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# NEW MEXICO'S ACCOUNTANT-CLIENT PRIVILEGE

ROBERT J. TEPPER\*

## I. INTRODUCTION

New Mexico has a legislatively enacted accountant-client privilege, which, by its terms, is applicable in state court proceedings.<sup>1</sup> In large measure, however, this privilege is probably unenforceable for two reasons. First, this statutory privilege may be viewed as being beyond the scope of power of the legislature to enact, given the New Mexico Supreme Court's plenary power regarding rules of evidence, particularly evidentiary privileges.<sup>2</sup> Alternatively, the statutory accountant-client privilege would probably be deemed a rule of procedure abrogated by the adoption of New Mexico's current rules of evidence.<sup>3</sup> The confusion surrounding the validity of New Mexico's accountant-client privilege has implications not only for the weight of legislative judgments concerning privilege, but also for lawyers and accountants advising clients as well as clients who might rely upon such a privilege.

This Article considers the nature of and justification for an accountant-client privilege, the lack of a comprehensive federal accountant-client privilege, and the current legal situation in New Mexico. Part II discusses the rationale for and against an accountant-client privilege and provides a comparison to the more established attorney-client privilege. This Part concludes that, given competing policy choices, a state legislature could rationally enact such a privilege.

In Part III, the focus shifts to federal law, particularly to the Federal Rules of Evidence and the U.S. Supreme Court's emphatic rejection of a common law accountant-client privilege or work-product privilege, at least in the federal tax context. Although a federally authorized tax practitioner-client privilege exists, it provides very limited protection for clients. Part III concludes that confidential communications between accountant and client might be protected under the attorney-client privilege, but only when the accountant is working under the

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1. New Mexico statutory law provides:

In the courts of the state, no certified public accountant or public accountant shall be permitted to disclose information obtained in the conduct of any examination, audit or other investigation made in a professional capacity, or which may have been disclosed to said accountant by a client, without the consent in writing of such client or his, her or its successors or legal representatives.

NMSA 1978, § 38-6-6(C) (1973).

The section in which the accountant-client privilege may be found is entitled "Privileged communications." *Id.* § 38-6-6. In New Mexico, the title of a statute may be used in construing its meaning. *E.g.*, *State v. Smith*, 2004-NMSC-032, ¶ 14, 98 P.3d 1022, 1027.

Section 38-6-6 also contains marital communications and attorney-client privileges. NMSA 1978, § 38-6-6(A)-(B); *see also* *State v. Teel*, 103 N.M. 684, 685, 712 P.2d 792, 793 (Ct. App. 1985) (characterizing section 38-6-6(A) as a "spousal testimonial privilege"). The statute, however, does not expressly state that such communications are privileged. *Compare* NMSA 1978, § 38-6-6(A)-(B), *with* IND. CODE ANN. § 25-2.1-14-2 (LexisNexis 2006) (containing an express statement of the "privileged and confidential" nature of "[t]he information derived from or as a result of professional [accounting] services").

2. For a discussion of the New Mexico Supreme Court's authority in this area, *see infra* notes 207-281 and accompanying text.

3. For a discussion of the treatment of the rules of procedure and the enactment of the current rules of evidence in New Mexico, *see infra* notes 191-205 and accompanying text.

direction of the client's attorney and is providing services exclusively for the rendition of legal advice.

Part IV discusses how the New Mexico accountant-client privilege might operate, focusing, in part, on its limitations. It also discusses the questionable validity of the statutory privilege given (1) the New Mexico Supreme Court's plenary power over rules of evidence and (2) the enactment of the rules of evidence, which did not create a role for the legislature in formulating privileges. Although two recent decisions of the New Mexico Supreme Court have moderated this approach by recognizing the possibility of legislatively created privileges that have close correspondence to existing constitutional or court-created privileges, Part IV concludes that the accountant-client privilege may lack such correspondence. In so concluding, Part IV surveys the ethical responsibilities of New Mexico accountants imposed by statute that may conflict with such a privilege. This conflict may suggest that the accountant-client privilege was repealed by implication.

Part V suggests a need for clarity so that lawyers, accountants, and the public are apprised of the validity of the privilege. Such clarity might come through litigation, a constitutional amendment allowing the legislature to create evidentiary privileges (or rules of evidence generally), repealing the present accountant-client privilege, or, ideally, harmonizing the existing statutory provisions concerning confidential client communications.

The validity of the New Mexico statutory accountant-client privilege is uncertain and should be evaluated against a backdrop of federal and state law. As mentioned above, a variety of steps might be taken to clarify the legal status of confidential client communications in state court proceedings. This clarification would have the salutary effect of apprising lawyers, accountants, and the public (including clients) of the extent to which such communications are protected, at least in state law matters.

## II. NATURE OF AND JUSTIFICATION FOR THE PRIVILEGE

Evidentiary privileges are recognized only for compelling reasons because they exclude relevant evidence. The law presumes a right to every person's evidence.<sup>4</sup> Most rules of evidence facilitate the search for truth. Given this truth-seeking function, the law places a duty to testify on individuals who can offer relevant evidence. Privileges are evidentiary rules that grant certain individuals the right to withhold evidence. Accordingly, privileges are exceptional and recognized only for compelling reasons.<sup>5</sup> Some privileges are recognized at common law; others are not. Privileges, particularly those not recognized at common law, such as the accountant-client privilege, are construed narrowly so as to minimize conflict between the truth-seeking function of the legal process and the duty to testify.<sup>6</sup>

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4. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996); *Estate of Romero ex rel. Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 7, 137 P.3d 611, 614.

5. *Jaffee*, 518 U.S. at 9; *United States v. Nixon*, 418 U.S. 683, 709 (1974); *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 17, 120 P.3d 820, 826.

6. *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998); *see also* *Colo. State Bd. of Accountancy v. Zaverl Boosalis Raisch*, 960 P.2d 102, 106 (Colo. 1998) ("[Evidentiary privileges] should be recognized only within the narrowest limits required by principle."); *Hartman v. El Paso Natural Gas Co.*, 107 N.M. 679, 687, 763 P.2d 1144, 1152 (1988) (discussing strict construction of the common-law attorney-client privilege).

An accountant-client privilege is not recognized at common law but has been added in some state jurisdictions to enhance the accountant-client relationship by encouraging client candor and protecting the privacy of clients' financial data.<sup>7</sup> Inevitably, the accountant-client privilege is compared to the attorney-client privilege. However, accountants and attorneys perform different functions. While an attorney's obligation is primarily to represent his or her client zealously within the bounds of the law, an accountant also may have more responsibility to the public.<sup>8</sup> Although an accountant-client privilege might encourage greater disclosure by clients, it is inconsistent with accounting and auditing trends, which may require greater investigation and reliability in reporting.<sup>9</sup> In the end, because it is a choice between competing policies, whether to adopt an accountant-client privilege seems well-suited for legislative resolution.

#### A. Rationale for an Accountant-Client Privilege

Some privileges are necessary for the proper functioning of relationships between two or more parties. Professor Wigmore suggests that courts should recognize privileges if "four fundamental conditions" are met:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory 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*.
- (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.<sup>10</sup>

This "utilitarian" approach justifies some privileges based upon their necessity in fostering particular socially useful relationships.<sup>11</sup> Several courts have discussed this approach when deciding accountant-client privilege cases.<sup>12</sup>

An application of Wigmore's utilitarian factors results in different views on whether an accountant-client privilege extending to confidential client

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7. For a discussion of the various rationales for an accountant-client privilege, see *infra* Part II.A. For a discussion of the number of state jurisdictions recognizing such a privilege, see *infra* note 317 and accompanying text.

8. For a discussion of the functions of an attorney and an accountant and their primary responsibilities insofar as privilege, see *infra* notes 35-46, 103-111 and accompanying text.

9. For a discussion of accounting and auditing trends that may require greater investigation and reliability in reporting, see *infra* notes 55-79.

10. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (rev. ed. 1961).

11. 1 CHARLES MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 72, at 300 (John W. Strong ed., 5th ed. 1999).

12. See, e.g., *Int'l Horizons, Inc. v. Comm. of Unsecured Creditors*, 16 B.R. 484, 488 (N.D. Ga. 1981) (determining that it was unlikely that the debtors in question had relied upon an accountant-client privilege or that it was essential for the proper functioning of the accountant-client relationship); *Zaveral Boosalis Raisch*, 960 P.2d at 106 n.4 (setting out factors in the context of recognizing that such a privilege encourages full and frank discussion between accountant and client); *Ernst & Ernst v. Underwriters Nat'l Assurance Co.*, 381 N.E.2d 897, 901-02 (Ind. Ct. App. 1978) (deciding that allowing an accountant, instead of the client, to assert an accountant-client privilege was contrary to the purpose of the legislatively enacted privilege).

communications should exist.<sup>13</sup> Beginning with the first factor, most clients disclose financial information with the expectation that the accountant will hold it in confidence,<sup>14</sup> and a certified public accountant (CPA) is professionally obligated “to hold the affairs of clients in confidence.”<sup>15</sup> Whether clients expect that the information conveyed will be further protected by an evidentiary privilege is another matter. Accountants are largely in the business of producing reports and disclosures for clients.<sup>16</sup> Much of the information conveyed to CPAs will find its way into documents that will be viewed by a limited class of third parties such as federal and state taxing authorities, corporate governing authorities, regulatory authorities, or even the general public through U.S. Securities and Exchange Commission (SEC) mandated disclosure.<sup>17</sup> At the same time, even though a limited class of third parties may be granted access to certain financial information, many reports and disclosures are not meant to be public.<sup>18</sup>

A client’s reasonable expectation of confidentiality might also be shaped by a lawyer or an accountant’s advice concerning privilege. Regardless of New Mexico’s statutory accountant-client privilege, lawyers and accountants are surely on notice, based on decades of case law, that federal law provides very little protection for confidential communications between accountant and client and does not recognize an accountant-client privilege.<sup>19</sup>

Turning to the necessity of confidentiality to maintain the accountant-client relationship, many clients may be willing to disclose far more information than is required by law or professional standards based on an assumption that the information is confidential or even privileged. Such information, though not disclosed to either the authorities or the public, may prove useful to the accountant in deciding how to comply with regulatory requirements. Given the accountant’s expertise, clients are better served if the accountant makes the initial determination of relevancy of the client’s information. To the extent that this information will be utilized in publicly available reports, the justification for confidentiality wanes. An inverse relationship exists between the amount of public disclosure and the justification for an accountant-client privilege—the more disclosure, the less

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13. See *supra* note 10 and accompanying text.

14. *E.g.*, *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP*, 305 F.3d 813, 816 (8th Cir. 2002) (“Most clients reasonably expect the accountant will keep virtually all of their business and personal records secret.”).

15. NMAC 16.60.5.6, available at <http://www.nmcpr.state.nm.us/NMAC/parts/title16/16.060.0005.htm>. Such information is also statutorily “deemed confidential.” NMSA 1978, § 61-28B-24 (1999).

16. Denzil Causey & Frances McNair, *An Analysis of State Accountant-Client Privilege Statutes and Public Policy Implications for the Accountant-Client Relationship*, 27 AM. BUS. L.J. 535, 550 (1990).

17. See *Couch v. United States*, 409 U.S. 322, 325 (1973); 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5427, at 809 (1980).

18. The Internal Revenue Code places limits on the disclosure of federal tax returns and return information. I.R.C. § 6103 (2000). Similarly, New Mexico statutory law places limits on disclosure of state tax returns and other information about a taxpayer. NMSA 1978, § 7-1-8 (2005). While these statutes allow limited disclosure for certain purposes, particularly the investigation and enforcement of the tax laws, they suggest that the disclosure of the supporting information is a private matter, and a general policy of non-disclosure is appropriate for privacy protection. Of course, as discussed below, privacy statutes are not synonymous with evidentiary privileges.

19. In *Couch v. United States*, the U.S. Supreme Court unambiguously rejected a federal accountant-client privilege and noted that federal law does not recognize state-created accountant-client privileges. 409 U.S. at 335. For a discussion of unanimous federal law not recognizing an accountant-client privilege and of the limited protection of confidential client communications between accountants and clients, see *infra* Part III.

justification for the protection afforded by an accountant-client privilege. Given the complexity of laws relating to financial disclosure, for example tax and securities laws, and the mandatory nature of governmental regulation, most would agree that relationships between accountants and clients should be encouraged. As a practical matter, the alternative, where persons or other entities provide such services themselves or in house (so as to avoid disclosure concerns), is unrealistic given the specialized knowledge and many years of training needed to adequately complete these tasks. The advice furnished by accountants helps to ensure that the choices eventually made by clients concerning compliance and disclosure are both knowing and voluntary.<sup>20</sup>

When considering the potential injury to the accountant-client relationship caused by disclosure versus the correct resolution of the litigation, the main issue is whether clients would disclose all relevant information absent an accountant-client privilege. On one hand, the current system requiring voluntary compliance with tax and securities laws, and the potential for civil or criminal enforcement, may well be a sufficient incentive for full disclosure by the client.<sup>21</sup> An accountant certainly has an incentive to encourage full disclosure given tax return-preparer penalties<sup>22</sup> and possible civil liability arising from inadequate disclosure.<sup>23</sup> Likewise, a client has an incentive to disclose because the accountant, if aware of material non-disclosed information, may withdraw from the engagement. In the case of an audit, an accountant may respond to a client's non-disclosure with a qualified opinion based on a scope limitation, a disclaimer of opinion, or a withdrawal from the engagement.<sup>24</sup> These options weigh in favor of full disclosure of information by clients without an evidentiary privilege.<sup>25</sup> Additionally, accountants are required to keep information confidential.

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20. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005) (suggesting that an attorney who persuaded a client to withhold privileged documents from the government surely would not be obstructing justice).

21. See *United States v. Galletti*, 541 U.S. 114, 122 (2004) (noting that the federal tax system is one of self-assessment); *SEC v. Toomey*, 866 F. Supp. 719, 724 (S.D.N.Y. 1992) (noting that civil enforcement actions by the SEC promote voluntary compliance with the securities laws).

22. I.R.C. § 6694 (2000) (listing tax return preparer penalties for unrealistic positions and for understatements due to willful or reckless conduct).

23. This may take the form of liability based on either securities laws or on professional negligence. See, e.g., *In re Suprema Specialties, Inc.*, 438 F.3d 256, 279–81 (3d Cir. 2006) (discussing auditor liability under federal statutory and regulatory laws); *In re Stone & Webster, Inc., Sec. Litig.*, 414 F.3d 187, 198–99, 213–14 (1st Cir. 2005) (discussing auditor liability under federal statutory law); *Vigil v. State Auditor's Office*, 2005-NMCA-096, ¶¶ 13–18, 116 P.3d 854, 859–60 (discussing auditor liability to third parties for negligence and noting that New Mexico has yet to adopt an approach); see also *Bily v. Arthur Young & Co.*, 834 P.2d 745 (Cal. 1992) (providing a comprehensive discussion of auditor liability for negligence and negligent misrepresentation).

24. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement of Auditing Standards No. 58, § 508.22 (Am. Inst. of Certified Pub. Accountants 2004). An independent auditor expresses an opinion on the fairness with which the financial statements “present, in all material respects, financial position, results of operations, and...cash flows in conformity with generally accepted accounting principles.” CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement of Auditing Standards No. 1, § 110.01 (Am. Inst. of Certified Pub. Accountants 2004). The audit report may express an unqualified opinion, a qualified opinion, an adverse opinion, or a disclaimer of opinion. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement of Auditing Standards No. 58, § 508.10.

25. See, e.g., *Int'l Horizons, Inc. v. Comm. of Unsecured Creditors*, 16 B.R. 484, 488 (N.D. Ga. 1981) (explaining that a debtor's full disclosure to an accounting firm was ensured by the debtor's need for certified financial statements and the accounting firm's unwillingness to certify without full disclosure).

On the other hand, clients might well be more forthcoming if they knew that their communications would be held in confidence even if a matter ended up in litigation. To the extent that this is true, clients would be less likely to self-select information that they relayed to the accountant.<sup>26</sup> Any such incremental gain in disclosure would have to be balanced against the potential loss of the accountant's independent perspective, which is essential for an audit,<sup>27</sup> and the potential revenue loss coupled with less efficient tax administration.<sup>28</sup>

Another rationale for some privilege rules is the protection of privacy,<sup>29</sup> although at least one well-respected treatise would view the protection of personal privacy as distinct from matters relating to business or financial affairs.<sup>30</sup> Privileges protect privacy to the extent that they limit disclosure of client-provided personal information. In the context of a tax investigation, the U.S. Supreme Court has rejected the notion that one has a legitimate expectation of privacy "where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return."<sup>31</sup> Although a few courts have relied on financial privacy concerns in discussing the accountant-client privilege,<sup>32</sup> any right to financial privacy would seem to be more limited than a privilege and would certainly be subject to an ad hoc balancing against the

26. Of course, this is also the rationale for an attorney-client privilege. In discussing the attorney-client privilege, the U.S. Supreme Court has noted that it is the oldest common-law privilege, and [i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

27. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement of Auditing Standards No. 150, § 150.02 (Am. Inst. of Certified Pub. Accountants 2004); *see also* *United States v. Arthur Young & Co.*, 465 U.S. 805, 819 (1984) (discussing the "independent auditor's obligation to serve the public interest").

28. Harold N. Bynum, Note, *Evidence—Privileged Communications—Accountant and Client*, 46 N.C. L. REV. 419, 424–26 (1968). Of course, federal law already recognizes a limited tax practitioner-client privilege for legal advice by a tax-practitioner, I.R.C. § 7525(a)(1) (2000), but an accountant-client privilege probably would not be so limited.

29. 1 MCCORMICK ET AL., *supra* note 11, §§ 72, 77, at 300, 321. McCormick suggests that the utilitarian justification of privilege results in near-absolute privileges based upon "highly questionable sociological premises," whereas the privacy justification allows for an ad hoc balancing test in deciding whether matters should be privileged. *Id.* § 77, at 321. As a practical matter, a court called on to apply a statutory accountant-client privilege is likely to consider policy interests.

30. WRIGHT & GRAHAM, *supra* note 17.

31. *Couch v. United States*, 409 U.S. 322, 335 (1973). In *United States v. Miller*, the U.S. Supreme Court determined that a depositor lacked a legitimate expectation of privacy under the Fourth Amendment in bank records revealed to government authorities. 425 U.S. 435, 442–43 (1976). The Court has yet to regard financial decisions as implicating the same personal autonomy concerns as "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" that are protected under the Fourteenth Amendment. *See Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

32. *E.g.*, *Ernst & Ernst v. Underwriter's Nat'l Assurance Co.*, 381 N.E.2d 897, 902 (Ind. Ct. App. 1978) (noting that in enacting the Indiana accountant-client privilege, "the legislature has made a judgment that the welfare of the client will be best served if matters communicated between client and accountant are subject to a zone of privacy controlled by the client"); *In re A Special Investigation # 202*, 452 A.2d 458, 462 (Md. Ct. Spec. App. 1982) (explaining that Maryland's enactment of accountant-client privilege "was intended to protect the expectation of privacy of individuals in matters involving contracts, domestic disputes, and other civil and equity controversies"); *People v. Paasche*, 525 N.W.2d 914, 918 (Mich. Ct. App. 1994) (stating that the purpose of Michigan's accountant-client privilege is "to protect from disclosure the substance of the information conveyed by the client to the accountant" and contrasting it with the purpose of the attorney-client privilege).

legitimate needs for such information.<sup>33</sup> An accountant-client privilege would complement a right to financial privacy, which is recognized in several legislative enactments.<sup>34</sup> Though these enactments do not constitute privileges, they suggest a growing legislative awareness that indiscriminate disclosure of financial information is unacceptable and that more limited and qualified disclosure is appropriate given the potential for harm.

### *B. The Attorney-Client Privilege and the Accountant-Client Privilege*

Any discussion of an accountant-client privilege inevitably involves comparisons with the attorney-client privilege. In contrast to the accountant-client privilege, the attorney-client privilege is universally recognized.<sup>35</sup> Attorneys engage in the zealous representation of clients within the bounds of the law and act as advocates on behalf of their clients.<sup>36</sup> In contrast, accountants, especially when providing auditing services, have responsibilities beyond their clients to reasonably foreseeable third parties who may rely upon their work.<sup>37</sup> Further, an accountant performing an audit must approach the task with professional skepticism and remain independent of the client.<sup>38</sup> In tax compliance work, an accountant has a responsibility to the client as well as to the federal and state taxing authorities.<sup>39</sup>

The difference in functions between an accountant and a lawyer has been the most frequent argument against a federal accountant-client privilege.<sup>40</sup> An accountant advances multiple interests in the course of serving a client, and concerns often arise that such a privilege would shield unlawful client activity that might otherwise be reported, which would result in increased costs of administering the tax

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33. See, e.g., *Valley Bank of Nev. v. Superior Court*, 542 P.2d 977, 979 (Cal. 1975).

34. See, e.g., Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2000) (exempting personal and confidential financial information from disclosure); Right to Financial Privacy Act, 12 U.S.C. §§ 3401–3422 (2000) (placing conditions on the disclosure of customers' financial information); Gramm-Leach-Bliley Act of 1999, 15 U.S.C. § 6801(a) (2000) (declaring it the policy of Congress "that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information"); *In re Boston Herald, Inc.*, 321 F.3d 174, 190 (1st Cir. 2003) ("Personal financial information, such as one's income or bank account balance, is universally presumed to be private, not public."); *Trans Union LLC v. Fed. Trade Comm'n*, 295 F.3d 42, 46–47 (D.C. Cir. 2002) (discussing privacy protections related to non-public information given to financial institutions).

35. *Upjohn Co. v. United States*, 449 U.S. 383, 388 (1981) (noting that the attorney-client privilege is the oldest common law privilege); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995) (explaining that, even though its scope may vary, the attorney-client privilege is the only communications privilege recognized in every state).

36. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817–18 (1984); see also N.M. RULES OF PROF'L CONDUCT pmbl. ("As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); Rule 16-107 NMRA (explaining the general rule that lawyers must ensure conflict-free representation of clients).

37. Compare *Bily v. Arthur Young & Co.*, 834 P.2d 745, 746–47 (Cal. 1992) (discussing liability of accountants to third parties), with *Leyba v. Whitley*, 120 N.M. 768, 772 n.1, 907 P.2d 172, 176 n.1 (1995) (discussing liability of attorneys to third parties).

38. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement of Auditing Standards No. 2, § 150 (Am. Inst. of Certified Pub. Accountants 2004).

39. See CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Standards for Tax Services, ¶¶ 5–6 (Am. Inst. of Certified Pub. Accountants 2000) (recognizing that AICPA members have a responsibility to the taxpayer-client and the tax system, which depends upon tax returns that are "true, correct, and complete").

40. E.g., EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 6.2.5, at 482–83 (2002); WRIGHT & GRAHAM, *supra* note 17, § 5427, at 810–11.



system.<sup>41</sup> Of course, while any enforceable privilege inevitably results in the loss of relevant evidence, the issue is whether the absence of such evidence is outweighed by the societal benefits of the privilege.

Although lawyers also serve both public and private interests in representing clients, the balance weighs in favor of the client regarding the recognition of a privilege that will protect a client's confidential communications with the lawyer.<sup>42</sup> Lawyers are required to advance the personal interests of their clients, but also have duties of candor toward the court and fairness to opposing parties and counsel.<sup>43</sup> In other words, in addition to representing the client, a lawyer also has a responsibility to the legal system to see that justice is done. Yet, despite that institutional obligation, the lawyer has a straightforward professional responsibility not to disclose confidential client communications related to the representation,<sup>44</sup> which is reinforced by an evidentiary privilege.<sup>45</sup> This suggests that accountants can have a similar responsibility for the administration of the tax system or for financial reporting, yet still represent clients ethically, even with an accountant-client privilege.

Moreover, although lawyers and accountants perform different functions, accountants' functions are at times similar to those of lawyers. For example, in rendering tax advice, whether in transactional work, tax compliance, or representation of clients before taxing authorities, accountants must apply the facts of a case to the law and accomplish the client's objectives within the bounds of the law.<sup>46</sup> This suggests that at least some protection is warranted, even if it is narrower than the attorney-client privilege, as long as it looks to the actual tasks performed.

### C. Possible Effect of an Accountant-Client Privilege on the Work of Accountants

Concern for the public interest dominates the debate when it comes to considering an accountant-client privilege. This is evidenced by the fact that relatively few jurisdictions recognize such an evidentiary privilege.<sup>47</sup> Although arguments in favor of an accountant-client privilege exist, significant concerns remain given recent audit failures and auditors' responsibility to disclose, if not detect, material misstatements in financial statements.<sup>48</sup>

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41. WRIGHT & GRAHAM, *supra* note 17, § 5427, at 809.

42. See *Fisher v. United States*, 425 U.S. 391, 403 (1976).

43. Rule 16-303 NMRA (candor toward the tribunal); *id.* R. 16-304 (fairness to opposing party and counsel).

44. *Id.* R. 16-106(A) (confidentiality).

45. *Id.* R. 11-503 (attorney-client privilege).

46. See Ronald E. Friedman & Dan L. Mendelson, *The Need for CPA-Client Privilege in Federal Tax Matters*, TAX ADVISER, Mar. 1, 1996, at 154 (stating that Congress has recognized that accountants and lawyers perform the same functions before the IRS).

47. See *infra* note 317 (indicating that slightly less than one third of the states of the United States have a statutory accountant-client evidentiary privilege).

48. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 699 n.3 (2005) (mentioning that Enron's auditor allowed it to aggregate the results of special purpose entities for "'off balance sheet'" activities, clearly violating generally accepted accounting principles); *SEC v. Gemstar-TV Guide Int'l, Inc.*, 401 F.3d 1031, 1035-36 (9th Cir. 2005) (noting the congressional response to "one cataclysmic corporate accounting scandal after another, including Enron, WorldCom, and Tyco" and upholding a temporary escrow provision for the termination of payments to officers undergoing investigation for securities fraud). For a discussion of the responsibility of auditors to detect and disclose material misstatements in financial statements due to illegal acts, see *infra* notes 52-79 and accompanying text.

Theoretically, an accountant-client privilege encourages free and open communication between the client and the accountant and enables the latter to better discharge his or her professional tasks.<sup>49</sup> This, in turn, should result in better compliance with laws and professional standards regulating reporting and disclosure. Because clients are often unaware of tax laws or accounting principles, they should be forthcoming and not have to rely on their own judgment as to what is relevant financial information. An accountant can better advise the client when provided with more complete information, whether the subject of that advice is compliance with the law or managing a business more productively.<sup>50</sup> Clients might be reticent to provide such information if they are concerned about outside disclosure.<sup>51</sup>

On the other hand, accountants are already required to hold client affairs in confidence, even if that confidence does not encompass an evidentiary privilege. However, that confidence generally does not extend to information required to be disclosed by financial reporting standards.<sup>52</sup> Current professional standards suggest that the trend is toward greater, rather than less, responsibility for the detection and reporting of material misstatements in (1) financial reporting and (2) professional engagements beyond auditing, such as assurance services, reviews, and compilations.<sup>53</sup> Not surprisingly, an auditor is required to consider the possibility of illegal acts that have a direct and material effect on financial statements.<sup>54</sup>

Auditors have traditionally been required to “plan and perform the audit to obtain reasonable assurance that material misstatements, whether caused by errors or fraud, are detected.”<sup>55</sup> Fraudulent misstatements may involve financial reporting or

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49. Colo. State Bd. of Accountancy v. Zaverla Boosalis Raisch, 960 P.2d 102, 106 (Colo. 1998).

50. See Gearhart v. Etheridge, 208 S.E.2d 460, 461 (Ga. 1974).

51. Quantifying this effect could well be difficult. Cf. Swidler & Berlin v. United States, 524 U.S. 399, 409 n.4 (1998) (discussing the scant empirical evidence on whether limiting the attorney-client privilege would reduce client disclosure).

52. NMSA 1978, § 61-28B-24 (1999); AICPA CODE OF PROF'L CONDUCT § 301.01(1) (Am. Inst. of Certified Pub. Accountants 2006).

53. See *In re Cardinal Health Inc. Sec. Litigs.*, 426 F. Supp. 2d 688, 763-64 (S.D. Ohio 2006) (noting that with the enactment of the Private Securities Litigation Reform Act, the U.S. Congress sought to expand oversight provided by accountants).

54. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 54, § 317.05 to .06 (Am. Inst. of Certified Pub. Accountants 1989). The American Institute of Certified Public Accountants (AICPA) is a voluntary national organization that serves its members as well as the public interest. Members agree to be bound by its professional pronouncements. AICPA CODE OF PROF'L CONDUCT § 202.01 (Am. Inst. of Certified Pub. Accountants 1988). The Auditing Standards Board is a senior technical committee of the AICPA that promulgates enforceable auditing standards called Statements on Auditing Standards. Those standards were adopted on an interim basis by the Public Company Accounting Oversight Board (PCAOB), a private non-profit corporation that oversees auditors of public companies. See 15 U.S.C. § 7213(a) (Supp. II 2002) (requiring the PCAOB to establish auditing standards); BYLAWS AND RULES OF THE PCAOB, R. 3200T (Pub. Co. Accounting Oversight Bd. 2003) (adopting AICPA Auditing Standards); see also *id.* R. 3300T (adopting AICPA Attestation Standards).

Under the AICPA standards, illegal acts are “violations of laws or governmental regulations” and attributable to the entity being audited or its management or employees. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 54, § 317.02. Such acts do not include personal misconduct by client “personnel unrelated to their business activities.” *Id.*

55. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 107, § RAS.3 (Am. Inst. of Certified Pub. Accountants 2006); see also CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 104, § RAS.2 (Am. Inst. of Certified Pub. Accountants 2006); BYLAWS AND RULES OF THE PCAOB, Auditing Standard No. 2, ¶ 17 (Pub. Co. Accounting Oversight Bd.

misappropriation of assets.<sup>56</sup> At times, auditors may provide services that are related to fraud detection but are not part of an audit of the financial statements.<sup>57</sup> These services may include attestation designed to provide assurance concerning certain behavior, including compliance with laws and regulations.<sup>58</sup> These tasks require the auditor to both gather and disclose information that might be incriminatory or indicative of liability.

In addition to audit and attest services, accountants often perform non-attest services, such as a compilation or review of financial statements and the issuance of a report thereon. These engagements are not audits. A compilation is limited to presenting information that is the representation of management in the form of financial statements.<sup>59</sup> A review involves performing inquiry and analytical procedures on financial statement data to enable an accountant to express limited assurance that no material modifications need to be made to conform to generally accepted accounting principles.<sup>60</sup> A compilation or review engagement cannot be relied upon to disclose errors, fraud, or illegal acts,<sup>61</sup> but accountants are now required to report to management any evidence or information indicative of fraud or illegal acts that comes to their attention.<sup>62</sup> To the extent that accountants are required to consider and report fraud or illegal acts, an accountant-client privilege that would extend to such information could potentially inhibit any investigation and reporting because an accountant would be justifiably concerned about compromising the client's privilege while performing such tasks. Moreover, such a broad accountant-client privilege could suppress highly relevant information in prosecuting fraudulent financial reporting or misappropriation of assets.

Auditors and those performing attest or consulting engagements often are required to gather evidence to support various assertions contained in financial statements. Consistent with professional standards, an auditor should gather evidence to assess the risk of material misstatement due to fraud.<sup>63</sup> This includes

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2004); *Deephaven Private Placement Trading, Ltd. v. Grant Thornton & Co.*, 454 F.3d 1168, 1175 (10th Cir. 2006) (discussing the concept of "reasonable assurance"). Fraud is defined as "an intentional act that results in a material misstatement in financial statements that are the subject of an audit." CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 99, § 316.05 (Am. Inst. of Certified Pub. Accountants 2002) (footnote omitted). Fraud is distinguished from error on the basis of intent—an error results from unintentional conduct. *Id.* § 316.05 n.4.

56. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 99, § 316.06.

57. *Id.* § 316.01 n.2.

58. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Standards for Attestation Engagements No. 10, § 101.7(f) (Am. Inst. of Certified Pub. Accountants 2001).

59. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Standards for Accounting & Review Services No. 1, § 100.04 (Am. Inst. of Certified Pub. Accountants 1978).

60. *Id.*

61. *Id.* § 100.05(a); CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Standards for Accounting & Review Services No. 13, § 110.06(a) (Am. Inst. of Certified Pub. Accountants 2005).

62. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Standards for Accounting & Review Services No. 1, §§ 100.05(b), .09, .25. Under recent review pronouncements, management is now required to acknowledge its responsibility to prevent and detect fraud as well as to disclose its awareness of fraud or suspected fraud that could be material in financial statements. *Id.* § 100.32(c)–(d); *see also* Michael D. Akers & Jodi L. Bellovary, *Fraud Requirements in SSARS 10: Practitioners' Perceptions Raise Interesting Questions*, CPA J., Apr. 2006, at 34, 34–35; J. Russell Madray, *New Fraud Guidance*, J. ACCT., Jan. 2006, at 51, 51–52.

63. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No.

communicating with management, the audit committee, internal audit personnel, and other client operating personnel, including those not directly involved in financial reporting.<sup>64</sup> Such inquiry is important because it may provide individuals with an opportunity to convey information not known by the auditor from a different perspective than those involved in financial reporting.<sup>65</sup> Often fraud is discovered through information obtained upon inquiry, and while such information may corroborate management's response, in some cases it will not.<sup>66</sup> "[F]or example, a response from an employee indicating an unusual change in the way transactions have been processed" may suggest an override of controls by management.<sup>67</sup>

An auditor's inquiries may be influenced by analytical procedures performed in planning an audit and by consideration of fraud risk factors including (1) incentives and pressures, (2) opportunities, and (3) attitudes and rationalizations.<sup>68</sup> During the audit, an auditor assesses the risk of material misstatement due to fraud in light of discrepancies in the accounting records, conflicting or missing evidence, and problematic or unusual auditor-client relationships.<sup>69</sup> Once an auditor determines that a misstatement is or may be the result of fraud and that the effect of the misstatement is material (or it cannot be determined whether the effect is material), the auditor may need to gather more evidence and consider the implications.<sup>70</sup> Consideration of the risks of material misstatement and the results of substantive tests might indicate a need to withdraw and communicate such reasons to the audit committee or others.<sup>71</sup>

Regardless of materiality, an auditor should always bring evidence of fraud to the attention of an appropriate level of management, and if the fraud involves senior management or is material, it should be reported directly to the audit committee.<sup>72</sup> Depending on the understanding reached with the audit committee concerning the nature and extent of communication, an auditor may disclose any misappropriations of assets by lower-level employees to the audit committee.<sup>73</sup> Thus, the extent of any

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99, § 316.19 (Am. Inst. of Certified Pub. Accountants 2002) (outlining procedures for gathering information). The responsibility to perform risk assessment, design audit procedures in response, and analyze that evidence is pervasive in auditing and makes communication with client personnel and third parties essential. See CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 109, § RAS.5, .6(a), .7, .8, .10, .12 (Am. Inst. of Certified Pub. Accountants 2006). Members of the audit team must participate in a discussion about "the susceptibility of the entity's financial statements to material misstatements." *Id.* §§ RAS.14–20; see also CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 99, §§ 316.14–18. The PCAOB recently emphasized the importance of conducting and documenting these "brainstorming sessions" as part of the auditor's broad-based inquiry. PUB. CO. ACCOUNTING OVERSIGHT BD., OBSERVATION ON AUDITORS' IMPLEMENTATION OF PCAOB STANDARDS RELATING TO AUDITORS' RESPONSIBILITIES WITH RESPECT TO FRAUD 4–5 (2007), available at [http://www.pcaobus.org/Inspections/Other/2007/01-22\\_Release\\_2007-001.pdf](http://www.pcaobus.org/Inspections/Other/2007/01-22_Release_2007-001.pdf).

64. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 99, §§ 316.20 to .25.

65. *Id.* § 316.26.

66. *Id.*

67. *Id.*

68. *Id.* § 316.35; see also *id.* § 316.85 (providing examples of fraud risk factors).

69. *Id.* § 316.68.

70. *Id.* § 316.77.

71. *Id.* § 316.78.

72. *Id.* § 316.79; CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 114, § 20 (Am. Inst. of Certified Pub. Accountants 2006).

73. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No.

fraud would normally be disclosed to senior management, the audit committee, or both.<sup>74</sup>

The necessary interaction in an audit between the auditor, management, those responsible for corporate governance, including the board of directors and the audit committee,<sup>75</sup> third parties such as customers and suppliers, as well as regulatory authorities and the SEC, may not lend itself well to an accountant-client privilege given an auditor's need to investigate and discuss matters with internal and external parties. Though confidentiality is required,<sup>76</sup> such investigation and discussion might well be inhibited for fear of a waiver of any privilege and auditor liability to the client for improper disclosure.<sup>77</sup> Moreover, the auditor must retain a sufficient level of independence from and professional skepticism toward the client in order to report on management's assessment of internal control<sup>78</sup> and on the financial statements themselves.<sup>79</sup>

99, § 316.79.

74. *Id.* § 316.82.

75. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 114, § 3(a).

76. *See* ALVIN A. ARENS ET AL., *AUDITING AND ASSURANCE SERVICES: AN INTEGRATED APPROACH* 91–93 (11th ed. 2006). For a discussion of an accounting firm's responsibility to report an audit client's possibly illegal acts that are material to the SEC, *see infra* note 106.

77. Insofar as internal disclosure, to the extent that an accountant-client privilege has been analogized to the attorney-client privilege, the U.S. Supreme Court has recognized that an entity's attorney-client privilege may protect confidential communications between the attorney and high-level managerial employees, as well as mid-level and lower-level employees, provided that all have relevant information that will enable the lawyer to advise the client. *Upjohn Co. v. United States*, 449 U.S. 383, 391–97 (1981). This, of course, does not address potential waiver problems when external parties are informed of such information. *See generally In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1192–1201 (10th Cir. 2006) (rejecting the doctrine of selective waiver of attorney-client privilege and work-product immunity where the materials sought had been furnished to the SEC and the Department of Justice), *cert. denied*, 127 S. Ct. 584 (2006); *In re Cardinal Health Inc. Sec. Litig.*, No. C2 04 575 ALM, 2007 WL 495150, at \*6–9 (S.D.N.Y. 2007); *United States v. Reyes*, 239 F.R.D. 591, 601–05 (N.D. Cal. 2006).

78. 15 U.S.C. § 7262(b) (Supp. II 2002) (requiring auditors of issuers to attest to management's internal control assessment). The Sarbanes-Oxley Act of 2002 contains a number of other provisions designed to strengthen auditor independence, reaffirm corporate responsibility for accurate financial statements, and enhance financial disclosure. *See id.* §§ 7231–7266; 18 U.S.C. §§ 1519, 1520(a)(1) (Supp. II 2002). These restrictions apply to registered public accounting firms that audit issuers of publicly traded securities. *See infra* notes 121–122 and accompanying text. These restrictions include (1) limiting an auditor to providing audit services (rather than allowing an auditor to provide both audit and non-audit services to an audit client), (2) audit committee pre-approval of most audit services, (3) audit partner rotation after five years, (4) timely and informative reports by the auditor to the audit committee, (5) a prohibition on an auditor providing audit services where certain key client personnel were previously employed (one year prior to the initiation of the audit) by the auditor and who participated in the audit of the client, and (6) retention of audit working papers for seven years. *See* 15 U.S.C. § 78j-1(g)–(l) (2000 & Supp. II 2002); *id.* § 7213(a)(2)(A)(i); 18 U.S.C. § 1520; 17 C.F.R. § 210.2-06(a) (2006).

79. Generally, an auditor may issue one of the following types of opinions on a company's financial statements: (1) an unqualified or "clean" opinion that "the financial statements present fairly, in all material respects, the financial position of the Company, as of the balance sheet date, and the results of its operations and its cash flows for the period then ended in conformity with generally accepted accounting principles" of the United States, (2) a qualified or "except for" opinion, (3) an adverse opinion, or (4) a disclaimer of opinion. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 79, §§ 508.08, .10 (Am. Inst. of Certified Pub. Accountants 1989).

*D. Summary: Reasons in Favor Of and Against Recognizing an Accountant-Client Privilege*

In determining whether an accountant-client privilege exists, courts have considered utilitarian factors and, to a limited extent, financial privacy. Utilitarian factors include client expectations of confidentiality, the need for confidentiality to encourage full disclosure by clients so that the accountant may better perform assigned tasks, the value placed on the accountant-client relationship, and the potential injury to the accountant-client relationship balanced against resolving litigation with incomplete information.<sup>80</sup> The major factors favoring an accountant-client privilege are (1) an inference that clients will disclose information more freely if they know that the confidentiality obligations of the accountant will be backed by an evidentiary privilege and (2) better advice, reporting, disclosure, and the like will be provided when the client does not make initial determinations of relevancy concerning information, but rather provides complete and correct information.<sup>81</sup>

Factors weighing against an accountant-client privilege include (1) full and adequate disclosure is already mandated by tax and securities laws;<sup>82</sup> (2) the accountant-client privilege is not recognized in federal law (except to a limited extent in non-criminal tax matters);<sup>83</sup> (3) a minority of states have such a privilege—suggesting that clients do not rely on it;<sup>84</sup> (4) the Supreme Court has never recognized a right to financial privacy; (5) accountants are in the business of preparing reports and disclosures for clients, and much of the information conveyed by clients will become public anyway;<sup>85</sup> and (6) in performing auditing and other accounting services, an accountant's duty to investigate and report material errors and irregularities would be frustrated by a privilege that might suppress such information.<sup>86</sup>

When compared to the attorney-client relationship, the traditional view has been that accountants perform different functions than lawyers—accountants have institutional responsibilities beyond the client, such as to third parties (investors and creditors) and regulatory agencies (for example, government taxing or securities regulation authorities), that may rely upon the accountant's work.<sup>87</sup> But not every function that accountants perform is destined to become public and relied upon, thus suggesting a need for a qualified privilege that would protect the confidential nature of accountant-client communications in those circumstances where an accountant functions as an advisor.

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80. See *supra* notes 10–12 and accompanying text.

81. See *supra* notes 26, 49–51 and accompanying text.

82. See *supra* notes 21–25 and accompanying text.

83. See *infra* Part III.

84. See *infra* notes 316–317 and accompanying text.

85. See *supra* note 16; *infra* note 110 and accompanying text.

86. See *supra* notes 55–79 and accompanying text.

87. See *supra* notes 37–39; *infra* notes 106–110 and accompanying text.

### III. FEDERAL LAW REGARDING ACCOUNTANT-CLIENT PRIVILEGE

Under the Federal Rules of Evidence, privileges are largely recognized and developed in accordance with the common law.<sup>88</sup> In federal tax cases, the U.S. Supreme Court has determined that an accountant-client privilege does not exist in federal law,<sup>89</sup> so any federal recognition of such a privilege would require either a change in course or an affirmative legislative enactment. Although Congress has enacted a federal tax practitioner privilege, it is of limited applicability and pertains only to legal advice rendered by the tax practitioner.<sup>90</sup> Where the accountant assists a lawyer in providing legal advice, confidential client communications between an accountant and a client *might* be protected pursuant to an attorney-client privilege.<sup>91</sup> However, such a privilege requires that the accountant's services deal exclusively with the offering of legal advice rather than an accounting service.<sup>92</sup> In sum, federal law offers very little protection for confidential communications between accountants and their clients.

As enacted by Congress, the Federal Rules of Evidence do not contain provisions specifying privileges.<sup>93</sup> Though nine privileges were originally suggested (an accountant-client privilege was not among them),<sup>94</sup> Congress generally provided that non-constitutional privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."<sup>95</sup> Although the U.S. Supreme Court subsequently recognized one of the privileges not enacted by Congress (psychotherapist-patient),<sup>96</sup> it has not been receptive to a common-law development of an accountant-client privilege when considering the issue in federal tax cases.<sup>97</sup> Thus, if a federal accountant-client privilege is to exist, it must be created by statutory enactment because the common law does not recognize it.

As a general rule, no federal accountant-client privilege exists, and federal courts do not recognize state-created accountant-client privileges.<sup>98</sup> It is axiomatic in the U.S. legal system that federal privilege law controls in federal criminal and civil

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88. FED. R. EVID. 501.

89. *See* United States v. Arthur Young & Co., 465 U.S. 805, 816 (1984); *Couch v. United States*, 409 U.S. 322, 335 (1973).

90. I.R.C. § 7525(a)(1) (2000).

91. *See* United States v. Frederick, 182 F.3d 496, 500 (7th Cir. 1999).

92. *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000).

93. *See* FED. R. EVID. 501.

94. The nine proposed evidentiary privileges included (1) "required reports," (2) "lawyer-client," (3) "psychotherapist-patient," (4) "husband-wife," (5) "communications to clergymen," (6) "political vote," (7) "trade secrets," (8) "secrets of state and other official information," and (9) "identity of informer." FED. R. EVID. 501 advisory committee's notes. Of course, Congress could enact specific privileges if it so chose. *See* FED. R. EVID. 501 (providing for common-law development of evidentiary privileges except as required by the Constitution, congressional act, or U.S. Supreme Court rules enacted pursuant to statutory authority).

95. FED. R. EVID. 501.

96. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) ("[W]e hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.").

97. *See* United States v. Arthur Young & Co., 465 U.S. 805, 816 (1984); *Couch v. United States*, 409 U.S. 322, 335-36 (1973).

98. *E.g.*, *Couch*, 409 U.S. at 335 ("[W]e note that no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases.").

cases.<sup>99</sup> In civil cases heard in federal court, only where “[s]tate law supplies the rule of decision” on “an element of a claim or defense” (i.e., diversity cases) do courts look to state law privileges.<sup>100</sup> Where federal and state law claims are tried together, the federal rule in favor of admissibility would prevail over a state law privilege not recognized by federal law.<sup>101</sup> Where federal law incorporates elements of state law, such as under the Federal Tort Claims Act, federal law concerning privileges applies.<sup>102</sup>

In contrasting the roles of attorneys and accountants, the U.S. Supreme Court has never viewed the two as comparable and has found the offered justification for an accountant-client privilege wanting. For example, in *United States v. Arthur Young & Co.*, the Court reasoned that an independent auditor’s tax accrual work papers subpoenaed pursuant to Internal Revenue Code section 7602 were neither protected by workproduct immunity nor an accountant-client privilege.<sup>103</sup> The Court came to this conclusion even though such work papers might sometimes contain the auditor’s opinion on the validity of certain transactions affecting tax liability, as well as documentation supporting such an opinion.<sup>104</sup> The Court relied upon congressional intent in enacting a broad subpoena power to investigate tax returns and the auditor’s public responsibility to express an opinion on the financial statements.<sup>105</sup> The Court drew a distinction between attorneys who must remain loyal to clients, keep confidences, and provide zealous representation and independent accountants who have a responsibility to the public, including creditors and investors, that transcends loyalty to the client.<sup>106</sup>

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99. Federal privilege law undoubtedly applies in federal criminal cases, although state law may sometimes be surveyed in deciding whether federal law ought to recognize a privilege. *E.g.*, *Jaffee*, 518 U.S. at 12 (noting that all fifty states and the District of Columbia have enacted some form of the psychotherapist-patient privilege); *United States v. Gillock*, 445 U.S. 360, 368 (1980) (explaining that an evidentiary privilege recognized under Tennessee state law “does not compel an analogous privilege in a federal prosecution”). In civil cases, “[w]here the interests of the United States are directly affected and the issue or right being adjudicated derives from a federal source,” federal privilege common law applies in the absence of a contrary enactment by Congress. *See Menses v. U.S. Postal Serv.*, 942 F. Supp. 1320, 1321 (D. Nev. 1996). In enacting Rule 501 of the Federal Rules of Evidence, Congress has provided, consistent with the concerns expressed in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), that when state law is operative by its own force, for example in diversity cases, state privilege law applies. *See In re Grand Jury Investigation*, 918 F.2d 374, 379 (3d Cir. 1990); *Menses*, 942 F. Supp. at 1322.

100. FED. R. EVID. 501.

101. *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982). *But see Garza v. Scott & White Mem’l Hosp.*, 234 F.R.D. 617, 624–25 (W.D. Tex. 2005) (indicating that state privileges can apply where the specific evidence is unrelated to the federal claims).

102. *Am. S.S. Owners Mut. Prot. & Indem. v. Alcoa S.S. Co.*, 232 F.R.D. 191, 194–96 (S.D.N.Y. 2005) (“[I]n cases arising under the Federal Tort Claims Act..., for example, federal privilege rules apply because, although state law governs the substantive issues, it is only because that law has been ‘absorbed’ by the federal statute.”); *Menses*, 942 F. Supp. at 1323–24 (explaining that applying “state privilege laws to Federal Tort Claims Act cases would allow the uneven administration of the law that...Rule 501 attempts to avoid”).

103. *United States v. Arthur Young & Co.*, 465 U.S. 805, 815–19 (1984).

104. *See id.* at 808, 812–13.

105. *Id.* at 815–17.

106. *See id.* at 817–18. In the auditing context, an accountant’s responsibility to the public, and particularly to the SEC, would create some tension with an accountant-client privilege because an accounting firm may be required to report an audit client’s possibly illegal acts that are material to the SEC.

Under Title III of the Private Securities Litigation Reform Act of 1995, audits of issuers must have “procedures designed to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statement amounts.” 15 U.S.C. § 78j-1(a)(1) (2000). If an accounting firm discovers a possible illegal act it must decide whether that act was likely to have occurred and determine the



In reaching its holding that tax accrual work papers are not protected by work-product immunity, the Court rejected the notion that such immunity was necessary “to foster candid communication between accountant and client.”<sup>107</sup> The Court noted that such a rationale was more akin to the recognition of an accountant-client privilege than work-product immunity and that it had previously rejected such a privilege in *Couch v. United States*.<sup>108</sup> In *Couch*, the Court held that the Fifth Amendment’s protection against self-incrimination does not shield a client from producing financial records subpoenaed by the federal government when the client had directed those records to his or her accountant for many years.<sup>109</sup> The Court rejected such an accountant-client privilege as not having a significant justification on Fifth Amendment grounds because (1) much of the information would be disclosed in the return, (2) the accountant rather than the client would exercise discretion concerning disclosure, and (3) a strong need for voluntary compliance with federal tax laws exists.<sup>110</sup> In sum, the Fifth Amendment protects against compelled self-incrimination, but it does not apply when a third party is required to produce a client’s records.<sup>111</sup>

In 1998, seemingly in response to *Arthur Young & Co.* and *Couch*, the U.S. Congress enacted a limited privilege between taxpayers and federally authorized tax practitioners, which may include attorneys, CPAs, enrolled agents, and enrolled actuaries.<sup>112</sup> The federally authorized tax practitioner-client privilege applies to the extent that the same communication would be considered privileged if it were between an attorney and the taxpayer client.<sup>113</sup> In other words, the privilege only pertains to legal advice rendered by the tax practitioner. The privilege is further limited because it only applies to federal non-criminal tax matters before the Internal Revenue Service (IRS) and in federal court.<sup>114</sup> Moreover, the privilege does not

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potential effect of the act. *Id.* § 78j-1(b)(1)(A). If the accounting firm finds that an illegal act has taken place, and it is of consequence, it must, “as soon as practicable,” inform the appropriate management personnel of the issuer and assure that the audit committee or, if there is no audit committee, its board of directors is adequately informed. *Id.* § 78j-1(b)(1)(B). Once the accounting firm determines that the appropriate company entities have been adequately informed, it must report to the board of directors in the event that (1) the illegal act is “material”; (2) “the senior management has not taken, and the board of directors has not caused senior management to take, timely and appropriate remedial actions”; and (3) “the failure to take remedial action is reasonably expected” to result in a departure from the standard audit report or “resignation from the audit engagement.” *Id.* § 78j-1(b)(2)(A)–(C). If the company receives such a report, it must inform the SEC within one business day and also provide the same notice to the accounting firm. *Id.* § 78j-1(b)(3). If the accounting firm does not receive a copy of that notice, it may resign from the engagement or furnish a copy of its report to the SEC. *Id.* § 78j-1(b)(3)(A)–(B). In any event, if the firm resigns, it must furnish a copy of its report to the SEC. *Id.* § 78j-1(b)(4). Although the statute contains a provision that the accounting firm is not liable in a private action for the contents of its report, the provision envisions such information to be confidential. *See id.* § 78j-1(c).

107. *Arthur Young & Co.*, 465 U.S. at 817.

108. *Id.* (citing *Couch v. United States*, 409 U.S. 322, 335 (1973)).

109. *Couch*, 409 U.S. at 334–35.

110. *Id.* at 335–36.

111. *Id.*; *see also* SEC v. Jerry T. O’Brien, Inc., 467 U.S. 735, 742 (1984) (“It is also settled that a person inculcated by materials sought by a subpoena issued to a third party cannot seek shelter in the Self-Incrimination Clause of the Fifth Amendment.”).

112. *See* I.R.C. § 7525(a) (2000); *see also* 31 C.F.R. § 10.3 (2006) (listing the types of professionals that are permitted to practice before the IRS).

113. I.R.C. § 7525(a)(1); *see also* *United States v. Bisanti*, 414 F.3d 168, 170 n.1 (1st Cir. 2005); *United States v. Frederick*, 182 F.3d 496, 502 (7th Cir. 1999).

114. I.R.C. § 7525(a)(2); *see also* *Sylvan Siegler & Stanley P. Weiner, The Privilege and Perils of Public*

apply to written communications between federally authorized tax practitioners and persons or entities in connection with tax shelters.<sup>115</sup>

One federal court has held that the federally authorized tax practitioner privilege does not protect the identities of clients in response to IRS summonses concerning tax shelters.<sup>116</sup> In *United States v. BDO Seidman*, the Seventh Circuit Court of Appeals reasoned that confidential communications were not at issue and, therefore, the clients had no credible expectation of confidentiality in their identities given the regulation and documentation requirements attendant to the promotion and sale of tax shelters.<sup>117</sup> This suggests a narrow construction of the privilege consistent with prior law.

Congressional recognition of a federally authorized tax practitioner privilege clearly does not alter the holding in *Arthur Young & Co.*<sup>118</sup> Additionally, state law accountant-client privileges do not affect the government's summoning authority under the tax laws.<sup>119</sup> Thus, in cases involving federal law or federal administrative proceedings, state accountant-client privileges do not apply.<sup>120</sup>

State accountant-client privileges also do not apply in administrative proceedings with a federal character involving the regulation of public accounting firms. The Public Company Accounting Oversight Board (PCAOB),<sup>121</sup> the agency tasked with periodically inspecting, investigating, and disciplining registered public accounting firms,<sup>122</sup> will not honor an accountant-client privilege in any form.<sup>123</sup> Documents and information prepared or received by the PCAOB in connection with an inspection or investigation, however, are confidential and subject to an evidentiary privilege in state and federal proceedings.<sup>124</sup> Such documents and information are also exempt from disclosure under the Freedom of Information Act<sup>125</sup> until they are released in public or disciplinary proceedings.<sup>126</sup>

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*Accounting*, NAT'L PUB. ACCT., Dec. 2000, at 8, 8.

115. I.R.C. § 7525(b); see also Francine J. Lipman & James E. Williamson, *The New Accountant-Client Privilege Provision: A Partial Step Forward for Nonattorney Tax Practitioners*, NAT'L PUB. ACCT., July 1999, at 41, 41.

116. *United States v. BDO Seidman*, 337 F.3d 802, 812 (7th Cir. 2003).

117. *Id.*

118. See *supra* notes 103–106 and accompanying text.

119. *Scotty's Contracting & Stone, Inc. v. United States*, 326 F.3d 785, 791 (6th Cir. 2003) (citing *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984)).

120. *E.g., id.*; *Inspector Gen. of the U.S. Dep't of Agric. v. Glenn*, 122 F.3d 1007, 1012 (11th Cir. 1997).

121. The PCAOB is a private-sector non-profit corporation that was created by the Sarbanes-Oxley Act of 2002 to oversee audits of public companies to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports. 15 U.S.C. § 7211(a) (Supp. II 2002).

122. *Id.* §§ 7211(c)(3)–(4), 7214, 7215.

123. PUB. CO. ACCOUNTING OVERSIGHT BD., *INSPECTION OF REGISTERED PUBLIC ACCOUNTING FIRMS A2-16* (2003), available at [http://www.pcaobus.org/Rules/Docket\\_006/Release2003-019.pdf](http://www.pcaobus.org/Rules/Docket_006/Release2003-019.pdf); PUB. CO. ACCOUNTING OVERSIGHT BD., *RULES ON INVESTIGATIONS AND ADJUDICATIONS A2-33* (2003), available at [http://www.pcaobus.org/Rules/Docket\\_005/Release2003-015.pdf](http://www.pcaobus.org/Rules/Docket_005/Release2003-015.pdf). The PCAOB develops rules that are submitted to the SEC for approval. Rule 5106 provides the procedures to assert a privilege. BYLAWS AND RULES OF THE PCAOB, R. 5106 (Pub. Co. Accounting Oversight Bd. 2003). Rule 4006 requires registered public accounting firms to cooperate with the PCAOB. *Id.* R. 4006. The duty under Rule 4006 includes (1) "provid[ing] access to, and the ability to copy, any record in the possession, custody, or control of such firm or person" and (2) "provid[ing] information by oral interviews, written responses, or otherwise." *Id.*

124. 15 U.S.C. § 7215(b)(5)(A).

125. 5 U.S.C. § 552a (2000).

126. 15 U.S.C. § 7215(b)(5)(A).

Presently, federal law offers very little evidentiary protection for accountant-client communications. Accountant-client communications, however, may be considered privileged “if they meet the traditional requirements of the attorney-client privilege.”<sup>127</sup> Thus, when a client reveals confidential information to an accountant who is assisting a lawyer (in the provision of legal advice) as a specialized agent, the client may be able to invoke the attorney-client privilege.<sup>128</sup> This distinction is important because “the expertise of an accountant often is necessary, or highly useful, to an effective consultation between client and lawyer.”<sup>129</sup>

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,...or if the advice sought is the accountant’s rather than the lawyer’s, no privilege exists.<sup>130</sup>

If confidential communications to accountants performing tax compliance work do not qualify for any privilege, the question remains whether the privilege exists regarding confidential communications to attorney-accountants performing the same work. Generally, clients of attorney-accountants cannot rely upon an attorney-client or an attorney work-product privilege to prevent disclosure of documents or confidential communications incident to return preparation.<sup>131</sup> The current state of the law is that all return preparation is generally viewed as an accounting service, even if the client’s information is provided for the dual purpose of preparing the return and for use in future litigation.<sup>132</sup>

If an accountant produces documents involving client communications solely in anticipation of litigation, such materials might be protected from discovery under work-product immunity, particularly if the accountant is working under the direction of a lawyer.<sup>133</sup> “[T]he mental impressions, conclusions, opinions, or legal theories

127. *Cavallaro v. United States*, 284 F.3d 236, 246 (1st Cir. 2002).

128. *See id.*

129. *Aull v. Cavalcade Pension Plan*, 185 F.R.D. 618, 629 (D. Colo. 1998) (citing *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961)).

130. *Kovel*, 296 F.2d at 922 (citations omitted).

131. *E.g.*, *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999) (“To rule otherwise would be to impede tax investigations, reward lawyers for doing nonlawyers’ work, and create a privileged position for lawyers in competition with other tax preparers....”).

132. *Id.* at 501; *see also In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000) (“The preparation of tax returns is an accounting service, not the provision of legal advice.”); Corby Brooks, *A Double-Edged Sword Cuts Both Ways: How Clients of Dual Capacity Legal Practitioners Often Lose Their Evidentiary Privileges*, 35 TEX. TECH L. REV. 1069 (2004) (arguing in favor of a privilege for clients of attorney accountants).

133. *E.g.*, *In re Grand Jury Subpoena*, 599 F.2d 504, 513 (2d Cir. 1979) (concluding that accountants’ work papers reflecting oral conversations with corporate employees after a law firm was retained to assist in the general counsel’s investigation qualified as work product).

Of course, to the extent that he or she will testify as an expert witness at trial, the accountant’s testimony and the basis for it must be disclosed and supplemented if additional or corrective information comes to light. FED. R. CIV. P. 26(a)(2)(B)–(C), (e)(1); *see also Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203–04 (6th Cir. 2006); *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP*, 305 F.3d 813, 817 n.2 (8th Cir. 2002). If the accountant is consulted as an expert witness in anticipation of litigation but is not expected to testify at trial, an opposing party may obtain discovery only “upon a showing of exceptional circumstances under which it is impracticable...to obtain facts or opinions on the same subject by other means.” FED. R. CIV. P. 26(b)(4)(B); *see also Durlinger v. Artilles*, 727 F.2d 888, 891 (10th Cir. 1984).

of an attorney or other representative of a party concerning the litigation”<sup>134</sup> contained in documents or other tangible things are considered opinion work-product and should be afforded the greatest protection—they are either absolutely immune from discovery or discoverable only upon compelling need.<sup>135</sup> That having been said, non-opinion fact work-product may be discoverable based upon a showing of substantial need by the party seeking discovery and an inability to obtain the substantial equivalent through other means.<sup>136</sup> Thus, work-product immunity, which does not protect the facts or opinions themselves, provides far more uncertain protection than a privilege and, of course, may be subject to waiver through disclosure.<sup>137</sup> Although one federal appellate court has held that quality control assessments prepared by an accounting firm for a client are protected by work-product immunity,<sup>138</sup> work-product immunity is a narrower concept than an accountant-client privilege and involves only qualified immunity from discovery of documents or other tangible things.<sup>139</sup>

While some persuasive arguments may be made in favor of a federal accountant-client privilege, not the least of which is enabling accountants to better represent their clients, such an expansion of federal law has not been well-received.<sup>140</sup> Still, even recognizing the limitations in this area, an accountant must consider whether an attorney should direct the accountant’s provision of services in certain cases where litigation is anticipated; otherwise, the confidential communications between the accountant and client are almost surely not protected by any evidentiary privilege.<sup>141</sup> Because a functional approach is used, any confidential client communications, whether made to a lawyer, a lawyer-accountant, or an accountant working for a law firm, must relate to the provision of legal advice rather than an accounting service.

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134. FED. R. CIV. P. 26(b)(3).

135. See *Hickman v. Taylor*, 329 U.S. 495, 511–12 (1947); *In re Qwest Commc’ns Int’l Inc.*, 450 F.3d 1179, 1186 (10th Cir. 2006), cert. denied, 127 S. Ct. 584 (2006); *Frontier Refining, Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 704 (10th Cir. 1998). Of course, in the context of a federal tax investigation, the U.S. Supreme Court has rejected the concept of an accountant-client work-product immunity that would prevent disclosure of an auditor’s “tax accrual workpapers” pursuant to subpoena. *United States v. Arthur Young & Co.*, 465 U.S. 805, 819 (1984).

136. FED. R. CIV. P. 26(b)(3).

137. See *United States v. Nobles*, 422 U.S. 225, 240 (1975); *In re Qwest*, 450 F.3d at 1186; *In re Echostar Commc’ns Corp.*, 448 F.3d 1294, 1302 (Fed. Cir. 2006).

138. *PepsiCo, Inc.*, 305 F.3d at 817.

139. *Nobles*, 422 U.S. at 246–52; *In re Perrigo Co.*, 128 F.3d 430, 437 (6th Cir. 1997).

140. See, e.g., Emily Jones, Comment, *Keeping Client Confidences: Attorney-Client Privilege and Work Product Doctrine in Light of United States v. Adlman*, 18 PACE L. REV. 419, 428–33, 456–59 (1998) (discussing federal court rejections of an accountant-client privilege and concluding that arguments against the privilege outweigh arguments in favor of it); Thomas J. Molony, Note, *Is the Supreme Court Ready to Recognize Another Privilege? An Examination of the Accountant-Client Privilege in the Aftermath of Jaffee v. Redmond*, 55 WASH. & LEE L. REV. 247 (1998) (concluding that the federal system is not ready to recognize an accountant-client privilege in light of federal precedent and the fact that the majority of states do not have such a privilege); Michael Wilson, Note, *Careful What You Wish for: The Tax Practitioner-Client Privilege Established by the Internal Revenue Service Restructuring and Reform Act of 1998*, 51 FLA. L. REV. 319 (1999) (discussing potential problems with the federally authorized tax practitioner-client privilege).

141. See *Ferko v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125, 138–40 (E.D. Tex. 2003) (explaining that documents given to an accountant for advice in anticipation of litigation with the SEC were protected by the attorney-client privilege); see also Carl Pacini et al., *Attorney-Client Privilege: CPAs and the E-Frontier*, J. ACCT., Apr. 2004, at 64, 64 (suggesting ways in which CPAs can preserve the attorney-client privilege).

#### IV. NEW MEXICO LAW CONCERNING ACCOUNTANT-CLIENT PRIVILEGE

Similar to federal law, in New Mexico when a client reveals confidential information to an accountant assisting a lawyer in providing legal advice as a specialized agent, the client ought to be able invoke the attorney-client privilege.<sup>142</sup> Another possibility for a person in such a position would be to limit discovery by asserting work-product immunity.<sup>143</sup> But New Mexico also has a legislatively enacted accountant-client privilege that seemingly offers protection for confidential communications independent of an attorney directing the accountant.<sup>144</sup> New Mexico courts would likely declare this statutory accountant-client privilege invalid as a rule of procedure because in New Mexico, rules of evidence, including privileges, are procedural matters generally within the sole province of the New Mexico Supreme Court.<sup>145</sup> Thus, legislatively enacted evidentiary privileges that are not recognized or required by the New Mexico Constitution or the rules of the New Mexico Supreme Court are invalid and therefore not recognized.<sup>146</sup> Although some judges and commentators have criticized this unique position,<sup>147</sup> it remains a formidable barrier to the operation of New Mexico's statutory accountant-client privilege. Although the New Mexico Supreme Court recently declared that it would consider legislative enactments pertaining to privilege that are consistent with

142. See Rule 11-503(A)–(B) NMRA.

143. New Mexico courts have defined attorney "work product [as] material prepared in anticipation of civil litigation by a party, a party's attorney, and other people employed by a party." *State ex rel. Brandenburg v. Blackmer*, 2005-NMSC-008, ¶ 11, 110 P.3d 66, 69. Rather than a privilege, the work-product rule provides immunity from discovery. *Id.* There are two types of work product: opinion work product and non-opinion work product. *Id.*; *Hartman v. Texaco Inc.*, 1997-NMCA-032, ¶ 19, 937 P.2d 979, 984. Opinion work product consists of the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning...litigation." Rule 1-026(B)(4) NMRA. Opinion work product enjoys virtually absolute immunity in civil litigation. *Brandenburg*, 2005-NMSC-008, ¶ 12, 110 P.2d at 69. Non-opinion work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to the obtain the substantial equivalent of the materials by other means." Rule 1-026(B)(4) NMRA; accord *Brandenburg*, 2005-NMSC-008, ¶ 12, 110 P.2d at 69. Materials containing confidential client communications prepared by an accountant for litigation might thus enjoy either absolute or qualified immunity from discovery depending upon the circumstances.

Of course, to the extent that the accountant will testify as an expert witness at trial, his or her opinions and the basis for them must be disclosed and supplemented if corrective information comes to light. Rule 1-026(B)(5), (E) NMRA. Even if the accountant is not expected to testify, his or her opinion and the basis for it may be discoverable upon a showing of exceptional circumstances demonstrating that the party seeking discovery cannot obtain the facts or opinions by other means. *Id.* R. 1-026(B)(6).

144. NMSA 1978, § 38-6-6(C) (1973).

145. *Ammerman v. Hubbard Broad., Inc.*, 89 N.M. 307, 312, 551 P.2d 1354, 1359 (1976) ("[U]nder our Constitution the Legislature lacks power to prescribe by statute rules of evidence and procedure, this constitutional power is vested exclusively in this court....").

146. *Id.*

147. *E.g.*, *Maples v. State*, 110 N.M. 34, 37, 40–43, 791 P.2d 788, 791, 794–97 (1990) (Montgomery, J., dissenting) (urging that statutes that implement legislative policies apart from regulation of the courts should be upheld and that *Ammerman* should be overruled); *Sw. Cmty. Health Servs. v. Smith*, 107 N.M. 196, 201, 755 P.2d 40, 45 (1988) (Scarborough, C.J., dissenting) (urging the overruling of *Ammerman* insofar as it held statutory evidentiary privileges unconstitutional); Michael B. Browde & M.E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. REV. 407 (1985); Note, *Evidence—Newsmen's Privilege—Legislatively Enacted Newsmen's Privilege Invalid as Infringement on Judicial Rule-Making Power—Ammerman v. Hubbard Broadcasting, Inc.*, 551 P.2d 1254 (N.M. 1976), 1977 BYU L. REV. 493.

existing supreme court or constitutional privileges,<sup>148</sup> it is unlikely that the accountant-client privilege has a counterpart in either the New Mexico Constitution or the New Mexico Supreme Court rules, so the court would likely find the accountant-client privilege invalid.

#### A. Statutory Privilege

The New Mexico privileged communications statute provides:

In the courts of the state, no certified public accountant or public accountant shall be permitted to disclose information obtained in the conduct of any examination, audit or other investigation made in a professional capacity, or which may have been disclosed to said accountant by a client, without the consent in writing of such client or his, her or its successors or legal representatives.<sup>149</sup>

As originally enacted in 1880, the section now containing this accountant-client privilege included only a marital communications privilege.<sup>150</sup> A 1933 amendment added several other privileges: attorney-client, priest-penitent, doctor-patient, and accountant-client.<sup>151</sup>

Before addressing the validity of the statutory accountant-client privilege, it is important to consider how it might operate in light of New Mexico court decisions. In *Ash v. H.G. Reiter Co.*,<sup>152</sup> the New Mexico Supreme Court held that only the client may assert the accountant-client privilege.<sup>153</sup> *Ash* involved a dispute over a bonus provision in an oral contract of employment.<sup>154</sup> The employee prevailed at the trial court level, and on appeal the defendant-employer claimed that the testimony of its accountant was privileged and erroneously admitted.<sup>155</sup> The employee used the accountant's testimony to establish the defendant-employer's gross profit upon which the bonus was based.<sup>156</sup> The accountant had prepared annual reports and had audited the employer's records.<sup>157</sup> The New Mexico Supreme Court rejected the defendant-client's assertion of the accountant-client privilege as to his accountant's testimony at the appellate level because the client had not asserted it at the trial court

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148. *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶¶ 8–9, 120 P.3d 820, 823.

149. NMSA 1978, § 38-6-6(C) (1973).

150. Act of 1880, ch. 12, 1880 N.M. Laws § 7.

151. Act of Feb. 25, 1933, ch. 33, 1933 N.M. Laws 35. Today, the statute contains three privileges: a marital communications privilege, an attorney-client privilege, and an accountant-client privilege. NMSA 1978, § 38-6-6(A)–(C). Additionally, the New Mexico Supreme Court adopted rules of evidence concerning a marital communications privilege and an attorney-client privilege. *See* Rule 11-505 NMRA (husband-wife privilege); *id.* R. 11-503 (attorney-client privilege).

152. 78 N.M. 194, 429 P.2d 653 (1967). *Ash* did not consider the validity of the state accountant-client privileges at issue. *See infra* note 160.

153. *Ash*, 78 N.M. at 196, 429 P.2d at 655; *accord* *Fed. Ins. Co. v. Arthur Anderson & Co.*, 816 S.W.2d 328, 331 (Tenn. 1991) (holding that Tennessee's statutory accountant-client privilege is "personal to the client"). In this regard, the attorney-client privilege is similar; the privilege belongs to the client or his or her representative. Rule 11-503(C) NMRA. However, in New Mexico the person who was the lawyer at the time of the communication may assert the privilege, but only on behalf of the client. *Id.*; *Hunter v. Kenney*, 77 N.M. 336, 338–40, 422 P.2d 623, 625–27 (1967).

154. *Ash*, 78 N.M. at 195, 429 P.2d at 654.

155. *Id.*

156. *Id.*

157. *Id.*

level.<sup>158</sup> The court implied, however, that the trial court might have properly excluded the accountant's testimony if the client had raised a timely objection.<sup>159</sup> The court held that, absent a contemporaneous objection, the accountant's testimony was admissible.<sup>160</sup>

Traditionally, most evidentiary privileges, because they are in derogation of the common law, have been strictly construed, which has resulted in several exceptions to their application. For example, in Indiana, blanket assertions of privileges are not sufficient, and the party claiming one has the burden to prove its applicability on a question-by-question or document-by-document basis.<sup>161</sup> New Mexico's accountant-client privilege provision appears to apply to "information" that the accountant learns in the course of "any examination, audit or other investigation made in a professional capacity" or to information that the client discloses to the accountant.<sup>162</sup> The provision concerning client disclosure might not be restricted to disclosures in the course of "any examination, audit or other investigation made in a professional capacity"<sup>163</sup> because such a construction would render the client disclosure language unnecessary. If interpreted otherwise, the terms "examination, audit or other investigation"<sup>164</sup> could substantially limit the privilege.

At the same time, limits may exist about what type of confidential information might be protected because accountants provide assurance and tax services that might be beyond the scope of the statute.<sup>165</sup> The term "information"<sup>166</sup> should surely be interpreted to mean "confidential information," as the rationale for the privilege depends upon the need for confidentiality.<sup>167</sup> The provision applies "in the courts of this state," thereby suggesting application in criminal and civil proceedings.<sup>168</sup> In

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158. *Id.* at 196, 429 P.2d at 655.

159. *See id.*

160. *Id.* *Ash* is probably more noteworthy as an application of the contemporaneous objection rule rather than as an exposition of the limits of the accountant-client privilege. The contemporaneous objection rule provides that, absent plain error affecting substantial rights, a party must object to the admission of evidence to preserve the issue for appeal. *See* Rule 11-103(A), (D) NMRA.

161. *Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165, 169 (Ind. 1996) (observing that "courts disfavor blanket claims of privilege").

162. NMSA 1978, § 38-6-6(C) (1973).

163. *Id.*

164. *Id.*

165. *See PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP*, 305 F.3d 813, 816 (8th Cir. 2002) (construing the Illinois accountant-client privilege as not encompassing communications made in the course of an accountant performing non-financial consulting services).

166. NMSA 1978, § 38-6-6(C).

167. *See State v. Teel*, 103 N.M. 684, 686, 712 P.2d 792, 794 (Ct. App. 1985) (discussing the limits of New Mexico's marital communication privilege contained in the same statute as the accountant-client privilege); *see also Vellone v. First Union Brokerage Servs., Inc.*, 203 F.R.D. 231, 233-34 (D. Md. 2001) (construing "communication" as "confidential communication" in Maryland's accountant-client privilege statute); *Capps v. Wood*, 718 P.2d 1216, 1219-20 (Idaho 1986) (construing "communication" as "confidential communication" in Idaho's accountant-client privilege statute). Like the attorney-client privilege, only client communications with accountants that are intended to be confidential and for the rendition of professional services seem to be protected under New Mexico's law. *Cf.* Rule 11-503(A)(4) NMRA (defining "confidential communication" for attorney-client privilege); *id.* R. 11-503(B) (explaining that the attorney-client privilege applies to confidential communications); *Diversified Dev. & Inv., Inc. v. Heil*, 119 N.M. 290, 295-96, 889 P.2d 1212, 1217-18 (1995) (construing New Mexico's attorney-client privilege).

168. *See* NMSA 1978, § 38-6-6(C).

some jurisdictions, however, accountant-client privilege does not extend to criminal and bankruptcy proceedings.<sup>169</sup>

In considering how the New Mexico accountant-client privilege might operate, waiver and survival are concepts that appear to be addressed by the terms of the statute, thereby necessitating less reliance on decisions from other jurisdictions.<sup>170</sup> The statute indicates that the privilege can be waived by the written consent of the "client or his, her or its successors or legal representatives."<sup>171</sup> This suggests that the accountant-client privilege survives the death of the client.<sup>172</sup> Additionally, the statute provides that if the client offers himself as a witness and voluntarily testifies about the communications, the client has waived the privilege and has consented to the accountant's examination.<sup>173</sup>

Other limitations may also exist regarding the accountant-client privilege. These include the assertion of the privilege by a corporation when shareholders seek such information, waiver by conduct, suits against an accountant, the crime-fraud exception, using the accountant as a conduit to shield information, and matters involving professional licensure and discipline.<sup>174</sup> When shareholders of a closely held corporation seek, in good faith, to obtain information conveyed to the accountant by the corporation or by fellow shareholders, the privilege may not apply because the corporation, in engaging the accountant, is deemed to be acting on behalf of all of the shareholders.<sup>175</sup> Moreover, to the extent that an accountant jointly represents clients who later become involved in a controversy involving the joint representation, the common interest of the clients allows for disclosure of conversations between the accountant and the clients<sup>176</sup> but not to third parties. The privilege remains intact as to disclosure to third parties unless the conversation has

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169. See, e.g., ARIZ. REV. STAT. ANN. § 32-749(A) (2002); MD. CODE ANN., CTS. & JUD. PROC. § 9-110(d) (LexisNexis 2006); *State v. O'Brien*, 601 P.2d 341, 348 (Ariz. Ct. App. 1979); *In re A Special Investigation # 202*, 452 A.2d 458, 461 (Md. Ct. Spec. App. 1982).

170. See NMSA 1978, § 38-6-6(C).

171. *Id.* New Mexico provides for waiver, by less formal means, of the various privileges recognized by its rules of evidence, including the attorney-client privilege, which can be waived simply by voluntary disclosure or consent to disclosure by the holder of the privilege. Rule 11-511 NMRA; *Pub. Serv. Co. of N.M. v. Lyons*, 2000-NMCA-077, ¶¶ 10-29, 10 P.3d 166, 169-75.

172. See generally Denise P. Lindberg, Comment, *The Accountant-Client Privilege: Does It and Should It Survive the Death of the Client?*, 1987 BYU L. REV. 1271. The U.S. Supreme Court has indicated that the attorney-client privilege survives death. See *Swidler & Berlin v. United States*, 524 U.S. 399, 404-10 (1998); accord Rule 11-503(C) NMRA (describing that personal representatives or successors in interest may claim the attorney-client privilege).

173. NMSA 1978, § 38-6-6(D) ("If a person offers himself as a witness and voluntarily testifies with reference to the communications specified in this section, that is a consent to the examination of the person to whom the communications were made as above provided.").

174. See *infra* notes 175-182 and accompanying text.

175. See *Neusteter v. Dist. Court*, 675 P.2d 1, 5-6 (Colo. 1984); *Pattie Lea, Inc. v. Dist. Court*, 423 P.2d 27, 30 (Colo. 1967). Because an entity like a corporation must speak through its agents, administration of an entity's testimonial privilege may present "special problems" in determining who has the power to speak on behalf of and waive any privilege. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) (determining that the bankruptcy trustee of a corporation could waive attorney-client privilege as to pre-bankruptcy communications).

176. *Pattie Lea, Inc.*, 423 P.2d at 30; cf. Rule 11-503(D)(5) NMRA (explaining that there is no attorney-client privilege when the communication in question is made in the course of joint representation).



been disclosed to a party other than one of the clients involved in the joint representation.<sup>177</sup>

Like all privileges, an accountant-client privilege is subject to waiver by conduct, including a client's disclosure of information or consent to disclose information to third parties.<sup>178</sup> The client may also waive the privilege when the client, as part of a claim or defense in a lawsuit, relies upon a matter involving the accountant's advice or services.<sup>179</sup> An accountant-client privilege is also subject to the crime-fraud exception, which provides that communications made in furtherance of a fraud (before it occurs) are not privileged.<sup>180</sup> Finally, a client may not shield information that he or she would otherwise be obligated to disclose by communicating it or transferring it to an accountant.<sup>181</sup> Some statutory accountant-client privileges contain lists of exceptions where the privilege does not apply, and most of those make exceptions for matters involving professional licensure and discipline.<sup>182</sup>

Admittedly, the New Mexico appellate courts' interpretation of New Mexico's accountant-client privilege is sparse, especially considering that for twenty-six years New Mexico had two statutory accountant-client privileges. In addition to the current statutory privilege,<sup>183</sup> the New Mexico Public Accountancy Act of 1947 contained an accountant-client privilege that only the accountant could assert.<sup>184</sup> The Act provided:

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 con-

177. See *Zepter v. Dragisic*, 237 F.R.D. 185, 189 (N.D. Ill. 2006) ("The [Illinois] accountant-client privilege does not extend to matters which are disclosed to a third party.").

178. E.g., *Sears, Roebuck & Co. v. Gussin*, 714 A.2d 188, 194 (Md. 1998); see also Rule 11-511 NMRA (explaining that evidentiary privileges may be waived by voluntary disclosure or consent to such disclosure). One seeking the disclosure of apparently privileged documents based upon waiver has the burden of proof in showing that the privilege was actually waived. E.g., *Eight Hundred, Inc. v. Fla. Dep't of Revenue*, 837 So. 2d 574, 576 (Fla. Dist. Ct. App. 2003).

179. *Nashville City Bank & Trust Co. v. Reliable Tractor, Inc.*, 90 F.R.D. 709, 712 (M.D. Ga. 1981); *Savino v. Luciano*, 92 So. 2d 817, 819 (Fla. 1957); *Gussin*, 714 A.2d at 194. This may occur in disputes between a professional's client and third parties. See *Pub. Serv. Co. of N.M. v. Lyons*, 2000-NMCA-077, ¶ 15, 10 P.3d 166, 171. It may also occur between the client and the professional. See Rule 11-503(D)(3) NMRA (explaining that no attorney-client privilege exists for communication involving breach of duty of lawyer or client); *id.* R. 11-504(D)(3) (explaining that no physician/psychotherapist-patient privilege exists for communications relevant to a patient's claim or defense); *Trujillo v. Puro*, 101 N.M. 408, 413, 683 P.2d 963, 968 (Ct. App. 1984) (noting that jurisdictions that recognize a physician-patient privilege find a waiver for health and medical history placed in issue by a plaintiff).

180. *Rose v. Commercial Factors of Atlanta, Inc.*, 586 S.E.2d 41, 42-44 (Ga. Ct. App. 2003); see also Rule 11-503(D)(1) NMRA (describing New Mexico's crime-fraud exception in its attorney-client privilege).

181. *Paper Corp. of Am. v. Schneider*, 563 So. 2d 1134, 1135 (Fla. Dist. Ct. App. 1990); *Gussin*, 714 A.2d at 196; *McNair v. Eighth Judicial Dist. Court*, 885 P.2d 576, 579-80 (Nev. 1994).

182. See, e.g., FLA. STAT. ANN. § 473.316(4)(a)-(c), (5) (West 2006); GA. CODE ANN. § 43-3-32(b)(1)-(4) (2005); IDAHO CODE ANN. § 9-203A (2004); LA. REV. STAT. ANN. § 37:86 (2000); IDAHO R. EVID. 515(d) (2006); LA. CODE EVID. ANN. arts. 515(C), 516, 517 (2006). New Mexico's attorney-client privilege contains a similar exception in claims of breach of duty by attorneys or clients. Rule 11-503(D)(3) NMRA. Additionally, an attorney may disclose information relating to a client's representation in a controversy between the lawyer and the client. *Id.* R. 16-106(D).

183. NMSA 1978, § 38-6-6(C) (1973).

184. See *Ash v. H.G. Reiter Co.*, 78 N.M. 194, 196, 429 P.2d 653, 655 (1967) (citing *Dorfman v. Rombs*, 218 F. Supp. 905 (D. Ill. 1963)) (relying upon the construction of a similar Illinois statute).

fidential capacity as such, provided, however, that the provisions of this section shall not apply to auditing under the supervision of the State Comptroller.<sup>185</sup>

While New Mexico state appellate courts have not recently interpreted the current statutorily created accountant-client privilege, other courts have referenced it in reported decisions. In *Lukee Enterprises, Inc. v. New York Life Insurance Co.*,<sup>186</sup> a New Mexico federal district court sitting in diversity recognized both New Mexico accountant-client privileges and quashed a scheduled deposition of the plaintiff's accountant.<sup>187</sup> Importantly, in 1973, the accountant-client privilege provision originating in the New Mexico Public Accountancy Act of 1947 was repealed.<sup>188</sup> Additionally, a California federal district court sitting in diversity in 1995 declined to apply the remaining New Mexico accountant-client privilege (section 38-6-6(C)), reasoning that, although the accountant was deposed in New Mexico, the underlying action was pending in California, and a choice-of-law provision applied California law, which lacked an accountant-client privilege.<sup>189</sup> Similarly, a New Mexico federal district court referenced a plaintiff's claim for declaratory and injunctive relief based upon the New Mexico accountant-client privilege, but the court remanded the removed action to state court for want of a federal question.<sup>190</sup> While these three reported cases discuss New Mexico's current accountant-client privilege, they were only decided based on the issues before the court and do not address whether the asserted accountant-client privilege would have been enforceable.

### *B. Questionable Validity of the Statutory Privilege*

In 1933, a little more than two weeks after enacting the current accountant-client privilege, the New Mexico legislature passed an enabling act providing that the New Mexico Supreme Court could promulgate rules to "regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits."<sup>191</sup> This enactment would become the first step toward the supreme court's dominant position in rule making, including the rules of evidence and privileges.<sup>192</sup> The questionable validity of the remaining New Mexico accountant-client privilege became readily apparent in a series of cases decided by the New Mexico Supreme Court beginning in 1976. In *Ammerman v. Hubbard Broadcasting, Inc.*,<sup>193</sup> the court determined that a journalist-newscaster privilege enacted by statute<sup>194</sup> was a legislative attempt to create a rule of evidence and ruled that the

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185. New Mexico Public Accountancy Act of 1947, ch. 115, 1947 N.M. Laws 187.

186. 52 F.R.D. 21 (D.N.M. 1971).

187. *Id.* at 22-23; *see also* FED. R. EVID. 501 (explaining that in civil actions where state law provides the rule of decision, it also determines the applicable privileges).

188. Act of Mar. 29, 1973, ch. 223, 1973 N.M. Laws 813.

189. *Platypus Wear, Inc. v. K.D. Co.*, 905 F. Supp. 808, 812-13 (S.D. Cal. 1995).

190. *Salman v. Arthur Andersen LLP*, 375 F. Supp. 2d 1233, 1236-39 (D.N.M. 2005).

191. Act of Mar. 13, 1933, ch. 84, 1933 N.M. Laws 147, 148 (codified as amended at NMSA 1978, § 38-1-1(A) (1966)).

192. *See Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 340-41, 805 P.2d 603, 607-08 (1991).

193. 89 N.M. 307, 551 P.2d 1354 (1976).

194. NMSA 1978, § 38-6-7 (1973).

attempt was invalid.<sup>195</sup> The court also determined that the legislature had no power to prescribe the procedure by which an appeal could be taken from a district court order directing disclosure of a source.<sup>196</sup>

In invalidating the statutory privilege, the New Mexico Supreme Court based its opinion on two grounds. First, the court held that rules of evidence, including privileges, are rules of procedure, which are within the court's exclusive constitutional power to promulgate.<sup>197</sup> In doing so, the court relied on the New Mexico constitutional provisions establishing the judicial branch and granting the supreme court the power of superintending control over inferior courts.<sup>198</sup> Since the enactment of the statutory enabling act, which provides that the court is to regulate "pleading, practice and procedure,"<sup>199</sup> the modern New Mexico Supreme Court—until its August 2005 decision in *Albuquerque Rape Crisis Center v. Blackmer*<sup>200</sup>—has regarded such power as inherent, largely exclusive, and resting upon constitutional grounds.<sup>201</sup>

195. *Ammerman*, 89 N.M. at 312, 551 P.2d at 1359.

196. *Id.* at 312–13, 551 P.2d at 1359–60.

197. *Id.* at 311, 551 P.2d at 1358. Consistent with the "truth-seeking" function of judicial proceedings, all witnesses must produce evidence and testify, and exceptions to that important principle that are not otherwise provided by the state constitution are exclusively subject to the discretion of the New Mexico Supreme Court. *State v. Gonzales*, 1996-NMCA-026, ¶ 13, 912 P.2d 297, 301.

198. *Ammerman*, 89 N.M. at 311, 551 P.2d at 1358 (relying on N.M. CONST. arts. III, § 1, VI, § 3). Article III, section 1 of the New Mexico Constitution establishes the separation of powers and provides:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

N.M. CONST. art. III, § 1. Article VI, section 3 grants the New Mexico Supreme Court authority over lower courts and provides, "The supreme court...shall have a superintending control over all inferior courts...." *Id.* art. VI, § 3.

199. NMSA 1978, § 38-1-1(A) (1966).

200. 2005-NMSC-032, 120 P.3d 820.

201. *Ammerman*, 89 N.M. at 310–11, 551 P.2d at 1357–58. The supreme court's dominant position in rule making arises from an enabling act which provided:

Section 1. The Supreme Court of the State of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant. The Supreme Court shall cause such rules to be printed and distributed to all members of the bar of the State of New Mexico and to all applicants, and the same shall not become effective until thirty days after they have been so printed, made ready for distribution and so distributed.

Section 2. All statutes relating to pleading, practice and procedure, now existing, shall, from and after the passage of this Act, have the force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto.

Act of Mar. 13, 1933, ch. 84, 1933 N.M. Laws 147, 147–48 (codified as amended at NMSA 1978, §§ 38-1-1 (1966), 38-1-2 (1933)). Three years after its enactment, this provision was challenged on separation of powers grounds as an unlawful delegation of legislative power to the judiciary. *State v. Roy*, 40 N.M. 397, 400, 60 P.2d 646, 648 (1936). In *Roy*, the defendant challenged a short form information charging him with murder pursuant to rules promulgated by the supreme court. *Id.* at 402–04, 409, 60 P.2d at 651–53, 658. The supreme court upheld the provision and its power to adopt rules:

When the legislature enacted chapter 84, it merely withdrew from a field wherein it had theretofore functioned as a co-ordinate branch of our government with the court in the promulgation of rules of pleading, practice, and procedure. Whether the legislative branch of the government was ever rightfully in the rule-making field, or was a mere trespasser or usurper, need not now be determined.

Second, in *Ammerman*, the New Mexico Supreme Court relied on New Mexico's rule of evidence 11-501, which pertains to privileges. Rule 11-501, which went into effect on July 1, 1973, explains that no person may claim a privilege except as provided or required by the New Mexico Constitution or by rule of the New Mexico Supreme Court.<sup>202</sup> No provision in the current enactment of the New Mexico Rules

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*Id.* at 411, 60 P.2d at 660. In so holding, the court recognized its inherent power to prescribe such rules, but because no conflict existed between legislative and judicial rules, the court declined to decide which branch, legislative or judicial, would prevail in such a conflict. *Id.*

In 1960, the supreme court promulgated the following rule, which now appears as a rule of civil procedure:

All statutes relating to pleading, practice and procedure in judicial proceedings in any of the courts of New Mexico, existing upon the taking effect of the act of the eleventh legislature, approved March 13, 1933, and all statutes since enacted by any session of the legislature relating to said subjects, or any of them except as any of said statutes heretofore may have been or hereafter may be amended or vacated by order of this court, shall remain and be in effect and have full force and operation as rules of court.

Rule 1-091 NMRA (citation omitted); *see also* *Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 340, 805 P.2d 603, 607 (1991). Although this rule might be interpreted to provide that legislatively enacted privileges (such as the accountant-client privilege) are valid in the district courts until the New Mexico Supreme Court amends or vacates the rule, the supreme court views the rule as dovetailing with the 1933 rules enabling act. *Mendez*, 111 N.M. at 340-41, 805 P.2d at 607-08. According to the court, the rule "reflects a consistent intention on the part of the legislature and this Court that legislative rules relating to pleading, practice and procedure in the courts, particularly where those rules relate to court management or housekeeping functions, may be modified by a subsequent rule promulgated by the Supreme Court." *Id.*

In several cases thereafter, the supreme court determined that judicially prescribed rules control when a conflict exists—in other words, the legislative provision is invalid. *See, e.g.*, *Maples v. State*, 110 N.M. 34, 36, 791 P.2d 788, 790 (1990) (holding that a court rule allowing an appeal from Workers' Compensation actions prevailed over contrary statutory language); *State ex rel. Anaya v. McBride*, 88 N.M. 244, 246-47, 539 P.2d 1006, 1008-09 (1975) (explaining that in a quo warranto proceeding, a court rule that did not require naming the person rightfully entitled to office prevailed over a statute that required such naming); *Sw. Underwriters v. Montoya*, 80 N.M. 107, 109-10, 452 P.2d 176, 178-79 (1969) (reasoning that a court rule prescribing a shorter time period for when a dismissal for want of prosecution could be had prevailed over a longer statutorily mandated time period); *State ex rel. Bliss v. Greenwood*, 63 N.M. 156, 160-61, 315 P.2d 223, 227-28 (1957) (noting that repealing a statute that provided for jury trials in all contempt proceedings did not conflict with the constitutional provision guaranteeing the right to trial by jury because the statute was invalid as an intrusion on the judiciary's power to regulate direct criminal contempt); *State v. Arnold*, 51 N.M. 311, 312-13, 183 P.2d 845, 846-47 (1947) (holding that a court rule establishing a three-month time limit for an appeal prevailed over a statute establishing a six-month period). *But see* *State v. Alvarez*, 113 N.M. 82, 85, 823 P.2d 324, 327 (Ct. App. 1991) (holding that a statute establishing a ten-day time period for an appeal prevailed over a court rule establishing a thirty-day period because the type of appeal contemplated was not one of constitutional right).

The rule, however, is not absolute. To the extent that a substantive right is involved, the court rule must yield. *Eturriaga v. Valdez*, 109 N.M. 205, 209-10, 784 P.2d 24, 28-29 (1989) (concluding that a statute establishing a thirty-day time period for an election challenge prevailed over a court rule providing for fifteen days because the time period represented a substantive right). When a statute, though regulating pleading, practice, or procedure, does not conflict with any rule adopted by the supreme court, it might still be given effect. *E.g.*, *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 14, 120 P.3d 820, 825 (considering a statutory rape counselor-victim privilege); *Alexander v. Delgado*, 84 N.M. 717, 718, 507 P.2d 778, 779 (1973) (considering a statute providing grounds for writ of certiorari); *State v. Herrera*, 92 N.M. 7, 13, 582 P.2d 384, 390 (Ct. App. 1978) (considering a rape shield law).

Finally, in an effort to avoid constitutional questions (i.e., whether the legislature is empowered to enact rules), certain statutes and rules that overlap have been harmonized. *See, e.g.*, *Mendez*, 111 N.M. at 339-41, 805 P.2d at 606-08 (discussing a statutory time limit placed on filing an interlocutory appeal and the silence in the supreme court rules regarding the same); *Madrid v. Univ. of Cal.*, 105 N.M. 715, 718, 737 P.2d 74, 77 (1987) (explaining that a construction of the New Mexico Workers' Compensation Act that required "expert medical testimony" was not exclusive to licensed medical doctors and did not conflict with the supreme court's rule of evidence regarding expert witnesses).

202. Rule 11-501 NMRA. New Mexico's rule of evidence 11-501 went into effect on July 1, 1973 and provides:

Except as otherwise required by constitution, and except as provided in these rules or in other

of Evidence provides for legislatively enacted privileges. On the contrary, the current rules of evidence abrogate any privilege that does not fit within the framework of Rule 11-501.<sup>203</sup> Thus, evidentiary privileges under New Mexico state law are those expressly provided for or required by the New Mexico Constitution, the rules of evidence, or other rules of the New Mexico Supreme Court.<sup>204</sup> Such privileges apply to all stages of litigation—from discovery to trial.<sup>205</sup> The second rationale for invalidating the statutory journalist-newscaster privilege in *Ammerman* was fundamentally derivative of the first—the New Mexico Supreme Court’s adoption of the rules of evidence omitted any role for the legislature to create, or the common law to develop, evidentiary privileges.<sup>206</sup>

In *Ammerman*, the New Mexico Supreme Court concluded that the statutory journalist-newscaster privilege was (1) constitutionally invalid and (2) unenforceable in judicial proceedings.<sup>207</sup> The court, however, expressed no opinion regarding whether the statutory privilege could “be asserted in any proceeding or investigation before, or by any legislative, executive or administrative body or person.”<sup>208</sup> In 1982, roughly six years after its ruling in *Ammerman*, the New Mexico Supreme Court adopted a narrower news media-confidential source privilege, which includes procedures for claiming the privilege and for appealing adverse determinations.<sup>209</sup>

Until recently, the New Mexico state appellate courts regularly relied upon *Ammerman* in rejecting evidentiary rules of admissibility<sup>210</sup> as well as claims of privilege not recognized specifically by the New Mexico Constitution, the rules of evidence, or other rules of the supreme court.<sup>211</sup> In *State ex rel. Attorney General v. First Judicial District Court*, the New Mexico Supreme Court concluded that the New Mexico Constitution required executive privilege,<sup>212</sup> which led it to

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rules adopted by the supreme court, no person has a privilege to:

- A. refuse to be a witness; or
- B. refuse to disclose any matter; or
- C. refuse to produce any object or writing; or
- D. prevent another from being a witness or disclosing any matter or producing any object or writing.

*Id.*; see also *Ammerman*, 89 N.M. at 311–12, 551 P.2d at 1358–59 (relying on Rule 11-501 to support the conclusion that the legislature may not enact evidentiary rules or privileges).

203. *Trujillo v. Puro*, 101 N.M. 408, 413, 683 P.2d 963, 968 (Ct. App. 1984) (explaining that no privileges are recognized except for those that are “specifically delineated” in the New Mexico Constitution or in the rules of evidence).

204. *E.g.*, *State ex rel. Att’y Gen. v. First Judicial Dist. Court*, 96 N.M. 254, 260, 629 P.2d 330, 336 (1981); *Pub. Serv. Co. of N.M. v. Lyons*, 2000-NMCA-077, ¶ 11, 10 P.3d 166, 170.

205. Rule 11-1101(C) NMRA.

206. *Ammerman*, 89 N.M. at 311–12, 551 P.2d at 1358–59.

207. *Id.* at 312, 551 P.2d at 1359.

208. *Id.*

209. Rule 11-514 NMRA.

210. See *Miller & Assocs. v. Rainwater*, 102 N.M. 170, 171, 692 P.2d 1319, 1320 (1985) (invalidating a statutory provision allowing for proof of a duly verified open account to be offered into evidence without the need for the book of original entry where the truth of the account is not directly denied under oath); *State ex rel. Reynolds v. Holguin*, 95 N.M. 15, 17, 618 P.2d 359, 361 (1980) (invalidating a statutory provision allowing proof of the contents of a hydrographic survey based upon a signed and filed report by the state engineer to be offered into evidence).

211. *State ex rel. Att’y Gen. v. First Judicial Dist. Court*, 96 N.M. 254, 257, 629 P.2d 330, 333 (1981).

212. Executive privilege is a qualified privilege that protects communications between members of the executive branch from disclosure based on the need for candor in decision-making and separation of powers

affirmatively recognize such a qualified privilege with respect to the state attorney general.<sup>213</sup> But the court rejected the “public interest privilege”<sup>214</sup> proposed by the attorney general (and based on common law) because it did not have support in either the state constitution or in the state rules of evidence.<sup>215</sup> The court observed that, although New Mexico’s rules are patterned after the federal rules of evidence, an important difference is that the common law does not govern New Mexico’s rules regarding privileges.<sup>216</sup> On the contrary, the adoption of New Mexico’s rules of evidence in 1973 resulted in the abrogation and inapplicability of common law privileges.<sup>217</sup>

New Mexico courts have also rejected privileges that might have been legislatively implied, even if they were not expressly called “privileges.” In *Maestas v. Allen*,<sup>218</sup> the supreme court did not recognize a privilege based upon a statute providing that a mother and an alleged father could not be compelled to give evidence as to paternity.<sup>219</sup> The court’s rationale mirrored that of *Ammerman*—the supreme court’s constitutional position and the current enactment of the rules of evidence do not permit legislatively enacted privileges.<sup>220</sup> For similar reasons, the court of appeals in *Trujillo v. Puro*<sup>221</sup> rejected a statutory ethical rule precluding a physician from revealing a professional secret as a basis for asserting the physician-patient privilege.<sup>222</sup> A psychotherapist/physician-patient privilege subsequently

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concerns. *See* *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 383–84 (2004) (vice-presidential privilege); *United States v. Nixon*, 418 U.S. 683, 705–06 (1974) (presidential privilege); *State ex rel. Att’y Gen.*, 96 N.M. at 258, 629 P.2d at 334 (state attorney general privilege); *see also* *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001) (discussing the common law deliberative process privilege designed to generally protect the decision making of executive officials).

213. *State ex rel. Att’y Gen.*, 96 N.M. at 257–58, 629 P.2d at 333–34.

214. In this context, a “public interest privilege” is a qualified privilege that protects confidential communications between government officials, and also between private persons and government officials, when the public interest would be harmed if the material were disclosed. *See In re World Trade Ctr. Bombing Litig.*, 709 N.E.2d 452, 455–56 (N.Y. 1999); *Cirale v. 80 Pine Street Corp.*, 316 N.E.2d 301, 303–04 (N.Y. 1974); *Doe v. Riback*, 788 N.Y.S.2d 590, 593–95 (App. Div. 2005); *see also* CAL. EVID. CODE § 1040 (West 1995).

215. *State ex rel. Att’y Gen.*, 96 N.M. at 258–61, 629 P.2d at 334–37.

216. *Id.* at 260, 629 P.2d at 336. The Federal Rules of Evidence are promulgated by the U.S. Supreme Court as assisted by the Judicial Conference of the United States, but Congress may reject or modify those rules, which it did with respect to the privilege rules. *E.g.*, *Jaffee v. Redmond*, 518 U.S. 1, 8–9 (1996) (recognizing a privilege between a psychotherapist and her patient); *Trammel v. United States*, 445 U.S. 40, 47 (1980) (recognizing a spousal privilege that allows one to refuse to testify against his or her spouse). As enacted by Congress, Rule 501 provides that privilege “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” FED. R. EVID. 501. Rather than restricting the development of privileges to a particular court or time period, the federal approach allows federal courts to recognize common-law privileges and their respective evolutions. *Jaffee*, 518 U.S. at 8–9.

217. *State ex rel. Att’y Gen.*, 96 N.M. at 260, 629 P.2d at 336.

218. 97 N.M. 230, 638 P.2d 1075 (1972).

219. *Id.* at 231, 638 P.2d at 1076.

220. *Id.*

221. 101 N.M. 408, 683 P.2d 963 (Ct. App. 1984).

222. *Id.* at 413, 683 P.2d at 968; *see also* *Salazar v. St. Vincent Hosp.*, 96 N.M. 409, 412–13, 631 P.2d 315, 318–19 (Ct. App. 1980) (holding that the state medical malpractice act did not create a privilege for medical-legal panel members and that any such privilege would be invalid under *Ammerman*), *rev’d in part*, *St. Vincent Hosp. v. Salazar*, 95 N.M. 147, 619 P.2d 823 (1980) (upholding the court of appeals’ determination that the statutory privilege applied to the medical review commission with respect to panel deliberations and reports but not to testimony heard by the panel).

became part of New Mexico's rules of evidence through the auspices of the supreme court's rule-making authority.<sup>223</sup>

A case of particular relevance to the statutory accountant-client privilege is *State v. Teel*<sup>224</sup> because, as in *Ammerman*, a legislatively enacted privilege was in question. In *Teel*, the New Mexico Court of Appeals ruled that the statutory marital communication privilege,<sup>225</sup> which appears in the same section of the New Mexico statutes as the accountant-client privilege,<sup>226</sup> was broader than that recognized by the rules of evidence and therefore did not apply.<sup>227</sup> The statutory privilege extended the privilege to "any communication" during the marriage,<sup>228</sup> whereas the corresponding rule of evidence privilege restricted it to *confidential* communications.<sup>229</sup> Accordingly, the court did not use the broader statutory privilege to decide the case.<sup>230</sup>

Interestingly, in *Southwest Community Health Services v. Smith*,<sup>231</sup> the New Mexico Supreme Court held that a statute making medical peer review records non-discoverable in civil proceedings did not create an evidentiary privilege.<sup>232</sup> The court reasoned that the statute did not benefit a particular party, but rather it benefited the health and safety of the community, and confidentiality was essential for the peer review process to function.<sup>233</sup> However, the court held that such confidential information was discoverable only if it was critical to a party's claim or defense.<sup>234</sup> Had the statute created a privilege, it would have been invalid.<sup>235</sup>

The supreme court's dominance in this area rests first upon the distinction between substance and procedure and then upon the superintending authority of the supreme court. Generally, courts lack the power to create substantive law (although they may modify the common law), and a court rule that conflicts with a substantive statutory provision must yield to the statutory provision.<sup>236</sup> Generally, "substantive law creates, defines, or regulates rights while procedural law outlines the means for enforcing those rights,"<sup>237</sup> but substance and procedure often overlap, particularly when it comes to evidentiary privileges that, in addition to precluding the use of certain evidence in a particular case, are designed to serve broader social goals.<sup>238</sup>

223. See Rule 11-504 NMRA.

224. 103 N.M. 684, 712 P.2d 792 (Ct. App. 1985).

225. NMSA 1978, § 38-6-6(A) (1973).

226. *Id.* § 38-6-6(C).

227. *Teel*, 103 N.M. at 685-86, 712 P.2d at 793-94.

228. NMSA 1978, § 38-6-6(A) (emphasis added).

229. *Teel*, 103 N.M. at 685, 712 P.2d at 793 (citing Rule 11-505 NMRA).

230. *Id.*

231. 107 N.M. 196, 755 P.2d 40 (1988).

232. *Id.* at 198-99, 755 P.2d at 42-43; see also *State v. Rickard*, 118 N.M. 312, 314, 881 P.2d 57, 59 (Ct. App. 1994) (assuming without deciding that the statutory privilege against disclosure of social records of probationers and parolees would be constitutional presumably because of reasons for such privilege), *rev'd in part*, 118 N.M. 586, 884 P.2d 477 (1994).

233. *Sw. Cmty. Health Servs.*, 107 N.M. at 198-99, 755 P.2d at 42-43.

234. *Id.* at 200-01, 755 P.2d at 44-45.

235. *Id.* at 199, 755 P.2d at 43.

236. *State v. Valles*, 2004-NMCA-118, ¶ 14, 143 P.3d 496, 501 ("[W]hen a statute conflicts with a Supreme Court rule on a matter of procedure, the Supreme Court rule prevails, and the statute is not binding."); see also *Eturriaga v. Valdez*, 109 N.M. 205, 209, 784 P.2d 24, 28 (1989) ("It is not the province of this Court to invalidate substantive policy choices made by the legislature.").

237. *State ex. rel. Gesswein v. Galvan*, 100 N.M. 769, 770, 676 P.2d 1334, 1335 (1984).

238. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) ("Except at the extremes, the terms 'substance'

In the case of an accountant-client privilege, a legislature seems no less competent than a court to weigh competing policy choices, such as the value of full and forthright client disclosure against potential loss of relevant evidence, and enact or reject such a privilege.

The New Mexico Supreme Court's long-held view of its exclusive power concerning evidentiary privileges underwent some change in the last few years. In *Albuquerque Rape Crisis Center v. Blackmer*,<sup>239</sup> the court declared that a legislatively enacted privilege protecting information exchanged between a victim and a victim counselor during the course of treatment<sup>240</sup> should be given effect because it was consistent with the psychotherapist-patient privilege<sup>241</sup> that the supreme court had affirmatively enacted by rule.<sup>242</sup> The court announced that its prior decisions did not categorically prohibit the legislature from enacting statutes granting a privilege as long as the statute did not conflict with an existing constitutional privilege or a supreme court rule concerning privilege.<sup>243</sup> In rejecting an argument that its rule-making power is exclusive, the court explained that it had "ultimate rule-making authority" and suggested that its prior cases were merely an attempt to ensure its supremacy in the event of a conflict between legislative and judicial rules.<sup>244</sup> It characterized its holding in *Ammerman* as "narrow" and identified the "conflict" in that case as between a statutory journalist-newscaster privilege and Rule 11-501 of New Mexico's rules of evidence, recognizing only privileges adopted by the supreme court or the constitution.<sup>245</sup> "The conflict existed because [the New Mexico Supreme] Court had not adopted a confidential source privilege."<sup>246</sup> The supreme court then observed that *Ammerman* "did not discuss what the result would have been had there been a court rule recognizing or requiring a confidential source privilege" and suggested that *State v. Herrera* provided the answer.<sup>247</sup>

In *State v. Herrera*,<sup>248</sup> the New Mexico Court of Appeals upheld a limited rape shield law providing that evidence of a victim's past sexual conduct was not admissible unless it was material to the case and its prejudicial nature did not outweigh its probative value.<sup>249</sup> In response to the defendant's argument that only the supreme court could promulgate such a rule, the court of appeals stated: "The

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and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn."); see also *Maples v. State*, 110 N.M. 34, 40, 791 P.2d 788, 794 (1990) (Montgomery, J., dissenting) (criticizing "substance" versus "procedure" as masking the real inquiry, which ought to be whether the statute in some way deprives the court of the ability to perform its essential adjudicative functions or interferes with the efficient and effective operations of the court).

239. 2005-NMSC-032, 120 P.3d 820.

240. NMSA 1978, § 31-25-3(A) (1987); see also *id.* § 31-25-2(A) (1987) (defining "confidential communication" as including that "which is disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from a sexual assault or family violence").

241. Rule 11-504 NMRA.

242. *Albuquerque Rape Crisis Ctr.*, 2005-NMSC-032, ¶ 1, 120 P.3d at 821.

243. *Id.* ¶ 11, 120 P.3d at 824.

244. *Id.* ¶ 5, 120 P.3d at 822.

245. *Id.* ¶¶ 6-7, 120 P.3d at 822-23.

246. *Id.* ¶ 7, 120 P.3d at 823.

247. *Id.*

248. 92 N.M. 7, 582 P.2d 384 (Ct. App. 1978).

249. *Id.* at 11-13, 582 P.2d at 388-90.



legislation may not be binding upon the Supreme Court but, nevertheless, is to be given effect until a conflict exists.”<sup>250</sup> The court of appeals noted that the statute merely applied New Mexico’s Rule 11-403, which allows for the exclusion of relevant evidence if its probative value substantially outweighs the danger of unfair prejudice, to past sexual conduct evidence.<sup>251</sup> As such, the legislative provision did not conflict with the rules of evidence promulgated by the supreme court.<sup>252</sup>

In *Albuquerque Rape Crisis Center*, the supreme court developed a new test for determining when a legislatively created rule of procedure might be given effect:

First, if a privilege is not recognized or required by the New Mexico Constitution or court rule, then the Legislature may not enact such a privilege because to do so would conflict with Rule 11-501. Second, if a privilege is recognized or required by the Constitution or court rule, and the Legislature enacts a privilege affecting arguably the same subject matter, we analyze the statutory privilege to determine whether it is consistent with the purpose of the constitutional or court rule privilege. If the statutory privilege is consistent, both are given effect because the court rule recognizing a privilege is more specific than Rule 11-501 and the court rule is expanded only within the boundaries of its purpose. If the statutory privilege is not consistent, the statutory privilege is not given effect and the constitutional or court rule privilege prevails.<sup>253</sup>

The supreme court then compared the victim-counselor privilege with the broader psychotherapist-patient privilege<sup>254</sup> and concluded that both had similar purposes: protecting confidential client communications made in the course of treatment of emotional or psychological conditions.<sup>255</sup> The court also concluded that similar private and public interests justified both privileges.<sup>256</sup> Protecting confidential communications from involuntary disclosure, so necessary to counseling and psychotherapy relationships, serves private interests,<sup>257</sup> and effective treatment of the underlying conditions and reporting of sexual abuse advances the public interest.<sup>258</sup> Looking at how the privilege functions, the court stated, “It would make little sense for victims of rape to be deprived of the privilege because they seek help from victim counselors at a rape crisis center, while victims with the resources to seek help from a licensed psychologist would benefit from the privilege.”<sup>259</sup> Ultimately, the supreme court remanded the case to the trial court to determine whether the victim’s statements to the counselors were made in the course of treatment for an emotional or psychological condition due to a sexual assault, thus coming within the protection of the legislatively enacted privilege.<sup>260</sup> Additionally, the supreme court referred the issue of a victim-counselor privilege to its Rules of

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250. *Id.* at 13, 582 P.2d at 390.

251. *Id.* at 12, 582 P.2d at 389.

252. *Id.*; accord *Albuquerque Rape Crisis Ctr.*, 2005-NMSC-032, ¶¶ 7–13, 120 P.3d at 823–24.

253. *Albuquerque Rape Crisis Ctr.*, 2005-NMSC-032, ¶ 11, 120 P.3d at 824.

254. Rule 11-504 NMRA.

255. *Albuquerque Rape Crisis Ctr.*, 2005-NMSC-032, ¶ 13, 120 P.3d at 824.

256. *Id.* ¶¶ 15–17, 120 P.3d at 825–26.

257. *Id.*

258. *Id.* ¶¶ 13–15, 120 P.3d at 824–25.

259. *Id.* ¶ 17, 120 P.3d at 826.

260. *Id.* ¶ 21, 120 P.3d at 827.

Evidence Committee for discussion and public input concerning the breadth of any such potential supreme court rule evidentiary privilege.<sup>261</sup>

In an eloquent dissent, Chief Justice Bosson characterized the New Mexico Supreme Court's opinion in *Albuquerque Rape Crisis Center* as "wrong on the law, wrong on policy, and grossly unfair" to the criminal defendant in the case.<sup>262</sup> Drawing from the text of previous cases and Rule 11-501, the dissent explained how the court had disregarded thirty years of precedent "that [the New Mexico Supreme] Court, and only [the New Mexico Supreme] Court, may create a testimonial privilege."<sup>263</sup> The dissent's reading of *Ammerman* and Rule 11-501 is certainly more natural than the one offered by the majority because it is confirmed by the dozens of cases that have considered the parameters of the supreme court's authority over procedure.<sup>264</sup> Though recognizing the possibility of a more conciliatory policy vis-à-vis the legislature, the dissent suggested that a more direct approach would be to amend Rule 11-501 to recognize legislatively created privileges or to change the interpretation of that rule and overrule *Ammerman*.<sup>265</sup> The dissent defended the supreme court's exclusive power in the area of testimonial privilege on several grounds apart from stare decisis, including separation of powers, ease of application, and the authority of the judicial branch over compelled testimony.<sup>266</sup> The dissent also recognized that the court's approach invited the legislature to act regarding matters of evidentiary privilege.<sup>267</sup> In anticipating problems with the application of the new rule, the dissent pointed out that the supreme court had never recognized a rape counselor privilege and that application of this new rule in the case at hand would violate the defendant's constitutional right to be tried based on the rules in effect at the commencement of his case.<sup>268</sup>

A year after *Albuquerque Rape Crisis Center v. Blackmer* was decided, the New Mexico Supreme Court held that it would not recognize a privilege in local law enforcement investigatory materials.<sup>269</sup> In *Estate of Romero ex rel. Romero v. City of Santa Fe*, the parents of a missing child sued the City of Santa Fe, its police department, and a police officer for negligent investigation concerning the child's disappearance.<sup>270</sup> The parents sought discovery of the police department's investigation files.<sup>271</sup>

The *Romero* opinion was delivered with a firm but conciliatory tone concerning the balancing of policies of the legislature and the rules of the court with respect to

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261. *Id.* ¶ 19, 120 P.3d at 826–27.

262. *Id.* ¶ 23, 120 P.3d at 827 (Bosson, C.J., dissenting).

263. *Id.* ¶ 24, 120 P.3d at 827.

264. *See supra* note 201.

265. *Albuquerque Rape Crisis Ctr.*, 2005-NMSC-032, ¶¶ 32–33, 120 P.3d at 829.

266. *Id.* ¶¶ 33–35, 120 P.3d at 829.

267. *Id.* ¶ 32, 120 P.3d at 829.

268. *Id.* ¶ 36, 120 P.3d at 829–30. The New Mexico Constitution guarantees that "[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." N.M. CONST. art. IV, § 34. The majority dismissed this argument by pointing out that the date of enactment of the legislative victim-counselor privilege was 1987, which predated the offense and prosecution in the case at hand. *Albuquerque Rape Crisis Ctr.*, 2005-NMSC-032, ¶ 20, 120 P.3d at 827.

269. *Estate of Romero ex rel. Romero v. City of Santa Fe*, 2006-NMSC-028, ¶¶ 11–14, 137 P.3d 611, 615–16.

270. *Id.* ¶ 1, 137 P.3d at 613.

271. *Id.*

privileges.<sup>272</sup> While identifying compelling reasons for recognizing a privilege for law enforcement investigatory materials, the court did not retreat from its position of recognizing only privileges contained in the state constitution, rules of evidence, or other rules of the court.<sup>273</sup> In holding that neither the state constitution nor the state rules of evidence provided such a privilege, the supreme court noted that separation of powers and executive privilege, which are inherent in the state constitution, do not apply to municipalities and that it had previously rejected a “public interest privilege.”<sup>274</sup> Turning to the rules of evidence, the court considered two similar privileges contained in those rules: one that protects reports required by law when the law provides a privilege and one that protects the identity of informants.<sup>275</sup> But the court required greater correspondence between the similar privileges and the privilege that it was asked to recognize: “[W]hile our Rules of Evidence do provide some protection for individual pieces of investigatory materials and information, these rules do not afford complete protection from disclosure of all ongoing criminal investigative materials obtained by law enforcement.”<sup>276</sup> Lacking a basis in the state constitution or the rules of evidence, the court was “unable to recognize the existence of such a privilege.”<sup>277</sup>

Following the approach taken in *Southwest Community Health Services v. Smith*,<sup>278</sup> which sought to accommodate the interests of the legislature and those of the court, the *Romero* court held that the Inspection of Public Records Act created immunity from the discovery of such records.<sup>279</sup> The immunity was not absolute, and the court prescribed a balancing test—weighing the need for discovery in a private lawsuit against the public interest in confidentiality of certain law enforcement records.<sup>280</sup> The court also referred the need for a law enforcement privilege to its Rules of Evidence Committee for discussion and review.<sup>281</sup>

The decisions in *Albuquerque Rape Crisis Center* and *Romero* recognize that the application of the New Mexico Supreme Court’s rule-making power to legislative enactments ought to be measured rather than categorical. *Albuquerque Rape Crisis Center* did not go so far as to recognize all privileges enacted by the legislature, but rather only those that have some analog in existing constitutional or court-rule privileges. Further, such legislative privileges must be consistent with, and must not conflict with, the constitutional or supreme court-created privilege, an approach that was reaffirmed in *Romero*.<sup>282</sup>

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272. See *id.* ¶ 17, 137 P.3d at 617 (“While we have superintending control over procedures used in the courts, the legislature describes the public policies of the state through statutes.”).

273. *Id.* ¶ 8, 137 P.3d at 615.

274. *Id.* ¶ 13, 137 P.3d at 616. For a discussion of a “public interest privilege,” see *supra* note 214.

275. *Romero*, 2006-NMSC-028, ¶ 14, 137 P.3d at 616 (citing Rules 11-502, 11-510 NMRA).

276. *Id.*

277. *Id.* On remand, however, the trial court was instructed to consider the applicability of other state rules and policies to determine whether some of the materials in question could remain confidential. See *id.* ¶¶ 19–22, 137 P.3d at 618–19.

278. 107 N.M. 196, 755 P.2d 40 (1988).

279. *Romero*, 2006-NMSC-028, ¶ 17, 137 P.3d at 617 (relying upon NMSA 1978, § 14-2-1(A)(4) (2005)).

280. *Id.* ¶¶ 19–21, 137 P.3d at 618–19.

281. *Id.* ¶ 22, 137 P.3d at 619.

282. *Id.* ¶ 11, 137 P.3d at 615.

Because no obvious analog exists in the constitution or in the supreme court's rules of evidence, this requirement is problematic regarding the statutory accountant-client privilege. Of course, the difference between a good lawyer and a great lawyer is imagination, and perhaps one of the existing rules might arguably be deemed to cover the same subject matter as the accountant-client privilege.<sup>283</sup> In very limited circumstances, the attorney-client privilege might be deemed to cover similar subject matter, at least when the accountant is working at the direction of the lawyer.<sup>284</sup> Apart from those specific circumstances, *Romero* suggests that the court will look to other enactments concerning the subject matter of the privilege to ascertain legislative policy,<sup>285</sup> which in this instance is apparent in the 1999 New Mexico Public Accountancy Act.<sup>286</sup>

Another difficult question is whether the supreme court would adhere to the notion that, by enacting the rules of evidence in 1973 with no apparent legislative participation, it had the power to repeal the few statutorily based rules of evidence previously adopted by the legislature. That notion is more consistent with the view that the legislature not only lacks any role in formulating new privileges (regardless of the broader social implications of those rules), but also that the legislature is powerless to accept, reject, or modify those privileges recognized by the court.<sup>287</sup> Unlike a court's interpretation of the common law or a statute with which the legislature does not agree, the legislature may not "overrule" the court through legislation if the privilege is deemed procedural.<sup>288</sup> In sum, *Albuquerque Rape Crisis Center* portends change in the area of evidentiary privilege and may make it easier to convince New Mexico courts to consider the accountant-client privilege on its merits because it recognizes that some legislative enactments can be harmonized with the rules of evidence.

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283. "[I]t seems a long step from a lawyer-client privilege to a tax advisor-client or accountant-client privilege. But if one recharacterizes it as a 'legal advisor' privilege, the extension seems like the most natural thing in the world." *Jaffee v. Redmond*, 518 U.S. 1, 20 (1996) (Scalia, J., dissenting) (stating that the prototypical evidentiary privilege, the attorney-client privilege, is based on the professional status of the attorney, not on the broad area of advice).

284. Where an accountant is employed to assist a lawyer in the rendition of legal services to a client, communications between the client and the accountant in furtherance of the lawyer's rendition of those services, as well as between the lawyer and the accountant for that purpose, should be protected by the attorney-client privilege. See Rule 11-503(A)-(B) NMRA.

285. *Romero*, 2006-NMSC-028, ¶ 18, 137 P.3d at 618.

286. NMSA 1978, § 61-28B-24 (1999).

287. The New Mexico Supreme Court's categorical approach to privilege in *Ammerman* did not escape notice by commentators: "The New Mexico Supreme Court has taken what most students of procedure would consider a high-handed attitude of denigrating legislative competence in this field. Its position that privileges are strictly procedural rather than substantive and thus not amenable to legislative action is in the extreme minority." JACK B. WEINSTEIN & MARGARET E. BERGER, 2 WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND STATE COURTS ¶ 501[07], at 501-95 to -96 (Joseph M. McLaughlin ed., 1996) (footnote omitted).

288. For example, New Mexico's rape shield law is plainly a rule of evidence, but the statute enacted by the legislature in 1975 specifically provided that the statutory provisions were as matters "of substantive right." Act of Apr. 3, 1975, ch. 109, 1975 N.M. Laws 394, 399. In *State v. Herrera*, the court of appeals was not swayed by the identification of the statute as substantive, but rather held that the statute's provisions could be given effect absent a conflict with a rule adopted by the supreme court even though those statutory provisions were not binding upon the supreme court. 92 N.M. 7, 12, 582 P.2d 384, 389 (Ct. App. 1978). Finding no conflict, the court enforced the statutory provisions. *Id.* The supreme court later expressly adopted a similar evidentiary rule. Rule 11-413 NMRA.

Still, the cases make apparent the primacy of the privileges found in the rules of evidence as opposed to statutory enactments.<sup>289</sup> This applies to evidentiary privileges, including testimonial privileges.<sup>290</sup> The court of appeals has similarly suggested that the rules of evidence, not the common law, govern the waiver of any privilege.<sup>291</sup> The state rules of evidence contain a very thoughtful approach to privileges through uniform draftsmanship, first considering pertinent definitions, the general rule of the privilege, who may claim the privilege, and exceptions to the privilege.<sup>292</sup> The rules also contain safeguards to protect those privileges, including protection in case of erroneously compelled disclosure or lack of opportunity to claim the privilege.<sup>293</sup> The state rules expressly provide that a court is not permitted to comment upon a claim of privilege (i.e., no inference may be drawn from such a claim) and jury cases are to be conducted so that the jury has no knowledge of claims of privilege.<sup>294</sup> Noticeably absent from the privileges contained in the state rules of evidence, however, is an accountant-client privilege. Moreover, as discussed below, an accountant-client privilege may be in some tension with other legislative and regulatory enactments concerning accountants.

### C. Ethical Responsibilities of New Mexico Accountants

New Mexico's statutory accountant-client privilege, requiring written consent of the client prior to the disclosure of information obtained in the course of an audit or investigation or communicated to the accountant by a client,<sup>295</sup> imposes a more absolute obligation on accountants and may be inconsistent with certain other provisions regulating accountants. For example, although the 1999 Public Accountancy Act discourages the disclosure of confidential communications between an accountant and a client,<sup>296</sup> it does not create a privilege.<sup>297</sup> The statute specifically provides that a CPA "shall not voluntarily disclose information communicated to him by the client relating to and in connection with a service rendered to the client by him" and "[s]uch information shall be deemed confidential."<sup>298</sup> Of course, a

289. See Rule 11-502 NMRA (required written reports privileged by statute); *id.* R. 11-503 (lawyer-client privilege); *id.* R. 11-504 (physician-patient and psychotherapist-patient privilege); *id.* R. 11-505 (husband-wife privileges); *id.* R. 11-506 (communications to clergy); *id.* R. 11-507 (political vote cast in secret); *id.* R. 11-508 (trade secrets); *id.* R. 11-509 (communications to juvenile probation officers and social service workers); *id.* R. 11-510 (identity of informer); *id.* R. 11-514 (news media-confidential source or information).

290. *State v. Brown*, 1998-NMSC-037, ¶ 61, 969 P.2d 313, 330.

291. *Pub. Serv. Co. of N.M. v. Lyons*, 2000-NMCA-077, ¶ 14, 10 P.3d 166, 171.

292. See, e.g., Rule 11-503 NMRA (lawyer-client privilege).

293. *Id.* R. 11-512.

294. *Id.* R. 11-513.

295. NMSA 1978, § 38-6-6(C) (1973).

296. *Id.* § 61-28B-24 (1999).

297. Cf. *Trujillo v. Puro*, 101 N.M. 408, 412, 683 P.2d 963, 967 (Ct. App. 1984) (holding that a statutory provision precluding a physician from divulging a professional secret was an ethical constraint, not an evidentiary privilege).

298. The statute provides in full:

Except by permission of the client for whom a certificate or permit holder performs a service or the heir, successor or personal representative of the client, a certificate holder shall not voluntarily disclose information communicated to him by the client relating to and in connection with a service rendered to the client by him. Such information shall be deemed confidential; provided that nothing in this section shall prohibit the disclosure of information required to be disclosed by a standard of the public accounting profession in reporting on the examination of

communication may be confidential (i.e., not intended to be disclosed to third parties except for a specified purpose) without necessarily being privileged (i.e., protected from compelled disclosure). That seems to be the import of this section of the Act—though information might be confidential, “nothing in this section shall...prohibit disclosure in a court proceeding.”<sup>299</sup> Other exceptions include (1) disclosure required by a financial reporting standard, (2) disclosure in an investigation or proceeding pursuant to the Public Accountancy Act, (3) disclosure in an ethical investigation by a private professional organization, (4) disclosure in the course of a peer review, (5) disclosure to a person (on a need-to-know basis) active in the private professional organization performing a service for the client, or (6) disclosure to a person in the entity needing the information solely for the purpose of assuring quality control.<sup>300</sup> This statutory provision is based upon section 18 of the Uniform Accountancy Act, the commentary to which explains that the Uniform Act recognizes the confidentiality of client communications “without, however, extending it to the point of being an evidentiary privilege.”<sup>301</sup> Many other states have similar provisions that recognize the confidentiality of accountant-client communications but also provide exceptions for disclosure in court proceedings.<sup>302</sup> Even if the New Mexico provision in section 38-6-6(C) did somehow create an accountant-client privilege, the exceptions could arguably result in the waiver of any such privilege.

Administratively, New Mexico requires its CPAs to conform to (1) the Code of Conduct of the American Institute of Certified Public Accountants (AICPA) and (2) state rules.<sup>303</sup> CPAs are expected, within the constraints of client confidentiality, to be honest and candid.<sup>304</sup> Specifically, “[a] member in public practice shall not disclose any confidential client information without the specific consent of the client.”<sup>305</sup> This rule is subject to similar exceptions contained in New Mexico

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a financial statement or prohibit disclosure in a court proceeding, in an investigation or proceeding pursuant to the 1999 Public Accountancy Act, in an ethical investigation conducted by a private professional organization or in the course of a peer review, or to another person active in the organization performing a service for that client on a need-to-know basis or to a person in the entity who needs this information for the sole purpose of assuring quality control.

NMSA 1978, § 61-28B-24 (citation omitted).

299. *Id.*

300. *See id.*; 16.60.4.10 NMAC.

301. UNIF. ACCOUNTANCY ACT § 18 cmt. (Am. Inst. of Certified Pub. Accountants 4th ed. 2005), available at [http://www.aicpa.org/download/states/UAA\\_2005\\_Fourth\\_Edition.pdf](http://www.aicpa.org/download/states/UAA_2005_Fourth_Edition.pdf). The commentary suggests that treating accountant-client communications as a privilege “would prevent...disclosure in court in certain circumstances—essentially, those in which the licensee is not a party, such as divorce proceedings where one of the parties is a client of the licensee.” *Id.*

302. *E.g.*, ALASKA STAT. § 08.04.662 (2006); CONN. GEN. STAT. ANN. § 20-281j (West 1999); IOWA CODE ANN. § 542.17 (West 1997); KY. REV. STAT. ANN. § 325.440 (West 2006); ME. REV. STAT. ANN. tit. 32, § 12279 (1999); MASS. GEN. LAWS ANN. ch. 112, § 87E (West 2003); MINN. STAT. ANN. 326A.12 (West 2004); MISS. CODE ANN. § 73-33-16(2) (2004); MONT. CODE ANN. § 37-50-402 (2005); N.H. REV. STAT. ANN. § 309-B:18 (LexisNexis 2005); N.J. STAT. ANN. § 45:2B-65 (West 2004); N.D. CENT. CODE § 43-02.2-16 (2001); OR. REV. STAT. § 673.385 (2003); 63 PA. CONS. STAT. ANN. § 9.11a (West 1996); R.I. GEN. LAWS § 5-3.1-23 (2004); VT. STAT. ANN. tit. 26, § 82 (2006); WASH. REV. CODE ANN. § 18.04.405 (West 2005).

303. 16.60.5.8 NMAC.

304. AICPA CODE OF PROF'L CONDUCT § 54.02 (Am. Inst. of Certified Pub. Accountants 2006).

305. *Id.* § 301.01. This rule further provides:

This rule shall not be construed (1) to relieve a member of his or her professional obligations under rules 202 [ET section 202.01] and 203 [ET section 203.01], (2) to affect in any way the

statutory law, including the obligation to comply with a validly issued and enforceable subpoena and summons.<sup>306</sup>

A strong argument can be made that New Mexico's accountant-client privilege has been impliedly repealed by the more specific, and perhaps contrary, confidential communications provision in the 1999 Public Accountancy Act.<sup>307</sup> That provision prohibits voluntary disclosure of engagement-related client communications and deems them confidential but at the same time makes it clear that nothing in the provision "shall...prohibit disclosure in a court proceeding."<sup>308</sup> In contrast, the statutory accountant-client privilege generally prohibits such disclosure in state courts without written consent of the client.<sup>309</sup> Implied repeals are not favored because the legislature is presumed to act with the awareness of existing law,<sup>310</sup> which in this case was the statutory accountant-client privilege. Moreover, perhaps the legislature would be deemed aware that the statutory accountant-client privilege was ineffective as a legislatively created privilege. Nevertheless, "when two statutes are inconsistent, the latter enactment repeals the former by implication to the extent of the inconsistency."<sup>311</sup> As such, to the extent that the confidential communications provision in the 1999 Public Accountancy Act is more specific, that specificity could be construed to control over the more general 1933 statutory provision.<sup>312</sup> The objective must be to give effect to legislative intent; when provisions can be construed harmoniously, they should be.<sup>313</sup> One way to harmonize the two statutes at issue with respect to communications between accountants and clients would be to apply the directive concerning the non-creation of the privilege literally. In other words, the directive would only apply to the confidential communications provision

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member's obligation to comply with a validly issued and enforceable subpoena or summons, or to prohibit a member's compliance with applicable laws and government regulations. (3) to prohibit review of a member's professional practice under AICPA or state CPA society or Board of Accountancy authorization, or (4) to preclude a member from initiating a complaint with, or responding to any inquiry made by, the professional ethics division or trial board of the Institute or a duly constituted investigative or disciplinary body of a state CPA society or Board of Accountancy.

Members of any of the bodies identified in (4) above and members involved with professional practice reviews identified in (3) above shall not use to their own advantage or disclose any member's confidential client information that comes to their attention in carrying out those activities. This prohibition shall not restrict members' exchange of information in connection with the investigative or disciplinary proceedings described in (4) above or the professional practice reviews described in (3) above.

*Id.* For an excellent discussion of this rule, see ARENS ET AL., *supra* note 76, at 91-93.

306. Compare AICPA CODE OF PROF'L CONDUCT § 301.01, with NMSA 1978, § 61-28B-24 (1999).

307. NMSA 1978, § 61-28B-24.

308. *Id.*

309. *Id.* § 38-6-6(C) (1973).

310. Kahrs v. Sanchez, 1998-NMCA-037, ¶ 24, 956 P.2d 132, 136.

311. Hall v. Regents of the Univ. of N.M., 106 N.M. 167, 168, 740 P.2d 1151, 1152 (1987). In *Hall*, the supreme court found repeal by implication where the conflict was "apparent and irreconcilable." *Id.* The conflict was between the Wrongful Death Act, enacted in 1882, which prohibited a personal representative from using proceeds to satisfy a decedent's creditors, and the Hospital Lien Act, enacted in 1961, which allowed a hospital to assert a lien on such proceeds. *Id.*

312. See, e.g., City of Albuquerque v. N.M. State Corp. Comm'n, 93 N.M. 719, 721, 605 P.2d 227, 229 (1979).

313. T-N-T Taxi, Ltd. v. N.M. Pub. Regulation Comm'n, 2006-NMSC-016, ¶ 7, 135 P.3d 814, 817.

in the 1999 Public Accountancy Act and not to the statutory accountant-client privilege.

## V. NEED FOR CLARITY

Accountants may presently be compelled to give testimony or produce documents, including work papers, by way of a summons or a subpoena. To the extent that the transactions are of interest in federal civil, criminal, or administrative proceedings, it is unlikely that a client would be able to claim an accountant-client privilege in such testimony or documents except with respect to legal advice rendered by an accountant in tax matters under I.R.C. section 7525. Given that many engagements handled by accountants involve federal law, the existence or non-existence of a state accountant-client privilege is irrelevant because, in general, federal law does not recognize such a privilege nor does it recognize state-created privileges.<sup>314</sup>

But not every accounting engagement and subsequent litigation involves federal law. For example, though there may be federal aspects, divorce proceedings, probate and estate administration, corporate governance, an action for partition or an accounting, and state tax administration are primarily state law matters. Because of this, a state accountant-client privilege may have real value to a client if recognized in state proceedings. Though New Mexico's accountant-client privilege statute dates back to 1933, a statute cannot be ignored solely because of its age. The problem with New Mexico's accountant-client privilege is that it was probably either abrogated by the enactment of New Mexico's rules of evidence or was beyond the power of the legislature to enact under prevailing views concerning the limited role of the legislature in rulemaking. Notwithstanding, the accountant-client privilege represents a policy choice by the legislature, although one that may be disregarded based on separation of powers concerns.<sup>315</sup>

The accountant-client privilege is hardly universal, but some of New Mexico's neighbors have statutory accountant-client privileges.<sup>316</sup> A decided minority, less than one third of the states of the United States, have statutory accountant-client evidentiary privileges.<sup>317</sup> The New Mexico accountant-client privilege statute, by its

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314. See *supra* Part III.

315. Cf. *Estate of Romero ex rel. Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 17, 137 P.3d 611, 617 ("While we have superintending control over procedures used in the courts, the legislature describes the public policies of the state through statutes.").

316. ARIZ. REV. STAT. ANN. § 32-749 (2002); COLO. REV. STAT. ANN. § 13-90-107(1)(f)(I) (West 2005).

317. Quantifying the number of states that have evidentiary accountant-client privileges, as opposed to provisions merely requiring confidentiality, requires statutory analysis in light of state decisional law. For example, New Mexico appears to have a testimonial accountant-client privilege, but it is probably unenforceable given state decisional law. See *supra* Part IV. A number of states (perhaps fifteen or sixteen) appear to have accountant-client privileges that could be asserted to limit an accountant's testimony or production of other evidence. ARIZ. REV. STAT. ANN. § 32-749; COLO. REV. STAT. § 13-90-107(1)(f)(I); FLA. STAT. ANN. §§ 90.5055, 473.316 (West 2006); GA. CODE ANN. § 43-3-32 (2005); IDAHO CODE ANN. § 9-203A (2004); 225 ILL. COMP. STAT. ANN. 450/27 (West 1998); IND. CODE ANN. § 25-2.1-14-1 (LexisNexis 2006); LA. REV. STAT. ANN. tit. 37, § 86(a)(1) (2000); MD. CODE ANN., CTS. & JUD. PROC. § 9-110 (LexisNexis 2006); MICH. COMP. LAWS ANN. § 339.732 (West 2004); MO. ANN. STAT. § 326.322 (West 2001); NEV. REV. STAT. ANN. § 49.185 (LexisNexis 2006); TENN. CODE ANN. § 62-1-116 (1997); IDAHO R. EVID. 515(b) (2006); LA. CODE EVID. ANN. arts. 515(C), 516, 517 (2006). Courts have recognized the privileges created by most of these statutes. See *State v. O'Brien*, 601 P.2d 341, 348 (Ariz. Ct. App. 1979); *Colo. State Bd. of Accountancy v. Zaverl Boosalis Raisch*, 960 P.2d 102, 105-06 (Colo. 1996); *Paper Corp. of Am. v.*



terms, applies only to court proceedings—it is prefaced with the words, “In the courts of this state.”<sup>318</sup> Even assuming a broader application, if administrative proceedings progressed to judicial proceedings, the privilege would be of questionable validity.

The legislature could address the apparent invalidity of New Mexico’s statutory accountant-client privilege either by seeking a constitutional amendment allowing it to create rules of evidence or by repealing the present, but potentially ineffective, statutory privilege.<sup>319</sup> A successful constitutional amendment or repeal would clearly apprise lawyers, accountants, and the public of whether a privilege, or some lesser degree of protection, exists and what information is considered privileged.<sup>320</sup>

Ideally, New Mexico’s two statutory provisions that address accountant-client communications, sections 38-6-6 and 61-28B-24, should be integrated so that they are consistent. Though the court’s decision in *Albuquerque Rape Crisis Center* suggests some flexibility and its decision in *Romero* suggests deference to legislative policy expressed in statutes, it is unlikely that the New Mexico Supreme Court will retreat from its position that evidentiary privileges that are not recognized by the New Mexico Constitution or supreme court rule are procedural and therefore exclusively within the court’s discretion to enact. That said, however, cooperation between the legislature and the supreme court in resolving apparent conflicts between statutory evidentiary privileges and the current system of court-created privileges is highly desirable.<sup>321</sup>

Schneider, 563 So. 2d 1134, 1134–35 (Fla. Dist. Ct. App. 1990); *Gearhart v. Etheridge*, 208 S.E.2d 460, 461 (Ga. 1974); *Capps v. Wood*, 718 P.2d 1216, 1219–20 (Idaho 1986); *In re* October 1985 Grand Jury No. 746, 530 N.E.2d 453, 456–57 (Ill. 1988); *First Cmty. Bank & Trust v. Kelley, Hardesty, Smith & Co.*, 663 N.E.2d 218, 221–22 (Ind. Ct. App. 1996); *Sears, Roebuck & Co. v. Gussin*, 714 A.2d 188, 192–94 (Md. 1998); *People v. Paasche*, 525 N.W.2d 914, 917 (Mich. Ct. App. 1995); *McNair v. Eighth Judicial Dist. Court*, 885 P.2d 576, 577–78 (Nev. 1994); *Fed. Ins. Co. v. Arthur Anderson & Co.*, 816 S.W.2d 328, 329–30 (Tenn. 1991). A limited privilege may exist in Kansas. See KAN. STAT. ANN. § 1-401 (2001); *Holley v. Allen Drilling Co.*, 740 P.2d 1077, 1081 (Kan. 1987).

318. NMSA 1978, § 38-6-6(C) (1973).

319. An amendment to the New Mexico Constitution may be proposed by a constitutional convention, an independent commission, or in either house of the legislature. N.M. CONST. art. XIX, §§ 1–2. A constitutional convention requires a two-thirds vote of the legislature and a majority vote by the electorate, and amendments proposed by the convention require a majority vote of the electorate to be enacted. *Id.* § 2. Whether originating in either house or by commission, a proposed amendment requires a majority vote in each house, and thereafter, the proposed amendment is submitted to the electorate and requires a majority vote of the electorate in order to be enacted. See *id.* §§ 1–2.

320. See *Roberts v. Chaple*, 369 S.E.2d 482, 484 (Ga. Ct. App. 1988) (holding accountant potentially liable for unauthorized disclosure of client information contrary to accountant-client privilege); *Orban v. Krull*, 805 N.E.2d 450, 453–54 (Ind. Ct. App. 2004) (same).

321. See Simona Martinez-McConnell, Note, *The Unstated Tension in Albuquerque Rape Crisis Center v. Blackmer: A Divergence Between Formalism and Functionalism*, 36 N.M. L. REV. 661, 685 (2006).

The controversy concerning the supreme court’s exclusive rule-making power may be viewed as the ebb and flow of two different approaches to separation of powers concerns: functionalism and formalism. *Id.* at 664–65. Functionalism is pragmatic, allowing shared functions such as rule making, provided that one branch does not encroach on the functions or increase its power at the expense of another branch. *Id.* at 665. Formalism is concerned with constitutional limits on authority and leads to bright-line rules on authority. *Id.* at 667. At various times, the New Mexico Supreme Court has endorsed either approach in discussing its power over rule making. The promulgation of Rule 11-501, *Ammerman v. Hubbard Broadcasting* and *State ex rel. Anaya v. McBride* probably constitute the high-water mark for formalism. *Id.* at 672–75. Recent decisions such as *Albuquerque Rape Crisis Center* and *Romero* have assumed a more functional tone, recognizing a role for the legislature in enacting statutes that might affect the court’s rules, provided that they do not conflict. *Id.* at 661–62. The advantage of the functionalist approach is that it allows both the judiciary and the legislature to respond to perceived problems, while

Of course, resolution of this issue could occur through litigation, and a client asserting an accountant-client privilege might be encouraged by *Albuquerque Rape Crisis Center* with its more moderate views toward legislatively created privileges and by *Romero* with its concern for policy judgments of the legislature expressed through statutes. Alternatively, the New Mexico Supreme Court could act administratively and refer the issue to its Rules of Evidence Committee.<sup>322</sup> That committee may act upon its own motion, in response to a request from the supreme court, or in response to a request from the bar.<sup>323</sup> The supreme court, however, is the only body that could recognize or adopt an enforceable accountant-client privilege absent further change in the law or a constitutional amendment allowing for the legislative enactment of evidentiary rules. And with any new privilege, proponents would have to make a strong case that such a privilege is integral to the proper functioning of the accountant-client relationship and that the public and private benefits of such a privilege outweigh the loss of reliable evidence that would no longer be admissible in state proceedings. This may be a difficult case to make given the federal government's refusal to recognize such a privilege and the current regulatory trend of requiring greater financial responsibility by public companies (echoed by professional standards), more responsibility by auditors and accountants to detect fraud and misstatement that is material, and more peer review among accountants.<sup>324</sup>

## VI. CONCLUSION

New Mexico has a legislatively created accountant-client privilege that prohibits an accountant from disclosing information gained during an engagement or that may have been disclosed by a client to an accountant, except with the client's written consent. The major justification for the privilege is to encourage full and frank disclosure by clients to their accountants in order to enhance the accountant-client relationship and enable the accountant to better represent and provide services to the client. A minor justification for the privilege is to enhance the client's financial privacy.

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recognizing the supreme court's final word when it comes to rules of practice and procedure, particularly evidentiary privileges. *Id.* at 664–65.

322. Rule 23-106(I) NMRA (rule-making procedure); *id.* R. 23-106(J)(4) (listing the Rules of Evidence Committee as a standing committee).

323. *Id.* R. 23-106(I). The supreme court has recently referred issues involving claimed privileges to its Rules of Evidence Committee. *Estate of Romero ex rel. Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 22, 137 P.3d 611, 619; *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 19, 120 P.3d 820, 826–27.

324. The New Mexico Public Accountancy Board commissioned a multi-phase research study to assess the potential effect of applying some or all of Sarbanes-Oxley to private companies in New Mexico. I N.M. PUB. ACCOUNTANCY BD., SARBANES-OXLEY ACT FOCUS GROUP AND TOWN HALL MEETING ANALYSIS 4 (2005), available at <http://www.rld.state.nm.us/accountancy/PDFs/Sarbanes-Oxley%20Volume%201.pdf>. The study found little support among business professionals and CPAs for adopting all of the Sarbanes-Oxley provisions but some support for adopting certain provisions. See II N.M. PUB. ACCOUNTANCY BD., SARBANES-OXLEY ACT SURVEY RESEARCH AMONG BUSINESS PROFESSIONALS AND CPAS 3–4 (2005), available at <http://www.rld.state.nm.us/accountancy/PDFs/Sarbanes-Oxley%20Volume%202.pdf>. Based on the study, the Board concluded that “implementing Sarbanes-Oxley legislation in New Mexico would not be beneficial to either the business community or the public.” N.M. Public Accountancy Board, <http://www.rld.state.nm.us/b&c/accountancy/News/news.htm> (last visited Apr. 22, 2007).

An accountant-client privilege, like any privilege, results in the suppression of relevant evidence that might be used to more accurately decide a case. Several justifications have been advanced against recognizing such a privilege, including (1) that much of the information communicated by clients to accountants will find its way into publicly disclosed reports, (2) that accountants are already under an ethical obligation not to disclose client information, and (3) that legal sanctions encourage clients and accountants to fully disclose information without the need for an evidentiary privilege.

Any discussion of an accountant-client privilege inevitably invites comparison to an attorney-client privilege, which is a widely recognized common-law privilege. Lawyers are tasked with zealously representing clients within the bounds of the law, and an attorney-client privilege is deemed essential to encourage client disclosure, thereby furthering observance of the law and the administration of justice. Accountants have broader institutional obligations that depend upon full and fair disclosure to third parties such as investors, creditors, and regulatory authorities (i.e., taxation and securities regulatory bodies). These broader institutional obligations may militate against such a privilege. An accountant-client privilege may be in some tension with an accountant's duty to investigate and report material misstatements affecting the financial statements, whether caused by error or fraud. This responsibility certainly applies to auditing, and accountants performing some non-attest services are now required to report such information should it come to their attention. Given the policy choices inherent in considering whether to recognize an accountant-client privilege, this seems like a matter upon which the legislature would be competent to act.

Federal law does not recognize a common law accountant-client privilege or work-product privilege that might shield the testimony or work product of an accountant. Although a federally authorized tax practitioner-client privilege exists, it provides very limited protection because it only protects client communications in the context of an accountant rendering legal advice in certain civil matters. Confidential communications between accountant and client might be protected under the attorney-client privilege, but only where the accountant is working under the direction of the client's attorney and is providing services exclusively for the rendition of legal advice.

Accountant-client privileges from other jurisdictions, as well as the New Mexico Rules of Evidence and the law of attorney-client privilege, provide guidance with respect to how the New Mexico accountant-client privilege might operate as well as reveal its limitations. Doctrines of waiver, the crime-fraud exception, and disclosure for professional licensure matters are common limitations on the privilege. Although the lack of a federal accountant-client privilege may lessen the practical significance of the lack of a state accountant-client privilege, accountants certainly deal with matters involving state law where a privilege might benefit the client. But given the New Mexico Supreme Court's plenary power over rules of evidence as well as the enactment of the rules of evidence, which omit a role for the legislature in formulating privileges, it is doubtful that New Mexico's accountant-client privilege is enforceable in New Mexico courts.

Two recent New Mexico Supreme Court decisions, *Albuquerque Rape Crisis Center v. Blackmer* and *Estate of Romero ex rel. Romero v. City of Santa Fe*, appear

to have moderated this approach somewhat. *Albuquerque Rape Crisis Center* recognized a legislatively created privilege that had close correspondence to existing constitutional or court-created privileges, but the accountant-client privilege may lack such correspondence because it differs from its closest analog, the attorney-client privilege. Moreover, from a practical perspective, the ethical responsibilities of New Mexico accountants suggested by statute, and implemented by regulation, may conflict with such an accountant-client evidentiary privilege and indeed may suggest that the accountant-client privilege was repealed by implication.

Clarity is needed in this area so that attorneys, accountants, and the public are apprised of the validity of the 1933 evidentiary privilege concerning accountants and clients beyond the confidentiality recognized in the New Mexico Public Accountancy Act.<sup>325</sup> Such clarity might come through litigation, a constitutional amendment allowing the legislature to create privileges, repealing the present accountant-client privilege, or, ideally, harmonizing the existing statutory provisions concerning confidential client communications.

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325. Compare NMSA 1978, § 38-6-6(C) (1973), with *id.* § 61-28B-24 (1999).