  - Disclosure to third party, e.g., financial auditor or SEC.
  - Reliance on the advice as a defense to asserted penalties.
- Rules of subject matter waiver for attorney-client apply to waiver of tax practitioner privilege.

Tax Practitioner Privilege Waiver Case Law

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- *Salem Financial Inc. v. United States*, 103 Fed. Cl. 793 (Fed. Cl. 2012), tax practitioner privilege waived where the taxpayer indicated that it intended to rely on the tax advice as a defense to penalties.
- *Santander Holding USA, Inc. v. United States*, 2012 U.S. Dist. LEXIS 109148 (D. Mass. 2012), taxpayer waived the tax practitioner privilege by intentionally disclosing a KPMG memo that revisited its original opinion in light of more recent case law. *Waiver applied to all advice relating to the IRS audit of the transaction, including memo analyzing the IRS's positions in connection with the audit.*

State Accountant Privilege

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- Courts historically have not recognized a common-law accountant-client privilege.
- Situation is rectified on federal level by tax practitioner privilege.
- But: Federal privilege only reaches communications pertaining to matters before the IRS.

State Accountant Privilege

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- States take a non-uniform approach to accountant-client privilege.

- Three general categories:

  (1) Evidentiary privilege.

  (2) Confidentiality requirement.

  (3) No legislative action.

State Accountant Privilege

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- Evidentiary Privilege:

  (1) Statutory privilege protecting communications between a taxpayer and accountant.

  (2) Usually found in state's code of evidence.

State Accountant Privilege

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- States with Evidentiary Privilege:

California
Florida
Georgia
Idaho
Louisiana
Nevada
Oklahoma

State Accountant Privilege

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- Evidentiary Privilege in California.
  - Mirrors protection provided by state's attorney-client privilege.
  - References federal tax practitioner privilege.
  - "With respect to tax advice, the protection of confidentiality that apply to a communication between a client and an attorney … also shall apply to a communication between a taxpayer and a federally authorized tax practitioner" to extent communication would be subject to attorney client privilege. Cal. Rev. & Tax. Code Sec. 7099.1(a).
  - Tax advice: "advice given by an individual with respect to a state tax matter, which may include federal tax advice if it relates to the state tax matter."

State Accountant Privilege

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- Confidentiality Privilege:
  - Many states have statutes providing that documents prepared by accountants for their clients are confidential.
  - Found in business and occupation section of a state's code.
  - Significant diversity between states in language used.
  - Language used affects ability to claim evidentiary privilege.
  - Some say communications may be protected from discovery, some say communications are "privileged," others say only that documents must be kept confidential by accountant or client.

State Accountant Privilege

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- Confidentiality Privilege Example: Texas
  - Texas Occupations Code Section 901.456 “Accountant-Client Privilege.”
  - Provides only that information may not be voluntarily disclosed except with the permission of the client or the client’s representative.
  - Title held not to create an evidentiary privilege. *In re Baldev Patel,* 218 S.W.3d 911 (Tex. App. 2007).

State Accountant Privilege

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- Confidential Privilege Example: Michigan
  - Mich. Stat. Ann. Sec. 339.732.
  - "Except as otherwise provided in this section, the information derived from or as the result of professional service rendered by a certified public accountant is confidential and privileged."
  - Recognized as evidentiary privilege by Michigan Tax Tribunal (*General Products Delaware Corp. v. Township of Leoni,* No. 249550 (3/08/2001).

State Accountant Privilege

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- Some states have no statutes providing either an evidentiary privilege or confidentiality for accountant – client communications.

- In other states, courts have refused to recognize the privilege. New York, North Carolina, Ohio, Texas, Virginia

State Accountant Privilege

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- Take aways:
  - Great variation between states in protection afforded.
  - Language protecting confidentiality may not create an evidentiary privilege.
  - Duty to preserve confidentiality may be given to accountant, client or both.
  - Production of documents in state without privilege may destroy evidentiary privilege nationwide, regardless of statutory protection.

Work Product Protection

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- Established by the U.S. Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947).
- Supreme Court held that the attorney's interview notes were protected from discovery.
- Based on premise that attorneys must be able to carefully and thoroughly prepare their client's cases for litigation without undue interference from adversaries.

Federal Rule of Civil Procedure 26(b)(3)

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- Federal Rules of Civil Procedure partially codified *Hickman v. Taylor*.

- "Ordinarily, a party may not discover documents or tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."

  - Exception: "[P]arty shows that it has a substantial need for the materials to prepare for its case and cannot, without undue hardship, obtain their substantial equivalent by other means."

  - But there is almost absolute protection from disclosure of so-called "opinion work product."

    - Court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B).

Elements of Work Product

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- Provides protection for documents or testimony;
- Prepared in "anticipation of litigation" or for trial;
- By or for another party;
- Or for that other party's representative;
- Unless the opposing party demonstrates a substantial need.

Timeline For “Anticipation of Litigation”

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- Moving target or continuum.
  - Planning stage.
  - Analysis of litigating hazards in order to prepare.
    - Tax reserves.
    - Schedule UTP.
  - Commencement of Audit.
  - Receipt of IDR.
  - Receipt of NOPA.
  - Receipt of RAR.
  - Appeals.

Anticipation of Litigation: Documents Prepared During the Planning Stage

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U.S. v. Adlman,134 F.3d 1194 (2nd Cir. 1998).

- Accounting firm tax advisor prepared memorandum assessing litigating hazards if proposed transaction was undertaken.
- Work product protection applied even though the memorandum assisted in the business decision.
- Dual purpose documents can satisfies the "because of" standard for anticipation of litigation.
  - Whether a document is prepared because of the prospect of litigation turns on whether the substantially same document would have been prepared irrespective of the expected litigation.

During the IRS Audit-Cont'd.

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U.S. v. Eaton Corp., 110 AFTR2d 5638 (N.D. Ohio 2012).

- *4 summonses issued to the taxpayer and executives.*
  - *Emails and correspondence – 61 documents.*
  - *Redacted documents from APA binder.*
  - *Notes taken during employee interviews – no privilege log provided.*
  - *Performance evaluations of former employees responsible for managing compliance with Advanced Pricing Agreement.*
- Work product protection upheld.
  - Eaton demonstrated that the IRS audit was adversarial and contentious.
  - Court rejected IRS's argument that work product did not protect documents prepared during the course of an IRS audit or in anticipation of an administrative dispute with the IRS.

Planning Stage – Cont'd.

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- But *see Schaeffler v. United States*, 113 AFTR2d (S.D. NY 2014), appeal pending.
  - Accounting firm tax opinion was denied work product protection, because it did not discuss litigation strategy and court held that due to the complexity of the transaction, the taxpayer would have had to obtain the same tax assistance even if it knew that no audit or litigation would ensue. Case on appeal to Second Circuit.
- *U.S. v. ChevronTexaco,* 241 F. Supp. 2d 1065 (N.D. Cal. 2002).
  - Accounting firm tax opinion was protected work product because the VP of Tax's declaration supported finding that corporation reasonably believed that it was a certainty that the IRS would challenge the proposed transaction.

Planning Stage – Cont'd.

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- *U.S. v. Veolia Environ. North America Op., Inc.,* 112 AFTR 2d 6658 (D. Del. 2013), court upheld the taxpayer's claim of work product protection for documents prepared during the planning stages of the transaction.
- Taxpayer established that it subjectively anticipated litigation when it sought valuation reports and retained outside counsel to obtain a Private Letter Ruling, and the subjective expectation of litigation was objectively reasonable due to the sheer size of the deduction and the fact that the taxpayer was already under audit for prior years.

Anticipation of Litigation: Documents Prepared After the Close of the Transaction

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- *US v. Roxworthy*, 457 F.3d 590 (6th Cir. 2006).
  - *Two memoranda prepared by KPMG tax advisor analyzing the consequences of certain transactions entered by taxpayer.*
  - *Applies the "because of" test for anticipation of litigation but concludes that that anticipation of litigation must be both subjectively and objectively reasonable.*

Anticipation of Litigation: Documents Prepared During the IRS Audit

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- *Deseret Management Corp. v. U.S. 99 AFTR 2d 2007-1891* (Fed. Cl. 2007).
  - Taxpayer sought documents prepared by the IRS during the audit.
  - Government claimed work product protection.
    - "Government reasonably anticipated litigation on this issue almost from the inception of the audit."
    - Because "once the audit has begun, the likelihood of litigation increases."
  - The court upheld the IRS's work product claim – "The court believes that, due to the size of the corporation and the significance of the transaction, both plaintiff and defendant knew or should have known that the auditing process could lead to litigation."

IRS Chief Counsel Position

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- With respect to the assertion of work product for Chief Counsel Advice, Chief Counsel Notice CC-2002-026, Q&A (37) provides that the work product protection requires a "litigation predicate," but is not limited to documents prepared in connection with docketed cases or cases in litigation.
- Chief Counsel Notice CC- 2004-012, Q&A (21) provides that an assertion of work product is not limited to documents prepared in connection with docketed cases or cases designated for litigation, but assertion outside of this context should be coordinated with the Associate Chief Counsel.
  - The Notice identifies two examples in which litigation might reasonably be anticipated: (1) when the taxpayer's representative states an intention to litigate the matter; and (2) the taxpayer has litigated the same issue in prior audit cycles.

Anticipation of Litigation: Tax Court Case Law

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- The Tax Court generally holds the view that "the audit or examination process is not conducted in anticipation of litigation" unless a matter has been "singled out for litigation." *See, e.g., Bennett v. Comr.*, T.C. Memo. 1997-505.
- And, as a corollary principle, the Tax Court has held that revenue agent's reports, audit workpapers, and district and appellate conference reports are only subject to work product protection if the agent's work was supervised by counsel or the agent consulted with counsel to support the proposed adjustment. See e.g., *Branerton Corp. v. Comr.*, 64 T.C. 191, 198-99 (1975).

Tax Court Rule 70(c)(3)

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The amendment added a new paragraph (c)(3) under Rule 70, which closely tracks FRCP 26(b)(3)(A) and (B):

"(3) *Documents and Tangible Things:*

(A) A party generally may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent), unless, subject to Rule 70(c)(4),

(i) they are otherwise discoverable under Rule 70(b); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) If the Court orders discovery of those materials, it must protect against disclosure of mental impressions, conclusions, opinions, or legal theories of a party's counsel or other representative concerning the litigation."

Tax Accrual Workpapers

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- Who prepares them:
  - Taxpayer prepares tax accrual workpapers.
  - Financial auditor – *U.S. v. Arthur Young*, Inc., 465 U.S. 805 (1984) auditor's tax accrual workpapers are not protected by work product protection.
- IRS policy of restraint limits IRS's requests for tax accrual workpapers prepared by the taxpayer and financial auditor.
- Modified policy – Announcement 2002-63 to combat tax shelters.
- Announcement 2010-9 modifies policy with respect to Schedule UTP.

U.S. v. Textron, 577 F.3d 21 (1st Cir. 2009)

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- IRS sought taxpayer's tax accrual workpapers.
- District Court held that the tax accrual workpaper prepared by in-house attorneys and accountants were protected by
  - (1) attorney-client privilege,
  - (2) tax practitioner privilege, and
  - (3) work product protection.
- Attorney-client privilege and tax practitioner privileges were waived by taxpayer's disclosure of the tax accrual workpapers to its financial auditor.
- Work product protection was not waived.

Textron – En Banc Panel

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- Reversed district court decision.
- Tax accrual workpapers are not protected work product.
- Establishes new "prepared for use in possible litigation" standard.
- Inconsistent with other circuits – in particular Second Circuit *Adlman* decision.
- Cert. petition denied.

Adlman Litigation Reserve Example

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- A business entity prepares financial statements to assist its executives, stockholders, prospective investors, business partners, and others in evaluating future courses of action.
- Financial statements include reserves for projected litigation.
- The company's independent auditor requests a memorandum prepared by the company's attorneys estimating the likelihood of success in litigation and an accompanying analysis of the company's legal strategies and options to assist it in estimating what should be reserved for litigation losses.
- Concludes that work product would protect the litigation reserves analysis.

Wells Fargo v. U.S.,112 AFTR 2d 5380 (D. Minn. 2013) – Tax Accrual Workpapers

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- District Court held that certain information contained in tax accrual workpapers must be disclosed by the taxpayer pursuant to an IRS summons, but that other information was protected by the work product doctrine or the attorney-client privilege.
- Court rejected taxpayer's argument that all tax accrual workpapers, by their nature, are created "because of litigation," but ultimately held that the recognition and measurement analyses reflected in the tax accrual workpapers of both taxpayer and auditor were prepared in anticipation of litigation, and therefore are protected by the work product doctrine.
- In reaching its holding of non-disclosure, the court rejected the government's argument that Wells Fargo had waived its privilege by disclosing work product to a potential adversary, its auditor. The court was persuaded by the fact that the taxpayer and its auditor had never opposed each other in litigation and there was no evidence that any non-litigation dispute then existed.
  - However, it is unclear whether the court's analysis turned on the potential for any future litigation (*e.g.*, a billing dispute) or only litigation with respect to the UTPs described in the tax accrual workpapers themselves.
  - In *Deloitte*, the D.C. Circuit stated that the only relevant litigation in determining whether work product has been disclosed to an adversary is "the sort of litigation" described in the documents at issue. 610 F.3d at 140.

Regions Financial Corp. v. U.S.A., 101 AFTR 2d 2179 (N.D. Ala. 2008) – Tax Accrual Workpapers

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- During the course of the audit of Regions Financial Corp. (RFC), the IRS determined that RFC had participated in two listed transactions and, pursuant to its modified tax accrual workpaper policy, the IRS sought all the workpapers relating to the 2002 and 2003 tax years.
- In April 2006, the IRS issued a summons to RFC's outside auditor requesting all tax accrual workpapers that it had created or assembled in connection with its audit of RFC.

Regions Financial Corp. - Holding

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- The court held that the documents were protected work product and suggested that the preparation of analyses with respect to contingent tax liabilities is fundamentally an action carried out in anticipation of litigation.
- The court did not resolve the uncertainty as to the standard for application of work product in the 11th Circuit (to which the case would be appealed). Instead the court said that under either more restrictive "primary purpose" test or the less restrictive "because of litigation" test the documents met the requirements for work product protection.

Regions Financial Corp. - Analysis

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- The court characterized the IRS's main argument that in order for work product to apply the *only* reason for the creation of the document must be litigation preparation. In rejecting this argument, the court implicitly embraced the "because of" test. A document can be created because of litigation while satisfying other legitimate purposes, e.g., financial reporting or penalty protection.
- The court went further in its rejection of the IRS argument by turning it on its head – the only reason the tax position regarding the transaction was necessary to disclose for financial reporting purposes was because RFC anticipated litigation.
- Government dismissed its notice of appeal to the 11th Circuit.

Waiver of Work Product Protection

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- Clear case = intentional disclosure to adversary.
- Disclosure to a third party does not necessarily waive the work product protection.
- Waiver occurs where disclosure of protected materials to third persons substantially increases the opportunity for potential adversaries to obtain the information.

United States v. Deloitte, 610 F.3d 129 (D.C. Cir. 2010)

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- Summons issued to Deloitte, Dow Chemical's outside auditor, to produce its files related to Deloitte's review and audit of Dow's reserves with respect to the tax treatment of certain Dow partnerships.
- Dow claimed work product regarding three documents:
  - A July 1993 draft memorandum created by Deloitte based on a meeting with Dow's attorneys regarding possible litigation of the tax treatment of the partnerships.
  - A September 1998 analysis created by Dow's in-house counsel.
  - A June 2005 tax opinion from Dow's outside counsel.
- DOJ moved to compel in the District Court for the District of Columbia, which upheld the claims of work product.
- The court held the three documents contained protected work product and the work product protection was not waived upon disclosure to Deloitte, Dow's independent auditor.

Salem Financial – "At Issue" Waiver

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- Taxpayer claimed that tax reserve workpapers and related documents were protected by work product protection.
- Court avoided debate over whether tax reserves and associated workpapers are prepared in anticipation of litigation, but noted that it is sympathetic to public policy considerations counseling toward application of the work product doctrine to tax reserve documents.
- Court held that taxpayer waived any potential work product protection because taxpayer put the legal advice at issue by claiming reasonable cause defense.

At Issue – Work Product Waiver

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- Work product cannot be used as both a sword and a shield.
- "At Issue" waiver occurs when party relies on its work product to defend against penalties.
- Waiver applies to all communications related to the same subject matter.

Eaton Corp. – "At Issue" Waiver

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- District Court rejected government's contention that Eaton had implicitly waived its claims of privilege by filing a petition in the Tax Court.
- "The IRS has not persuasively demonstrated that Eaton has affirmatively raised claims that can only be disproven through disclosure of privileged documents."

Substantial Need Exception

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- Fact work product protection is not absolute.
- To overcome the work product protection for fact work product, the party must show a particularized need beyond a desire to learn what kind of case the adversary has.
- In *Sterling Trading Opportunities, LLC v. Commissioner*, T.C. Memo 2007-339, the Tax Court considered whether a document containing notes by an individual and his attorney made during meetings with tax advisors were work product subject to the substantial need exception. The court assumed, without deciding, that the documents contained fact-based work product and framed the issue as whether the IRS had substantial need for the information contained in the documents and was unable to obtain the substantial equivalent from other sources.
- Tax Court Rule 70(c)(3) currently provides that when the court orders discovery under the substantial need exception, "it must protect against disclosure of mental impressions, conclusions, opinions, or legal theories of a party's counsel or other representative concerning the litigation."

Scope of Waiver of Work Product Protection – Opinion Work Product

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- Opinion work product is viewed as being nearly immune from discovery, thus subject matter waiver for opinion work product is generally limited to those documents actually produced. *In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988).*
  - Exception to this general rule occurs when the privilege holder puts the advice of counsel in issue.
    - In *Salem Financial* the taxpayer relied on pre-closing tax opinions to avoid the imposition of penalties. By placing the tax advice at issue, the taxpayer waived privilege on the pre-closing opinion work product and subject-matter waiver extended to post-closing opinion work product.
    - In *Santander* the taxpayer relied on the pre-closing tax opinions to avoid the imposition of penalties. The court, however, disagreed with the *Salem Financial' court's* broad application of subject-matter waiver" and held that the protection had not been waived as to post-closing work product relating to changes in law and advice relating to the unwinding of the transaction.
    - In *AD Investment 2000 Fund LLC v. Commissioner*, *142 T.C. 13 (2014),* the Tax Court went further in extending the waiver doctrine to tax opinions even thought the taxpayer claimed not to be relying on the tax opinions as a basis for its affirmative defense that the taxpayer "reasonably believed " that the tax treatment was more likely than not correct, that the underpayment was due to reasonable cause, and that they acted in good faith.

Scope of Waiver of Work Product Protection – Fact Work Product

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- In contrast, waiver of fact work product is treated like waiver of attorney-client privilege and tax practitioner privilege.
- Waiver of fact work product may extend to all fact work product on the same subject.

Summons Litigation Over Privilege Disputes

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- An IRS administrative summons is issued to taxpayer or third party.
- An IRS administrative summons is not self enforcing.
- Court proceeding is commenced.
  - DOJ Tax Division brings a summons enforcement proceeding.
  - Third party institutes a proceeding to quash the summons.

Summons Litigation

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- Government bears the initial burden to show that the summons is valid.
  - *Issued for a legitimate purpose.*
  - *Information may be relevant – "throw light on the correctness of the return."*
  - *Not already in the possession of the IRS.*
  - *Meets all administrative requirements, i.e., service, notice, no referral to DOJ criminal.*
- Burden shifts to the summoned party.
  - Must prove that each of the requested documents are protected by privilege, and the privilege has not been waived.
  - No blanket claim of privilege.
  - Summoned party produces privilege logs and affidavits.

Requirements for Privilege Logs

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- Federal Rules of Civil Procedure 26(b)(5) provides that a party must describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.
- Sample privilege log:
  - Document identifier, such as a number or file location.
  - Date document was created.
  - Type of document, such as letter, memo, email.
  - Author.
  - Recipients.
  - Persons received as cc's.
  - Summary.
  - Privilege Reason.

Eaton Corp. – Privilege Log Requirement

McDermott Will & Emery

- Court required production of interview notes because taxpayer had not provided a privilege log.
  - Rejected Eaton's contention that a privilege log was not required since the request on its face reflected the privileged nature of the documents.

Privilege Log

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- IRS IDR request for privilege log may trick taxpayer into waiving privilege.
  - IDR's now requests that the privilege log disclose information to support allegation of waiver.
- The privilege log should provide a prima facie showing of the basis for privilege, however it is advisable to suggest an in camera review.
- In summons litigation, submit affidavits to establish the elements of work product protection.
  - Why it was subjectively and objectively reasonable to anticipate litigation.
  - Documents were prepared because of the prospect of litigation.
  - Documents would not have been created but for the prospect of litigation.

Best Practices for Claiming Work Product Protection

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- Duty to Preserve documents.
- What is it?
- When does it arise?
- Hand-in-hand with “anticipation of litigation”
- Consequences of failure to preserve
- Litigation hold.
- Create contemporaneous memo documenting basis for “anticipation of litigation.”

Best Practices and Strategies

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- Take “Precautions” – Be Disciplined to Protect the Jewels.
- Know your rules.
  - Understand and keep up with the laws and rules that apply.
  - Federal and state laws vary.
- Think about your role.
  - Consider the roles you perform and recognize that part of what you do may by protected by privilege.
- Preparation of documents.
  - Use business judgment on what and when documents need to be prepared.
  - Be label conscious.
  - Limit “dual purpose” documents by identifying purpose in opening paragraphs.

Conclusion

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Thank you!!

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Robin L. Greenhouse is a partner in the law firm of McDermott Will & Emery LLP based in the Firm's Washington, D.C., office and a member of the Firm's Tax Controversy Practice. *U.S News and Best Lawyers* named McDermott "Tax Litigation Firm of the Year" for 2014.

Robin represents businesses and individuals in resolving complex federal tax controversies through dispute resolution techniques including Fast Track Mediation, Pre-Filing Agreements, IRS Appeals and Post-Appeals Mediation and litigation. Over her 30-year career as a government and private practice litigator, she has litigated more than 100 cases in the United States Tax Court, United States District Courts, United States Courts of Appeals, United States Court of Federal Claims and United States Bankruptcy Courts.

Robin is a recognized authority on attorney-client, work product and tax practitioner privileges, and speaks and writes frequently on matters relating to tax litigation and IRS administrative practice and procedure.

Robin has the honor of being the second woman to serve as Chair of the Court Procedure and Practice Committee of the American Bar Association Section of Tax Section. She recently completed a two year term as Chair of the Committee on Appointments to the Tax Court of the American Bar Association Section of Taxation.

Robin is a Fellow of the American College of Tax Counsel and has been listed in *Best Lawyers in America* since 2012; SuperLawyers since 2013, and *Baltimore & Washington D.C.'s Top Lawyers* in 2012.

Prior to entering private practice, Robin served as a trial lawyer with the U.S. Department of Justice, Tax Division, where she was honored with the Tax Division's "Outstanding Attorney" award in 1987.

She is admitted to practice in the District of Columbia and before the U.S. Tax Court , U.S. Court of Federal Claims, U.S. Court of Appeals for the First, Second, Fourth, Eighth and Ninth Circuits, and U.S. Supreme Court.

Representative Experience

OMJ Pharmaceuticals Inc. v. United States, 2014 U.S. App. LEXIS 10414 (1st Cir. 2014) rev'g, 2012-2 USTC 50,6333 (D. PR. 2012)

Securitas Holdings, Inc. v. Commissioner, No. 21206-10 (Tax Ct., government partial concession October 25, 2011) judgment for taxpayer T.C. Memo 2014-225

Barnes Group, Inc. and Subsidiaries v. Commissioner, T.C. Memo 2013-109 (Tax Ct.) aff. 2014 WL 5649863 (2nd Cir. 2014)

Colella v. The Children's Hospital Corporation, No. 14-11687 (D. Mass. filed April 7, 2014, motion to dismiss granted November 4, 2014)

Karen Davidson, Donor v. Commissioner, No. 17166-13 (Tax Ct. filed July 25, 2013)

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Mary Kay McCalla Martire is a partner in the law firm of McDermott Will & Emery LLP and is based in the Firm's Chicago office. As a member of the Firm's State & Local Tax Practice Group, Mary Kay helps clients resolve state and local tax disputes in a wide range of tax and fee issues, including income, sales and use, utility, aircraft, tobacco, workers compensation and premium and retaliatory taxes. She represents clients in audit disputes, settlement conferences and other negotiations with state and local tax officials. Mary Kay has extensive litigation experience in state and federal court and administrative tribunals, including appeals. Her litigation experience includes injunctions, whistleblower actions and class action defense.

Mary Kay's recent experience includes:

- Winning a trial verdict for a client in a case involving the Illinois manufacturing equipment and hand held tool exemptions.
- Obtaining the dismissal of a federal court complaint seeking a refund of gas use and revenue tax from a firm utility client.
- Obtaining the dismissal of six different Illinois False Claims Act cases filed against Firm clients who are internet retailers. The litigation accused the clients of knowingly failing to collect Illinois sales/use tax on internet sales to Illinois residents and sought treble damages and attorneys fees, or failing to collect tax on shipping and handling charges. Mary Kay has also served as an active member of a joint defense team of counsel defending against these actions.
- Mary Kay also has helped clients resolve (1) a large income and franchise tax dispute with the State of North Carolina; (2) disputes with Minnesota and Maryland regarding the payment of worker's compensation surcharges, (3) a retaliatory tax dispute with the Illinois Department of Insurance, involving the proper tax treatment of income tax refunds in computing retaliatory tax; (4) an income tax dispute with the Kansas Department of Revenue, involving the tax treatment of a captive insurance company; (5) an income tax dispute raising unitary questions with the Illinois Department of Revenue; (6) a dispute with Cook County regarding the collection of cigarette tax; (7) nexus disputes with States of Washington and Illinois; and (8) a Single Business Tax dispute with the State of Michigan.
- Obtaining the dismissal, with prejudice, of proposed class action litigation filed in Cook County Circuit Court seeking a refund of Illinois premium tax.
- Representing a client insurance group in settlement negotiations with the State of Illinois, other insurers and proposed class action counsel in a lawsuit challenging the constitutionality of the Illinois surcharge on workers' compensation premiums.
- Obtaining a favorable ruling from the Illinois Secretary of State, reversing a large assessment of California truck registration fees.

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Mary Kay also has litigated a number of disputes in the insurance arena. She served as the principal trial attorney for a group of insurance companies who successfully challenged the constitutionality of the Illinois privilege tax. *Milwaukee Safeguard Ins. Co. v. Selcke*, 179 Ill. 2d 94 (1997). She has also handled retaliatory tax and state income tax matters for insurers, including captives.

Mary Kay also has a wide range of experience in other types of business disputes, including antitrust matters, contract disputes, intellectual property and media law.

Mary Kay has been Peer Review Rated as AV® Preeminent™, the highest performance rating in Martindale-Hubbell's peer review rating system and was selected for inclusion in the 2005, 2008, 2009, 2010 and 2011 *Illinois Super Lawyers* lists.

Mary Kay is a past chair of the State and Local Tax Committee of the Chicago Bar Association and the Chicago Lawyers Committee for Civil Rights Under Law, Inc. (CLCCRUL). She frequently speaks on state and local tax topics.

Mary Kay earned her J.D. from the University of Michigan Law School and her B.A. from Michigan State University. She is a member of the Illinois and Michigan bars, and is admitted to practice in many federal district and appellate courts.

Mary Kay's recent publications include:

- "Born on the First of July: The Countdown to Illinois' New Independent Tax Tribunal," Matthew C. Boch and Mary Kay Martire (IICLE Press Update to Illinois State and Local Taxation, 2013 Supplement March 2013)
- "A Decade of Lessons Learned From Litigating State Tax False Claims Act Cases," Mary Kay Martire and Lauren Ferrante (State Tax Notes, October 7, 2013)