

DISCUSSION PAPER

**WORKING PAPERS, WORK PRODUCT, AND WRITINGS
IN THE CPA'S PERFORMANCE OF
LITIGATION SERVICES**

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LITIGATION SECTIONS

CALIFORNIA SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS

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NON-AUTHORITATIVE DISCUSSION PAPER

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PREFACE

This Litigation Services Committee discussion paper is an educational reference source for members of the California Society of Certified Public Accountants and others interested in the subject. This document does not establish standards or preferred practices.

GENERAL

The CPA, in the performance of litigation services, often prepares and maintains work papers to assist in establishing a record of the work performed and conclusions reached. The work papers may aid in the planning, conducting, supervising and review of the engagement. The final form and content of the work papers should be determined by the judgment of the CPA.

The need to prepare and maintain working papers in the CPA's performance of litigation services is discretionary. The professional standards set forth in SAS-41 (Working Papers) do not apply to litigation services. Work papers are maintained when, in the judgment of the CPA, it is deemed appropriate to do so.

Work papers may include engagement letters, correspondence, schedules, memoranda, trial balances, court documents, analyses, abstracts of financial records, meeting notes, deposition testimony and narratives. They may be handwritten, typewritten, or in the form of a computer printout. Work papers also may be in the form of data stored on tapes, diskettes or other electronic media. Frequently, work papers are prepared by client personnel under the supervision or direction of the CPA. Data prepared by client personnel may be a part of the CPA's work papers.

THREE IMPORTANT DEFINITIONS AND DISTINCTIONS

Working Papers

The terms work papers and working papers are synonymous and are interchangeable in this paper. When used, work papers may constitute a record of the work done, i.e., the evidence of the work performed supporting conclusions reached by the CPA. Transcripts of oral testimony as well as other written records may constitute work papers.

Attorney Work Product

Attorney work product is a legal doctrine that is beyond the scope of this paper. Generally, work product is the work done by an attorney, or his or her designee, in the course of providing services to the attorney's client. Under certain circumstances, writings prepared for the attorney by others, such as CPA's work papers, are a part of the attorney work product. The work product of an attorney is privileged and usually not subject to discovery. Although the legal presumption is that these work papers are privileged and not subject to discovery, under unusual circumstances, discovery of attorney work product may be permitted by the Court. Therefore, if work papers are prepared, the CPA should recognize the possibility that they may be subject to discovery.

Writings

It is important to understand the meaning of "writings."

1. Writings encompasses a concept that is broader than the traditional meaning of work papers.
2. To the extent such writings are discoverable, CPAs may be required to

produce them.

According to the California Code of Evidence, “‘Writings’ means handwriting, typewriting, printing, photocopying, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.”

The Federal Rules of Evidence defines writings and recordings as consisting of “letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photocopying, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.”

Business records, computer disks, financial statements, correspondence, etc. that consist of numbers only or of letters, as well, may be considered writings for litigation purposes. All writings, however, are not necessarily a part of the CPA’s work papers. CPA work papers may be considered writings, and conversely a CPA’s work papers may contain writings. Writings may also be included as attorney work product.

RELEVANT PROFESSIONAL STANDARDS AND RULES

Rule 301 (AICPA) and Rule 54 (State Board of Accountancy) prohibit CPAs from disclosing any confidential client information without the specific consent of the client.¹

¹ The CPA should understand that in litigation engagements the client can be the attorney and not the client of the attorney. Disclosures made to the client of the attorney may be in violation of Rules 301 and 54.

Inadvertent disclosures of client confidential information other than those of the parties in interest to the litigation may also be considered in violation of rules 301 and 54, such as when giving deposition or trial expert testimony. For example, using information of specifically identified clients who are not parties to the litigation as a basis for forming an opinion given during deposition or trial testimony may be in violation of the rules 301 and 54.

Confidential client information includes the information contained in work papers and writings generated by the CPA in the performance of litigation services. When a CPA receives a formal notice to produce the work papers, the CPA may wish to consult with the CPA's own attorney before taking any action and notifying the client and the client's attorney, if known.

California Accountancy Act

The California Accountancy Act provides that working papers and other writings made by a CPA in the performance of professional services are the property of the CPA in the absence of an express agreement to the contrary between the CPA and the client.

Rule 68 – State Board of Accountancy

Proceedings under Rule 68 of the State Board of Accountancy frequently identify certain information in a CPA's work papers as constituting part of the client's books and records. Further, Rule 68 provides that a CPA is prohibited from withholding client records after demand by the client to turn over the records. Generally, the work papers prepared for litigation engagements would not be defined as part of the client's books and records.

AICPA and SAS-41

SAS-41 (Working Papers – April 1, 1982) is a statement on auditing standards that requires auditors to prepare and maintain work papers. The requirements of SAS-²41 normally do not apply to litigation services .

² An interpretation (AT 9100) of the Statement of Standards of Attest Engagements ("SSAE") issued by the staff of the Auditing Standards Division of the AICPA provides that SSAE does not apply to litigation services that are not considered attest engagements. Testimony as an expert witness as defined by the interpretation is not an attest engagement. Statements on Auditing Standards (including SAS-41) are a part of the SSAE. Interpretations by the staff of the AICPA Auditing Standards Division may be relied upon by CPAs.

THE DECISION TO PREPARE WORKING PAPERS

In litigation engagements, the preparation of work papers is discretionary rather than mandatory. The decision to prepare work papers should be based on what the CPA believes is needed to give weight and substance to his or her analysis and/or opinion.

If the CPA has been designated as an expert witness, the working papers are subject to subpoena by the adverse party. Therefore, when preparing work papers the CPA should bear in mind that they may be examined by a party adverse to the CPA's client. In particular, the CPA should be careful to avoid statements which could be misinterpreted.

FORM AND CONTENT OF WORK PAPERS

Work papers may assist the CPA expert to form an opinion and as an aid to testimony, as well as to support consulting advice. Much of the following discussion is directed toward the work papers of the CPA expert based on an assumption that such work papers will be subject to discovery. While the work papers of a CPA consultant in litigation may not be subject to discovery, the CPA consultant might consider many of the following suggestions in anticipation of a potential changed role to CPA expert and resultant work paper discovery.

Work papers generated during the litigation process may differ substantially from attestation engagement work papers, and do not follow a prescribed format. Work papers should be prepared under the assumption that they will be scrutinized and, therefore, should be prepared with consideration given to the following:

1. Work papers should contain information that is needed or relevant to the CPA's analysis and/or final opinion, findings, or testimony. Work papers should not include extraneous information. Generally, unless prohibited by order or

- agreement, litigation work papers, like all work papers, should not include scratch notes, superseding schedules or other information not forming a part of the basis of the CPA's opinion.
2. Work papers should be understandable and easy to use during testimony. The CPA should be able to explain the purpose of work papers, the work paper format, procedures performed, sources of information, and the interrelationships within the work papers.
 3. Some CPA consultants label or stamp work papers as prepared under the direction of counsel and subject to the attorney-client privilege and/or attorney work-product rule. If the CPA consultant changes role to a CPA expert and the work papers become subject to discovery, the asserted privileges may no longer be effective.
 4. Annotations and markings, including highlighting, become part of the work papers and could be misinterpreted.
 5. During work paper preparation, a CPA often is not yet familiar with all important case facts. Remarks placed in work papers should be carefully considered, since documentation of preliminary conclusions may be inappropriate.
 6. Litigation tasks and objectives often change during the process. Models and theories developed early in the process may not be those upon which the expert is called to opine. It is acceptable for the content of work papers to evolve during the process of the CPA's analysis.
 7. Documents subject to protective orders should be segregated from other work papers and documents.

8. Computer database files and electronic work papers present an array of additional considerations:
- a) Software and models may be subject to discovery. Care should be taken when considering the use of software models developed for previous matters. The CPA should not expose the work papers of other matters to discovery.
 - b) When developing computer-based models, alternative scenarios, approaches and iterations are often considered and later superseded. The CPA should ensure that files or data intended to be superseded are not inadvertently retained.
 - c) With the use of electronic spreadsheets, consideration must be given to the identification of the cell contents. Spreadsheet cells often contain algorithms that are “invisible” on hard copy printouts which show only the mathematical result. The CPA should be prepared to explain the calculation basis, if any, for every number on a spreadsheet report.
 - d) In more complex litigation, document management and retrieval databases are often installed. Attorneys, CPAs, additional experts, and others frequently have access to the database contents, which may include copies of deposition testimony and trial exhibits. Care should be taken in the use of extracted database documents Which contain work product annotations of consultants and attorneys. The extracted information, with annotations, may become part of the CPA’s work papers and subject to the discovery process.

9. The CPA should be aware that work papers prepared for a current matter may become subject to discovery in another matter. Before producing such documents the CPA may wish to consult with his or her own attorney.

DISCOVERABILITY OF WORK PAPERS

The basic premise of discovery is to provide disclosure of information and facts before a case is tried. It is important to understand discovery rules and their effect on work papers maintained by a CPA. Generally, the discovery rules may impact CPAs as follows:

1. Work papers generated for non-litigation assignments maintained by CPAs may be subject to discovery.
2. Confidential client information should not be volunteered by the CPA during the discovery process.
3. A validly issued and enforceable subpoena may require the CPA to provide client information which could be considered confidential. The CPA may wish to consult independent legal counsel to determine if the Subpoena is enforceable.
4. Work papers may not be subject to discovery when they are generated within the attorney work product privilege.
5. AICPA designated as an expert witness may be required to produce reports, writings and work papers to others before deposition or trial.

OWNERSHIP AND CUSTODY OF WORK PAPERS

Statements on auditing standards, other professional standards and state licensing licensing rules provide that work papers belong to the CPA. However, in litigation practice the CPA may enter into a different understanding with the attorney and/or client regarding ownership and/or custody of work papers.

The CPA may transfer custody of the work papers to the client or attorney, with or without the transfer of ownership. However, care should be exercised before transferring custody of the work papers.

The receipt of a subpoena may restrict the right of the CPA to transfer the ownership and/or custody of the work papers and the right of the CPA to modify the then existing work papers. In this regard, the CPA may wish to consult independent legal counsel. The discussion paper “Working Papers, Work Product, and Writings in the CPA’s Performance of Litigation Services” was adopted by the members of the committee.

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