

# IRS Reportedly Threatens to Challenge the Use of Kovel Accountants in Criminal Tax Cases

In defending tax prosecutions, defense counsel routinely engage forensic accountants to analyze tax returns, books and records and financial statements, and to assist in cross-examining the government's summary and/or expert witnesses at trial. Such accountants are commonly referred to as "Kovel accountants," referring to the case that established the precedent that an accountant working adjunct to a lawyer's representation can operate under the umbrella of attorney-client privilege and/or work product protection. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). This constitutes an exception to the general rule that there is no accountant-client privilege. An adversary's attempt to compel testimony from a Kovel accountant should proceed similar to any challenge to a claim of attorney-client privilege. Comisky, Feld and Harris, *Tax Fraud and Evasion — Offenses, Trials, Civil Penalties* ¶ 10.06[3] (Warren, Gorham & Lamont, 6th ed. 2007).

A statement reportedly made at a recent ABA Tax Section meeting — if true — suggests that the Internal Revenue Service may no longer respect this application of the attorney-client privilege and work product doctrine. [A May 21, 2010 entry on the Tax Problem Attorney Blog](#) reports that the IRS's Deputy Division Counsel for Criminal Tax stated that the IRS may extend its normal practice of questioning tax preparers to obtaining grand jury subpoenas for Kovel accountants. The blog also quotes the official as stating, "Whether or not that accountant comes to testify can be very serious for the accountant. The grand jury may decide he is part of the problem."

If true, this may be indicative of a pattern of the IRS abandoning longstanding policies of restraint in its approach to criminal cases, and its use of such cases to try to close the tax gap. For instance, the government has also undertaken its well known efforts at forcing European governments to relax bank secrecy rules. Similarly, with the 2005 revision of Policy Statement P-4-84 (and its redesignation as Policy Statement 4-26), the IRS relaxed its own rules to permit sharing information in parallel proceedings. The revised policy contains aggressive language asserting that civil and criminal coordination is the key to preventing and stopping tax abuse. I.R.M. 1.2.13.1.11 (October 5, 2005). [See Axelrod and Friedman, Parallel IRS \(and Other\) Civil and Criminal Proceedings Now Intersect \(2010 ABA National Institute on White Collar Crime\)](#).

Time will tell whether the IRS in fact adopts such an aggressive position in challenging established rules. In the meanwhile, while often having little choice about the use of Kovel accountants, practitioners may be well advised to inform their use with the potential for disclosure.