

Translating Tax: How the *Kovel* Doctrine Extends Privilege to Experts in Tax Litigation

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For many, tax is like a foreign language. Attorneys frequently leverage expert assistance to help “translate” complex tax concepts. In litigation, this assistance can be vital to understanding the underlying transaction. However, without careful planning, the retention of experts can inadvertently waive privilege. The *Kovel* Doctrine bridges the gap between privileged communications and expert assistance.

In 1961, the Second Circuit recognized that attorney-client privilege could be extended to various experts, and specifically tax accountants. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). Since then, the majority of courts have adopted the *Kovel* Doctrine to the attorney-client privilege, work product doctrine or both. See, e.g., *Dublin Eye Assocs., P.C. v. Mass. Mut. Life Ins. Co.*, No. 5:11-CV-128-KSF, 2013 WL 653541 (E.D. Ky. Feb. 21, 2013). There are limitations to the doctrine so it is important for practitioners to understand the boundaries to effectively preserve privilege.

Kovel and its Progeny

Kovel was a former IRS agent who used his accounting skills in connection with his law firm employment. *Kovel*, 296 F.2d at 919. Under attorney supervision, he engaged in confidential client communications. One of these clients, Hopps, was the subject of a grand jury investigation related to federal income tax violations. *Id.* *Kovel* was called by the grand jury to testify against Hopps, but at the direction of his employer, asserted that attorney-client privilege barred him from answering certain questions. Despite pressure from the assistant United States attorney and district judge, who both contended that the attorney-client privilege did not apply to accountants, *Kovel* remained firm and was held in contempt of court. *Id.* at 919–20.

The Second Circuit evaluated *Kovel*’s claims by looking to the basic elements of the attorney-client privilege from Wigmore’s Code of Evidence:

- (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, save (7); literally, none of them is within (7) since the disclosure is not sought to be compelled from the client or the lawyer.

Id. at 921–22 (quoting 8 Wigmore § 2292, Evidence; 53 A.L.R. 369 (Originally published in 1928)). Analogizing that “[a]ccounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases,” the Second Circuit reasoned that:

[t]he presence of an accountant...while the client is relating a complicated tax story to the lawyer, ought not to destroy the privilege, any more than would that of the linguist in the second or third variations of the foreign language...the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to prevent.

Id. at 922. It is “vital to the privilege” that the communication in question “be made in confidence for the purpose of obtaining legal advice from the lawyer.” *Id.* Any communications in furtherance of accounting services or advice of the accountant would be outside the scope of the privilege. *Id.* The result is a fact-specific inquiry into the nature of any potentially privileged communication.

More recently, the U.S. District Court for the Middle District of Louisiana weighed in on the limits of the *Kovel* Doctrine. See *United States v. Melissa Rose Barrett*, No. 3:22-cr-00071 (M.D. La. 2023). In *Barrett*, a law firm employed an accountant who prepared, signed and submitted a collection information statement to the IRS on behalf of a client. The forms omitted material information about the client’s finances, which became the subject of an indictment for criminal tax evasion. The government subpoenaed the accountant’s testimony, and her employer filed a motion to quash based on the attorney-client privilege and work product doctrine.

In a decision that provides some insight into how a court will evaluate the *Kovel* Doctrine, the *Barrett* court denied the motion to quash because the firm did not show that the potentially privileged communications involved (1) translating “complex tax terms into a form intelligible

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The Louisville Bar Association recently concluded its annual Summer Law Institute (SLI), held from Saturday, June 14, through Saturday, June 19, 2025, at the Bar Center. This immersive program welcomes local high school students eager to explore a career in law. Throughout the week, participants engaged in dynamic panel discussions, toured the courthouse and capped off their experience by presenting a mock trial.

Admission to SLI is competitive; students apply and are selected based on their GPA, letters of recommendation and a submitted essay. This year, we proudly accepted 32 students, with more than half of the class being either recent May graduates or rising seniors.

This invaluable program is made possible thanks to a generous grant from the Louisville Bar Foundation. Their support allowed us to award a record 12 scholarships, ensuring that tuition costs are not an obstacle for families who might otherwise be unable to afford this enriching experience.

We extend our sincere gratitude to the following speakers who generously dedicated their time to share their expertise with our students:

Benjamin Barberie	Amy D. Cabbage	Sean P. Oates
Hon. Joan L. Byer	Seth A. Gladstein	Heend S. Sheth
Jason Cebe	Amy I. Hannah	Nicholas Stiegemeyer
Hon. A.C. McKay Chauvin	Zoe Jessie	Claude O. Tackett
Ryane E. Conroy	Deana Lively	Erin C. White
Jasmine Cox	Marc S. Murphy	Milja Zgonjanin

Finally, a huge thank you to the Bellarmine Mock Trial Team for dedicating almost 20 hours of time to help our students prepare for their mock trial. We also extend our gratitude to **Judge Yvette De La Guardia**, Jefferson District Court, Div. 4, and **John Young**, Executive Director of the Legal Aid Society, for presiding over the court!

Bellarmine Mock Trial Team
Shamir Patel
Jack Wathen
Norah Wulkopf

“I didn’t know how many opportunities there were in the legal field and the importance of each part. Learning this surprised me as I was able to learn about how they all connect and really figure out what and who I want to be in the future by looking at all the opportunities.”
- SLI participant, 2025

to a lawyer at the lawyer's behest," or (2) the accountant's work was intended to aid in anticipated litigation. Instead, the court reiterated that no accountant-client privilege applies under federal law and that to the extent that the *Kovel* Doctrine extends the attorney-client privilege or work product doctrine to accountants, such extension is necessarily narrow. Further, the defendant in the criminal tax evasion case filed a similar motion asserting privilege under the *Kovel* Doctrine, which was denied because confidentiality was not maintained when the forms were disseminated to the IRS. The defendant also waived privilege by asserting as a defense that the forms were incorrectly filled out by the accountant.

Application of the *Kovel* Doctrine

First, all the elements of the attorney-client privilege or work product doctrine must apply. Thus, if one of the exceptions to either is present (e.g., confidentiality is not maintained) then the *Kovel* Doctrine is inapplicable. Next, a court will generally analyze (1) whether the expert assisted in providing legal advice, (2) whether the expert interpreted complex subject matter for the attorney

and (3) whether the attorney directed the actions of the expert. As with attorney-client privilege, any privilege extended by the *Kovel* Doctrine belongs to the client. *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir. 1991). The burden is on the party asserting the privilege to show that the *Kovel* Doctrine applies. See *United States v. BDO Seidman*, 337 F.3d 802, 811 (7th Cir. 2003). "A blanket refusal to tes-

tify [or produce evidence] is unjustified," instead the party asserting the privilege must establish the privilege "with respect to each question sought to be avoided." *United States v. Schmidt*, 343 F. Supp. 444, 446 (M.D. Pa. 1972), *supplemented*, 360 F. Supp. 339 (M.D. Pa. 1973) ([] added).

There is an exception to attorney-client privilege for communications made with respect to preparation of a tax return. See, e.g., *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir. 1981). However, some courts have recognized that privilege may apply to legal advice with respect to a tax position taken on a return or information contained in workpapers that is not intended to be disclosed. *Id.* at 1043, n.17; see also *United States v. Baucus*, 377 F. Supp. 468, 471 (D. Mont. 1974). Thus, if tax return preparation is conducted in connection with anticipated litigation, it is important to delineate between data entry and tax advice. The intention behind workpapers should be carefully documented.

The *Kovel* Agreement

While not required, many practitioners execute a *Kovel* Agreement to memorialize the relationship between the attorney and the expert. See *Schmidt*, 343 F. Supp. at 445. The agreement may serve as evidence of the expert's relationship with the attorney, so that if necessary, the attorney can assert that any communications to which the expert is privy are privileged. Likewise, the agreement binds the expert to terms that support the extension of privilege.

The scope of the *Kovel* Agreement should be clearly defined to demonstrate that the expert will assist in the rendering of legal advice. It should indicate that the expert will take the direction solely from the attorney. Additionally, there should be terms clarifying that the attorney owns all the expert's analysis and workpapers in connection with the engagement. The expert should be restricted from breaching confidentiality or providing work product to third parties outside the permission of the attorney or pursuant to a court order. Finally, the expert should be paid by the attorney, although such payment is often contingent upon the receipt of funds from the client. Where the expert has already been engaged by the client for routine tax services, a separate *Kovel* Agreement can avoid involuntary waiver of privilege.

Best Practices for Preservation of Privilege

All potentially privileged documents should be segregated. Proper labelling and Bates-stamping can mitigate problems with proof that arise through the co-mingling of privileged and non-privileged documents. Any communications between the expert and the client should include the attorney. Maintaining these best practices supports the extension of privilege to an expert under the *Kovel* Doctrine.

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