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Confidential Communications—The Accountants' Dilemma

Cover Page Footnote

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CONFIDENTIAL COMMUNICATIONS—THE ACCOUNTANTS' DILEMMA

CONSTANTINE N. KATSORIS*

I. THE CERTIFIED PUBLIC ACCOUNTING PROFESSION AND THE IMPORTANCE OF CONFIDENTIAL COMMUNICATIONS

SINCE the turn of the century, the public accounting profession has played an ever increasing role in the economic development of this country. This expanding role is principally due to the following factors: (i) the burgeoning size of modern industry has brought with it numerous and complex problems requiring greater and more detailed financial analysis and assistance, (ii) the ever increasing demand and reliance by lending institutions, investors and the government on accurate, independent financial and economic reporting, and (iii) the adaptability of the accounting profession in meeting business' need for newer and more complex financial services beyond auditing and financial reporting, namely, tax practice and management consulting.

Along with the rapid development of the profession came legislative regulation, particularly dealing with the Certified Public Accountant (hereinafter sometimes referred to as "CPA"). The first such statute was enacted in New York in 1896,¹ and today, each state has legislation dealing with the practice of accountancy.²

The first accountancy laws were permissive—that is, they provided that only persons who met certain educational and experience requirements and passed a written examination would be entitled to use the CPA designation.³ These permissive statutes, however, contained no restrictions on the use of titles such as "public accountant" or on the right to engage in any phase of accounting practice, including the auditing and certification of financial statements.⁴

Because such statutes left unregulated a large segment of persons who were engaged in the practice of public accounting, many members of the profession believed the permissive statutes were inadequate. This philos-

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1. N.Y. Sess. Laws 1896, ch. 312.

2. See 1 and 2 CCH Accountancy L. Rep.

3. Penney, *The American Institute of CPAs—Past and Future*, J. Accountancy, Jan. 1962, p. 31, at 32.

4. *Ibid.*

ophy, therefore, led to the passage in Maryland in 1924 of the first regulatory accountancy statute.⁵

The basic philosophy underlying the regulatory accountancy statutes is "that the independent audit function is so affected with the public interest that all who engage in such practice should be required to meet certain statutory standards of qualification and conduct."⁶ Generally, these statutes strive to achieve this result by restricting the use of public accounting titles and certain types of public practice to persons who meet prescribed qualifications.⁷

In all fifty states—whether the underlying accountancy statute is permissive or regulatory—the use of the term "Certified Public Accountant" is limited to those who have met certain qualifications. Present requirements for each of these states include the passage of the same uniform CPA examination. This achievement of voluntary uniformity by fifty state legislatures in restricting the use of the title of CPA to those who have passed said examination not only has had a profound influence on educational standards,⁸ but also clearly hallmarks the CPA as supreme in his profession;⁹ consequently, the balance of this article will concern itself principally with the CPA.

In the past two decades, the CPA profession has numerically increased at a remarkable rate.¹⁰ This dynamic growth is due not only to the substantial expansion of the national economy itself, but also to an increased demand for the CPA's services in fields other than accounting and auditing (namely, taxation and management consulting)¹¹ and the enjoyment of an excellent reputation for professional integrity.¹² This combination of integrity and competence in a wide variety of financial matters has catapulted the CPA into the select circle of confidants entrusted by most businessmen with the innermost of secrets.

If a CPA can be forced to involuntarily reveal these confidences before some future forum, his client will necessarily be hesitant to make full disclosure to him, thus hampering the CPA's usefulness in solving his client's problems. Of vital importance, therefore, to the nurturing of this relationship is the extent to which these confidences are protected as privileged communications.

5. Md. Laws 1924, ch. 585.

6. Heimbucher, *Fifty-three Jurisdictions*, J. Accountancy, Nov. 1961, p. 42, at 43.

7. *Ibid.*

8. Penney, *supra* note 3, at 33.

9. See Carey, *The CPA Plans for the Future* 485 (1965).

10. See text accompanying notes 79-82 *infra*.

11. See Carey, *op. cit. supra* note 9, at 120-27; Solomon, *Accounting in the Next Decade*, J. Accountancy, Jan. 1965, p. 22.

12. See Carey, *op. cit. supra* note 9, at 311.

II. THE DEVELOPMENT OF THE PRIVILEGE OF CONFIDENTIAL COMMUNICATIONS

Unlike rules of exclusion (*e.g.*, the hearsay rule) which have as their common purpose the ascertainment of truth by guarding against evidence which is unreliable or calculated to prejudice or mislead, the evidential privilege of confidential communications does not in any way aid in this quest for truth.¹³ Instead, its sole purpose is the protection of interests and relationships which "are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice."¹⁴ Countered against this need for the fostering of certain interests and relationships is the "general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule . . ."¹⁵ Consequently, four fundamental conditions are generally considered essential to the establishment of a privilege against the disclosure of communications:¹⁶ (1) the communications must originate in a confidence that will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which, in the opinion of the community, ought to be sedulously fostered; and, (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the proper disposal of litigation.

Such a privilege was generally recognized at common law for confidential communications between spouses,¹⁷ and also those between an attorney and his client.¹⁸ Moreover, although no such privilege existed at common law for communications between (i) the physician and patient¹⁹ and (ii) the priest and penitent,²⁰ the privilege has been extended to these relationships by broad statutory enactment.

No accountant-client privilege was generally recognized at common law;²¹ however, approximately fourteen states have enacted legislation recognizing some form of such privilege. This article, therefore, will

13. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 *Texas L. Rev.* 447 (1938).

14. *Id.* at 448.

15. 8 *Wigmore, Evidence* § 2192, at 70 (McNaughton rev. ed. 1961).

16. *Id.* § 2285, at 527.

17. *Hopkins v. Grimshaw*, 165 U.S. 342 (1897).

18. *Baird v. Koerner*, 279 F.2d 623, 629 (9th Cir. 1960).

19. McCormick, *Evidence* § 101, at 211 (1954).

20. 8 *Wigmore*, *op. cit.* supra note 15, § 2285, at 528.

21. *Falsone v. United States*, 205 F.2d 734, 739 (5th Cir.), cert. denied, 346 U.S. 864 (1953).

generally analyze the extent to which confidential communications between a CPA and his client are privileged.

III. THE EXTENSION OF THE ATTORNEY-CLIENT PRIVILEGE TO THE ACCOUNTANT

There has been a relatively current expansion of the attorney-client privilege to include confidential communications between a client and his accountant.²² This extension is basically interposed when the accountant is found to be in the employ of the attorney; however, there is some conflict regarding the circumstances under which this privilege applies to accountants.²³

Attempts at such expansion, however, were rejected as recently as seventeen years ago when the court of appeals for the Ninth Circuit, in *Himmelfarb v. United States*,²⁴ denied the extension of the attorney-client privilege to the accountant on the ground that his presence at attorney-client conferences was not "indispensable in the sense that the presence of an attorney's secretary may be."²⁵ Moreover—although the accountant was engaged by the attorney to assist in the preparation of the defense of the client's income tax evasion case—the court reasoned that the accountant was merely "a convenience which, unfortunately for the accused, served to remove the privileged character of whatever communications were made."²⁶

Two years after *Himmelfarb*, the court of appeals for the Sixth Circuit in *Garipey v. United States*²⁷—in affirming an accused's conviction for income tax evasion—stated that an accountant's testimony was not privileged, because there was no evidence that the accountant was employed by the accused's counsel when he received the confidential communications. Regardless of this issue of employment, however, the court further reasoned, citing *Himmelfarb*, that "there is respectable authority that denies him the privilege status."²⁸

Some ten years after the *Garipey* case, however, the court of appeals for the Second Circuit, in *United States v. Kovel*,²⁹ rejected the rationale of *Himmelfarb*, stating:

We cannot regard the privilege as confined to "menial or ministerial" employees. Thus, we can see no significant difference between a case where the attorney sends a

22. See *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

23. Annot., 96 A.L.R.2d 125, 131-32 (1964).

24. 175 F.2d 924 (9th Cir.), cert. denied, 338 U.S. 860 (1949).

25. Id. at 939.

26. Ibid.

27. 189 F.2d 459 (6th Cir. 1951).

28. Id. at 463-64.

29. 296 F.2d 918 (2d Cir. 1961).

client speaking a foreign language to an interpreter to make a literal translation of the client's story; a second where the attorney, himself having some little knowledge of the foreign tongue, has a more knowledgeable non-lawyer employee in the room to help out; a third where someone to perform that same function has been brought along by the client; and a fourth where the attorney, ignorant of the foreign language, sends the client to a non-lawyer proficient in it, with instructions to interview the client on the attorney's behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal advice. . . .

This analogy of the client speaking a foreign language is by no means irrelevant to the appeal at hand. Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of the linguist in the second or third variations of the foreign language theme discussed above; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.³⁰

In the *Kovel* case, the accountant seeking to invoke the privilege was in the employ of the client's lawyers. In the later case of *United States v. Judson*,³¹ the court of appeals for the Ninth Circuit further extended the attorney-client privilege to materials prepared by an accountant who was hired by the client at the request of the attorney for the purpose of preparing the client's net worth statement for the attorney's use in a pending income tax investigation of the client. The court therein reasoned that it was immaterial whether the client or the attorney hired the accountant, so long as it was at the attorney's request and not before the client had consulted with the attorney. It thus appears that the Ninth Circuit has reversed the rationale of the *Himmelfarb* case.³²

Moreover, before the attorney-client privilege will apply to an "accountant-employee," it is imperative that said accountant was assisting an attorney in the performance of the latter's rendering of legal services to the client. If the attorney himself was acting in a non-legal capacity, such privilege would be inapplicable to communications made to the attorney as well as the accountant.³³

IV. STATUTORY RECOGNITION OF ACCOUNTANT-CLIENT PRIVILEGE

Since there was no accountant-client privilege recognized at common law, several jurisdictions have passed legislation recognizing such an

30. *Id.* at 921-22. (Footnote omitted.)

31. 322 F.2d 460 (9th Cir. 1963).

32. Comment, Accountants, Privileged Communications, and Section 7602 of the Internal Revenue Code, 10 St. Louis U.L.J. 252, 259 (1965).

33. *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961), 30 Fordham L. Rev. 809 (1962).

exemption.³⁴ Although there is no such federal legislation, fourteen states and Puerto Rico presently have such statutes.³⁵ However, despite the

34. Annot., 38 A.L.R.2d 670 & n4 (1954).

35. Arizona: "Certified public accountants and public accountants practicing in this state shall not be required to divulge, nor shall they voluntarily divulge information which they have received by reason of the confidential nature of their employment . . . [B]ut this section shall not be construed as modifying, changing or affecting the criminal or bankruptcy laws of this state or the United States." Ariz. Rev. Stat. Ann. § 32-749 (Supp. 1966).

Colorado: "A certified public accountant shall not be examined without the consent of his client as to any communication made by the client, to him in person or through the media of books of account and financial records, or his advice, reports or working papers given or made thereon in the course of professional employment . . ." Colo. Rev. Stat. Ann. § 153-1-7(b) (1953).

Florida: "All communications between certified public accountants and public accountants and the person for whom such certified public accountant or public accountant shall have made any audit or other investigation in a professional capacity, and all information obtained by certified public accountants and public accountants in their professional capacity concerning the business and affairs of clients shall be deemed privileged communications in all of the courts of this state . . ." Fla. Stat. Ann. § 473.15 (1965).

Georgia: "Any communications to any practicing certified public accountant transmitted to such accountant in anticipation of, or pending, the employment of such accountant shall be treated as confidential and not disclosed nor divulged by said accountant in any proceedings of any nature whatsoever." Ga. Code Ann. § 84-216 (1955).

Illinois: "A public accountant shall not be required by any court to divulge information or evidence which has been obtained by him in his confidential capacity as a public accountant." Ill. Ann. Stat. ch. 110 1/2, § 51 (Smith-Hurd 1954).

Iowa: "The information acquired by registered practitioners . . . in the course of professional engagements shall be deemed confidential and privileged . . . provided, however, that nothing contained in this section shall be construed to modify, change, or otherwise affect the criminal or bankruptcy laws of this state or of the United States." Iowa Code Ann. § 116.15 (1949).

Kentucky: "A certified public accountant or public accountant shall not be required by any court to divulge information or evidence which has been obtained by him in his confidential capacity as such." Ky. Rev. Stat. § 325.440 (1962).

Louisiana: "No certified public accountant, public accountant, or person employed by certified public accountant or public accountant, shall be required to, or voluntarily disclose or divulge, the contents of any communication made to him by any person employing him to examine, audit, or report on any books, records, or accounts . . . except by express permission of the person employing him or his heirs, personal representative or successors." La. Rev. Stat. Ann. §37:85 (1964).

Maryland: "Except by express permission of the person employing him . . . a certified public accountant or public accountant or any person employed by him shall not be required to . . . disclose or divulge the contents of any communication made to him by any person employing him to examine, audit or report on any books, records, accounts or statements nor any information derived therefrom in rendering professional service; provided that nothing in this section shall be taken or construed as modifying, changing or affecting the criminal laws of this state or the bankruptcy laws." Md. Ann. Code art. 75A, § 20 (1965).

Michigan: "Except by written permission of the client . . . a certified public accountant, or a public accountant . . . shall not be required to, and shall not voluntarily, disclose or

recognition by each of these statutes of some form of accountant-client privilege, there exists an over-all lack of uniformity in approach and scope. Although other differences exist, the basic underlying variances prevalent among these statutes are in the following three areas:³⁰

(1) some profess to apply to all matters generally, whereas others specifically exclude situations involving criminal or bankruptcy matters; (2) some extend the privilege solely to CPAs, whereas others include "Public Accountants" or variations thereof; and, (3) some profess to apply generally to all of the accountant's services, whereas many specifically exclude certain types of services.

Because such accountant privilege statutes are in a distinct minority, even their cumulative effect falls far short of offering complete protection. Moreover, conventional problems of conflicts of laws complicate the effect of such statutes—particularly for those accountants whose practices are not limited to one state. For example, assume an action is brought in a state court of X (which has no accountant privilege statute) based on

divulge information of which he or she may have become possessed relative to and in connection with any examination of, audit of, or report on, any books, records, or accounts which he or she may be employed to make. . . . Provided, however, That nothing in this paragraph shall be taken or construed as modifying, changing or affecting the criminal or bankruptcy laws of this state or of the United States." Mich. Comp. Laws § 338.523 (1948). (Italics omitted.)

Nevada: "An accountant cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment . . ." Nev. Rev. Stat. § 48.065 (1963).

New Mexico: "A certified or registered public accountant shall not be required by any court to divulge information or evidence which has been obtained by him in his confidential capacity as such . . ." N.M. Stat. Ann. § 67-23-26 (1953).

Pennsylvania: "Except by permission of the client . . . 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. . . . Provided, however, That nothing herein shall be taken or construed as modifying, changing or affecting the criminal or bankruptcy laws of this Commonwealth or of the United States." Pa. Stat. Ann. tit. 63, § 9.11a (Supp. 1965).

Puerto Rico: "No court shall require a certified public accountant or public accountant to divulge information or evidence obtained by him in his confidential capacity as such." P.R. Laws Ann. tit. 20, § 790 (1961).

Tennessee: "Certified public accountants practicing in this state shall not divulge nor shall they in any manner be required to divulge, any information which may have been communicated to them or obtained by them by reason of the confidential nature of their employment. . . . Except that nothing in any section of this chapter shall be construed as modifying, changing, or affecting the criminal and bankruptcy laws of this state or the United States." Tenn. Code Ann. § 62-114 (1955).

36. See Levy, Accountants' Legal Responsibility 63-64 (1954).

a cause of action arising in state Y (which has a general accountant privilege statute). The question of whether state X will enforce the privilege granted by state Y is not totally clear. It might depend on whether state X considers privileged communication statutes to be procedural or substantive.³⁷ Instead of such arbitrary and mechanical "characterization of the privilege as a matter of substance or procedure," it has been suggested that the only feasible test for recognition of such a privilege in conflicts cases is "that of reasonable reliance."³⁸ As stated by Professor Ehrenzweig:

Thus, a man, in the course of negotiating a contract with another, may have confided to his wife in reasonable reliance on the law of their marital domicile. Should his opponent be permitted to coerce her testimony under "the law of the contract"? Presumably the privilege accorded to her under the law of her domicile is designed to encourage and protect free disclosure among spouses. What justification could there be for infringing upon this privilege under any other law?³⁹

Then again, the solution to the problem has been suggested to revolve around the law of the state which has the most significant relationship with the communication.⁴⁰ In determining which state has the "most significant relationship," the following guidelines have been proposed:

The state which has the most significant relationship with a communication will usually be the state where the communication took place, which . . . is the state where an oral interchange between persons occurred, where a written statement was received or where an inspection was made of a person or thing. The communication may take place in a state different from that whose local law governs the rights and liabilities of the parties. So in a case involving a contract that is governed by the local law of state X . . . a question of privilege may arise with respect to a communication that took place in state Y.

The state where the communication took place will be the state of most significant relationship in situations where there was no prior relationship between the parties to the communication. If there was such a prior relationship between the parties, the state of most significant relationship will be that where the relationship was centered unless the state where the communication took place has substantial contacts with the parties and the transaction. So if husband and wife are domiciled in state X and the wife makes a statement to the husband in state Y while the spouses are spending a weekend in the latter state, X is the state which has the

37. See Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 Colum. L. Rev. 535 (1956).

38. Ehrenzweig, *Conflict of Laws* 356 (1962).

39. *Ibid.*

40. Restatement (Second), *Conflict of Laws* § 599b (Tent. Draft No. 11, 1965) provides that: "(1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong policy of the forum. (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect."

most significant relationship with the communications. Y, on the other hand, might be the state of most significant relationship if the spouses spent a considerable portion of their time there.⁴¹

Moreover, whether federal courts must follow the law of the forum state with respect to privileged communications has caused even more confusion.⁴² Insofar as the federal courts are concerned, however, the problem must be approached differently, depending on whether the action involves diversity jurisdiction, or if a federal question is involved.

In diversity jurisdiction the rule of *Erie R.R. v. Tompkins*⁴³ basically requires the federal courts to apply the substantive law of the forum state, leaving procedural matters therein to be decided by federal law.⁴⁴ If held to be substantive, then the federal courts under *Erie* must apply state law to determine the matter of privilege, whereas if it is held to be procedural, Rule 43(a) of the Federal Rules of Civil Procedure should determine its admissibility.⁴⁵ This distinction, however, is not made without difficulty, and there is considerable confusion in the decisions as to the application of the *Erie* rule and the Federal Rules to state evidentiary privileges.⁴⁶ Although there is some authority holding that a federal court in a diversity action is not bound to enforce a confidential communication recognized by state law,⁴⁷ the majority rule appears to be that, in such actions, the federal courts must enforce a confidential communication privilege recognized by the forum state.⁴⁸

In logically discussing federal non-diversity cases, separate analysis is necessary of those cases involving federal criminal jurisdiction and those involving federal civil questions. As to federal criminal jurisdiction, it has been held that a federal court is not bound to follow a confidential communication privilege recognized by the forum state.⁴⁹ The rule in-

41. *Id.*, comment e at 234-35. (Footnote omitted.)

42. See *Palmer v. Fisher*, 228 F.2d 603 (7th Cir. 1955), cert. denied, *Fisher v. Pierce*, 351 U.S. 965 (1956), which dealt with the question of the applicability of a privilege to a deposition where a diversity action was pending in a state which did not recognize said privilege, with the deposition being taken in a state recognizing the privilege. In *Application of Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964), a similar question was involved in which the diversity action was pending in a state which did recognize such a privilege, with the deposition of the witness being taken in a state which did not recognize said privilege.

43. 304 U.S. 64 (1938).

44. For a recent discussion of the *Erie* case, see *Hanna v. Plumer*, 380 U.S. 460 (1965).

45. Annot., 95 A.L.R.2d 320, 330 (1964). Fed. R. Civ. P. 43(a) is discussed in text accompanying notes 51-70 *infra*.

46. *Massachusetts Mut. Life Ins. Co. v. Brei*, 311 F.2d 463, 465 (2d Cir. 1962).

47. Annot., 95 A.L.R.2d 320, 327 (1964).

48. *Id.* at 330. The predominant ground for this majority view is that the court finds the privilege to be a matter of substance. However, in some cases the basis of the holding is (i) Fed. R. Civ. P. 43(a) or some other federal statute, (ii) that state statutory law must be followed, or (iii) not explicitly stated. *Id.* at 330-31.

49. *United States v. Kovel*, 296 F.2d 918, 921 n.2 (2d Cir. 1961). This court indicated

volving federal civil non-diversity questions, however, finds less unanimity among the federal circuits.

The Federal Rules of Civil Procedure govern the procedure in the United States district courts and apply "in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81."⁵⁰ Rule 43(a) provides:

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. *All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held.* In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.⁵¹

Rule 43(a) is a rule of admission and not of exclusion and is intended to liberalize admissibility of testimony; consequently, state rules of *admissibility* are generally controlling in federal courts, whereas state *exclusionary* rules are not.⁵² Evidence admissible, therefore, either as a result of federal statute or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity must be received even though state courts would hold otherwise.⁵³ In the case of privileged communications, however, questions often arise where state law excludes the evidence as privileged, and there is no federal statute or precedent allowing discovery.⁵⁴ Accordingly, although there is authority to the contrary,⁵⁵ it is generally held that privileged communications are principally controlled in federal civil non-diversity actions "by state

that such state-recognized privileges are probably also inapplicable in federal grand jury proceedings. Moreover, Fed. R. Crim. P. 26 states that "in all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, 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."

50. Fed. R. Civ. P. 1.

51. Fed. R. Civ. P. 43(a). (Emphasis added.)

52. 5 Moore, Federal Practice ¶ 43.04, at 1319 (2d ed. 1964).

53. *Id.* at 1327.

54. 4 *id.* ¶ 26.23(9), at 1483 n.7 (2d ed. 1963).

55. See Annot., 95 A.L.R.2d 320, 337 (1964), citing *United States v. Brunner*, 200 F.2d 276 (6th Cir. 1952); *Fraser v. United States*, 145 F.2d 139 (6th Cir. 1944), cert. denied, 324 U.S. 849 (1945); *Mariner v. Great Lakes Dredge & Dock Co.*, 202 F. Supp. 430 (N.D. Ohio 1962); and *Fahey v. United States*, 18 F.R.D. 231 (S.D.N.Y. 1955). The *Mariner* decision recognized that, although federal courts should respect state statutes on privilege, they should be free to give their own interpretation to the concept of privilege.

statutes . . . if no federal statutes or rules of court contrary to the state statutes are enacted or promulgated"⁵⁶

Of possibly greatest significance to the CPA, however, is the discord among the federal circuits on the issue of whether an administrative hearing under section 7602 of the Internal Revenue Code and subsequent court action to enforce a summons issued pursuant to that section, is a "civil action" covered by state law under Rule 43(a), or covered by federal law.⁵⁷ In analyzing the cases hereunder involving the privilege of confidential communications, it should be noted that some deal with privileges other than accountant-client, and the suggestion has been made to distinguish such cases on the ground that different privileges are involved.⁵⁸ Such distinctions, however, seem insignificant for our purposes because the basic underlying problem in all of them was whether state or federal law applied.⁵⁹

The Fifth Circuit, in *Falsone v. United States*,⁶⁰ refused to apply a Florida statute creating an accountant-client privilege and compelled an accountant served with a summons by an internal revenue agent (i) to testify before said agent concerning the tax liability of one of the accountant's clients and (ii) to bring with him all documents relating to the client's income tax returns. In drawing a distinction between the adminis-

56. 5 Moore, Federal Practice ¶ 43.07, at 97 (Supp. 1965). (Footnotes omitted.) See *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). An example of a contrary federal statute is Bankruptcy Act § 21(a), 52 Stat. 852 (1938), 11 U.S.C. § 44(a) (1964), which generally abolishes the spousal privilege in bankruptcy matters. As to other bankruptcy matters, however, the Federal Rules of Civil Procedure are generally made applicable by General Order 37, 11 U.S.C. App. (1964), although Fed. R. Civ. P. 81(a) provides, inter alia, that those rules "do not apply to proceedings in bankruptcy . . . except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States."

57. Report on Attorney-Client Privilege Study, ABA Bull., Section of Taxation, April 1965, p. 83, at 109. Int. Rev. Code of 1954, § 7602 provides: "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 or his delegate 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 required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons 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."

58. See *United States v. Summe*, 208 F. Supp. 925, 927 (E.D. Ky. 1962).

59. Comment, Accountants, Privileged Communications, and Section 7602 of the Internal Revenue Code, 10 St. Louis U.L.J. 252, 254 (1965).

60. 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S. 864 (1953).

trative proceeding there involved and the court action to enforce the summons, the court stated:

Appellant insists that this is a civil case, and, as such, subject to the Federal Rules of Civil Procedure . . . and, further, that under those rules the competency and privilege of witnesses is governed by state laws. . . . Both insistences might be conceded and it still would not follow that the privilege provided by the Florida statute would be applicable to appellant's testimony before the Internal Revenue agent under 26 U.S.C.A. § 3614. *Appellant has failed to observe the important distinction between the administrative proceeding under that section and the court action to enforce the summons under 26 U.S.C.A. § 3633 (a).* Rule 81(a)(3) makes the Rules of Civil Procedure applicable to "proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States" That means that the rules are applicable to the court action to enforce the summons under 26 U.S.C.A. § 3633(a). To contend that the proceeding itself before the Commissioner or the Internal Revenue agent is also a civil case subject to the Rules of Civil Procedure, and particularly to Rule 43(a) as to the admissibility of evidence, would be going too far. For, speaking generally, the system of rules of evidence in force for trials by jury or even in courts of equity is not applicable, either by historical precedent, or by sound practical policy, to inquiries of fact determinable by administrative tribunals or officers.⁶¹

In the same year as *Falsone*, the Second Circuit in *In re Albert Lindley Lee Memorial Hospital*⁶² rejected the application of a New York statute recognizing a physician-patient privilege and similarly held that the admissibility of evidence in an income tax investigation is to be decided by federal law, stating:

But determination of what evidence is admissible in an income tax investigation authorized by 26 U.S.C.A. § 3614(a) is a matter to be decided according to federal law. Such investigatory inquiry by a Government agent is not a judicial proceeding. As we said in *Bolich v. Rubel*, 2 Cir., 67 F.2d 894, 895, "It is strictly inquisitorial, justifiable because all the facts are in the taxpayer's hands." Even administrative agencies like the Federal Trade Commission, the Labor Board and the Interstate Commerce Commission have never been restricted by the rigid rules of evidence applicable in courts of law. As pointed out in *Torras v. Stradley*, D.C.N.D. Ga., 103 F. Supp. 737, 739, there is even less reason to restrict the revenue agent's inquiry by technical rules of evidence. We agree, therefore, with the decision in *Falsone v. United States*, that neither state statute prohibiting the use of privileged communications in court actions nor Rules 81(a)(3) and 43(a) are applicable to the investigatory inquiry by a revenue agent pursuant to 26 U.S.C.A. § 3614(a).⁶³

Some seven years after the *Falsone* and *Lindley* cases, however, the Ninth Circuit in *Baird v. Koerner*⁶⁴ applied the privileged communications rules of the forum state in reversing a judgment of civil contempt arising out of the refusal of an attorney to reveal the name of his client

61. Id. at 741-42. (Emphasis added.) (Footnote omitted.) (Citations omitted.)

62. 209 F.2d 122 (2d Cir. 1953), cert. denied, 347 U.S. 960 (1954).

63. Id. at 123-24. (Footnotes omitted.) (Citation omitted.)

64. 279 F.2d 623 (9th Cir. 1960).

to an internal revenue agent. In ruling that it involved a "civil case," to which Rule 43(a) applied, the court in *Baird* concluded:

In summation, we find (1) that because the relationship of client and attorney is created and controlled by the law of the various states; and that such creation and control is recognized, followed, and approved by the federal courts, the nature and extent of the privilege created between a lawyer and his client by the attorney-client relationship requires the federal courts to follow the state law; (2) that some considerable number of federal cases enunciate the rule that the state law governs the rule of privilege; (3) that some federal cases apply the law of the forum state, but do so without enunciating the principle under which they act; (4) that no federal statute forbids the use of the law of the forum state, and that if there is any definite rule set up by federal statute, it requires us to follow the law of the forum state, and (5) any federal "common law" which may exist does not require us to ignore the forum state law⁶⁵

Soon after *Baird*, the Seventh Circuit in *FTC v. St. Regis Paper Co.*⁶⁶—in applying the *Falsone* rationale to a subpoena of the Federal Trade Commission—attempted to reconcile the inconsistency between the *Baird* and *Falsone* cases as follows:

Baird v. Koerner is distinguishable from the case at bar because the appeal there was from a judgment of civil contempt against an attorney for his refusal to comply with a District Court order to identify, in an Internal Revenue Service inquiry, his client. We agree with that court that that case was ". . . a civil case." p. 628. The *Falsone* appeal was not from a judgment of contempt but, although an Internal Revenue proceeding, was from an order similar to the one before us. There is no inconsistency, therefore, between the view of the court in *Baird v. Koerner* and the decision in *Falsone* that such an administrative proceeding is not a civil case.⁶⁷

Irrespective of whether this distinction is valid, barely one month after *St. Regis*, the Second Circuit in *Colton v. United States*⁶⁸—in considering the question of what law applies to questions of privilege in a federal income tax investigation—rejected *Baird*, stating:

At the outset, we reiterate our view, stated in *In re Albert Lindley Lee Memorial Hospital* . . . that questions of privilege in a federal income tax investigation are matters of federal law. See *Falsone v. United States* For the reasons stated in our *Albert Lindley Lee Memorial Hospital* opinion, we do not agree with the Court of Appeals for the Ninth Circuit, *Baird v. Koerner* . . . that a hearing held by the Internal Revenue Service under § 7602 of the Internal Revenue Code of 1954 is a "civil action" governed by state evidence law under Rule 43(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., or that state law should govern for any other reason.⁶⁹

As a practical matter, this problem is more acute in situations involving the accountant-client privilege, or other similar privileges which exist

65. *Id.* at 632.

66. 304 F.2d 731 (7th Cir. 1962).

67. *Id.* at 734-35. (Citation omitted.) See also *Reisman v. Caplin*, 375 U.S. 440 (1964).

68. 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963).

69. *Id.* at 636. (Emphasis added.) (Citations omitted.)

solely as a result of state statutes, than in the case of the attorney-client privilege which was recognized at common law.⁷⁰ It has been suggested that *Colton* is the better reasoned decision, because it results in uniformity which "is desirable in the application of the attorney-client privilege in tax investigations."⁷¹ However, until the discrepancy between *Colton* and *Baird* is reconciled, it is not clear to what extent a state created accountant-client privilege would apply in an Internal Revenue administrative proceeding and subsequent court action relating to a summons issued therein.

V. EFFORTS TOWARD BETTER PROTECTION

In view of (i) the non-recognition of an accountant-client privilege at common law,⁷² (ii) state statutes recognizing such a privilege are in a distinct minority (14 out of 50),⁷³ and (iii) the uncertain effect such statutes have in other jurisdictions,⁷⁴ it is axiomatic that confidential communications to an accountant—unless he comes under the attorney's umbrella⁷⁵—are not secure from disclosure. Such protection can come only by federal legislation and statutory enactment by all the states.

Such a mammoth legislative undertaking, however, is by no means a simple task. There are numerous problems to be overcome, the least insignificant of which is general reluctance to extend the present scope of the privilege of confidential communications. Indeed, it has been expressed that "the tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege."⁷⁶ Moreover, a patronizing report of the American Bar Association's Committee on the Improvement of the Law of Evidence in 1937-38—in discussing so-called "novel privileges"—stated:

Of recent years, there have appeared on the statute book of several legislatures certain novel privileges of secrecy. *Their history has not been traced; but they bear the marks of having been enacted at the instances of certain occupational organizations of semi-national scope. The demand for these privileges seems to have been due, in part to a pride in their organization and a desire to give it some mark of professional status, and in part to the invocation of a false analogy to the long-established privileges for certain professional communications.*

The analogies are not convincing (though this is not the place for a demonstration). Moreover, the tendency is an unwholesome one. Yet it threatens to spread not only to other legislatures but to other occupations. The correct tendency would rather be to cut down scope of the existing privileges, instead of to create any new ones. We

70. See Report on Attorney-Client Privilege Study, *supra* note 57, p. 111.

71. *United States v. Threlkeld*, 241 F. Supp. 324, 326 (W.D. Tenn. 1965).

72. Note 21 *supra* and accompanying text.

73. See statutes cited note 35 *supra*.

74. See text accompanying notes 34-71 *supra*.

75. See text accompanying notes 22-33 *supra*.

76. *People ex rel. Mooney v. Sheriff*, 269 N.Y. 291, 295, 199 N.E. 415, 416 (1936).

recommend that the legislatures refuse to create any new privileges for secrecy of communications in any occupation; and particularly we recommend against any further recognition of

- (A) Privilege for information obtained by Accountants;
- (B) Privilege for information obtained by Social Workers;
- (C) Privilege for information obtained by Journalists.⁷⁷

As has been pointed out, after this report, significantly, "both the Model Code of Evidence, adopted in 1942 by the American Law Institute, and the Uniform Rules of Evidence, approved in 1953 by the National Conference on Uniform State Laws, excluded all of the so-called novel privileges."⁷⁸

Since the time of the writing of this report, however, the CPA profession has had an era of exceptional growth in its membership, a broadening in the scope of its services, and a formidable upgrading of its professional status.

Between 1950 and 1960 the aggregate number of CPAs in the United States had grown from 38,000 to 69,200, an increase of 82%; a growth rate in excess of three times that of either lawyers and judges, or physicians and surgeons during the comparable period.⁷⁹ By 1964 the aggregate number of CPAs increased to approximately 90,000, and it is anticipated that it should reach 120,000 by 1970.⁸⁰ Moreover, during the period 1950-1960, membership in the American Institute of Certified Public Accountants ("AICPA"), the only national CPA society, grew from 15,800 to 37,400 members, an increase of 137 per cent.⁸¹ As of 1964 AICPA membership had reached approximately 51,000, and by 1970 it is expected to have 70,000 members.⁸²

To measure the relative improvement in the CPAs' professional status in as precise terms as their numerical growth is an impossibility; however, a generalization that their overall status is "demonstrably better than it was twenty-five years ago"⁸³ can be alluded to by an analysis of objective data other than mere economic success and growth.

Recognition of professional status is granted by all fifty states which limit the use of the title "CPA" only to those who have met certain rigid qualifications.⁸⁴ Included in these requirements for qualifications in each of these jurisdictions is the passage of the same uniform examination

77. 63 A.B.A. Rep. 570, 595 (1938). (Emphasis added.) (Italics omitted.)

78. 8 Wigmore, Evidence § 2286, at 537 (McNaughton rev. ed. 1961).

79. Stettler & Vanatta, *Our Changing Profession*, J. Accountancy, Oct. 1963, p. 53.

80. Carey, *The CPA Plans for the Future* 342-43 (1965).

81. Stettler & Vanatta, *supra* note 79.

82. Carey, *op. cit. supra* note 80.

83. *Id.* at 379.

84. Penney, *The American Institute of CPAs—Past and Future*, J. Accountancy, Jan. 1962, p. 31, at 33.

which is both thorough and difficult. This achievement of voluntary uniformity by fifty state legislatures in testing professional prowess is not only remarkable and without parallel,⁸⁵ but is also indeed moot evidence of their high regard for the CPA profession.

The American Bar Association, recognizing that there are many areas of tax law where the services of lawyers and CPAs overlap, approved a statement of principles relating to the practice in the field of federal income taxation promulgated by the National Conference of Lawyers and Certified Public Accountants.⁸⁶ In the preamble to the statement of principles, the following recognition of the CPAs' competence was made:

In our present complex society, the average citizen conducting a business is confronted with a myriad of governmental laws and regulations which cover every phase of human endeavor and raise intricate and perplexing problems. These are further complicated by the tax incidents attendant upon all business transactions. As a result, citizens in increasing numbers have sought the professional services of lawyers and certified public accountants. Each of these groups is well qualified to serve the public in its respective field. The primary function of the lawyer is to advise the public with respect to the legal implications involved in such problems, whereas the certified public accountant has to do with the accounting aspects thereof. Frequently the legal and accounting phases are so interrelated and interdependent and overlapping that they are difficult to distinguish. Particularly is this true in the field of income taxation where questions of law and accounting have sometimes been inextricably intermingled. As a result, there has been some doubt as to where the functions of one profession end and those of the other begin.⁸⁷

In addition, evidence of high regard for the CPA profession can also be found embodied in recent federal legislation. Previously, in order for an individual to act as attorney or agent for a taxpayer in proceedings before the Treasury Department, he had to be enrolled in accordance with the regulations prescribed by the Director of Practice and had to hold a power of attorney executed by the taxpayer.⁸⁸ A congressional enactment on November 8, 1965, eliminated these special admission and enrollment requirements for both attorneys and CPAs who are members in good standing of their respective professions and who file written declarations that they are currently qualified and authorized to act on behalf of their clients.⁸⁹

Finally, an independent survey conducted several years ago for the AICPA documented the CPAs' reputation for integrity and high pro-

85. *Ibid.*

86. 76 A.B.A. Rep. 550-51 (1951). This statement of principles was also approved by the American Institute of Certified Public Accountants in the same year. *J. Accountancy*, June 1951, p. 869.

87. 76 A.B.A. Rep. 283 (1951).

88. See 6 CCH 1966 Stand. Fed. Tax Rep. ¶ 6029J.02.

89. 79 Stat. 1281, 5 U.S.C. § 1201(b) (Supp. I, 1965). See D.C. 230, 1966 Int. Rev. No. 37, at 20-21.

fessional standards.⁹⁰ This study was conducted through thorough interviews with presidents or chief executive officers of medium-sized manufacturing firms which retain independent public accountants.⁹¹ The results indicated, *inter alia*, that these executives generally held the accounting profession with high regard, and instances of criticism were relatively rare in comparison with similar surveys of attitudes toward other professions.⁹²

This article will neither attempt to suggest the extent to which a uniform accountant-client privilege should be enacted, nor solve the many problems that would accompany such creation. Not only has it been questioned whether such a privilege is in the public interest, but there is even a difference of opinion within the accounting profession itself whether or not such a privilege should exist.⁹³ As is pointed out, however, by John L. Carey, the Executive Director of the AICPA:

confidence that what is told an auditor in his professional capacity will be held inviolate should not only enable him to obtain all the information necessary for the conduct of an examination, but should place him in a position to perform the maximum service to his client. This too is in the public interest.⁹⁴

Despite disagreement on whether or not a general accountant-client privilege is in the public interest, consideration should be given to the much narrower issue of whether such a privilege is desirable in various areas of state and federal tax practice. It is generally in this area that the privilege protection is desired by accountants "as a protection to clients who may be unjustly charged with fraud, or need to be protected against fishing expeditions . . ." ⁹⁵ In discussing this area of tax practice—insofar as it relates to an attorney in the federal tax field—the court in *Colton v. United States*⁹⁶ stated:

There can, of course, be no question that the giving of tax advice and the preparation of tax returns—which unquestionably constituted a very substantial part of the legal services rendered the Matters by the Colton firm—are basically matters sufficiently within the professional competence of an attorney to make them *prima facie* subject to the attorney-client privilege.⁹⁷

Implicit in this holding is the recognition that the attorney-client privilege in tax practice serves the public interest. Certainly, the public interest would not change because these same services were performed by a CPA; and, to hold otherwise is not only inconsistent, but would put the CPA at

90. What Manufacturers Think of CPAs, J. Accountancy, July 1963, p. 35.

91. *Ibid.*

92. Carey, *op. cit. supra* note 80, at 380.

93. Carey, Professional Ethics of Certified Public Accountants 167 (1956).

94. *Ibid.*

95. Carey, *op. cit. supra* note 80, at 327.

96. 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963).

97. *Id.* at 637.

a substantial competitive disadvantage with the attorney in rendering his services in his permissible sphere of tax work.⁹⁸

To create even such a limited privilege in so many jurisdictions, however, would require substantial effort, support and planning. As a practical matter, such a task could only be effectively accomplished by a unified effort by the AICPA in conjunction with all the state CPA societies. Because this unity is so essential to the success of this venture, any such efforts should first be preceded by an analytical study of this entire area by the CPA profession itself. This study could serve as a guide in determining the scope and aid in the drafting of such proposed legislation. Keeping in mind that such a proposal must be made palatable to diverse legislative bodies and withstand the understandable pressures of competing professions seeking a similar privilege, the underlying study should be thorough and broad, including, but not limited to, consideration of such problems as:

- (1) Should such legislation be limited solely to CPAs, or should it be expanded to the accounting profession generally?
- (2) Should such privilege apply to CPAs and/or accountants who are not engaged in public accounting—for example, an accountant in the accounting department of a large industrial corporation?⁹⁹
- (3) In whose favor should the privilege inure—the accountant, the client, or both?¹⁰⁰
- (4) Should certain areas be excluded completely from the privilege regardless of the accountant's services, for example, bankruptcy or criminal matters, etc.?

98. Although Wigmore opposes general recognition of an accountant-client privilege, 8 Wigmore, Evidence § 2286 (McNaughton rev. ed. 1961), he does recognize a need for such a privilege in administrative proceedings: "A correct test for recognizing professional privilege would seem to be this: If the administrative department (bureau, board, commission, etc.) requires an oath of office and prior proof of professional qualifications and maintains a list of registered persons so qualified, or if in any other way its regulations treat the special practitioners as a licensed body having the responsibility of attorneys and subject to professional discipline, then the parties so represented are in the status of clients, and the clients are therefore entitled to the appropriate consequences, including the confidentiality of communications. This is so whether the special practitioners are skilled in the general body of law or only in the matter peculiar to the department. It should be borne in mind throughout, however, that, since the privilege is intended for the benefit of the client, the decision of this question mainly turns on the just interest of the party represented, not on that of the person appearing for him." *Id.* § 2300(a), at 582. (Emphasis omitted.) (Citation omitted.)

99. For a somewhat related problem which arose in the legal profession, see *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771 (N.D. Ill.), *aff'd* on rehearing, 209 F. Supp. 321 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963).

100. In *Dorfman v. Rombs*, 218 F. Supp. 905 (N.D. Ill. 1963), the court held that the Illinois accountant privilege statute did not protect the client, but applied only to the accountant himself.

- (5) Should any provision be made as to the legal title to the accountant's workpapers?¹⁰¹
- (6) To which of the four general areas of accounting should this privilege apply, namely: accounting, auditing, taxation and management consulting services? In considering this problem, it should be borne in mind that the accountant's services basically consist of (i) external reports to outsiders and (ii) internal reports, advice and assistance to management.¹⁰² In connection with the former, consideration must be given to preservation of the independent nature of said services, and to what extent divulgence in such external reports constitutes a waiver of the underlying confidential communication.

The study might—depending on the issue involved—consider dealing with the aforementioned and other problems either by specific statutory provision, or by leaving the particular question open for judicial interpretation. If it is imperative that a particular problem be uniformly handled in all jurisdictions, then it should be spelled out and not left to the chance of varying and diverse judicial interpretations.

VI. CONCLUSION

As the law presently exists, no accountant privilege statute affords adequate over-all protection to the confidential communications between an accountant and his client. If it is imperative that such communications be protected from divulgence before some future forum, it appears that the prudent course would be to make such disclosures to the accountant only upon the advice of counsel and in furtherance of said counsel's legal services. In this manner the accountant could be considered an "employee" of the attorney, enabling such communications to the accountant to qualify under the far broader privilege applicable between a client and his attorney and employees thereof. As was cautioned in *United States v. Kovel*,¹⁰³ however:

What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal* advice from the lawyer. If what is sought is not legal advice but only accounting service, as in *Olender v. United States*, 210 F.2d 795, 805-806 (9th Cir. 1954), see *Reisman v. Caplin*, 61-2 U.S.T.C. Par. 9673 (1961), or if the advice sought is the accountant's rather than the lawyer's, no privilege exists. We recognize this draws what may seem to some a rather arbitrary line between a

101. See Levy, Accountants' Legal Responsibility 53-59 (1954).

102. Carey, *op. cit. supra* note 80, at 126; cf. *United States v. Bowman*, 358 F.2d 421 (3d Cir. 1966). The Bowman decision applied the Pennsylvania accountant privilege statute which excludes from its protection of CPA professional services "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." Pa. Stat. Ann. tit. 63, § 9.11a (Supp. 1965).

103. 296 F.2d 918 (2d Cir. 1961).

case where the client communicates first to his own accountant (no privilege as to such communications, even though he later consults his lawyer on the same matter, *Garipey v. United States*) and others, where the client in the first instance consults a lawyer who retains an accountant as a listening post, or consults the lawyer with his own accountant present. But that is the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of client and lawyer under conditions where the lawyer needs outside help.¹⁰⁴

Moreover, although "the peculiar character of accountant's work papers has raised questions which are not yet truly resolved,"¹⁰⁵ it appears advisable that any work product prepared by or materials given to the accountant under such an arrangement should, by agreement, be retained by the attorney so as to preserve their confidential nature and insure that their production be sought from the attorney instead of the accountant.¹⁰⁰ Such possession by either the individual taxpayer or his attorney—instead of continued possession by the accountant¹⁰⁷—would hopefully shroud these materials with the additional protection of said taxpayer's fifth amendment privilege against incrimination.¹⁰⁸

104. *Id.* at 922. (Citation omitted.) (Emphasis omitted.)

105. Representations by Counsel at Formal Internal Revenue Interrogation, *ABA Bull.*, Section of Taxation, April 1965, p. 37, at 42.

106. See Comment, *supra* note 59, at 260.

107. It has been suggested that an accountant, with proper representative authority, should also be able to assert the taxpayer's constitutional rights. Cohen, *Accountants' Workpapers in Federal Tax Investigations*, 21 *Tax L. Rev.* 183, 220 (1966).

108. As to the application of the fifth amendment privilege against incrimination to individual taxpayers' cancelled checks and bank statements which were in their attorney's possession, see *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963). In rejecting the government's attempt to subpoena such materials from the attorney (even though they were unprotected by the attorney-client privilege because their transfer from the client did not constitute a confidential communication), the court stated: "The government states that the evil which the Fifth Amendment sought to prevent is not present when the prosecution seeks evidence of A's guilt from B. But this argument ignores the realities of the relationship existing where B is A's attorney. An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has. No other 'third party,' nor 'agent,' nor 'representative' stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry." *Id.* at 467. Cf. *United States v. Cohen*, 250 F. Supp. 472 (D. Nev. 1965), which applied the privilege against incrimination, *inter alia*, to an accountant's workpapers (regardless of their ownership) which were held by the taxpayer in his personal capacity in rightful and indefinite possession. On the other hand, *In re Fahey*, 300 F.2d 383 (6th Cir. 1961), and *Deck v. United States*, 339 F.2d 739 (D.C. Cir. 1964), cert. denied, 379 U.S. 967 (1965), held that the delivery of such workpapers to the taxpayer's counsel leaves them amenable to required production. These cases were distinguished in the Cohen case, however, on the ground that "taxpayers in those cases could not claim the rightful and indefinite possession, since the accountants, found to have been the owners, had demanded that the work papers be given to the government (*Fahey*) and that they be returned (*Deck*)." 250 F. Supp. at 475. (Italics omitted.)