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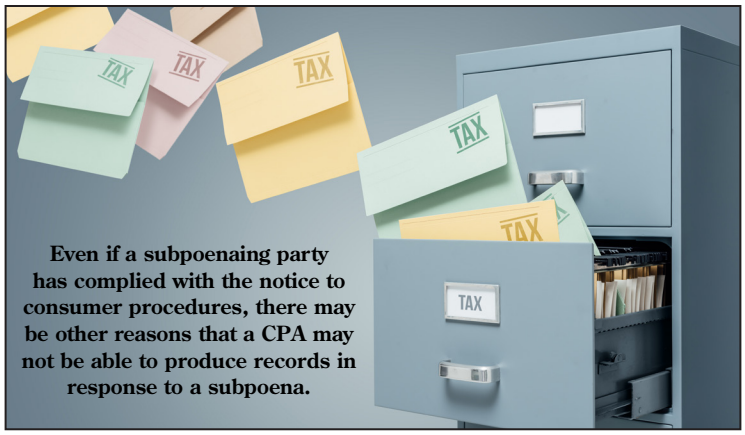
Need a CPA to produce records? Here's *their* rules

By Benjamin Koodrich



Even if a subpoenaing party has complied with the notice to consumer procedures, there may be other reasons that a CPA may not be able to produce records in response to a subpoena.

Certified public accountants who have clients that are parties in litigation may find themselves having been served with a deposition subpoena for production of business records. The subpoena is seeking records that may be relevant to the litigation. This article reviews issues that may arise in California for a CPA responding to a subpoena. Whenever a CPA is served with a subpoena, it is generally advisable for the CPA to consult with a professional liability insurance carrier and an attorney to seek assistance. Failure to do so may result in inadvertently producing confidential and/or private documents or irrelevant documents not responsive to the subpoena.

Does the subpoena comply with the notice to consumer procedures?

California law provides that notice must be given to a "consumer" where a subpoena seeks a consumer's "personal records." *See* Code Civ. Proc. Section 1985.3(b). The term "personal records" is defined to specifically include records maintained by an accountant. *See* Code Civ. Proc. Section 1985.3(a)(1). The term "consumer" is defined as "any individual, partnership of five or fewer persons, association, or trust which has transacted business with, or has used the services of, the witness or for whom the witness has acted as agent or fiduciary." *See* Code Civ. Proc. Section 1985.3(a)(2).

Prior to the production of the records, the subpoenaing party must show proof that notice has been given to the consumer in compliance with the statute or written authorization by the consumer to release the records. *See* Code Civ. Proc. Section 1985.3(c). Failure to comply with these procedures is "sufficient basis … to refuse to produce the personal records sought by a subpoena." *See* Code Civ. Proc. Section 1985.3(k). It is generally advisable to contact the consumer or the consumer's attorney prior to the production of records to confirm that the consumer does not object.

Has the taxpayer consented to production of tax return information?

Even if a subpoenaing party has complied with the notice to consumer procedures, there may be other reasons that a CPA may not be able to produce records in response to a subpoena. In particular, CPAs should be concerned about requirements to keep tax return information confidential. In general, Section 7216(a) of the Internal Revenue Code imposes criminal penalties on tax return preparers who knowingly or recklessly make unauthorized disclosures or uses of information furnished in connection with the preparation of an income tax return. *See* Rev. Proc. 2013-14, 2013-3 I.R.B. 283, 283-284.

Regulations under Section 7216 provide that disclosure or use of tax return information is generally permitted only with the taxpayer's consent. *See* 26 C.F.R. Section 301.7216- 3(a) ("Unless section 7216 or § 301.7216-2 specifically authorizes the disclosure or use of tax return information, a tax return preparer may not disclose or use a taxpayer's tax return information prior to obtaining a written consent from the taxpayer, as described in this section."). The term "tax return information" is defined broadly to include "any information … which is furnished in any form or manner for, or in connection with, the preparation of a tax return of the taxpayer" as well as "information the tax return preparer derives or generates from tax return information in connection with the preparation of a taxpayer's return." 26 C.F.R. Section 301.7216-1(b)(3)(i).

While the regulations authorize the disclosure of tax return information in response to certain subpoenas (for example, grand jury subpoenas), the regulations do not authorize the disclosure of tax return information in response to a deposition subpoena for production of business records commonly issued in civil lawsuits in California. *See* 26 C.F.R. Section 301.7216-2(f). Thus a CPA needs to evaluate whether to object to a deposition subpoena for production of business records to the extent that it seeks tax return information where the taxpayer has not consented to disclosure and there has been no order from the court to do so. *See* 26 U.S.C. Section 7216(b)(1)(B).

California law likewise provides a prohibition against the disclosure of confidential information obtained by a CPA unless an exception applies. Business and Professions Code Section 5063.3(a) provides: "No confidential information obtained by a licensee, in his or her professional capacity, concerning a client or a prospective client shall be disclosed by the licensee without the written permission of the client or prospective client, except the following." However, unlike federal law, California law provides an exception for "[d]isclosures made by a licensee in compliance with a subpoena or a summons enforceable by order of a court." Bus. Prof. Code Sec-

tion 5063.3(a)(1). Thus the prohibition against disclosure under Section 5063.3 does not provide a basis for objecting to a deposition subpoena for production of business records.

California courts have also recognized a "tax return privilege." *See Schnabel v. Superior Court*, 5 Cal. 4th 704, 719 (1993). The tax return privilege under California law has been held to "also protect the information contained in the returns." *Sav-On Drugs, Inc. v. Superior Court*, 15 Cal. 3d 1, 7 (1975).

In summary, both Internal Revenue Code Section 7216 and the tax return privilege recognized under California law may be grounds for objecting to a subpoena to the extent that it seeks tax return information where the taxpayer has not consented to disclosure and there has been no order of court.

Would compliance with the subpoena be unduly burdensome or expensive?

A subpoena may be objectionable on the ground that compliance with the subpoena would be unduly burdensome or expensive. *See* Code Civ. Proc. Section 2020.220(l). For example, a subpoena may be unduly burdensome to the extent that it seeks records in the possession of the parties. In *Calcor Space Facility, Inc. v. Superior Court*, 53 Cal. App. 4th 216 (1997), the court concluded that a subpoena was unduly burdensome where the plaintiff who issued the subpoena had not demonstrated why it could not obtain the subpoenaed records from the defendant. The court stated: "As between parties to litigation and nonparties, the burden of discovery should be placed on the latter only if the former do not possess the material sought to be discovered."

Are a CPA's working papers relevant to the dispute?

Under Business and Professions Code Section 5037, "the work papers of accountants are the property of the accountants in the absence of a contrary agreement." *Elmore v. Superior Court*, 255 Cal. App. 2d 635, 641 (1967). "Working papers" are defined buy regulation as "the licensee's records of the procedures applied, the tests performed, the information obtained and the pertinent conclusions reached in an audit, review, compilation, tax, special report or other engagement." Cal. Code Regs., tit. 16, Section 68.1. In Elmore, the court ruled that the subpoenaing parties would have to present additional facts as to why they needed a CPA's working papers from an audit of a client's financial statements. Thus it may be helpful to meet and confer with the subpoenaing party's attorney to find out what need there would be for a CPA's working papers.

CPAs responding to a subpoena may be able to avoid disputes over the subpoena by considering these issues. Again, whenever a CPA is served with a subpoena, it is generally advisable for the CPA to consult with a professional liability insurance carrier and an attorney to seek assistance.

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