Tax Law Confidential: Attorney-Client Privilege and the Work Product Doctrine in Tax Practice

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OUTLINE

I. ATTORNEY-CLIENT PRIVILEGE

a. Generally

- The attorney-client privilege is a rule of evidence and discovery that protects from discovery and admissibility confidential communications between the client and the attorney. Fed. R. Evid. 501; Fed. R.Civ. P. 26(b)(1).

- The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981)(citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961).

b. Distinguished from duty of confidentiality

- The attorney-client privilege is separate and distinct from an attorney's ethical duty of confidentiality. The duty of confidentiality is a rule of professional conduct that generally prohibits an attorney from revealing, without the client's informed consent, information relating to representation of that client. Model Rules of Prof'l Conduct R. 1.6; Fl. St. Bar R. 4-1.6.

c. Governing law

- For questions of privilege in federal tax cases, federal common law applies. In re Albert Lindley Lee Memorial Hospital, 209 F.2d 122 (2d Cir. 1953), cert. denied, 347 U.S. 960 (1954).

- State law applies to questions of privilege in cases involving state tax issues (e.g. state sales and use tax). See, e.g., PacifiCorp v. Dep't of Revenue of State of Mont., 838 P.2d 914, 919 (Mont. 1992).

- Though not adopted by Congress, courts recognize "as a source of general guidance regarding federal common law principles" the rule the U.S. Supreme Court promulgated as part of the Proposed Federal Rules of Evidence. In re Grand Jury Investigation, 399 F.3d 527, 532 (2d. Cir. 2005); Fed. R. Evid. 501.

- Proposed Rule 503 states:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client,
>
> > (1) between himself or his representative and his lawyer or his lawyer's representative, or
> >
> > (2) between his lawyer and the lawyer's representative, or
> >
> > (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or
> >
> > (4) between representatives of the client or between the client and a representative of the client, or
> >
> > (5) between lawyers representing the client.
>
> Prop. Fed. R. Evid. 503(b).[2]

- For the purpose of applying Proposed FRE 503:
  - (1) A "**client**" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.
  - (2) A "**lawyer**" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

[2] Courts have invoked various iterations of the rule. For example, in United Shoe Machine Corp., the court stated :

> [T]he privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machine Corp., 89 F. Supp. 357 (D. Mass 1950).

- (3) A "**representative of the lawyer**" is one employed to assist the lawyer in the rendition of professional legal services.

- (4) A communication is "**confidential**" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

Prop. Fed. R. Evid. 503(a).

- Summary of the Elements of Attorney Client Privilege

  - (1) A communication

  - (2) Made between privileged persons

  - (3) In confidence

  - (4) For the purpose of obtaining or providing legal assistance.

  8 John H. Wigmore, Evidence in Trials at Common Law § 2290, at 542 (McNaughton rev. ed. 1961).

d. Extension of Attorney-Client Privilege to communications with Non-lawyer Professionals (Kovel Doctrine)

- The attorney-client privilege extends to communications with non-lawyer professionals who act as agents of the attorney and who facilitate the provision of legal services. U.S. v. Kovel, 296 F.2d 918 (2d Cir.1961).

- To enjoy attorney-client privilege, the communication with the non-lawyer agent must (1) be made in confidence and (2) for the purpose of obtaining legal advice from the lawyer. Id.

- The privilege does not extend to communications with a nonlawyer who advises or consults with the client on matters beyond the scope of the legal services. The nonlawyer must act as a "translator or facilitator."

- The privilege that extends to communications with accountants under Kovel is separate and distinct from the Section 7525 Tax Practitioner-Client discussed below.

e. Policy

- The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby to promote broader public interests in observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

f. Contexts in which attorney client privilege issues arise

- In tax practice, attorney-client privilege issues arise throughout the course of representation:
  - (1) During initial consultation/retention;
  - (2) In tax planning;
  - (3) With IRS summonses as part of both civil examinations (i.e. audits) and criminal investigations; and
  - (4) During litigation with discovery and admissibility of evidence.

II. TAX PRACTITIONER-CLIENT PRIVILEGE

a. Creation of the Tax Practitioner-Client Privilege

- Section 3411 of the IRS Reform Act of 1998 created the tax practitioner-client privilege by adding § 7525 to the Internal Revenue Code of 1986 ("IRC").

- Section 7525 provides:

> With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

I.R.C. § 7525.

- Accordingly, in applying the tax practitioner privilege, we look to the law governing attorney-client privilege. See United States v. BDO Seidman, 337 F.3d 802, 810 (7th Cir. 2003).

b. Limitations on the Tax Practitioner-Client Privilege

- Applies only to civil matters
    - The practitioner-client privilege applies only to noncriminal (i.e. civil) matters before either the IRS or in Federal court brought by or against the United States. I.R.C. § 7525(a)(2).
- Applies only to the extent the attorney-client privilege would have applied
    - The tax practitioner-client privilege applies only to the extent that the communications would be privileged if between a client-taxpayer and an attorney. S. Rep. No. 105-174, at 70 (1998). Thus, the services the tax practitioner provides must be legal in nature.
- Tax shelter exception
    - Does not apply to communications in connection with the promotion of the direct or indirect participation in any tax shelter (as defined in section 6662(d)(2)(C)(iii)). I.R.C. § 7525(b).
    - A tax shelter is a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, if a significant purpose of that partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax. I.R.C. § 6662(d)(2)(C)(iii).

c. Federally-authorized tax practitioner

- A "federally authorized tax practitioner" means any individual authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under section 330 of title 31, United States Code. I.R.C. § 7525(a)(3)(A).
- Federally authorized tax practitioners include enrolled agents,[3] CPAs, enrolled actuaries,[4] and attorneys. 31 U.S.C. § 330.

[3] Enrolled agents are individuals, other than attorneys or CPAs, authorized to represent clients and practice before the IRS. See 31 C.F.R. § 10.3(c) (1998); I.R.S. News Release IR-86-65 (May 8, 1986).
[4] *See* S. Rep. No. 105-174, at 70 (1998). Enrolled actuaries are individuals who are enrolled as actuaries by the Joint Board for the Enrollment of Actuaries pursuant to 29 U.S.C. § 1242, and are authorized to represent clients before the IRS. See 31 C.F.R. § 10.3(d) (1998).

III. WORK PRODUCT DOCTRINE

a. Generally

- The attorney work-product doctrine is not a privilege within the scope of the federal rules of evidence, but rather a tool of judicial administration that furthers the goals of fairness and convenience. Fed. R. Civ. P. 26(b)(3)(A); Fed. R. Evid. 501.

- The work product doctrine protects from discovery or admission as evidence documents and tangible items prepared *in anticipation of litigation* by or for a party or by or for that party's representative. United States v. Roxworthy, 457 F.3d 590, 593 (6th Cir. 2006) (Nonacq.) (citing Hickman v. Taylor, 329 U.S. 495, 510–11 (1947); Fed. R. Civ. P. 26(b)(3).

    - The doctrine does not protect materials prepared in the "ordinary course of business." Western Nat'l Bank v. Employers Ins. of Wausau, 109 F.R.D. 55, 57 (D.Colo.1985).

- The critical inquiry is whether the document was prepared *in anticipation of litigation*.

- A document is protected if, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998).

b. Policy

- The work product doctrine "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye toward litigation, free from unnecessary intrusion by his adversaries." Adlman, 134 F.3d 1194, 1196 (2d Cir. 1998).

c. Application

- If, during an IRS examination, a taxpayer's lawyer or CPA firm prepares documents containing analyses of the strengths, weaknesses, and likely outcomes of potential legal arguments and the taxpayer believes litigation is probable, the documents are protected from discovery under the work product doctrine. Schaeffler, 806 F.3d at 43-45 (2d Cir. 2015)

- Documents prepared in an anticipation of litigation are protected under the work product doctrine even if the client also intends to utilize the documents to assist in business dealings. Id. at 43.

IV. LIMITATIONS ON AND EXCEPTIONS TO PRIVILEGE

a. Waiver

- A client's disclosure to a third party of information otherwise subject to attorney-client privilege or work product doctrine protections constitutes waiver of the privilege or work product protection. In re Int'l Oil Trading Co., LLC, 548 B.R. 825, 831 (Bankr. S.D. Fla. 2016); In re Grand Jury Proceedings (Vargas), 723 F.2d 1461, 1467 (10th Cir. 1983) (recognizing that the crime-fraud exception applies to both the attorney-client privilege and the work product doctrine); Salem Fin., Inc. v. United States, 102 Fed. Cl. 793, 797 (2012).

- Once the attorney-client privilege or work product protection has been waived, the privilege or protection is generally deemed to be surrendered for all purposes and in all circumstances thereafter. Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

    - Accordingly, when the privilege is waived and the confidential information is disclosed to one party, then it is deemed to also have been waived to all other parties. Id.

    - When a party waives work product protection, the waiver extends to all non-opinion work product concerning the same subject matter. In re EchoStar Comms. Corp., 448 F.3d 1294, 1302 (Fed. Cir. 2006).

- Waiver can occur inadvertently or unintentionally; however, courts have been reluctant to find complete waiver where disclosure was inadvertent. See Data Gen. Corp. v. Grumman Sys. Support Corp., 139 F.R.D. 556, 559 (D. Mass. 1991).

    - The Data Gen. Corp. found that, while unintentional waiver of the attorney-client privilege has been criticized, those criticisms are not valid with regard to work product immunity. Id. The court reasoned that disclosure of an allegedly protected document to an adversary is fundamentally inconsistent with the policy behind work product immunity–to bolster the adversarial system. Id.

- Courts have held that a taxpayer waives attorney- client privilege and work product protection of tax advice if the taxpayer places that tax advice at issue by asserting a "reasonable cause" or "reasonable basis" affirmative defense to a penalty. In re G-I Holdings Inc., 218 F.R.D. 428, 433 (D.N.J. 2003) ("Had [the taxpayers] sought to preserve the attorney-client privilege, they should have refrained from raising [as a defense] the

advice of counsel altogether."); Salem Fin., Inc., 102 Fed. Cl. at 797 (finding that the taxpayer waived any work product protection that may have applied to its tax reserve documents by relying on the CPA firm's advice as a defense to IRS penalties).

b. Common Interest Exception to Waiver

- Although a party generally waives privilege by voluntary disclosure of the communication to another party, the party does not waive privilege by disclosing the communications to a party that is engaged in a "common legal enterprise" with the holder of the privilege. Schaeffler, 806 F.3d at 40.

- The common legal interest exception can apply to a common business, economic, or financial interest in the outcome of a legal matter. Id. at 41-43.

c. Crime-Fraud Exception

- The attorney-client privilege does not apply to a communication occurring when a client:

    - (a) Consults lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or

    - (b) Regardless of the client's purpose at the time of consultation, uses the lawyer's advice to engage in or assist a crime or fraud.

  In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987).

- The crime-fraud exception applies even if lawyer is unaware of client's intent. Id.

- The crime-fraud exception does not apply to communications about client criminal or fraudulent acts that occurred in the past, nor to crimes or frauds that are ongoing or continuing. Id.

- The party claiming that the crime-fraud exception applies must show:

    - (1) Facts (i.e. factual basis beyond naked allegations) that, if believed by trier of fact, would establish elements of some violation that was ongoing or about to be committed mere allegations of criminality are insufficient to warrant application of the exception; and

- (2) That the communication is related to criminal or fraudulent activity established under the first prong. Id.

d. Tax Preparation Exception

- Case law has long held that tax return preparation is not privileged information. In re Grand Jury Investigation, 842 F.2d at 1225 ("[I]nformation … transmitted … for the purpose of preparing … tax returns … is not privileged information.").[5]

- Foundation of the tax preparation exception is U.S. v. Lawless, 709 F.2d 485 (7th Cir. 1983)

- However, some courts have held that tax return preparation involves some legal advice, but the privilege did not attach because there was either no expectation of confidentiality or there had been a waiver of the privilege.[6]

- Courts sometimes take the position that attorney-client communications preceding the filing of a tax return are not privileged because tax return preparation is not the practice of law. United States v. Frederick, 182 F.3d 496, 501 (7th Cir. 1999); see also In re Grand Jury Investigation, 842 F.2d 1223, 1225 (11th Cir. 1987) (stating that while tax return preparation does include some legal analysis, it is not privileged because tax returns are generally completed by accountants).

- However, in Frederick, the court recognized that attorney-client privilege may attach where a lawyer prepares tax returns for a client while representing that client before the IRS during an examination if the lawyer is present to deal with issues of statutory interpretation or case law that the revenue agent may have raised in connection the examination of the taxpayer's return. Frederick, 182 F.3d at 502.

- A dual purpose document is not privileged

    - A dual purpose document, one that the accountant and/or lawyer prepares both for use in preparing returns, a nonprivileged

[5] See also United States v. Gurtner, 474 F.2d 297, 298-99 (9th Cir. 1973) (holding that tax return preparation is not the rendering of legal advice); Canaday v. United States, 354 F.2d 849, 857 (8th Cir. 1966).

[6] See United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983) (holding that information transmitted for use on a tax return has no expectation of confidentiality); Dorokee Co. v. United States, 697 F.2d 277, 279-80 (10th Cir. 1983) ("Even those courts holding that the attorney-client privilege can arise from the preparation of income tax returns do not apply the privilege to documents given by a client to an attorney for inclusion in the client's income tax return, because such information is obviously not intended to remain confidential."); United States v. Cote, 456 F.2d 142, 145 n.4 (8th Cir. 1972) (holding privilege waived not only as to the information on the tax return but also as to the details underlying the information because taxpayer's accountant transcribed the information from workpapers onto amended tax returns).

communication, and for use in litigation, a protected communication, is not privileged. Id.

e. The Kovel Doctrine: Engaging as Agents Accountants and Other Non-lawyer Professionals to Facilitate the Attorney-Client Relationship (U.S. v. Kovel, 296 F.2d 918 (2d Cir.1961)).

- Under Kovel, even if the accountant does not provide services that are "legal" in nature, in certain circumstances, an accountant's communications and work product may fall within the attorney-client privilege.

- To protect non-lawyer communications and work product under Kovel:

  - (1) establish an attorney-client relationship;
  - (2) lawyer hires agents or experts to assist in rendering legal advice; and
  - (3) the agent's role is to clarify, translate, or interpret the communication.

- The Kovel court carefully limited the attorney-client privilege between an accountant and a client to circumstances in which the accountant functions as a "translator" or interpreter of client communications, between the client and the attorney. In re G-I Holdings Inc., 218 F.R.D. 428, 434 (D.N.J. 2003).

- If the agent's role is that of a consultant who provides non-legal advisory services, attorney-client privilege does not attach under Kovel. Id. at 436.

- The attorney-client privilege does not attach simply because the non-layer services are necessary or valuable for the provision of legal services. U.S. v. Ackert, 169 F.3d 136, 139–40. (2d Cir.1999).

V. PROCEDURE AND BURDENS OF PROOF

a. A party may assert attorney-client privilege or the work product doctrine as a defense to an IRS summons enforcement action, discovery requests (via motion to quash), or objection to the admission of evidence during litigation.

b. Summons Enforcement

- To enforce a summons, the IRS need only make a prima facie showing (i) that the investigation will be conducted pursuant to a legitimate purpose, (ii) that the inquiry may be relevant to the purpose, (iii) that the information sought is not already within the [IRS's] possession, and (iv)

that the administrative steps required by the [Internal Revenue] Code have been followed. United States v. Powell, 379 U.S. 48, 57-58 (1964).

- The burden of the party challenging the summons bears a "heavy" burden to negate the IRS's good faith purpose or show that enforcement rises to an abuse of the court's process. Fortney v. United States, 59 F.3d 117, 120 (9th Cir. 1995).

- Nevertheless, the IRS's summons power is limited by the attorney-client privilege and the work product doctrine. Upjohn Co., 449 U.S. at 398; United States v. Euge, 444 U.S. 707, 714 (1980) (holding IRS summonses are "subject to the traditional privileges and limitations").

c. Discovery

- Generally, any fact that is "relevant" (i.e. helpful in the cause of action) and *not subject to privilege*, is discoverable. Fed. R. Civ. P. 26(b).

d. Evidentiary

- Relevant evidence is admissible unless any the United States Constitution, a federal statute, the federal rules of evidence, or other rules prescribed by the Supreme Court provide otherwise. Fed. R. Evid. 402.

e. Asserting attorney-client privilege or the work product doctrine

- The court in United States v. Chevron Corp. articulated the procedure for asserting privilege as follows:

> [T]he party asserting the attorney-client privilege bears the initial burden of proving that the communication in question is privileged. If the party seeking discovery asserts that the privilege which initially attached to the communication in question was subsequently waived, that party must bear the burden of production on the issue of waiver. Once the opponent has proffered evidence that the claimed privilege has been waived, the party asserting attorney-client privilege bears the ultimate burden of proving that the privilege was not waived.

United States v. Chevron Corp., Case No. 94–cv–1885–SBA, 1996 WL 444597, at *4 (N.D. Cal. May 30, 1996).

VI. RECENT CASES AND OTHER NOTEWORTHY DEVELOPMENTS

a. Schaeffler v. United States, 806 F.3d 34 (2d Cir. 2015). Decided November 10 2015.

- Facts:

  - The taxpayer, Shaeffler Group (Shaeffler) attempted to by a minority interest in a German target, which had made a tender offer.[i] To finance the acquisition, Shaeffler borrowed eleven billion euros from a consortium of banks.[ii] The financial markets collapsed just two days before the tender offer expired and the value of the target's shares plummeted. Unfortunately, German law obligated the Shaeffler to purchase substantially all the shares, leaving it the not-so-proud owner of 90% of the target. These events threatened the taxpayer's solvency and ability to meet its obligations to repay the consortium loans. The consortium and taxpayer sought to refinance the debt, structuring the refinancing in as a tax-free transaction. The taxpayer retained Ernst and Young (EY) to evaluate the tax implications of the transactions and the possibility of future litigation with the IRS. EY prepared a memo containing (i) "detailed legal analysis of the federal tax issues implicated," (ii) "assert[ions] that there is no law clearly on point," (iii) "language such as 'although not free from doubt,' 'the better view is that,' 'it may be argued,' and 'it is not inconceivable that the IRS could assert'; and (iv) "arguments and counter-arguments that could be made by Schaeffler and the IRS with regard to the appropriate tax treatment of [the refinancing and restructuring]." The taxpayer shared the memo with the consortium. The IRS issued a summons seeking production of the memorandum and the taxpayer sought to quash the summons, arguing the memo was protected by the practitioner-client (i.e. attorney-client) privilege and the work product doctrine. The IRS argued that the taxpayer waived privilege by disclosing the memorandum

- Holding:

  - The Second Circuit held that the taxpayer did not waive the tax practitioner-client privilege by sharing with a consortium of banks with whom the taxpayer proposed to enter into a refinancing arrangement a tax memorandum prepared by the taxpayer's Big Four CPA firm because the taxpayer and the consortium shared a common legal interest in the outcome of any ensuing tax controversy.

- The court also applied the work product doctrine to hold that tax analyses and opinions contained in documents created to assist in the large and complex transaction, which had uncertain tax consequences, could have work product protection because they are "prepared in anticipation of litigation."

- Reasoning:

  - The court reasoned that the taxpayers and the consortium had an interest in the refinancing and restructuring of the debt and had a common interest in ensuring that U.S. tax law was applied in a tax-efficient manner. Therefore, the parties not only had a common commercial interest, but also a common legal interest, which meant the taxpayer did not waive the attorney-client privilege by sharing the memo with the consortium.

- Implications:

  - (1) The tax practitioner-client privilege is alive and well for tax opinions issued by CPA firms;

  - (2) A document protected by the attorney-client privilege or tax practitioner-client privilege can have both a legal and a business purpose; and

  - (3) The meaning of "in anticipation of litigation" in the tax context is sufficiently broad to include documents created in the planning stages of large and complex transactions where the size and complexity of a transaction increase the probability IRS scrutiny.

b. United States v. Sanmina Corp. & Subsidiaries, No. 5:15-CV-00092-PSG, 2015 WL 2412322, at *1 (N.D. Cal. May 20, 2015).

- Facts:

  - The IRS challenged the taxpayer corporation's $503 million worthless stock deduction. At the administrative level, the taxpayer attempted to substantiate a $503 million worthless stock deduction by submitting to the IRS a valuation report drafted by its outside counsel DLA Piper. The report indicated that, for its valuation, the report relied on two separate internal memoranda prepared by the taxpayer's in-house tax department. The taxpayer had distributed those two memoranda to its internal tax team and to its outside CPA firms, who advised the taxpayer on tax matters. The IRS issued a summons requesting production of the two

internal memoranda. When the taxpayer failed to appear or produce the memoranda claiming attorney-client privilege, the IRS petitioned the court for enforcement of the summons.

- Holding:
    - The two memoranda are protected by both the attorney-client privilege and the work product doctrine.
- Reasoning:
    - (1) The taxpayer sufficiently demonstrated that the memoranda constituted tax advice from lawyers to Sanmina—not merely preparation of tax returns or number crunching—such that the attorney client privilege attaches.
        - Both of the drafters were attorneys at the time of drafting, at least one of the memoranda had "Confidential—Work Product Privilege" written on each page, and the taxpayer's declarants were able to explain the memoranda's legal analysis contents with detail.
    - (2) The taxpayer did not waive the privilege concerning the "subject matter" of the report by producing to the IRS the DLA Piper report, which relies on and summarizes the content of the memoranda.
        - The taxpayer distributed the attorney memos only to its outside counsel and CPAs. Distribution to its counsel did not constitute waiver because legal counsel does not lose its status as counsel, even if it provided come non-legal services. Distribution to the taxpayer's accountants, or federal tax practitioners, was also privileged, and did not constitute waiver of the attorney client privilege.
    - (3) The taxpayer initially created the documents in anticipation of litigation, despite the fact that no litigation or audit was pending at the time the taxpayer drafted the memoranda.
    - (4) The taxpayer did not waive its work product claims by producing its outside counsel valuation report to the IRS, a potential adversary.
        - The applicable standard for determining whether disclosure to a third party constitutes a work product waiver is not merely whether the documents were shared with third

parties, but whether such disclosure is consistent with maintaining secrecy against an adversary.

- Here, the valuation report merely references the memoranda rather than summarizing the memoranda.

- Implications:

  - The attorney-client privilege and work-product doctrine can protect from production tax memoranda prepared by in house counsel.

  - The taxpayer need not face pending litigation at the time it prepares a document for that document to fall within the work product doctrine's protection.

c. In re Grand Jury Subpoenas Dated Mar. 2, 2015, 628 F. App'x 13, 13 (2d. Cir. 2015) (pending case United States v. Zukerman, S1 16 Cr. 194 (AT)).

- Facts:

  - The taxpayer defendant is the subject of a grand jury tax fraud investigation. During the course of a civil audit, the taxpayer utilized the two attorneys who currently represent him in the pending criminal case, to allegedly convey false information to the IRS. The taxpayer appealed the District Court's order, finding that the crime-fraud exception to attorney-client privilege requiring the taxpayer's two attorneys to testify against him over the taxpayer's attorney-client privilege claim.

- Holding:

  - Court ordered taxpayer Defendant's tax counsel, who represented the taxpayer at both the administrative level and in the instant criminal proceeding, to testify against him in a grand jury investigation.

- Rules:

  - The crime-fraud exception removes the protection of the attorney-client privilege from "client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct."

  - A party seeking to invoke the crime-fraud exception must prove

        - (1) That the client communication or attorney work product in question was itself in furtherance of the crime or fraud" and

        - (2) Probable cause to believe that the particular communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity.

    - Reasoning:

        - Even with the heightened probable cause standard of the crime-fraud exception, when the very act of litigating is alleged as being in furtherance of a fraud, applied to communications made in tax protests, the District Court did not clearly err in finding that company's tax protest was based on a false, undocumented transaction and that owner of a company engaged in the tax protest as part of a strategy to further conceal that tax fraud and shirk his tax liabilities, as required for the Court to order the disclosure of communications between attorneys company's owner in an ongoing grand jury investigation into tax fraud.

    - Implication:

        - This is a very rare case. Generally, under the conflict-of-interest rules of professional conduct, an attorney cannot testify against his client. See ABA Model R. Prof. Conduct 3.7. However, where circumstances warrant, the court is willing to force an attorney to testify against his client.

        - The issue will certainly arise as to whether the defense counsel can serve as a witness against the defendant client continue representation without violating ABA Model R. Prof. Conduct 3.7 and other conflict rules 1.7, 1.9 and 1.10.

d. Panama Papers

    - Are communications during tax planning and structuring privileged?

    - Should you advise your client to waive privilege and disclose otherwise protected communications?

        - Disclosure may be necessary to assert a reasonable cause or reasonable basis defense.

[i] Schaeffler, 806 F.3d at 37.
[ii] Id.