

84903-0

NO. _____

IN THE SUPREME COURT OF WASHINGTON
(Court of Appeals at Division I, No. 62824-1-I)

D. EDSON CLARK,

Appellant,

v.

SMITH BUNDAY BERMAN BRITTON, PS, *et. al.*

Respondents.

FILED
AUG 23 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

APPELLANT CLARK'S PETITION FOR REVIEW TO
THE WASHINGTON SUPREME COURT

Michele Earl-Hubbard
David M. Norman
Attorneys for Appellant D. Edson Clark

Allied Law Group LLC
2200 Sixth Avenue, Suite 770
Seattle, WA 98121
(206) 443-0200 (Phone)
(206) 428-7169 (Fax)



2010 JUL 29 PM 2:57
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

ORIGINAL

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER 1

II. COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE..... 2

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED 4

A. Division I’s Opinion is in Conflict With Opinions of the
Supreme Court and the Lower Appellate Divisions. 4

1. This Court and the Court of Appeals have previously held
that the burden is always on the proponent of sealing to
rebut the presumption that filed court records are open
to the public..... 5

2. The public’s constitutionally-protected interest in accessing
court records extends to all documents filed in anticipation
of a court decision, not only those records considered
by a court..... 10

3. GR 15 must be followed for all sealings, regardless of the
extent to which the court “uses” the court records. 15

4. Even if good cause is a sealing standard for filed court
records, the moving party must meet the substantive
test and the court must make adequate findings. 17

B. This Case Involves Significant Questions of Law Under the
Washington State Constitution and Issues of Substantial Public
Interest That Should be Determined by The Supreme Court..... 18

VI. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

<u>Allied Daily Newspapers of Wash. v. Eikenberry,</u> 121 Wn.2d 205, 848 P.2d 1258 (1993).....	7, 19
<u>Beuhler v. Small,</u> 115 Wn. App. 914, 64 P.3d 78 (2005).....	20
<u>Cowles Publ'g. Co. v. Murphy,</u> 96 Wn.2d 584, 637 P.2d 966 (1981).....	20
<u>Dreiling v. Jain,</u> 151 Wn.2d 900, 93 P.3d 861 (2004).....	passim
<u>In Re Marriage of Treseler and Treadwell.,</u> 145 Wn. App. 278, 187 P.3d 773 (2008).....	8, 13, 14
<u>In Re Marriage of R.E.,</u> 144 Wn. App. 393, 183 P.3d 339 (2008).....	7, 16
<u>Indigo Real Estate Svcs.v. Rousey,</u> 151 Wn. App. 941, 215 P.3d 977 (2009).....	6, 7, 8, 15, 16
<u>McCallum v. Allstate Property and Casualty Ins. Co.,</u> 149 Wn. App. 412, 204 P.3d 944 (2009).....	7, 18
<u>Nast v. Michels,</u> 107 Wn.2d 300, 730 P.2d 54 (1986).....	20
<u>Press-Enterprise Co. v. Superior Court,</u> 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).....	19
<u>Richmond Newspapers, Inc. v. Virginia,</u> 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).....	19
<u>Rufer v. Abbott Labs.,</u> 154 Wn.2d 530, 114 P.3d 1182 (2005).....	passim
<u>Seattle Times v. Ishikawa,</u> 97 Wn.2d 30, 640 P.2d 716 (1982).....	passim

State v. Duckett,
141 Wn. App. 797, 173 P.3d 948 (2007)..... 15

State v. Waldon,
148 Wn. App. 952, 202 P.3d 325 (2009)..... 6, 7, 8, 15

Woo v. Fireman's Fund Ins. Co.,
137 Wn. App. 480, 154 P.3d 236 (2007)..... 8

Statutes

Article I, Section 10 of the Washington State Constitution..... 7, 12, 14, 18

Court Rules

GR 15 15, 16

I. IDENTITY OF PETITIONER

D. Edson Clark (“Appellant” or “Clark”) asks this Court to accept review of the Division I decisions designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Clark asks this Court to accept review of the published decision Clark v. Smith Bunday Berman Britton, et. al., 156 Wn. App. 293, ___ P.3d ___, 2010 WL 2697136 (May 24, 2010), from the Division I of the Court of Appeals (“Opinion” or “Op.”), and accept review of Division I’s Order Denying Motion for Reconsideration and Granting Motion to File Amici Curiae Memorandum (“Reconsideration Order”), issued June 30, 2010. A true and correct copy of the Opinion is attached hereto as Appendix A, and the Reconsideration Order is attached hereto as Appendix B.¹

III. ISSUES PRESENTED FOR REVIEW

1. Whether Division I’s conclusion is incorrect that the public only has a constitutionally-protected interest in filed court documents when those documents are “part of the court’s decision-making process” and only become part of that process when those documents are specifically reviewed by the court?

2. Whether Division I’s conclusion is incorrect that the only way for a record to “become part of the court’s decision-making process,” and therefore presumptively open, is for the court itself to use the record?

3. Whether Division I’s conclusion is incorrect that records are presumptively open only if they are relevant to the “fairness of the fact-finding process” or to “evaluate the performance of the court,” as if only the *court’s* actions matter, and as if the public has no legitimate interest in

¹ Clark’s Motion for Reconsideration (without its accompanying appendices) is attached hereto as Appendix C, and the Newspapers’ Amicus Memorandum in Support of Reconsideration is attached hereto as Appendix D.

the actions of prosecutors, lawyers, litigants, witnesses, or others who influence the courts and consume their resources?

4. Whether the test set forth in Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) (“Ishikawa”) must be applied to seal, or to keep sealed, court records filed in anticipation of a decision, regardless of whether the court ultimately makes such a decision, or whether the court relies upon the records in making such a decision?

5. Whether a court may impose a duty on a person, including a non-party, seeking to unseal or oppose sealing of court records to prove the records were filed in anticipation of a decision and were considered by a court in connection with such decision before the presumption of openness applies and the party seeking to seal or keep court records sealed must therefore comply with the Ishikawa test?

6. Whether court records filed with a court in anticipation of a decision can be sealed or kept sealed under the “good cause” standard for a protective order in discovery rather than Ishikawa, whether or not the court considers the records or makes the anticipated decision?

7. Whether court records filed with a court in anticipation of a decision as legal briefing or in support of a motion or response may ever be treated by a court as “raw discovery” or be subject to sealing based solely on the “good cause” standard for raw unfiled discovery?

8. Whether Division I’s conclusion is incorrect that even if there is no compelling interest justifying continued secrecy, unsealing such records is required only “to the extent they enter into the court’s decision-making process *in making a ruling*” (Op. at 1)?

9. Whether Division I’s conclusion is incorrect and in conflict with Dreiling v. Jain, infra, that the relevance of the record to a lawsuit, not the record’s ultimate impact on the case, is what matters in the sealing analysis?

10. Whether Division I’s conclusions were incorrect (a) that the Ishikawa test did not apply to these sealed records, and (b) that the trial court did not err in denying Clark’s Motion to Unseal despite the absence of any finding to seal or keep sealed records by the trial court under any standard, including the “good cause” discovery standard or under GR 15?

IV. STATEMENT OF THE CASE

This case addresses the substantive test for sealing and unsealing records filed with a court in anticipation of a decision, and the burden

borne by those seeking unsealing. Clark was an expert witness for plaintiffs in a civil action against their former accountant and accounting firm alleging that the defendants assisted plaintiffs' former business partner in embezzling from their joint companies, and hid the embezzlement in the books. CP 260-72. Defendants designated more than 4000 records produced in discovery as "confidential" pursuant to a stipulated protective order that required parties to file all records so designated under seal; the trial court subsequently allowed many documents to be placed under seal, without any sealing order or review by the trial court under this order. CP 1-5; CP 56-57. When the parties sought to seal Clark's own Declaration and its attachments filed in connection with a response to a motion for summary judgment, Clark independently intervened and moved to unseal all sealed court records and to prevent sealing of records in the future. CP 123-33. The case settled before the summary judgment motion was heard, but other motions for which sealed documents had been filed had been heard in open court; while the trial court had deferred rulings on some motions, the materials were reviewed by the court in connection with the motions. CP 243-44; CP 273-74; CP 323-33. The trial court granted Clark's Motion to Intervene, but denied his Motion to Unseal, and further ordered additional records which had been filed and accessible by the public to be re-filed

under seal, including Clark's Declaration and its exhibits. CP 231-33.

The judge stated that he had not reviewed the summary judgment materials and thus did not believe the Ishikawa standard applied.

Moreover, the trial judge did not address the previously-sealed records at issue, or the fact it appeared clear from the record that such records were reviewed by the court, even if no decision had been rendered. CP 232-33.

Clark appealed the denial of his Motion to Unseal, and the new sealing order to Division I of the Court of Appeals. Division I issued its published Opinion on May 24, 2010, upholding the sealing. Clark timely moved for reconsideration, but was denied by Division I on June 30, 2010.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Division I's Opinion is in Conflict With Opinions of the Supreme Court and the Lower Appellate Divisions.

Division I's Opinion merits review pursuant to RAP 13.4(b)(1)-(2) as it is in conflict with several opinions of this Court and the lower appellate courts for the following reasons. First, the Opinion holds that the proponent of *unsealing* has the initial burden of showing both that (1) the court records he or she seeks to unseal were filed in anticipation of a decision, and (2) were actually considered by the court in rendering a decision, before the public's interest in the records is triggered.² Second,

² As Clark has noted repeatedly in the appeal, the conclusion that none of the documents sealed in this case were ever considered by the trial court is erroneous. Specifically, the

the Opinion holds that the public's presumptive constitutional right to access filed court records is limited to only records considered by the court, and not all records that have been filed in anticipation of a court decision. Third, the Opinion holds that absent a showing by the person challenging sealing that records have been filed and considered by the court, those records may be sealed or kept sealed upon a mere showing of "good cause" (not even shown here) as defined in the discovery rules for pre-trial protective orders. These holdings conflict with this Court's and other Appellate Courts' opinions.

- 1. This Court and the Court of Appeals have previously held that the burden is always on the proponent of sealing to rebut the presumption that filed court records are open to the public.**

The Opinion imposes an initial burden on the party seeking to *unseal* sealed court records to show that: the documents both (1) were filed in anticipation of a court decision, and (2) were reviewed by the court (and only then became part of the court's decision-making process) — *before* the presumption of openness to the public is triggered under Article I, Section 10³ and Ishikawa, supra. Specifically, when discussing the sealed documents attached to the Second Declaration of Wright Noel on

records filed under seal in May of 2008 under the December 2007 stipulated protective order were attached to substantive briefing and were considered in open court, and the trial court was wholly silent as to why those records should not be unsealed. CP 231-33.
³ Article I, Section 10 of the Washington State Constitution is attached hereto as Appendix E.

May 27, 2008, the Opinion states:

Without citation to the record, Clark claims that they were filed in connection with a supplemental brief in support of a discovery request by plaintiff Bennett. There is no such brief in our record nor do we find a motion to compel discovery. *Part of the predicate for subjecting sealed discovery documents to examination under Ishikawa is a showing that they were “filed with the court in anticipation of a court decision.”* **Rufer**, 154 Wn.2d at 549. The trial court’s denial of the motion to unseal is affirmed with respect to the Wright Noel documents because, as to them, *Clark failed to make that showing.*

Op. at *10 (emphasis added). This burden shift conflicts with this Court’s and the Appellate Courts’ precedents establishing that the burden is always on the proponent of sealing or continued sealing to show that the presumption of openness and the five-part **Ishikawa** test does not apply.⁴ This Courts’ precedents make clear that all documents filed with a court carry a presumption of openness that can only be overridden with a showing of a serious and imminent threat to a compelling interest by the proponent for sealing. **See, e.g., Dreiling v. Jain**, 151 Wn.2d 900, 909, 93 P.3d 861 (2004) (“Openness is presumptive[.]”); **Rufer v. Abbott Labs.**, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005) (“In determining whether court records may be sealed from public disclosure, we start with the

⁴ The proponent of sealing must meet the five-part test from **Ishikawa** to justify sealing or redacting filed court documents. **Ishikawa**, 97 Wn.2d at 37-39; **see also State v. Waldon**, 148 Wn. App. 952, 958-59, 202 P.3d 325 (2009) (emphasizing that **Ishikawa** requires a showing of a “serious and imminent threat to some other important interest”, and not merely a “compelling interest” as this Court characterized it in **Rufer** and **Dreiling**). The **Ishikawa** test has “served as the benchmark constitutional analysis regarding attempts to restrict access to courtroom proceedings or records.” **Indigo Real Estate Services v. Rousey**, 151 Wn. App. 941, 949, 215 P.3d 977 (2009).

presumption of openness.”); **Ishikawa**, 97 Wn.2d at 37-38 (“[C]ourts are presumptively open[.]”). This Court has further held that the burden is always on the party seeking to seal or keep sealed court documents to show that another interest overrides the public’s constitutional interest in open courts. **See, e.g., Dreiling**, 151 Wn.2d at 909 (“The burden of persuading the court that access must be restricted to prevent a threat to an important interest is generally on the proponent[.]”); **Rufer**, 154 Wn.2d at 540 (same); and **Allied Daily Newspapers of Wash. v. Eikenberry**, 121 Wn.2d 205, 210-12, 848 P.2d 1258 (1993) (same).

Further, the Opinion conflicts with decisions of the lower appellate courts, which hold that filed court records are presumed open to the public, and that the **Ishikawa** test must be met to justify any limitation on access to those records. **See, e.g., Waldon**, 148 Wn. App. at 957 (Div. I 2009) (“In determining whether court records may be sealed from public disclosure, we start with the presumption of openness.”); **Indigo Real Estate Svcs.**, 151 Wn. App. at 948 (Div. I 2009) (“[A]ny request to redact court records implicates the public’s right of access to court records under Article I, Section 10 of the Washington State Constitution.”); **McCallum v. Allstate Property and Casualty Ins. Co.**, 149 Wn. App. 412, 420, 204 P.3d 944 (Div. II 2009) (same) (citation omitted); **In Re Marriage of R.E.**, 144 Wn. App. 393, 399, 183 P.3d 339 (2008) (“To the extent

documents in court files are intended to inform a judicial decision, they are presumed open.”); **In Re Marriage of Treseler and Treadwell**, 145 Wn. App. 278, 283, 187 P.3d 773 (Div. I 2008) (same); and **Woo v. Fireman's Fund Ins. Co.**, 137 Wn. App. 480, 486, 154 P.3d 236 (Div. I 2007) (same). The lower appellate courts likewise hold that the burden is on the party seeking to seal or keep sealed records to show that some other interest overrides the public’s interest in filed court records. **See, e.g., Waldon**, 148 Wn.2d at 958; **Indigo Real Estate Svcs.**, 151 Wn. at 948-49; **Treseler**, 145 Wn. App. at 283.

Here, all the sealed documents were filed with the trial court in connection with substantive motions, as the record before Division I made clear—a fact never challenged by Respondents. All court documents that have been filed in anticipation of a court decision are presumed open to the public, meaning that the proponent of sealing or continued sealing must meet the constitutional test from **Ishikawa**. **See Rufer**, 154 Wn.2d at 540. This means that ***Respondents*** had the initial burden of showing that the records were *not* filed in anticipation of a decision in order to rebut the presumption that the public had no constitutionally-protected interest in accessing the records, and that the records could be sealed or kept sealed under a standard less stringent than **Ishikawa**. Not only did Respondents fail to argue below that the records were not filed in

anticipation of a court decision and that the “good cause” discovery standard should apply, they in fact argued that Ishikawa did apply and that they had met that constitutional burden. See CP 168-172.

The trial court stated it had not reviewed the summary judgment materials, held that Ishikawa did not apply to records filed with the court but not actually reviewed by the court, and then with no findings of “good cause” or any basis to seal or keep records sealed, the court permanently sealed those records. CP 231-33. The trial court did not address the other sealed records filed in connection with motions that had been heard by the court, and made no findings that even “good cause” had been met to justify the continued sealing of those records, and yet denied Clark’s Motion to Unseal. Id. Division I found no error because Clark allegedly failed to meet a burden he did not legally bear, held “good cause” was sufficient to seal these records and yet failed to make findings establishing “good cause” or that Respondents had met any burden for sealing.⁵

The Opinion confuses the burdens on this issue and misreads the portion of Rufer it cites. See Op. at *8 (citing Rufer, 154 Wn.2d at 540). Rufer did not hold that the party seeking to unseal or prevent records from

⁵ As to the May and October 2008 records filed under seal (CP 24, CP 55, CP 73, CP 75, CP 292, CP 294) all in connection with motions that were heard by the court, no party has ever argued that the records were not “filed in anticipation of a court decision”, the trial court in its Order made no finding that Respondent met any burden at all, nor did the trial court provide any findings on its own that could justify keeping the records sealed nor state he did not review these records. CP 231-33.

being sealed must first show that the records were “filed in anticipation of a court decision” in order to obtain the presumption of openness—such a conclusion would preclude describing the public’s ability to access filed court records as a “presumption” in the first place. Instead, the rule from **Rufer** is that records filed in anticipation of a court decision are presumed open, meaning that to redact, seal or keep those records sealed, a party must presumably meet **Ishikawa**. **Rufer**, 154 Wn.2d at 549.

2. The public’s constitutionally-protected interest in accessing court records extends to all documents filed in anticipation of a court decision, not only those records considered by a court.

Division I affirmed the trial court regarding the sealed summary judgment-related documents because it concluded the public’s constitutionally-protected interest in the records did not arise because the trial court never reviewed the records. **See** Op. at **5-10. The trial court’s and Division I’s misinterpretation of this Court’s precedents as to “unfiled discovery” and the sealing standard for such materials, specifically from **Dreiling** and **Rufer**, is at the core of why this Court must correct the Opinion. Neither **Dreiling** nor **Rufer** stand for the principles that the public only has an interest in accessing filed court records if they were considered by the court, or that the “good cause” standard from discovery applies to keeping records *attached to motions*, as opposed to raw discovery, sealed. Instead, those cases hold that the

public has a constitutional interest in accessing all court records filed in anticipation of a decision, regardless of whether attached to dispositive or non-dispositive motions, and regardless of whether the court uses the records in rendering a decision or considers the records at all.

This Court's differentiation between "dispositive motions" and "mere discovery" in **Dreiling** made clear that unfiled discovery had a lower than **Ishikawa** sealing standard because "information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action" and therefore "does not become part of the court's decision making process." 151 Wn.2d at 909-10. This Court further explained that the "materials attached to a summary judgment motion" are not akin to unused records gleaned in discovery where access is restricted because of a protective order, stating "when previously sealed discovery documents are attached in support of a summary judgment motion, they lose their character as the raw fruits of discovery", and cannot be kept from the public view without complying with **Ishikawa**. **Id.** at 910. The Court, moreover, was explicit in emphasizing "[the good cause standard] applies primarily to *unfiled discovery*, not documents filed with the trial court in support of a motion that can potentially dispose of a case." **Id.** at 912 (emphasis in original). **Dreiling** does not require that the records actually be considered by the court in order for the records to

“become part of the court’s decision making process” and for the public’s right of access to those records to be triggered under Article I, Section 10.

This Court later clarified the Dreiling rule in Rufer, where the Court extended the presumption of public access to filed court records attached to non-dispositive motions. 154 Wn.2d at 549. The Court explicitly rejected the notion that the public only has an interest in the outcome of the court’s decision making, emphasizing that Article I, Section 10 addresses “our *entire judicial system*.” Id. (emphasis in original). The Court further stated that the public must have the ability to “witness the complete judicial proceeding, including all records the court has considered in making any ruling, whether ‘dispositive’ or not.” Id. This reasoning, as interpreted by Division I in this case, apparently means that only records that have been considered by the court implicate the public’s interest in the “entire judicial process.” This is logically unsound and not supported by Rufer. The Rufer Court expressly noted that the good cause standard applied to deposition transcripts that were *not* used at trial *or* as an “attachment to any motion.” Id. at 550 (emphasis added). The black letter rule from Rufer is that “any records that were filed with the court in anticipation of a court decision (dispositive or not) should be sealed or continue to be sealed only when the court determines—pursuant to Ishikawa—that there is a compelling interest which overrides the public’s

right to the open administration of justice.” Id. at 549. There is no limiting language that requires the court to consider the records before the presumption of openness, and thus compliance with Ishikawa, applies. Nor is there any language supporting the notion that the party moving to unseal has the initial burden of demonstrating that the records were filed in anticipation of a decision or that they were used by the court in some manner before that presumption arises. Instead, this Court in Rufer explicitly held that the relevance, or irrelevance, of the documents is subsumed in the Ishikawa test. Id. at 547-48. If filed documents are not considered by the court and truly “irrelevant to the motion” to which they are attached, then the interest of the party that is attaching the documents is necessarily low enough where the Ishikawa test could likely be met by the sealing party. Id. at 548. This does not equate to a conclusion that Ishikawa does not apply in the first place to documents that are “truly irrelevant to the merits of the case and the motion before the court,” but only that it would be likely in such a circumstance that Ishikawa would allow the records to be sealed.

The Opinion here also conflicts with prior opinions of the Court of Appeals, as Division I in Treseler expressly rejected the argument that the “good cause” standard for protective orders in discovery should apply to the sealing of “filed documents [that] are not used by the court to make a

decision.” 145 Wn. App. at 282. Instead, Division I correctly noted, consistent with Rufer, that a court record is presumed to be open to the public once filed in anticipation of a decision, and that the Ishikawa standard applies equally to records filed in anticipation of a court decision but were “never part of the court’s determination, similar to unused discovery documents.” Id. at 285. Rejecting the argument that the court must consider the records in order for Article I, Section 10 to be implicated, Treseler stated:

Rufer did not hold that only documents that a trial court considered in rendering a decision are subject to the Ishikawa test. Rather the court held that any document filed in “anticipation of a court decision,” whether or not dispositive of the case, triggers the public’s right of access and requires a compelling interest to seal.... [C]ourts must presume documents filed in conjunction with a motion are open to the public and leave assessment of their relevance to the application of the Ishikawa factors.

Id. at 285-86. Applied here, there is no dispute that the records were filed in anticipation of a court decision. There is no argument that any of the documents, which were attached to motions and pleadings or were briefs themselves, are akin to the “raw fruits” of discovery, such as a published deposition transcript technically filed but never cited or used as support in connection with a motion. In fact, most of the records at issue here were filed in anticipation of a **dispositive** decision. Despite this, and despite the above case law from this Court and its own court, Division I ruled that if a

court never reviewed the filed court records, the public has no interest in them, and Ishikawa therefore did not apply. This conclusion is erroneous.

3. GR 15 must be followed for all sealings, regardless of the extent to which the court “uses” the court records.

Even if this Court believes that records filed in anticipation of a court decision are “not part of the judicial process” if not considered by the court, and that this rule applies here, this Court must clarify that GR 15 applies to the sealing and unsealing of all civil records, regardless of the extent to which a court considered the records. The requirements under GR 15, which was largely rewritten after Dreiling and Rufer, supra, unambiguously apply to *all* sealings of filed court records. GR 15 (see Appx. F); see also Indigo Real Estate Servs., 151 Wn. App. at 946 (Division I stating “GR 15 sets forth a uniform procedure for the destruction, sealing, and redaction of court records. This rule *applies to all court records*[.]”) (emphasis added); State v. Duckett, 141 Wn. App. 797, 808, 173 P.3d 948 (Div. I 2007) (same). While Waldon, 148 Wn. App. at 960-62, held that the revised GR 15 must be harmonized with the constitutional mandate of Ishikawa to have any applicability, there is no authority for the converse idea that filed court records that are sealed under the lesser “good cause” standard do not need to also comply with GR 15 to be lawfully sealed or that GR 15 does not apply in keeping any

records filed under seal because of a protective order. This means that to comply with GR 15, there must be written findings justifying the sealing (not present here), a specific finding of a compelling interest in the sealing (not present here), etc. Despite the total absence of these requirements, and the fact that party agreement was the sole basis for sealing (violating GR 15(c)(2)), Division I affirmed the trial court—a ruling that directly conflicts with its own prior case law. See, e.g., Indigo Real Estate Servs., 151 Wn. App. at 946 (remanding because it was “ambiguous” as to whether the trial court applied GR 15); In Re Marriage of R.E., 144 Wn. App. at 403 (remanding because of lack of adequate findings justifying sealing). GR 15 clearly says it applies to all court records, and thus Division I’s Opinion simply cannot be affirmed.⁶

If this Court perceives a conflict between the two standards, or believes that filed court records allegedly not reviewed by a court do not implicate GR 15 (despite GR 15(c)(1) stating that the rule’s sealing requirements apply to “civil cases”) it should establish that rule with clear and well-articulated justifications.

⁶ The revised GR 15 makes no distinction between records that have been considered or not considered by the trial court, or between discovery materials as the prior rule had under former GR 15(c)(2)(B) (referencing CR 26(j)).

4. Even if good cause is a sealing standard for filed court records, the moving party must meet the substantive test and the court must make adequate findings.

While Clark contends that the “good cause” standard cannot be used to seal records or keep records filed with the court in anticipation of a decision sealed, even if this Court disagrees, it must find error with Division I’s failure to actually identify any “good cause” justifying sealing in this case. **Dreiling** made clear that “a party bearing good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted[,]” that “[u]nsubstantiated allegations will not satisfy the rule,” and that the asserting party must show that redaction is not sufficient, and support its claims with affidavits and other “concrete examples.” 151 Wn.2d at 916-17. This Court further held that the trial court cannot rely on the existence of a protective order and cannot permanently seal such records. **Id.** at 917. The trial court did not comply with either rule.

Here, the trial court permanently sealed records with no showing of good cause or particularized harm and based its ruling solely on its conclusion that **Ishikawa** did not apply. This is in direct opposition to this Court’s requirements for a particularized showing to seal under the standard adopted in **Dreiling** and **Rufer** and the lower appellate courts.

See McCallum, 149 Wn. App. at 423. The Court must accept review of this case and remedy this undeniable error by Division I.

B. This Case Involves Significant Questions of Law Under the Washington State Constitution and Issues of Substantial Public Interest That Should be Determined by The Supreme Court.

This case merits review pursuant to RAP 13.4(b)(3)-(4) as it involves significant questions of law under the Washington State Constitution, and issues of substantial public interest that should be determined by this Court. This case deals with the meaning and scope of Article I, Section 10 of the Washington State Constitution, the level of the public's presumptive access to court records under that provision, the burden that must be borne and by whom to restrict or obtain access, and when and how one meets that burden. It also addresses the interplay between Article I, Section 10 and GR 15 and the related local court rules governing court record sealing, and the applicability of the protective order standard of CR 26 to filed court records. Absent review and clarification by this Court, the public, parties, and all lower courts will understandably be uncertain as to what records the public may access and the proper tests to apply to sealing questions in the future. However, at the heart of this case is the extent to which our judicial system remains open, accessible and accountable to the public—the basis for the public's constitutional right to open court proceedings and records, as repeatedly recognized by the Washington and

U.S. Supreme Courts. See Dreiling, 151 Wn.2d at 915 (policy for granting public access to civil courts “relate to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.”); see also Allied Daily Newspapers, 121 Wn.2d at 211 (“it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice”).

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (“Press-Enterprise I”).⁷ Further, absence of public scrutiny “breed[s] suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the law[.]” Richmond Newspapers, 448 U.S. at 595 (Brennan, J., concurring). This Court has specifically noted that

The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public’s understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history. The right of the public, including the press, to access trials and court

⁷ See also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 604, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (Blackmun, J., concurring) (“[T]he public has an intense need and a deserved need to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, other public servants, and all the actors in the judicial arena....”).

records may be limited only to protect significant interests and any limitation must be carefully considered and specifically justified.

Dreiling, 151 Wn.2d at 903-04.⁸ This Court has also recognized that this right is "fundamental to a democratic state." **Nast v. Michels**, 107 Wn.2d 300, 303, 730 P.2d 54 (1986).

Finally, because the proper interpretation of **Rufer** and **Dreiling**, is central to this case, this is the only court in a position to clarify and elaborate on the scope of its holdings. Further, only this Court can address the conflicts between Division I's Opinion and its own and other appellate decisions, and only this Court can address the meaning and role of the revised GR 15, adopted by this Court following **Dreiling** and **Rufer**.

VI. CONCLUSION

For the foregoing reasons, this Court should accept review of the Opinion and Reconsideration Order.

Respectfully submitted this 30th day of July 2010.

By:



Michele Earl-Hubbard, WSBA #26454
David M. Norman, WSBA #40564
Attorneys for Appellant D. Edson Clark

ALLIED
LAW GROUP

⁸ See also **Cowles Publ'g. Co. v. Murphy**, 96 Wn.2d 584, 590, 637 P.2d 966 (1981) ("The public's interest in an open legal process convinces us that our judicial process is best served by ordering that these records should be available to the public."); **Beuhler v. Small**, 115 Wn. App. 914, 919, 64 P.3d 78 (2005) ("[T]he public has an interest in the openness of the judicial process and the neutrality of the judiciary.").

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on July 30, 2010, I caused the delivery of the foregoing Petition For Discretionary Review to by the method indicated to:

By Legal Messenger and U.S. Mail:

Barbara L. Schmidt & Mary Eklund
Eklund Rockey Stratton, P.S.
521 2nd Ave. West
Seattle, WA 98119-3297
Attorneys for Respondents

Catherine Smith
Edwards, Sieh, Smith & Goodfriend, P.S.
1109 1st Ave., Suite 500
Seattle, WA 98101
Attorney for Respondents

Michael T. Callan
Peterson Russell Kelly PLLC
1850 Skyline Tower
10900 N.E. 4th Street
Bellevue, WA 98004-8341
Attorney for Non-Party Todd Bennett

Kathleen Benedict
Freimund Jackson & Tarfif, LLP
711 Capitol Way S., Suite 605
Olympia, WA 98501 Attorney for Amicus WSCPA

By email pursuant to agreement:

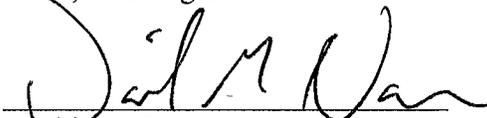
Katherine George
Harris Benis & Spence, LLP
2101 4th Ave., Suite 1900
Seattle, WA 98121
Attorney for Amicus ADNW and WNPA

By U.S. Mail pursuant to agreement:

Rondi Bennett
P.O. Box 53224
Bellevue, WA 98015

Gerald Horrobin
303 2nd Street South#C3
Kirkland, WA 98033

Dated this 30th day of July, 2010 at Seattle, Washington.



David M. Norman

APPENDIX A

--- P.3d ---, 156 Wash.App. 293, 2010 WL 2697136 (Wash.App. Div. 1)
(Cite as: 2010 WL 2697136 (Wash.App. Div. 1))

H Only the Westlaw citation is currently available.

Court of Appeals of Washington,
Division 1.
Rondi BENNETT, an individual, and Gerald Horrobin, an individual, Plaintiffs,
D. Edson Clark, Appellant,
v.
SMITH BUNDAY BERMAN BRITTON, PS, a Washington professional services corporation, and Sharon Robertson, individually and her marital community, Respondents.
No. 62824-1-I.

May 24, 2010.
Reconsideration Denied July 6, 2010.

Background: Action was brought against accounting firm for accounting malpractice. Following settlement of action, accounting expert who was not a party to action filed motion to intervene and to unseal documents. The Superior Court, King County, James E. Rogers, J., granted a limited right to intervene but denied motion to unseal records. Intervenor appealed.

Holding: The Court of Appeals, Becker, J., held that the public did not have a constitutional right of access to sealed documents filed with the court in anticipation of a decision, where the court did not read the documents and did not make the anticipated decision.

Affirmed.

West Headnotes

[1] Records 326 ↪ 32

326 Records
326II Public Access
326II(A) In General
326k32 k. Court Records. Most Cited Cases
On appeal, a trial court's decision to seal or unseal records is reviewed for abuse of discretion, but the determination of the legal standard to be used for sealing or unsealing records is a question of law that is reviewed de novo.

[2] Records 326 ↪ 32

326 Records
326II Public Access
326II(A) In General
326k32 k. Court Records. Most Cited Cases
The good cause standard for unsealing of records applies to the raw fruits of discovery that have not become part of the court's decision-making process; otherwise, the compelling interest standard applies and the court must proceed under *Ishikawa*.

[3] Records 326 ↪ 32

326 Records
326II Public Access
326II(A) In General
326k32 k. Court Records. Most Cited Cases
If the trial court uses the wrong standard when making a decision to seal or unseal records, the remedy is to remand for application of the correct standard.

[4] Constitutional Law 92 ↪ 2314

92 Constitutional Law
92XIX Rights to Open Courts, Remedies, and Justice
92k2313 Conditions, Limitations, and Other Restrictions on Access and Remedies
92k2314 k. In General. Most Cited Cases
State constitutional right to the open administration of justice does not grant the public a right of access to sealed documents that were filed with the court in anticipation of a decision when the court does not read the documents and does not make the anticipated decision. West's RCWA Const. Art. 1, § 10.

[5] Constitutional Law 92 ↪ 2314

92 Constitutional Law
92XIX Rights to Open Courts, Remedies, and Justice
92k2313 Conditions, Limitations, and Other Restrictions on Access and Remedies
92k2314 k. In General. Most Cited Cases

--- P.3d ---, 156 Wash.App. 293, 2010 WL 2697136 (Wash.App. Div. 1)
(Cite as: 2010 WL 2697136 (Wash.App. Div. 1))

Records 326

326 Records

326II Public Access

326II(A) In General

326k32 k. Court Records. Most Cited Cases
Right of access to judicial records under state constitutional provision requiring the open administration of justice did not extend to documents filed in support of motion for summary judgment in accounting malpractice action, where case settled before the trial court began to consider the pending summary judgment motion and the sealed documents filed in support of it; as the court did not read or decide the motion and did not consider the sealed documents for any purpose, the documents did not become part of the court's performance that the public had a constitutional right to scrutinize. West's RCWA Const. Art. 1, § 10.

[6] Records 326

326 Records

326II Public Access

326II(A) In General

326k32 k. Court Records. Most Cited Cases
Core concern of the constitutional right of access to judicial records is to guarantee the public's right to observe the operations of the courts and the judicial conduct of judges. West's RCWA Const. Art. 1, § 10.

[7] Records 326

326 Records

326II Public Access

326II(A) In General

326k32 k. Court Records. Most Cited Cases
Claim that trial court failed to comply with court rules in sealing documents in accounting malpractice action was not preserved for appeal, where such rules-based claim was not brought to the attention of the trial court.

Appeal from King County Superior Court; Hon. James E. Rogers, J.Rondi Bennett, Bellevue, WA, pro se.

Gerald Horrobin, Kirkland, WA, pro se.

Barbara L. Schmidt, Mary C. Eklund, Catherine Wright Smith, Edwards Sieh Smith & Goodfriend PS,

Seattle, WA, for Respondents.

Michele Lynn Earl-Hubbard, Christopher Roslaniec, David M. Norman, Allied Law Group LLC, Seattle, WA, for Appellant Intervenor.

Katherine George, Harrison Benis & Spence LLP, Seattle, WA, for Amicus Curiae on behalf of Allied Daily Newspapers.

Kathleen Dell Benedict, Freimund Jackson Tardif & Benedict Garra, Olympia, WA, for Amicus Curiae on behalf of Wash. Society of Cert. Public Accountants.

Michael T. Callan, Peterson Russell Kelly PLLC, Bellevue, WA, for Other Parties.

PUBLISHED OPINION

BECKER, J.

*1 ¶ 1 This accounting malpractice case settled before the trial court began to consider a pending motion for summary judgment and the sealed documents filed in support of it. Discovery documents that are initially designated as confidential pursuant to a protective order may be filed with the court under seal in connection with an anticipated decision by the court. To the extent they enter into the court's decision-making process in making any ruling, the documents must be unsealed unless the proponent of secrecy can show a compelling interest justifying nondisclosure. Under the particular circumstances presented here, where the court did not read or decide the motion and did not consider the sealed documents for any purpose, the documents did not become part of the court's performance that the public has a constitutional right to scrutinize. Accordingly, the court did not need to find a compelling interest to justify allowing them to remain sealed.

¶ 2 The underlying action began in October 2007 when Rondi Bennett and her father, Gerald Horrobin, filed an accounting malpractice lawsuit against their former accounting firm, Smith Bunday Berman Britton, P.S. They complained that Smith Bunday had assisted Todd Bennett, the former husband of Rondi Bennett, in defrauding companies the Bennetts and Horrobin once owned together. Sharon Robertson, the accountant at Smith Bunday who handled their busi-

--- P.3d ----, 156 Wash.App. 293, 2010 WL 2697136 (Wash.App. Div. 1)
(Cite as: 2010 WL 2697136 (Wash.App. Div. 1))

nesses, was also named as a defendant. We will refer to the defendants collectively as Smith Bunday.

¶ 3 The plaintiffs requested production of documents, including some that contained tax information concerning Todd Bennett and other nonparties. Smith Bunday objected that such information could not legally be disclosed without the consent of the nonparties. The parties resolved the dispute by stipulating, in early December 2007, to entry of a protective order under CR 26(c) allowing any party to designate as "confidential" any document containing confidential or proprietary information produced in discovery. The protective order required a party filing such a document with the court to file it under seal.

¶ 4 The court dismissed plaintiff Rondi Bennett's claims in August 2008 in response to Smith Bunday's motion for judgment on the pleadings. In October 2008, Smith Bunday moved for summary judgment dismissal of the remaining claims of plaintiff Gerald Horrobin. Horrobin identified accountant Ed Clark, intervenor and appellant herein, as an expert witness.

¶ 5 Horrobin filed a motion for an order removing certain documents from the protective order so that he could submit them in response to Smith Bunday's motion for summary judgment. Smith Bunday opposed the motion. Horrobin replied that Smith Bunday had failed to identify any compelling reason why the documents should be filed under seal. On November 10, 2008, superior court judge James Rogers issued an order deferring his ruling on the motion to remove the documents until he had received the specified documents.^{FN1}

*2 ¶ 6 Friday, November 14, 2008, was Horrobin's deadline to respond to the summary judgment motion. As of that morning, Horrobin had still not filed his response or Clark's declaration with the court. Throughout the day, the parties negotiated. By 4:27 p.m. they had reached a settlement and signed an agreement. Part of the agreement was that Smith Bunday's motion for summary judgment would be stricken from the calendar. But at 3:18 p.m., Horrobin had already completed the electronic filing of his response to the motion, including Clark's declaration. Attached to Clark's declaration were some of the confidential documents attached to Horrobin's earlier motion to remove. Horrobin thought he had filed them under seal, but he apparently neglected to do so. Sev-

eral more documents were later filed with the court as additional attachments to Clark's declaration; these were filed under seal.^{FN2}

¶ 7 On Monday, November 17, 2008, Smith Bunday informed the court that the case had been settled and the motion for summary judgment withdrawn. A question then arose concerning the confidential documents that Horrobin filed without placing them under seal. Smith Bunday and Horrobin agreed by stipulation dated November 24, 2008, to ask the court to order the confidential documents, Clark's declaration, and Horrobin's brief to be filed under seal and to replace the original versions in the public court file with redacted versions.

¶ 8 Clark was not a party to this agreement. He moved to intervene for the purpose of moving to unseal court records. Clark took the position that all the documents filed with the court, sealed or not, should be open to public inspection unless the court held a hearing and found a compelling interest to justify sealing. Clark's motion to unseal, filed on November 25, 2008, specifically designated the documents filed under seal in conjunction with the summary judgment motion, as well as the documents filed with Horrobin's motion to remove. He also designated certain documents that had been filed with the court under seal on May 27, 2008, as exhibits to a declaration by Horrobin's counsel Wright Noel in connection with a discovery dispute. Clark asserted that because all of these initially private documents had been filed with the court in anticipation of a court decision, they could not be sealed from public view unless Smith Bunday, as the party advocating secrecy, showed that sealing was justified under Seattle Times Co. v. Ishikawa, 97 Wash.2d 30, 640 P.2d 716 (1982).

¶ 9 The analytical approach of *Ishikawa* includes five basic factors:

1. The proponent of closure or sealing must make some showing of the need therefor.
2. Anyone present when the closure or sealing motion is made must be given an opportunity to object to the suggested restriction.
3. The court, the proponents, and the objectors should carefully analyze whether the requested method for curtailing access would be both the least

--- P.3d ----, 156 Wash.App. 293, 2010 WL 2697136 (Wash.App. Div. 1)
(Cite as: 2010 WL 2697136 (Wash.App. Div. 1))

restrictive means available and effective in protecting the interest threatened.

*3 4. The court must weigh the competing interests of the parties and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Ishikawa, 97 Wash.2d at 37-39, 640 P.2d 716. The *Ishikawa* factors, first set forth as a guide to ensuring the constitutional right of public access to court hearings, are now applied not only to the closure of courtrooms but also to the sealing of documents filed with a court. Rufer v. Abbott Laboratories, 154 Wash.2d 530, 544 n. 7, 114 P.3d 1182 (2005); Dreiling v. Jain, 151 Wash.2d 900, 914, 93 P.3d 861 (2004).

¶ 10 The question in this case is whether the *Ishikawa* factors apply to documents filed with a court under seal if the documents do not in some way become part of the court's decision-making process. Clark argued below that the *Ishikawa* criteria have to be met for each sealed document whether or not the records are ultimately reviewed by a court or relied upon in connection with any motion, citing this court's recent decision in In re Marriage of Treseler & Treadwell, 145 Wash.App. 278, 187 P.3d 773 (2008), review denied, 165 Wash.2d 1026, 203 P.3d 381 (2009).^{FN3} He asserted that none of the records designated in his motion should have been sealed because there had not been, as required by *Ishikawa* and *Rufer*, a sufficient sealing motion, notice and opportunity for opponents of sealing to be heard, and findings articulating the less restrictive alternatives that were considered and identifying the competing interests that were weighed. Smith Bunday responded that all the sealed documents should remain sealed because they were confidential accounting and federal tax documents of nonparties who had not consented to disclosure, and their privacy interest in tax information outweighed Clark's interest as a member of the public in gaining access to the information. In addition, Smith Bunday argued that the record supported a finding that all *Ishikawa* factors had been satisfied.^{FN4}

¶ 11 On December 5, 2008, the trial court granted Clark a limited right to intervene but at the same time denied his motion to unseal records.^{FN5} The court approved the parties' November 24 stipulation, the-

reby sealing those portions of the summary judgment documents that should have been filed under seal pursuant to the provisions of the protective order and leaving redacted versions in the public file.^{FN6}

¶ 12 In rejecting Clark's motion to unseal, the court did not apply *Ishikawa* and did not find a compelling interest. The court explained that although the documents had been filed with the court in anticipation of the court hearing on the summary judgment motion, the constitutionally mandated presumption of public access did not arise because the documents did not become part of the court's decision-making process:

The Court reviewed all pleadings in the matter. As a matter of procedure, the Court had not previously received the 24 November stipulation of the parties which was referenced in briefing. Mr. Noel has now sent that to the Court and it has been filed. In addition, while the parties may have meant to file responsive documents dated 14 November 2008 under seal, none of the contested documents related to defendant and nonparties income tax information were in fact filed under seal by plaintiffs, a fact apparently unknown to any in this case including Mr. Clark. This Court operated under the impression that they were filed under seal as required by earlier Court Order.

*4 To address the Motions, the first concerns a request to intervene. Any member of the public may move to unseal a document in a court of this State in any case. To that extent, the limited right to intervene is GRANTED.

Intervention for all purposes is a larger request, which would require notice and opportunity to be heard in every matter that may come before the Court in this matter. Therefore, the Motion to Intervene in this cause number for all purposes is Denied.

The second Motion is to unseal certain documents. Mr. Clark, who filed documents as an expert in this case, now makes the somewhat unusual request to unseal documents he himself used as an expert, allegedly for use in his personal litigation.¹ His reason or motive is not relevant. The question involves one of a constitutional right available to any citizen where the openness of justice is involved. The documents sealed here involve income

--- P.3d ----, 156 Wash.App. 293, 2010 WL 2697136 (Wash.App. Div. 1)
(Cite as: 2010 WL 2697136 (Wash.App. Div. 1))

tax information of persons and corporations.

The analysis here hinges on the fact that this Court did not review or consider the summary judgment papers or supporting documents involved, made no decision based upon these decisions [sic]. Also, the parties settled the very day of the filing of the documents seeking to be unsealed. In *Rufer v. Abbott Laboratories*, 154 Wash.2d 530, 549, 114 P.3d 1182 (2005) our Supreme Court stated: "In *Dreiling*, we noted that article I, section 10 'does not speak' to the disclosure of information surfacing during pretrial discovery that does not otherwise come before the court because it 'does not become part of the court's decision-making process.'" *Id.* at 541, 114 P.3d 1182. While *Rufer* further articulates factors to be followed in a variety of situations, there is no public interest involved where this Court has made no decision and has never even considered the documents (the documents are of a sensitive nature and might be sealed in any case, but the Court does not reach that issue).

Therefore, the Court rules as follows:

The summary judgment documents filed under seal, specifically, referring to the tax returns of the parties and witnesses are ORDERED SEALED as earlier filed by the parties and the Motion to Unseal is DENIED.

The Clerk shall SEAL the entire document in Docket numbers # 153, 154 and 159. By prior stipulation, this Court is causing to be filed substitute documents for 153 and 154, so those documents will remain in the record with certain redactions.

¹ Clark is correct in claiming that the burden should be on the party seeking to seal, but *Rufer* allows the procedure followed in this case. See *Rufer*, 154 Wash.2d at 550, 114 P.3d 1182. ^[FN2]

¶ 13 Clark appeals. Arguing that all sealings were improper, he assigns error to the above order and related orders entered by the court on December 5, 2008.

[1][2][3] ¶ 14 On appeal, a trial court's decision to seal

or unseal records is reviewed for abuse of discretion, but the determination of the legal standard to be used for sealing or unsealing records is a question of law that is reviewed de novo. *Rufer*, 154 Wash.2d at 540, 114 P.3d 1182. The good cause standard applies to the raw fruits of discovery that have not become part of the court's decision-making process. *Rufer*, 154 Wash.2d at 541, 114 P.3d 1182. Otherwise, the compelling interest standard applies and the court must proceed under *Ishikawa*. *Rufer*, 154 Wash.2d at 549-50, 114 P.3d 1182. If the trial court uses the wrong standard when making a decision to seal or unseal, the remedy is to remand for application of the correct standard. *Rufer*, 154 Wash.2d at 540, 114 P.3d 1182.

*5 ¶ 15 Smith Bunday contends that the rationale articulated by Judge Rogers shows that he denied Clark's motion to unseal after applying the *Ishikawa* factors. This is manifestly incorrect. Judge Rogers did not apply the *Ishikawa* factors. Judge Rogers believed that since he had not read the documents, he did not need to determine whether the privacy of tax information was a compelling interest. As he interpreted *Rufer*, the public does not have a constitutionally recognized interest in viewing discovery documents that do not become part of the court's decision-making process.

¶ 16 Clark contends Judge Rogers used the wrong standard in that he should have proceeded under *Ishikawa* and should have reviewed the documents and unsealed them absent identification of a compelling interest justifying the sealing. Clark's argument raises a question of law which we review de novo.

¶ 17 Clark's motion to unseal was primarily concerned with the sealed documents that were filed with the court in connection with Smith Bunday's motion for summary judgment, including his own declaration, the documents supporting it, and the exhibits to Horrobin's motion to remove. Clark maintains that once a document is filed with the court in anticipation of a decision, under *Rufer* it becomes presumptively open for public inspection whether or not a judge actually makes a decision or considers it. Accordingly, Clark contends the December 5 orders must be reversed and the motion to unseal must be determined under *Ishikawa*.

[4][5] ¶ 18 Does the public have a constitutional right

--- P.3d ---, 156 Wash.App. 293, 2010 WL 2697136 (Wash.App. Div..1)
(Cite as: 2010 WL 2697136 (Wash.App. Div. 1))

of access to sealed documents that were filed with the court in anticipation of a decision when the court does not read the documents and does not make the anticipated decision? Following *Rufer*, we conclude the answer is no because such documents have not become part of the court's decision-making process.

¶ 19 It is true that some language in *Rufer* lends support to Clark's argument. The court summarizes its holding in the second paragraph: "[D]ocuments filed with the court will presumptively be open to the public." *Rufer*, 154 Wash.2d at 535, 114 P.3d 1182 (emphasis added). Later: "We hold that any records that were filed with the court in anticipation of a court decision (dispositive or not) should be sealed or continue to be sealed only when the court determines-pursuant to *Ishikawa*-that there is a compelling interest which overrides the public's right to the open administration of justice." *Rufer*, 154 Wash.2d at 549, 114 P.3d 1182. And further: "[W]e hold in this case that all documents filed with the trial court are open absent compelling interests to the contrary." *Rufer*, 154 Wash.2d at 550, 114 P.3d 1182.

¶ 20 But a full examination of *Rufer* demonstrates that Judge Rogers correctly understood its holding. In *Rufer*, defendant Abbott Laboratories obtained a pre-trial order protecting proprietary information produced during discovery. After the verdict, Abbott moved to maintain confidentiality of one trial exhibit, several pretrial and deposition exhibits, and selected portions of deposition testimony. The other parties requested that the confidentiality order be dissolved and all sealed court records be unsealed, including the depositions of witnesses who testified at the trial. The trial court found that Abbott had not made a showing of a compelling interest as to any of the material. The trial court ordered that *all* exhibits, briefs, and memoranda filed with the court be made available for public inspection, *including* the depositions not used at trial. *Rufer*, 154 Wash.2d at 538, 114 P.3d 1182.

*6 ¶ 21 All parties appealed. This court reversed, holding that the "compelling interest" standard applies only to dispositive motions, while sealed discovery documents attached to nondispositive motions require only good cause to maintain their confidentiality. We ordered a remand for the trial court to evaluate the plaintiffs' unsealing request in light of that distinction. We also ordered the trial court to grant Abbott's motion to seal the depositions that were not used at trial.

See *Rufer*, 154 Wash.2d at 544-45, 114 P.3d 1182, describing the Court of Appeals' decision in *Rufer*. The Rufers petitioned for review.

¶ 22 In the Supreme Court, the Rufers continued to argue that the trial court decision was correct-with one exception. They conceded that to the extent depositions taken during discovery were never used at trial, they could properly remain sealed even if, having been published, they were technically available for use at trial:

With respect to depositions, initially the Rufers opposed the motion to seal *any* depositions of witnesses who testified at trial. However, they have since conceded in their briefing and oral argument before this court that *depositions which were never used at trial* (for impeachment or as substantive evidence) may properly remain sealed for good cause shown. They stress, however, that any depositions or deposition excerpts "which were submitted in support of or in opposition to summary judgment motions, or motions in limine *which were considered by the trial court*, or depositions or deposition excerpts *used at trial in any way*" should be subject to the compelling interest standard.

Rufer, 154 Wash.2d at 536-37, 114 P.3d 1182 (quoting *Rufer's* supplemental brief) (some emphasis added).

¶ 23 The Supreme Court agreed with the Rufers. First, in view of the public's broad right to the "open administration of justice," the court refused to approve a lower standard for nondispositive motions:

The basis for this disagreement, and how we must resolve it, depends upon the extent of the public's right to the open administration of justice. If we define this right narrowly to consist only of the observation of events leading directly up to the court's final decision, then arguably any documents put before the court that were not a part of that final decision would be outside of the scope of article I, section 10. Put another way, if the jury does not see it, the public does not see it. But our prior case law does not so limit the public's right to the open administration of justice. As previously noted, the right is not concerned with merely whether our courts are generating legally-sound *results*. Rather, we have interpreted this constitutional mandate as a

--- P.3d ---, 156 Wash.App. 293, 2010 WL 2697136 (Wash.App. Div. 1)
(Cite as: 2010 WL 2697136 (Wash.App. Div. 1))

means by which the public's trust and confidence in our entire judicial system may be strengthened and maintained. To accomplish such an ideal, the public must-absent any overriding interest-be afforded the ability to witness the complete judicial proceeding, including all records the court has considered in making *any* ruling, whether "dispositive" or not.

*7 Rufer, 154 Wash.2d at 549, 114 P.3d 1182 (citation omitted). Second, the Supreme Court agreed that the unused depositions were not subject to the compelling interest standard: "The one exception would be any deposition transcripts published but not used in trial or as an attachment to any motion. Both parties concede that these documents should remain sealed for good cause." Rufer, 154 Wash.2d at 550, 114 P.3d 1182. The court remanded "only to reseal any depositions that were not used in trial or used as support for any motion." Rufer, 154 Wash.2d at 551, 114 P.3d 1182.

[6] ¶ 24 In coming to this result, the court reaffirmed its observation in Dreiling that article I, section 10 "does not speak" "to the disclosure of information surfacing during pretrial discovery that does not otherwise come before the court because such information does not become part of the court's decision-making process." Rufer, 154 Wash.2d at 541, 114 P.3d 1182, quoting Dreiling, 151 Wash.2d at 909-10, 93 P.3d 861. The core concern of the constitutional article is to guarantee the public's right to observe "the operations of the courts and the judicial conduct of judges." Dreiling, 151 Wash.2d at 908, 93 P.3d 861. The exchange of information during discovery does not implicate this concern, and thus, such information may be sealed for good cause shown. Rufer, 154 Wash.2d at 541, 114 P.3d 1182.

¶ 25 In Rufer, the court was reviewing a decision to unseal records made at the end of a completely litigated case. Much of the material designated as confidential during discovery had been filed with the court and actually considered and used by the judge in deciding motions for summary judgment, pretrial motions, and the entire array of issues that a judge decides during a trial. Except for the "unused" depositions, the material lost its character as the raw fruits of discovery and served to inform the judge's rulings. Where that occurs, the public must "be afforded the ability to witness the complete judicial proceeding, including all records the court has considered in making *any* ruling," whether the ruling is dispositive

or not. Rufer, 154 Wash.2d at 549, 114 P.3d 1182. Cf. Dreiling, 151 Wash.2d at 911, 93 P.3d 861, indicating that a document may remain confidential when it is not "part of the trial judge's record in *adjudicating*" a motion. (Emphasis added.)

¶ 26 The present case followed a different, but no less familiar, pattern in civil litigation. A complaint and answer were filed, a protective order was entered, the parties engaged in discovery, the plaintiff retained an expert, the defendant prepared and filed a motion for summary judgment, and the plaintiff filed a response. Because the protective order required a court order to unseal some of the documents filed in support of the motion for summary judgment, the proponent of unsealing filed a motion to remove the confidential designation. The court deferred ruling on this motion, recognizing it would not be necessary to examine the documents unless and until it became clear that the motion for summary judgment would actually be heard. As the date for the hearing on the motion drew near, the parties notified the court that they had settled the case. Because of the settlement, the court did not need to decide the motion for summary judgment or to look at any of the materials filed with the court in anticipation of the motion. In short, the civil rules worked well, as they often do, as the framework for a lawsuit that achieves the resolution of a private dispute without a judge having to read documents produced in connection with the litigation.

*8 ¶ 27 This is not a case where the judge took the summary judgment motion under advisement and determined that the sealed documents were irrelevant or inadmissible. This case settled before Judge Rogers even began to consider the motion or the materials filed in support of it. The sealed documents therefore did not become part of the record of adjudication. The sealed documents are analogous to the depositions in Rufer that were categorized as "discovery that is published (and thus technically filed) but not used at trial." Rufer, 154 Wash.2d at 540, 114 P.3d 1182 (footnote omitted). Publishing a deposition at trial means breaking the sealed envelope and making the document "available" for use by the parties or the court. Rufer, 154 Wash.2d at 540 n. 3, 114 P.3d 1182. The sealed documents at issue here were likewise technically filed, that is, they were brought to court and made available for use there by the parties or the court. But as it turned out, the parties and the court did not make any use of them. Because the sealed docu-

---P.3d ---, 156 Wash.App. 293, 2010 WL 2697136 (Wash.App. Div. 1)
(Cite as: 2010 WL 2697136 (Wash.App. Div. 1))

ments are not part of a record of an adjudication, they are not relevant to evaluating the performance of the court. The good cause standard applies, not the compelling interest standard.

¶ 28 Clark contends, however, that affirming Judge Rogers will put us at odds with this court's decision in *Treseler*, 145 Wash.App. 278, 187 P.3d 773. We disagree. At issue in *Treseler* were documents filed with the court during the pendency of a dissolution proceeding. The case was dismissed with prejudice three months after being filed, apparently because a divorce proceeding between the parties was already pending in Texas. Two years later, the husband moved to seal or redact certain documents in the court file, including the wife's petition, two temporary restraining and show cause orders against the husband, a declaration in support of the temporary restraining order, and the wife's response to the husband's motion to dismiss and exhibits. The trial court denied the motion.

¶ 29 On appeal, the husband argued that the good cause standard should be applied in considering whether to seal these documents, as was done in *Rufer* with the unused depositions. But unlike the unused depositions in *Rufer* and the sealed documents in this case, some of the documents had actually been considered by the commissioner who had entered the show cause orders. And the husband was not arguing that the challenged documents were "discovery documents of the type that potentially would be subject to sealing or redaction" on a showing of good cause under the relevant civil rules for superior court. *Treseler*, 145 Wash.App. at 284, 187 P.3d 773. When the husband claimed that the court did not "use" the documents, what he was really arguing was that the documents were not necessary or relevant to any decision made by the trial court. *Treseler*, 145 Wash.App. at 284-85, 187 P.3d 773. We therefore determined that the more applicable reasoning from *Rufer* to apply was from that court's discussion of nondispositive motions.

*9 ¶ 30 Under *Rufer*, "everything that passes before a trial court is relevant to the fairness of the fact-finding process, even if a document is later deemed inadmissible at trial or unresponsive of a viable claim." *Treseler*, 145 Wash.App. at 285, 187 P.3d 773. The same would be true with respect to otherwise confidential discovery documents to the extent they

were actually considered by the court, even if the court found them irrelevant or inadmissible or ultimately made no decision. The same would likely also be true with respect to otherwise confidential discovery documents if, like in *Treseler*, a court was asked to seal or unseal certain documents in the court file under circumstances where the court could only speculate about whether or not the documents had ever been considered or used by a judge. There was no speculation here. Judge Rogers stated unequivocally that he "made no decision and ... never even considered the documents." Clark does not challenge this statement. The documents are not relevant to the fairness of the fact-finding process. Our conclusion that such documents are not presumptively open to the public is consistent with *Treseler*.

¶ 31 Amici Allied Daily Newspapers of Washington and Washington Newspaper Publishers Association argue that any document filed with a court for any reason should be presumptively open, regardless of whether or not a judge actually considers the document or a decision is actually made. According to amici, this is necessary to make sure that when discovery reveals wrongdoing of a public nature, the litigant who wishes to keep the records secret cannot do so simply by settling the case. "It is common for one party to buy the opposing party's silence by settling a controversy before it is decided. Such manipulation should not, by itself, diminish the public's right to review the parties' filings." ^{FNS} Amici argue that the better approach "is to presume that a judge reviews everything that is filed with his or her court (as to do otherwise is to shirk judicial responsibility)." ^{FNS}

¶ 32 Amici do not address the protection given by *Rufer* to depositions that are available at trial but not used. They say that *Dreiling* "is not a model of clarity." ^{FNI10} But they do not persuasively explain how to reconcile their preferred result with *Dreiling's* statement that article I, section 10 "does not speak" to disclosure of information that does not become part of the court's decision-making process. Each sealed document in this case is like a witness subpoenaed to a trial who sits in the front row of the courtroom but is never called to testify. What the witness knows may be a matter of great public interest and curiosity. But our state constitution does not force that witness to speak.

--- P.3d ---, 156 Wash.App. 293, 2010 WL 2697136 (Wash.App. Div. 1)
 (Cite as: 2010 WL 2697136 (Wash.App. Div. 1))

¶ 33 As the trial court stated, the summary judgment papers in this case are not subject to the constitutional mandate for the open administration of justice. Accordingly, the court was not required to identify a compelling interest in order to maintain their sealed status. We conclude the trial court did not err by denying Clark's motion to unseal the summary judgment papers.

*10 ¶ 34 Clark's motion to unseal identifies several documents filed in court under seal as exhibits I and P to the second declaration of Wright Noel, dated May 27, 2008. The trial court did not mention these documents in the order denying Clark's motion to unseal. Without citation to the record, Clark claims they were filed in connection with a supplemental brief in support of a discovery request by plaintiff Bennett. There is no such brief in our record nor do we find a motion to compel the discovery. Part of the predicate for subjecting sealed discovery documents to examination under *Ishikawa* is a showing that they were "filed with the court in anticipation of a court decision." *Rufer*, 154 Wash.2d at 549, 114 P.3d 1182. The trial court's denial of the motion to unseal is affirmed with respect to the Wright Noel documents because, as to them, Clark failed to make that showing.^{FN11}

¶ 35 Clark suggests that there is a problem with the first stipulated protective order that allowed the parties to stamp documents as "confidential" and required them to seal such documents before filing them with the court. Clark, however, has not assigned error to the entry of the protective order, did not ask Judge Rogers to lift or modify the protective order, has not supplied the kind of record that would be necessary for conducting a review of the protective order, and does not argue on appeal that the protective order should be reversed or vacated. How to enter a proper protective order is a complex subject. See, e.g., *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943 (7th Cir.1999), cited by Clark. On this record, we decline to undertake a critique of the initial protective order. RAP 10.3(a)(4)-(5).

¶ 36 Finally, Clark argues that the trial court failed to comply with the requirements for sealing under the general court rules and the local rules for King County. Specifically, he alleges that the court failed to make and enter written findings and keep such findings open to the public as required by GR 15(c)(2), GR 15(c)(5)(C), and GR 15(c)(4); allowed the sealing

without a motion brought by either party, in violation of GR 15(c)(1) and (2) and KCLGR 15(a); failed to consider redaction as required by GR 15(c)(3); allowed an agreement by the parties to be the lone basis for sealing, in violation of GR 15(c)(2); and failed to give a clear caption to one of the December 8 orders indicating that it was an order to seal, in violation of KCLGR 15(b).

[7] ¶ 37 Clark's argument on appeal based on the court rules is largely unpreserved. Below, the thrust of Clark's motion to unseal was the constitutional argument based on article I, section 10 and *Ishikawa*, *Dreiling*, and *Rufer*. He made three cursory references to the rules. After discussing the fifth element of the *Ishikawa* standard ("Any sealing order must be limited in duration," *Ishikawa*, 97 Wash.2d at 39, 640 P.2d 716), Clark added, "Further, the orders must themselves be open and unsealed. GR 15(c)(5)(C). A court must consider redaction."^{FN12} After arguing that the procedure used by the court violated the dictates of *Ishikawa*, *Dreiling*, and *Rufer*, he added, "The sealing procedures utilized in this case also violate KCLGR 15(a). KCLGR 15(a) provides that motions to destroy, redact or seal all or part of a civil or domestic relations court record shall be presented, in accordance with GR 15 and GR 22, to the assigned judge."^{FN13} He argued that allowing the parties to independently seal the record by stamping each page "Confidential" violated KCLGR 15(a) as well as KCLGR 15(b), the requirement for clear captioning.

*11 ¶ 38 We decline to consider Clark's rule-based argument to the extent that he is now citing rules that he did not bring to the trial court's attention. RAP 2.5(a); *Ryder v. Port of Seattle*, 50 Wash.App. 144, 150, 748 P.2d 243 (1987) (An issue, theory, or argument not presented to the trial court will not be considered on appeal.). With respect to the rules Clark did cite in his trial brief, we do not find that the trial court committed error. In conformance with GR 15(c)(5)(C), the court did leave the sealing orders themselves open and unsealed. And the court did consider redaction, as evidenced by the last line of the order denying Clark's motion to unseal ("so those documents will remain in the record with certain redactions").^{FN14}

¶ 39 Clark also misses the mark with his argument that the court violated the local rules requiring presentment of a sealing order to a judge and clear captioning of a

--- P.3d ----, 156 Wash.App. 293, 2010 WL 2697136 (Wash.App. Div. 1)
(Cite as: 2010 WL 2697136 (Wash.App. Div. 1))

sealing order. The stipulated protective order entered in December 2007 allowed the parties to designate documents as "Confidential" and required the filing of such documents under seal, a procedure discussed with approval in Rufer, 154 Wash.2d at 550, 114 P.3d 1182. Contrary to Clark's suggestion, the filing of sealed documents in compliance with the protective order did not amount to filing motions to seal that would implicate anew the local rule requiring a presentation to the assigned judge and a clear caption.

¶ 40 Smith Bunday, as the substantially prevailing party, is awarded costs under RAP 14.2.

¶ 41 Affirmed.

¶ 42 WE CONCUR: DWYER, C.J., and LEACH, J.

FN1. The order is at Clerk's Papers 273-74. The motion is found in docket 137, Clerk's Papers 56-76. The sealed exhibits are found in docket 140A, Clerk's Papers (sealed) at 275-94.

FN2. Clerk's Papers (sealed) at 248-56.

FN3. Clerk's Papers at 127-29 (Motion to Unseal).

FN4. Clerk's Papers at 143 (Defendants' Response to Ed Clark's Motion to Intervene).

FN5. Clerk's Papers at 231-33 (Order Granting on Motion to Intervene and Denying on Motion to Unseal).

FN6. Clerk's Papers at 230, 234. The stipulated order refers to dockets 153 and 154, which are respectively Horrobin's responsive brief on summary judgment and Ed Clark's declaration. Clerk's Papers (sealed) at 295-315 and 204-226. The related sealing order directs the clerk to seal the exhibits to Clark's declaration that were mistakenly left unsealed when filed with the court on November 14. These were designated by the court to be sealed in docket 159. Clerk's Papers (sealed) at 316-22.

FN7. Clerk's Papers at 231-33 (Order

Granting on Motion to Intervene and Denying on Motion to Unseal).

FN8. Brief of Amici at 15-16.

FN9. Brief of Amici at 15. No authority is cited in support of this presumption, and amici do not address the practical implications of requiring judicial attention to each and every document filed with a court.

FN10. Brief of Amici at 6.

FN11. After oral argument, Smith Bunday submitted to this court a letter dated January 25, 2010, in connection with the issue of the Wright Noel documents. As noted by Clark in a motion to strike, this letter amounts to an unauthorized supplemental brief, and we have not considered it. The statement of supplemental authorities Smith Bunday submitted does not violate the Rules of Appellate Procedure.

FN12. Clerk's Papers at 128 (Motion to Unseal).

FN13. Clerk's Papers at 131 (Motion to Unseal).

FN14. Clerk's Papers at 233 (Order Granting on Motion to Intervene and Denying on Motion to Unseal).

Wash.App. Div. 1, 2010.

Bennett v. Smith Bunday Berman Britton, PS

--- P.3d ----, 156 Wash.App. 293, 2010 WL 2697136
(Wash.App. Div. 1)

END OF DOCUMENT

APPENDIX B

RECEIVED

JUL 02 2010

ALLIED LAW GROUP
SEATTLE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

RONDI BENNETT, an individual, and)
GERALD HORROBJN, an individual,)

Plaintiffs,)

D. EDSON CLARK,)

Appellant,)

v.)

SMITH BUNDAY BERMAN BRITTON,)
PS, a Washington professional services)
corporation, and SHARON)
ROBERTSON, individually and her)
marital community;)

Respondents.)

No. 62824-1-1

ORDER DENYING MOTION
FOR RECONSIDERATION AND
GRANTING MOTION TO FILE
AMICI CURIAE MEMORANDUM

Appellant D. Edson Clark having filed a motion for reconsideration of the opinion filed May 24, 2010; Allied Daily Newspapers of Washington, the Washington Newspaper Publishers Association, and the Washington Coalition for Open Government having filed a motion for leave to file an amici curiae memorandum in support of appellant's motion for reconsideration; and the court having determined that amici curiae's motion to file a memorandum should be granted and appellant's motion for reconsideration should be denied; Now, therefore, it is hereby

ORDERED that amici curiae's motion for leave to file a memorandum in support of appellant's motion for reconsideration is granted. It is further

62824-1-1/2

ORDERED that appellant's motion for reconsideration is denied.

DONE this 30th day of June, 2010.

FOR THE COURT:

Becker
Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JUN 30 PM 3:20

APPENDIX C

return

RECEIVED
COURT OF APPEALS
DIVISION ONE

JUN 14 2010

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

D. EDSON CLARK,
Appellant,

v.

SMITH BUNDAY BERMAN
BRITTON, PS, et. al.,
Respondents.

NO. 62824-1-I

MOTION FOR
RECONSIDERATION OF
DECISION TERMINATING
REVIEW PURSUANT TO
RAP 12.4

I. IDENTITY OF MOVING PARTY

Appellant D. Edson Clark ("Clark") respectfully asks for the relief designated in Part II of this Motion.

II. RELIEF SOUGHT

Clark moves pursuant to RAP 12.4(a) for reconsideration of the Opinion issued on May 24, 2010, D. Edson Clark v. Smith Bunday Berman Britton PS, ("Opinion" or "Op."), see Appendix A.

III. RELEVANT FACTS¹

This Court issued its Opinion on May 24, 2010. In the Opinion, this Court found that Clark's Motion to Unseal challenged the documents filed under seal (1) in conjunction with the summary judgment motion that was

¹ The relevant background facts of the case are delineated in Clark's Brief of Appellant (filed April 23, 2009), at pages 3 through 12, and in Clark's Answer to the Amicus Brief of the Washington Society of Certified Public Accountants, pages 1 through 4.

ultimately withdrawn; (2) in conjunction with Plaintiff Horrobin's Motion to Remove Documents from the December 11, 2007 Stipulation and Protective Order; and (3) as exhibits to a declaration filed by Horrobin's attorney in conjunction with a Motion to Supplement Discovery filed May 27, 2008. Op. at 4. The trial court's December 5, 2008, Order ("Order") denied Clark's Motion to Unseal all of these records and allowed for additional sealings. This Court affirmed the trial court's Order, concluding that the public does not have a constitutional right of access under Article I, Section 10 of the State Constitution to sealed documents filed in anticipation of a court decision where the Court never "read the documents" and where the court never makes the "anticipated decision." Op. at 10. Specifically, the Opinion holds that

[d]iscovery documents that are initially designated as confidential pursuant to a protective order may be filed with the court under seal in connection with an anticipated decision by the Court. To the extent they enter into the court's decision-making process in making any ruling, the documents must be unsealed unless the proponent of secrecy can show a compelling interest justifying non-disclosure. Under the particular circumstances presented here, where the court did not read or decide the motion and did not consider the sealed documents for any purpose, the documents did not become part of the court's performance that the public has a constitutional right to scrutinize. Accordingly, the court did not need to find a compelling interest to justify allowing them to remain sealed.

Op. at 1-2. The Court's conclusion was based on its assumption that the trial court "did not read or decide" the sealed documents in considering

any motion, and therefore that the trial court did not err in not applying Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Id.

IV. STATEMENT OF GROUNDS FOR RELIEF SOUGHT

A. **The Material Sealed Was Not “Raw Fruits of Discovery,” Instead This Case is Similar to Treseler.**

It is undisputed that every sealed document at issue in this appeal was a document filed with the court in anticipation of a decision. The records are briefs, declarations, and attachments.² They are “court records” as defined by GR 31(c)(4), and subject to sealing and continued sealing only if the procedures in GR 15 are met. GR 15, 31(c)(4). Further, “good cause” is a standard for restricting discovery materials not filed with a court, including depositions “opened” and thus “published” for use at trial, but which never get filed with the court or submitted for any purpose. See Rufer v. Abbott Labs, 154 Wn.2d 530, 541, 114 P.3d 1182 (2005). It does not apply to records “filed with the court in anticipation of a court decision (dispositive or not).” 154 Wn.2d at 549. The Opinion erroneously concludes that a good cause standard applies to these filed court records—something not allowed for filed court records. It does so under a faulty theory—that a court did not actually review any of the records. Even if relevant to determining the standard for sealing, this conclusion is wrong as several of the records were filed with motions

² See CP 24, 55, 73, 75, 204-225, 316-22.

for which hearings were actually held³ and for which some form of Order was entered.⁴ All of the records were filed with a court in anticipation of a decision. Thus, contrary to the Opinion's analogy, these records are not akin to "a witness subpoenaed to a trial who sits in the front row of the courtroom but is never called to testify", see Op. at 18, but rather to witnesses who testify, but the case settles before a verdict is rendered. This case does not involve the unsubmitted discovery at issue in Rufer, but rather involves materials filed with the court in anticipation of a decision where some decisions were actually rendered and others were not⁵, similar to In Re Marriage of Treseler and Treadwell, 145 Wn. App. 278, 187 P.3d 773 (2008).

B. The Burden Is Always On the Proponent of Sealing to Rebut the Presumption that Filed Court Records are Open.

All documents filed with the court, whether attached to dispositive motions or non-dispositive motions, carry a presumption of openness that can only be overridden with a showing of a compelling interest by the proponent for sealing. See, e.g., Dreiling v. Jain, 151 Wn.2d 900, 909, 93 P.3d 861 (2004) ("Openness is presumptive[.]"); Rufer, 154 Wn.2d at 540 ("[i]n determining whether court records may be sealed from public

³ See CP 24, 55.

⁴ See CP 24, 55, 73, 75, 204-225, 234-35, 243-44, 273-74, 316-22.

⁵ See Treseler, 145 Wn. App. at 287-91 (applying Ishikawa to all records including specifically records filed in connection with a motion that was never heard before case was voluntarily dismissed)

disclosure, we start with the presumption of openness.”); Treseler, 145 Wn. App. at 282 (same).⁶

Washington law establishes that the burden is always on the party seeking to seal court documents (or keep them sealed) to show that another interest overrides the public’s constitutional interest in having its courts open. See, e.g., Dreiling, 151 Wn.2d at 909 (“The burden of persuading the court that access must be restricted to prevent a threat to an important interest is generally on the proponent[.]” (citing Ishikawa, 97 Wn.2d at 37); In Re Marriage of R.E., 144 Wn. App. 393, 404-06, 183 P.3d 339 (2008); Treseler, 145 Wn. App. at 283; Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-12, 848 P.2d 1258 (1993).⁷

1. The burden was on Smith Bunday to demonstrate sealing was justified—a burden not met here.

Even if the Court believes that all of the sealed documents here are like the “raw fruits” of unsubmitted discovery because the trial court supposedly never considered any of them in rendering a decision, the Opinion shifts the initial burden onto Clark in conflict with governing case

⁶ Federal courts likewise operate under the presumed openness of their courts, for both civil and criminal cases. See, e.g., Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995); Kamakana v. Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006) (“Unless a particular court record is one ‘traditionally kept secret,’ a ‘strong presumption in favor of access’ is the starting point.”) (citations omitted).

⁷ Federal courts likewise recognize this same basic principle. See, e.g., Kamakana, 447 F.3d at 1178 (citations omitted); Foltz, 331 F.3d at 1135 (citation omitted).

law. The Opinion imposes an initial burden on the party seeking to unseal to show that: the documents (1) were filed in anticipation of a court decision, and (2) that the documents in some way became part of the court's decision-making process *before* the presumption of openness to the public is triggered under Article I, Section 10 and **Ishikawa**.

Specifically, when discussing the sealed documents attached to the Second Declaration of Wright Noel on May 27, 2008, the Opinion states:

Without citation to the record, Clark claims that they were filed in connection with a supplemental brief in support of a discovery request by plaintiff Bennett. There is no such brief in our record nor do we find a motion to compel discovery. *Part of the predicate for subjecting sealed discovery documents to examination under Ishikawa is a showing that they were "filed with the court in anticipation of a court decision."* **Rufer**, 154 Wn.2d at 549. The trial court's denial of the motion to unseal is affirmed with respect to the Wright Noel documents because, as to them, *Clark failed to make that showing.*

Op. at 19 (emphasis added). This holding is in error for several reasons.

First, the Court suggests that Clark has failed to provide this Court with an adequate record to reverse the trial court's refusal to unseal the May 2008 records because he did not designate the motion the sealed records were filed to support. **See id.** Whether or not Clark provided the Court with all the motions for which sealed records were filed in support cannot provide the basis of affirming the trial court's refusal to unseal these records, when the trial court provided no basis for refusing to unseal

them nor provided a basis at the time they were originally sealed. All the documents were filed with the court in connection with motions, as the record before the Court makes clear. The burden was on Smith Bunday to argue at trial that the records were not filed in anticipation of a court decision or were not reviewed by the trial court. It cannot be disputed that Smith Bunday made no such showing. See CP 168-172.

Second, again there is no dispute that all of the sealed records here were filed in anticipation of a decision. All court documents that have been filed are presumed open to the public. See Treseler, 145 Wn. App. at 282 (“Documents filed with the court will presumptively be open to the public[.]”). In Treseler, this Court correctly placed the burden on the proponent of sealing and held that the Ishikawa test would apply where it was ambiguous as to whether the trial court considered any of the records. Id. at 284-86; see also Op. at 17 (citing rule from Treseler). Here, the Court suggests the reverse burden for Clark, that he had to show these records were filed in anticipation of a decision and were considered at some point in the judicial process, and only after that showing does Ishikawa apply. The Court must amend its Opinion to clarify that the party seeking to keep records sealed and have the “good cause” standard apply—a test Clark maintains cannot apply to filed court records but only protective orders in discovery—must first show that the records were

never considered by the Court for any purpose (to bypass the presumed **Ishikawa** standard for sealing), and only then attempt meet the good cause standard articulated in CR 26(c). As to the May and October 2008 records filed under seal, no party has ever argued that the records were not “filed in anticipation of a court decision”, the trial court in its Order made no finding that Smith Bunday met any burden at all, nor did the trial court provide any findings on its own that could justify keeping the records sealed, nor did the trial judge state he did not review these records.

Third, the practical implications of this burden-shift have been specifically warned against by this Court in **Treseler**. In **Treseler**, this Court rejected the argument that the court should apply the good cause standard in deciding whether to seal filed court records “that were never part of a trial court’s determination, similar to unused discovery documents”, and instead insisted that **Ishikawa** must be met for such records. 145 Wn. App. at 285. The test proposed by the party in **Treseler**, and rejected by this Court there, invites discovery where a trial judge could potentially be subpoenaed to indicate specifically what records he or she did not consider. **See id.** (“It also would be impractical in many cases, requiring speculation about whether a trial court used all, a part of, or none of any filed documents that a proponent of closure seeks to have sealed.”).

Fourth, this Court faults Clark for not challenging at trial the stipulated protective order from December of 2007, and not assigning error to that protective order. See Op. at 19-20. The Court is imposing a superfluous burden on Clark for this appeal. Clark's Motion to Unseal sought to unseal all documents that had been previously filed under seal without judicial oversight (*i.e.*, via the protective order), and sought to prevent the sealing of the summary judgment documents by another agreed order. By challenging the previous sealings in his Motion, Clark was challenging the validity of the previous filings under seal made solely under the protective order—*not* the validity of the protective order itself that provided the vehicle for the sealings. The validity of the original protective order is irrelevant as to whether it is appropriate to keep the records sealed once a party moves to unseal.

Clark addressed the December 2007 protective order at trial to show that the only basis for all the sealings in 2008 was a protective order, and that reliance on only a protective order to seal and keep records sealed is insufficient under Ishikawa, GR 15, and even the "good cause" standard. Clark's Motion to Unseal forced Smith Bunday to meet its burden of showing that keeping the records sealed was warranted. Once Clark had challenged the sealings in his Motion, it did not matter that the protective order was the basis for the sealings as Smith Bunday still had the burden

to justify keeping the records sealed and to seal the summary judgment documents. The State Supreme Court in **Rufer** addressed this scenario:

Upon the filings of records under seal, the parties will now know that the court, upon motion, will open such records unless the party wishing to keep them sealed demonstrates an overriding interest. Thus, filing merely triggers the analysis of whether records should be opened; it does not automatically open previously sealed records. *Parties opposing the potential opening would then be required to make the requisite showing of a compelling or overriding interest for closure.*

154 Wn.2d at 550 (emphasis added). Clark assigned error to the sealing on the basis that the trial court did not make any findings under **Ishikawa**, the standard both parties believed applied. Even if this Court believes that good cause was the standard, the trial court cannot conclude that Smith Bunday met its burden as to the May and October 2008 sealings by simply relying on the existence of the protective order.⁸ Moreover, there is no basis in law for this Court to conclude that a party must challenge the original protective order in order to move to unseal a document filed under seal pursuant to that order—if was required, it is certain that **Rufer** would have included it in its holding on this issue, which it did not.

⁸ The trial court's error here was even more egregious, as it failed to even discuss why it was keeping those records sealed. **See** CP 231-33.

2. The Court must clarify that if the sealed records were considered by the trial court, and not necessarily for the decision they were filed in anticipation of, Ishikawa provides the appropriate standard

The Opinion should be amended also to correct an inconsistency and clarify that documents filed in anticipation of a decision are subject to Ishikawa analysis to justify sealing if the trial court considered the documents for *any purpose*. This Court made clear in its Opinion that its earlier decision of Treseler, 145 Wn. App. 278, remains binding and valid law. See Op. at 16-17. In quoting Treseler, this Court stated:

Under Rufer, “everything that passes before a trial court is relevant to the fairness of the fact-finding process, even if a document is later deemed inadmissible at trial or unresponsive of a viable claim.” Treseler, 145 Wn. App. at 285. The same would be true with respect to otherwise confidential discovery documents to the extent they were actually considered by the court, even if the court found them irrelevant or inadmissible *or ultimately made no decision*.

Op. at 17 (emphasis added). Yet, earlier in its Opinion, the Court frames the issue presented in the current case as follows:

Does the public have a constitutional right of access to sealed documents that were filed with the court in anticipation of a decision *when the court does not read the documents and does not make the anticipated decision?*

Op. at 10. This Court’s holding that whether the anticipated decision was made controls whether the records are subject to Ishikawa conflicts with

the Court's interpretation in Treseler that the records may be subject to Ishikawa even if the court "ultimately made no decision." Op. at 17.

The Court must clarify that Treseler stands for the principle that the trial court need not rely on the court records in making a judicial determination, or make any determination related to those records in order for Ishikawa to be the standard when a party seeks to seal those records, see 145 Wn. App. at 285, but that this case stands for the narrow principle that if the trial court does not consider the documents at all—supported by conclusive evidence of that fact brought by the proponent of sealing—then the presumed application of Ishikawa is rebutted, and the proponent of sealing need only meet the good cause standard and GR 15 to overcome the public's presumed right to access the records.

3. The Court must also clarify that if it is ambiguous as to whether the trial court ever considered the sealed records at issue, Ishikawa is the presumed standard

The Court must also amend the Opinion to clarify that if it is ambiguous whether records were considered by the trial court, Ishikawa is the presumed standard. The Opinion now states that it would "likely also be true" that otherwise confidential discovery documents filed before the trial court would be subject to Ishikawa if "the court could only speculate about whether or not the documents had ever been considered or used by a judge." Op. at 17. This Court must clarify that the sole reason

that it believes the summary judgment records in question here were not subject to the sealing standard under Ishikawa, when they were undisputedly filed in anticipation of a decision and attached also to dispositive pleadings, is based on the trial court's express statements that it did not consider the records for any purpose. See CP 232; CP 274. This holding must be amended for the other sealed records for which there is no such evidence the court did not review them. CP 24, 55, 73, 75, 292-94. The Opinion now conflicts with Treseler regarding these other records for which there is ambiguity regarding whether the court reviewed them.

C. Even If Ishikawa Was Not the Applicable Test For Sealing, the Trial Court Still Made No Finding of Good Cause.

The December 5th Order was a denial of Clark's Motion to unseal all sealed court records, and authorized the sealing of additional records. See CP 231-33. The trial court denied the Motion to Unseal, concluding that the five-part Ishikawa test was not required if the records were never considered by the trial court. See id. The trial court did not make any finding of good cause in its Order, and Smith Bunday did not even argue that good cause was the standard or that it had met that substantive standard. There is no mention of the good cause standard in the Order, or that it applied, or that it had been met by Smith Bunday, and there are none of the required written findings under that standard justifying any

sealings or continued sealings. See id. Instead, the trial court only provided reasons why it believed Ishikawa did not apply to these records.

Even if this Court concludes that good cause is the standard whenever Ishikawa is not, the conclusion as to what test applies is not a finding that the test has been met. This Court has specifically ruled that remand is appropriate even when it is only “ambiguous” as to whether the trial court applied the proper test. See Indigo Real Estate Servs. v. Rousey, 151 Wn. App. 941, 946, 215 P.3d 977 (2009) (“Since we cannot determine whether the trial court used the correct standard, the appropriate remedy is remand to the trial court to apply it.”). Under this Court’s reasoning, the trial court identified the correct standard, but unquestionably failed to apply it. This Court never concluded, nor could it, that good cause was met under CR 26(c) or that the trial court provided any justification for ordering records sealed or kept sealed.

Further, this Court’s assertion that the trial court “correctly understood” the holding in Rufer—implying that the trial court found good cause to seal the records—is inconsistent with this Court’s conclusion that the trial court did not consider the records at all. See Op. at 11-13.⁹ The central basis for this Court’s Opinion—that the trial court

⁹ Additionally, because Clark received some of the sealed documents at issue outside the scope of this lawsuit, there could now be no interest of confidentiality which would

never considered the records and therefore only the good cause standard applied—is directly at odds with any conclusion that the trial court could have found “good cause” to seal records it allegedly never reviewed.¹⁰ It is unclear how this Court could affirm the trial court’s Order on the basis that the trial court never considered the records, when that fact—assuming it is true—necessarily means that the court could never have found that the good cause standard was met for records the trial court never reviewed.

A finding that a record is not subject to the **Ishikawa** requirements to justify sealing does not equate to a finding of good cause to seal. Under the Court’s reasoning, if **Ishikawa** does not apply, the records must meet the good cause standard to justify sealing or keeping the records sealed.¹¹ Even assuming this Court’s conclusion that the records here—including those filed related to dispositive motions—are somehow analogous to the “raw fruits” of discovery due to the extent a court supposedly considers

justify sealing of records that were otherwise available to him. See CP 212 (Declaration of Ed Clark), ¶31

¹⁰ On this point, this Court correctly pointed out that the Order Clark appealed was wholly silent as to the May and October 2008 records filed under seal. See Op. at 19.

¹¹ “To establish good cause, the party should show specific prejudice or harm will result if no protective order is issued.” **McCallum v. Allstate Property and Cas. Ins. Co.**, 149 Wn. App. 412, 423, 204 P.3d 944 (2009) (citing **Dreiling v. Jain**, 151 Wn.2d 900, 916-17, 93 P.3d 861 (2004)). Further, “in exercising its discretion to issue a protective order under CR 26(c) for raw fruits of discovery, a court must weigh the respective interests of the parties.” **Rhinehart v. Seattle Times Company**, 98 Wn.2d 226, 236, 654 P.2d 673 (1982); see also **T.S. v. Boy Scouts of Am.**, 157 Wn.2d 416, 431, 138 P.3d 1053 (2006) (citing **Rhinehart**).

them, the good cause standard still requires a substantive showing by the party seeking to seal under CR 26(c).

The trial court's general description of the records at issue here only applied to the records filed in connection with the summary judgment motion since the trial court did not discuss or describe the May and October 2008 sealed documents in its Order. CP 231-33. The general description by the trial court of the summary judgment records (“[t]he documents sealed here involve income tax information of persons and corporation”) further does not accurately describe all of the records, which include invoices from accountants for services and emails as well as a schedule of adjusting journal entries voluntarily provided to Clark long before litigation commenced and thus outside of the protective order or the lawsuit. CP 8-9, 24, 55, 73, 75, 204-225, 234-35, 243-44, 273-74, 278-80, 316-22. Further, this general statement does not equate to an identified interest that would justify sealing, and does not weigh the respective interests of the parties with regard to disclosure of the records under CR 26(c).¹² See CP 232. Absent findings identifying and weighing the respective interests of the parties, the good cause standard cannot be met. Again, the trial court did not conclude that “good cause” was the

¹² An altered version of the adjusting journal entries was filed with the Court under seal and provided via the protective order, but the existence of the un-doctored version voluntarily released by Todd Bennett to Clark (CP 212) should weigh heavily against any finding for secrecy of the doctored version provided to the Court.

standard here, but only that **Ishikawa** was not, and this Court has now affirmed the trial court's ruling based on the Court's conclusion that good cause was the appropriate standard—this Court has therefore affirmed a conclusion that was never made by the trial court.

Moreover, while Clark did not previously argue the absence of good cause below, as he believes that **Ishikawa** applies to these records (as did Smith Bunday throughout the appeal), this fact alone does not allow this Court to affirm the trial court merely because it believes the trial court was correct in concluding that good cause was the proper standard. A trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it—to affirm the trial court despite this, in fact, directly conflicts with this Court's prior case law. **See** **Optimer Intern., Inc. v. RP Bellevue, LLC**, 151 Wn. App. 954, 962, 214 P.3d 954 (2009) (“We have an obligation to see that the law is correctly applied.”) (**citing State v. Quismundo**, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008)). Applying the rules articulated in **Optimer** and **Quismodo**, this Court cannot affirm the trial court's unquestionable failure to make the required findings showing good cause existed for sealing even though Clark and Smith Bunday did not address the good cause standard below. The appropriate remedy is therefore a remand to the trial court to force Smith Bunday to make a showing that good cause exists to keep these

records sealed, and that GR 15 is met, and to require the trial court to include written findings justifying the sealings under those standards. See Indigo Real Estate Srvs., 151 Wn. App. at 951 (appellate court should not “engage in fact finding”, and remanding when trial court made no written findings justifying redactions).

D. Clark’s Arguments Related to General and Local Rules Are Preserved and the Court Still Fails to Address Facial Violations of the Rules by the Trial Court.

In its Opinion, the Court dismisses Clark’s rule-based arguments as “largely unreserved”, and concludes that the main “thrust” of his arguments was rooted in Article I, Section 10. See Op. at 20. Based on this, the Court adopts a narrow view of Clark’s trial court arguments for unsealing and neglects to address the trial court’s violations of GR 15.

First, the December 5th Order kept previously-sealed records sealed (despite lack of findings or justification) and ordered the Clark Declaration exhibits filed under seal on one narrow ground (despite lack of findings or justification). Clark could not argue the sealing of the summary judgment documents violated GR 15 or KCLGR 15 because those documents had yet to be sealed, and were not sealed until the December 5th Order.

Second, the requirements under GR 15 unambiguously apply to all sealings of filed court records. See Indigo Real Estate Servs. v. Rousey, 151 Wn. App. 941, 946, 215 P.3d 977 (2009) (this Court stating “GR 15

sets forth a uniform procedure for the destruction sealing, and redaction of court records. This rule *applies to all court records*[.] (citation omitted) (emphasis added). While State v. Waldon, 148 Wn. App. 952, 960-62, 202 P.3d 325 (2009), clearly established that the revised GR 15 must be harmonized with the constitutional mandate of Ishikawa to have any applicability, there is no authority for the converse idea that filed court records that are sealed under the “good cause” standard do not need to also comply with GR 15 to be lawfully sealed. If this Court perceives a conflict between the two standards, or believes that filed court records that only need to be sealed under the “good cause” standard do not implicate GR 15 (despite GR 15(c)(1) stating that the rule’s sealing requirements apply to “civil cases”) it should clarify and explain its position. The trial court’s refusal to address the May and October 2008 sealings in its Order, its failure to provide a basis for keeping those records sealed, and the trial court’s failure to provide justification for sealing the summary judgment documents in the Order—undisputedly required under GR 15 and was argued by Clark at trial and on appeal—is reversible error.

Third, Clark *did* assert before the trial court that all of the previous and anticipated sealings either violated or would violate GR 15. This Court reasons that because Clark only cited two specific subsections of GR 15 in his Motion to Unseal, see CP 128 (listing GR 15(c)(5)(C) and

GR 15(c)(3)), that all of the “rule-based” arguments on appeal are unpreserved because the trial court did not hear them. See Op. at 20-21. This is wrong, as the trial court was fully aware that Clark was arguing that the sealings at issue violated or would violate GR 15 and KCGLR 15, and now this Court is construing the erroneous absence of any mention of those rules by the trial court, or several of their subsections by Clark at trial, as a means by which to deny Clark an opportunity for meaningful review of facial errors by the trial court on this issue.

More importantly, there is no basis for this Court to conclude that because Clark did not provide the exact subsection of every violation under GR 15 or KCLGR 15, that the trial court did not “hear” the arguments. Such a strict requirement imposed by this Court is especially troubling when the substance of the arguments from Clark’s Motion to Unseal applies directly to the standard articulated in GR 15 and its subsections, which largely incorporate the rulings from Dreiling and Rufer. See Waldon, 148 Wn. App. at 959. For instance, GR 15(c)(2) requires that the trial court make and enter “written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record.” This provision almost mirrors the fourth element of the Ishikawa test, which requires that the findings by the trial court in ordering records

sealed or kept sealed be in writing and specific, and that the public and the private interests at issue be weighed. See Rufer, 154 Wn.2d at 544 (describing element). Clark explicitly made this argument before the trial court, see CP 131, and now this Court finds it “largely unpreserved” apparently because he did not cite subsection GR 15(c)(2) in his Motion to Unseal. In other words, the Court is finding fault not with Clark’s supposed failure to make particular arguments, but a failure to root those arguments in *particular subsections* of the cited rules.¹³

The Court’s reliance on Ryder v. Port of Seattle, 50 Wn. App. 144, 748 P.2d 243 (1987), where a party made an entirely new argument on appeal and an argument that could have been dispositive of the case, is wholly misplaced. There is no authority for the idea that the general prohibition on an appellate court considering arguments not raised at trial applies when a party makes substantively identical arguments that apply to two different standards, and where the party fails to cite the specific subsection of the rules providing one of those standards, especially when doing so would equate to sanctioning facial errors of law by the trial court.

¹³ Another example on this issue is Clark arguing before the trial court that party agreement cannot be the lone basis for sealing—as occurred here for all sealings—which is exactly what GR 15(c)(2) prohibits. See In re Marriage of R.E., 144 Wn. App. at 402 n.21 (rejecting party’s argument that opponent agreed to seal case file because to accept it would “ignore the presumptive openness of court records”); see also CP 129-31. Again, the trial court did in fact “hear” the argument that party agreement cannot be the only reason records are sealed; Clark’s supposed failure to provide the specific subsection of GR 15 in his original Motion to Unseal should not preclude this Court from reversing the trial court’s facial violation of GR 15.

Even if this Court continues to impose such a narrow requirement on Clark that all rules where the specific subsections were not provided, but were merely addressed in substance, are therefore “unpreserved”, the Court’s reasoning is inconsistent and must be reconsidered. For instance, the Court notes and addresses the fact that Clark cited GR 15(c)(5)(C) in his Motion to Unseal before the trial court, concluding that it was one of the rules “Clark did cite in his trial brief”, and indicating that at least, as to that specific subsection, his argument was “preserved.” See Op. at 20-21. GR 15(c)(5)(C) unambiguously also requires that any order to seal must have “*written findings supporting the order*” within it. Clark argued at trial, and on appeal, that the previous sealings were made despite lack of written findings that none of the sealings in the case were made pursuant to an order with findings justifying the sealings, and also that the appealed Order had absolutely no findings under either the Ishikawa test or under GR 15.¹⁴ The Court here neglects to mention that aspect of the rule Clark has preserved, and instead critiques his argument regarding the sealing order being open to the public under GR 15(c)(5)(C). See Op. at 20-21.¹⁵ This inconsistency warrants reconsideration.

¹⁴ Even sealing under the “good cause” standard—which this Court has now concluded applied—required written findings, findings that no party has argued exist, and which this Court conspicuously cannot identify either in affirming the trial court.

¹⁵ Additionally, as to the other GR 15 rule undisputedly preserved for appeal, GR 15(c)(3), see CP 128, the Court concludes that because the trial court stated that some of

Finally, in light of the facial insufficiency of the trial court's actions, the Court's citation to RAP 2.5(a) is as misplaced as its reliance on Ryder. Again, this Court held less than a year ago that even if a party fails to raise a particular argument below, that does not negate the appellate court's duty to apply the correct law and correct mistakes by the trial court. See Optimer Intern., Inc., 151 Wn. App. at 962 ("We have an obligation to see that the law is correctly applied."). Clark has demonstrated the facial invalidity of the trial court's actions, even if this Court still believes that the "good cause" standard applied in the sealings of all the records at issue. This Court should not extend itself to highlight and rely on perceived procedural inadequacies from Clark, while sacrificing its duty to correct facially invalid actions by the trial court in the process.

It is also inconsistent for this Court to decide in favor of Smith Bunday despite rejecting its central argument as to what standard applied. At trial, Smith Bunday argued that Ishikawa applied to all the records

the records will remain in the record with "certain redactions" the trial court did not err because it considered redaction—as required by GR 15(c)(3) and the fourth element of Ishikawa. Even if one accepts this reasoning despite the absence of any findings justifying the sealings (or even redactions) in the trial court's Order, it necessarily only addresses the documents ordered sealed by the December 5th Order, not the documents that were kept sealed by the Order. The trial court was completely silent as to the records from May and October 2008 that he kept sealed via the Order, as this Court recognized, or why those records should stay sealed; yet, this Court finds no error because he somehow "considered redaction" for all those records he failed to address. It is logically untenable for this Court to conclude that redaction was considered for records this Court has concluded the trial court never even examined for any purpose. There is no basis for this conclusion, the argument was undeniably "preserved" by Clark, and it must therefore be reconsidered by this Court.

Clark sought to unseal or keep from being sealed and that it had met **Ishikawa**. See CP 169-72. On appeal, Smith Bunday did not assign any error to the trial court, still largely maintained that **Ishikawa** applied and had been met, but then also strangely asserted that the trial court “had ‘good cause’” to keep the documents sealed. See Resp. Br. at 28. Despite raising a truly new argument, because Smith Bunday made no mention of “good cause” being the standard in challenging the original Motion to Seal, this Court faults only Clark for raising non-existent “new” arguments in affirming the trial court’s facial violation of the law.¹⁶

Even if this Court believes the trial court concluded that good cause, and not **Ishikawa**, was the applicable standard, that is only the first half of the applicable process when a party seeks to seal or keep court records sealed. The trial court was obligated to provide actual findings establishing “good cause” to seal, and to comply with the standard and GR 15—findings that unquestionably do not exist in the appealed Order, and which preclude this Court from performing a meaningful review. This mandates a remand to the trial court under this Court’s jurisprudence. See **In re Marriage of R.E.**, 144 Wn. App. at 403 (this Court remanding

¹⁶ Note also that nowhere does Smith Bunday actually argue that good cause standard had been applied and substantively met, only that the trial court would have had “good cause” to keep certain documents sealed. This is due to the fact that it believed **Ishikawa** was the standard—a proper assumption given the total lack of findings by the trial court as to why good cause existed to keep the records sealed.

because no findings by the trial court were entered justifying court's decision). The Court simply cannot recognize that the trial court was wholly silent on the May and October 2008 sealings in its Order—which left the records sealed—and then conclude that GR 15 was somehow complied with only because it believes Clark was not specific enough in making his trial arguments. Case law from this Court could not be clearer that even when it is only “ambiguous” as to whether the trial court applied GR 15 in sealing records (or keeping them sealed), it is reversible error. See Indigo Real Estate Svcs., 151 Wn. App. at 950. Here, there is no ambiguity—the trial court wholly failed to mention GR 15 in its Order, failed to apply the standard in substance, and yet this Court has affirmed the trial court in its Opinion. Reconsideration must therefore be granted.

V. CONCLUSION

For the reasons specified above, Clark respectfully requests that this Court reconsider its Opinion under RAP 12.4.

By: 

Michele Earl-Hubbard, WSBA #26454
David M. Norman, WSBA #40564
Chris Roslaniec, WSBA #40568
Allied Law Group LLC
Attorneys for Appellant Clark
2200 Sixth Avenue, Suite 770
Seattle, WA 98121



APPENDIX D

NO. 62824-1-I

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION I

D. EDSON CLARK,

Appellant/Intervenor,

v.

SMITH BUNDAY BERMAN BRITTON, PS, *et. al.*

Respondents

**AMICUS CURIAE MEMORANDUM OF ALLIED DAILY
NEWSPAPERS OF WASHINGTON, WASHINGTON
NEWSPAPER PUBLISHERS ASSOCIATION and
WASHINGTON COALITION FOR OPEN GOVERNMENT
SUPPORTING RECONSIDERATION PURSUANT TO RAP 12.4**

Katherine George
WSBA No. 36288
HARRISON BENIS & SPENCE LLP
2101 Fourth Ave., Suite 1900
Seattle, WA 98121
(425) 802-1052
Attorney for Amici

I. INTRODUCTION

RAP 12.4(i) allows amicus parties to submit memoranda “for the purpose of addressing... the soundness of legal principles announced” in Court opinions for which reconsideration is proposed. In this case, the announced principles that are not sound, and that should be reconsidered, include:

- that the public has no constitutional right to view a court record unless a court “considered” the record and made whatever decision the record was supposed to influence;
- that the only way for a record to “become part of the court’s decision-making process,” and therefore presumptively open, is for the court itself, not a party, to use the record; and
- that records are presumptively open only if they are relevant to “fairness of the fact-finding process” or to “evaluating the performance of the court,” as if only the *court*’s actions matter, and as if the public has no legitimate interest in the actions of prosecutors, lawyers, litigants, witnesses, or others who influence the courts and consume their resources.

In general, the Court’s May 24, 2010 Opinion (“Opinion”) reflects an overly narrow view of the public interest in open courts, as if it is limited to scrutinizing actions of the courts themselves and not other important actors in the system. This is too insular, and conflicts with prior case law. The constitutional requirement for open administration of justice implicates much more than a court’s ultimate decision-making. *Any* use of our taxpayer-funded court system invites

public scrutiny, unless there is a compelling interest in secrecy outweighing the public interest.

While evaluating the fairness or correctness of court decisions is certainly important, there are many other reasons why the public should know about controversies presented for court resolution. For example, voters should be able to assess the performance of elected prosecutors by examining the fairness or wisdom of charging decisions, regardless of whether charges are dropped or resolved through plea bargaining. And *any* time the government is a party to litigation, even if it is settled or withdrawn, all records filed should be presumptively open so that citizens may evaluate how and why taxpayer resources were expended in court and whether any government reforms are needed. Litigation involving private parties also can raise compelling public concerns about the administration of justice, including whether court resources are wasted on frivolous matters, whether particular litigants consume an undue share of resources, and the impact of court congestion on citizens seeking judicial relief, to name just a few examples. In sum, the public's interest in the justice system is not limited to court decisions and the records considered in making those decisions. Therefore, the Opinion should be reconsidered.

II. DISCUSSION

A. **It Is *Not* a Sound Principle that Court Records Can be Shielded from Public View, Without a Compelling Interest in Secrecy, Unless They Are Considered in Making a Ruling.**

This Court announced in its Opinion a new prerequisite for unsealing records that are filed under seal, pursuant to a protective order, in anticipation of a court decision. Op. at 1. That is, even if there is no compelling interest justifying continued secrecy, unsealing such records is required only “to the extent they enter into the court’s decision-making process *in making a ruling.*” Op. at 1 (italics added).

The Court stated:

Does the public have a constitutional right of access to sealed documents that were filed with the court in anticipation of a decision when the court does not read the documents and does not make the anticipated decision? Following Rufer, we conclude the answer is no because such documents have not become part of the court’s decision-making process.

Op. at 10, referring to *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 114 P.3d 1182 (2005).

This is the first time that the presumption of openness has been limited to records actually affecting an issued ruling. Previously, *any* record filed in court in anticipation of a court ruling was presumptively open, and subject to the compelling-interest test for sealing, regardless

of whether the anticipated ruling was made or whether the judge actually read the record. In fact, *Marriage of Treseler and Treadwell*, which followed *Rufer*, expressly rejected the notion that the public has no interest in a record unless it is “used by the court to make a decision.” *Treadwell*, 145 Wn. App. 278, 282, 285 (2008).

This Court in *Treadwell* reiterated the *Rufer* rule that a record is presumptively open once it is filed in court. *Id.* at 284. Recognizing that *Rufer* seemed to place some importance on whether a record was “never part of a trial court’s determination,” the *Treadwell* court said it is “inconsistent with the presumption of openness by filing” to “adopt a good-cause standard for [sealing] documents that were never part of a trial court’s determination.” *Id.* at 285. This Court continued:

[W]e believe the more applicable reasoning from *Rufer* to apply here is in that court’s discussion of non-dispositive motions. There, the court recognized that **everything that passes before a trial court is relevant to the fairness of the fact-finding process**, even if a document is later deemed inadmissible at trial or unresponsive of a viable claim. ***Rufer* did not hold that only documents that a trial court considered in rendering a decision are subject to the *Ishikawa* test. Rather, the court held that any document filed in ‘anticipation of a court decision,’ whether or not dispositive of the entire case, triggers the public’s right of access and requires a compelling interest to seal.**

Id. (emphasis added). Thus, *Treadwell* affirmed that the public has a protected interest in viewing any record “that passes before a trial court,” even if the record is not used in a decision. *Id.*

There is no sound legal or policy basis for the Opinion’s departure from Article I, Section 10 case law. As this Court observed in *Treadwell*,¹ whether a court used a record in making a decision is an impractical standard because it requires speculation about a judge’s thoughts. Besides, allowing a court to seal records solely because it never reviewed or considered them – as happened in this case – ignores the principle that Article I, Section 10 applies as much to the process as to the results of litigation. As the Washington Supreme Court stated emphatically in *Rufer*: “**The open administration of justice is more than just assuring that a court achieved the ‘right’ result in any given case.**” 154 Wn. 2d at 542 (emphasis added). Rejecting arguments that only records leading to dispositive decisions are subject to constitutional guarantees of openness, the *Rufer* Court noted:

The *Rufers* and Amicus Washington State Trial Lawyers Association Foundation ask this court to extend *Dreiling* and its predecessors to require an overriding interest before a court will seal *any* records once they have been filed with the court – including those filed in furtherance of nondispositive motions, such as motions in limine.

¹ 145 Wn. App. at 285.

Abbott and amici...ask us to limit *Dreiling* to only those records which the court relied upon in making dispositive decisions. Thus, any records not considered by the court in making a dispositive decision would continue to be sealed for good cause.

The basis for this disagreement, and how we must resolve it, depends upon the extent of the public's right to the open administration of justice. **If we define this right narrowly to consist only of the observation of events leading directly up to the court's final decision,** then arguably any documents put before the court that were not part of that final decision would be outside of the scope of article I, section 10. Put another way, if the jury does not see it, the public does not see it. **But our prior case law does not so limit the public right to the open administration of justice.** As previously noted, the right [to open administration of justice] is not concerned with merely whether our courts are generating legally sound *results*. Rather, we have interpreted this constitutional mandate as a means by which the public's trust and confidence in our *entire judicial system* may be strengthened and maintained.

Id. at 548-49 (italics in original, bold added).

The Opinion directly contradicts the reasoning of *Rufer* that the public is entitled to observe the entirety of our tax-funded court system, including not just "results" but all court filings offered to influence those results. *Id.* Because the Opinion is inconsistent with *Rufer* and *Treadwell*, and improperly constrains the public's right to open administration of justice, it should be reconsidered.

B. It is *Not* a Sound Principle that Only the Court, and Not Parties, Can Make a Record “Part of the Decision-Making Process” For Purposes of the Constitutional Sealing Test. Prior Case Law Considered Whether Records Were Relevant to the Parties’ Motions When Filed, Not Whether Anything Happened with The Records After Filing.

In *Dreiling v. Jain*, 151 Wn. 2d 900, 93 P.3d 861 (2004), the Seattle Times intervened in a shareholder derivative suit involving Infospace, Inc., and sought to unseal records related to a motion to terminate the suit. The Court held that the *Ishikawa* compelling-interest test must be applied before sealing dispositive motions or the records supporting such motions. *Dreiling*, 151 Wn.2d at 904.

The *Dreiling* court said there are “good reasons to distinguish between” records that are attached to a dispositive motion filed in court, and “mere discovery” material that surfaces before trial and is “unrelated, or only tangentially related, to the underlying cause of action.” *Id.* at 909-10. Referring to the latter category of material that is obtained through pretrial discovery and turns out to be unrelated to the lawsuit, the Court said: “As this information does not become part of the court’s decision making process, article I, section 10 does not speak to its disclosure.” *Id.* In making that statement, the Court was simply distinguishing between records at the extreme ends of the

public-interest spectrum -- those which are not even relevant to a controversy, which presumably are not filed in court, and those which are so highly relevant that they are filed in court to justify a desired disposition. The latter records should continue to be presumptively open because they enable the public to scrutinize the merits of cases that consume public court resources.

The Opinion is inconsistent with *Dreiling's* reasoning that relevance of the record to the lawsuit - not the record's ultimate impact on the case - is what matters in a sealing analysis. *Dreiling* reflects the sound reasoning that if a record is relevant enough to be attached to a dispositive motion, it should be open to public view, unless an important countervailing interest in secrecy outweighs the public interest in openness. *Id.* at 912. *Dreiling* does not say that the public has no interest in a record unless it is actually considered by a court in decision making. Rather, it is a departure from *Dreiling* to focus only on judges' actions, as if controversies which have consumed court resources are worthy of public attention only if they elicit judicial attention.

The Opinion also contradicts the *Dreiling* ruling that the "good cause" standard, which applies to protective orders governing discovery

under CR 26(c), is insufficient for continued sealing of a discovery record once it is attached to a motion. The *Dreiling* Court said:

CR 26(c) applies primarily to *unfiled discovery*, not documents filed with the trial court in support of a motion that can potentially dispose of a case.

Id. at 912 (emphasis in original). Thus, in discussing the importance of whether records are filed or not, *Dreiling* set the tone for later decisions clarifying that once any record is filed in court for any reason – even in support of a non-dispositive motion – it is presumptively open to the public and subject to the *Ishikawa* sealing test. *See, e.g., Rufer*, 154 Wn.2d at 549; *Treadwell*, 145 Wn. App. at 284.

The Opinion fails to recognize the rule that the public has a constitutionally protected interest in anything that is relevant to the parties' motions, not to the court's actual decisions. In *Rufer*, for example, the defendant in a product liability suit moved to seal certain trial and motion exhibits that allegedly contained proprietary information. 154 Wn.2d at 536-37. The Washington Supreme Court held that the *Ishikawa* test applied to all records filed in court in anticipation of a decision, whether dispositive or not. *Id.* at 549.

Addressing the concern that parties could try to embarrass opponents

by attaching confidential but irrelevant documents to motions, the

Court said:

If a party attaches to a motion something that is both **irrelevant to the motion** and confidential to another party, the court should seal it. When there is indeed **little or no relevant relationship between the document and the motion**, the court, in balancing the competing interests of the parties and the public pursuant to the fourth *Ishikawa* factor, would find that there are *little or no valid interests*...of the public with respect to disclosure of the document.

Id. at 547-48 (italics in original, bold added). Thus, it is relevance to the parties' motions – to the relief sought – that matters, and it is not the court's action or inaction that determines whether a record is presumptively open.

III. CONCLUSION

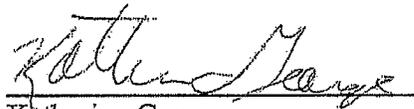
For the foregoing reasons, the Opinion should be reconsidered.

Dated this 18th day of June, 2010.

Respectfully submitted,

HARRISON BENIS & SPENCE LLP

By:



Katherine George
WSBA No. 36288
Attorney for Amici

APPENDIX E

**WASHINGTON STATE CONSTITUTION
ARTICLE I - DECLARATION OF RIGHTS**

SECTION 10 ADMINISTRATION OF JUSTICE. Justice in all cases shall be administered openly, and without unnecessary delay.

APPENDIX F

GR 15

DESTRUCTION, SEALING, AND REDACTION OF COURT RECORDS

(a) Purpose and Scope of the Rule. This rule sets forth a uniform procedure for the destruction, sealing, and redaction of court records. This rule applies to all court records, regardless of the physical form of the court record, the method of recording the court record, or the method of storage of the court record.

(b) Definitions.

(1) "Court file" means the pleadings, orders, and other papers filed with the clerk of the court under a single or consolidated cause number(s).

(2) "Court record" is defined in GR 31(c)(4).

(3) Destroy. To destroy means to obliterate a court record or file in such a way as to make it permanently irretrievable. A motion or order to expunge shall be treated as a motion or order to destroy.

(4) Seal. To seal means to protect from examination by the public and unauthorized court personnel. A motion or order to delete, purge, remove, excise, or erase, or redact shall be treated as a motion or order to seal.

(5) Redact. To redact means to protect from examination by the public and unauthorized court personnel a portion or portions of a specified court record.

(6) Restricted Personal Identifiers are defined in GR 22(b)(6).

(7) Strike. A motion or order to strike is not a motion or order to seal or destroy.

(8) Vacate. To vacate means to nullify or cancel.

(c) Sealing or Redacting Court Records.

(1) In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal case or juvenile proceedings, the court, any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile. No such notice is required for motions to seal documents entered pursuant to CrR 3.1(f) or CrRLJ 3.1(f).

(2) After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record. Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:

(A) The sealing or redaction is permitted by statute;

or

(B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or

(C) A conviction has been vacated; or

(D) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or

(E) The redaction includes only restricted personal identifiers contained in the court record; or

(F) Another identified compelling circumstance exists that requires the sealing or redaction.

(3) A court record shall not be sealed under this section when redaction will adequately resolve the issues before the court pursuant to subsection (2) above.

(4) Sealing of Entire Court File. When the clerk receives a court order to seal the entire court file, the clerk shall seal the court file and secure it from public access. All court records filed thereafter shall also be sealed unless otherwise ordered. The existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, names of the parties, the notation "case sealed," the case type and cause of action in civil cases and the cause of action or charge in criminal cases, except where the conviction in a criminal case has been vacated, section (d) shall apply. The order to seal and written findings supporting the order to seal shall also remain accessible to the public, unless protected by statute.

(5) Sealing of Specified Court Records. When the clerk receives a court order to seal specified court records the clerk shall:

(A) On the docket, preserve the docket code, document title, document or subdocument number and date of the original court records;

(B) Remove the specified court records, seal them, and return them to the file under seal or store separately. The clerk shall substitute a filler sheet for the removed sealed court record. If the court record ordered sealed exists in a microfilm, microfiche or other storage medium form other than paper, the clerk shall restrict access to the alternate storage medium so as to prevent unauthorized viewing of the sealed court record; and

(C) File the order to seal and the written findings supporting the order to seal. Both shall be accessible to the public.

(D) Before a court file is made available for examination, the clerk shall prevent access to the sealed court records.

(6) Procedures for Redacted Court Records. When a court record is redacted pursuant to a court order, the original court record shall be replaced in the public court file by the redacted copy. The redacted copy shall be provided by the moving party. The original unredacted court record shall be sealed following the procedures set forth in (c)(5).

(d) Procedures for Vacated Criminal Convictions. In cases where a criminal conviction has been vacated and an order to seal entered, the information in the public court indices shall be limited to the case number, case type with the notification "DV" if the case involved domestic violence, the adult or juvenile's name, and the notation "vacated."

(e) Grounds and Procedure for Requesting the Unsealing of Sealed Records.

(1) Sealed court records may be examined by the public only after the court records have been ordered unsealed pursuant to this section or after entry of a court order allowing access to a sealed court record.

(2) Criminal Cases. A sealed court record in a criminal case shall be ordered unsealed only upon proof of compelling circumstances, unless otherwise provided by statute, and only upon motion and written notice to the persons entitled to notice under subsection (c)(1) of this rule except:

(A) If a new criminal charge is filed and the existence of the conviction contained in a sealed record is an element of the new offense, or would constitute a statutory sentencing enhancement, or provide the basis for an exceptional sentence, upon application of the prosecuting attorney the court shall nullify the sealing order in the prior sealed case(s).

(B) If a petition is filed alleging that a person is a sexually violent predator, upon application of the prosecuting attorney the court shall nullify the sealing order as to all prior criminal records of that individual.

(3) Civil Cases. A sealed court record in a civil case shall be ordered unsealed only upon stipulation of all parties or upon motion and written notice to all parties and proof that identified compelling circumstances for continued sealing no longer exist, or pursuant to RCW 4.24 or CR 26(j). If the person seeking access cannot locate a party to provide the notice required by this rule, after making a good faith reasonable effort to provide such notice as required by the Superior Court Rules, an affidavit may be filed with the court setting forth the efforts to locate the party and requesting waiver of the notice provision of this rule. The court may waive the notice requirement of this rule if the court finds that further good faith efforts to locate the party are not likely to be successful.

(4) Juvenile Proceedings. Inspection of a sealed juvenile court record is permitted only by order of the court upon motion made by the person who is the subject of the record, except as otherwise provided in RCW 13.50.010(8) and 13.50.050(23). Any adjudication of a juvenile offense or a crime subsequent to sealing has the effect of nullifying the sealing order, pursuant to RCW 13.50.050(16).

(f) Maintenance of Sealed Court Records. Sealed court records are subject to the provisions of RCW 36.23.065 and can be maintained in mediums other than paper.

(g) Use of Sealed Records on Appeal. A court record or any portion of it, sealed in the trial court shall be made available to the appellate court in the event of an appeal. Court records sealed in the trial court shall be sealed from public access in the appellate court subject to further order of the appellate court.

(h) Destruction of Court Records.

(1) The court shall not order the destruction of any court record unless expressly permitted by statute. The court shall enter written findings that cite the statutory authority for the destruction of the court record.

(2) In a civil case, the court or any party may request a hearing to destroy court records only if there is express statutory authority permitting the destruction of the court records. In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to destroy the court records only if there is express statutory authority permitting the destruction of the court records. Reasonable notice of the hearing to destroy must be given to all parties in the case. In a criminal case, reasonable notice of the hearing must also be given to

the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile.

(3) When the clerk receives a court order to destroy the entire court file the clerk shall:

(A) Remove all references to the court records from any applicable information systems maintained for or by the clerk except for accounting records, the order to destroy, and the written findings. The order to destroy and the supporting written findings shall be filed and available for viewing by the public.

(B) The accounting records shall be sealed.

(4) When the clerk receives a court order to destroy specified court records the clerk shall;

(A) On the automated docket, destroy any docket code information except any document or sub-document number previously assigned to the court record destroyed, and enter "Order Destroyed" for the docket entry;

(B) Destroy the appropriate court records, substituting, when applicable, a printed or other reference to the order to destroy, including the date, location, and document number of the order to destroy; and

(C) File the order to destroy and the written findings supporting the order to destroy. Both the order and the findings shall be publicly accessible.

(5) This subsection shall not prevent the routine destruction of court records pursuant to applicable preservation and retention schedules.

(i) Trial Exhibits. Notwithstanding any other provision of this rule, trial exhibits may be destroyed or returned to the parties if all parties so stipulate in writing and the court so orders.

(j) Effect on Other Statutes. Nothing in this rule is intended to restrict or to expand the authority of clerks under existing statutes, nor is anything in this rule intended to restrict or expand the authority of any public auditor in the exercise of duties conferred by statute.

[Adopted effective September 22, 1989; amended effective September 1, 1995; June 4, 1997; June 16, 1998; September 1, 2000; amended effective October 1, 2002; amended effective July 1, 2006.]