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LEGAL MEMORANDUM

TO: **CPAs, Clients & Associates**

FROM: **David L. Silverman, Esq.**
Shirlee Aminoff, Esq.

DATE: **April 2, 2010**

RE: **Attorney-Client Privilege**

The attorney-client privilege protects the confidentiality of communications arising from the attorney-client relationship. Although there is no traditional “accountant-client” privilege, certain communications made by the client to an accountant hired by an attorney to assist in providing legal services may be privileged. U.S. v. Kovel, 296 F.2d 918 (1961). The work product doctrine, enunciated by the Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1974), protects from disclosure materials prepared in anticipation of litigation. The Hickman doctrine was codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. Although Hickman involved a civil matter, the doctrine has found application in criminal litigation, grand jury investigations, and IRS summonses.

The Supreme Court, in U.S. v. Arthur Young and Co., 465 U.S. 805 (1984) declined to extend the work product doctrine to accountants, holding that the doctrine does not protect an

Any advice herein is not intended or written by our firm to be used, and cannot be used by any taxpayer, for the purpose of avoiding any penalties that may be imposed under the Internal Revenue Code. Advice from our firm relating to Federal tax matters may not be used in promoting, marketing or recommending any entity, investment plan or arrangement to any taxpayer.

accountant's work papers from discovery by the IRS during an audit of the client's tax return. Nevertheless, the Second Circuit, in U.S. v. Kovel, *supra*, held that the privilege protected communications made to an accountant hired by counsel to assist in legal representation. U.S. v. Adlman, 134 F.3d 1194 (1998) extended the work product doctrine to protect an analysis prepared by an accountant and furnished to an attorney, notwithstanding the fact that (i) events contemplated in the memorandum had not yet occurred; (ii) the anticipated litigation was fairly distant on the horizon; and (iii) the legal analysis in the memorandum served other business purposes as well.

IRC § 7525, enacted in 1998, extends the attorney-client privilege to communications between a taxpayer and any "federally authorized tax practitioner" with respect to "tax advice" to the extent the communication would be privileged if it were between a taxpayer and an attorney. The privilege may be asserted in (i) any noncriminal tax matter before the IRS and (ii) any noncriminal tax proceeding in federal court. The privilege will not apply to written communications between a federally authorized tax practitioner and an officer or shareholder of a "tax shelter." The statute also does not contain a work product privilege.

The attorney-client privilege only protects "legal advice." Yet non-attorney tax practitioners may not render legal advice. The statute appears to surmount this problem by phrasing the privilege in terms of "tax advice." However, the practitioner privilege will not protect information disclosed to an authorized practitioner acting "beyond his capacity." Accordingly, the privilege may have only limited application. Since courts have been reluctant to extend these privileges, and since the scope of the tax practitioner privilege is uncertain, counsel and tax practitioners may wish to consider implementing the following precautions:

¶ The scope of the attorney-client and work product privilege may differ with respect to different tasks. Accordingly, separate billing and files should be maintained for legal services relating to IRS audits, appeals and litigation. To avoid an unintended waiver of the privilege, all privileged documents should bear the legend "ATTORNEY WORK PRODUCT — PRIVILEGED

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AND CONFIDENTIAL”.

¶ Documents prepared by accountants and consultants should state that the document was prepared in order to assist in a particular legal matter, and should contain the name of the attorney supervising or requesting the work. A cover letter might also reference the letter of engagement pursuant to which the document was prepared.

¶ Letters by clients to attorneys and accountants engaged to assist in legal matters should contain the phrase “we request your legal advice.” Responses prepared by attorneys or accountants should reference the client’s request, e.g., “In response to your request for legal advice.”

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