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# Can You Keep a Secret?

*What privileges and protections apply to Illinois CPAs and their clients?*

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Liability

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Not all information is intended for public disclosure, and the law recognizes this fact. The two most common legal protections are the attorney-client privilege and the work-product doctrine. In Illinois, accountants also have their own privilege, known as the accountant client privilege.

Of course, an assertion of protection is easy to make. But, if contested, a court may rule that protections simply don't apply. *Stopka vs. American Family* is a case in point.

The Stopkas had employed a builder for a single-family home project. The builder, in turn, hired various subcontractors, one of which caused a fire. Subsequently, the subcontractor's general liability carrier, American Family, was engaged to remediate the construction.

Aside from their lawyers, the Stopkas also relied heavily on their CPA and financial advisor, Wolowicki, who provided advice and acted as their representative in communications with American Family, various remediation subcontractors and their attorney.

When the relationship between the Stopkas and American Family broke down, the Stopkas filed suit against the liability carrier and, as is customary, American Family requested the formal production of certain documents. The Stopkas withheld 22 emails sent to and from Wolowicki and their attorney, asserting that these items were protected by the attorney-client privilege, the work-product doctrine and the accountant-client privilege. The Court therefore was forced to decide on the applicability of these protections.

The attorney-client privilege is designed to encourage open discussion between attorneys and their clients. To be enforced, the parties have to establish that the communications 1). were made to any attorney acting in their legal capacity, 2). originated in the belief that they would not be disclosed, 3). involved legal advice, and 4). remained confidential. The privilege protects communications flowing from the client to the attorney and vice versa, but is to be construed within the narrowest limits possible.

By contrast, the work-product doctrine protects documents that an attorney or party representative creates in anticipation of litigation. A lawsuit need not be underway, "provided the prospect of litigation is not remote." The protection prevents the disclosure of protected documents or communications, but doesn't protect the underlying facts from disclosure.

The statutory accountant-client privilege in Illinois, like the attorney-client privilege, promotes open and forthright disclosures by individuals using accounting services. It has four requisite elements: 1). the communication must originate in the confidence that it will not be disclosed, 2). the confidential element must be essential to maintaining the relation of the parties involved, 3). the relationship itself must be one that public opinion believes should be protected, and 4). disclosing the communication would injure the relationship between the parties more than the underlying litigation would be benefited by its disclosure.

Furthermore, the accountant-client privilege doesn't extend to communications disclosed to third parties, unless those parties have a common interest with the disclosing party.

Once the Court compared these privileges, it turned to the question of application. As for the work-product doctrine, the Court concluded that certain documents were protected insofar as they were created just before or soon after the action was filed. However, it concluded that the accountant-client privilege didn't prevent disclosure, and further noted that the privilege only protects "accounting services involving opinions on financial statements," and doesn't extend to non-financial services.

Although the Court acknowledged there were services that could be interpreted as giving rise to the accounting privilege, it concluded that the relevant issue wasn't the general nature of Wolowicki's work, but rather whether the specific documents named involved activities that were protected. Ultimately, the Court concluded that the Stopkas failed to carry the burden of proof.

For purposes of the attorney-client privilege, the Court separated the remaining emails into two categories: Emails between Wolowicki and the Stopkas, and emails sent to or by one of the Stopkas' attorneys to Wolowicki and/or the Stopkas.

Under the first category, the Court noted that just because an email doesn't involve an attorney as a direct sender or recipient, it doesn't necessarily mean that the attorney-client privilege won't apply. However, the Court also noted that, irrespective of the sender or recipient, the attorney-client privilege extends only to communications that either seek or give legal advice. Concluding that this category of documents didn't reflect any intention of confidentiality, the Court determined that it wasn't protected by the attorney-client privilege.

Under the second category, the Court noted that the mere involvement of an attorney isn't sufficient to establish the attorney-client privilege. Rather, each document has to show all the hallmarks of the privilege. The Court also noted that a privilege can be waived by disclosure to third parties, but that analysis of the attorney-client privilege also has to consider whether the third party is a proper agent of the client.

Ultimately, the Court concluded that disclosure of information to Wolowicki, who was a "central cog" in the Stopkas efforts to resolve this matter, didn't constitute a waiver of the attorney-client privilege. Accordingly, it found that, in those instances where the communication was to or from an attorney and originated in the belief of confidentiality regarding legal advice and remained confidential, the attorney-client privilege did apply.

For accountants, attorneys and the people who rely on them, the Stopka decision is a useful example of how information should be generated and shared in order to protect

it from disclosure, and how a court ultimately will apply those protections.

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