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Be Mindful of Joint Representation

Take steps to protect attorney-client privilege.

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Caution is in order when multiple clients are considering hiring the same law firm to represent them in a matter. If the clients' interests are aligned, a dual or joint representation might be possible. The clear incentive for the clients is cost savings. But, the mere fact that this case occurred suggests caution in trying to economize on legal costs in this manner.

IRS Audit

In *Micro Cap KY Insurance Company, Inc.*, DC Ky. April 5, 2017, two physicians sought advice from an attorney who assisted them in forming C corporations that elected tax treatment as Internal Revenue Code Section 831(b) captive insurance companies. In 2014, the Internal Revenue Service began auditing the captives, as well as the physician's practices. As part of its audit, the IRS issued a summons directing the physicians to produce several categories of documents for examination. The physicians produced all of the documents requested in the summons, except for a series of email communications exchanged between the physicians and their attorneys, which they stated were protected by the attorney-client privilege.

Emails Protected

The court held that certain emails were protected from disclosure to the IRS because of the attorney-client privilege. The IRS claimed that the privilege was waived as a result of the two taxpayers sharing documents. The court held that taxpayers hadn't not waived the privilege, as they had jointly retained counsel. It found that the two taxpayers had a clear commonality of interests. Practitioners should be mindful that the terms of the engagement letter or retainer agreement might prove quite important in protecting the privilege.

The court reasoned that the physicians had properly invoked the attorney-client privilege, because each email predominately involved legal advice within the retention of counsel.

Exactly how much legal advice an email must contain to become privileged is left maddeningly unclear. With emails being so frequently sent without careful thought or consideration, or with laypersons sending emails without understanding potentially negative legal implications of what to them seemed an innocuous email, attorneys should exercise caution.

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