

Ninth Circuit Rejects Attorney-Client Privilege and Work Product Protection for Tax Appraisal File

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[U.S. v. Richey, No. 09-35462 \(9th Cir. Jan. 21, 2011\)](#)

Brief Summary

The U.S. Court of Appeals for the Ninth Circuit held that a tax appraiser's work file, prepared to value an income tax deduction, was neither privileged nor protected by the work product doctrine. The valuation ultimately derived in the report and supported by the work file was necessary whether there was litigation or not. Furthermore, a tax appraiser hired by a lawyer is not providing legal advice to the taxpayer in that context.

Complete Summary

A married couple claimed a charitable contribution deduction on their federal income taxes after their lawyer hired a certified tax appraiser to provide valuation services and tax advice as to the value of the deduction of a conservation easement. The couple attached the appraisal to their tax return, as required by law. The report itself had a disclaimer noting that the report did not include all of the data used in the valuation and that such “[s]upporting documentation concerning the data, reasoning, and analysis [was] retained in the appraiser’s file.”

After the Internal Revenue Service opened an investigation, the agency issued a summons to the appraiser to obtain his testimony, documents, records and information regarding his valuation. The district court quashed the summons, and an appeal ensued.

The Ninth Circuit reversed. Holding that the work file was not privileged, the court concluded that the appraiser was not acting to provide legal advice to the couple, but rather to value the easement. The court also noted that the work file did not contain communications between the couple’s lawyer and the appraiser. Analyzing the file

under work product doctrine, the court rejected a “dual purpose” designation, finding that the file was not prepared in anticipation of litigation. Instead, the report had been prepared to attach to the couple’s tax return, which would have been required whether there was potential litigation or not. There also was no evidence that the appraiser would have performed his duties differently in the absence of prospective litigation.

Significance of Opinion

This decision underscores the importance of not assuming that files underlying reports prepared by an attorney’s agent on behalf of a client will be protected from disclosure, particularly when the law requires that the report itself must be disclosed.

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