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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.

BRIEF OF AMICUS
THE WASHINGTON SOCIETY
OF CERTIFIED PUBLIC ACCOUNTANTS

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. INTERESTS OF THE WASHINGTON SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS 1

III. STATEMENT OF THE CASE..... 3

IV. ARGUMENT AND DISCUSSION..... 3

A. Adopting the Appellant/Intervenor’s Proposed Standard for the Unsealing of CPA Clients’ Private Financial and Tax Records Would Be at Odds with the Statutory Structure and Rules Regulating CPAs’ Obligations to Maintain Client Confidences. ... 3

1. Disclosure of Tax and Financial Records is Regulated by the Federal Government and Disfavored by the Courts. 5

2. Chapter 18.04 RCW Prohibits the Disclosure of Client or Former Client Records..... 8

3. The AICPA’s Rules and Policies Further Prohibit CPAs from Disclosing Clients’ Financial Records and Information..... 10

B. Allowing the Public to Unseal Private Tax and Other Financial Information Will Expose CPAs to Unfair Liability and Increase Costs for Accounting Services..... 11

V. CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

<i>Ameriquest Mortgage Co. v. State Attorney General</i> , 148 Wn. App. 145, 199 P. 3d 468 (2009).....	7
<i>Dreiling v. Jain</i> , 151 Wn.2d 900, 93 P.3d 861 (2004).....	4
<i>Hoffer v. State</i> , 113 Wn.2d 148, 776 P.2d 963 (1989).....	2
<i>Kodsi v. Gee</i> , 54 A.D.3d 613, 864 N.Y.S.2d 9 (2008).....	6
<i>Ledee v. Devoe</i> , 225 Ga. App. 620, 484 S.E.2d 344 (1997).....	6
<i>Rufer v. Abbott Laboratories</i> , 154 Wn.2d 530, 114 P.3d 1182 (2005).....	1, 4
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30, 640 P.2d 716 (1982).....	1, 4
<i>Ultramares Corp. v. Touche</i> , 174 N.E. 441 (N.Y. 1931).....	11

Statutes

26 U.S.C. § 6103.....	6, 7, 8
26 U.S.C. § 6103(a).....	6
26 U.S.C. § 6103(a)(1-3).....	6
26 U.S.C. § 6103(b)(1).....	6
26 U.S.C. § 6103(b)(3).....	6
26 U.S.C. § 6103(c)-(m).....	6
Chapter 18.04 RCW.....	8, 9
Chapter 4-25 WAC.....	8
ORS 673.010(21).....	10
ORS 673.153.....	10
RCW 18.04.025(6).....	5
RCW 18.04.180.....	10
RCW 18.04.295, .370, .405(1).....	9
RCW 18.04.390.....	9
RCW 18.04.390(3).....	8
RCW 18.04.390, .405.....	8
RCW 18.04.405.....	9

RCW 18.04.405(1) –(3) 9
RCW 18.04.405(3)..... 9, 11
WAC 4-25-610, -640 8

Other Authorities

AICPA Rule 301 10
Tax Reform Act of 1976 6, 7

I. INTRODUCTION

The Washington Society of Certified Public Accountants (“Society”) concurs with the Respondent’s arguments that the trial court correctly denied Appellant/Intervenor’s motion to unseal private financial and tax records of Respondent’s non-party clients after the resolution of the lawsuit by the parties. Those records were not part of the court’s decision-making process and therefore, under the standards established by the Washington State Supreme Court in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982) and *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005), there was no public interest that overrode the Respondent’s clients’ interest in keeping their financial and tax records confidential. If, however, this Court decides that it is necessary to balance the interests of the public in disclosure against the fundamental and statutory privacy interests of the clients, which must be maintained by CPAs, the Society asks that this Court affirm that CPA client tax and financial records are private and have statutory confidentiality restrictions which prohibit the records from being unsealed pursuant to public request absent a showing of a specific statutory exception that allows disclosure.

II. INTERESTS OF THE WASHINGTON SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS

The WSCPA is a professional association whose membership includes over 7,800 certified public accountants (“CPAs”) licensed to practice in the state of Washington. The Society was founded in 1904 and

its services extend to the public, CPAs in academia, government, for-profit and non-profit businesses and organizations, as well as the CPAs and CPA firms in this state. Among the Society's primary purposes are promotion and maintenance of high professional standards and integrity in the practice of accounting in the state of Washington.

The Society serves the public and the professional needs of CPAs through its consumer education programs, continuing professional education programs for CPAs, involvement with CPA associations in other states, association with the national organization of CPAs, the American Institute of Certified Public Accountants ("AICPA"), and monitoring and participating in state and national activities, legislation, and initiatives affecting public accountancy. In furtherance of these services, the Society has several initiatives, which include leading advocacy efforts for its members and the profession with the Washington State Legislature, the Washington State Board of Accountancy, the Washington State Bar Association, and on rare occasions in judicial proceedings. *See e.g., Hoffer v. State*, 113 Wn.2d 148, 776 P.2d 963 (1989).

The Society has requested authority to file an amicus brief in this appeal because of its concern about the impact of a decision here on the accounting profession's long-standing statutory, policy, and other requirements to maintain client confidences, including laws and rules prohibiting the release or other disclosure of client records. Without this fundamental client confidence, a CPA cannot effectively perform tax,

audit, and attest functions since it is the client that must candidly provide the financial records necessary for the CPA to provide appropriate services. Any erosion in that relationship will have a ripple effect on the greater context in which public accounting is conducted. Public accountancy underlies many of this state's private and governmental financial activities and transactions, as well as business activities and transactions conducted nationally and internationally. The Society believes that its perspective may assist the Court in better understanding the impact on the accounting profession and the profession's regulatory standards if this Court were to adopt a broad public disclosure rule that liberally allows the unsealing of CPA client records in court cases.

III. STATEMENT OF THE CASE

The Society adopts the Statement of the Case as set forth in the Response Brief of Respondents Smith Bunday Berman Britton, PS ("Smith Bunday").

IV. ARGUMENT AND DISCUSSION

A. Adopting the Appellant/Intervenor's Proposed Standard for the Unsealing of CPA Clients' Private Financial and Tax Records Would Be at Odds with the Statutory Structure and Rules Regulating CPAs' Obligations to Maintain Client Confidences.

The Appellant/Intervenor focuses his arguments on the public's constitutional right to access court records and court proceedings. That constitutional right, however, is not without limitation. This state's Supreme Court has stated:

Our state constitution mandates that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” CONST. art. I, § 10. But while we presume court records will be made open and available for public inspection, court records may be sealed “to protect other significant and fundamental rights.”

Rufer v. Abbott Laboratories, 154 Wn.2d at 540, citing *Dreiling v. Jain*, 151 Wn.2d 900, 909, 93 P.3d 861 (2004). The Court has balanced the constitutional requirement of open administration of justice against potentially conflicting rights by applying the five *Ishikawa* factors to determine whether documents in court proceedings should continue to be sealed. Two of those factors are relevant to the Society’s interest in this appeal: (1) whether the proponent of closure and/or sealing must make some showing of the need therefor; and (2) courts “must weigh the competing interests of the [parties] and the public.” *Rufer v. Abbott Laboratories*, 154 Wn.2d at 543; see also *Seattle Times Co. v. Ishikawa*, 97 Wn.2d at 37-39.

Appellant/Intervenor has not chosen to focus his arguments on the CPAs’ “need” to ensure their clients’ records remain sealed because of strict statutory requirements that govern the disclosure of client records. Nor does the Appellant/Intervenor weigh the competing interests of the public with the CPAs’ and their clients’ significant, fundamental, and statutory rights to privacy in their confidential financial and tax records. This is remarkable since the Appellant/Intervenor is himself a CPA and must therefore have an understanding of the profession’s statutory and

regulatory requirements for protecting client confidences and records from disclosure. Appellant/Intervenor's apparent dissatisfaction with the statutory and policy restrictions on the disclosure of client records should not be placated by allowing circumvention of these rules through court initiated unsealing proceedings. Changes in the limitations on CPA and CPA client record disclosures are better addressed by the regulatory bodies that imposed them: Congress, Washington and other state legislatures, the Washington State Board of Accountancy, and the AICPA.

1. Disclosure of Tax and Financial Records is Regulated by the Federal Government and Disfavored by the Courts.

At the core of the issue of whether a CPA's client's records should remain sealed by the court or open to public inspection, are how those records are characterized and what protections are given clients who provide those records to their CPAs. The practice of public accounting is by definition the performance of services for clients that involve the use of accounting or auditing skills, including the issuance of audit reports, review reports, compilation reports on financial statements, consultation on tax matters, and preparation of tax returns. RCW 18.04.025(6). In order to properly perform these functions, CPAs must obtain from their clients personal financial information - information that clients typically do not want known to the public. It is therefore not surprising that Congress has imposed disclosure restrictions on those engaged in the

practice of accounting with regard to clients' tax returns and tax return information.¹ See 26 U.S.C. § 6103.

It is significant that citizens' tax information and supporting financial records were not always characterized as private. The Tax Reform Act of 1976 reversed the presumption created in earlier legislation that made tax returns and return information public. 26 U.S.C. § 6103(a). Under the 1976 Act, tax returns and return information is private and, without written client consent, can only be disclosed to certain specified persons for specific purposes. 26 U.S.C. § 6103(c)-(m). Those restrictions apply to all employees of federal and state governments, as well as CPAs and other persons who have access to tax returns or return information under the Act. 26 U.S.C. § 6103(a)(1-3).

Consistent with this reversal in the presumption regarding the confidentiality of tax returns and return information, the courts now consistently declare the disclosure of those returns and return information to be disfavored. See e.g., *Kodsi v. Gee*, 54 A.D.3d 613, 614, 864 N.Y.S.2d 9 (2008). Accordingly, when a party's tax information is brought into a litigation, the courts have typically designated the records confidential and protected them from disclosure under a protective order or seal. *Id.*; see also, e.g., *Ledee v. Devoe*, 225 Ga. App. 620, 484 S.E.2d 344 (1997). It is perfectly appropriate for CPAs to ask the courts to place

¹ This restriction encompasses all tax returns, declarations, claims, schedules, or attachments filed with the IRS (26 U.S.C. § 6103(b)(1)), and any information that may be extracted from the returns and associated or identified with a particular taxpayer (26 U.S.C. § 6103(b)(3)).

these tax records under a protective order or seal during a lawsuit. Indeed, CPAs “need” to do so under the federal statutory scheme.

In this matter, the sealed financial and tax records that the Appellant/Intervenor asks this Court to unseal are not the financial and tax records of any of the parties to the action, nor were they considered by the court in any determinations. Instead, the records the Appellant/Intervenor seeks to have unsealed are records of non-party clients who received tax and accounting services from Smith Bunday, the defendant CPA firm in this appeal. There is no evidence that those clients are even aware that their private tax and financial records are subject to this requested public viewing. *See Ameriquest Mortgage Co. v. State Attorney General*, 148 Wn. App. 145, 156-157, 165, 199 P. 3d 468 (2009) (customers whose loan files were obtained through discovery from the plaintiff mortgage company had to be notified and provided an opportunity to respond before the defendant Attorney General could disclose those files pursuant to a public records request).

The burden to ensure protection of these clients’ rights to privacy in their tax and financial records has fallen upon their CPAs, Smith Bunday, and it is Smith Bunday that must incur the legal obligation and expenses to defend the continued sealing and privacy of those records. The reason this burden is relegated to Smith Bunday is that the Tax Reform Act of 1976 made CPA client’s tax and tax return records private and thereby imposed the obligation to maintain the confidentiality of those records. 26 U.S.C. § 6103.

2. Chapter 18.04 RCW Prohibits the Disclosure of Client or Former Client Records.

The federal non-disclosure requirement in 26 U.S.C. § 6103 is augmented by the various state laws, including Washington's chapter 18.04 RCW, the Washington State Board of Accountancy's rules, chapter 4-25 WAC, and the AICPA's rules and policies against client record disclosures. Consistent with the federal approach, the Washington Legislature has imposed significant prohibitions on CPAs' handling and disclosure of client records and information. RCW 18.04.390, .405; *see also* WAC 4-25-610, -640. Most significant to this appeal, RCW 18.04.390(3) provides:

(3) A licensee shall furnish to the board or to his or her client or former client, upon request and reasonable notice:

...

(b) Any accounting or other records belonging to, or obtained from or on behalf of, the client that the licensee removed from the client's premises or received for the client's account; the licensee may make and retain copies of such documents of the client when they form the basis for work done by him or her.

(Emphasis added.)

The client-owned records that are used by the CPA or CPA firm to provide tax and accounting services remain the client's property and must be returned upon request and reasonable notice. The client's ownership of these tax and financial records does not change once they have been

submitted to a CPA, or because the CPA is required to disclose copies of those records under seal in a lawsuit.

Moreover, chapter 18.04 RCW prohibits a CPA from disclosing “any confidential information obtained in the course of a professional transaction except with the consent of the client or former client or as disclosure may be required by law, legal process, the standards of the profession, . . .” RCW 18.04.405. While RCW 18.04.405 does not limit the state, United States, or any agency from reviewing or using a CPA’s client-obtained records in investigations, hearings, and other government proceedings, this exception is specifically limited. *See* RCW 18.04.405(1)–(3).

The only other limited exception to these statutory obligations regarding client confidences and records is for the temporary transfer of client work papers for carrying out peer reviews. RCW 18.04.390, *see also* RCW 18.04.405(3). Peer reviews are regularly conducted reviews of one or more aspects of the attest work of a CPA by another licensed CPA who is not affiliated with the person or firm being reviewed. Failure to comply with these disclosure rules subjects the CPA and his/her firm to disciplinary action by the Board of Accountancy. RCW 18.04.295, .370, .405(1).

Recognizing that today’s practice of accountancy is no longer confined by state borders, the Washington Legislature has adopted comity and reciprocity provisions that allow CPAs to practice under certain conditions in different states without the need to obtain additional state

licensure. RCW 18.04.180. One of the provisions that other states specifically require to grant comity to another state's CPA is the requirement that CPAs not disclose client records or confidences. *See, e.g.*, ORS 673.153 (the Oregon Board of Accountancy authorizes a CPA licensed in another state to practice public accountancy in Oregon if that out-of-state CPA's licensing requirements are substantially equivalent to Oregon's licensing requirements, including maintaining client confidences); *see also* ORS 673.010(21). If this nondisclosure cannot be guaranteed by Washington law because courts allow client documents to be opened to public viewing, then Washington CPAs may not be granted comity or reciprocity by other states when those CPAs find it necessary to provide clients services outside the state of Washington. *Id.* It is this framework of accountancy laws and regulations, both at the state and the federal level, that makes possible the multistate practice of public accounting.

3. The AICPA's Rules and Policies Further Prohibit CPAs from Disclosing Clients' Financial Records and Information.

Washington and other state statutes are further grounded in the standards established by the AICPA. Not only does the AICPA impose a national standard that prohibits the disclosure of client records without the client's consent, it is also the entity that has developed the peer review program. *See* AICPA Rule 301. The success of the peer review program depends on the confidentiality of the process. Client records are reviewed by a CPA's peer to determine compliance with accepted accounting

principles and to suggest practice improvements. Under RCW 18.04.405(3), documents that are part of a peer review are confidential and privileged and not subject to discovery, subpoena, or testimony. If peer reviewed client records and the peer review report are submitted as part of a lawsuit under a confidentiality agreement, but may then be unsealed at the request of a member of the public, the peer review program's underpinning of confidentiality will be compromised.

Thus, a client's confidence in his/her CPA is built on state law, national standards, and federal tax laws. Any change to any part of this profession's framework will have a ripple effect on CPAs' licenses, comity and reciprocity from other states, federal scrutiny and, most importantly, client confidence in the CPA that has been given their private, often sensitive, tax and financial information.

B. Allowing the Public to Unseal Private Tax and Other Financial Information Will Expose CPAs to Unfair Liability and Increase Costs for Accounting Services.

Imposing upon CPAs the obligation to ensure private tax and other financial records of their clients are not made public is an expansive liability rule that will "expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931) (Chief Justice Cardozo's landmark decision and reasoning for not expanding negligence liability to third parties for common law negligence because such liability would be incompatible with the nature of the accounting process). If a CPA fails to

contest a litigant's request for the unsealing of client records, even after the case is completed (as here), it is possible that the client would pursue an action against the CPA. This would be grossly unfair as well as costly to all CPAs. CPAs are already placed in the position of having to ensure that client records are sealed in any litigation in which the CPA is a party or a non-party witness, which is often the case.² This burden is significantly increased when any member of the public can move to unseal those client records months or years after the litigation has been completed.

V. CONCLUSION

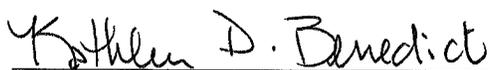
It is the cornerstone of the system of public accountancy in this state, nationally, and internationally that tax preparation, consultation, audits, and advice will only work properly if the client has faith in their CPA's ability to maintain the confidential nature of their personal and business tax and financial information and records. The private and confidential nature of this scheme facilitates the candid and accurate disclosure of tax information, information regarding the financial stability of corporations and small businesses, the disclosure of the investment viability of bonds and other securities, and ensures government fiscal responsibility. If the public's interest in openness of the judicial system overrides the CPAs', their clients', and the public's interest in maintaining

² Invariably, clients will look to their CPAs to defend the privacy of their records, with the cost to be borne by the CPA, and those costs will also invariably be passed on to clients.

the existing structure of confidentiality that supports on-going tax and accounting activities, the result will be the erosion of that multifaceted system. The filing of a court action is all that would be necessary to circumvent the statutes, rules, and case law that have otherwise uniformly established these records as private.

The Society asks this Court to affirm the trial court's determination that the non-party client's tax and other financial records under seal in the underlying lawsuit should remain under seal since those records were not considered by the court in any of its decision-making. The Society further asks this Court to affirm that CPA client tax and financial records are private and have statutory confidentiality restrictions that prohibit the records from being unsealed pursuant to public request absent a showing of a specific statutory exception that allows disclosure.

RESPECTFULLY SUBMITTED this 28th day of October,
2009.



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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the 29 day of October, 2009, I caused to be served a true and correct copy of Brief of Amicus Washington Society of Certified Public Accountants on the following individuals in the manner indicated:

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