SOUTHERN FEDERAL
TAX INSTITUTE

SAFEGUARDING PRIVILEGE: NAVIGATING KOVEL ENGAGEMENTS

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Brian McManus, Global Co-Chair of Latham & Watkins' Tax Controversy Practice, advises companies and high net-worth individuals in all phases of civil and criminal tax disputes.

Widely recognized as one of the nation's leading tax litigators, Brian helps clients confidentially resolve a range of controversies — from Internal Revenue Service (IRS) audits and appeals to litigation before federal and state courts throughout the United States. He delivers clear and technically astute counsel to a diverse mix of American and international clients, including multinational and Fortune 500 corporations across industries, such as technology, banking, insurance, energy, pharmaceuticals, airlines, entertainment, and retail, as well as global professional services firms, international charitable organizations, trust companies, and offshore corporate service providers

Drawing on nearly two decades of "inside the Beltway" experience, Brian regularly handles controversy matters with broader tax policy implications. His Washington ties include serving as an Adjunct Professor of Law at Georgetown University Law Center where he currently teaches IRS Practice and Procedure in the graduate tax (LLM) program.

Brian brings a winning track record in court handling some of the nation's largest tax disputes. His work encompasses all areas of federal and state taxation, with an emphasis on disputes involving cross-border and international tax matters, sophisticated corporate transactions, enterprise and asset valuations, transfer pricing, partnerships, tax-exempt organizations, employment taxes, R&D credits, REITs, oil and gas taxation, renewable energy tax credits, tax shelters and promoter penalty defense, and cryptocurrency matters. He also frequently handles sensitive tax matters involving allegations of fraud and potential criminal tax charges, as well as voluntary disclosures of domestic and offshore filing errors. Brian is admitted to practice before the US Court of Appeals for Federal Circuit, the US Tax Court, the US Court of Federal Claims, and the US District Court for the District of Massachusetts.

Brian currently serves as Chair of the American Bar Association (ABA) Tax Section's Civil and Criminal Tax Penalties Committee and is a member of the ABA's Appointments to the US Tax Court Committee. He is a Fellow of the American College of Tax Counsel. Brian regularly speaks at national tax conferences and authors tax controversy-focused articles.

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James Parks is a Partner in Bennett Thrasher's International Tax practice. He has more than 10 years of public and industry experience working with clients ranging from Fortune 500 Companies to mid-sized, privately-held companies operating in a wide variety of industries.

James' broad base of experience includes assisting U.S. and foreign-based multinational companies on cross-border tax planning and compliance matters (both inbound and outbound). Such matters include the design and implementation of tax strategies in alignment with strategic business objectives, while complying with all local and foreign tax regulations, mergers, acquisitions, dispositions, debt restructurings, cross-border financing and local country tax planning strategies. Additionally, he has broad knowledge of tax planning issues facing corporations, partnerships and limited liability companies, as well as experience with ASC740 income tax provision preparation and review in the international context.

Prior to joining Bennett Thrasher, James was at Deloitte Tax LLP in the International practice, where he assisted U.S.- and foreign-based multinationals on cross-border tax planning and compliance matters. Thereafter, he worked as head of the foreign position team at Koch Industries, Inc., where he was responsible for the development, implementation and management of global tax strategies that aligned with the strategic direction of the various Koch Companies.

James is a member of the State Bar of Georgia, including the Administrative, Business, International, Legal Economics and Taxation Law Sections. He is also a member of the American Bar Association, including the Business, International and Taxation Law sections.

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I. PRIVILEGE AND PROTECTION LANDSCAPE IN FEDERAL TAX CONTROVERSIES

A. Attorney–Client Privilege

1. Elements. The privilege applies only if four elements are satisfied:

   (a) A communication, whether oral, written, or electronic;

   (b) Made in confidence (i.e., with a reasonable expectation that it will not be disclosed beyond those persons necessary to transmit or receive it);

   (c) Between a lawyer and a client (or a prospective client);

   (d) For the primary purpose of soliciting or providing legal, as distinct from business, advice.

2. If any element is missing, the privilege does not attach.

   (a) The privilege does not attach to business advice, tax preparation work, etc., even if that work is undertaken by a practicing attorney.

   (b) The privilege does not attach to business records, such as accounting records, engagement letters, or invoices for legal services.

B. Burden of Proof

1. The burden of proving the applicability of the attorney-client privilege is normally on the party asserting the privilege. See generally *In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir. 1992); *In re Horowitz*, 482 F.2d 72, 82 (2d Cir. 1973); s*ee also Deel v. Bank of America, N.A.* , 227 F.R.D. 456 (W.D. Va. 2005) ("[t]he burden is on the proponent of the attorney-client privilege to demonstrate its applicability"); *King v. Deutsche Bank AG*, 2005 U.S. Dist. LEXIS 11317 (D. Or. 2005) ("[t]he party asserting the attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication"); *Tartaglia v. Paul Revere Life Ins. Co.*, 948 F. Supp. 325, 327 (S.D.N.Y. 1996) (same).

2. That burden is not met simply by asserting that the information sought is privileged; rather, the proponent of the privilege must allege specific facts sufficient to bring the information within the legal definition of the privilege. *See U.S. v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989); *In re Grand Jury Subpoena*, 750 F.2d 223, 225 (2d Cir. 1984). The "taxpayer need not reveal so many facts that the privilege becomes worthless." *U.S. v. First State Bank*, 691 F.2d 332, 335 (7th Cir. 1982). Generally, a blanket assertion of the privilege is insufficient; the privilege must be asserted on a document-by-document or question-by-question basis. *U.S. v. Martin*, 278 F.3d 988 (9th Cir. 2002).

C. Distinguishing Business Advice from Legal/Tax Advice

1. It is important to distinguish between business advice and legal (including tax) advice for purposes of the attorney-client privilege. The privilege attaches only to communications made for the purpose of obtaining legal advice, not to those seeking or conveying business advice—even if the communication is with an attorney. For example, a client may be considering a transaction for business reasons, but if the client requests an attorney's advice as to whether the proposed transaction is legal (*see In re Grand Jury Subpoena (Marc Rich)*, 731 F.2d 1032, 1038–39 (2d Cir. 1984)), or as to the tax implications of the transaction, the communication is privileged. As the Second Circuit explained, "Tax advice rendered by an attorney is legal advice within the ambit of the privilege," and "an attorney's opinion as to the lawfulness of a transaction is certainly 'legal advice.'" *Id.* By contrast, communications that merely discuss the business merits or commercial aspects of a transaction, without seeking legal advice, are not protected by the privilege.

D. Corporate Context – Upjohn Principles

1. The "client" is the entity, not the individual employee. Consequently, the company alone controls waiver.

2. Upjohn warnings: when in-house or outside counsel interviews employees for fact-gathering, counsel should explain that:

   (a) counsel represents the entity,

   (b) the conversation is privileged but the privilege belongs to the entity, and

   (c) the entity may later elect to disclose the substance of the interview to the IRS or others.

3. Who counts as a "client representative"? Courts look to whether the employee's duties include supplying information to counsel so that counsel can provide legal advice.

E. Frequent Waiver Triggers in the Tax Arena

1. Copying the outside auditor or the tax return preparer on otherwise privileged e-mails. Because auditors and tax return preparers are third parties, this almost always effects a subject matter waiver of the attorney-client privilege.

2. Forwarding a tax opinion or memo to outside accounting personnel "for their files." Merely stamping "privileged" on the document cannot undo the waiver.

3. Asserting a penalty defense that puts the taxpayer's "state of mind" at issue (e.g., reliance on counsel, reasonable-cause, reasonable-basis). Courts routinely hold that such a defense creates an implied waiver extending to all communications on the same subject matter.

4. Testimony by an executive that "our lawyers blessed the structure" or "tax said this was OK." Any public reference to privileged advice can potentially waive privilege. Providing a document to the IRS that references privileged advice may constitute a waiver depending on how descriptive the description is.

F. Practical Safeguards

1. Label privileged communications conspicuously ("Privileged & Confidential"). Labeling documents will help with electronic discovery.

2. Segregate privileged files from business files; use locked sub-folders or legal-only SharePoint sites.

3. Provide regular privilege-training to tax, finance, and treasury teams with concrete examples (penalty waivers, auditor requests, IDR responses).

4. Adopt a standing rule that no employee may forward legal advice to outside accountants without first clearing it through counsel.

G. Attorney Work-Product Protection

1. Statutory Anchor. Federal Rule of Civil Procedure 26(b)(3) and Tax Court Rule 70(c)(3) protect "documents and tangible things" prepared "in anticipation of litigation" or for trial, by or for a party or its representative (including attorneys, consultants, and Kovel experts).

2. Fact versus Opinion Work Product

   (a) Fact work product comprises objective data, chronologies, spreadsheets, and witness interview summaries. It can be discovered on a showing of "substantial need" and inability to obtain the equivalent without "undue hardship."

   (b) Opinion work product reflects mental impressions, legal theories, or strategy of counsel. It is "virtually sacrosanct" and is discovered only in the rarest circumstances (e.g., crime-fraud).

3. When Does "Anticipation of Litigation" Begin in a Tax Matter?

   (a) Courts apply a sliding-scale test: was litigation "reasonably foreseeable" rather than mere possibility? Common tax inflection points are (i) receipt of an IRS opening letter for an IRS audit, (ii) issuance of the first IDR

targeting a contentious position (e.g., transfer pricing), or (iii) receipt of a Notice of Proposed Adjustment/30-Day Letter.

(b) Routine return-preparation materials created before those triggers rarely qualify. Routine audit responses may not qualify.

(c) It is important to issue "litigation holds" and document anticipation of litigation. Issuing a litigation hold may also avoid spoliation claims.

H. Compatibility with Kovel

1. Sharing work product with a Kovel-engaged accountant does not waive the protection, so long as counsel directs the work and litigation is reasonably anticipated. (More on Kovel below).

I. Tax-Practitioner Privilege under I.R.C. § 7525

1. Overview. Section 7525 extends attorney-client principles to "federally authorized tax practitioners" (CPAs, enrolled agents, enrolled actuaries) in "non-criminal tax matters before the IRS" and in "non-criminal tax proceedings in federal court."

2. Key Limitations

(a) The privilege can only be asserted in a federal tax proceeding. The privilege does not protect against discovery by a state or local tax authority, another government agency (SEC), or a private plaintiff (a shareholder, a former employee).

(b) No protection for tax return preparation work.

(c) No protection in criminal investigations, state tax proceedings, SEC or shareholder litigation, or when the practitioner is promoting a "tax shelter."

(d) Does not cover return-preparation services or business advice.

(e) In short, the privilege often does not apply when you really need it to apply.

3. Waiver Rules. Like the attorney-client privilege, disclosure to a third party (e.g., an outside consultant or an auditor) permanently waives § 7525 protection. Work-product rules may not rescue the document because § 7525 has its own waiver regime.

4. Strategic Use. Section 7525 is helpful for routine civil examinations of individuals and closely held entities, but should not be relied upon for large corporate controversies or complex tax planning. Where potential penalties, SEC disclosure, or multi-jurisdictional audits loom, consider elevating the engagement to counsel and covering the communications with Kovel instead.

J. Common-Interest and Joint-Defense Doctrines

1. Purpose. Allow separately represented clients who face a common legal threat to communicate among themselves and with their lawyers without waiving privilege.

2. Prerequisites

   (a) A common legal interest (not merely a business or commercial interest);

   (b) Communications must further that shared legal strategy; and

   (c) Confidentiality must be intended and maintained.

3. Litigation Requirement Split. Some circuits require pending or anticipated litigation; others allow the doctrine in purely transactional contexts.

4. Documentation. A short written agreement naming the parties, describing the common legal objective, disclaiming duty of loyalty, and memorializing confidentiality is considered a best practice. Courts ask for it when privilege is challenged. However, there may be circumstances when an oral agreement is better for strategic reasons.

K. Fifth-Amendment Considerations — Personal, Not Corporate

1. Scope. The privilege against self-incrimination applies only to natural persons' testimonial communications; it does not shield the production of entity records, even if those records might incriminate an individual.

2. Executives and Partners. During an IRS interview, an individual may assert the Fifth as to specific questions. Counsel should prepare a question-by-question script and, where feasible, provide requested information through corporate records rather than personal testimony.

3. No Blanket Refusals. The witness must assert privilege question-by-question. A generalized refusal can be contemptuous.

4. Practical Fallout. The IRS may draw an adverse inference in civil cases (not in criminal).

5. Practice Point: Engage criminal tax counsel if you intend to assert the Fifth Amendment.

L. IRS "Policy of Restraint" for Tax-Accrual Workpapers

1. Historical Arc. The IRS's right to obtain tax accrual workpapers was definitively established in *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984). Following the Supreme Court's decision, the IRS announced that it would continue its policy of restraint and would not request tax accrual workpapers as a standard examination technique. See Announcement 84-46, 1984-18 IRB 18.

2. The IRS' current policy is summarized in the Internal Revenue Manual 4.10.20.1 and described in Announcement 84-46, 1984-18 IRB 18; Announcement 2002-63-

2002-27 IRB 72; Announcement 2010-76, 2010-41 IRB 432 (extending to Schedule UTP).

3. Definitions Matter

(a) Tax-Accrual Workpapers – documents that reflect estimates of current, deferred, or contingent tax liabilities (e.g., FIN 48 memos). See IRM 4.10.20.1.5(2) for the IRS' definition of Tax Accrual Workpapers.

(b) Tax-Reconciliation Workpapers – schedules reconciling book and tax figures used to prepare the return (e.g., M-1/M-3 detail). These receive no special deference. See IRM 4.10.20.1.5(1) for the IRS' definition of Tax Accrual Workpapers.

4. Interaction with Schedule UTP. Filing Schedule UTP neither waives privilege nor renders underlying opinions discoverable, but the Service may still summon them. See Announcement 2010-76.

M. Putting It All Together

1. Privilege in tax practice is a patchwork. Each doctrine covers different communications, different audiences, and different stages of a controversy.

2. The safest route for high-stakes matters is to structure all sensitive tax analysis as attorney-client communications, supported by Kovel-engaged experts, and contemporaneously document the anticipation of litigation for work-product purposes.

3. Discipline wins: privilege is maintained through clear protocols, meticulous labeling, and constant training — and it can be lost with a single careless e-mail.

II. THE KOVEL DOCTRINE—HOW TO EXTEND ATTORNEY–CLIENT PRIVILEGE TO NON-LAWYER EXPERTS

A. Origin and Rationale: *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)

1. The "interpreter" analogy. The Second Circuit analogized an accountant hired by a law firm to a translator who enables attorney and client to speak the same language. When an expert is essential (or at least highly useful) for counsel to render legal advice, the expert's communications with the lawyer and the client may share in the attorney-client privilege.

2. Judicial purpose. Kovel is not about making accountants immune from discovery; it is about protecting the flow of confidential facts from client to lawyer when those facts cannot be understood without technical mediation.

3. Fragile extension. Because Kovel is a judicial principle, courts apply it narrowly. The engagement must be demonstrably legal in purpose; otherwise, the privilege collapses.

B. Core Requirements for a Defensible Kovel Arrangement

1. Engagement must be by counsel, not by the client directly.

   (a) The retainer letter is signed by outside or in-house counsel, the invoices are addressed to counsel, and the expert reports to counsel—not to the tax department.

2. Primary purpose must be to assist counsel in providing legal advice.

   (a) If the expert is preparing a tax return or a valuation for financial-statement purposes, privilege will not attach. The safest approach is dual engagements: one privileged, one non-privileged.

3. Confidentiality must be intended and protected.

   (a) The expert is told, in writing, to keep all communications confidential and to label work product "Privileged & Confidential – Per Kovel."

4. Scope must be reasonably tailored.

   (a) Courts scrutinize engagements that appear boiler-plate or vastly broader than the specific legal issue. Tie the scope to the controversy or transaction at hand and to the subject matter of the legal advice.

5. Attorney direction and participation must be real, not cosmetic.

   (a) At least one lawyer should be copied on substantive e-mails, attend kick-off meetings, and review deliverables. Pure accountant-to-client traffic is a red flag.

   (b) An attorney should never allow an accounting firm to "borrow" their attorney-client privilege. The attorney may be liable for malpractice if they fail to properly supervise their Kovel expert.

C. "Multiple-Hat" Pitfalls and Practical Solutions

1. Return preparer as Kovel expert—the classic problem.

   (a) The same Big-Four firm that prepares the 1120 or Form 1065 may also be the best technical expert for the dispute. Courts may be suspicious because the firm is wearing a tax return preparer hat.

   (b) Practical solution: two separate engagements, teams, client codes, and electronic folders. The Kovel team does not touch return-prep documents except under counsel's supervision.

   (c) These situations are not always feasible and in reality it is not uncommon for an accounting firm to wear two hats.

2. Financial-statement auditor. Auditor independence rules usually bar the audit team from serving as litigation support. If the audit firm has the needed specialist group, use a separate affiliate and disclose the arrangement to the audit committee.

D. Recent Judicial Attacks—Lessons from the Case Law

1. *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998)—work product survives even when analysis informs business decisions, but must be in anticipation of litigation. The Court adopted the "because of" language.

2. *Schaeffler v. United States*, 806 F.3d 34 (2d Cir. 2015)—common interest privilege applied where a consortium of banks shared a refinancing memo prepared by counsel with outside accountants; Kovel doctrine also discussed.

3. *United States v. Sanmina*, 968 F.3d 1107 (9th Cir. 2020)—providing privileged information to a law firm engaged to prepare a non-privileged valuation analysis was a waiver of the attorney-client privilege, but not work product.

4. *Taylor Lohmeyer PLLC*, 957 F.3d 505 (5th Cir. 2020)—law firm compelled to disclose list of clients involved in offshore structures; names of clients are not privileged.

5. Key themes distilled:

   (a) Courts look for real lawyer involvement and real anticipation of litigation.

   (b) Boiler-plate letters or after-the-fact documentation may fail.

   (c) Facts (client identities, dates, amounts) are probably not privileged—only the communications to attorneys and legal advice surrounding them.

E. Interaction with § 7525 and Work-Product Protection

1. Kovel extends attorney-client privilege; it is independent of § 7525. If Kovel fails, § 7525 rarely rescues the communication.

2. Work product provides a second layer of protection, but only if the document is prepared because litigation is reasonably anticipated. Have counsel document that expectation in real time (e.g., litigation hold notice).

3. Practical sequencing: engage expert through Kovel first; simultaneously mark deliverables "Privileged & Confidential"; rely on § 7525 only for residual routine tax advice.

4. Work product protection may save the day in the event of a waiver of the attorney-client or section 7525 privilege.

F. International and Cross-Border Dimensions

1. Non-U.S. accountants. U.S. privilege may not be recognized abroad. If documents will cross borders (e.g., transfer-pricing files hosted in Europe), consider a local-counsel Kovel.

G. Best-Practice Checklist—Maintaining Kovel Protection Day-to-Day

1. Engage early, before substantive information flows.

2. Use explicit privilege legends on every communication: "PRIVILEGED & CONFIDENTIAL –PER KOVEL."

3. Copy at least one attorney on all substantive e-mails.

4. Hold a kickoff workshop with the expert's staff explaining privilege boundaries and do's & don'ts.

5. Maintain separate digital and physical folders labelled "KOVEL."

III. DESIGNING, IMPLEMENTING, AND POLICING A DEFENSIBLE KOVEL ARCHITECTURE

A. Timing: When to Invoke a Kovel Arrangement

1. Pre-transaction planning stage

   (a) Complex restructurings, cross-border financing, or large-dollar credit claims may lead to LB&I "campaign" audits three-to-five years later. Engaging the accounting or valuation expert through counsel at the planning stage locks privilege in before sensitive modelling is circulated. But, the engagement must have substance and be grounded in legal advice.

2. At the beginning, middle, or end of a tax controversy

   (a) Receipt of a Notice of Audit Selection is a classic trigger that litigation is now reasonably foreseeable.

   (b) The receipt of a 30-day Letter is a strong indicator that litigation may ensue. That is another time to evaluate whether to engage Kovel expert.

   (c) Sometimes a Kovel engagement must be retrofitted because the accountant advised on tax matters. Counsel should issue a fresh engagement letter, document litigation anticipation, and quarantine previously created material to preserve work-product arguments going forward.

3. Re-engagement for Appeals and litigation support

   (a) If the expert will now become a testifying witness, memorialize the role change; earlier non-testifying work may retain privilege, but should be prepared with the expectation that privilege may be waived when the expert is designated as a witness.

B. Drafting the Engagement Letter

1. Purpose clause (the "why")

   (a) "Expert is engaged exclusively to assist Counsel in providing legal advice to Client in connection with the anticipated IRS examination and any resulting litigation concerning the federal income-tax treatment of …."

2. Counsel-control clause (the "who commands")

   (a) Expert acts "solely at the direction of Counsel"; no direct reporting line to tax or finance personnel.

3. Confidentiality and privilege acknowledgement (the "shield")

   (a) Expert agrees to maintain strict confidentiality; communications and deliverables are intended to be protected by the attorney–client privilege and the attorney work-product doctrine.

   (b) Watch for boiler-plate language in accounting firm engagements that permit disclosures to third parties, regulators, peer review and ensure such provisions are deleted. Likewise, watch for language intended to address Code § 7216 that authorize disclosures and use of tax return information and ensure those provisions are deleted to avoid a potential prospective privilege waiver.

4. Scope, deliverables, and carve-outs (the "guardrails")

   (a) Describe tasks tied to the legal issue—e.g., provide accounting support in an IRS examination.

   (b) Carve-out non-privileged tasks—routine tax-return preparation, statutory audit support—into separate engagements.

5. Segregation mandate (the "filing cabinet rule")

   (a) Expert must use discrete electronic folders labelled "KOVEL—PRIVILEGED," maintain privilege legends on every document, and keep time entries narrative-free.

6. Billing mechanics and independence

   (a) Invoices addressed to Counsel; no detailed description that could reveal strategy if later subpoenaed.

7. Data-protection and cross-border clauses

   (a) GDPR, CCPA, and cloud-hosting issues—identify servers, encryption standards, and consent mechanisms.

   (b) Watch for possible AI-related privilege waivers.

8. Indemnification provisions (Ethics Flag!)

   (a) Counsel should carefully review any indemnification provisions to ensure the terms do not run afoul of state bar (ethical) rules.

9. Termination, Dispute Resolution, and Claw-back Provisions

   (a) Expert will return or destroy privileged material at Counsel's direction and assist in any privilege contest.

   (b) Include a dispute resolution mechanism, such as arbitration or mediation, to handle any disagreements that arise during the engagement.

   (c) Specify procedures for claw-back of inadvertently disclosed privileged information, ensuring compliance with Federal Rule of Evidence 502(d) to protect against waiver.

C. Communication Protocols—Practices That Help Preserve Privilege

1. E-Mail Discipline

   (a) Subject line legend: "PRIVILEGED & CONFIDENTIAL / PER KOVEL."

   (b) Copy at least one attorney on all substantive messages.

2. Virtual Data Rooms and Shared Drives

   (a) Segregate Kovel folders; restrict access.

   (b) Consider disabling external downloads unless counsel approves.

3. Meetings and Video Conferences

   (a) Calendar invite should state privilege legend.

   (b) AI transcriptions and recordings are discouraged (due to potential waiver issues); if required, store in the privileged repository.

4. Draft Documents

   (a) Watermark "DRAFT – FOR LEGAL REVIEW, or PER KOVEL." Never circulate drafts to auditor teams, tax return preparers, or treasury without counsel's written approval.

D. Training and Ongoing Monitoring

1. Train the Team on Kovel

    (a) Agenda: privilege basics, Kovel letter terms, e-mail legends, IDR response workflow, “no hallway chat” rule.

2. Quarterly Privilege Audits

    (a) Conduct regular reviews to ensure compliance with privilege protocols and address any breaches immediately.

3. Change-of-Scope or Staff Transition

    (a) Issue an amended Kovel letter if the expert’s role expands or changes.

E. Key Take-Aways

1. Kovel protection is not a form letter—maintaining privilege requires discipline in every e-mail, file name, and meeting invite.

2. Segregation, counsel control, and continuous training are critical.

3. Design the architecture on Day 1 of the project.

4. Document the privilege. Courts respect contemporaneous evidence of legal purpose far more than after-the-fact affidavits.

SAMPLE KOVEL ENGAGEMENT LETTER

[DATE]

PRIVILEGED & CONFIDENTIAL
VIA E-MAIL

[Kovel Expert]

Re: *Kovel* Engagement for Tax Controversy Services Related to [Client]

Dear [expert],
After consultation with our client [client]. ("**Client**"), [Law Firm] ("**[Law Firm]**") is retaining [expert] ("**you**" or "**[expert]**") in connection with an examination of the Client by the Internal Revenue Service ("**Matter**"). This letter agreement ("**Agreement**") describes the terms and conditions of your retention by [Law Firm] on behalf of the Client. This engagement is made pursuant to the opinion of the United States Court of Appeals for the Second Circuit in the case captioned *United States v. Kovel* and its progeny; as a result, any work product or communication you may generate during the course of this engagement is intended to be covered by the attorney-client privilege and/or the work product protection.1 This Agreement is intended to be effective as of [insert].

1. Services. You agree to provide technical tax and other strategic audit support to [Law Firm] in connection with the Matter ("**Services**"), as determined and directed by [Law Firm]. You will not subcontract any of the Services or other obligations under this Agreement without the prior written consent of the Client and [Law Firm]. You warrant that you will (a) carry out the Services with reasonable care and skill, in a timely manner, and in accordance with the terms of this Agreement and (b) comply with all applicable laws and regulations in force relating to the provision of the Services.

For clarity, you are not being retained by [Law Firm] to prepare or file federal or state tax returns or to otherwise provide advice in connection with the preparation of any prospective tax returns. Consequently, we do not intend that your work on this matter would include tax return preparation advice. Likewise, any issues related to the preparation of the Client's financial statements are beyond the scope of this *Kovel* engagement. In the event that you separately provide such tax or accounting services to the Client, those services shall be provided pursuant to a separate engagement directly between you and the Client.

2. Confidentiality and Privilege. You are being retained in this Matter because your specialized knowledge is essential for [Law Firm]'s provision of legal advice to the Client. As such, you will report to [Law Firm] and act as [Law Firm]'s agent in the Matter. The Services that you will perform, including the fact that you are providing the Services and all information provided to you hereunder, are confidential and may require review of privileged, proprietary, confidential, and trade secret information and communications, as well as personal data/personal information, of the Client or other parties (collectively, "**Confidential Information**"). You agree to protect and maintain the confidentiality of such Confidential

1 Your advice and work product may also be privileged and protected from disclosure under Internal Revenue Code § 7525 (tax practitioner privilege).

Information and not to disclose any such Confidential Information to any other person or entity without the prior written consent of [Law Firm], except as otherwise required by law.

All documents and other materials generated or prepared by you in connection with your activities are understood to be protected attorney work product, shall be addressed to [Law Firm], and shall be marked "*Privileged and Confidential*" (or marked as otherwise instructed by [Law Firm]). Further, all documents and other materials generated or prepared by you or furnished to you by [Law Firm] or any of the Client's personnel shall be kept in separate files clearly marked "*Privileged and Confidential*" (or marked as otherwise instructed by [Law Firm]).

You agree to abide by the terms of any court orders provided to you regarding confidentiality. In the event that you are requested, pursuant to legal, judicial, or administrative process, to disclose any Confidential Information or other information of the Client, including without limitation any information obtained, created, or developed in the course of this engagement, or any analyses, summaries, or derivations thereof, you shall notify [Law Firm] as promptly as possible (but in any event within two business days of receipt). You may only refrain from notifying [Law Firm] if you are prohibited by law from doing so. You will cooperate with [Law Firm] in all reasonable respects at the Client's cost and expense in any and all such efforts to protect such information from disclosure. In the event that no protective order or other appropriate remedy is obtained, you agree to disclose only such information as is required to be disclosed by such process, as modified or limited by such protective order or other remedy, if any.

3. General Security Obligations. You will take all reasonable steps to ensure that proper and secure storage is provided for all Confidential Information to protect against theft or unauthorized access with no lesser degree of care and no less robust security measures than those which would apply to your own confidential information. You agree to comply with all reasonable safety and security policies and procedures notified by [Law Firm] (either in writing or orally) and have appropriate policies and procedures in place in accordance with industry standards relating to physical and cyber security (*i.e.*, business continuity, disaster recovery).

You also agree to implement and maintain reasonable administrative, technical, and physical safeguards designed to: (a) maintain the security and confidentiality of Confidential Information; (b) protect against reasonably anticipated threats or hazards to the security or integrity of Confidential Information; and (c) protect against unauthorized access to or use of Confidential Information. These safeguards include, but are not limited to (i) the encryption of Confidential Information on desktop computers, notebook or laptop computers, mobile devices, and removable media (*e.g.,* USB thumb drives) and in the transmission of electronic communications involving Confidential Information and (ii) ensuring that the computing systems, workstations, and laptops that access Confidential Information have functional and current antivirus and utilize personal firewall software. All remote access to Confidential Information shall be secured by two-factor authentication.

You will notify [Law Firm] within 24 hours if you learn of any actual or suspected improper, unlawful, or unauthorized access to, misappropriation, disclosure, destruction, loss, alteration, or use of any Confidential Information ("**Security Breach**"), providing full details and circumstances thereof. You agree to promptly mitigate any harmful effects resulting from a Security Breach and agree to fully cooperate with [Law Firm] in connection with any investigation [Law Firm] may wish to conduct and/or any efforts to remediate a Security Breach.

Upon request by [Law Firm], and in any event upon termination or expiration of this Agreement, you further agree to promptly (within 30 calendar days of such request, termination, or expiration) return or destroy (at [Law Firm]'s sole election) any information provided to you pursuant to this engagement and to ensure the shredding or other secure disposal of any media containing Confidential Information.

The obligations under this section shall survive the termination or expiration of this Agreement.

4. Data Protection.

(a) **GDPR.** For the purposes of this section, "**Data Controller**", "**Data Subject**", "**Personal Data**", "**Process**", "**Processed**", and "**Processing**" shall have the meanings set out in the GDPR and "**GDPR**" means Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of personal data processing and any applicable local implementing laws (including for the avoidance of doubt the United Kingdom Data Protection Act 2018). You acknowledge and agree that in accordance with your provision of the Services, you may receive certain Personal Data of the Client and/or its representatives (*e.g.*, of Client's personnel, clients, contractors, adverse parties) ("**Client Personal Data**") and that you will Process such Client Personal Data as a separate Data Controller. In providing the Services, you shall, and shall ensure that any approved subcontractors shall, comply with all applicable laws in force from time to time relating to confidentiality and data privacy, including without limitation the GDPR. You shall: (i) Process the Client Personal Data only as reasonably necessary to perform your obligations and exercise your rights in accordance with this Agreement; (ii) not transfer any Client Personal Data outside the country of origin without prior written agreement from [Law Firm] or the Client (which may be granted subject to such conditions as [Law Firm] or the Client may require); (iii) provide [Law Firm] with any information reasonably necessary to enable [Law Firm] and/or the Client to comply with their respective obligations pursuant to the GDPR; and (iv) promptly notify [Law Firm] in writing and provide reasonable assistance if you receive any communication from a Data Subject or any data protection authority seeking to exercise rights under, or alleging or proposing to investigate an allegation of breach of, applicable law (including the GDPR) in respect of Client Personal Data, and give [Law Firm] and/or the Client a reasonable opportunity to comment before responding to any such communication.

(b) **CCPA.** For the purposes of this section, "**Business Purpose**", "**Collects**", "**Commercial Purpose**", "**Consumer**", "**Personal Information**", "**Process**", "**Sale**", "**Sell**", and "**Service Provider**" shall have the meanings given to them by the California Consumer Privacy Act of 2018, California Civil Code §§ 1798.100 et seq., and the related regulations adopted by the California Attorney General (collectively, "**the CCPA**"). For the purposes of the CCPA, to the extent that [Law Firm] or the Client shares Personal Information with you pursuant to this Agreement that would otherwise constitute a Sale, the parties intend and agree that (i) you are a Service Provider for [Law Firm] and the Client and (ii) all such Personal Information is disclosed to you for one or more Business Purpose(s) and its use or sharing by [Law Firm] or the Client with you is necessary to perform such Business Purpose(s). You further agree that you: (1) will Process all such Personal Information as a Service Provider on behalf of [Law Firm] and the Client for the Business Purpose(s) described in this Agreement or as otherwise permitted by the CCPA only; (2) are prohibited from retaining, using, or disclosing such Personal Information for any purpose other than for the specific purpose of performing the Services specified in this Agreement, including without limitation from retaining, using, or disclosing such Personal Information for a Commercial Purpose other than providing the Services specified in this Agreement; (3) will assist [Law Firm] and/or the Client in responding to any request from a Consumer to exercise rights under the CCPA; (4) will not respond directly to or otherwise communicate with such Consumers in relation to such requests, and will notify [Law Firm] if you directly receive a request from a Consumer relating to the Personal Information provided to you by [Law Firm] or the Client; and (5) will not further Collect, Sell, or use such Personal Information except as necessary to perform the Business Purpose(s).

5. Non-Disclosure of Third-Party Confidential Information. By signing this Agreement, you represent that your performance of all terms of this Agreement will not breach any agreement to (a) keep in confidence proprietary information acquired by you in confidence or in trust prior to your retention under this Agreement or (b) assign inventions, original works of authorship, developments, concepts, improvements, and trade secrets to any former employer or any other third-party. You will not disclose to

[Law Firm] or the Client, or use on [Law Firm]'s or the Client's behalf, any confidential or privileged information belonging to others, including but not limited to confidential or privileged information belonging to your former employers.

6. Engagement Conflicts. You have reviewed your records and made all reasonable inquiries to determine whether you have or had any engagements with other parties that could reasonably be deemed to conflict with this engagement, and have determined that you have none. Conflicts could involve the provision of services in this Matter to an opposing party to the Client, or representation of other parties in other matters where you take a stance on the issues presented that is opposed to the position you take here. You will make all reasonable efforts to ensure that a conflict does not arise during the scope of your engagement.

You and your employer, employees, partners, and affiliates agree not to perform consulting services in or related to this Matter for anyone other than the Client, without the prior written approval of [Law Firm].

In the event that you determine that you have an actual or potential conflict of interest in this matter that arises from any prior tax, accounting or other advice that you provided to the Client, you agree to promptly notify us and the Client of all material facts and circumstances surrounding that potential conflict of interest and to cooperate with our evaluation of that potential conflict of interest. For example, if you are requested by the IRS to provide information related to communications or advice that you provided to the Client in connection with matters under examination by the IRS, that would present a potential conflict of interest. Another example of a potential conflict of interest would be if you discovered a potential error on the Client's previously filed tax return, regardless of whether the potential error was caused by you or the Client. For purposes of determining whether an issue presents an actual or potential conflict of interest, please see, *e.g.*, Treasury Department Circular 230.

7. Fees and Expenses. We understand that fees for the Services [insert] provides will be billed plus direct and indirect costs, in accordance with the various Services rendered and the level of skill and responsibility required for these Services. We understand that your invoices for these fees will be issued as work progresses and are payable by [client] upon receipt.

[insert billing terms]

We understand that your fees for the scope of this project will be based on current hourly standard rates, which are as follows:

[insert billing terms]

[insert billing terms]

The Client will be solely responsible for payment of your fees and expenses, and will directly reimburse you for all such fees and reasonable expenses incurred incidental to your Services, provided that itemized lists of expenses are submitted to support the charges (*e.g.*, copies of itemized hotel bills, meal receipts, taxi receipts, etc.). Unusual office related expenses, such as bulk photocopying and specialized exhibit production, will be invoiced. Major expenses, such as flights, travel expenses, and significant copying or document production expenses, may be incurred only with the Client's or [Law Firm]'s prior written approval. At Agreement termination or expiration, all materials and equipment provided by the Client or purchased on the Client's behalf shall be returned to the Client.

Please send a copy of your invoices directly to the Client and please also provide a copy of your invoices to [Law Firm] via email to [INSERT] with a copy to [insert]. Neither [Law Firm] nor its attorneys or other personnel shall be responsible for such fees and expenses. In the event of non-payment, your sole remedy shall be against the Client and not against [Law Firm].

Your fees and expenses are in no way contingent upon the nature of your findings or conclusions, nor do you guarantee any result or specific outcome of the Matter. Any findings or conclusions developed or reached by you in connection with your Services will reflect your own independent, professional judgment and be based on methods and techniques that you consider appropriate under the circumstances.

8. Document Disposition. At the conclusion of your retention, [Law Firm] and you agree to discuss the appropriate disposition of the documents that [Law Firm] or the Client have provided to you in connection with your Services. At the request of [Law Firm] and/or in accordance with any protective order that may apply, you may be asked to store, discard, or return any such documents. You hereby agree to comply with such requests, except to the extent you are required by governing law, regulation, or code of professional conduct to retain work papers or similar documentation of your work.

9. Compliance With Law. [Law Firm] is committed to practicing and operating according to the highest ethical and legal standards and therefore expects those with whom it conducts business to operate in a similar fashion. As such, [Law Firm] expects that you will comply with all applicable laws, rules, and regulations and adhere to the highest ethical standards in performing the Services hereunder.

10. Term and Termination. This Agreement shall commence on the date that it is fully executed by all parties and shall continue until your Services are completed or until otherwise terminated by either party. This Agreement may be terminated without cause by either party at any time upon written notice to the other party; provided however, that you may not terminate this Agreement or cease providing Services without cause if doing so would materially prejudice the Client's legal rights in the Matter. In the event that you have not provided any Services under this Agreement during the six-month period following the execution of this Agreement, this Agreement shall be deemed as having been terminated by the parties. In the event this Agreement is terminated by any party, you shall promptly render a final statement for fees and expenses for payment by the Client, as set forth in Fees and Expenses above. The provisions of this Agreement that give the parties rights beyond termination of this Agreement will survive any termination of this Agreement. In the event of a conflict between the terms of this Agreement and any other agreement or engagement letter related to these Services and this Matter, this Agreement shall control.

11. Governing Law and Dispute Resolution. This Agreement and any dispute between the parties whether in contract, tort, or otherwise will be governed by and construed, interpreted, and enforced in accordance with the laws of the State of California, without giving effect to any choice of law principles or provisions relating to conflict of laws that require the laws of another jurisdiction to apply. The parties hereto agree to jurisdiction and venue in the State of [insert] for resolution of disputes hereunder. Notwithstanding the above, should such dispute involve [Law Firm] as a party, this clause shall be subordinated to any arbitration provision [Law Firm] might otherwise be entitled to invoke. In such circumstance, you agree to arbitrate any such dispute to whatever extent may be necessary to avoid defeating [Law Firm]'s arbitration rights.

12. Entire Agreement and Miscellaneous. You and we understand that this letter constitutes the entire agreement pertaining to your Services, and that it shall not be modified by any policies, procedures, guidelines or correspondence from you or your representative unless agreed to in writing by [Law Firm] and the Client.

All parties signing this letter represent and warrant that they are fully authorized to enter into this Agreement, and in the case of signatories agreeing on behalf of organizations, to bind the organization or organizations to the terms in this Agreement.

The words "execution," "execute", "signed," "signature," and words of like import in or related to this Agreement and/or any document to be signed in connection with this Agreement and the transactions contemplated hereby shall be deemed to include electronic signatures and contract formations on electronic platforms approved by [Law Firm], or the keeping of records in electronic form, each of which shall be of the same legal effect, validity or enforceability as a manually executed signature or the use of a paper-based recordkeeping system, as the case may be, to the extent and as provided for in any applicable law, including the Federal Electronic Signatures in Global and National Commerce Act, or any other similar California state laws based on the Uniform Electronic Transactions Act.

We appreciate your assistance on this Matter, and look forward to working with you. Please indicate your agreement to the terms and conditions set forth above by countersigning below and returning an original or electronic (PDF) copy to me.

Sincerely,

[NAME]
of [Law Firm]

Agreed and Acknowledged:

[EXPERT]

Date:

Agreed as to fees by [CLIENT]:

Date:

SAMPLE KOVEL PROTOCOLS FOR CLIENT

Privileged & Confidential
Kovel Engagement – Protocols for the Client

1. **Purpose and Scope**
   • The Kovel accountant is engaged by [law firm] to assist us in providing legal advice to you in connection with a federal tax controversy and potential litigation.
   • The Kovel accountant is not your general business advisor or tax return preparer for this engagement. Any work performed by the Kovel accountant outside the scope of this engagement should be undertaken pursuant to a separate engagement letter between you and the adviser. Please let us know if you intend to enter into such an engagement.

2. **Communications regarding Routine Fact Finding and Document Gathering**
   • You may communicate directly with the Kovel accountant and their team for the purpose of providing factual information, responding to document requests, and clarifying factual issues. You do not need to include us in those communications.
   • Examples include: sending requested documents, answering questions about business operations, or confirming dates and amounts.

3. **Substantive Discussions**
   • Please do not discuss legal advice, tax positions, legal strategy, or request opinions from the Kovel accountant unless we are present or have expressly authorized the discussion.
   • If you are unsure whether a topic is factual or substantive, consult with us before responding.

4. **Communications and Markings**
   • Mark all written communications with the Kovel accountant as "***Privileged & Confidential/Per Kovel***."
   • Please do not forward privileged communications to third parties (including auditors, other advisors, or business partners) without speaking to us.

5. **Meetings and Calls**
   • For meetings involving the Kovel accountant, please invite us to any discussion that may involve legal advice or strategy.
   • Please do not record or transcribe privileged meetings without discussing those risks with us (including using AI note taking features, etc.)

By following these protocols, you help preserve your attorney-client privilege and work-product protection.

SAMPLE KOVEL PROTOCOLS FOR KOVEL EXPERT

Privileged & Confidential/Per Kovel
Kovel Engagement – Protocols for Kovel Expert

1. **Purpose and Scope**
   • You are retained **solely** to assist counsel in providing legal advice in anticipation of, or in connection with, federal tax controversy and potential litigation.
   • Do **not** undertake any tasks unrelated to that purpose (e.g., return-preparation, audit work, or general business consulting). If in doubt, please obtain written direction from [firm] before proceeding.

2. **Counsel-Controlled Communications**
   • Address all memoranda, e-mails, analyses, and draft schedules to **Counsel** and mark each page: **PRIVILEGED & CONFIDENTIAL / PER KOVEL**.
   • Copy at least one attorney on every substantive communication. Do not include, copy, or forward to third parties without consulting with us.
   • The client may communicate directly with the Kovel team for routine fact finding, document gathering, and clarification of factual issues. However, any substantive discussions regarding legal advice, tax positions, or strategy should include or be directed by counsel.
   • Limit oral discussions of privileged matters to meetings where counsel is present or has expressly authorized the conversation in advance.

3. **Document Handling and Storage**
   • Maintain electronic files in a **segregated, access-restricted folder** labeled "KOVEL – PRIVILEGED."
   • House physical documents in locked cabinets labeled the same. No privileged material may be stored on shared drives, personal devices, or cloud platforms not approved by counsel.
   • Drafts are as sensitive as finals. Do not circulate or print drafts outside the privileged workspace.
   • If the client requests factual clarifications or provides documents, such communications may occur directly, but any substantive feedback or analysis must be routed through counsel.

4. **Work-Product Protection**
   • Treat every worksheet, calculation, note, and e-mail as potential work product prepared **because of anticipated litigation**.
   • Include us in the development of all analyses; request legal input on framing of assumptions, issues, and conclusions.
   • Avoid factual recitations that could be obtained from business records; focus on legal and strategic analysis requested by counsel.

5. **Meetings and Calls**
   • Label calendar invites "Privileged & Confidential/Per Kovel."
   • Disable automatic recording or transcription functions (including AI note-taking tools).
   • If counsel cannot attend, circulate a brief agenda to counsel in advance and a summary afterward, both marked "Privileged."

6. **Data Security and Confidentiality**
   • Encrypt portable media, laptops, and any data transmitted electronically
   • Report to us any suspected breach, loss, or unauthorized access to privileged information immediately so that we can take appropriate steps to preserve our client's privilege claims.

7. **No Waiver Triggers**
   • Do not discuss privileged analyses with the client's auditors, tax return preparers, investors, or any other third parties.

• Do not reference counsel's conclusions in business e-mails, board decks, or financial-statement workpapers.
• If asked for information by anyone other than counsel, politely decline and refer the request to counsel.

8. **Time Entries and Billing**
   • Submit invoices to counsel; subject to the client's instruction please omit substantive detail. Please do not include discussions of tax positions or legal theories, issues in billing documents or time records.

9. **Termination and Return of Materials**
   • Upon completion or termination of the engagement, return or securely destroy all privileged material as instructed by counsel.
   • Retain no copies unless required by law and, even then, store them in a manner consistent with these protocols.

By adhering to these protocols, you help preserve the client's attorney-client privilege and work-product protection critical to our mutual client's defense.