



# Journal of the CPA Practitioner

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**UPDATE...FROM THE NCCPAP PRESIDENT**



ANDREW L. HULT, CPA

There’s a plethora of issues that potentially will affect our profession, some positively and some not so positively. Among them are mobility; much wider registration of tax preparers with the IRS; disclosure of uncertain tax positions not only in financial statements but also, perhaps, in tax returns; and issuance of 1099s for corporations.

**Mobility.** Mobility is crucial to our practices. (Mobility, or cross-border practice privilege, allows a CPA licensed in good standing in his or her substantially equivalent home state to provide services to clients in other states without

having to file paperwork or pay fees.) Smaller firms simply do not have the resources to focus on compliance with disparate CPA licensure requirements in multiple states, as larger firms do. Accordingly, NCCPAP has focused on this issue, most recently in New York State.

Alan Feldstein, Herb Schoenfeld and Bob Goldfarb all spoke at a meeting of the NYS Board of Accountancy and met with various NYS Senators on behalf of NCCPAP—and you. They explained that many smaller firms have out-of-state clients. If New York State were to deny to out-of-state CPAs the right to practice in New York, then other states might retaliate and deny to New York CPAs the right to practice in other states. This could hurt New York CPA firms, and the smaller firms the most of all.

As a result of NCCPAP’s efforts, as well as those of the AICPA and the New York State Society, the NYS Board of Education has approved the mobility provisions. Mobility is not a done deal, however. The provisions, which had been in the New York State Senate’s Education Committee, are currently awaiting approval in the Senate’s Codes Committee. Should that approval be forthcoming, then both the full Senate and Assembly must approve them. As I write this letter, Alan Feldstein is meeting with Sheldon Silver, Speaker of the NYS Assembly, to provide further support for the provisions. If you see Alan, Bob or Herb, please thank them for their exceptional work on our behalf.

**Registration.** The next issue is unsettling. The IRS has adopted a Paid Tax Return Preparer Initiative. The scope is broad. It requires the registration, testing and continuing education requirements for tax return preparers. NCCPAP supports the registration concept but is NOT comfortable with the manner of implementation. As the Initiative stands, the definition of tax preparer extends beyond the signing preparer to include staff who have prepared significant portions of the return or made significant judgments regarding the application of tax law to that return. Moreover, the definition extends to include people who prepare payroll taxes.

In other words, the IRS is mandating registering, paying a fee for re-registration every few years, and educating not just you and me, but also many of the people in your office and mine. The IRS has kept its options open regarding the testing of these personnel as a condition of registration.

Speaking for myself, not necessarily for NCCPAP as an organization, I believe that this is overreaching. It is regulating people who, in most cases, are already effectively supervised by the signing preparers in the CPA, attorney, and enrolled agent offices. Furthermore, I have concerns about the ability of the IRS to register

*(continued on page 2)*

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UPDATE...from the NCCPAP President (continued from page 1)

the tax preparers who currently are unlicensed and are preparing returns for a fee but not signing those returns. Yet registration of this latter group, in my judgment, would provide the greatest benefit.

**Uncertain Tax Positions.** The issue of disclosure of uncertain tax positions is another corker. The IRS released a Draft Schedule UTP (Uncertain Tax Position) Statement. It indicates that, beginning with the 2010 tax year, corporations filing Form 1120, Form 1120-L, Form 1120-PC or Form 1120-F with uncertain tax positions and assets equal to or exceeding \$10 million will be required to file Schedule UTP if they or a related party issued audited financial statements. This mirrors the GAAP reporting requirements of FIN 48. Again, the NCCPAP Tax Committee will consider this and, hopefully, reach a consensus on the best approach to represent your interests and those of the nation.

**1099s for Corporations.** A third tax concern is the issuance of 1099s to corporations. Under a little-discussed mandate of the health care reform legislation, beginning in 2012 businesses will be required to report ALL payments in excess of \$600 for services or merchandise to the IRS on a Form 1099. The reporting burden on small businesses will be immense. The Tax Committee will be determining NCCPAP's response to this, again representing your interests as well as those of the nation.

In addition to the issues above, please consider an initiative of the Membership Committee, under Alan Feldstein's leadership, to change NCCPAP's membership unit from the current "firm" to individual CPA. This is analogous to the U.S. Senate, where each state has two senators regardless of the size of the state. In NCCPAP, one firm has one vote, regardless of the size of the firm. This is in marked contrast to the AICPA and to state societies where the individual CPA has a vote, enabling larger firms to exert considerable influence when they so choose.

The Membership Committee is discussing changing the membership unit to the individual CPA while still preserving the "one firm, one vote" aspect of NCCPAP membership. I personally support the change; NCCPAP has had difficulty attracting younger members, and it must do so in order to survive and to continue to represent you. By changing the membership unit, NCCPAP may be able to attract younger members more easily. Consider whether this is a direction where you want NCCPAP to go. Then let the Membership Committee know how you feel.

And finally, I invite you to attend the upcoming National meeting in Cambridge, Massachusetts on August 4, 5, and 6. (Think Fenway on Wednesday evening...) NCCPAP is "practitioners helping practitioners." Your insights and suggestions are needed. Join us at the National Meeting and participate in the various committee meetings held there.

Please feel free to reach out to me as well at any time. My e-mail address is [alhult@alhcompany.com](mailto:alhult@alhcompany.com). My telephone number is 516-565-1702.

*Andrew L. Hult, CPA*

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*Journal of the CPA Practitioner* is published by the National Conference of CPA Practitioners (NCCPAP), a not-for-profit New York association.  
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**Advertising:** Camera-ready art due the 12th of the month preceding publication.  
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Price per issue: \$2.50 ©2010 NCCPAP ISSN 2152-4661

## NCCPAP Goes to Washington

### Meetings on Capitol Hill and With the IRS

by Neil H. Fishman, Chairman, NCCPAP Tax Policy Committee

**O**n May 12, 2010, NCCPAP members went to Washington, D.C. to meet with various offices of members of Congress. While we did not necessarily meet with the actual Congressmen and Congresswomen, we were usually able to meet with their legislative aide who handles tax-related issues. Unfortunately, we were often given less time for the appointment than anticipated, or we met with a different legislative aide—someone who was not familiar with tax issues. Both of these situations can arise when it gets particularly busy on the Hill and the legislators have to attend a session. Another problem we encountered was getting the actual appointment set up. Many members of Congress are more receptive to meetings when they know that one of their constituents will be attending. If a constituent is not going to be there, it makes it more difficult to get the appointment. Or, if one will be there, we may be disappointed with the way the person with whom we are meeting receives us. On the other hand, some of the people that we met with were very well-informed on the issues we presented.

A recurring theme this year, as in previous years was that, if there is to be a cut in revenues to the federal government, there has to be an opportunity to replace these funds. The most common terms for this are “revenue neutral” and “pay as you go.” This does not mean our ideas are dismissed. Many of our issues do strike a chord of interest in the various congressional offices we visited. The items we suggest to move “above the line” on Form 1040 are more difficult to get across, as these would cut revenues immediately, without replacing them in the eyes of many congressional staffers. However, several offices we met with liked our agenda items very much. The problem was that there would need to be “significant tax reform” to get

these items included, and given the current economic-political situation, that is not likely to happen at this time.

Nevertheless, it is still important to continue to present these issues as often as possible in the hope that we will hit the right office at the right time with the right issue.

On May 13, 2010 several NCCPAP members went to a meeting at the IRS with David Williams, head of Electronic Tax Administration (ETA), and Karen Hawkins, head of the Office of Professional Responsibility (OPR). Mr. Williams also heads the Paid Tax Return Preparer Initiative for Commissioner Shulman. That is where our conversation began, and we were able to present our concerns about the program and our ideas on how to possibly improve it. We pointed out that, under the proposed changes in the IRS Regulations, any individual who prepares payroll tax forms will also have to register with the IRS and get a PTIN—something that had not been considered before. In addition, we discussed the possibility of having the routing information placed on Form 8879—a concern of many of our members. We also discussed the creation of a payment voucher for Form 1041. (Note: The IRS is planning to create a 1041-V payment voucher for 2010 returns.)

Overall, the meetings both on Capitol Hill and the IRS were productive. I thank everyone who came to Washington this year. I also thank NCCPAP members who submitted ideas to present to Washington, and I encourage everyone to continue to do so. We are always looking for more new ideas that we can bring to the attention of Congress. Remember, we are only as strong as your involvement.

We will return to Capitol Hill in May of 2011 and hope you will join us next year.

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## Ten Circuits: Three Different “Work Product” Tests Supreme Court Ruling Warranted!

by Glenn Burdi, CPA

**O**n December 24, 2009, Textron Inc. petitioned the U.S. Supreme Court (Textron Inc. v. United States, U.S., No. 09-750) for review of the First Circuit decision which found that tax accrual work papers sought by the Internal Revenue Service in an administrative summons were not entitled to work product protection (Textron Inc. v. United States, U.S., No. 09A361). The question presented is whether the work-product privilege in Federal Rule of Civil Procedure 26 (b)(3), which protects documents that are “prepared in anticipation of litigation or for trial,” is limited to documents that are prepared for use in litigation. To date, eleven amicus briefs have been filed in the U.S. Supreme Court supporting Textron’s certiorari petition seeking review of the First Circuit’s decision.

Previously, the IRS commenced an audit of Textron’s tax returns for tax years 1998-2001. The IRS issued an administrative summons requesting “all the Tax Accrual Work papers” for Textron’s tax year ending on December 2001. The government then filed a petition to enforce the summons in the United States District Court for the District of Rhode Island. The District Court denied the IRS’s petition for summons enforcement and held that the documents at issue were covered by work product protection. An appeal was filed by the IRS and the U.S. Court of Appeals, after the First Circuit affirmed the lower court’s decision. The IRS then petitioned for and received an en banc rehearing; the en banc court reversed the panel opinion by a 3-2 vote and agreed with the IRS, granting the IRS a victory. This decision presents a substantial conflict with rulings issued by other circuits and has thrown the law of the work-product protection into disarray.

Historically, the Court first recognized work product protection

in *Hickman v. Taylor*, 329 U.S. 495 (1947), where the Court held that “work product” privilege protected “written materials obtained or prepared by an adversary’s counsel with an eye toward litigation.” In 1970, Rule 26(b)(3) of the Federal Civil Procedure was amended to codify the work product privilege and stated that, “so-called opinion work product, that is, materials that would disclose...the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representatives concerning the litigation,” may not be obtained by a party to litigation. The issue lies in the interpretation of the language of Rule 26(b)(3) by the federal courts, thereby creating many circuit conflicts. Not only have the courts in the past had to deal with tax accrual work papers but many cases have dealt with other risk assessment documents. These conflicts warrant Supreme Court review.

Interpreting the requirement, “in anticipation of litigation,” under Rule 26(b)(3), eight court of appeals applied the testing question as to whether the document(s) were prepared or obtained “because of” the prospect of litigation. In applying the “because of” standard, the focus is on whether the document at issue would not have been prepared “but for” the prospect of litigation, or whether the document was prepared for a litigation-related purpose, even if it was prepared for another purpose as well.

There has been a long standing conflict between the Fifth Circuit and the other circuits due to the fact that the Fifth Circuit applies the “primary motivating purpose” test (produced primarily or exclusively to assist in litigation in order to be protected) for which the documents were prepared in determining whether a document was prepared “in anticipation of litigation” under Rule 26(b) (3). Numerous courts have rejected the “primary purpose” standard, contending that “the Fifth Circuit’s ‘primary purpose’ test is clearly at odds with the plain meaning of the test of Rule 26(b)(3) and undercuts the policy goals of the work product doctrine.”

Initially, the First Circuit in the Textron case followed the prevailing “because of” standard and stated that “dual purpose documents created because of the prospect of litigation are protected even though they were also prepared for a business purpose.” The court also concluded that administrative proceedings with the IRS qualify as litigation under Rule 26(b)(3) in applying the “anticipation of litigation” standard. The dissenting judge argued that this decision departed from the First Circuit case precedents and such a change in rules can only be brought about by an en banc opinion.

Therefore, an en banc hearing was granted and the majority took a different approach by adopting an unprecedented narrower interpretation of the work product protection under Rule 26(b) (3) by applying the “prepared for

(continued on page 6)

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**Ten Circuits: Three Different “Work Product” Tests** (continued from page 5)

use in possible litigation” standard, never adopted by any other court. This standard requires that a document must possess a litigation-related use in order to be protected. The court explained that “it is not enough to trigger work product protection that the subject matter of a document relates to a subject that might conceivably be litigated, (n)or is it enough that the materials were prepared by lawyers or represent legal thinking”. The en banc panel concluded that by applying the for use standard “there is no evidence that in this case that the work papers were prepared for...use (in litigation) or would in fact serve any useful purpose for conducting litigation if it arose.” The panel concluded by stating, “other circuits have not passed on tax audit work papers and some might take a different view.”

Ten circuits have now ruled on the scope of the work product protection issue, taking three irreconcilable different positions: “because of,” “primary motivating purpose” and now, “prepared for use.” It is vitally important that there be uniformity of decision-making among the circuits interpreting tax law.

The dissenting en banc judge concluded that the majority’s decision “throw(s) the law of work product protection into disarray and will be viewed as a dangerous aberration in the law of well-established and important evidentiary doctrine.” He added that the majority’s decision “further(s) the split” in the circuits concerning the meaning of Rule 26(b)(3), and that the time is ripe for the Supreme Court to intervene and set the circuits straight on this issue, which is essential to the daily practice of litigators across the country.”

As we wait to see if the Supreme Court will accept the case, be aware that the First Circuit standard test of “prepared for use” is not just limited to tax accrual work papers and IRS conflicts. This new standard has wide ramifications outside the tax arena and is why the tax practitioner needs to prepare their tax work papers and other risk assessment documents with this in mind.

In anticipation of the Supreme Court granting *Textron’s* petition for certiorari, on January 26 IRS Commissioner Douglas Shulman unveiled Announcement 2010-9, which proposes to modify IRS Policy of Restraint with respect to a taxpayer’s tax accrual work papers. The IRS is considering changes to the reporting requirements regarding a taxpayer’s “uncertain tax positions” taken on its tax returns. The IRS is developing a schedule (a tax return attachment) requiring a taxpayer or a related entity to disclose “a concise description of each uncertain tax position in sufficient detail so that the Service can determine the nature of the issue...the rationale for the position and a concise general statement of the reasons for determining that the position is an uncertain tax position.” The tax positions that must be disclosed are those for which a reserve has been recorded in the financial statements, including information about their magnitude (potential federal tax liability attributable to each uncertain tax position). Commissioner Schulman stated that the “proposal does not require the taxpayer to disclose the taxpayer’s risk assessment or tax reserve amounts.”

The schedule requirement would be applicable for a taxpayer with total assets in excess of \$10 million if the taxpayer has one or more uncertain tax positions of the type required to be reported on the new schedule. The IRS intends to publish the new schedule as quickly as possible and invited comments on the proposed Announcement by March 29, 2010.

The remainder of the year will be interesting for the tax

practitioner as we wait for a potential Supreme Court ruling on tax accrual work papers and a new IRS schedule disclosing uncertain tax positions.

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## Maximizing Business Value Strategies to Consider

by *Anthony J. Citrolo, CPA, CVA*

**H**ere is the first of several factors for owners to consider and implement to maximize the value of their business in preparation for an exit. Although many are common-sense and should be in place at every company, they are often inadequate or ignored.

- Develop a company mission and vision statement.
- Develop, update, maintain and annually review the company business plan.
- Consider how to grow the business, through acquisition or organically. Growth is essential in maximizing business value.
- Identify key employees and managerial personnel. Determine whether there is a need for specific talent that is lacking. Hiring a full or part-time CEO or CFO should create value.
- Develop a plan for key managerial personnel and a succession plan for owners of the company, where there is a generation who will be successors.
- Implement a “stay” agreement and an incentive plan for key employees.
- Look at annual bonuses and the compensation policy in order to remain competitive in the marketplace.
- Consider agreements for owners and management. Owners need buy/sell agreements, while management may need “key man” insurance.
- Develop and update your organization chart, determining which staff members are ones whose loss would negatively affect your strategy to maximize business value.
- Run the business “lean and mean.” Maximizing business value includes maximizing bottom line net income while maintaining a productive work environment.
- Consider Human Resource issues. Develop an employee manual or update an existing manual on an annual basis. Consider outsourcing the HR function to mitigate immediate risk and contain costs.
- Evaluate relationships with trusted professionals (CPA, attorney, financial planner, commercial banker, insurance broker), who have experience in assisting owners in maximizing the value of their businesses. It is the responsibility of both the business owner and the professional to look at the business objectively and recommend ways to improve it. Both sides must realize they are part of the team and that by working together everyone achieves more.

There are many other aspects to be considered. The above list is a basic starting point so that today’s business owners considering exiting can begin the process that can bring them maximum value for their company.

*Anthony J. Citrolo, CPA, CVA is a Certified Business Intermediary and principal in New York Business Brokerage, Inc. He specializes in the valuation and confidential sale of privately held businesses. Anthony can be contacted at his Melville, New York office at 1-631-390-9650 or online at anthony@nybbinc.com.*

## E-mail Essentials

by *Armando D’Accordo,*  
*CMIT Solutions/South Nassau*

**T**oo many people take technology for granted and don’t notice its impact on business until their e-mail provider fails or they lose important data. What can you do to protect yourself and increase productivity? Start with the basics.

**Free E-mail vs. Hosted, or In-house Exchange.** “You get what you pay for” applies to almost everything regarding technology. Basic free e-mail from a common service provider will work most of the time. However, if you are reliant on e-mail you probably would benefit from more control. Free e-mail systems give you little recourse with issues such as hacking or lost e-mail. A free e-mail account is also less identifiable to your business. (For example: jsmith@aol.com instead of jsmith@smithcpa.com.)

**The Blackberry Effect.** Hosted, or in-house exchange, also allows you to take better advantage of your Blackberry or other mobile e-mail device.

- Wireless synchronization of contacts and calendar appointments removes the need to connect your PDA to your computer to keep the data current. This can be a competitive advantage, a time saver or a workgroup productivity tool.

### E-Mail Archiving

- Are you confident that you’d still be able to access your e-mail if the power went out in your office?
- If a lawsuit arose and you needed to dig up a five-year-old e-mail as part of the legal discovery process, could you do it?
- Could you still support normal business communications if your e-mail server got hit with a denial-of-service attack?

### SPAM Filtering

- Over 80% of e-mail today is spam.
- A large percentage of spam contains some type of malware in the e-mail or attachments. Some spam directs you to infected websites.
- Hosting, or in-house exchange, with a proper spam filter gives the user the ability to white- and blacklist e-mail addresses.

### The Hack Attack

- It is becoming common to receive emails from friends and colleagues asking for money because “they are stuck in a foreign country and need your help.” These fake e-mails are the result of a hacker obtaining the user’s password. How? The culprit infects a PC with malware that transmits passwords back to the hacker. The hacker then changes the password and sends out absurd and embarrassing e-mails from your account. The only way to prevent this from happening is to keep your anti-virus and anti-spyware software up to date and scan your PC nightly. In addition, keep yourself protected and take into consideration the concept that you “get what you pay for.”

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**NASSAU/SUFFOLK, NEW YORK**

Contact: Chapter Office (516) 997-9500  
 Chapter Meeting: Reg. /Buffet Dinner 5:30 p.m.;  
 Seminar 7:00 p.m.  
 Holiday Inn of Plainview, 215 Sunnyside Blvd., Plainview, N.Y.  
 (exit 46 off the L.I.E.), except as noted

*Thursday, June 3, Chapter Meeting*  
**Workers' Compensation Update** – 2 CPE credits

*Thursday, June 24, Full Day Seminar 8 a.m. - 5 p.m.*  
**Accounting & Auditing Update** – 8 CPE credits

*Wednesday, June 30, Registration 7:45 a.m., Seminar 8-10 a.m.*  
**How To Market & Manage Relationships**  
**Using the Internet** – 2 CPE credits  
 On Parade Diner, 7980 Jericho Turnpike, Woodbury, N.Y.

*Thursday, July 1, Chapter Meeting*  
**Asset Protection** – 2 CPE credits

*Wednesday, July 28, Registration 7:45 a.m., Seminar 8-10 a.m.*  
**Work Flow Management For the CPA** – 2 CPE credits  
 On Parade Diner, 7980 Jericho Turnpike, Woodbury, N.Y.

*Thursday, July 29, Chapter Meeting*  
**FIN 48—Accounting For Uncertainty In Income Taxes**  
 – 2 CPE credits

*Thursday, August 19, 8 - 12 noon*  
**Ethics**– 4 CPE credits

*Wednesday, August 25, Registration 7:45 a.m., Seminar 8-10 a.m.*  
**How to Improve Profit Margins in Your Practice**  
 – 2 CPE credits  
 On Parade Diner, 7980 Jericho Turnpike, Woodbury, N.Y.

**LONG ISLAND EAST, NEW YORK**

Contact: Chuck Pegler, CPA (631) 582-9090  
 E-mail: Chuck@PeglerCPA.com

Call for information.

**NEW YORK CITY, NEW YORK**

Contact: NYC Chapter Office (212) 946-4718  
 Please call to confirm; meetings, topics, times, locations.

*June, July and August: To be announced.*

**WESTCHESTER/ROCKLAND, NEW YORK**

Contact: Chapter Office (914) 708-9404  
 DoubleTree Hotel, 455 South Broadway, Tarrytown, N.Y.

*Tuesday, June 8, 7:30 a.m. - 9 a.m.*  
**Ethics (Basic)** – 2 CPE credits

*Tuesday, June 22, 9 a.m. - 5 p.m.*  
**Compilation and Review** – 8 CPE credits

*Tuesday, July 6, 6 - 9 p.m.*  
**Pension Planning** – 2 CPE credits

*Tuesday, July 20, 7:30 - 9:30 a.m.*  
**Wealth Management** – 2 CPE credits

*Tuesday, August 17, 6 - 9 p.m.*  
**Sales Tax** – 2 CPE credits

**NEW JERSEY**

Contact: Fred Bachmann, CPA (973) 377-2009  
 E-mail: bachmanncpa@msn.com  
 All meetings at Victor's Maywood Inn  
 122-124 West Pleasant Avenue, Maywood, N.J.  
 Phone (201) 843-8022/ E-mail: www.maywoodinn.com  
 6 - 8 p.m. – Dinner and Seminar

*Monday, June 14, 6 - 8 p.m.*  
**Estate Tax** – 2 CPE credits

*July and August: To be announced.*

**FLORIDA**

Contact: Neil Fishman (561) 369-3228  
 All meetings at 1500 Gateway Blvd., Room 220,  
 Boynton Beach, FL  
 8:45 a.m. – 10:45 a.m., Registration at 8:30 a.m.

*Thursday, June 10*  
**Compilation & Review Update on SSARS #19**  
 – 2 CPE credits

*July and August: To be announced.*

**MASSACHUSETTS**

Contact: Ronald Tockman, CPA (781) 341-2400  
*June, July and August: To be announced.*

**HOUSTON**

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