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The Creation of an Accountant Workproduct Privilege--Rendering Relevancy Irrelevant: United States v. Arthur Young & Co.

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COMMENTS

THE CREATION OF AN ACCOUNTANT WORKPRODUCT PRIVILEGE— RENDERING RELEVANCY IRRELEVANT: *United States v. Arthur Young & Co.*

Section 7602 of the Internal Revenue Code (the Code) authorizes the Internal Revenue Service (IRS) to issue a summons requesting the production of any books, papers, or data which may be relevant to an investigation of a particular taxpayer's tax liability.¹ The summons may be directed either at the taxpayer or at a third party in possession of the requested documents, including the taxpayer's accountant.² As a result, accountants who refuse to

¹ I.R.C. § 7602 (West 1982). Section 7602 provides in pertinent part:

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give testimony, under oath, as may be relevant or material to such inquiry

Id.

² See *id.* § 7609(a)(2); Moses, *Issuance and Enforcement of IRS Summonses Against Third-Party Recordkeepers*, 60 TAXES 66, 68-69 (1982). The third-party recordkeepers to whom an IRS summons may be issued include accountants, attorneys, trust companies, brokers, and banks. I.R.C. § 7609(a)(3). Prior to the enactment of section 7609 in 1976, the taxpayer did not even possess the legal right to be informed of an IRS investigation of his tax return. Moses, *supra*, at 68-69. The courts upheld this practice because it was usually the third party, and not the taxpayer, who was in possession of the necessary documents. See, e.g., *United States v. Shlom*, 420 F.2d 263, 266 (2d Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970). Today, however, the taxpayer being investigated has a right to notice of the summons' issuance within 3 days of its service upon the third party, as well as a right to intervene in any proceeding resulting from enforcement of the summons. See I.R.C. § 7609.

surrender summoned material often become involved in litigation with the IRS.³ Particularly controversial has been the question whether an accountant may resist an IRS demand for production of "tax accrual workpapers."⁴ These workpapers, which are not used in the preparation of tax returns, but may contain the accountant's candid interviews, opinions, and judgments, are prepared by an accountant in verifying a corporate entity's estimate of its contingent tax liability.⁵ Notwithstanding the broad interpre-

³ See, e.g., *United States v. Price Waterhouse & Co.*, 515 F. Supp. 996, 998 (N.D. Ill. 1981); *United States v. Goldman*, 453 F. Supp. 508, 510 (C.D. Cal. 1978), *aff'd*, 637 F.2d 664 (9th Cir. 1980); *United States v. Coopers & Lybrand*, 413 F. Supp. 942, 944 (D. Colo. 1975), *aff'd*, 550 F.2d 615 (10th Cir. 1977).

⁴ See Caplin, *IRS Toughens its Stance on Summoning Accountant's Tax Accrual Workpapers*, 53 J. TAX'N 130, 130 (1980). The existing controversy between the accounting profession and the IRS primarily concerns the question whether the tax accrual workpapers are sufficiently relevant as to permit their procurement by the IRS. *Id.* The inherently sensitive nature of these particular papers serves to inspire continued conflict. *Id.* Indeed, tax accrual workpapers often contain material that reflects the mental processes utilized by an accountant in his preparation of tax returns. *Id.*; see *infra* note 5. See generally Note, *Government Access to Corporate Documents and Auditors Workpapers: Shall We Include Auditors Among the Privileged Few?*, 2 J. CORP. L. 349, 356 (1977). An examination of the cases dealing with this conflict reveals disparate judicial views. Compare *United States v. Goldman*, 453 F. Supp. 508, 512 (C.D. Cal. 1978) (court denied enforcement of summons requesting taxpayer's accountant to produce documents and give testimony relating to tax years under investigation), *aff'd*, 637 F.2d 664 (9th Cir. 1980) and *United States v. Coopers & Lybrand*, 413 F. Supp. 942, 954 (D. Colo. 1975) (judicial enforcement of summons to produce tax accrual papers denied), *aff'd*, 550 F.2d 615 (10th Cir. 1977) with *United States v. Price Waterhouse & Co.*, 515 F. Supp. 996, 999 (N.D. Ill. 1981) (court granted access to tax accrual papers) and *United States v. Arthur Andersen & Co.*, 474 F. Supp. 322, 332 (D. Mass. 1979) (court compelled production of tax accrual workpapers), *appeal dismissed*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980). Although the Second Circuit did not specifically address the issue of tax accrual workpapers in *United States v. Noall*, 587 F.2d 123, 123 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979), its rationale has been used to uphold IRS summonses requesting production of such documents, see, e.g., *United States v. Arthur Andersen & Co.*, 474 F. Supp. at 330.

⁵ See 1 INT. REV. MAN. (CCH) § 4024.2(3), at 7019 (1981). The accountant's tax accrual workpapers, which also are referred to as the tax pool analysis, tax cushion, or tax contingency reserve, reflect an estimation of a company's contingent tax liability. *Id.* The objective of the accountant in preparing these papers is to obtain a reasonable estimate of the income tax attributable to all items of income and expense, and of the accrued balance necessary to cover estimated tax liabilities. *Id.* Tax accrual workpapers may include:

- (a) A summary of the transactions recorded in the taxpayer's general ledger with respect to income tax accounts;
- (b) A computation of the tax provision for the current year, whether or not the tax is payable in that year; and
- (c) A memorandum discussing items reflected in the financial statements as income or expense where the ultimate tax treatment is unclear.

Id. In addition, the tax accrual workpapers may contain candid interviews, opinions, and judgments of the auditors which might identify specific items of questionable deductions

tation traditionally afforded section 7602 by the federal judiciary,⁶ the Second Circuit Court of Appeals, in *United States v. Arthur Young & Co.*,⁷ recently created an accountant workproduct privilege, holding that absent a sufficient showing of need by the IRS, tax accrual workpapers prepared by an accountant need not be released to the IRS.⁸

In *Arthur Young*, an IRS summons was issued to the accounting firm of Arthur Young & Co. (Arthur Young), which had served as independent auditor to the Amerada Hess Corporation (Amerada) since 1971.⁹ The summons, which requested the production of all firm files relating to Amerada,¹⁰ was issued as part of an IRS criminal investigation of the tax returns prepared by Amerada

claimed by the taxpayer for the relevant tax years. Brief for Appellee at 8, *United States v. Arthur Young & Co.*, 677 F.2d 211 (2d Cir. 1982). Moreover, the tax accrual workpapers may set forth a series of positions which the auditor believes the IRS may take with respect to his client, as well as notes taken from confidential conversations with company clients. 677 F.2d at 217. These papers also may include the auditor's speculations and opinions as to his client's views on particular tax issues. Amicus curiae (A.I.C.P.A.) brief at 10, *United States v. Arthur Young & Co.*, 677 F.2d 211 (2d Cir. 1982). It should be noted that disclosure of these opinions may prejudice the taxpayer in its negotiations with the IRS concerning tax liability. *Id.* For a general discussion on tax accrual workpapers, see *United States v. El Paso Co.*, 682 F.2d 530, 534-35 (5th Cir. 1982).

⁶ See, e.g., *United States v. Euge*, 444 U.S. 707, 719 (1980) (summons for exemplar of taxpayer's handwriting enforced); *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 319 (1978) (IRS summons enforced although sole motive was to obtain criminal evidence); *United States v. Bisceglia*, 420 U.S. 141, 150 (1975) (enforcement of John Doe summons upheld); *Donaldson v. United States*, 400 U.S. 517, 536 (1971) (summons issued in furtherance of an investigation, which could have resulted in criminal prosecution, is permissible, provided that its issuance is in good faith); *Foster v. United States*, 265 F.2d 183, 185 (2d Cir.) (section 7602 held to authorize IRS to issue summons for production of signature cards, cancelled checks, and ledger sheets), *cert. denied*, 360 U.S. 912 (1959). In support of the policy of interpreting section 7602 in a broad fashion, the Court in *Donaldson* reasoned that "[a]ny other holding . . . would thwart and defeat the appropriate investigatory powers that the Congress has placed in 'the Secretary or his delegate'. . . . to carry out the broad responsibilities . . . for the administration and enforcement of the internal revenue laws." *Donaldson*, 400 U.S. at 533-34 (footnote omitted).

⁷ 677 F.2d 211 (2d Cir. 1982).

⁸ *Id.* at 221.

⁹ *Id.* at 214. Arthur Young is a firm of certified public accountants. *Id.* In its capacity as Amerada's independent auditor, the firm had reviewed the financial statements prepared by Amerada during the years 1972 through 1974. *Id.* The IRS investigation of Amerada's tax returns focused upon these fiscal years. Amicus curiae (A.I.C.P.A.) brief at 5, *United States v. Arthur Young & Co.*, 677 F.2d 211 (2d Cir. 1982).

¹⁰ 677 F.2d at 214-15. Over 250,000 pages of documents were contained in the requested files. *Id.* at 215. Included among these documents were the audit program files, the audit workpaper files, the tax pool analysis files, and "[a]ny other information pertinent to the audit of Amerada . . . [during the years in question]." *Id.* at 215 n.4.

from 1972 through 1974.¹¹ Following Arthur Young's refusal to relinquish the material, a proceeding to enforce the summons was initiated by the IRS.¹² The district court ordered enforcement of the summons which, with two exceptions, required the production of all the requested material.¹³

On appeal, Arthur Young challenged the district court order with respect to the production of the audit workpapers¹⁴ and tax

¹¹ *Id.* at 214. In 1976, it was learned that many American companies may have made payments to public officials or political parties in foreign countries. *See id.*; Auerbach v. Bennett, 47 N.Y.2d 619, 624, 393 N.E.2d 994, 996, 419 N.Y.S.2d 920, 923 (1979). Reports of such activity prompted Amerada to initiate an internal investigation of possible wrongdoing. 677 F.2d at 214. Toward this end, a committee was formed, comprised of the company's board of directors and assisted by several attorneys. *Id.* IRS interest in the findings of the committee apparently was piqued, and a criminal investigation of Amerada's tax returns for the years 1972 through 1974 was instituted. *Id.* Arthur Young & Co., meanwhile, had been engaged in a routine audit of the corporation, the product of which was sought by the IRS to aid in its investigation. *Id.* at 214-15.

¹² *Id.* A taxpayer who receives notice that an IRS summons has been issued to a third party in possession of information or documents relating to the taxpayer may, within 14 days of receipt of the notice, direct the third party not to comply with the summons. I.R.C. § 7609(b)(2). Proper notice given to both the third-party recordkeeper and the IRS will stay the third party's compliance with the summons, and thereby preclude IRS examination of the summoned records, absent a court order. *Id.* § 7609(d). The IRS then may enforce the summons under section 7402, which provides:

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Id. § 7402(b). The taxpayer has an absolute right to intervene in these proceedings. *Id.* § 7609(b)(1).

¹³ 496 F. Supp. 1152, 1160 (S.D.N.Y. 1980). The district court ordered enforcement of the summons, thus requiring Arthur Young to release the requested material. *Id.* Two exceptions were made, however, insofar as the district court determined that a special committee report dealing with questionable foreign payments was protected by the attorney work-product doctrine, and that certain audit programs were too remote to the question of tax liability. *Id.* at 1157-58.

¹⁴ The audit workpapers consisted mainly of factual data derived from the attempt to verify Amerada's financial statements. 677 F.2d at 215. The Internal Revenue Manual defines audit workpapers as those used by auditors to account for "the procedures followed, the tests performed, the information obtained, and the conclusions reached" in the verification process. 1 INT. REV. MAN. (CCH) § 4024.2(2), at 7018 (1981). Indeed, these workpapers provide support for the independent certified public accountant's opinion regarding the fairness of a taxpayer's financial statements. *Id.* In *Arthur Young*, the court held that these documents satisfied the Second Circuit's relevancy test, 677 F.2d at 218-19; *see infra* note 21, rejecting Arthur Young's argument that an enhanced burden of showing relevance is placed upon the IRS when these documents are being sought from a third party rather than from the taxpayer himself, 677 F.2d at 215. In addition, the court stated that it would be anomalous to deny the IRS request for the audit workpapers when Amerada itself did not object to their production. *Id.* at 216; *see infra* note 15.

accrual workpapers.¹⁵ A divided Second Circuit panel¹⁶ affirmed the district court's decision concerning the audit papers,¹⁷ but reversed the order insofar as it mandated production of the tax accrual material.¹⁸ Writing for the court, Chief Judge Feinberg recognized that the primary inquiry in IRS summons enforcement proceedings is whether the IRS has satisfied the prerequisites to enforcement which the Supreme Court delineated in *United States v. Powell*,¹⁹ including a showing that the summoned materials are relevant to the investigation being conducted by the IRS.²⁰

¹⁵ 677 F.2d at 215, 217. On appeal, Arthur Young was the sole challenger of the court's order requiring production of the audit workpapers. *Id.* at 215. Although Amerada chose not to intervene in connection with the audit workpapers, it did join Arthur Young and "a host of amici curiae" in challenging the district court's order to release the tax accrual workpapers. *Id.* at 217; see also *supra* note 12 (enforcement procedures).

¹⁶ Chief Judge Feinberg wrote the majority opinion in which Judge Mansfield joined. Judge Newman filed a separate opinion, dissenting in part and concurring in part.

¹⁷ 677 F.2d at 214, 217.

¹⁸ *Id.* at 214, 221. The Second Circuit's reversal of the district court's order with respect to the tax accrual workpapers marks a significant departure from prior judicial decisions which have enforced summonses requesting production of these materials. See *United States v. Price Waterhouse & Co.*, 515 F. Supp. 996, 999 (D. Minn. 1979); *United States v. Arthur Andersen & Co.*, 474 F. Supp. 322, 327, 332 (D. Mass. 1979), *appeal dismissed*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980). *But see United States v. Coopers & Lybrand*, 413 F. Supp. 942, 951, 954 (D. Colo. 1975) (court denied enforcement of IRS summons requesting tax accrual workpapers), *aff'd*, 550 F.2d 615 (10th Cir. 1977). Initially, the Arthur Young majority addressed and rejected Amerada's contention that since the summons was issued pursuant to a criminal investigation, the relevance of the tax accrual papers must be measured with respect to that investigation. 677 F.2d at 217-18. Chief Judge Feinberg relied upon the rationale set forth by the Supreme Court in *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 319 (1978), in which the Court held that the original motive of an IRS agent in issuing a summons is not dispositive in all cases. *Id.* Furthermore, the majority in *Arthur Young* observed that since an agent simply may reissue a new summons, considerations of judicial economy are also significant. 677 F.2d at 218.

¹⁹ 379 U.S. 48 (1964). In *Powell*, a taxpayer was issued an IRS summons subsequent to an examination of his tax returns. *Id.* at 49. The taxpayer contended that, absent fraud, assessment of additional deficiencies was barred by the statute of limitations. *Id.* Accordingly, he refused to produce the records unless the IRS disclosed its ground for suspicion of fraud. *Id.* The Supreme Court granted certiorari due to intercircuit conflict regarding the standard which must be met by the IRS prior to judicial enforcement of a summons. *Id.* at 50-51. In an attempt to resolve this conflict, the Court set forth the following four prerequisites to enforcement: first, "that the investigation will be conducted pursuant to a legitimate purpose"; second, "that the inquiry may be relevant to the purpose;" third, "that the information sought is not already within the Commissioner's possession;" and finally, "that the administrative steps required by the Code have been followed." *Id.* at 57-58; see Kenderine, *The Internal Revenue Service Summons To Produce Documents: Powers, Procedures, and Taxpayer Defenses*, 64 MINN. L. REV. 73, 76-77 (1979). Notably, the *Powell* Court specifically stated that the IRS need not establish probable cause in order for there to be judicial enforcement of a summons. 379 U.S. at 57.

²⁰ 677 F.2d at 218; *Powell*, 379 U.S. at 57; *supra* note 19.

Applying the relevancy standard consistently used by the Second Circuit, namely that the requested documents "might have thrown light upon" the accuracy of the tax return,²¹ the court unanimously concluded that the tax accrual workpapers met this low threshold of relevance.²²

Notwithstanding this determination, the majority held that a qualified workproduct privilege attaches to tax accrual papers prepared by an accountant.²³ Relying primarily upon *Hickman v. Taylor*,²⁴ in which the Supreme Court declared that an attorney's prelitigation workproduct is privileged against compelled disclosure,²⁵ the Second Circuit stated that "strong public policies [must be balanced] against a party's need for information whenever a conflict between the two arises."²⁶ Chief Judge Feinberg perceived that, with respect to the surrender of tax accrual workpapers, a conflict exists between society's interest in the proper collection of tax revenues and the investing public's interest in corporate com-

²¹ *E.g.*, *Foster v. United States*, 265 F.2d 183, 187 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959); *see* *United States v. Acker*, 325 F. Supp. 857, 862 (S.D.N.Y. 1971). In *Foster*, the Second Circuit espoused a policy of affording a broad interpretation to the section 7602 summons power. *See* 265 F.2d at 186-87. The court declared that "relevancy" as it relates to an IRS summons should be determined in essentially the same manner as "materiality" is determined in relation to grand jury investigations. *Id.* Thus, the summoned material is relevant, according to the court, if it "might have thrown light upon" the IRS' investigation of the taxpayer's tax returns. *Id.* at 187. This standard consistently has been used by the Second Circuit in considering whether the IRS has satisfied the *Powell* criteria. *See, e.g.*, *United States v. Arthur Young & Co.*, 677 F.2d 211, 218 (2d Cir. 1982); *United States v. Shlom*, 420 F.2d 263, 265 (2d Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).

²² 677 F.2d at 218-19. Judge Newman, though dissenting from that part of the majority opinion creating an accountant workproduct privilege, concurred in the determination that the tax accrual workpapers were relevant to the IRS audit of Amerada. *Id.* at 221 n.1 (Newman, J., concurring in part and dissenting in part).

²³ *Id.* at 221.

²⁴ 329 U.S. 495 (1947).

²⁵ *Id.* at 510-11; *see infra* notes 42-46. The Second Circuit, in addition to relying on *Hickman* itself, also relied upon Rule 26(b)(3) of the Federal Rules of Civil Procedure, which incorporates the doctrine enunciated in *Hickman*. 677 F.2d at 219; *see* FED. R. CIV. P. 26(b)(3). Rule 26 provides:

[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party . . . only upon a showing that the party seeking discovery has substantial need of the materials and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials . . . the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Id.

²⁶ 677 F.2d at 219.

pliance with disclosure requirements imposed by the securities laws.²⁷ The court conceded that access to tax accrual workpapers would enhance the government's ability to collect corporate taxes.²⁸ The majority observed, however, that such unrestricted access also would discourage full disclosure of information which, though vital to accurate financial assessments,²⁹ may be perceived by the corporate taxpayer as potentially damaging to the company.³⁰ Thus, the court reasoned, the investing public would be provided with inaccurate financial information upon which to base its investment decisions.³¹ Balancing these countervailing interests, the court fashioned a workproduct privilege which, Chief Judge Feinberg concluded, would protect the investing public's interest in enforcement of the securities laws and would permit the IRS to obtain information upon "a sufficient showing of need."³²

Dissenting in part, Judge Newman contended that the creation of an accountant workproduct privilege is more appropriately

²⁷ *Id.* The majority's examination of the federal securities laws focused primarily upon the disclosure requirements of sections 78l and 78m of the Securities Exchange Act of 1934 (the '34 Act). *Id.*; see 15 U.S.C. §§ 78l-78m (1976). The '34 Act, a legislative response to the stock market crash of 1929, was intended to regulate the securities industry in order to protect investors against price manipulation. See W. KNEPPER, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* 275 (3d ed. 1978). Under the '34 Act, any corporation which desires listing on a national securities exchange is required to comply with several disclosure requirements. 15 U.S.C. § 78m (1976). Pursuant to these requirements, the corporation must file with the Securities Exchange Commission certain financial statements that have been verified by independent auditors "in accordance with generally accepted auditing standards." 17 C.F.R. § 210.1-02(d) (1982). These statements contain the financial data upon which the investing public must rely in its appraisal of the corporation. See H. KRIFKE, *THE SEC AND CORPORATE DISCLOSURE: REGULATION IN SEARCH OF A PURPOSE* 142-43 (1979). To a great extent, therefore, the investing public is dependent upon the accountant's verification of these statements and upon the accounting methods utilized in the process. See *generally id.* This dependence is heightened by the fact that "[a]ccounting is not discovered but instead is an agreed-on set of techniques whose selection legislates its meaning and prima facie determines how we are permitted to see the world. Its correctness and its usefulness depend on what one wants to achieve." *Id.* at 143.

²⁸ See 677 F.2d at 219-20.

²⁹ *Id.* at 219. The majority reasoned that inherent in the '34 Act's verification procedures is the requirement that there be a free flow of information between the management of the subject corporation and the auditors. *Id.* The ultimate result, it is hoped, is a "fair and honest" securities market. See *id.*

³⁰ *Id.* at 220. The court reasoned that the flexible nature of the federal tax laws requires a relationship between the accountant-auditor and the corporate taxpayer that encourages the exchange of confidences regarding possible tax liability. See *id.* Chief Judge Feinberg stated that the potential for disclosure of this information to the IRS necessarily would inhibit this free exchange. See *id.*

³¹ *Id.* at 220-21.

³² *Id.* at 221.

a matter of congressional than judicial concern.³³ Furthermore, Judge Newman rejected the policy argument advanced by the majority, asserting that it "rests on an indictment of corporate America."³⁴ The dissent stated that although some corporations may be tempted to violate their obligations under the securities laws, it is not the responsibility of the court to furnish them with a shield behind which to do so.³⁵ Finally, Judge Newman observed, the certified public accountant is responsible to the public as well as to his client, and thus, contrary to the majority's opinion, the accountant and attorney workproduct privileges are not analogous.³⁶

Although the Second Circuit in *Arthur Young* apparently has attempted both to limit the power of the IRS and to encourage full compliance with the federal securities laws, it is suggested that the privilege recognized by the court for the tax accrual workpapers commands a result unduly restrictive of the IRS summons power. This Comment will examine the Second Circuit's rationale for creating an accountant workproduct privilege and, after identifying the weaknesses in its reasoning, will suggest an alternative approach to the blanket privilege granted by the *Arthur Young* court.

³³ *Id.* at 221-22 (Newman, J., concurring in part and dissenting in part). Judge Newman questioned the majority's very authority to create an accountant's workproduct privilege, and concluded that it was unlikely that even Congress would act to create such a privilege. *Id.* at 222-23 (Newman, J., concurring in part and dissenting in part).

Indeed, an accountant-client privilege that would preclude production of an accountant's workproduct was not recognized at common law. *See, e.g.,* *United States v. Bowman*, 358 F.2d 421, 423 (3d Cir. 1966); *United States v. Kelly*, 311 F. Supp. 1216, 1217 (E.D. Pa. 1969); *In re Rashba & Pokart*, 271 F. Supp. 946, 948 (S.D.N.Y. 1967).

Moreover, the federal courts consistently have refused to recognize any judicially created privilege between an accountant and his client. *Couch v. United States*, 509 U.S. 322, 335 (1973); *United States v. Arthur Andersen*, 474 F. Supp. 322, 326-27 (D. Mass. 1979), *appeal dismissed*, 623 F.2d 725, 729 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980). It must be noted, however, that more than 15 jurisdictions have accorded a statutory accountant-client privilege. *See Note, Government Access to Corporate Documents and Auditor's Workpapers: Shall We Include Auditors Among the Privileged Few?*, 2 J. CORP. L. 349, 369 n.121 (1979); *see also, Katsoris, Confidential Communications: The Accountant's Dilemma*, 35 *FORDHAM L. REV.* 51, 67-68 (1966) (discussing accountant-client privilege statutes).

³⁴ 677 F.2d at 223 (Newman, J., concurring in part and dissenting in part).

³⁵ *Id.* (Newman, J., concurring in part and dissenting in part).

³⁶ *Id.* at 224 (Newman, J., concurring in part and dissenting in part).

Hickman v. Taylor—THE CREATION OF THE ATTORNEY
WORKPRODUCT DOCTRINE

The Second Circuit interpreted the Supreme Court's decision in *Hickman v. Taylor* to mandate a balancing of interests whenever a conflict arises between a strong public policy and a party's need for information.³⁷ Close examination of *Hickman* reveals, however, that the Supreme Court never contemplated such an analysis.

In *Hickman*, the plaintiff's counsel sought discovery of materials obtained by the defense counsel in anticipation of litigation, including statements of witnesses and documents reflecting various thoughts of the defendant's attorney.³⁸ While the plaintiff argued that the Federal Rules of Civil Procedure afforded him access to the requested materials,³⁹ the defendant asserted that the attorney-client privilege insulated the information from compelled disclosure.⁴⁰ After examining the intended scope of rule 26 of the Fed-

³⁷ *Id.* at 219.

³⁸ 329 U.S. at 498-99. In *Hickman*, the plaintiff brought suit against the defendant tug owners to recover damages on behalf of a deceased crew member. *Id.* at 498. In anticipation of the litigation, the defendant's counsel interviewed and took statements from several survivors and witnesses of the accident which gave rise to the plaintiff's claim. *Id.* Subsequent to the commencement of the action, the plaintiff's attorney filed a number of interrogatories directed at the tug owners, seeking copies and summaries of any records, reports, statements, or other memoranda relating to the accident. *Id.* at 498-99. The defendants, through their counsel, declined to comply with the requests, asserting that to do so would be to reveal privileged information and, "almost, the thoughts of counsel." *Id.* at 499.

³⁹ *Id.* at 501-02. The plaintiff in *Hickman* originally believed that, in issuing his interrogatories to the defendant, he was proceeding under Rule 33 of the Federal Rules of Civil Procedure. *Id.* at 501. It became apparent, however, that he actually was invoking rule 26. *Id.* at 502. At the time, rule 26 provided that any party may take the testimony of any person by deposition or by written interrogatories for the purpose of discovery or for the procurement of evidence, and that the deponent's examination may pertain to any matter involved in the pending action as long as such matter is not privileged. *See id.* at 503; FED. R. CIV. P. 26(a)-(b)(1).

⁴⁰ *See* 329 U.S. at 499. The attorney-client privilege, claimed by the defendant as a defense against disclosure of the requested material, is the oldest of the privileges protecting confidential communications. 8 J. WIGMORE, EVIDENCE § 2290, at 542-43 (J. McNaughton rev. ed. 1961). The privilege was created in furtherance of the "oath and honor" of the attorney, since it was considered the duty of the attorney to keep his client's secrets. *Id.* As the "judicial search for the truth" evolved, however, the privilege came to be regarded as that of the client. *Id.* The purpose of this privilege is to promote a free flow of information between the attorney and his client without the fear of subsequent, compelled disclosure. *See Note, supra* note 4, at 360. Candid communication, in turn, would enable the attorney to represent his client more effectively. *Id.* It has been stated that although withholding relevant information may be somewhat detrimental to the judicial system, the benefits to the client and to society outweigh such risks. *See United States v. El Paso Co.*, 682 F.2d 530,

eral Rules,⁴¹ the Court determined that this rule or, for that matter, "even the most liberal of discovery theories," does not justify unwarranted excursions into the "workproduct of the attorney."⁴² The Court observed, however, that such a result obtains not because the workproduct represents privileged matter,⁴³ but rather because "it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims."⁴⁴ Indeed, the Court stated, to permit discovery of an attorney's workproduct as an absolute right would unduly hinder the historical and necessary means by which an attorney fulfills the interests of his client and of society.⁴⁵ Thus, the *Hickman* Court concluded that the requested material did not fall within the contemplated ambit of rule 26.⁴⁶

538-39 (5th Cir. 1982); C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 87, at 175 (E. Cleary 2d ed. 1972). The general principles underlying the attorney-client privilege may be summarized as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by his client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

8 J. WIGMORE, *supra*, § 2292, at 554 (footnote omitted) (emphasis in original); see *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826); *Olender v. United States*, 210 F.2d 795, 806 (9th Cir. 1954), *cert. denied*, 352 U.S. 982 (1957); see also *Cafritz v. Koslow*, 167 F.2d 749, 751 (D.C. Cir. 1948) (mere existence of attorney-client relationship does not ipso facto establish an attorney-client privilege); *infra* note 43.

⁴¹ 329 U.S. at 509-10.

⁴² *Id.* at 510. The "workproduct" of the attorney consists of "interviews, statements, and memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible" means of reflecting the attorney's thoughts. *Id.* at 511.

⁴³ *Id.* at 508-09. The Court unequivocally rejected the defendant's contention that the requested material should benefit from the protection afforded by the traditional attorney-client privilege. *Id.* at 508. Indeed, Justice Murphy stated:

[T]he protective cloak of [the attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client Nor does this privilege concern the memoranda, briefs, communications, and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions, or legal theories.

Id.

⁴⁴ *Id.* at 510-11.

⁴⁵ See *id.* The Court observed that as an officer of the court, a lawyer is bound to protect his client's interests, and at the same time has obligations to work for the "advancement of justice." *Id.* at 510. Thus, the Court concluded, the ability to work with some degree of privacy, free from unnecessary intrusions, is essential to the proper performance of these obligations. *Id.*

⁴⁶ *Id.* at 514. The Court decried the notion that rule 26 and other discovery rules were not intended to allow adversaries "free scrutiny" of all the files and mental processes of

In light of the language employed by the Court, it appears that a balancing test is not necessarily applicable to all situations in which a conflict exists between public policy and the need for information.⁴⁷ Indeed, the *Hickman* Court carefully limited the scope of its decision to the pretrial discovery context.⁴⁸ Moreover, the Court apparently intended to afford at most a qualified privilege to the workproduct produced by an attorney during that particular stage of a lawsuit.⁴⁹

fellow attorneys. *Id.* Justice Jackson, in his concurring opinion, reasoned that to allow the plaintiff access to the subject material would extend the discovery "tool" to an unwarranted extreme. *See id.* at 515-16 (Jackson, J., concurring). Indeed, Justice Jackson stated that "a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Id.* at 516 (Jackson, J., concurring).

⁴⁷ *See* 677 F.2d at 222 (Newman, J., concurring in part and dissenting in part) (there is nothing in "*Hickman v. Taylor* . . . or Rule 26 of the Federal Rules of Civil Procedure that requires or even permits this Court to depart from the broad command of section 7602" (citations omitted)). In addition to reading *Hickman* as mandating a balance of conflicting policy interests, the Second Circuit, like the *Hickman* Court, declared that a "sufficient showing of need" would justify compelled disclosure of tax accrual workpapers. *Id.* at 221; *see* 329 U.S. at 511. The *Arthur Young* court, however, again emulated the *Hickman* panel, failing to supply any readily discernible criteria which would indicate that the IRS has established the requisite need for the accountant's workpapers. 677 F.2d at 221; *see* 329 U.S. at 511.

⁴⁸ 329 U.S. at 513-14; *see* *United States v. Nobles*, 422 U.S. 225, 244 (1975) (White, J., concurring). In discussing the *Hickman* rationale, the concurrence in *Nobles* stated that "the [*Hickman*] Court treated the matter entirely as one involving the plaintiff's entitlement to pretrial discovery under the new Federal Rules." 422 U.S. at 224 (White, J., concurring). Thus, it is clear that the *Hickman* Court did not intend the workproduct doctrine to act either as an absolute privilege or as a means of preventing the production of evidence. *Id.* at 246 (White, J., concurring); *see* 4 J. MOORE & J. LUCAS, FEDERAL PRACTICE ¶ 26.63[7], at 26-387 (2d ed. 1982); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2026 (1970).

⁴⁹ *See* *United States v. Nobles*, 422 U.S. at 237-38. The *Hickman* Court itself recognized that an absolute privilege does not attach to an attorney's workproduct. *See* 329 U.S. at 511; *see also* Note, *A Balancing Approach to the Discoverability of Accountant's Tax Liability Workpapers Under Section 7602 of the Internal Revenue Code*, 60 WASH. U.L.Q. 188, 199 (1982) (the attorney workproduct doctrine "is not, strictly speaking, a privilege"). Since disclosure of this material may be had upon a sufficient showing of need by the requesting party, it has been implied that the *Hickman* Court merely created a "qualified privilege." *See* Note, *supra*, at 199. Interestingly, however, the *Hickman* doctrine even has been interpreted to be less than a qualified privilege. *See, e.g.*, 422 U.S. at 246 (White, J., concurring). In his concurring opinion in *Nobles*, Justice White stated that the *Hickman* Court did not intend to provide a privilege of any kind. *Id.* at 245 (White, J., concurring). To have done so, Justice White opined, would have been to limit the potential evidentiary use of the attorney's workproduct. *Id.* at 245-46. In this regard, the *Hickman* Court itself seemingly did not want the workproduct doctrine to encroach upon the rules of evidence, as it clearly stated that not all materials obtained by the adversary's counsel would be free from discovery, especially since "[s]uch . . . documents [m]ay under certain circumstances,

THE BALANCING OF INTERESTS—COLLECTION OF REVENUES VERSUS
SEC DISCLOSURE

Even assuming that the Second Circuit properly interpreted *Hickman*, it is submitted that the court failed to articulate a policy argument which would necessitate the creation of an accountant workproduct privilege. While it is recognized that protection of the investing public is essential,⁵⁰ the court's assumption that a publicly held corporation would intentionally violate federal disclosure regulations in order to shield itself against potential tax liability is dubious.⁵¹ If a corporation fails to comply with the federal securities laws, it runs the risk of receiving a qualified opinion from its auditor.⁵² This opinion, which is rendered if it appears that the corporation's financial statement does not fairly represent its financial condition, may subject the corporation to, *inter alia*, delisting from the national stock exchange and shareholder derivative suits.⁵³ Thus, contrary to the reasoning relied upon by the court, it is unlikely that a corporate entity would disregard federal disclosure obligations merely to avoid additional tax liability.⁵⁴ Moreover, by assuming that inaccurate financial statements will be supplied to the investing public, the court has questioned the integrity, as well as the competency, of the accounting profession.⁵⁵

be admissible in evidence." 329 U.S. at 511.

⁵⁰ See 677 F.2d at 220-21; *supra* note 27.

⁵¹ See Nath, *Internal Revenue Summonses for "Sensitive" Accountant's Papers*, 34 VAND. L. REV. 1561, 1593 (1981). Interestingly, in *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), the corporate taxpayer asserted that disclosure of the tax accrual workpapers would have a "chilling effect" on a company's compliance with Securities and Exchange Commission regulations, thereby ultimately creating an adverse effect on the investing public. *Id.* at 544. The *El Paso* court, unequivocally rejecting this policy argument, stated that "this premise [is] wholly speculative." *Id.*

⁵² See Nath, *supra* note 51, at 1593. The Securities and Exchange Commission will not permit a financial statement to become effective if the accountant's opinion is qualified. *Id.* Furthermore, if the qualified opinion is revealed in a public document, the corporation may suffer many long-term effects, including the decline of public investments. See *id.* at 1593-94.

⁵³ *Id.* at 1593.

⁵⁴ See Roth, *The Role of the Auditor*, in CORPORATE FINANCIAL REPORTING: CONFLICTS AND CHALLENGES 251 (J. Burton ed. 1969). The federal securities law disclosure requirements have influenced significantly the financial reporting carried out by corporations, due primarily to corporate desire to avoid the inclusion of exceptions or qualifications in an auditor's financial report. *Id.*; Coombe, *Directors, Duties and Responsibilities: New Dimensions, New Opportunities*, 95 BANKING L.J. 634, 641 (1978). Indeed, it has been noted that "the mere threat of a qualified financial statement, for whatever reason, is cause for serious broad concern." *Id.*

⁵⁵ See generally A.I.C.P.A., CODIFICATION OF STATEMENTS ON AUDITING STANDARDS §

It appears that the court's supposition is unfounded since, in addition to ethical incentives, an accountant is subject to personal liability for failure to discharge properly his professional obligations.⁵⁶ In sum, it seems uncertain that affording the IRS access to tax accrual workpapers would result in noncompliance with federal securities regulations.⁵⁷

Clearly, the ultimate effect of the balancing analysis employed by the *Arthur Young* court is the creation of a privilege which is designed merely to promote compliance with obligations already imposed by law.⁵⁸ In addition, it is suggested that Chief Judge Feinberg's reliance upon *Hickman* in this context⁵⁹ neglects two important distinctions between the *Hickman* and *Arthur Young* situations. In *Hickman*, the Supreme Court was influenced by the adversarial nature of the relationship between the attorney and the party requesting disclosure of material, as well as by the absence of any legal obligation on the part of the client or a third party to confide in the attorney.⁶⁰ The relationship between an accountant

110.09, at 6 (1982) (all certified public accountants are bound by a code of ethics, which requires strict adherence to auditing standards). The auditing standards which must be adhered to by accountants have been imposed in the following manner:

Information essential for a fair representation in conformity with generally accepted accounting principles should be set forth in the financial statements. If the financial statements . . . fail to disclose information required by generally accepted accounting principles, the auditor should express a qualified or an adverse opinion because of departure from those principles.

Id. § 509.17, at 278. Justification for the auditor's opinion "rests on the conformity of his examination with generally accepted auditing standards, and on his findings." *Id.* § 509.03, at 213; *see, e.g.*, Coombe, *supra* note 54, at 641 ("the accounting profession reluctantly has come to the recognition that it owes a primary allegiance to the investing public and not to the corporate entity by which it is employed"); *see also* 677 F.2d at 224 (Newman, J., concurring in part and dissenting in part) ("[t]he certified public accountant . . . has responsibilities to the public that far transcend his private employment relationship").

⁵⁶ *See* I.R.C. § 7206. It is a felony to assist wilfully in the preparation of fraudulent tax returns. *Id.*; *see, e.g.*, *United States v. Egenberg*, 441 F.2d 441, 444 (2d Cir.), *cert. denied*, 404 U.S. 994 (1971). Moreover, accountants may be subject to censure or suspension for failure to follow generally accepted accounting principles. *See Nath, supra* note 51, at 1566.

⁵⁷ *See supra* notes 51-56 and accompanying text.

⁵⁸ *See supra* note 27.

⁵⁹ *See* 677 F.2d at 221 (1982).

⁶⁰ *See* 329 U.S. at 510-14. In his dissenting opinion in *Arthur Young*, Judge Newman exhibited the *Hickman* attitude that "privileges generally are created to serve some policy, independent of lawful obligations, that is thought to be impaired . . ." 677 F.2d at 224 (Newman, J., concurring in part and dissenting in part). Judge Newman further explained that while a client has no legal obligation to confide in his attorney, the law accords an attorney-client privilege to encourage communication and, thus, to promote an efficient legal system. *Id.* (Newman, J., concurring in part and dissenting in part). Furthermore, in *Hickman*, the Court sought to avoid both the possibility that witnesses and other subjects of an

and the IRS, however, is nonadversarial,⁶¹ and a corporate taxpayer has an existing legal duty to comply with federal disclosure regulations.⁶² Thus, it appears that although the *Hickman* Court was responding to a legitimate policy need, the Second Circuit has offered protection in an area which already is adequately safeguarded.

THE STANDARD OF RELEVANCE

It is submitted that the Second Circuit's creation of an accountant workproduct privilege enabled the court to circumvent the unsettled question of whether particular information is sufficiently relevant so as to subject it to the summons power of the IRS. While it is conceded that resolution of this issue involves a "delicate and demanding analysis of facts, research of law, and reflection on policy,"⁶³ section 7602 itself ostensibly calls for such treatment.⁶⁴ Moreover, in *United States v. Bisceglia*,⁶⁵ the Supreme Court, after recognizing that the authority vested in the IRS may be abused, nevertheless stated that "the solution is not to restrict that authority so as to undermine the efficacy of the federal tax system"⁶⁶ It appears, however, that the *Arthur Young* decision imposes such a strict limitation upon the summons power of the IRS.⁶⁷ Hence, it is suggested that the court, instead, should have evaluated the various relevancy standards in an attempt to provide a workable standard which would afford protection for all concerned parties.

Seemingly, at the core of the conflict concerning the appropriate relevancy standard is the peculiar nature of the concept itself.⁶⁸ No item is inherently relevant; the relevancy of a given item de-

attorney's investigations would become reluctant to cooperate with the attorney due to fear of disclosure to the adversary, and the chance that an attorney would fail to keep proper records by reason of the same fear. See 329 U.S. at 510-14.

⁶¹ See *infra* note 96.

⁶² See *supra* note 27.

⁶³ *United States v. Arthur Andersen & Co.*, 623 F.2d 725, 729 (1st Cir. 1980).

⁶⁴ See Note, *supra* note 49, at 208.

⁶⁵ 420 U.S. 141 (1975).

⁶⁶ *Id.* at 146.

⁶⁷ See *supra* text accompanying note 66; *infra* notes 97-101 and accompanying text.

⁶⁸ See Note, *supra* note 49, at 208. The current relevancy requirement "provides no inherent limits on the types of documents that the IRS may summon." *Id.* (footnote omitted); see Nath, *supra* note 51, at 1574. It nonetheless has been stated that accountants most frequently rely upon the relevancy standard when challenging an IRS summons. Nath, *supra* note 51, at 1574-75.

pendes upon its relation to some other matter.⁶⁹ Thus, to a great degree, relevancy must be determined on a case by case basis.⁷⁰ Confusion has arisen, however, by virtue of divergent interpretations of the relevancy standard.⁷¹ In *United States v. Matras*,⁷² for example, the Eighth Circuit Court of Appeals, in refusing to enforce a summons,⁷³ stated that the IRS may not impose unnecessary burdens upon a taxpayer or accountant merely for its own convenience.⁷⁴ The court acknowledged the relevancy standard espoused by the Second Circuit, which states that the summoned material is relevant if it "might shed light upon" the IRS investigation,⁷⁵ and interpreted this language to mean a "realistic expectation rather than an idle hope" that something will be discovered.⁷⁶ Subsequently, in *United States v. Noall*,⁷⁷ the Second Circuit liberalized its relevancy standard, noting that the language of section 7602 should be accorded a broad interpretation.⁷⁸ Enforcing an IRS summons, the court relied upon the "might have thrown light upon" standard⁷⁹ and concluded that it requires the

⁶⁹ See James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 690 (1941).

⁷⁰ See *id.*

⁷¹ See, e.g., *United States v. Matras*, 487 F.2d 1271, 1275 (8th Cir. 1973); *United States v. Giordano*, 419 F.2d 564, 568 (8th Cir. 1969), *cert. denied*, 397 U.S. 1037 (1970). In *Matras*, the court denied an IRS request for production of company-wide budgets of the taxpayer, stating that "[t]he term 'relevant' connotes and encompasses more than 'convenience.'" 487 F.2d at 1275. The *Giordano* court, on the other hand, observed that if the conduct of the IRS could be characterized as a fishing expedition, then section 7602 authorizes the Secretary or his delegate to go fish. 419 F.2d at 568.

⁷² 487 F.2d 1271 (8th Cir. 1973).

⁷³ *Id.* at 1273.

⁷⁴ *Id.* at 1275; see *United States v. Theodore*, 479 F.2d 749, 754 (4th Cir. 1973). In denying enforcement of an IRS summons, the *Theodore* court stated that the IRS should not be given "unrestricted license to rummage through" an accountant's files. *Id.* at 754.

⁷⁵ See *United States v. Harrington*, 388 F.2d 520, 524 (2d Cir. 1968); *Foster v. United States*, 265 F.2d 183, 187 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959); *supra* note 21.

⁷⁶ See 487 F.2d at 1274 (quoting *United States v. Harrington*, 388 F.2d at 524).

⁷⁷ 587 F.2d 123 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979).

⁷⁸ 587 F.2d at 126. In *Noall*, the IRS requested the internal audit reports of the Bunge Corporation. *Id.* at 124. Included in these reports were "hearsay, rumors, and opinions" which were not used in the preparation of the company's tax returns. *Id.* at 125. The court ordered their production, however, finding no significance in the argument that the papers were not used in the preparation of the tax returns. *Id.* at 125-26; *cf.* *United States v. Price Waterhouse & Co.*, 515 F. Supp 996, 999 (N.D. Ill. 1981) (IRS allowed to review documents containing opinions even though IRS already possessed documents containing factual information); *United States v. Acker*, 325 F. Supp. 857, 862 (S.D.N.Y. 1971) (in allowing enforcement of IRS summons, court reasoned that although many of the requested documents concededly were not relevant, if category as a whole "might shed light" upon the returns, category itself will be deemed relevant).

⁷⁹ See *supra* note 75 and accompanying text.

IRS to surmount a very low threshold.⁸⁰

In contrast to the confusion engendered by these decisions, the Tenth Circuit, in *United States v. Coopers & Lybrand*,⁸¹ affirmed a district court opinion which developed a more workable relevancy standard. In *Coopers*, the IRS commenced an enforcement proceeding in an effort to obtain, *inter alia*, various tax accrual workpapers.⁸² After acknowledging the lack of reliable guidelines to determine whether certain information is relevant to an IRS investigation, the district court sought to propose a viable solution.⁸³ Initially, the court divided the requested documents into two categories—factual and nonfactual.⁸⁴ According to the court, the factual category, which is comprised primarily of records of actual corporate transactions, is implicitly relevant and therefore automatically susceptible to IRS access.⁸⁵ The court then stated that materials which are nonfactual in nature will not be deemed relevant without further inquiry.⁸⁶ Included in this category of material are all documents and papers reflecting the mental processes of the accountant.⁸⁷ Unfortunately, the degree of need which must be displayed by the IRS in order to procure nonfactual information was articulated vaguely by the *Coopers* court.⁸⁸ It is suggested, therefore, that when the IRS attempts to obtain material falling within the nonfactual category, it should be required to establish that the information could not be acquired from other sources,⁸⁹ and that there is a “realistic expectation” that the summoned material would aid in its investigation.⁹⁰

Although the *Arthur Young* court was “unimpressed” with the

⁸⁰ 587 F.2d at 125.

⁸¹ 550 F.2d 615 (10th Cir. 1977), *aff'g* 413 F. Supp. 942 (D. Colo. 1975).

⁸² 413 F. Supp. at 944.

⁸³ *Id.* at 950.

⁸⁴ *Id.*

⁸⁵ *Id.*; see also *United States v. El Paso Co.*, 682 F.2d at 537 (the corporate taxpayer conceded that the IRS has a right to all factual information upon which the income tax return is based).

⁸⁶ 413 F. Supp. at 952. The *Coopers* court stated that the IRS would be pressed to a higher standard of relevance when it sought the production of data which did not represent actual transactions. *Id.* at 950.

⁸⁷ *Id.*; see *P.T. & L. Constr. Co. v. Commissioner*, 63 T.C. 404, 414 (1974).

⁸⁸ See *id.* at 953. The *Coopers* court noted that, in order for the IRS to gain access to nonfactual material, it must show more than merely that the documents “might shed light upon” the investigation. *Id.*

⁸⁹ See 1 INT. REV. MAN. (CCH) § 4024.3, at 7019 (1981).

⁹⁰ See *Harrington*, 388 F.2d at 524.

Coopers approach,⁹¹ close examination of the two cases indicates that they bore identical outcomes. Indeed, in each case, the tax accrual workpapers were protected against disclosure and were obtainable by the IRS only upon a showing of a certain degree of need.⁹² It is submitted, however, that the *Arthur Young* alternative to the relevancy conundrum is less preferable than the *Coopers* approach. While the *Coopers* analysis ensures that factual information contained in tax accrual workpapers will be available to the IRS,⁹³ the workproduct privilege promulgated by the Second Circuit shields the entire group of workpapers from the IRS access and, invariably, conceals facts to which the IRS properly is entitled.⁹⁴ In addition, the *Coopers* approach is less inimical to the policy of minimizing the restrictions placed upon the summons power of the IRS.⁹⁵ Most significantly, however, the *Coopers* standard affords adequate protection to all concerned, while simultaneously avoiding the problems inherent in the creation of a workproduct privilege.⁹⁶

⁹¹ 677 F.2d at 219. The *Arthur Young* court's major disagreement with the *Coopers* approach was that the documents at issue in *Coopers* were not used in the preparation of the corporate tax returns. *Id.* It is significant, however, that the papers involved in *Coopers* were prepared in order to satisfy the filing requirements imposed by the Securities Exchange Commission, 413 F. Supp. at 950, since these documents are of the type that the *Arthur Young* court sought to protect, 677 F.2d at 214.

⁹² See 550 F.2d at 621; 677 F.2d at 221.

⁹³ See *supra* text accompanying note 85.

⁹⁴ See *United States v. El Paso Co.*, 682 F.2d 530, 548 (5th Cir. 1982) (Garwood, J., dissenting); *United States v. Bisceglia*, 420 U.S. 141, 150 (1975).

⁹⁵ See *Bisceglia*, 420 U.S. at 150-51.

⁹⁶ Research has indicated that the accounting profession does not unanimously seek the creation of any type of accountant privilege. See Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 *YALE L.J.* 1226, 1246-49 (1962). Indeed, it has been noted that "[t]he possibility of an accountant-client privilege . . . is one which has not been enthusiastically embraced by all accountants." *Id.* at 1248. Explaining the rationale underlying this attitude, the Executive Director of the National Society of Public Accountants has stated:

Perhaps the reason for not pushing for privileged communication for our members practicing public accounting is the fact that much of their income is from tax work, and they maintain a good relationship with the Internal Revenue Service. There might be some question about cooperation and working relationships should there be privileged communication. Usually the client will tell the agent, "Go see my accountant." The agent would not be so amenable to this suggestion if the accountant were privileged.

Id. (citing letter from R.E. Jennison, Executive Director, National Society of Public Accountants, to the *Yale Law Journal* (Nov. 17, 1961) (available in Yale Law School Library); see also *Amicus Curiae* (A.I.C.P.A.) brief at 25, *United States v. Arthur Young & Co.*, 677 F.2d 211, 250 (2d Cir. 1982) ("none of this is intended to suggest that the institute claims the tax accrual workpapers should be privileged").

CONCLUSION

Notwithstanding the broad interpretation traditionally afforded the IRS summons power,⁹⁷ the power is not unfettered. Indeed, the Supreme Court has characterized the summons power as a "limited [one which] should be kept within its proper bounds."⁹⁸ Unfortunately, courts have permitted the IRS to extend its power beyond reasonable limits.⁹⁹ Although it is the responsibility of a reviewing court to ensure that the summoned material falls within the purview of section 7602,¹⁰⁰ a number of tribunals have enforced summonses requesting production of materials which include hearsay, rumors, mental impressions, and personal thoughts.¹⁰¹ It is perhaps these broad judicial interpretations that led the *Arthur Young* court to create an accountant workproduct privilege, which significantly undermines the IRS summons power.¹⁰²

⁹⁷ See, e.g., *United States v. Arthur Andersen & Co.*, 474 F. Supp. 322, 332 (D. Mass. 1979), *appeal dismissed*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980); see *infra* note 99 and accompanying text.

⁹⁸ *United States v. Bisceglia*, 420 U.S. 141, 151 (1975) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 166 (1927)).

⁹⁹ See, e.g., *United States v. Price Waterhouse & Co.*, 515 F. Supp. 996, 999 (N.D. Ill. 1981) (court allowed IRS to review documents of opinion even though it already possessed documents of factual bases); *United States v. Acker*, 325 F. Supp. 857, 863 (S.D.N.Y. 1971) (court enforced summons demanding production of entire category of documents even though court conceded that much of the material was irrelevant).

¹⁰⁰ See *United States v. Bisceglia*, 420 U.S. 141, 153 (1975) (Stewart, J., dissenting). The federal court system provides the recipient of an IRS summons with some protection against governmental abuse of power. *Id.* (Stewart, J., dissenting). This protection, however, is illusory "unless the federal courts are provided with a measurable standard when asked to enforce a summons." *Id.* (Stewart, J., dissenting).

¹⁰¹ See, e.g., *United States v. Arthur Andersen & Co.*, 474 F. Supp. 322, 332 (D. Mass. 1979), *appeal dismissed*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980).

¹⁰² It is interesting to note that, notwithstanding judicial extension of the IRS summons power, the Internal Revenue Manual recently has been revised to restrict IRS access to tax accrual workpapers prepared by accountants. See 1 INT. REV. MAN. (CCH) § 4024.4, at 7019 (1981). Section 4024.4 of the manual reads:

(1) In unusual circumstances, access may be had to the audit or tax accrual workpapers. . . . [These workpapers] should normally be used only when such factual data [needed to support the tax return] cannot be obtained from the taxpayer's records and then only as a collateral source for factual data, access to which should be requested with discretion and not as a manner of standard examining procedure. . . .

(2) Unusual circumstances, for this purpose exist under the following conditions:

- (a) a specific issue or issues has been identified by the examiner for which there exists a need for additional facts; and
- (b) the examiner has sought from the taxpayer all facts known to the taxpayer relating to the identified issue(s); and
- (c) the examiner has sought from the taxpayer's accountant supplemen-

It appears that the accountant workproduct privilege, however, is too severe a limitation on the ability of the IRS to procure relevant information which may be contained in an accountant's tax accrual workpapers. Furthermore, the court's reliance upon the analysis employed by the Supreme Court in fashioning the attorney workproduct privilege is misplaced. Thus, in view of the dubiety of and difficulties engendered by the court's creation of an accountant workproduct privilege, it is submitted that the *Arthur Young* panel simply should have revised the standard used to determine the relevancy of information sought by the IRS. To be sure, the relevancy touchstone utilized by the Tenth Circuit in *Coopers* seemingly protects the interest of the investing public, the major concern of the *Arthur Young* court, without unduly restricting the summons power of the IRS.

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tary analysis (not necessarily contained in the workpapers) of facts relating to the identified issue(s).

(3) In any case . . . the examiner should limit the request only to the portion of the workpapers believed to be material and relevant to the examination.

Id. The guidelines for proper access to tax accrual workpapers, if followed by the IRS, seemingly would provide a sufficient safeguard for the accountant and for the corporate taxpayer. *See id.* § 4024.4. Unfortunately, the guidelines provide little protection since the courts are not required to enforce them. In *United States v. Price Waterhouse & Co.*, 515 F. Supp. 996 (N.D. Ill. 1981), for example, the court enforced an IRS summons, holding that the failure of the IRS to follow the manual guidelines was not violative of the fourth *Powell* criteria, which requires the IRS to adhere to certain administrative steps. *Id.* at 999.