



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 88- 70

The Honorable Vincent K. Snowbarger
State Representative, Twenty-Sixth District
1451 Orleans Drive
Olathe, Kansas 66062

Re: Accountants, Certified Public--General Provisions--
Client Communications, Privileged, Exception

Synopsis: Though the Kansas appellate courts have not construed the accountant-client privilege in K.S.A. 1-401, the language of the statute clearly creates an absolute privilege between a certified public accountant and his client regardless of judicial process. The only limitations to the statutorily-created privilege include instances where the communication is material to the defense of an action against a certified public accountant [K.S.A. 1-401(b)] and where the communication is material to a peer review against the accountant's accounting and auditing practices, where such disclosure is not tantamount to a waiver of the privilege [K.S.A. 1-401(c)]. Cited herein: K.S.A. 1-401.

* * *

Dear Representative Snowbarger:

As a member of the Kansas House of Representatives you inquire about the accountant-client privilege in K.S.A. 1-401. Specifically, you ask whether this statute creates an absolute privilege regardless of the issuance of summons, subpoena, order for attendance or other judicial process. Secondly you

ask whether a certified public accountant can be compelled to disclose any confidential information without the consent of his client.

The accountant-client privilege found in K.S.A. 1-401(b) states:

"(b) No certified public accountant shall be examined through judicial process or proceedings without the consent of the client as to any communication made by the client to the certified public accountant in person or through the media of books of account and financial records, or as to advice, reports or working papers given or made thereon in the course of professional employment, nor shall a secretary, stenographer, clerk or assistant of a certified public accountant be examined without the consent of the client concerned, concerning any fact the knowledge of which any such person has acquired in such capacity or relationship with the certified public accountant. This privilege shall exist in all cases except when any such communication is material to the defense of an action against a certified public accountant and as otherwise provided by this section.
(Emphasis added.)

Under common law there is no privilege that attaches to an accountant-client relationship. 1 Am. Jur. 2d Accountants §13 (1962). K.S.A. 1-401 was thus enacted in derogation of common law. Though the statute has never been construed by the Kansas appellate courts, generally the reason for enacting an accountant-client privilege statute is to encourage free and open communications between a client and his accountant, 33 A.L.R. 4th 539, 541 (1984), and to protect the client's expectations of confidentiality. The language in K.S.A. 1-401 is clear and unambiguous, providing its purpose with reasonable certainty. The statute states "no certified public accountant shall be examined through judicial process or proceedings without the consent of the client. . . ." When a statute is clear on its face the court must give effect to the intent of the legislature as expressed. U.S. v. O'Brien, 686 F.2d 850 (C.A. Kan., 1982); State v. Haug, 237 Kan. 390 (1985); City of Overland Park v. Nikias, 209

Kan. 643 (1972). The statutory language clearly establishes an absolute privilege against disclosure of information by a certified public accountant without his client's consent. Accordingly, it is our opinion that the statutory accountant-client privilege exists between a client and his certified public accountant in any judicial proceeding regardless of the issuance of summons, subpoena, order of attendance or other judicial process. The statute defines a certified public accountant in K.S.A. 1-401(d) as ". . . a person who holds a permit from the board of accountancy to engage in practice as a certified public accountant in this state." Thus the privilege would not extend to an accountant or a public accountant. See Dees v. Scott, 347 So.2d 475 (Fla. App. 1977).

Your second question regarding whether a certified public accountant can be compelled to disclose any confidential information without the consent of the client involves the limitations of the accountant-client privilege in K.S.A. 1-401. The only limitations on the privilege are found in K.S.A. 1-401(b) and (c):

"This privilege shall exist in all cases except when any such communication is material to the defense of an action against a certified public accountant and as otherwise provided by this section."

. . . .

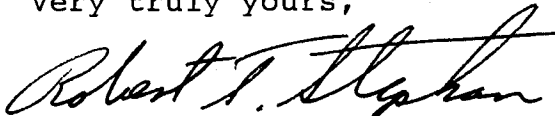
"Nothing in subsection (b) shall prohibit a certified public accountant or anyone employed by a certified public accountant from disclosing any data to any other certified public accountant or anyone employed by a certified public accountant in connection with peer reviews of such certified public accountant's accounting and auditing practice nor shall such disclosure waive the privilege. Persons conducting such peer reviews shall be subject to the same duty of confidentiality in regard to such data as is applicable to certified public accountants under this section."

Thus the statutorily-created privilege is absolute, subject only to the limitations imposed by the statute itself. The

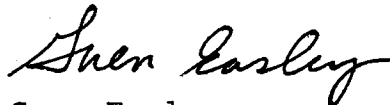
instances where an accountant could be compelled or allowed to testify without the consent of his client are first where the communication is material to the defense of an action against a certified public accountant and second where the communication is material to a peer review against the accountant's accounting and auditing practices, where such disclosure is not tantamount to a waiver. (We note that your inquiry does not include nor have we addressed the issue of whether the accountant-client privilege in K.S.A. 1-401 would apply in cases involving "federal question" jurisdiction or a conflict of law question.)

In conclusion, though the Kansas appellate courts have not construed the accountant-client privilege in K.S.A. 1-401, the language of the statute clearly establishes an absolute privilege between a certified public accountant and his client, regardless of judicial process. The only limitations to the statutorily-created privilege include instances where the communication is material to the defense of an action against a certified public accountant and where the communication is material to a peer review against the accountant's accounting and auditing practices, where such disclosure is not tantamount to waiver.

Very truly yours,



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