THE OVERLOOKED PRIVILEGE: ACCOUNTANT–CLIENT

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A great deal of attention, and rightfully so, is paid to the attorney-client, doctor-patient, and priest-penitent privileges. In the wake of a recent decision in Illinois however, accountants, and those who represent them, should take a second look at the accountant-client privilege and in particular the scope of the privilege and even more fundamentally, to whom the accountant-client privilege belongs. In *Brunton v. Kruger*, 2015 IL 117663, the Illinois Supreme Court held that, based upon the language of the statute creating the privilege, that the accountant-client privilege contains no testamentary exception and that the privilege belongs to the accountant, not the client allowing the accountant to control disclosure regardless of the client's approval or disapproval. This development should focus those who represent accountants on who the holder of the privilege is in their state and, in the context of this case where the client was deceased, who has authority to waive the privilege.

The Illinois Accounting Act

The accountant-client privilege is created in Illinois by Section 27 of the Illinois Public Accounting Act ("the Act"), provides that "a licensed or registered certified 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 licensed or registered certified public accountant. This Section shall not apply to any investigation or hearing undertaken pursuant to this Act." 225 ILCS 450/27. Section 8 of the Act defines accounting practice as follows:

> Persons, either individually, as members of a partnership or limited liability company, or as officers of a corporation, who sign, affix or associate their names or any trade or assumed names used by them in a profession or business to any report expressing or disclaiming an opinion on a financial statement based on an audit or examination of that statement, or expressing assurance on a financial statement, shall be deemed to be in practice as licensed public accountants or licensed certified public accountants within the meaning and intent of this Act.

The scope of Section 27 in defining the accountant-client privilege has not been examined frequently by the courts and when it has it has not often been done by Illinois state courts. Accordingly, this case was only the second time the Illinois Supreme Court addressed this provision (*In re October 1985 Grand Jury No. 746,* 124 Ill. 2d 466 (1988), and the first time in which the Court was presented a case in which the information sought to be protected was not intended to be disclosed to third parties and where the services provided extended beyond those typically provided by accountants.

Supporting an interpretation of the privilege in Illinois that the scope of the privilege extends to activities beyond simple accounting services is Section 0.02 which states that the Act's public policy is "[t]o promote the dependability of information which is used for *guidance in financial transactions* or for *** *assessing the status or performance of non-commercial enterprises* whether public, private or governmental." (Emphasis added.) 225 ILCS 450/0.02(a). The Act also seeks to regulate the "[p]reparing, auditing or examining financial statements and issuing a report expressing or disclaiming an assurance on such statements." 225 ILCS 450/0.02(c). This Section indicates that the legislature sought to regulate not only the activity set forth in Section 8 of the Act, but additional activities and services licensed CPAs typically perform. This extension was important in this case where the accountant was involved in providing services related to estate planning.

Background Facts

In *Brunton v. Kruger*, the daughter of Helen and Gordon Kruger, June Brunton, initiated a will contest against her brother Robert Kruger and other family members. *Brunton v. Kruger*, 2015 IL 117663, ¶ 4. June, who was not named in the trusts of her parents, alleged undue influence on behalf of certain family members who were named as beneficiaries of the trusts, including Robert. *Id.* She also cited her mother's diminished capacity at the time the trust documents were executed as being subjected to any outside influence. *Id*.

Prior to their death the Krugers consulted with the accounting firm of Striegel, Knobloch & Co., LLC (Striegel) during the process of planning their estate. *Id*. at ¶ 5. Striegel provided information to assist the attorneys for the Krugers in preparing trust documents

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ACCOUNTANT-CLIENT PRIVILEGE, CONT'D

and "pour over" wills. *Id*. Brunton's attorney claimed that Robert's and the others' alleged undue influence on the Krugers took place during the estate planning process and sought to obtain information and evidence relating to discussions and information provided by the Krugers and any of the trusts beneficiaries to Striegel during the preparation of the trust documents. *Id*. at ¶¶ 5-6. Brunton issued a discovery subpoena which was later followed by the Estate issuing an identical subpoena for the same information. *Id*.

One of Striegel's CPAs complied with the Estate's subpoena, turning over all of the documents in its possession that related to the Krugers' estate planning. *Id*. at ¶ 7. The CPA did not comply with Brunton's subpoena and Brunton filed a motion to compel compliance. In a motion to quash the subpoena, Striegel invoked Section 27 of the Act, claiming that the documents were protected from disclosure. *Id*.

Decision of the Trial Court

The circuit court found that the documents were protected under Section 27, but also found that Striegel waived the privilege when it provided the documents to the Estate. *Id*. ¶ 9. The circuit court further found that Section 27 was nevertheless overcome because the donative and testamentary intent of the now-deceased clients were at issue. *Id*. Striegel's attorney, Matthew Tibble, refused to comply with the discovery order and requested that he be found in contempt and fined for his refusal so as to allow the matter be reviewed by the Appellate Court. *Id*.[1]

Decision of the Illinois Appellate Court

The Appellate Court vacated the contempt order against Tibble and affirmed the circuit court. *Id*. at ¶ 11. The Court concluded that estate planning is a type of activity performed by a CPA to be included in the general term of "accounting activities" as provided in the statute under Section 8.05, and thus subject to Section 27. *Id*. The Court agreed with the circuit court that the statutory privilege in Section 27 was subject to the same testamentary exception as the common law attorney-client privilege because, in that situation, the benefit of disclosure outweighs any injury to the relationship between CPAs and their clients. *Id*. The Court further concluded that the client, not the CPA, is the holder of the privilege. *Id*. As the holder, the client had the power to waive the privilege, which the Court held occurred because the Estate filed a brief with the Court in support of the circuit court's decision. *Id*.

Decision of the Illinois Supreme Court

While the Supreme Court affirmed the Appellate Court and the circuit court's judgments, it reversed their decisions as to the testamentary exception and the privilege holder. *Id*. at ¶ 90.

As an initial matter, the Court addressed Brunton's argument that she raised in the Appellate Court that Striegel's estate planning activities fell outside the definition of "accounting activities" as provided in Section 8.05 of the Act. *Id*. at ¶¶ 18-19. The Court agreed with the analysis of the Appellate Court that the legislature intended the privilege of Section 27 to apply to information obtained by an accountant in the course of providing estate planning services as it applies to any of the expressly listed activities in Section 8.05(a) of the Act. *Id*. at ¶¶ 20-21.

The Court, however, rejected the circuit court and Appellate Court's reasoning that a testamentary exception applies to Section 27. *Id*. at ¶ 48. The Court observed that the one clear and major difference between the testamentary exception allowed in the attorney-client common law privilege and Section 27 is that Section 27 is a creature of statute which means that the legislature has determined that public policy trumps the truth-seeking function of litigation in certain circumstances. *Id*. at ¶ 63. Thus, while Brunton, the Estate, the circuit court and the Appellate Court, all endorsed a testamentary exception necessary to aid the search for the truth behind the creation of the now-deceased Krugers' wills and trusts, the legislature had simply not allowed for such an exception in a will contest. *Id*. at ¶¶ 49, 67, and 69. The Court suggested that if the legislature wanted to create such an exception it could do so by amending Section 27 to bring it in line with other privileges created by the various acts in chapter 225. *Id*. at ¶ 67.

The Court also rejected the Appellate Court's reasoning that the client, not the accountant, is the holder of the privilege in Section 27. *Id*. at ¶¶ 33-34. In doing so, the Court distinguished the privilege in Section 27 from the number of other evidentiary privileges in the Illinois Code of Civil Procedure by the fact that the accountant privilege is codified in the Public Accounting Act which is not part of the legislatively created body of evidentiary privilege, but expressly tied to the legislative scheme enacted to regulate the public accounting profession in Illinois. *Id*. at ¶ 35. The Court explained that the separate treatment of privileges in the context of the accountant-client relationship combined with the plain language of Section 27, reveals the legislative intent to confer the privilege in Section 27 on the accountant who provides the services, not the client who receives them. *Id*. at ¶ 46.

The Court observed that the accountant's privilege is, for practical purposes, a limited one. *Id*. at ¶ 47. It made clear that if the client is still living, the privilege does not bar the client from voluntarily producing the information, or prevent a client from disclosing information in his possession under court order. *Id*. Rather, the Court observed that the accountant's full power over the information or evidence involves situations such as the one in this case where the client is de-

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ACCOUNTANT-CLIENT PRIVILEGE, CONT'D

ceased. *Id*.

Next, in deciding that the CPA holds the privilege, the Supreme Court found the issue of waiver "simple" to resolve. *Id*. at ¶ 85. The Court explained that whenever a privilege holder voluntarily discloses or consents to disclosure of privileged information to a third-party, the privilege is waived. *Id*. at ¶¶ 86-87. In this case, the Court held that the accountant, as the privilege holder, disclosed the information and evidence to the Estate in the subpoena seeking the same information and evidence as Brunton, the privilege was waived and Brunton is entitled to compliance of her subpoena. *Id*. at ¶ 88.

Contrast With Other States

Illinois seems to stand in stark contrast with the law of other states regarding the holder of the privilege. The language of most states' statutes requires the client's consent in order to disclose information of conversations by the accountant with the client. To wit:

Colorado: "A certified public accountant shall not be examined *without the consent of his or her client* ***." C.R.S. 13-90-107.

Florida: *"[a] client has a privilege* to *refuse* to *disclose,* and to prevent any other person from disclosing, the contents of confidential communications with an accountant ***." Fla. Stat. § 90.5055.

Georgia: "all information obtained by a certified public accountant *** shall be deemed privileged communications in all courts ***; and no such certified public accountant *** shall be permitted to testify with respect to any of such matters, *except with the written consent of such person or client* ***." Ga. Code Ann. § 43-3-29.

Idaho: "Any *** certified public accountant, cannot, *without the consent of his client,* be examined as a witness as to any communication made by the client" Idaho Code § 9-203A.

Kentucky: "[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" K.R.S § 325.44.

Kansas: "[n]o certified public accountant shall be examined through judicial process or proceedings *without the consent of the client* as to any communication made by the client to the certified public accountant" K.S.A.§ 1-401.

Louisiana:" *fa] client has a privilege* to *refuse* to *disclose,* and to prevent another person from disclosing, a confidential communication, whether oral, written, or otherwise, made for the purpose of facilitating the rendition of professional accounting services to the client." La. C.E. Art. 515.

Maryland: *"unless expressly permitted by a client* ***, a licensed certified public accountant or firm may not disclose: (1)The contents of any communication made to the licensed certified public accountant or firm" Md. Code Ann., Cts. & Jud. Proc. § 9-110.

Michigan:" *Except by written permission of the client* ***, a licensee *** shall not disclose or divulge and shall not be required to disclose or divulge information. MCLS§ 339.732.

Missouri: *"Except by permission of the client* for whom a licensee performs services ***, a licensee *** shall not voluntarily disclose information communicated to the licensee § 326.322 R.S.Mo.

Nevada: "Who may claim privilege. 1. *The privilege may be claimed by the client* ***; 2. The person who was the accountant may claim the *privilege but only on behalf of the client* ***." Nev.

Oklahoma: *"a client* has *a privilege* to *refuse* to disclose, and to prevent any other person or entity from disclosing, the contents of confidential communications with an accountant ***." 12Okl. St. § 2502.1.

Pennsylvania: *"Except by permission of the client* ***, a licensee *** shall not be required to, and shall not voluntarily, disclose or divulge information of which he may have become possessed unless the sharing of confidential information ***." 63 P.S. § 9.11 a.

In addition, the Indiana Court of Appeals in *Ernst & Ernst v. Underwriters National Assurance Co.,* 178 Ind. App. 77 (Ind. Ct. App. 1978), observed that while the Indiana accountant privilege did not reference the client, the Court nevertheless found language to suggest that the client had power over the privilege. The Tennessee Supreme Court in *Federal Insurance Company v. Arthur Anderson & Co.*, 816 S.W.2d 328 (Tenn. 1991) following the *Ernst* court without analysis.

Analysis

The *Brunton* case illustrates the importance of identifying the holder of the privilege, however, the inquiry cannot end there. If, as is the case in most states, the privilege is held by the client, once the client is deceased the issue to be determined is who the client is who can assert the privilege. The Illinois Supreme Court held that disclosure of the information to the estate of the accountant's client was a waiver of the privilege. In the context of the attorney-client privilege disclosure by the client to the attorney would work no such waiver.

In order to provide accountants the most robust defense to the privilege, accounting firms and those who represent them should address their engagement letters to define the accountant-client privilege. Accounting firms generally attach "terms and conditions" to their basic engagement letters. These terms and conditions include such issues as confidentiality, ownership

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ACCOUNTANT-CLIENT PRIVILEGE, CONT'D

and retention of workpapers, restrictions of the use of reports, termination of the agreement, liability limitations, hold harmless and indemnification terms, and the state law governing the agreement.

In light of the Illinois Supreme Court's decision, the issues of confidentiality, ownership and retention of workpapers and the state law governing the agreements become critical. It is important for accountants to consult with counsel when demands for their workpapers are received.

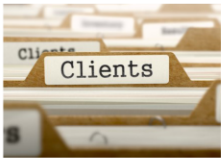
During the course of performing accounting services, accountants may have access to clients' proprietary information, including, but not limited to, information regarding trade secrets, business methods, plans, or projects. Terms and conditions generally acknowledge that such information, regardless of its form, is confidential and proprietary to those clients and the accountants will not use such information for any purpose other than the services subject to the engagement.

Professional standards require that accounting firms create and retain certain workpapers for specific to engagements. All such workpapers created in the course of engagements are and shall remain the property of the accounting firms. The accounting firms maintain the confidentiality of all such workpapers as long as they remain in their possession.

Under certain circumstances, accounting firms may be required to make their workpapers available to regulatory authorities or by court order or subpoena. In states in which the client is the holder of the privilege, agreements should state that disclosure of confidential information in accordance with requirements of regulatory authorities or pursuant to court order or subpoena will not constitute a breach of the provisions of this agreement. In the event that a request for any confidential information or workpapers covered by this agreement is made by regulatory authorities or pursuant to a court order or subpoena, accounting firms should notify their clients of such request in a timely manner and cooperate with their clients should the clients attempt to limit such access. Such provisions should survive the termination of these agreements.

Accounting firms should also reserve the right to destroy workpapers created in the course of their engagements in accordance with their record retention and destruction policies, which are designed to meet all relevant regulatory requirements for retention of workpapers.

In light of *Brunton*, defense practitioners and accountants across the country should take time to focus their attention on the accountant-client privilege as lawyers who represent attorneys do as the starting point of their representation and adjust engagement letters accordingly.



Endnote

1. In Illinois contempt, which is non-contumacious, as was the case here, is the approved manner to obtain review of an otherwise interlocutory discovery order.

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