

LIMITATIONS OF PRIVILEGE IN Valuation-Driven Planning

BY **NATHAN G. PATTERSON & HALEY FAUST LEISE**, KOLEY JESSEN

VALUATIONS PLAY A CRITICAL ROLE IN BUSINESS, TAX, and wealth transfer planning, and are often the culmination of work from several of the client's professional advisors. With the results of a professional valuation being subject to outside scrutiny, practitioners should understand the limits of attorney-client privilege and work-product protection in this context and structure engagements to preserve confidentiality where it genuinely advances legal advice. For CPAs partnering with counsel, the practical question is when valuation work is truly in service of legal advice and when it constitutes ordinary-course business analysis.

WHAT'S PROTECTED

Attorney-client privilege protects confidential communications when given to provide legal advice and, under certain circumstances, can extend to non-attorneys whose involvement is necessary to deliver that advice. This principle arose in the Second Circuit's decision in *United States v. Kovel*, which compared certain non-attorney roles (i.e., an accountant) to interpreters assisting attorneys in understanding client communications so they can provide legal advice. In light of *Kovel*, attorneys began engaging other professionals on their client's behalf through "Kovel letters," which establish the professional's role in the engagement in an attempt to extend attorney-client privilege to the communications between the attorney and the other professional. The protection provided under *Kovel* examines the substance of the engagement: the non-attorney must be engaged to facilitate legal advice, not to provide independent business advice or routine accounting services. For CPAs and other professionals engaged by attorneys on behalf of a client, this means routing valuation-related factual development through counsel only when it is genuinely necessary to enable legal advice, rather than for ordinary business purposes.

The work-product doctrine can be broader in scope, shielding materials prepared by or for counsel in reasonable anticipation of litigation. In valuation services contexts, however, this threshold is often difficult to meet. Some adversarial administrative proceedings may qualify, but ordinary IRS examinations are frequently viewed as non-litigation planning settings, making the showing highly fact specific. As a result, many planning stage valuations, particularly those created to support transactions or tax filings, may fall outside classic work-product protection.

WHAT ISN'T

Kovel does not provide a blanket privilege to client consultants. Courts often view valuation work as business, not legal, so privilege extends only when the professional's role is truly necessary for legal advice—not merely performing independent valuation services. Simply calling an appraiser a "Kovel consultant" is not sufficient on its own to take advantage of this protection.

This is especially relevant in estate, tax, and wealth-transfer planning. Valuations prepared to support gift or estate tax positions are often completed well before any controversy exists. Even though practitioners may reasonably expect scrutiny, courts frequently characterize such valuations as part of the ordinary course of planning, not as litigation-driven work product.

Additionally, once a matter goes to court and the appraiser or other professional has been designated a "testifying expert," communications and materials shared with that expert are generally discoverable to the extent considered in forming opinions. By contrast, consulting-only experts (never designated to testify)

typically maintain greater protection, though the line can blur if their work informs a later testifying expert.

HOW TO AVOID A WAIVER

It is also important that client advisors do not inadvertently waive privilege and work-product protections. In *United States v. Sanmina Corp.*, the court confronted waiver risks when legal analyses migrated into valuation materials provided to the IRS. Sanmina claimed a substantial worthless stock deduction and submitted a law-firm valuation report that referenced internal legal memoranda. When the IRS sought those memoranda, Sanmina asserted privilege and work-product protection. The court held that submitting the valuation waived protection for any factual information referenced in it, including the legal memoranda, but preserved protection for opinion work-product reflecting attorneys' mental impressions, conclusions, or legal theories.

Accordingly, attorney and other professions should proceed carefully when valuations are filed with returns or otherwise submitted to tax authorities. Build reports on independently supportable, non-privileged factual and financial assumptions. Avoid embedding

or summarizing privileged legal analysis in the body of the report, appendices, or footnotes. If the engagement relies on legal conclusions (for example, entity characterization or rights analysis), consider providing for those conclusions in a separate privileged memorandum that is not cited or attached to any valuation furnished to the IRS.

PRACTICAL TAKEAWAYS

Engagement letters should match the context and scope of the work sought and how that work is assisting counsel to provide legal advice. If counsel needs a CPA or appraiser to interpret complex financial data to render legal advice, document that necessity in the engagement letter and channel substantive communications through counsel with individuals necessary to such communications. Make clear that the professional's work product is for counsel's use in advising the client only, not for independent business reporting, and avoid dual-purpose scopes in which one purpose is arguably business advice oriented rather than legal. Where possible, keep valuation deliverables that may be shared with the IRS fact-focused, and segregate privileged analyses in separate attorney work product. For expert roles, decide early whether a consulting-only engagement better preserves confidentiality given the matter's potential outcomes.

CONCLUSION

Valuations are essential to many business and wealth-transfer planning strategies, but their importance also makes them prime targets for scrutiny by tax authorities and opposing parties. Despite their frequent involvement in legal strategies, valuations are not automatically protected by attorney-client privilege or the

work-product doctrine. Effective risk management, therefore, requires attorneys, tax professionals, and advisors to understand the limits of attorney-client privilege and the work-product doctrine, and take the necessary precautions to ensure that valuable client information is not inadvertently disclosed. With thoughtful planning, cross-disciplinary teams can preserve confidentiality where it truly advances legal advice—without compromising the integrity and usefulness of the valuation itself. ◀



Nathan G. Patterson and Haley Faust Leise are attorneys at Koley Jessen, focusing their practices on business succession planning, estate planning and administration, and implementing advanced tax-planning techniques for

business owners. Patterson and Faust Leise counsel business owners, families, and individuals, providing a range of services from preparation of basic estate plan documents to the development and implementation of sophisticated wealth transfer techniques and business succession strategies to achieve the client's personal, financial, and business-based objectives. If you would like to discuss a client matter with Patterson and Faust Leise, you can reach them at (402) 390-9500 or nathan.patterson@koleyjessen.com and haley.leise@koleyjessen.com.

We are delighted to announce that **Heidi Kelly** has been selected as a Partner at **Boone & Associates**.

Since joining our firm in 2021, Heidi has consistently demonstrated exceptional technical expertise, a deep commitment to client service, and strong leadership within our team. Her dedication to excellence and ability to foster trusted relationships have been instrumental in our continued growth and success.

As a Partner, Heidi will take on an expanded leadership role, guiding strategic initiatives, mentoring our professionals, and continuing to deliver outstanding value to our clients.

Please join us in congratulating Heidi on this well-deserved achievement. We look forward to the exciting contributions she will bring to this new chapter of her career.

