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Martin R. Bartel

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Pennsylvania's Accountant-Client Privilege: An Asset with Liabilities

Rev. Martin R. Bartel, OSB*

The purpose of the accountant-client privilege is to insure an atmosphere wherein the client will transmit all relevant information to his accountant without any fear of any future disclosure in subsequent litigation. Without an atmosphere of confidentiality the client might withhold facts he considers unfavorable to his situation thus rendering the accountant powerless to adequately perform the services he renders.¹

Accountants, their clients, and attorneys for both parties are no doubt generally aware of the accountant-client privilege and feel some assurance knowing that, when faced with a summons or subpoena, the privilege may be invoked to prevent disclosure of information which clients have revealed to their accountant. Perhaps, too, they derive a certain amount of professional pride knowing that the state holds the bond between accountant and client in such high esteem that, like the attorney-client, husband-wife, and priest-penitent relationships, protection of the accountant-client relationship outweighs the competing interest of presenting all relevant evidence at trial. Nevertheless, significant limitations on the accountant-client privilege exist in the Commonwealth of Pennsylvania, and accountants and attorneys should be cognizant of them so as not to be lured into a false sense of security.

This article will examine the Pennsylvania accountant-client privilege by discussing the legislative history of the statute and relevant cases construing the statute.² Furthermore, the coverage of

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2. 63 Pa Cons Stat Ann § 9.11a provides:
   Except by permission of the client or person or entity engaging him or the heirs,
the privilege, the conditions of its assertion, the type of information protected, waiver of the privilege and exceptions to its applicability will also be treated. Lastly, the article will touch on the availability of the Pennsylvania privilege in federal and tax cases and discuss circumstances where an accountant engaged by an attorney may be protected by the attorney-client privilege.

Pennsylvania's Accountant-Client Privilege

Pennsylvania, like approximately half of the other states, provides for a statutory accountant-client privilege, although, compared to the other states, the Pennsylvania statute has been characterized as one of the most restrictive in application. In general, the privilege prohibits the disclosure of any information told to the accountant while employed in a confidential relationship with a client. Unlike the attorney-client and the husband-wife privileges,

successors or personal representatives of such client or person or entity, a certified public accountant, public accountant, partnership or corporation, holding a license to practice under this act, or a person employed by a certified public accountant, public accountant, partnership, or a director of or a person employed by a professional corporation holding a license to practice under this act, or an associate of or a person employed by a professional association holding a license to practice under this act shall not be required to, and shall not voluntarily, disclose or divulge information of which he may have become possessed relative to and in connection with any professional services as a certified public accountant, public accountant, partnership or corporation. The information derived from or as the result of such professional services shall be deemed confidential and privileged: Provided, however, That nothing herein shall be taken or construed as prohibiting the disclosure of information required to be disclosed by the standards of the profession in reporting on the examination of financial statements, or in making disclosures in a court of law or in disciplinary investigations or proceedings when the professional services of the certified public accountant, public accountant, partnership or corporation are at issue in an action, investigation or proceeding in which the certified public accountant, public accountant, partnership or corporation are parties.


4. Note, Privileged Communications—Accountants and Accounting—A Critical Analysis of Accountant-Client Privilege Statutes, 66 Mich L Rev 1264, 1268 (1968) (this was written in 1968 before the more recent amendments to Pennsylvania’s accountant-client privilege statute, see notes 16-22 and accompanying text).

5. See generally Annotation, Privilege Against Disclosure of Matters Arising Out of Transactions or Relationship Between Accountant and Client, 38 ALR2d 670 (1954).

6. These were the only two privileges recognized at common law. Dean Wigmore, 8 Evidence §§ 2290, 2227 at 542, 211 (McNaughton rev ed 1961).

Dean Wigmore provides four conditions which are necessary to establish a privilege: (1) the communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory main-
the accountant-client privilege is not recognized at common law,\(^7\) nor is it recognized in the states, except where expressly provided by statute.\(^8\) Because the accountant-client privilege statute is in derogation of common law, and because it precludes judicial access to relevant evidence, a stance contrary to the public policy of full disclosure of all pertinent information during litigation, the privilege is strictly construed by the courts. In other words, any change in the common law effected by the statute must be clearly expressed by the explicit language of the statute and the privilege must not be given any broader scope than appears on its face.\(^9\)

**RELATIONSHIP TO THE ETHICAL DUTY OF CONFIDENTIALITY**

From the outset, it is necessary to note that the accountant-client privilege is separate and distinct from the ethical duty of an accountant to maintain confidentiality. In general, privileged communications are confidential, but not all confidential communications are privileged.

The obligation of confidentiality is grounded in Ethics Rule 301 of the American Institute of Certified Public Accountants (AICPA).\(^{10}\) This rule provides that a member in public practice

\(^{7}\) Wigmore, *Evidence* § 2285 at ______ (emphasis in original) (cited within this note).


\(^{10}\) AICPA, *AICPA Code of Professional Conduct*, Rule 301 (Confidential Client Information) (as amended May 20, 1991). The full text of the Rule reads:

A member in public practice shall not disclose any confidential information without the specific consent of the client.
shall not disclose any confidential client information without the specific consent of the client.\textsuperscript{11} However, this prohibition against disclosure can be overcome in the case of a validly issued and legally enforceable subpoena or summons as well as in the case of an investigation by a disciplinary body or in connection with a quality review.

The obligation of confidentiality also arises from state agencies which regulate professional conduct. For example, in Pennsylvania the State Board of Accountancy imposes a legal requirement of confidentiality upon certified public accountants (CPAs): "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 except to the extent provided by section 11.1 of the act (63 P.S. § 9.11a)."\textsuperscript{12}

Thus, despite the ethical duty to maintain confidentiality, client information remains subject to disclosure in court and in other proceedings.\textsuperscript{13} In contrast to the ethical rule, however, the accountant-client privilege gives the client the option to prevent disclosure.

This rule shall not be construed (1) to relieve a member of his or her professional obligations under rules 202 and 203 [dealing with the standards of the profession], (2) to affect in any way the member's obligation to comply with a validly issued and enforceable subpoena or summons, (3) to prohibit review of a member's professional practice under AICPA or state CPA society authorization, or (4) to preclude a member from initiating a complaint with or responding to any inquiry made by a recognized investigative or disciplinary body.

Members of a recognized investigative or disciplinary body and professional practice reviewers shall not use to their own advantage or disclose any member's confidential client information that comes to their attention in carrying out their official responsibilities. However, this prohibition shall not restrict the exchange of information with a recognized investigative or disciplinary body or affect, in any way, compliance with a validly issued and enforceable subpoena or summons.

Id.

The Pennsylvania Institute of Certified Public Accountants (PICPA) has an identical ethics rule and the Institute of Management Accountants (IMA) has a shorter, but substantially similar one.

See \textit{Wagenheim v Alexander Grant & Co.}, 482 NE2d 955 (Ohio App 1983), for a case of first impression in the United States where the court found no cause of action against an accounting firm for breaching the ethical duty of confidentiality. However, although no express written agreement was ever signed, the court determined that a contractual relationship existed between the accounting firm and the client and the code of professional conduct provided an implied term in the contract requiring the firm to maintain confidentiality. Thus, disclosure of confidential information constituted a breach of contract.

\textsuperscript{11} See note 10 for the text of Ethics Rule 301.

\textsuperscript{12} 40 Pa Code § 11.30 (1991) (exclusive language in original).

\textsuperscript{13} See generally Dennis, \textit{When Can Confidential Client Information Be Disclosed?}, 21 Prac Acct 42 (Apr 1988).
of the protected information in judicial proceedings.\textsuperscript{14}

Moreover, the courts are without jurisdiction to enforce provisions of the codes of ethics and rules of conduct which are applicable to accountants. Unlike the jurisdiction to enforce the canons of ethics for attorneys, which is based on the regulatory power of courts over members of the bar, there is no analogous basis for the court to enforce such rules for accountants.\textsuperscript{16}

\textbf{Legislative History}

The section on privileged communication and CPAs was originally enacted in 1961 as an amendment\textsuperscript{16} to Pennsylvania's then existing legislation\textsuperscript{17} regulating the accounting profession (hereinafter "the CPA Law"). In 1974, the provision was rewritten to extend the privilege to professional corporations and professional associations holding a permit to practice under the CPA Law as well as to directors, associates and employees of such corporations and associations. The 1974 amendment to the accountant-client statute also omitted the exclusion for information obtained by the accountant as a result of "the examination of, audit of or report on any financial statements, books, records, or accounts which [the accountant] may be engaged to make or requested by a prospective client to discuss."\textsuperscript{18} In its stead, perhaps due to undesirable court decisions construing this part of the statute,\textsuperscript{19} the legislature in-

16. Act of September 2, 1961, P L 1165, No 524. The original amendment read: Privileged Communication.—Except by permission of the client or person or firm or corporation engaging him or the heirs, successors or personal representatives of such client or person or firm or corporation, a certified public accountant or a person employed by a certified public accountant shall not be required to, and shall not voluntarily, disclose or divulge information of which he may have become possessed relative to and in connection with any professional services as a certified public accountant other than the examination of audit of or report on any financial statements, books, records or accounts, which he may be engaged to make or requested by a prospective client to discuss. The information derived from or as the result of such professional services shall be deemed confidential and privileged: Provided, however, That nothing herein shall be construed as modifying, changing or affecting the criminal or bankruptcy laws of this Commonwealth or of the United States.

Id.

Prior to the passage of this original amendment in 1961, privileged communications were not recognized as between a client and his accountant. \textit{United States v Stoehr}, 100 F Supp 143 (E D Pa 1951), aff'd, 196 F2d 276 (3d Cir 1952).

17. Act of May 26, 1947, P L 318, No 140 (hereinafter "the CPA Law").
18. The Act of December 30, 1974, P L 1122, No 362, amended the earlier version of the statute. See note 16 for the full text of the earlier provision.
19. See notes 58-60 and accompanying text.
asserted a different exclusionary clause. The new exclusion clarified the fact that the privilege does not prohibit the disclosure of information required by standards of the profession nor does it prohibit disclosures in judicial proceedings or disciplinary investigations where the accountant, professional corporation or professional association is a party or their services are at issue. At the same time, the legislature omitted the provision that the privilege shall not be "construed as modifying, changing or affecting the existing criminal or bankruptcy laws of this Commonwealth or of the United States."\textsuperscript{20}

Two years later, in 1976, the legislature deleted references in the statute to professional corporations and professional associations and made the privilege available to public accountants, partnerships and corporations holding permits to practice under the CPA Law.\textsuperscript{21} An amendment in 1984 left the substance of the statute unchanged, but made editorial changes to reflect the fact that, administratively, "permits" to practice had been replaced by "licenses."\textsuperscript{22}

\section*{Coverage of the Privilege}

The accountant-client privilege by its very name applies to accountants. However, precisely what constitutes an accountant for purposes of determining the privilege's coverage and what other related professionals are included under the umbrella protecting the accountant is subject to statutory definition. Furthermore, judicial interpretation of the privilege's applicability has looked to the geographic location where the privileged communication took place and the reasonable expectation of the parties regarding the availability of the jurisdiction's privilege under the circumstances.

Currently, Pennsylvania's statutory accountant-client privilege is available only to CPAs and public accountants holding a state license to practice, and to their employees and associates.\textsuperscript{23} Thus, it follows that unlicensed professionals retained to render accounting

\begin{itemize}
\item \textsuperscript{20} Act of December 30, 1974, P L 1122, No 362.
\item \textsuperscript{21} Act of December 8, 1976, P L 1280, No 286.
\item \textsuperscript{22} Act of March 7, 1984, P L 106, No 23, § 15 (effective Apr 1, 1984).
\item \textsuperscript{23} 63 Pa Cons Stat Ann § 9.11a (Purdon Supp 1989).
\end{itemize}

In \textit{Commonwealth v England}, 74 Pa D & C 2d 489, 494 (Pa Com Pl, Bucks Cty 1976), an opinion issued under the prior language of the accountant-client statute which extended the privilege only to certified public accountants, see note 21 and accompanying text, the court refused to extend the accountant-client privilege to an individual rendering professional accounting services because he at all times in question was not "certified" within the definitional meaning of the CPA Law.
services may not invoke the accountant-client claim of privilege.

Although the statute is not explicit on this issue, judicial interpretation suggests that even licensed accountants can claim the privilege only when the confidential communication occurred in circumstances where the parties could reasonably expect the Pennsylvania statute to apply. In *James Talcott, Inc. v C.I.T. Corp.*,\(^\text{24}\) the plaintiffs in an Arizona lawsuit sought to depose an accountant working in the Pittsburgh office of a national accounting firm. The testimony sought by the plaintiffs concerned information and records derived from services provided by the accountant while working in the Massachusetts office of the same accounting firm. Despite Pennsylvania's statutory accountant-client privilege, the court decided that the privilege could not be claimed because Massachusetts did not protect communications between accountants and clients, and the expectations of the parties as to the confidentiality of the communications would have been based on Massachusetts law.

The information which plaintiffs seek was obtained by [the accountant] in the course of providing accounting services to [his client corporations] in Massachusetts. Consequently, the expectations of the parties as to the confidentiality of the communications would be based upon Massachusetts law. Therefore, the scope of the accountant-client privilege in this case should not be broader than that provided by Massachusetts law. Any other result would deprive the parties to the litigation of information which may produce a more just result without strengthening the accountant-client relationship.

Massachusetts law does not protect from disclosure in court proceedings communications between accountants and clients. Therefore [the accountant] cannot refuse to disclose the information which plaintiffs seek on the ground that it constitutes a privileged communication.\(^\text{25}\)

The Pennsylvania version of the accountant-client privilege specifically provides coverage to all employees of the accountant, to directors of a corporation and to associates of an association holding licenses to practice under the CPA Law. However, as one writer has pointed out, while the extension of the privilege to these other groups may settle the question of privilege for these specifi-

\(^24\) 14 Pa D & C 3d 204 (Pa Com Pl, Allegheny Cty 1980).

\(^25\) *James Talcott, Inc.*, 14 Pa D & C 3d at 205-06. The court also noted that this result was supported by the Restatement (Second) Conflict of Laws § 139 (1971), which provides that, unless it would be contrary to the strong public policy of the forum, non-privileged evidence under the law of the state which has the most significant relationship with the communication should be admitted even though under the local law of the forum it would be privileged. Id at 206.
cally enumerated groups, serious consequences may result. For ex-
ample, a scenario where one licensed accountant, because of a
heavy workload or a special project, hires a second unlicensed ac-
countant, a stranger to the original accountant-client relationship,
to provide professional assistance could present problems. In the
event of subsequent litigation, the court might have to determine
whether this second accountant held the status of employee or in-
dependent contractor. If the second accountant is viewed by the
court as an independent contractor, the disclosure to him or her
would be improper, resulting perhaps in waiver of the privilege.26

A similar problematic situation could involve a consultation be-
tween accountants based on personal friendship or professional
courtesy rather than a remunerative engagement. In the former
case, a party to a lawsuit could make a strong argument that the
accountant consulted was nobody’s client and thus was not cloaked
by the accountant-client privilege and the protection it affords.27

Despite these potential problems, the accountant-client privilege
remains available to licensed CPAs and public accountants and
their related personnel. The accountant’s mere physical presence
in the Commonwealth of Pennsylvania does not guarantee the con-
fidentiality of accountant-client communications. Rather, the par-
ties must have a reasonable expectation that the Pennsylvania ac-
countant-client statute will indeed be applicable in the situation.

ASSERTING THE PRIVILEGE

Although the various states differ on these issues, Pennsylvania
provides its own answers to the questions of exactly who the privi-
lege “belongs” to, who may invoke the privilege to avoid divulging
the confidential information and whether the claim of privilege
survives the death of the client. Furthermore, because Pennsylva-
nia vests the privilege in the client rather than the accountant,
cases of joint clients, such as a corporation and its shareholders or
a husband and wife, present special problems when one client at-
ttempts to assert the claim of privilege against the other.

Pennsylvania’s accountant-client privilege provides that the
privilege may be waived by the client or by the client’s personal
representatives or heirs or successors. To the extent that the power
to waive implies the power to invoke, it can be said that the privi-

26. David A. Larson, Accountant-Client Privilege Statutes: A Clear Need for Re-
27. Larson, 8 Seton Hall Legis J at 211-12 (cited in note 26).
Accountant-Client Privilege belongs to the client. Furthermore, it must be the client who asserts and claims the privilege and raises any objection. The plain language of the statute makes it clear that the privilege survives the death of the client. Consequently, heirs, successors or personal representatives may step forward and invoke the privilege on behalf of the client.

The privileged communication may not be divulged voluntarily and it may not be mandated, except with the permission of the person or entity engaging the accountant for professional services. However, a court has ruled that the privilege may not be asserted by a corporation to preclude a major shareholder seeking to vindicate its rights from inquiring into matters vital to the shareholders’ cause of action.

Other than the case just cited, there is no Pennsylvania case law on whether communications from a member of a collective entity are privileged as to other members of the entity. Thus, the following issues remain unsettled: (1) whether the accountant-client privilege protects a corporation from disclosure in a shareholder’s derivative suit or an action against the corporation based on breach of fiduciary duty, and (2) whether communications by a partner or joint venturer to an accountant are privileged as to the other partners or venturers.

To gain some feel for how these issues might eventually be re-


Furthermore, “in general, the privilege ‘belongs’ to the person who previously disclosed the information in confidence to the person from whom that information is now sought to be obtained.” Tannenbaum, Liquidating Receiver of Computab, Inc. v May Dept. Stores Co., 65 Pa D & C 2d 700, 702 (Pa Com Pl, Allegheny Cty 1974) (refusing to extend a grant of privilege to the banker-customer relationship).


32. Albert M. Greenfield Foundation v Bankers Securities Corp., 7 Pa D & C 3d 535, 543 (Pa Com Pl, Philadelphia 1978) (hereinafter “Greenfield”). In Greenfield, the plaintiffs alleged that the defendants illegally voted treasury stock at a board election. Defendants, asserting a claim of confidentiality based on the accountant-client privilege, sought to refuse to answer interrogatories regarding the disputed designation of treasury stock in the annual financial statements. The court overruled objections based on the accountant-client privilege and ordered defendants to answer the interrogatories, reasoning that “it is inconceivable that professional accounting standards would not demand that the accountants explain the circumstances underlying the disputed designation.” Greenfield, 7 Pa D & C 3d at 542.
solved in Pennsylvania courts, it is helpful to look to the law in other jurisdictions which, like Pennsylvania, have no specific provisions addressing these issues. For example, the Colorado Supreme Court has concluded that a corporation cannot invoke the privilege against its stockholders in a shareholders’ derivative suit because CPAs are hired for the benefit of all corporate stockholders and, therefore, concealment of information from the stockholders of information given to the accountant by the corporation is forbidden. In the case of joint venturers, the Georgia Supreme Court has ruled that where an accountant is jointly employed, communications between each of the clients and the accountant are privileged as to all outside parties but not with regard to the other principals involved. Interestingly, some legislatures have specifically enacted statutes which make the accountant-client privilege unavailable in any of these kinds of situations.

The availability of the privilege in divorce proceedings, where husband and wife were previously joint clients, has not been treated by Pennsylvania courts either. Regardless, a sense of justice and fair play suggests that divorce cases deserve an exception to the accountant-client privilege. “One spouse should not be able to avoid an equitable alimony obligation or child support award by shielding his or her actual financial condition behind the accountant-client privilege.”

Although there is case law in other jurisdictions to the contrary, Pennsylvania case law suggests that a trustee in bank-

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33. Pattie Lea, Inc. v District Court, 161 Colo 493, 423 P2d 27 (1967). In reaching this decision, the Colorado court read into the state accountant-client privilege statute an exception analogous to a common law exception to the attorney-client privilege: when several persons employ the same attorney their communications to the attorney are not privileged inter se. The court ruled that the same kind of exception should prevent a corporation from using the accountant-client privilege in the derivative suit context. Note, 66 Mich L Rev at 1268 (cited in note 4).

34. Gearhart v Etheridge, 208 SE2d 460 (Ga 1974).

35. See, for example, Nev Rev Stat § 49.205(5) and (6) (1979); Fla Stat Ann § 473.316(4)(c) (West 1991).

36. Other states have, however, found the privilege unavailable where the accountant provided services to joint husband and wife clients. See Harwood v Randolph Harwood, Inc., 333 NW2d 609 (Mich App 1983) (“However, the facts appeared to involve separate engagements for related parties, one of which was the husband’s corporation”); Causey and McNair, 27 Am Bus L J at 543 (cited in note 3); Levin v Levin, 405 A2d 770 (Md App 1979). See generally Privileged Conversations in the Counting House: The Role of the Accountant, 10 Fam Advoc 31 (1987) (role of the accountant in divorce cases).

37. Larson, 8 Seton Hall Legis J at 217 (cited in note 26).

38. See, for example, Weck v District Court, 161 Colo 384, 422 P2d 46 (1967) (en banc).
Accountant-Client Privilege

In James Talcott, Inc., the accountant tried to assert the accountant-client privilege with respect to communications to him by certain client corporations. At the time the accountant was attempting to claim the privilege, the corporations had been adjudicated bankrupt, their corporate charters had been voided, and they had no place of, nor did they conduct any, business. The court said that the privilege belongs only to the client and, under these circumstances, there was no entity whose interests would be protected by the accountant-client privilege. Thus, no one could claim the privilege.

In summary, the accountant-client privilege may be invoked by the client and the client's heirs, successors or personal representatives to prevent disclosures by the accountant. Although the issue is far from settled, it appears that the privilege may not be asserted by a corporation against its stockholders, nor can it be invoked by one client to prohibit disclosure to a joint client.

INFORMATION PROTECTED

In general, the Pennsylvania statute provides that information obtained by the accountant in his or her professional capacity is within the scope of the privilege. In other words, the privilege operates with regard to communications, written or oral, made to an accountant by the client in connection with the rendering of professional services whether that be accounting and auditing services, tax practice or management advisory services. The statute does not cover information communicated from the accountant to the client or to any other person.

One court has had to rule that the privilege does not protect skills or expertise acquired at setting up books, compiling reports


41. In order for the statute to be at least prima facie applicable, there must be a showing that an accountant's services were sought in an accounting capacity. *Gatewood v United States Cellular Corp.*, 124 FRD 504, 505 (D DC 1989) (applying Pennsylvania law) (holding that appraisal service was not an accounting function). See notes 67-68 and accompanying text.

42. *Stauffer Chemical Co. v Keysor-Century Corp.*, 94 FRD 180 (D Del 1982).
and dealing with banks. These kinds of activities did not amount to confidential information envisioned by the authors of the applicable section of the CPA Law. Thus, a CPA who used his skills for a particular company, and acquired considerable knowledge of the business by doing so, was free to turn his knowledge to his own use and make himself into a business competitor of his original client.

**Waiver of the Privilege**

The accountant-client privilege prohibits the forced disclosure of certain confidential information between the accountant and the client. However, there are circumstances in which this protection is lost by either explicit or implied waiver of the privilege.

The statute expressly provides that a client may waive the accountant-client privilege by consenting to disclosure by the accountant. When a client initiates litigation in which communications with the accountant are relevant, for example in a case where the client sues the accountant for breach of contract or fiduciary duty, the privilege is deemed waived. One Pennsylvania case ruled that the accountant-client privilege did not apply to the facts of the case, but even if it did, "by placing in issue communications which they now decline to divulge, defendants have in effect waived the accountant-client privilege which might have otherwise attached."

The court in *Sansom Refining Co. v Bache Halsey Stuart Shields, Inc.* went further and held that, when the client initiates a lawsuit in which the client's allegations make relevant information and knowledge that is in the possession of the accountant, and where the information or knowledge would be discoverable from the client if it was in the client's possession, then the client has, in

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43. *Agra Enterprises, Inc. v Brunozzi*, 448 A2d 579, 582 (Pa Super 1982). One commentator, for reasons unknown to this author, has opined that this case "cannot be considered reliable as precedent." Causey and McNair, 27 Am Bus L J at 547 n 60 (cited in note 3).

44. *Agra*, 448 A2d at 582.

45. Id.


47. *Greenfield*, 7 Pa D & C 3d at 543. Accord *Continental Cas. Co.*, 338 F Supp at 761 (privilege is not the plaintiff’s but even if it were, the privilege is waived to the extent that the information is material to plaintiff’s claim or the defense thereto).

48. 92 FRD 440 (E D Pa 1981). In *Sansom*, the defendant sought information relating to the amount of loss sustained by the plaintiff because of allegedly unauthorized trades which occurred while the accountants were responsible for supervising the account and which were investigated by the accountants.
effect, waived the privilege by initiating the suit. The court added that the accountant-client privilege could not have been intended to cloak material that would be discoverable from the client if it was in the client's possession.\textsuperscript{49}

Another case construing Pennsylvania's accountant-client privilege statute, \textit{Nick Istock, Inc. v Research-Cotrell, Inc.},\textsuperscript{50} held that a party's calling of a CPA as a witness at trial constitutes a waiver of any privileged communications relating to the matters at issue and the privilege cannot be asserted for purposes of preventing discovery. The privilege will be deemed waived regardless of whether the accountant would be called as an expert witness or whether he would testify with respect to the facts of the case.\textsuperscript{51}

\textbf{Exceptions}

The Pennsylvania statute mentions specific instances where the circumstances under which the privilege may be invoked are restricted. In general, these situations include the public attest (audit) function and litigation, and disciplinary hearings or investigations in which the accountant's services are at issue and the accountant is a party to the action.

Noteworthy in this context is the fact that the legislature has specifically eliminated the exclusionary language in the statute that made the accountant-client privilege ineffectual as to existing criminal laws.\textsuperscript{52} This amendment by the legislature seemingly made the privilege available where a client is being prosecuted for a criminal offense. While this action should hardly be construed as legislative endorsement of an accountant furthering the endeavors of the criminally inclined, a client charged with a crime would be able to erect a barrier to relevant testimony by his or her accountant by invoking the accountant-client privilege.

Although one may argue that it is the responsibility of the certified public accountant to withdraw before a criminal act can be completed, one can easily imagine the situation in which the client's unlawful intentions are not entirely apparent until the act has been completed. The client would then have the power to silence the certified public accountant with a claim of privilege. The privilege may be asserted regardless of the certified public accountant's own belief that disclosure is necessary, or society's general con-

\textsuperscript{49} Sansom, 92 FRD at 441, citing Greenfield, 7 Pa D & C 3d at 543.
\textsuperscript{50} 74 FRD 150 (W D Pa 1977).
\textsuperscript{51} \textit{Nick Istock, Inc.}, 74 FRD at 151.
\textsuperscript{52} See note 20 and accompanying text.
cern that crimes be identified and prevented.\textsuperscript{53}

**STANDARDS OF THE PROFESSION**

An accountant has duties not only to his or her client, but also to third parties: investors, creditors and the government. Thus, the accountant must adhere to professionally imposed standards and responsibilities and is subject to governmental regulations and requirements.

Pennsylvania provides that while the accountant-client privilege may apply in situations where the accountant performs a private, advisory or consulting function, the privilege does not prohibit an accountant from making disclosures required by the standards of the profession in reporting on the examination of financial statements. "The statute, regrettably, does not indicate what the standards of the accounting profession demand by way of disclosure of 'confidential' information."\textsuperscript{54} Presumably this provision of the statute means that the privilege may not be invoked in connection with disclosures required by generally accepted accounting principles (GAAP) or generally accepted auditing standards (GAAS).

In the one Pennsylvania case construing this section of the statute, the opinion noted that it would be difficult to imagine that the standards of the accounting profession would not require accountants to reveal an explanation of the circumstances underlying a challenged designation in the annual report of the financial statements:

> It is inconceivable that professional accounting standards would not demand that the accountants explain the circumstances underlying the disputed designation. The accountants included the treasury stock designation in [their client corporation's] annual report, presumably pursuant to an examination of [the corporation's] financial affairs, including its financial statements. Furthermore, given the impact that the resolution of this issue will undoubtedly have on the question of defendant's liability, the standards of the profession cannot and should not impede the court's effort to assure plaintiff the fullest opportunity to prepare its case through the vehicle of discovery.\textsuperscript{55}

\textsuperscript{53} Larson, 8 Seton Hall Legis J at 213 (cited in note 26). The author recommends that states without an exception for criminal offenses should consider adopting a provision that makes the privilege unavailable "where an accountant's services were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud." Id at 214 (emphasis in original).

\textsuperscript{54} Greenfield, 7 Pa D & C 3d at 541.

\textsuperscript{55} Id at 542-43 (emphasis in original) (designation concerned treasury stock).
The court therefore ordered the defendant to provide fuller and more specific answers to an interrogatory and overruled the defendant's objections based on the account-ant-client privilege.

Although the privilege does not protect disclosures required by GAAS, it would appear to protect related documents supporting the disclosures. That is, it is possible that an auditor may not have to testify or produce records concerning: the audit program; evidential matter obtained through inspection, observation, inquiries, and confirmations; the analysis of internal control; and other notes and data pertinent to whether the financial statements are prepared in accordance with GAAP.\(^5\)

Because it may shed some light on judicial thinking on the topic, it is worth considering three early court cases. These cases were decided prior to the amendment in 1974, where the accountant-client privilege contained an exemption clause that withdrew from the statute's protection information acquired by the accountant as a result of "the examination of audit of or report on any financial statements, books, records or accounts, which he may be engaged to make or requested by a prospective client to discuss."\(^5\) The courts construing the former statutory exclusion held that the privilege did not attach to information obtained by the accountant directly from the client's books and records.\(^5\)

Another case has ruled that where an accountant examining the books of a client received verbal clarification concerning what a certain bookkeeping entry represented, the answer was not covered by the privilege.\(^5\) The answer had to be divulged because, although the information was not taken directly from the books, it was received in the answer to a question in connection with the

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57. See note 18 and accompanying text.
58. Marine Midland Trust Co. of S. NY v Douwanis, 50 Pa D & C 2d 403, 409 (Pa Com Pl, Lehigh Cty 1970). The plaintiff in Marine Midland Trust sought to take the deposition of defendant's accountant for the purpose of discovering assets against which execution might be issued. Defendant and his accountant objected to such discovery, claiming the information was confidential and privileged. The court compelled the testimony of the accountant, reasoning that the statutory accountant-client privilege in effect at the time did not extend to the defendant's books and records and, because the accountant's testimony was limited to facts derived therefrom, the proposed discovery was proper and in accordance with law. Accord United States v Bowman, 358 F2d 421, 423 (3d Cir 1966) (accountant must comply with IRS summons because all of the material to which the summons relates was derived from the books and records of the taxpayer corporation by the accountant or people working under his supervision and direction) (emphasis in original).
accountant’s examination of the books. Nor did the privilege attach, in a third case, to explanatory notes and statements made by the accountant pertinent to the financial statements which he or she compiled.

LEGAL OR DISCIPLINARY PROCEEDINGS

In Pennsylvania, the statutory accountant-client privilege does not apply to communications which are relevant to an action in a court of law or in disciplinary proceedings conducted by a governing authority where the professional services of the accountant are being contested and the accountant is a party.

FEDERAL LAW AND TAX CASES

Although various states, like Pennsylvania, recognize some form of testimonial accountant-client privilege by statute, in rejecting accountant-client and Fifth Amendment privileges for records delivered to a tax return preparer, the United States Supreme Court has decreed that “no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases.” Moreover, concerns which are central to the system of bankruptcy administration have been found to lie

60. Rubin, 347 F Supp at 324. The accountant had examined the corporate books of a client and inquired what a $500 entry represented. The information obtained in answer to the question was excluded from coverage by the privilege because the statute in effect at the time made an exception for information obtained in connection with an examination or report on any financial statements, books, records or accounts.

61. E. J. McAleer & Co. v Iceland Prod., Inc., 62 Pa D & C 2d 65, 70-71 (Pa Com Pl, Cumberland Cty 1973). This case was an action for breach of contract to furnish codfish along with a claim of damages. The court acknowledged the limited accountant-client privilege established by statute, but ruled that the defendant was entitled to not only the plaintiff's financial statements because of the statutory exclusion but also the accountant's notes thereto and any information pertinent to the financial statements compiled by the accountants.


63. Couch v United States, 409 US 322, 335 (1973) (citations omitted). In Couch, the Supreme Court's refusal to bar the accountant's production of business records pertinent to tax liability seems to be based on the expectation of privacy. The Court noted that: [there] could be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not the petitioner's. Indeed, the accountant himself risks criminal prosecution if he willingly assists in the preparation of a false return. Couch, 409 US at 335. See also United States v Jaskiewicz, 278 F Supp 525 (E D Pa 1968) (state-created accountant-client privilege is not applicable in federal criminal trial); United States v Berkowitz, 355 F Supp 897 (E D Pa 1973) (tax records not protected by accountant-client privilege).
singularly within the realm of federal law rather than state law and thus Pennsylvania's accountant-client privilege does not apply in bankruptcy adjudications. Therefore, in Pennsylvania and elsewhere, disadvantaged creditors can expect unrestricted access to documents in the possession of CPAs relating to a debtor's financial condition.

Federal courts do not recognize the accountant-client privilege in federal administrative proceedings either. However, the Federal Rules of Evidence stipulate that where state law provides the rule of decision, privilege is determined in accordance with state law. Thus, state-granted statutory privileges would be applied in diversity jurisdiction matters.

One federal district court decision involving Pennsylvania's statutory accountant-client privilege suggests that, in diversity jurisdiction matters, federal courts may disfavor state law which recognizes privileges and prefer instead state law which permits the disclosure of all facts relevant to a judicial proceeding. In Gatewood v United States Cellular Corp., a federal magistrate held that an appraisal performed by a CPA selected by plaintiffs in litigation concerning a limited partnership agreement was not an ac-

64. In re Oxford Royal Mushroom Prods., Inc., 41 Bankr 862 (E D Pa 1984). An amendment to the CPA Law eliminated the exclusionary language in the statute that made the accountant-client privilege ineffectual on existing bankruptcy laws. See note 20 and accompanying text.

Because the court reached the result that it did, it was not necessary to determine whether the trustee had the authority to waive a debtor corporation's accountant-client privilege. It is worth noting, however, that the Supreme Court has since overruled the analogous Seventh Circuit case cited in the Oxford opinion by holding that a trustee may waive the corporation's attorney-client privilege with respect to pre-bankruptcy proceedings. Commodity Futures Trading Comm. v Weintraub, 471 US 343 (1985).

65. United States v Kelly, 311 F Supp 1216 (E D Pa 1969) (IRS summons); F.T.C. v St. Regis Paper Co., 304 F2d 731 (7th Cir 1962) (Federal Trade Commission subpoena duces tecum); Falsone v United States, 205 F2d 734, 739 (5th Cir 1953) (IRS summons); Colton v United States, 306 F2d 633 (2d Cir 1963) (IRS summons).

66. FRE 501. The Rule reads:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Id.


68. 124 FRD 504 (D DC 1989).
counting function. Therefore, these communications were not protected by the Pennsylvania accountant-client privilege. Moreover, the court reasoned that even if the statute would offer protection to the plaintiffs precluding discovery of the appraisal report and communications with respect to the appraisal process, the court would not give extra-territorial recognition to a Pennsylvania statute in District of Columbia litigation. The court conducted an interest analysis approach and concluded that the District of Columbia's interest in applying its law in the instant proceedings was stronger than Pennsylvania's because the suit involved a partnership whose managing partner resided in the District of Columbia and the corporate defendant did business there. In addition, Pennsylvania's interest arose solely from the fact that the plaintiffs communicated with a Pennsylvania accountant. The professional relationship in Pennsylvania was merely fortuitous and was not purposely arranged because of the availability of the privilege.69

The Third Circuit has had the opportunity to address the choice of law problem in the context of Pennsylvania's statutory accountant-client privilege in Wm. T. Thompson Co. v General Nutrition Corp.70 In cases involving a combination of federal and state law claims, the Third Circuit has ruled that, in accordance with Federal Rule of Evidence 501,71 the state privilege law would govern in cases where state law provided the rule of decision.72 But, in federal question cases with pendent state law claims, the federal rule favoring admissibility will prevail despite the existence of pendent state claims.73


70. 671 F2d 100 (3d Cir 1982).

71. See note 66 for the text of the Rule.


72. Thompson, 671 F2d at 103.

73. Id at 104.
The *Thompson* opinion acknowledged the difficulty of applying two separate accountant-client disclosure rules with respect to different claims tried by the same jury. Therefore, the court held that in this litigation, involving allegations of federal antitrust laws as well as violations of state law, the federal rule permitting disclosure was controlling rather than Pennsylvania’s state law privilege protecting the information:

In this case the anti-trust and state law claims will be tried together. Obviously applying two separate disclosure rules with respect to different claims tried to the same jury would be unworkable. One rule or the other must govern. Thus, assuming the Pennsylvania privilege is in fact applicable as a matter of choice of law, we must decide whether it or the rule of *Couch v United States*, [409 US 322 (1973) (holding no federal common law accountant-client privilege)], will control.

We hold that when there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule. The question is one of first impression in this court, but our holding is consistent with the legislative history of rule 501 and the decisions of a number of trial courts. It is also consistent with the general rule in federal practice disfavoring privileges not constitutionally based.\(^74\)

Although accountants lost the question of a broad accountant-client privilege in an earlier United States Supreme Court decision,\(^75\) opinions by the Tenth Circuit and the Second Circuit initially gave independent accountants some prospect of protection in tax work.\(^76\) The Tenth Circuit, in *United States v Coopers &

\(^{74}\) Id.

\(^{75}\) See note 63 and accompanying text.


Lybrand,77 denied the Internal Revenue Service (IRS) access to an independent accountant's tax accrual workpapers78 because the court found that the documents were not relevant to determining the correctness of the taxpayer's tax return. Five years later, in United States v Arthur Young & Co.,79 the Second Circuit rejected the lack of relevance argument, but found that limited work-product immunity80 existed for tax accrual workpapers prepared in the course of certifying financial statements. However, on appeal, the United States Supreme Court81 reversed the Second Circuit's decision on the issue of work product immunity and unanimously refused to protect CPAs’ tax accrual workpapers from disclosure pursuant to an IRS summons.82

The United States Supreme Court’s opinion in Arthur Young is noteworthy for its discussion of the role of certified independent

leged Communications, and Section 7602 of the Internal Revenue Code, 10 St Louis L J 252 (1965).

77. 550 F2d 615 (10th Cir 1977).
78. Under GAAP and GAAS, independent auditors must evaluate whether adequate income tax reserves have been accrued and whether adequate disclosure has been made by the firm with respect to the income tax provided for in the financial statements and the estimated amount the firm may ultimately pay if its determination in questionable areas is found to be wrong. Tax accrual workpapers document the independent accountant’s investigation and evaluation of a firm’s contingent tax liability.

80. Work-product immunity refers to information which an attorney secures from a witness while acting as the client's confidential advisor and advocate in anticipation of litigation. The work-product doctrine was recognized by the Supreme Court in Hickman v Taylor, 329 US 495 (1947).

82. Internal Revenue Code § 7602 provides that:
For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . or any other person . . . to appear . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

IRC § 7602 (1982).
accountants. This role, according to the Court, is quite different from that of an attorney whose duty as a confidential advisor and advocate is to present the client's case in its most favorable possible light. When certifying financial statements, in contrast, a CPA assumes a public responsibility transcending any employment relationship with the client. Therefore, the independent auditor owes ultimate allegiance to the corporation's stockholders and creditors as well as to the investing public at large:

This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations... Thus, the independent auditor's obligation to serve the public interest assures that the integrity of the securities markets will be preserved, without the need for a work-product immunity for accountants' tax accrual workpapers.83

The United States Supreme Court's view of the role of the independent CPA suggests that corporate clients should not expect that communications with their accountants will be kept confidential, at least in the federal arena. However, one commentator has cautioned against reading the opinion too broadly. Far from announcing the death penalty for the testimonial privilege or work-product immunity for accountants, the opinion treated only independent auditors working under the direction of federal securities laws. Moreover, new guidelines promulgated by the IRS provide that tax accrual workpapers will be requested only in unusual circumstances, so the fact situation and concerns raised in the Arthur Young decision may never be replicated.84

**ACCOUNTANT ENGAGED BY ATTORNEY**

As noted previously, Pennsylvania's accountant-client privilege is not recognized in federal court. Therefore, while an accountant cannot refuse to testify on that basis, there are situations in which an accountant engaged by an attorney may be within the ambit of the attorney-client privilege.85

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85. See generally Comment, 2 Duquesne L Rev at 275-81 (cited in note 76) (regarding accountants engaged by attorneys in federal tax investigations). The attorney-client privilege has been extended to include communications made to the attorney's agents. Id at 275,
In general, these situations involve an accountant being retained by an attorney and subsequent extension of the attorney-client privilege to the accountant just as it was extended to include communications made to other agents of the attorney.\(^6\) However, the attorney-client privilege is not available by the mere transfer of an accountant’s documents to the client and the client’s subsequent delivery of the unprivileged materials to an attorney.\(^7\) The district court in *United States v Schmidt*\(^8\) stated:

There are circumstances in which an accountant may be within the scope of the attorney-client privilege, the elements of which are set forth as follows:

“(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.” \(^8\) Wigmore, *Evidence* § 2292 (McNaughton rev. 1961).

The burden of establishing the foregoing rests on the claimant against disclosure, and the operative rule of construction is that the privilege ought to be confined within its narrowest limits consistent with its policy to promote freedom of consultation of legal advisers by clients.

One corollary of the prerequisite that a professional legal adviser be consulted in his capacity as such is that the privilege does not apply when a person who merely happens to be an attorney translates his activities into those of an accountant.

Similarly, what is vital to the assertion of the privilege by an accountant employed by an attorney is that he assist in providing legal advice rather than merely rendering accounting services; and the specific nature of the proponent’s burden is to establish that the accountant’s role is essentially consultative.\(^9\)

The court went on rule that to the extent that tax return preparation requires the formulation of a legal judgment based upon prior consultative accounting, the accounting services can be legitimately included under the attorney-client umbrella.\(^9\)

Despite the court’s discussion in *Schmidt* of the topic and its citing Wigmore, *Evidence* § 2301 at 583 (cited in note 8).

86. Wigmore, *Evidence* § 2301 at 583 (cited in note 8).

87. *United States v Kelly*, 311 F Supp 1216 (E D Pa 1969). In addition, the attorney rendered no legal services regarding the materials but simply gained possession of them. *Kelly*, 311 F Supp at 1218.


90. *Schmidt II*, 360 F Supp at 347.
attempt to clarify the distinction between legal advice and accounting services, the two professions converge in some respects, especially in the area of taxation. "It has been stated that a competent accountant knows more about the Internal Revenue Code than most lawyers." Thus, particularly in the functional overlapping field of tax practice, the dividing line separating attorneys from accountants may be nearly invisible and troublesome for the courts to distinguish. Consequently, determining the applicability of the attorney-client privilege in relation to accountants may continue to be a judicial "thorn in the side."

In Schmidt, the court held that an accountant retained by the taxpayer's attorneys to assist them in the accumulation of business and financial information required to provide legal advice to the taxpayer could not refuse to testify on the basis of his role as an accountant. However, the attorney-client privilege did protect confidential communications made by the taxpayer to the accountant within the context of the attorney-client relationship. Consequently, the accountant could refuse to answer questions where providing an answer would amount to disclosure of information communicated in professional confidence.

In determining the applicability of the attorney-client privilege with regard to an accountant, the court in the Schmidt I and II litigation placed weight on the fact that the attorneys decided that the accounting services were necessary to allow them to properly advise their client. Accordingly, the law firm reached an agreement with the accounting firm, stipulating that, among other things, accounting services were to be performed at the written request of counsel, that except as otherwise directed, the accountants were to bill the law firm monthly for services rendered during the preceding month, and that information obtained by the accountants while performing the services contemplated by the agreement was to be confidential.

To summarize then:

Neither the accountant-client privilege nor the attorney-client privilege can be claimed as to information furnished to a tax return preparer, regardless

92. Schmidt II, 360 F Supp at 348.
93. See note 89.
of whether the preparer is an accountant or an attorney. The attorney-client privilege does not apply because information communicated for return preparation is not legal advice covered by the privilege. [The accountant-client privilege does not apply either, because it is not recognized in federal practice.\textsuperscript{95}] When the accountant is employed by the attorney to assist in defense of a tax fraud case, however, communications to the accountant are protected by the attorney-client privilege as well as the attorney-work-product rule. But to invoke the attorney-client privilege, the accountant must bill the attorney and be paid by the attorney. If any of the information is used to prepare tax returns, the privilege is waived as to all data supporting the filed returns.\textsuperscript{96}

Thus, even when an accountant prepares amended tax returns at the request of the taxpayer's attorney, the attorney-client privilege does not prevent their subpoena because the preparation of a tax return does not usually require legal advice.\textsuperscript{97}

**RECENT DEVELOPMENTS**

It has been reported that the primary motivation of CPAs who favor an accountant-client privilege is to promote the client's full disclosure of information required for the preparation of tax returns. Their interest is based on the notion that the privilege would operate to protect clients unjustly charged with fraud and to guard against "fishing expeditions."\textsuperscript{98} In addition, a subcommittee of the American Bar Association has recommended a qualified privilege for tax accrual workpapers.\textsuperscript{99} Seemingly in response to the wishes of these accountants and attorneys, legislation was proposed to enact a limited accountant-client privilege in tax matters. In early 1990, a bill was introduced in the Senate, amending the Federal Rules of Evidence to establish a tax preparer's privilege for lawyers and accountants doing tax work.\textsuperscript{100} The statute, if enacted as written, would make privileged, in the courts of the United States, the communications between a client and a lawyer or an accountant relating to the preparation of a tax return for the client. Confidentiality would not apply to accounting matters unre-

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95. Couch, 409 US at 335.
lated to tax preparation, nor to communications in anticipation of criminal activity or fraud.\textsuperscript{101}

The 1990 bill apparently died in committee, but in August of 1991, a similar amendment to the Federal Rules of Evidence was proposed as part of a larger bill to amend the Internal Revenue Code of 1986.\textsuperscript{102} The bill, introduced in the Senate and called the Fairplay for Taxpayers Act of 1991, includes wording which would create a federal privilege for communications between a client and a lawyer, an accountant, or an enrolled agent with respect to the preparation of tax return.\textsuperscript{103} The bill was referred to the Committee on Finance for further consideration.\textsuperscript{104} The Fairplay for Taxpayers Act of 1992 was introduced into the House of Representatives on February 25, 1992, and included the identical provision.\textsuperscript{105}

\textbf{CONCLUSION}

The accountant-client privilege remains a valuable protection for accountants and their clients in Pennsylvania. However, limitations on the privilege's use, exceptions to its coverage and conditions of its waiver significantly restrict its application. Nevertheless, in certain circumstances, even where the accountant-client privilege is not available, confidential accounting communications may be shielded from disclosure under the auspices of the attorney-client privilege.

Pennsylvania's statutory accountant-client privilege prohibits the disclosure of any client information communicated to a licensed accountant employed in a confidential relationship with the

\begin{itemize}
  \item \textsuperscript{101} Id.
  \item \textsuperscript{102} S 1617, 102d Cong, 1st Sess, in 137 Cong Rec S 11813, 11814, 11816 (Aug 1, 1991).
  \item \textsuperscript{103} Id. Under the proposed amendments, Federal Rule of Evidence 501 would read as follows:
    \begin{enumerate}
      \item Except as provided in subsection (b) and as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.
      \item The communications between a lawyer, an accountant, or an enrolled agent with respect to the preparation of a tax return for a client and the client shall be privileged in the courts of the United States.
    \end{enumerate}
  \item \textsuperscript{104} Id at 11814.
  \item \textsuperscript{105} HR 4309, 138 Cong Rec E423, E424 (Feb 25, 1992).
\end{itemize}
client and to the accountant's employees and associates. The privilege may be asserted only by the client and it may be waived by the client or by the client's personal representatives, heirs or successors by consenting to the disclosure or by placing the otherwise privileged communication in issue in litigation. The law remains unclear as to whether a joint client may invoke the privilege against the other joint client, such as husband against wife, partner against partner, or corporation against shareholder.

In general, the Pennsylvania privilege statute protects information communicated by clients to their accountants in their professional capacity. However, the protection does not extend to audit reports or disciplinary hearings, investigations, or lawsuits in which the accountant is a party and the accounting services are relevant.

Because the accountant-client privilege is not recognized by federal law, the protection it affords does not extend to disputes with the IRS and other federal cases. Nevertheless, in some limited circumstances, confidential information obtained by an accountant engaged by an attorney may be protected from disclosure by the operation of the attorney-client privilege. Generally these limited circumstances would not include situations where information is used in the preparation of tax returns unless proposed federal legislation creating a tax preparer's privilege is enacted.

The import of the foregoing discussion should be obvious: familiarization with the statutory accountant-client privilege and vigilant monitoring of the case law which interprets it is necessary for accountants and their attorneys in order to identify and eliminate potential areas of exposure.