

# Today's GENERAL COUNSEL SHAREHOLDER'S RIGHTS V. THE ACCOUNTANT-CLIENT PRIVILEGE

By Allen M. Levine and Jonathan D. Silver



It is common for a business or its executives to be presented with allegations of mismanagement or wrongdoing by a minority shareholder accompanied by requests for company financial records. When such allegations arise, it is important to efficiently address the allegations while protecting privileged communications with accountants. This article discusses when corporations can successfully deny the requested

documents based upon the accountant-client privilege.

## THE RIGHT TO INSPECT

As investors, shareholders and members have an absolute right to inspect and copy the corporation's articles of incorporation and bylaws. The rationale is that stockholders are entitled to determine whether the affairs of the

corporation are properly conducted and to vote intelligently on corporate policy and management.

However, a shareholder's right to examine additional company documents and private financial records is not absolute. Instead, in order to obtain access, the shareholder must show that the records request is made in good faith, for a proper purpose, and the purpose must be described with reasonable particularity. Courts have held that a proper purpose is for a lawful reason, not satisfaction of curiosity or a general fishing expedition.

Once a party demonstrates at least one proper purpose, any secondary purpose or ulterior motive that may underlie the request is irrelevant. On the other hand, if the corporation can maintain it refused a shareholder inspection in good faith or has a reasonable basis for doubt, then it may lawfully refuse to produce the requested documents pre-litigation.

Once litigation ensues, the court's determination becomes muddled when an objection to a shareholder's claim for financial records is made by the company on the basis of the accountant-client privilege.

Although shareholders may have a right to inspect the books and records of a corporation, in certain circumstances this may conflict with protections afforded to the corporation, such as the accountant-client privilege. Although confidential accountant-client privilege does not exist under federal law, many states have established a statutory accountant-client privilege.

Florida Statute section 90.5055 protects the client by preventing "any other person from disclosing, the contents of confidential communications with an accountant when...made in the rendition of accounting services." The rationale is that

the accountant-client privilege encourages full and frank communication between accountants and clients so that professional advice may be given on the basis of complete information free from apprehension about disclosure. Therefore, information transmitted within the accountant-client privilege is regularly withheld as privileged in litigation.



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**TWO CASES WITH CONFLICTING OUTCOMES**

When a company's financial documents relate to accounting services, a shareholder's right of inspection may not extend to those documents that are subject to the accountant-client privilege. Although the tension between the shareholder's right to inspection and the corporation's accountant-client privilege has not been decided by a Florida court, the Colorado statute is substantially similar, and its courts have held that in certain circumstances the privilege may super-

sede the statutory right of inspection.

In one case, shareholders accused the directors and accountants of fraud and conspiracy in connection with a merger. The plaintiffs demanded to inspect financial records possessed by the corporation's accountants. The court upheld the defendants' assertion of accountant-client privilege and found the fact that a qualified shareholder "shall have

the right to examine its books and records of account," does not nullify the company's privilege against having its accountants examined.

However, in another case, the same court determined that "the accountant-client privilege did not protect the communications between the corporations and their accountant from disclosure." Specifically, the petitioners alleged that the controlling shareholders of a realty company violated their fiduciary duty by engaging in the misapplication and waste of company assets. Plaintiffs sought to obtain financial records as well as to depose members of the corporation's accounting firm. The court concluded that the petitioners "established good cause to put aside the protections of the accountant-client privilege." The court focused on the fact that the discovery requests related to past events — communications that were directly related to the allegations brought against the company and essential to the crux of the action.

In examining a shareholder's request, courts will also focus on the stated purpose for the records and whether any non-privileged documents exist that may fulfill the

request. However, when only privileged records exist to fulfill the stated purpose, and such documents go to the heart of the shareholder's claims, a court may order them to be turned over to the shareholders accompanied by a confidentiality order.

As it is difficult to reconcile the two Colorado cases, it appears that the only court that has considered this issue twice has ruled in favor of providing the shareholders with the requested information. However, when documents other than financial records satisfy the shareholder's request or the privileged information can be redacted, the accountant-client privilege should continue to trump the shareholder's right to inspect a corporation's privileged financial records.

Although the Florida legislature has provided a method for a shareholder to examine certain company documents, the scope of the accountant-client privilege may overcome this right, depending upon the documents at issue and the facts and circumstances of the request. Therefore, the tension between the shareholder's statutory right of access to records and the corporation's accountant-client privilege is subject to a good cause examination by the courts to determine the shareholder's stated purpose — whether the requested documents relate to the central issue of the allegations and the communications contained within the privileged documents sought. ■



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