

THE DOCKET

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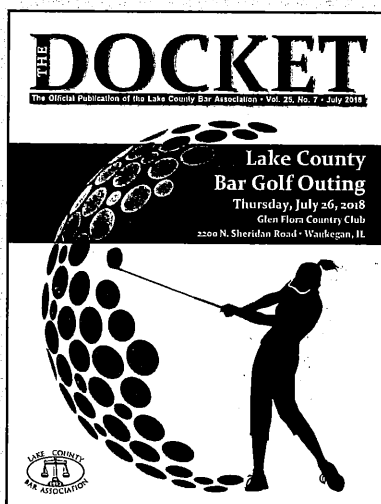
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One of These Things Is Not Like The Others

The CPA Privilege and Will Contests

Brunton V. Kruger

BY CHUCK NEWLAND

The term “privilege” can mean very different things depending on the context in which it is used. In the everyday world, it can mean a benefit, advantage or favor given to a particular person or group of persons that is not provided to others.¹ It can also mean a special opportunity that makes a person proud.² Privilege can also mean the advantage that wealthy people are perceived to have that the not so wealthy aspire to.³

Regardless of how it is applied, the term privilege connotes something out of the ordinary or special. In the legal world the term privilege also implies something special. That special something is communication. What is it about certain communication in our legal system that makes it so special that it is tagged with the term “privilege?” What is the effect of that tag? The second part of the question is easier to answer than the first. The effect of something tagged as a “privileged communication” is that it is not to be shared with an opposing litigant or

anyone outside a certain relationship.

To answer the first part of the question, we have to start with what we as attorneys have been taught to believe is the cornerstone of our legal system: the **search for the truth**. In fact, when it comes to our adversary system and the discovery process that allows for both sides to have access to information, our courts have repeatedly stated the mantra: “The purpose of the discovery rules ‘is to prevent surprise or unfair advantage and to aid in the search for the truth.’”⁴ This paramount goal of the search for the truth rises to the highest levels of our judicial system and our government. Our criminal justice system is based on an

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¹ “Privilege.” Merriam-Webster.com, Merriam-Webster, www.merriam-webster.com/dictionary/privilege. Accessed 26 Apr. 2018.

² *Id.*

³ *Id.*

⁴ *People v. Daniels*, 75 Ill.App.3d 35, 41(1st Dist. 1979).

adversary system, and the integrity of and public confidence in this system depends on a complete presentation of all relevant facts before a court of law.⁵ Of course, that ideal is not limited to the criminal justice system.

"The discovery provisions of the Civil Practice Act and our Supreme Court Rules were enacted to broaden the scope of available discovery to enhance the true function of a trial as a means of ascertaining the truth, and to provide methods from the prompt and just disposition of litigation."⁶

How ironic is it that a societal institution developed for the purpose of doling out justice to its members by creating a system that searches for the truth, implements rules that categorizes certain communication as so special that it is not to be shared in the truth-seeking process? Why, in a system in which the outcome sought is a just result based on the exposure of truth, does such privilege exist? Given that our system of justice is an adversarial system, communication between a client and his legal representative is as easy to comprehend as poker players not showing their hands to opposing players. If that were the extent of privileged communication in the legal world, the concept might not be quite so antithetical to the institution.

The simple answer is that there are certain relationships in other institutions of our society that would simply be ineffective and those institutions are deemed more important than the truth-seeking goals of the justice system. It actually sounds crazy when you say it that way, but without certain privileged communications, entire institutions could be completely undermined for fear of communications being used in a court of law. Yet, in our justice system, people go to jail for not communicating the truth or omitting the truth in certain circumstances. People are sued for millions and lose everything they own for not communicating the truth or omitting the truth. However, in this same system, certain communications that would expose the truth are allowed to be treated as non-existent and to even ask about them is verboten.

Those practicing law for decades might be shocked at just how many institutions in the State of Illinois are deemed more important than the pursuit of the truth, such that communications within those institutions are privileged, not only in the real world, but in the institution that requires all to be treated equal in the pursuit of justice. The purpose of these remarks is not to be sarcastic or to denigrate these institutions or the need for the recognized privileges. It is simply to state the obvious--truth and justice by any means is not paramount in our society.

SOME OF THESE PRIVILEGES, AND WHO HOLDS THE PRIVILEGE, ARE CODIFIED:

PRIVILEGE	HOLDER	AUTHORITY
Husband/Wife	declarant spouse	735 ILCS 5/8-801
Doctor/Patient	patient	735 ILCS 5/8-802
Rape Crisis Panel		735 ILCS 5/8-802.1
Counselor of Victims of Violent Crimes	victim	735 ILCS 5/8-802.2
Informant	informer	735 ILCS 5/8-802.3 must request/ balancing test
Clergy	declarant	735 ILCS 5/8-803
Union Agent/Member	member	735 ILCS 5/8-803.5
Reporter	source	735 ILCS 5/8-801 to 909
Voter	voter	735 ILCS 5/8-910
Language Interpreter	underlying privilege	735 ILCS 5/8-911
Deaf Interpreter	underlying privilege	735 ILCS 5/8-912
Clinical Psychologist	patient	225 ILCS 15/5
Social Worker	patient	225 ILCS 20/16 (1)(b)
Marriage/Family Therapist	provider of info	225 ILCS 55/70(a)
Professional Counselor	provider of info	225 ILCS 107/75(a)
Genetic Counselor	provider of info	225 ILCS 135.90(a)
Attorney/Client	client	Ill. Sup. Ct. Rule of Prof. Conduct 1.6

CERTIFIED PUBLIC ACCOUNTANT PRIVILEGE (225 ILCS 450/27)

When examining the application of privilege, one has to not only consider the content of what is believed to be privileged but also who is the "holder" of the privilege in order to have standing to raise it as an obstacle to disclosure. In *In re October 1985 Grand Jury No. 746*,⁷ a subpoena for taxpayer's records was issued to an accountant.⁸ The accountant refused to testify based on privilege.⁹ The trial court granted the motion to quash the subpoena.¹⁰ The First District Appellate Court reversed.¹¹ The Illinois Supreme Court affirmed the appellate court and directed the trial court to va-

⁵ See *United States v. Nixon*, 418 U.S. 683, 709, (1974).

⁶ *Stimpert v. Abdour* 24 Ill.2d 26, 31 (1962).

⁷ *In re October 1985 Grand Jury No. 746*, 124 Ill.2d 466 (1988).

⁸ *Id.* at 469

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 475

cate the order quashing the subpoena.¹² The basis for that ruling was that tax clients provide tax information to accountants with the understanding that the information will be shared with certain third parties, IRS, Dept. of Revenue, local taxing authorities, etc.¹³ This is the same exception that applies to attorney-client communication.¹⁴

In *FMC Corp. v. Liberty Mutual Insurance Co.*, a declaratory judgment action was filed against an insurance company as to coverage for environmental liability.¹⁵ The insurance company subpoenaed Peat Marwick seeking accounting records as to contingent environmental liabilities.¹⁶ The accounting firm's motion to quash was granted.¹⁷ However, in relying on *Grand Jury No. 746*, the appellate court reversed that ruling as to certain tax documents and those shared with third parties only.¹⁸

Significantly neither the *Grand Jury No. 746* nor the *FMC Corp.* courts saw the need to discuss the issue of who the "holder" of the privilege is in reaching their decisions. To address that issue they may have looked to a much earlier federal court case for some guidance. In *Dorfman v. Rombs*,¹⁹ the plaintiff sought to enjoin accountants and quash an IRS subpoena to prevent the disclosure of information.²⁰ The case was dismissed on the specific finding that because the CPA Act does not mention the word "client," the privilege inures to the accountant.²¹ The court analogized the CPA privilege to the attorney work product privilege.²² Other than noting the lack of the use of the word "client" in the statute, there was no analysis of a legislative scheme or policy.

That brings us to *Brunton v. Kruger*,²³ and the intersection of the CPA privilege with matters involving contested estates. In *Brunton*, the daughter of the deceased filed a will contest and subpoenaed documents from the deceased parent's CPA firm.²⁴ The CPA firm

produced certain documents to the estate pursuant to subpoena but refused to produce documents to the daughter by asserting privilege.²⁵ The court ordered the CPA to produce the same documents, finding that the privilege was waived due to the information being shared with an employee of the CPA firm who was not a licensed or registered certified accountant.²⁶ The attorney for the CPA asked to be held in contempt for purposes of obtaining an appealable order.²⁷

The pertinent language is in Section 27 of the Illinois Public Accounting Act, which states:

"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

The goal of ascertaining the truth in the pursuit of justice has its limitations.

to any investigation or hearing undertaken pursuant to this Act."²⁸

In a reasonably methodical analysis of Section 27, the Fourth District Appellate Court affirmed the lower court.²⁹ In doing so, it found that the application to activities of a CPA covered a broad scope that would include the subject matter at issue--estate planning--and reaffirmed the Illinois Supreme Court's analogy to the attorney-client privilege, referring to *Grand Jury*. However, the court disagreed with the trial court's conclusion that it was waived because the employee was not a CPA, finding that such support staff and agents, similar to paralegals, are "indispensable" to the work and services provided.³⁰ Moreover, the court was not convinced by the simplistic reasoning in *Dorfman* which held that the privilege belonged to the CPA merely because the statute does not mention the word "client," and reached the opposite conclusion.³¹ The court ruled that the testamentary exception to attorney-client communication applies to CPAs that assist with estate planning and held that the holder of the privilege is the client, but in this case, the client waived the privilege.³²

THE ILLINOIS SUPREME COURT'S ANALYSIS

The Illinois Supreme Court took a similar but even

12 *Id.* at 479

13 *Id.* at 458

14 *Center Partners, Ltd. v. Growth Head GP, LLC.*, 2012 IL 113107.

15 *FMC Corp. v. Liberty Mutual Insurance Co.*, 236 Ill. App.3d 355

16 *Id.* at 356.

17 *Id.* at 357.

18 *Id.* at 358.

19 *Dorfman v. Rombs* 218 F. Supp. 905 (N.D. Ill.1963).

20 *Id.*

21 *Id.* at 907.

22 *Id.*

23 *Brunton v. Kruger*, 2015 IL 117663 (2015).

24 *Brunton v. Kruger*, 2014 IL App (4th) 130421 at ¶19.

25 *Id.* at ¶ 12.

26 *Id.* at ¶ 19.

27 *Id.* at ¶ 21

28 Section 27 (225 ILCS 40/27(West 2012)).

29 *Id.* at ¶ 55

30 *Id.* at ¶ 37

31 *Id.* at ¶ 41

32 *Id.* at ¶ 50-51

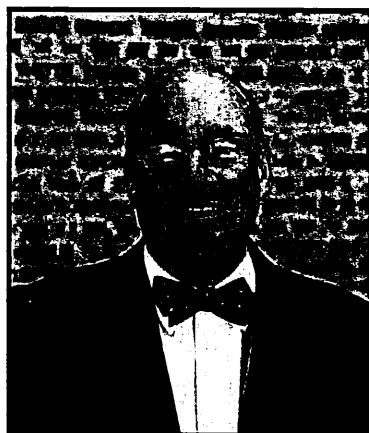
more surgical approach to the statutory construction of the Act. Relying on Section 8.05 (a), first the Court found that in order to give effect to the intent of the legislature it must apply the plain meaning to the language used and found that the privilege only applied to communications involving a CPA.³³ However, in deciding who the privilege actually belongs to and noting that there really was no Illinois precedent, it agreed with the appellate court's analysis in finding that the legislature's failure to mention the word "client"

was not dispositive of the issue.³⁴ Instead, the Court focused on the language: "shall not be required by any court," and found that such language indicates that even the client's consent does not affect the privilege, and therefore, the privilege is for the *protection of the accountant* (emphasis added)³⁵ In reaching this finding, the Court also noted that unlike certain evidentiary privileges found in the Code of Civil Procedure under Article VIII, the CPA privilege is codified in the

33 *Id.* at ¶ 18-21

34 *Id.* at ¶ 30

35 *Id.* at ¶ 33



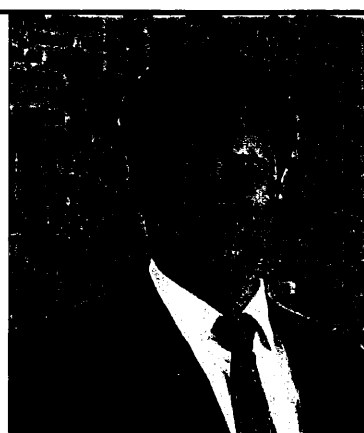
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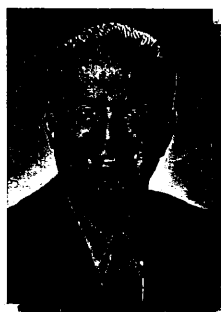
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Public Accounting Act.³⁶ Therefore, the privilege is not part of an evidentiary scheme but is expressly tied to the regulation of CPAs as a profession.³⁷ The Court also noted that other professions such as the Clinical Psychologists, Marriage & Family Counselors, and Genetic Counselors provide for the *client to consent to a waiver of the privilege*. The Public Accounting Act does not.³⁸ Additionally, the Court noted that the Act was one of eight professions subject to repeal by Sunset Act 5 ILCS 80/4.34 if not reenacted by 2024, and found that to be a signal to treat the privilege differently than an evidentiary privilege.³⁹ Moreover, the recent enactment that was subject to repeal in 2014 was reenacted with revisions by P.A. 98-254 effective August 9, 2013, passed unanimously with language proposed by professional accounting organizations, indicating deference to the profession and without concern for evidentiary rules to protect clients.⁴⁰ Finally, the new title, "Confidentiality of Licensee and Registrant's Records," also indicates deference to professional standards of

conduct and not evidentiary standards.⁴¹

With all of that in mind the Court reached the same conclusion as the appellate court, but by different means. It held that the privilege belongs to the CPA and that it is the CPA, not the client, who is in the position to waive it.⁴² Further, other than waiver, the only exceptions to the privilege are provided in the statute itself and the common law testamentary exception that applies to the attorney-client privilege is inapplicable to the statutory CPA privilege.⁴³ Thus, the Court held that the CPA waived the privilege when he provided requested information to the representative of the decedent's estate.⁴⁴

CONCLUSION

The goal of ascertaining the truth in the pursuit of justice has its limitations. The Illinois CPA lobby is strong. Unlike certain evidentiary privileges found in the Code of Civil Procedure, the CPA privilege is more of a substantive right afforded to those professionals covered by the Act. Moreover, unlike other privileges provided in other professional relationships, this privilege cannot be waived by the client.

36 *Id.* at ¶ 36

37 *Id.*

38 *Id.* at ¶ 37-38

39 *Id.* at ¶ 40

40 *Id.* at ¶ 42

41 *Id.* at ¶ 43

42 *Id.* at ¶ 46

43 *Id.* at ¶ 69

44 *Id.* at ¶ 88.

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