Demystifying Accountant-Client Privileges in State Tax Litigation

by Pilar Mata and Melissa J. Smith

Introduction

It is a common scenario — a client reaches out to an accounting firm and discussions ensue regarding a restructuring, a transaction, or a variety of other questions about a client’s tax return. Communications, many via e-mail, between the client and the accounting firm track the advantages and disadvantages to the tax return position and the legal authority supporting it. Eventually State A audits the client and litigation ensues. State A serves discovery requests on the client or its accounting adviser requesting all documents regarding the disputed tax position. It is often not until this point that someone stops to ask whether the communications exchanged between the client and its accounting firm adviser are protected by an evidentiary privilege or whether they must be disclosed to State A. Moreover, if those documents must be disclosed to State A, what are the ramifications if State B later makes a similar request, even if those communications would have been protected from disclosure under State B’s law?

Although Congress created a federal tax practitioner privilege that protects accountants’ confidential tax advice when litigating against the Internal Revenue Service, the federal tax practitioner privilege will not protect communications between accountants and their clients when matters are litigated in state courts. It is thus critical for taxpayers to determine the existence and scope of state privileges that can be used to protect state-tax-related communications between taxpayers and their accountants.

This Pinch of SALT reviews states’ adoption of accountant-client privileges and discusses other avenues of protection that may be available to taxpayers litigating in states that have not adopted an accountant-client privilege.1 Understanding states’ various approaches to accountant-client privileges earlier rather than later can often make the difference in protecting communications between a client and an accountant from disclosure in litigation.

Background — The Federal Tax Practitioner Privilege

In contrast to the attorney-client privilege, courts historically have not recognized a common-law accountant-client privilege.2 Congress rectified this difference for non-lawyer practitioners in 1998 by passing a statute that “allows taxpayers to consult with other qualified tax advisors in the same manner they currently may consult with tax advisors that are licensed to practice law.”3 The federal tax

3Joint Committee Print, 105th Congress, 2nd Sess; JCS 6-98.
practitioner privilege is modeled after the attorney-client privilege and provides:

With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.4

A tax practitioner is “any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under section 330 of title 31, United States Code,” which includes accountants, enrolled agents, and enrolled actuaries.5

Because the federal tax practitioner privilege hinges on the attorney-client privilege, the federal tax practitioner privilege is subject to the same scope and limitations. The attorney-client privilege protects confidential communications between a client and its attorney made for the purpose of providing the client with legal advice. The federal tax practitioner privilege is similarly limited to tax advice and does not protect “information disclosed to an attorney for the purpose of preparing a tax return.”6

The attorney-client privilege generally is waived if the communications are disclosed to third persons or to employees without the need to know that information. Similarly, the federal tax practitioner privilege will be waived if the tax advice is shared with third parties or employees without a need for that information.7

State Accountant-Client Privileges

The federal tax practitioner privilege reaches only communications pertaining to matters before the IRS. Whether communications between an accountant and client are protected in state court proceedings involves a state-by-state analysis.

For purposes of this article, we have classified states’ approaches to the accountant-client privilege in one of three ways. These classifications reflect the likelihood that a state’s courts would recognize an accountant-client privilege. The first category includes states that have adopted a classic evidentiary privilege that protects accountant-client communications by statute. In these states, the protection that will be provided is comparable to the attorney-client privilege and will be respected regardless of whether the discovery request is served on the client or the accountant.

The second category includes states that have adopted statutes requiring accountants to keep client information confidential. The nature of these confidentiality statutes varies widely. Some states have strong confidentiality statutes that prohibit accountants from testifying or disclosing documents in court proceedings unless the client has consented to the release of that information. Although these statutes arguably should be construed as providing a classic evidentiary privilege, they do not specifically state that the client is entitled to claim the privilege and thus withhold documents if the discovery request is served on the client. At the other end of the spectrum, some states confidentiality statutes simply preclude the accountant from disclosing confidential client information to third parties as part of their professional obligations and responsibilities. In those states, it will be more difficult to argue that there is an accountant-client privilege that would protect tax advice communications from discovery, particularly if the request is served on the client.

The third category includes states where no legislative action has been taken to protect accountant-client communications. In those states, taxpayers will have to resort to other general evidentiary protections, such as the work product doctrine and derivative privileges created by Kovel arrangements (see below).

Although we have grouped state privileges into these three categories, it is important to note that each state’s privilege contains its own particularities. Indeed, some states protect tax advice, whereas other states protect communications regarding accounting services or accounting advice. Moreover, protection may be lost in all states, even those that have a strong evidentiary privilege, after a taxpayer voluntarily discloses or is forced to disclose a document in discovery proceedings taking place in another state.

States With a Statutory, Evidentiary Privilege

Seven states have a statutory evidentiary privilege that would protect communications between a taxpayer and an accountant: California, Florida, Georgia, Idaho, Louisiana, Nevada, and Oklahoma.8

6 Joint Committee Print, 105th Congress, 2nd Sess; JCS 6-98.
7 There are additional limitations on the federal tax practitioner privilege. For example, it can be asserted only in noncriminal matters before the IRS or in federal court in an action brought by or against the United States. 26 U.S.C. section 7525(a)(2). Moreover, it does not apply to communications pertaining to tax shelters. 26 U.S.C. section 7525(b).
Those evidentiary privileges are often found in a state’s evidence code, which may provide details on who can claim the privilege, and what, if any, exceptions apply.

For example, Florida’s accountant-client privilege provides:

A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications with an accountant when such other person learned of the communications because they were made in the rendition of accounting services to the client. This privilege includes other confidential information obtained by the accountant from the client for the purpose of rendering accounting advice.9

The Florida accountant-client privilege can be claimed by:

- the client;
- a guardian or conservator of the client;
- the personal representative of a deceased client;
- a successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, regardless of whether it still exists; or
- the accountant, but only on behalf of the client.

The accountant’s authority to claim the privilege is presumed in the absence of contrary evidence.10

Thus, Florida’s privilege expressly protects discovery requests addressed to the client as well as the accountant.

California’s evidentiary privilege is similarly broad. It mirrors the protections provided by the state’s attorney-client privilege and references the federal tax practitioner privilege. California’s privilege provides that “with respect to tax advice, the protections of confidentiality that apply to a communication between a client and an attorney . . . also shall apply to a communication between a taxpayer and a federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a client and an attorney.”11 Tax advice is defined as “advice given by an individual with respect to a state tax matter, which may include federal tax advice if it relates to the state tax matter.”12

**States With Confidentiality Statutes**

Other states have enacted statutes providing that documents prepared by accountants for their clients are confidential communications.13 These statutes generally are found in the business and occupation section of a state’s code. Among states with this type of confidentiality language, there is significant diversity in the statutory language used and whether a strong or weak argument exists that the language establishes an evidentiary privilege. Sometimes these statutes do not explicitly state that those communications may be protected from discovery, and only state that accountants must keep those communications confidential. For example, Maine’s law provides:

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10Fla. Stat. Ann. section 90.5055(3). Similar to the crime-fraud exception from the federal tax practitioner privilege, Florida’s accountant-client privilege does not extend to when “the services of the accountant were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or should have known was a crime or fraud.” Fla. Stat. Ann. section 90.5055(4)(a). It also does not extend to issues relating to a “breach of duty by the accountant to the accountant’s client or by the client to his or her accountant.” Fla. Stat. Ann. section 90.5055(4)(b). Lastly, it does not cover communications that are “a matter of common interest between two or more clients, if the communication was made by any of them to an accountant retained or consulted in common when offered in a civil action between the clients.” Fla. Stat. Ann. section 90.5055(4)(c).


Except by permission of the client engaging a licensee under this chapter, or the heirs, successors or personal representatives of that client, a licensee or any partner, officer, shareholder or employee of a licensee may not voluntarily disclose information communicated to the licensee, or any partner, officer, shareholder or employee of the licensee, by the client relating to, and in connection with, services rendered to the client by the licensee in the practice of public accountancy. That information must be considered confidential.14

Although that language broadly describes the accountant’s obligation to keep client information confidential, it arguably falls short of creating an evidentiary privilege, particularly if the discovery request is directed to the client. Further, the language “may not voluntarily disclose” does not address how an accountant must respond if compelled or required to disclose that information to a court.

Some states have general confidentiality language in their statutes, but also state that the information is “privileged.” For example, Michigan’s confidentiality statute provides: “Except as otherwise provided in this section, the information derived from or as the result of professional service rendered by a certified public accountant is confidential and privileged.”15 It is unclear what the Legislature intended by using the term “privileged” in reference to the information; however, the use of the term undoubtedly strengthens the taxpayer’s argument that an accountant-client privilege exists.

That said, statutory language governs whether a court would likely interpret it as creating an evidentiary privilege shielding the taxpayer’s communications with an accountant from disclosure. For instance, Texas Occupations Code section 901.457, titled “Accountant-Client Privilege,” provides in subsection (a):

A license holder or a partner, member, officer, shareholder, or employee of a license holder may not voluntarily disclose information communicated to the license holder or a partner, member, shareholder, or employee of the license holder by a client in connection with services provided to the client by the license holder or a partner, member, shareholder, or employee of the license holder, except with the permission of the client or the client’s representative.

Despite its title, this “privilege” came under fire in 2007 and a Texas court of appeal found that it in fact did not create an evidentiary privilege. The court stated, in a footnote:

Like Texas, several states have established a statutory accountant-client privilege protecting confidential communications between accountant and client. However, “[s]tatutory provisions providing for duties of confidentiality do not automatically imply the creation of evidentiary privileges binding on courts.” Other than citing section 901.457 of the occupations code, neither party has provided authority for the proposition that an accountant-client evidentiary privilege exists in Texas, and we find none.16

Thus, courts may not recognize an evidentiary privilege in states where the legislature has not made it clear that it intended to create that protection.

Other states have actually included language in their confidentiality statutes that permits or forbids disclosure in judicial proceedings. Many states provide that although the accountants’ workpapers or communications with their clients are confidential, the confidentiality requirement does not prevent disclosure of those documents in a judicial proceeding. For example, Kentucky’s statute prohibits the accountant from disclosing a client’s information generally: “A licensee shall not, without the consent of his client, disclose any confidential information pertaining to his client obtained in the course of performing professional services.”17 However, Kentucky’s statute goes on to state: “This section does not . . . affect in any way a licensee’s obligation to comply with a validly issued subpoena or summons enforceable by order of a court.”18 Although it is unclear what would constitute a “validly issued subpoena or summons enforceable by order of a court,” it is possible that Kentucky courts would not recognize an evidentiary privilege based on the general accountant confidentiality statute.19

However, Mississippi’s confidentiality provision provides that certified public accountants or any partners, officers, shareholders, or employees of a certified public accountant “shall not be required by

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14Me. Rev. Stat. Ann. tit. 32, section 12279 (emphasis added). Note that Maine’s law does contain some exceptions to the confidentiality of communications in select scenarios; however, there is no exception for general court proceedings or when responding to a subpoena. Many states with confidentiality provisions allow for the disclosure of that information in ethical investigations by the professional organization or state agency charged with licensing public accountants. See, e.g., id.


16In re Baldev Patel, 218 S.W.3d 911 (Texas App. — Corpus Christi 2007) (internal citations omitted); see also Sims v. Kaneb Services, Inc., 1996 WL 62294 (Texas App — 14th Dist. June 16, 1988) (providing that there is no accountant-client privilege in Texas).


19To the authors’ knowledge, Kentucky courts have not recognized an accountant-client privilege.
any court of this state to disclose, and shall not voluntarily disclose, information communicated to him by the client relating to and in connection with the services rendered to the client by the certified public accountant in his practice as a certified public accountant."20 Mississippi's law thus provides strong support for the position that an accountant is not required to turn over information in response to a discovery request served on the accountant. However, the provision does not address whether those communications would be protected if the discovery request was served on the client.

Courts may not recognize an evidentiary privilege in states where the legislature has not made it clear that it intended to create that protection.

Less common and least likely to create an evidentiary privilege are statutes that provide for the confidentiality of some communications with accountants within the context of who “owns” the accountant’s workpapers. For example, Alabama keeps workpapers of accountants confidential by providing that they can be transferred only under specific circumstances:

All statements, records, schedules, working papers, and memoranda made by a certified public accountant or public accountant incident to or in the course of professional service to clients by the accountant, except reports submitted by a certified public accountant or public accountant to a client, shall be and remain the property of the accountant, in the absence of an express written agreement between the accountant and the client to the contrary. No statement, record, schedule, working paper, or memorandum shall be sold, transferred, or bequeathed, without the consent of the client or the personal representative or assignee of the client, to anyone other than one or more surviving owners or new owners of the firm of the accountant.21

Although such consent language provides some protection over accountant records, its failure to address what a client or accountant must do if called on to turn over communications in litigation, as well as its failure to reference confidentiality requirements more generally, makes it less likely to provide protection against a discovery request directed to the client.

States Without Evidentiary Privileges or Confidentiality Statutes

Finally, although some states have enacted clear evidentiary privileges to protect taxpayers’ communications with their accountants, and others have enacted language that arguably creates a privilege, there are states that provide neither type of provision. There are also states whose courts, regardless of whether they have statutory confidentiality provisions, have refused to recognize an accountant-client privilege — including New York,22 North Carolina,23 Ohio,24 Texas, and Virginia.25 In those states, taxpayers will have to rely on the state’s work product doctrine to protect accountant-client communications or seek protection under Kovel arrangements.26

Work Product Doctrine

Although attorney-client and accountant-client privileges are designed to protect communications between clients and their attorneys or accountants, the work product doctrine is designed to protect the adversarial process. The availability and scope of work product protection will vary by state. However, in many states this protection will extend to materials prepared by, and to communications with, accountants.

State courts often look to cases involving the federal work product doctrine when determining how state work product statutes should be applied; therefore, recent litigation involving the federal work product doctrine is informative. The federal work product doctrine is codified in Rule 26(b) of the Federal Rules of Civil Procedure. Rule 26(b)(3) provides, in relevant part:

20Miss. Code Ann. section 73-33-16(2).
22New York, it should be noted, has no comparable accountant-client privilege." First Interstate Credit Alliance, Inc. v. Arthur Andersen & Co., 150 A.D.2d 291 (N.Y.A.D. 1 Dept. 1989).
25"While [the client] may have some degree of expectation of confidentiality resulting from the privilege as recognized in Maryland, [the accountant] should not be allowed to throw up unilaterally in a Virginia lawsuit a shield of a privilege not recognized in this state." Abujaber v. Kawar, 1990 WL 751092 (Va. Cir. Ct. 1990).
26Of course, those protections could also be used to bolster a claim of privilege in states with a statutory evidentiary privilege or confidentiality statute.
(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.

Unlike the attorney-client privilege, work product protection is waived only by disclosure to an adversary or a conduit to a potential adversary. However, the scope of work product protection varies by state and might not protect work product created by non-attorneys. For example, Illinois law provides: “Materials prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party’s attorney.” Further, the “identity, opinions, and work product of a consultant” retained in anticipation of litigation or in preparation for trial, but who will not be called to testify at trial, “are discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts opinions on the same subject by other means.”

Moreover, although federal circuit court decisions on this subject are not binding on state courts, it bears noting that the federal circuit courts remain split regarding what constitutes documentation “prepared in anticipation of litigation.” At least one circuit has applied a narrow “primary motivating factor” test, which considers the most important reason for generating the document and protects only those documents prepared primarily for litigation. In states adopting that test, planning- or compliance-related documents, such as tax accrual workpapers, are unlikely to be entitled to protection.

Other circuits have adopted a broader “because of” test that examines whether the document was created because of potential or anticipated litigation, and provides that protection is not to be waived simply because the document was created for purposes in addition to potential or anticipated litigation. Planning and compliance documents are more likely to be protected in those states if they were prepared because of the prospect of litigation.

However, in United States v. Textron, the First Circuit purported to apply the because of test, but interpreted it in a manner that excluded tax accrual workpapers from protection. The en banc panel reasoned that those documents were not “tax documents and not case preparation materials,” and that they were “prepared in the ordinary course of business” to “support an audit of the company’s financial statements,” rather than “for use in possible litigation.” As noted by the Textron dissent, in the court’s application of the because of test, “it actually asked whether the documents were “prepared for use in possible litigation,” which is a more exacting standard.

Thus, the scope of the protection afforded under state work product protection statutes will depend both on the scope of the statutory privilege and the manner in which the state courts construe its application. To summarize, in order for taxpayers to receive protection under the work product doctrine:

- (1) the state in which the taxpayer is litigating must have enacted a work product protection statute broad enough to encompass work product created by accountants, and not just attorneys;
- (2) the work product must be prepared in anticipation of litigation;

See, e.g., United States v. Deloitte LLP, 610 F. 3d 129, 137 (D.C. Cir. 2010); Sandra T.E. v. Berwyn Sch. Dist. 100, 600 F. 3d 612, 622 (7th Cir. 2010); In re Profile Direct Ins. Co., 578 F.3d 432, 439 (6th Cir. 2009); In re Grand Jury Subpoena, 357 F.3d 900, 907 (9th Cir. 2004); PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP, 305 F.3d 813, 817 (8th Cir. 2002); Maine v. United States Dep’t of Interior, 298 F.3d 60, 68 (1st Cir. 2002); Montgomery County v. Microsystems Corp., 175 F.3d 296, 305 (3rd Cir. 1999); United States v. Adlman, 134 F.3d 1194, 1195 (2nd Cir. 1998); Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992) (Emphasis in original.). See, e.g., Commissioner v. Comstock Corp., 901 N.E. 2d 1185 (Mass. 2009).

United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982) (tax accrual workpapers not subject to protection because the primary motivation for their creation was to “bring its [the taxpayer’s] financial books into conformity with generally accepted accounting principles.”).

Footnote continued in next column.
• (3) in states adopting a primary motivating purpose test, the work product must have been prepared primarily to assist in future litigation; and
• (4) the documentation must not have been disclosed to an adversary or conduit to an adversary.

Derivative Privilege/Kovel Arrangements

Another option for taxpayers seeking to protect confidential accountant-client communications is through a derivative privilege obtained through a Kovel arrangement. A Kovel arrangement, which is based on a Second Circuit decision, United States v. Kovel,34 describes an arrangement whereby an attorney engages an accountant or other consultant to aid the attorney in the provision of legal services. Although the attorney-client privilege generally is waived when attorney-client communications are disclosed to third persons, an exception is made for Kovel arrangements, and a derivative privilege is provided to protect the underlying communications and work prepared by the accountant or consultant working with the attorney.

Kovel protection can be obtained only if the attorney uses the accountant for services in which the attorney requires the accountant’s expertise (such as interpreting financial data), and thus the accountant’s role and responsibilities should be limited. For example, in Commissioner v. Comcast Corp., the Massachusetts Supreme Judicial Court held Kovel protection was warranted only if the third party’s “presence ‘is necessary’ for the ‘effective consultation’ between client and attorney.”35 The court described the “necessity element” as being “more than just useful or convenient,” such that “the involvement of the third party must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications.”36 The court thus rejected Kovel protection for a tax advice memorandum obtained by in-house counsel from an accounting firm (but found that protection was permitted under the work product doctrine), stating: “We agree with the majority of courts that the Kovel doctrine applies only when the accountant’s role is to clarify or facilitate communications between attorney and client.”37

Moreover, procedural precautions must be taken to ensure that the Kovel arrangement is respected. For example, the attorney should engage the accountant directly, before the services are performed, to make it clear that the accountant is rendering services to aid the attorney in the provision of legal services, rather than the accountant providing the client with separate, nonlegal services. Moreover, although the attorney is not required to be involved in every communication between the accountant and the client, the attorney should oversee all those communications, and work performed in accordance with the Kovel arrangement must be done at the direction of the attorney.38

Conclusion

The types and scope of protection provided for communications and work prepared by accountants varies widely by state. Moreover, the production of documents in one state can lead to a loss of privilege in other states because documents will lose their confidential status once produced during a discovery process. It is thus essential to evaluate the available protections, conditions, and limitations before engaging accountants in sensitive matters likely to lead to litigation. That analysis can make the difference between protecting confidential documents or being required to disclose them once in court.

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very little protection left for communications with accountants; communications from accountants that constitute “independent information and expertise for the attorney to use in representing his or her client” are not protected by attorney-client privilege).

Protection of Kovel arrangements can also be strengthened if the accountant performs no direct services for the client or if non-Kovel engagements are adequately segregated. Also, a written engagement letter should be used for the attorney to retain the accountant. The engagement letter should specify the purpose, scope, and terms of the representation; instruct regarding the confidential and privileged nature of the work being performed, and manner in which communications are to be made; and state that services are to be billed by the accountant to the attorney, rather than to the client. Also, work product produced under the Kovel arrangement should be marked as being subject to the attorney-client privilege or the work product protection doctrine.

(Footnote continued in next column.)
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