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Privileged Communications for Attorneys and CPAs

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Privileged Communications for Attorneys and CPAs[1]

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I. Distinguishing Confidentiality from Privilege
   a. Confidentiality is a professional responsibility.
      i. Attorneys and CPAs are required to follow the rules of professional conduct for the jurisdictions in which they are licensed.
         1. Attorneys, *see, e.g.*, The State Bar of California, Rule of Professional Conduct 3-100 ("A member shall not reveal information protected from disclosure … without the informed consent of the client…").
         2. CPAs, *see, e.g.,* Cal. Bus. & Prof. Code § 5063.3, CalCPA Code of Professional Conduct Rule 301.
      ii. Protects the client against **voluntary** disclosure by the attorney or CPA.
      iii. Does not protect against an Information Document Request (IDR), a summons, or a discovery request.
   b. Privilege is an evidentiary exclusion.
      i. Makes certain evidence inadmissible in court.
      ii. Protects the client against **involuntary** disclosure.
      iii. Can protect against an IDR, summons, and discovery request.

II. Evidentiary Exclusions Available in Tax Controversy
   a. Attorney-client privilege
   b. Section 7525 tax practitioner privilege
   c. Work product doctrine[2]
   d. Fifth Amendment[3]
   e. State-created accountant-client privilege[4]

III. No federal accountant-client privilege.
   a. The Supreme Court has held that "no confidential accountant-client privilege exists under federal law." U.S. v. Arthur Young, 465 U.S. 805, 817 (1984), quoting Couch v. U.S., 409 U.S. 322, 335 (1973).

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[1] This outline is intended to provide an overview of the attorney-client privilege and the Section 7525 privilege so that tax practitioners can identify issues and opportunities relevant to their practice. Explanations have been simplified, for brevity, and practitioners are encouraged to conduct further research or consult with an advisor.
[2] *See* BNA Tax and Accounting Portfolio 5511, Boylan, Erwin, and Froelich, *The Section 7525 Tax Practitioner-Taxpayer Privilege and Related Issues* (Accounting Policy and Practice Series), Section VI for a thorough discussion of the work product doctrine in tax controversy.
[3] *See, e.g.*, Youssefzadeh v. Commissioner, No. 14868-14 (U.S.T.C. 2015).
[4] *See* BNA Tax and Accounting Portfolio 5511, *supra*, Sections I.D. and V.B.2, for a survey of the different state privilege statutes.

IV. Attorney-client privilege

a. Classic Definition: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." U.S. v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997), quoting 8 John Henry Wigmore, Evidence in Trials at Common Law § 2292 (John T. McNaughton rev. 1961).

b. Organization as the client.

i. In Upjohn v. U.S., 449 U.S. 383 (1981), a corporation's General Counsel conducted an internal investigation into possibly illegal payments made to foreign government officials. The company submitted a preliminary report to the SEC on Form 8-K, and provided a copy to the IRS. The IRS began an investigation to determine the tax consequences of the payments, and issued a summons demanding production of all files relevant to investigation. The corporation declined to produce the documents, asserting attorney-client privilege (and work product doctrine). At issue was whether the General Counsel's communications with low level employees were privileged, or whether the privilege was restricted to communications with employees in a position to control the activities of the corporation (the "control group"). The Supreme Court rejected the circuit court's control group test, noting that low level employees often have the relevant information needed by corporate counsel to advise the client corporation. Additionally, low level employees will often be the employees who will apply the counsel.

c. Client and attorney notes.

i. Attorney or client notes that would reveal a communication between attorney and client are privileged. A common example is notes memorializing a conversation between attorney and client. *See, e.g.*, Cencast Services., L.P. v. United States, 91 Fed. Cl. 496, 505 (2010) (client's notes memorializing "communication in connection with the seeking of legal advice" are privileged); *accord*, U.S. v. DeFonte, 441 F.3d 92 (2d Cir. 2006). *See also* CCA 201319019 (Westlaw printouts may be privileged if they contain highlights or notes that "would reveal the nature of the advice they were instrumental in shaping"). Notes prepared in advance of a meeting with counsel, outlining what a client wishes to discuss with counsel, can be privileged as well. DeFonte, 441 F.3d at 96.

ii. Notes that would not reveal a communication between attorney and client are not covered by attorney-client privilege. See, e.g., Cencast Services, 91 Fed. Cl. at 507 (notes that recount "attorneys' views on the significance of certain issues they have encountered in the context of [an] audit" are not, standing alone, privileged); Nat'l Bank & Trust Co. of Chicago v. AXA Client Solutions, No. 00 C 6786, 2002 U.S. Dist. LEXIS 4805, at 7-

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