

# THE ATTORNEY/CLIENT PRIVILEGE: A NECESSARY COMPONENT OF YOUR EXPORT OR IMPORT COMPLIANCE PROGRAM

By Braumiller & Rodriguez, LLC, Attorneys (October 1997)

## HOW DO YOU CHOOSE A CONSULTANT TO HELP YOUR COMPANY WITH ITS COMPLIANCE PROGRAM?

During your company's internal review, your company will produce documents, reports and reviews, including documents that may indicate regulatory violations. You will receive advice on how to handle these possible violations. Unless privileged, you may have to produce the documents and reveal the advice upon a request from the U.S. Government.

## THE ATTORNEY-CLIENT PRIVILEGE AND THE ATTORNEY WORK PRODUCT PRIVILEGE.

Probably the most important and powerful protections available to your company are provided by the attorney-client and attorney work product privileges. These privileges are available only if your corporation enlists the advice and guidance of lawyers.

Not only are these privileges unique to the attorney-client relationship, but only an attorney can provide adequate and thorough legal advice and interpretation of the evolving rules, regulations, and case law. You may well discover problems during your compliance audit that require the immediate attention of an attorney, including problems of marking, classification, valuation, duty deferral, etc. Even if not hired initially, your company may be forced to hire qualified outside counsel to deal with these problems.

## AN ATTORNEY WHO WORKS FOR AN ACCOUNTING OR CONSULTING FIRM CANNOT PROVIDE THE NEEDED PRIVILEGES.

Some consultants may claim to provide customs compliance training, auditing, and advice that appears similar to that of a law firm. However, they cannot provide the protections of the attorney-client and work product privileges.

First, there is no accountant-client privilege in Texas or in the federal courts. *Couch v. U.S.*, 465 U.S. 322, 355 (1972); *U.S. v. White*, 326 F.Supp. 459, 462 (SD Tex, 1971). Accountants cannot provide legal advice that is protected by the attorney-client privilege.

An accountant may apply legal knowledge and answer legal questions in connection with the practice of his ordinary work in the keeping of books and records and the preparation of tax returns and advising with respect to such matters, but where he undertakes to give legal advice and answer legal questions completely disconnected with such ordinary work in keeping and auditing books and preparing tax returns, he is guilty of practicing law without a license. When faced with interpretation or application of tax statutes, administrative regulations and rulings, court decisions, or general law, it is an accountant's duty to leave such questions to a lawyer. The fact that tax law is a specialized area of competence does not authorize accountants to engage in the business of giving legal advice based on their knowledge of the subject.

American Jurisprudence, 2d, v. 1, p. 534:

Second, not even an attorney who works for an accounting or consulting firm can provide these privileges. A basic element of the attorney-client privilege is that the attorney be in the appropriate role during communication with the client. Attorneys in such diverse occupations as professor or baseball manager do not occupy the role of attorney for privilege purposes as they discuss classroom assignment

or the hit-and-run play. Communications must be made in the role of an attorney in order to qualify for the attorney-client privilege.

Attorney-Corporate Client Privilege, John William Gergacx (Garland Law Publishing, 2d ed., 1990), § 1.10 (citations omitted). An attorney may not join an accounting or consulting firm to provide legal advice. See Lawyers' Manual on Professional Conduct (ABA/BNA 1996), p 91:401, citing to Model Rules 5.4(b) and 5.4(d), and DR 3-103(ad) and 5-107(c). Only communications between an attorney who is practicing as an attorney and a client are protected by the attorney-client privilege.

Sometimes an accountant may be helpful. The attorney-client privilege may still be maintained if the accountant is hired and supervised by outside legal counsel:

Where the accountant is retained by the client independent of any request to do so by an attorney, it is much more difficult to show that the accountant's services were in furtherance of the rendition of legal advice . . . Similarly, where the accountant is retained before the need for legal services is apparent, the privilege will presumably not apply to the initial client-accountant communications even though an attorney is later retained. As a practical matter, there may be a greater assurance that the privilege will be recognized if the lawyer, rather than the client, formally retains the accountant.

Testimonial Privileges, Scott N. Stone and Robert K. Taylor, (Shepards/McGraw-Hill, 2nd ed., 1993), § 1.13 (citations omitted).

#### **GET IT IN WRITING.**

If anyone claims that their communications are privileged or that they can provide you with legal advice, ask them to put their claims down in writing. They will not do so and will refuse to officially identify themselves as your legal counsel.

The burden to establish that the attorney was acting as a lawyer and not as a business advisor rests with the party asserting the privilege. Thus, persons who are parties to the communication need to be identified as lawyers and their legal role established. Otherwise, the court could infer that the unidentified parties were business advisors, or that they were attorneys acting in a nonlegal capacity.

#### **SHOULD YOUR COMPANY RELY SOLELY ON IN-HOUSE COUNSEL DURING AN INTERNAL AUDIT REVIEW?**

The ultimate goal of any compliance program is to develop in-house customs expertise. Corporations should develop policies that will enable them to automatically comply with export and import regulations and laws. However, it is wise to hire outside legal counsel during the development of a customs compliance program. The attorney-client privilege is much more difficult to maintain for in-house counsel.

In determining whether the privilege should apply in particular instances, courts have subjected communications with house counsel to closer scrutiny than is applied in the case of communications with outside counsel. The two principal reasons are that (1) communications with house counsel are more likely to relate to business, rather than professional legal matters, and (2) the sheer proximity of house counsel to the corporate-decision making process makes it more likely that counsel will become a repository for documents and information which the corporation does not want to disclose. Both of these justifications for stricter scrutiny are likely to be invoked with particular vigor in the case of house counsel who is at the same time a corporate officer or director. In fact, where counsel functions primarily in a business role, some courts have held that even his or her communications concerning legal matters will not be privileged.

VITALS from the author: BRAUMILLER & RODRIGUEZ, LLC, Attorneys  
1401 Elm Street, Suite 1818, Dallas, Texas 75202  
Phone: (214) 651-0034, Toll Free: (800) 256-2013  
Fax: (214) 651-0039  
E-mail: trade@exportimportlaw.com