

Be Careful What You Say: Accounting Privilege Is Weak

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You've scheduled a meeting with your trusted accountant to discuss a difficult transaction, assist with due diligence, structure a business deal, or simply to seek the accountant's sage advice while negotiating the best deal.

Will your conversation be privileged, as it likely would be if you were consulting your attorney? The simple answer is "no," not even close, unless a very narrow exception applies.

Oregon common law does not recognize a privilege protecting the confidentiality of communications arising from the accountant-client relationship.

Federal law, in contrast, creates an extremely limited privilege for tax advice by accountants and other professionals authorized to practice before the Internal Revenue Service. It's called the Federally Authorized Tax Practice Privilege. A common misconception is that the tax practitioner privilege is as broad as the attorney-client privilege. It is not.

The tax practitioner privilege applies only to "tax advice," as defined by federal law, and may be asserted only in noncriminal tax matters before the Internal Revenue Service or in federal court tax cases by or against the United States. In other words, the tax practitioner privilege does not apply to many, if not most, of the common situations where clients consult their accountants. For example:

- **Criminal proceedings.** Unlike the attorney-client privilege, the tax practitioner privilege does not apply in the context of criminal proceedings of any kind, whether they are situated in federal or state court. Hence, communications with your accountant can be used against your interests in any criminal proceeding.
- **Civil proceedings.** Unlike the attorney-client privilege, the tax practitioner privilege does not apply in all civil contexts; rather, it is limited to only those civil matters pending before the IRS or in federal court cases with the United States. Hence, your accountant can be compelled to

produce documents and to testify against you in the typical business dispute that ends up in state or federal court, or any other civil or administrative proceeding that is not tax related.

- Business advice. The tax practitioner privilege does not apply to business consultations, transaction negotiations, due diligence investigations, personal financial planning, and other advice not related. By statute, the privilege is strictly limited to tax advice only, and, as noted above, only that tax advice that ends up in a civil proceeding with the IRS or the United States.
- State and local tax advice. The tax practitioner statute is expressly limited to federal tax advice. It does not extend to state or local tax issues.
- Tax shelters. By statute, the tax practitioner privilege does not extend to any "written communications" concerning any tax shelter.

In short, the tax practitioner privilege is subject to a myriad of broad exceptions which, but for one narrow application, tend to swallow the rule itself.

There is hope, nevertheless, to protect the confidentiality of communications with your accountant. That hope is the attorney-client privilege.

Oregon law recognizes the extension of the attorney-client privilege to accountants when the accountant acts at the direction or under the control of an attorney to provide information or advice that is necessary for, or incident to, the rendition of legal services.

The attorney-client privilege is governed by Oregon Revised Statutes 40.255, codified at Rule 503 of the Oregon Evidence Code.

The rule provides that "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."

The purpose of the privilege is to encourage full and frank communication between attorneys and their clients. The public policy is that sound legal advice or advocacy depends upon the lawyer being fully informed by the client. Oregon courts have maintained that privilege protects not just the legal advice given, but information provided to the lawyer to enable him or her to offer sound and informed advice. Oregon courts have also maintained that factual investigations and consultations with accountants -- when directed by a lawyer or designed to assist the lawyer -- fall squarely within the protections of the attorney-client privilege.

Nearly all of the circumstances identified earlier in this column could be protected by the attorney-client privilege if the communications were appropriately structured through your

attorney, rather than consulting solely and initially with an accountant. The key element is hiring an attorney who, in turn, uses the services of an accountant to assist in giving legal advice. Thus, if you have any concerns about the confidentiality of information shared with or advice received from your accountant, and the legal ramifications arising from the absence of any privilege, consider first consulting your attorney to discuss how best to protect that information from further disclosure.

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