

American Legal Ethics: Attorney-Client and Accountant Privilege
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August 2002

Alert Your longtime business client to tell you that her CPA has just suggested a business restructuring that should save her millions of dollars. She then asks you to work with the CPA to "paper" the transaction. When you point out that the proposed restructuring will carry significant tax risks and that there is no general federal accountant-client privilege, your client tells you that she has read about a new federal accountant-client privilege for tax matters. Is it OK for you to proceed?

Yes and no. Working with a CPA is clearly lawful, and clients who ultimately decide what we, as attorneys, may or may not do for them, within the bounds of the law. On the other hand, we should try to minimize the risks our clients take or, at the very least, make sure that any risks are knowingly undertaken. So, what are the risks?

The risks stem from limitations on the federal privilege applicable to accountants. Pursuant to 26 U.S.C.A. § 7525 (West Supp. 2002), this privilege applies only (1) to federally authorized tax practitioners (i.e., not to CPAs who are not authorized to practice before the IRS), (2) who are giving advice that is within their scope of practice (i.e., not general legal advice), (3) on noncriminal matters, (4) that are unrelated to tax-shelter participation, and, perhaps most importantly, (5) "to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney" (id. § 7525(a)(1)).

The fifth limitation bears particular scrutiny. As many courts have observed, the provision of accounting advice, as distinguished from legal advice, is not subject to attorney-client privilege. It follows that when a CPA gives accounting advice, there is no federal privilege protection, since there would be none if that same advice had been given by an attorney. See, e.g., *Cavallaro v. United States*, 284 F.3d 236 (1st Cir. 2002). Nor is it necessarily a sufficient answer to assert that the lawyer and the client will both benefit from the CPA's involvement. Although the *Cavallaro* court noted that the applicable standards are stated somewhat differently in different circuits, there will likely be no privilege if the client is ultimately seeking the accountant's advice rather than the lawyer's advice. At a minimum, the involvement of the accountant must be "necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." *Id.* at 247-48 (internal quotation marks and citation omitted).

So, should we refuse to do what the client asks? Not necessarily, but we should inform the client that the greater the role of the CPA, the greater the potential risk that a claim of privilege will not be upheld.

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If you would like to suggest one or more issues for future topics, please contact me at: Peter Jarvis via e-mail.

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