



A Warning to Tax Practitioners

Attorney Client Privilege

Crime Fraud Exception

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Gary S. Wolfe has over 34 years of experience, specializing in IRS Tax Audits and International Tax Matters including: International Tax Planning/Tax Compliance, and International Asset Protection.

As of July 2016, Gary Wolfe has internationally published 15 books and 28 articles. Gary has received 14 international tax awards from five different Global expert societies in LONDON/UK including being voted one of the 100 leading world's law firms with votes from over 150,000 voters in over 160 countries with the following award: Global 100 (2016) (KMH Media Group) - CA/US International Tax Planning Law Firm of the Year.

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A Warning to Tax Practitioners

For non-compliant taxpayers, a tax practitioner's ethical duties are well summarized by the IRS see: IRS Offshore Voluntary Disclosure Program; Frequently Asked Questions and Answers 2014 (Effective for OVDP submissions made on or after 7/1/14, updated 2/8/16), see FAQ #47. The advice due client is contained in Circular 230 (Treas. Dept) Sec. 10.21 re: non-compliant taxpayers and penalty issues for non-compliance.

A practitioner has an ethical duty under Sec. 10.21 to advise the taxpayer of their tax non-compliance and their penalties (both civil and criminal) for tax non-compliance. For CPAs if the taxpayer does not remedy their non-compliance the CPA is not authorized to prepare & file their tax returns forward (important issue for your firm).

In addition, as I have previously advised there is no attorney-client privilege for criminal tax evasion so if a client is not accepted into the IRS OVDP they are then subject to both IRS civil tax examination and criminal tax prosecution (see FAQ 51 & 51.3). Under IRS Streamlined Filing Compliance Procedures (both domestic and foreign) it only is for non-willful taxpayers with no pre-emption for criminal prosecution. Once the returns are filed under the streamlined procedure they may be selected for audit, subject to additional civil penalties and if willful criminal prosecution.

A CPA with a client (in this tax position) may not object to testifying as a witness against the client based on an attorney-client privilege but would instead have to rely on another basis e.g.. 5th amendment right against self-incrimination, or unreasonable search under the 4th amendment.

As a final matter, for those tax practitioners who are aware that clients are non-compliant they may face two separate criminal issues (unless they advise clients of their non-compliance under Circular 230 Sec. 10.21 and withdraw if the clients refuse to become compliant prior to their acts being irreparably willful):

- 1) 18 USC 371: Conspiracy to Evade Taxes (a "Klein conspiracy") a five year felony
- 2) 18 USC 4: Misprision of a Felony. It is a felony to be aware of a felony (including a tax felony) and fail to report it to a court or other competent authority.

This criminal tax area is rife with exposure for advisors so be very careful.

Attorney Client Privilege: Crime Fraud Exception

Under the Crime-Fraud Exception to the Attorney-Client Privilege, a client's communications to their attorney is not privileged if made with the intention of committing or covering up a "crime or fraud".

Tax crimes (e.g. felonies) for willful evasion of tax, obstruction of tax collection, filing a false tax return may be not privileged under the Crime-Fraud Exception.

Since the attorney-client privilege belongs to the client, the client's intent determines whether the exception applies. The crime fraud exception applies if the client was in the process of committing a crime or intended to commit a crime or fraud. The crime fraud exception covers communications about a variety of crimes and frauds, including:

- 1) Suborning Perjury (the client asks an attorney to present evidence the client knows is false);
- 2) Destroying or Concealing Evidence;
- 3) Witness Tampering;
- 4) Concealing Income or Assets.

Client communications about past crimes and frauds are usually privileged but communications about ongoing or future crimes are subject to the crime-fraud exception. The key issue is whether the client is presently committing a crime or is about to commit a crime in the future. If the crime-fraud exception applies the attorney may be subpoenaed and forced to disclose the contents of the communication in question.

Under CA Evidence Code Sec. 956: "there is no Attorney-client privilege if an attorney was sought or obtained to facilitate the commission of the planning of a crime or fraud. In order for the exception to apply, two elements must be shown:

- 1) A prima facie case of a crime or fraud must be established by the party who is opposing the privilege;
- 2) They must "establish" a reasonable relationship between the crime or fraud and the attorney-client privilege.

Regarding the prima facie showing of fraud, the elements required to establish the exception are:

- a) A material misrepresentation of a material fact;
- b) Knowledge of the representation's falsity;
- c) Intent to deceive;
- d) the Right to rely on the representation.

See: BP Alaska Exploration, Inc v. Superior Court (1988) 199 Cal App. 3d 1240, 1263.

In California the crime-fraud exception only extends to communications "reasonably related to the crime or fraud". It does not effect a complete waiver of the attorney-client privilege, The crime fraud exception of Evidence Code Sec. 956 applies only to attorney-client privilege if does not apply to information protected by work product immunity. See: State Farm Fire & Casualty Co, v. Superior Court (1997) 54 Cal App. 4th 625, 650; BP Alaska 199 Cal. App. 3d at 1250-1251.

