

84903-0

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.

ANSWER TO AMICUS BRIEF FILED BY THE WASHINGTON
SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS

Michele Earl-Hubbard
David M. Norman
Attorneys for Appellant/Intervenor

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

ALLIED
LAW GROUP

2009 DEC 29 11:10:33
STATE OF WASHINGTON
THE COURT OF APPEALS
DIVISION I

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL AUTHORITY AND ARGUMENT 3

 A. The Federal and State Tax Provisions Cited by the WSCPA
 are Not Applicable to This Case 4

 1. The federal statute cited by the WSCPA is designed to
 protect tax-payers against disclosure of confidential tax
 records by the Government..... 4

 2. Section 6103 does not prohibit disclosure by commercial
 tax preparers 6

 3. Tax records, confidential or not, are discoverable 8

 4. No party has ever demonstrated that any of the records at
 issue are in fact “confidential” or “tax returns” or “return
 information” under the relevant federal and state
 definitions 11

 B. WSCPA’s Position Undermines the Policies and Values It
 Claims to Uphold and Protect 16

III. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

B.M. v. State,
335 N.W.2d 420 (Wis. 1983)..... 15

Baskin v. United States,
135 F.3d 338 (5th Cir. 1998) 15, 16

Chamberlain v. Kurtz,
589 F.2d 827, 835 (5th Cir. 1979) 6

<u>Church of Scientology of California v. I.R.S.,</u> 484 U.S. 9, 108 S.Ct. 271, 98 L.Ed.2d 228 (1987).....	5
<u>Clarke v. State Attorney General's Office,</u> 133 Wn. App. 767, 138 P.3d 144 (2006).....	9
<u>Commonwealth v. Burgess,</u> 688 N.E.2d 439 (Mass. 1997).....	16
<u>Confidential Informant 92-95-932X v. United States,</u> 45 Fed.Cl. 556 (2000).....	9
<u>Coopersmith v. Gold,</u> 156 Misc.2d 594 (N.Y. Sup. 1992).....	18, 19
<u>Gould v. Sullivan,</u> 54 N.Y.S.2d 430 (N.Y. Sup. 1945).....	10
<u>Graham Farm Land Co. v. Commonwealth,</u> 70 A.2d 219 (Pa. 1950).....	10
<u>Heathman v. U.S. Dist. Court for Central Dist. of California,</u> 503 F.2d 1032 (9th Cir. 1974).....	8, 9
<u>Hudson v. United Servs. Auto. Assn. Ins. Co.,</u> 902 N.E.2d 101 (Ohio 2008).....	9
<u>In re Marriage of Irwin,</u> 64 Wn. App. 38, 822 P.2d 797 (1992).....	16
<u>In re Marriage of Treseler and Treadwell,</u> 145 Wn. App. 278, 187 P.3d 773 (2008).....	3
<u>Kyser v. Garrett, Inc.,</u> 292 N.Y.S.2d 941 (N.Y. Sup. 1968).....	10
<u>Lampert v. United States,</u> 854 F.2d 335 (9th Cir. 1988).....	5, 7, 11

<u>Marron v. Stromstad,</u> 123 P.3d 992 (Alaska 2005).....	9
<u>McDonald v. United States,</u> 102 F.3d 1009 (9th Cir. 1996)	6
<u>McSurely v. McAdams,</u> 502 F. Supp. 52 (D.C. Cir 1980).....	5, 8
<u>Miller v. United States,</u> 66 F.3d 220 (9th Cir. 1995)	6, 11
<u>Paramount Film Dist. Corp. v. Ram,</u> 91 F. Supp. 778 (D.C. S.C. 1950).....	10
<u>Pinero v. Jackson Hewitt Tax Service Inc.,</u> 594 F. Supp.2d 710 (E.D. La. 2009).....	7
<u>Richards v. Stephens,</u> 118 F.R.D. 338 (S.D. N.Y. 1988).....	10
<u>Rubenstein v. Kleven,</u> 21 F.R.D. 183 (D. Mass. 1957).....	10
<u>Ryan v. Bureau of Alcohol, Tobacco and Firearms,</u> 715 F.2d 644 (D.C. Cir.1983).....	15
<u>Seattle Times v. Ishikawa,</u> 97 Wn.2d 30, 640 P.2d 716 (1982).....	3, 17, 19
<u>S.E.C. v. Cymaticolor Corp.,</u> 106 F.R.D. 545 (D.C.N.Y. 1985).....	8
<u>Sendi v. Prudential-Bache Securities,</u> 100 F.R.D. 21 (D.D.C. 1983).....	10
<u>Shenandoah Pub. House, Inc. v. Fanning,</u> 368 S.E.2d 253 (Va. 1988).....	18, 19
<u>Shollenburg v. F.D.I.C.,</u> 130 Fed.Appx. 889 (9th Cir. 2005).....	8

<u>Shwarz v. United States.</u> 234 F.3d 428 (9th Cir. 2000)	7
<u>Siddiqui v. United States.</u> 359 F.3d 1200 (9th Cir. 2004)	6
<u>St. Regis Paper Co. v. United States.</u> 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961).....	9
<u>Stokwitz v. United States.</u> 831 F.2d 893 (9th Cir. 1987)	5, 6
<u>Taylor v. United States.</u> 106 F.3d 833 (8th Cir.1997)	9
<u>Thomas v. United States.</u> 890 F.2d 18 (7th Cir. 1989)	16
<u>Tran v. State Farm Fire and Cas. Co.,</u> 136 Wn.2d 214, 961 P.2d 358 (1998).....	9
<u>William E. Schrambling Accountancy Corp. v. United States.</u> 937 F.2d 1485 (9th Cir. 1991)	11

Statutes

26 U.S.C. § 6103.....	passim
26 U.S.C. § 6103(a)	10
26 U.S.C. § 6103(a)(1).....	7
26 U.S.C. § 6103(a)(2).....	7
26 U.S.C. § 6103(a)(3).....	7
26 U.S.C. § 6103(b)(1)	15
26 U.S.C. § 6103(b)(2)(a), (b), (c), (d)	15
26 U.S.C. § 6713.....	7
26 U.S.C. § 7216.....	8
26 U.S.C. § 7431.....	6
26 U.S.C. § 7431(c)	7
26 U.S.C. § 7433.....	7

RCW 18.04.405(1)..... 11, 16

Rules

Fed.R.Civ.P. 26..... 9

General Rule 15 3

WAC 4-25-610..... 17

I. INTRODUCTION

This case stems from an accounting malpractice lawsuit filed against CPA firm Smith Bunday and one of its CPAs by two of their former clients, alleging that the CPAs helped the Plaintiffs' former business partner Todd Bennett embezzle funds from Plaintiffs' joint businesses and hide Mr. Bennett's wrongdoing. At the heart of the lawsuit were records about the accounting activities of the CPAs—particularly several revisions of a journal entry containing ever-changing descriptions of \$100,000 in profits that should have been paid to Mr. Bennett's business partner and Smith Bunday joint-client Gerald Horrobin that Mr. Bennett allegedly embezzled and kept off the corporate tax returns and K-1 shareholder reports with the help of Smith Bunday. The other records were emails and billing records between Mr. Bennett and the CPAs related to this transaction, and records showing that Smith Bunday had, in fact, allocated profits and losses and partnership shares for the businesses and charged the businesses for such activity though the defendants in sworn statements and court filings swore no such allocations had occurred. To date these journal entries, bills and emails and descriptions of them in an expert's declaration are sealed from public view. Mr. Bennett, the alleged embezzler and Smith Bunday's alleged accomplice in fraud, has objected to the unsealing of the records at issue. His business partners from whom

he is alleged to have embezzled, Rondi Bennett and Mr. Horrobin, do not oppose unsealing. No other tax payer or business partner has objected to the unsealing of the records at issue.

While this is a case involving the actions of accountants and the propriety or impropriety of their actions, the Defendant CPAs, and now Amicus the Washington Society of Certified Public Accountants (“WSCPAs”), argue that all records at issue here must be kept sealed and secret, alleging the records relate to tax returns and tax information.

In the context of medical malpractice cases, litigants discuss medical information and medical records in open court filings—*i.e.*, the parties do not litigate in code and leave the public to observe in ignorance. So, too, when the claims involve accounting malpractice, must the parties be able to discuss the accounting activities involved and allow the public to observe and monitor the details in order to understand the claims at issue. The blanket secrecy sought by the WSCPAs, and Respondents, for allegations of accountant malpractice are neither warranted nor allowed by Washington law, and the concerns and claims made by the WSCPAs must be dismissed for the reasons set forth below.

First, Clark is not advocating for a “new standard” for what is required for the sealing or redaction of a filed court record; instead he seeks a reversal of the trial court’s December 5, 2008 Order on the basis

that the trial court failed to apply the constitutional and local rule standards already articulated in *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), *In re Marriage of Treseler and Treadwell*, 145 Wn. App. 278, 187 P.3d 773 (2008), and General Rule 15.¹

Second, this case does not deal with truly private tax records of non-parties, and thus, the general federal and state provisions the WSCPA cites are inapplicable in this case and relate to categories of documents not implicated by this case. Clark's primary goal in this matter is to unseal his personal declaration that he prepared as an expert witness in the accounting malpractice case, and the attachments thereto—none of which constitute any part of any tax record or tax return.

Finally, the WSCPA's arguments run counter to the principles it claims to uphold, as the ruling it seeks would serve only to shield the alleged impropriety of CPAs from public scrutiny to the detriment of all CPAs, who rely to a great extent on the public's perception of the integrity of CPAs in the discharge of their duties of public trust in the safeguarding of the integrity of financial information reported to the public.

II. LEGAL AUTHORITY AND ARGUMENT

The WSCPA assumes that all of the records sealed implicate the "confidentiality" provisions of professional standards and federal and state

¹ Please see Brief of Appellant at pages 25-47 for a more complete elaboration on these standards and why they were not complied with by the parties and the trial court.

law. It is upon this basis that it warns this Court of the potential dangers to CPAs if the Court reverses the December 5, 2008 Order. However, the WSCPA fails to specify which record(s) in this case deserved to be sealed and to remain sealed under these provisions; instead, it asserts only broad pronouncements about how having any kind of tax records open to the public makes things more burdensome for CPAs. As will be shown below, these generalized concerns have no relevance to the case here.

A. The Federal and State Tax Provisions Cited by the WSCPA are Not Applicable to This Case

Clark agrees with the WSPCA's statement in its Brief that the central issue—in the context of the application of the tax provisions it cites—is “how those records are characterized.” WSPCA Br. at 5. The WSPCA's mischaracterization of the disputed records, in fact, is the primary reason why its arguments regarding the application of federal and state tax provisions dissolve under any scrutiny.

1. The federal statute cited by the WSCPA is designed to protect tax-payers against disclosure of confidential tax records by the Government

The WSCPA has attempted to present 26 U.S.C. § 6103 as a general prohibition against any disclosure of “confidential” tax records. *See* WSCPA Br. at 5-6. In reality, this is only half true: The section creates a general presumption that tax records that fall within its definition

are “confidential”, *not* that they are presumed not disclosable.² In fact, the Ninth Circuit has expressly rejected the WSCPA’s interpretation of Section 6103. *See Lampert v. United States*, 854 F.2d 335, 338 (9th Cir. 1988) (“[S]ection 6103 does not create a general prohibition against public disclosure of tax information.”) (citation omitted). The section is not intended to protect taxpayers against any potential public disclosure of their relevant tax records *except* in the context of filing their tax returns with the IRS—again, the Ninth Circuit has expressly so held.

In *Stokwitz v. United States*, 831 F.2d 893 (9th Cir. 1987), the Ninth Circuit stated in no uncertain terms that “[S]ection 6103 is clearly designed to protect the information flow between taxpayers and the IRS by controlling the disclosure by the IRS of information received from taxpayers.” 831 F.2d at 894. The court in *Stokwitz* continued, stating that

The legislative history of section 6103 indicates Congress's overriding purpose was to curtail loose disclosure practices by the IRS. Congress was concerned that [the] IRS had become a “lending library” to other government agencies of tax information filed with the IRS, and feared the public's confidence in the privacy of returns filed with [the] IRS would suffer. ... In short, *section 6103 was aimed at curtailing abuse by government agencies of information filed with the IRS.*

Id. at 894-95 (emphasis added) (citations omitted). In other words, this section is only appropriate as a basis for liability when a taxpayer is

² *See generally Church of Scientology of California v. I.R.S.*, 484 U.S. 9, 10, 108 S.Ct. 271, 98 L.Ed.2d 228 (1987) (“[Section 6301] lays down a general rule that ‘returns’ and ‘return information’ as defined therein shall be confidential.”).

bringing an action *against the government* or a *government agent* for improperly releasing their confidential tax returns or return information. *See, e.g., Siddiqui v. United States*, 359 F.3d 1200 (9th Cir. 2004); *McDonald v. United States*, 102 F.3d 1009 (9th Cir. 1996); *Miller v. United States*, 66 F.3d 220 (9th Cir. 1995).³ The WSCPA’s citation to this general rule, which does not even apply in this context, therefore provides no guidance to this Court.

2. Section 6103 does not prohibit disclosure by commercial tax preparers

Even if § 6103 somehow established a general prohibition on the disclosure of confidential tax records, which it does not, and did not only apply to the government and its employees, which it does, there is yet another reason the provision is not relevant to this action. The WSCPA implies that the statute applies to Smith Bunday, citing “§ 6103(a)(1-3)”, and stating that this provision prohibits disclosure by “other persons who have access to tax returns or return information.” WSCPA Br. at 6.

Section 6103(a)(1) applies only to government employees—obviously not applicable to Smith Bunday, its CPAs or Clark with respect to any tax return information he received in his capacity as an expert

³ This principle also applies to the 1976 amendments to the federal tax statute, cited by the WSCPA. *See Chamberlain v. Kurtz*, 589 F.2d 827, 835 (5th Cir. 1979) (“New section 6103 of the Internal Revenue Code was enacted primarily to regulate and restrict access to tax returns and return information by the many government bodies and agencies that routinely had access to such information under former section 6103.”).

witness in the Smith Bunday accounting malpractice lawsuit.⁴ Similarly, § 6103(a)(2) precludes certain kinds of state employees and employees of local agencies administering specific programs from disclosing tax returns or return information. The remaining category of persons precluded from disclosing tax returns and return information are those delineated under § 6103(a)(3); this consists of 11 categories of persons or entities that are not affiliated with the government.

However, the courts have expressly held that this category *does not apply to commercial tax preparers* that do not receive the tax information in the course of *public* business. *See Pinero v. Jackson Hewitt Tax Service Inc.*, 594 F. Supp.2d 710, 722-23 (E.D. La. 2009) (“Although defendants transmitted the information to the IRS, they did not receive the information from the IRS. Thus, *since section [6103] applies only to persons who have been granted access to returns or return information by the IRS, plaintiff has no claim under this statute.*”) (emphasis added). The substantive restriction on the disclosure of confidential tax returns and

⁴ This is reaffirmed by the fact that the civil remedies available for violations of § 6103, contained in § 7431 and § 7433, both require that the actions be brought against the United States. *See Shwarz v. United States*, 234 F.3d 428, 432 (9th Cir. 2000); *see also Lampert*, 854 F.2d at 336 (“The Act creates a private cause of action by taxpayers against the United States and provides for damages.”) (citing 26 U.S.C. § 7431(c)).

return information contained in 26 U.S.C. § 6103 thus does not apply to Smith Bunday and its CPAs, or to Clark.⁵

3. Tax records, confidential or not, are discoverable

The argument put forward by the WSCPA that discovery of tax returns and returns information is restricted and “disfavored” has likewise been rejected by courts interpreting § 6103. *See* WSCPA Br. at 5-7. One court is particularly instructive on this point:

The legislative history surrounding s 6103 indicates that Congress simply never addressed the issue of access to tax information by private parties in non-tax civil cases, pursuant to court discovery orders... *This court is unwilling to relegate to obscurity the practice of permitting court ordered discovery of tax information (other than actual returns) under the predecessor statute of s 6103.* This is especially true in light of what appears to be Congressional inattention to court ordered disclosure in this type of case, rather than clear Congressional disapproval. *Judicial supervision of the discovery process will ensure that access is far from wholesale[.]*

McSurely v. McAdams, 502 F. Supp. 52, 56-57 (D.C. Cir 1980) (emphasis added) (citations omitted); *see also Heathman v. U.S. Dist. Court for Central Dist. of California*, 503 F.2d 1032, 1035 (9th Cir. 1974) (recognizing that “the district courts have held in numerous cases that tax

⁵ *See also Shollenburg v. F.D.I.C.*, 130 Fed. Appx. 889, 890 (9th Cir. 2005) (no cause of action against government agency under § 6103 when agency received plaintiff’s tax returns from former employer bank files, not I.R.S.). Although, the penalty provisions within § 6713 and § 7216 conceivably do apply to any tax preparers, assuming for the sake of argument that any of the sealed records are in fact within this definition, there is a clear exception when disclosure is ordered by a court—a fact unsurprisingly not addressed by either Smith Bunday in its Response or the WSCPA in its Amicus Brief. *See S.E.C. v. Cymaticolor Corp.*, 106 F.R.D. 545, 547 (D.C.N.Y. 1985) (discussed in the Brief of Appellant at pages 40-41).

returns are subject to discovery in appropriate circumstances”) (citation omitted).

The confidentiality of taxpayer information is not absolute and thus cannot be an absolute shield from discovery. *See, e.g., Tran v. State Farm Fire and Cas. Co.*, 136 Wn.2d 214, 227-28, 961 P.2d 358 (1998) (rejecting argument that tax returns are generally “privileged” in Washington); *Clarke v. State Attorney General's Office*, 133 Wn. App. 767, 777-78 138 P.3d 144 (2006) (citing *Tran*).⁶

Consistent with this, courts from all jurisdictions have repeatedly recognized that tax records of parties in private actions are discoverable in civil actions. *See Confidential Informant 92-95-932X v. United States*, 45 Fed.Cl. 556, 558 (2000) (citing *Taylor v. United States*, 106 F.3d 833, 836 (8th Cir.1997)); *see also St. Regis Paper Co. v. United States*, 368 U.S. 208, 218-19, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961) (recognizing that tax returns are made confidential under the penalty provision in § 7213, but “copies [of the returns] in the hands of the taxpayer are held subject to discovery”) (citation omitted). Another court summarized the general rule as such:

⁶ Other jurisdictions have likewise recognized this principle. *See, e.g., Marron v. Stromstad*, 123 P.3d 992, 999 (Alaska 2005) (“There is no absolute right to privacy from discovery orders to produce tax returns.”); *Hudson v. United Servs. Auto. Assn. Ins. Co.*, 902 N.E.2d 101, 106 (Ohio 2008) (“The Civil Rules do not provide a specific exemption to shield tax returns.”).

The argument that sections 6103 and 7213 preclude the Court's power to order tax returns produced pursuant to Fed.R.Civ.P. 26 *borders on the frivolous*. There is nothing in the statutes themselves or in their legislative history which remotely suggests that those sections were designed to regulate anything other than disclosure of tax returns by people having access to tax returns in their official capacity.

Richards v. Stephens, 118 F.R.D. 338, 339 (S.D. N.Y. 1988) (emphasis added).⁷

In actions between private parties, tax returns and return information are discoverable. This is particularly true in instances where discovery of income tax returns or return information is ordered so a party can use them for purposes of impeaching a witness or party (see below).⁸

In a cause of action, such as the present case, alleging that the accounting firm breached its fiduciary duty to a client by helping another client

⁷ Cases where courts have ordered disclosure of tax returns and return information are voluminous, particularly where the information is highly material to the underlying cause of action. See, e.g., *Gould v. Sullivan*, 54 N.Y.S.2d 430 (N.Y. Sup. 1945) (ordering disclosure of tax returns to show existence of partnership in accounting action); *Paramount Film Dist. Corp. v. Ram*, 91 F. Supp. 778, 781-82 (D.C. S.C. 1950) (plaintiff entitled to production and inspection of tax returns and records in action alleging fraud).

⁸ See e.g., *Sendi v. Prudential-Bache Securities*, 100 F.R.D. 21, 22-23 (D.D.C. 1983) (ordering disclosure of tax returns because they were relevant to claims of fraud and also the credibility of a party); *Kyser v. Garrett, Inc.*, 292 N.Y.S.2d 941, 941 (N.Y. Sup. 1968) (tax returns of plaintiff ordered disclosed to potentially show that statements made in claim were misrepresentations); *Rubenstein v. Kleven*, 21 F.R.D. 183, 184-85 (D. Mass. 1957) (ordering disclosure of tax returns to potentially establish that party was lying about having received certain sums of money); *Graham Farm Land Co. v. Commonwealth*, 70 A.2d 219, 221 (Pa. 1950) (tax return ordered disclosed to establish validity of plaintiff's land value claim). Clark only illustrates the above cases for the purposes of showing that tax records deserving of the highest protections—tax returns and return information—are routinely ordered discoverable and disclosable. Again, no party has ever shown, nor did the trial court ever conclude, that even one of the records at issue in this case were “confidential”, a “tax return” or “return information.”

embezzle funds against the interest of that client, it is inconceivable for any party to assert or imply that material tax-related records should be by default precluded from discovery.

4. No party has ever demonstrated that any of the records at issue are in fact “confidential” or “tax returns” or “return information” under the relevant federal and state definitions

Again, the above rules are only relevant if the records at issue are in fact “confidential information” and are “tax returns” or “return information” defined by § 6103(a) and RCW 18.04.405(1). The reality is that no party or non-party to the suit was ever required to show that the filed court records at issue in this case implicate any provisions addressing confidential tax information. The WSCPA’s concerns that CPAs would be required to disclose clients’ confidential tax information are not relevant unless truly confidential tax records are indeed at issue.⁹ On this point, it is crucial that the Court understand the nature of the actual records that were sealed.

⁹ See *William E. Schrambling Accountancy Corp. v. United States*, 937 F.2d 1485, 1488 (9th Cir. 1991) (“Disclosure of return information that is not confidential does not violate Section 6103.”) (citing *Lampert*, 854 F.2d at 338). The natural extent of this rule is that even records that were “confidential” as defined under 26 U.S.C. § 6103, are no longer confidential and therefore the subsequent public disclosure of the records cannot be a substantive basis for a cause of action against the government. See *Schrambling*, 937 F.2d at 1488 (listing series of cases establishing general rule that a tax payer no longer has any privacy interest in tax returns and return records once part of the public domain); see also *Miller*, 66 F.3d at 224-25.

The WSCPA Brief is vague as to how any of the records at issue in this case qualify as “tax returns and return information” as defined above. Instead, it merely characterizes the sealed records as “financial and tax records” of “non-party” clients from Smith Bunday.¹⁰ WSCPA Br. at 7.

In the immediate case, the WSCPA’s generalized concerns about the public disclosure of “confidential” tax records are unwarranted. For instance, Docket number 83 is the Second Declaration of Wright Noel (former counsel for Plaintiffs), filed on May 27, 2008. *See* CP 6-9. Two of the exhibits were filed under seal pursuant to a blanket protective order, specifically Exhibits I and P. CP 24, 55, 191-203. Exhibit I is a series of documents that were redacted by Smith Bunday for attorney-client privilege reasons, and Exhibit P is a copy of the journal entry that shows the allegedly fraudulent and repeatedly re-characterized \$100,000 transaction and the services provided by Smith Bunday that obfuscated how the proceeds of a property sale were distributed. CP 8-9, 24, 55.

¹⁰ It seems appropriate to point out the absurdity of continuing to assert that “non-party” Todd Bennett has some kind of remaining privacy interest in the financial records at issue here. Mr. Bennett is the party alleged in the underlying action to have embezzled over a hundred thousand dollars from Gerald Horrobin by colluding with his accounting firm of Smith Bunday. Despite his “non-party” status, Mr. Bennett was given leave of court to participate in oral argument and has filed several briefs at both the trial, and now appellate, levels (including an improper “Joinder” alleging that the documents sealed by the December 5, 2008 Order all contain his personal financial information and that of non-party investors). Mr. Bennett also willingly disclosed several of the sealed records to Plaintiffs during the proceedings. As addressed more fully below, it is ironic that the WSCPA is adopting a position that would facilitate keeping records that may demonstrate unlawful accounting practices from the public under the guise that it involves “non-parties” such as Mr. Bennett.

Moreover, nine out of ten exhibits attached to their Motion to Remove Documents From the Protective Order were filed automatically under seal by Plaintiffs. *See* CP56-76. Plaintiffs sought to remove these documents from the effect of the protective order expressly to counter statements made in *public filings* by Defendants, but Defendants refused to allow the public filing. *See* CP 59-62, 72.¹¹

The original Declaration of Ed Clark was filed on November 14, 2008, and had seven attached exhibits. CP 204-226 (Clark Decl. with Exs. 1-5 absent). Exhibits 1-5 of the Declaration were refiled, pursuant to the blanket protective order, on November 17, 2008, and the docket number was later ordered completely sealed. CP 316-22; CP 234 (Order sealing exhibits).¹² The exhibits sealed include emails from Ms. Robertson to Mr. Bennett regarding allocations of funds, invoices for Smith Bunday's services, and adjusting journal entries. *See* CP 316-22.

The adjusting journal entries, in fact, were central to the underlying case, specifically one where Smith Bunday on three separate occasions reclassified items on the balance sheet—allegedly to hide the diversion of

¹¹*See* Brief of Appellant at 8-10 for a more complete description of the nature of the sealed documents; *see* CP 59-61 (describing sealed exhibits with Plaintiff's Motion to Remove). Based on the descriptions from Plaintiffs' counsel, there is no meritorious argument that any of the records filed automatically constitute tax returns, return information, or even "confidential" tax information.

¹² The December 5, 2008 Order, which is the subject of this appeal, ordered that Plaintiffs' Response, which Clark filed his Declaration in support of, be refiled as well, in addition to ordering that Exhibits 1-5 of Clark's Declaration be sealed in total. *See* CP 233; CP 234-35 (Order on sealing); CP 248-56 (refiled Clark Declaration with exhibits).

partnership profits properly due to Mr. Horrobin from Mr. Horrobin to Mr. Bennett. CP 212; CP 321 (sealed exhibit 4). Exhibit 6 of the Clark Declaration, which is not sealed, demonstrates how the journal entries were altered—this document was provided voluntarily to Clark from Mr. Bennett. *See* CP 212; CP 219. The alteration was not to any of the numeric entries in the journal entries—it was always \$100,000 at issue—it was the descriptions Smith Bunday provided for the money that changed and kept changing until it was hidden from Mr. Horrobin and the I.R.S. and Mr. Bennett’s embezzlement could be kept secret.

Importantly, however, none of these documents contain tax returns, return information, or “confidential” financial information. None of the sealed documents were ever shown to contain personal financial information of a “non-party,” nor were they introduced for such purposes; the evidence was needed to establish the existence of events to counter public statements made by Smith Bunday in its briefing—not to disclose personal financial information of non-parties.¹³

¹³ It should also be mentioned that there has not been any other “non-party” other than Todd Bennett (the person alleged to have colluded with Smith Bunday to embezzle over a hundred thousand dollars from Gerald Horrobin) that has objected to the public disclosure of any of the records sealed here. *See also* Reply Brief of Appellant at 2-3. The WSCPA is arguing on behalf of CPAs’ interest largely on the basis of protecting these unidentified “non-party” interests.

The records sealed here do not constitute “tax returns” under the definition established in 26 U.S.C. § 6103(b)(1).¹⁴ This is aside from the earlier point that the rule only precludes government agents from disclosing such returns.¹⁵

Likewise, none of the sealed documents constitute “return information” under the definition in § 6103(b)(2)(a-d).¹⁶ Nor has any party ever asserted that any sealed court filing actually meets any part of this definition—such as the requirement that the IRS actually receive the information. *See Baskin v. United States*, 135 F.3d 338, 342-43 (5th Cir.

¹⁴ “The term ‘return’ means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.” *See Ryan v. Bureau of Alcohol, Tobacco and Firearms*, 715 F.2d 644, 646 (D.C. Cir. 1983).

¹⁵ *See B.M. v. State*, 335 N.W.2d 420, 421-22 (Wis. 1983) (holding that § 6103 does not preclude a taxpayer from having to produce a copy of his own return in discovery).

¹⁶ “(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense; (B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110; (C) any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement; and (D) any agreement under section 7121, and any similar agreement, and any background information related to such an agreement or request for such an agreement, but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer [.]”

1998) (describing definition of “return information”); *see also Thomas v. United States*, 890 F.2d 18, 21 (7th Cir. 1989).¹⁷

If none of the sealed or redacted records meet the above definitions, there is no presumption of “confidentiality” as asserted by Smith Bunday, and the concerns of the WSCPA of this Court ruling that confidential tax returns and return information of non-parties be made public in an unredacted form simply dissolve.¹⁸

B. WSCPA’s Position Undermines the Policies and Values It Claims to Uphold and Protect

The position of the WSCPA, implying that the records at issue in this case should be precluded in total from public scrutiny to benefit CPAs, is at odds with the values the organization promotes. According to the WSCPA, its “primary purposes are promotion and maintenance of high professional standards and integrity in the practice of accounting in

¹⁷ It should also be noted that § 6103 and the general policy of the statute does not preclude a trial court in Washington from ordering disclosure of tax returns. *See Commonwealth v. Burgess*, 688 N.E.2d 439, 450-51 (Mass. 1997) (rejecting argument that § 6103 preempts state court’s ability to issue order forcing party to sign consent decree to IRS allowing disclosure of tax returns).

¹⁸ The WSCPA, in addition to citing inapplicable federal statutes, cites RCW 18.04.405(1) for the general rule that those licensed as CPAs are not allowed to disclose “confidential” information gleaned in a professional transaction. While this is true, no party has shown, or was ever required to show by the trial court, that any of the records sealed in this case are actually “confidential”, or that if any were confidential, disclosure would not be appropriate to resolve the issues in the underlying civil case. The same provision cited by the WSCPA allows for disclosure by consent of the tax payer “or as disclosure *may be required by law* [and] *legal process*.” RCW 18.04.405(1). The appellate courts interpret this to mean that disclosure may be necessary in a civil action to fairly resolve the issues at hand. *See In re Marriage of Irwin*, 64 Wn. App. 38, 52, 822 P.2d 797 (1992).

the state of Washington.” See WSCPA Brief at 2. The WSCPA website echoes these statements as well, providing that one of its core values is “*Integrity* - We conduct ourselves with honesty and professional ethics.”¹⁹

Based on the position taken by the WSCPA, the public would be prevented from ever knowing the substantial allegations of fraud, mismanagement, and breach of fiduciary duties against Smith Bunday²⁰— a member of the WSCPA and a private accounting firm that presumably numerous citizens and businesses trust with their private financial information.²¹ Clark has absolutely no interest in invading the legitimate privacy rights of persons uninvolved with the underlying case, but no party has shown that any of the records that were sealed or redacted meet the criteria of being “confidential,” let alone that the trial court would have sealed or refused to unseal under *Ishikawa* had the court applied it. In reality, there is also no indication that the WSCPA knows what the content of any of these records actually are, thus necessarily precluding the

¹⁹ See <http://www.wscpa.org/Content/Community/AboutWSCPA.aspx>. Also instructive are the WACs cited by the WSCPA that relate to the conduct of licensed CPAs in Washington. See WSCPA Brief at 8. In particular WAC 4-25-610 lists explicit mandates of behavior and values that CPAs are expected to abide by. Of note is subsection (2), which relates to the “public interest”: A person representing oneself as a licensee, CPA-Inactive certificate holder, or nonlicensee firm owner, and/or using the CPA or CPA-Inactive title, and employees of such persons *must accept the obligation to act in a way that will serve the public interest, honor the public trust, and demonstrate commitment to professionalism.* (emphasis added). The WAC, at subsection (3), also instructs that CPAs “must perform all professional responsibilities with the highest sense of honesty.” In light of the serious allegations of behavior by CPAs that demonstrate the polar opposite of such values, the WSCPA’s position is, again, confounding.

²⁰ See CP 257-72 (Complaint against Smith Bunday).

²¹ See <http://www.sbbb.com/profile.html>.

organization from having any meaningful commentary on the propriety of any of the trial court's actions.

Courts from all jurisdictions have repeatedly recognized that the court should be wary of sealing evidence supporting allegations of impropriety of those that provide professional services to the public. For instance, in *Coopersmith v. Gold*, 156 Misc.2d 594 (N.Y. Sup. 1992), a newspaper intervened to challenge the sealing of evidence gleaned in a malpractice suit against a psychiatrist; despite the doctor being exonerated, the court agreed with the newspaper, vacated the sealing order, and cited another case in stating:

[i]n balancing the interests of the parties with those of the public, it is clear that the right of the public to be informed of the allegations in these papers far outweighs the rights of the parties ... (These allegations) exposed conduct which can have an adverse impact on a large segment of the public. The public not only has a right to know, it has a need to know.

156 Misc.2d at 604 (citation omitted). The court continued, stating that

presumption of openness must be given effect to its records and decisions particularly where, as here, Dr. Gold practices in a highly regulated profession and female patients ought to be aware of the serious allegations made so that they may make an intelligent decision to become or continue as a patient.

Id. at 607. Likewise, in *Shenandoah Pub. House, Inc. v. Fanning*, 368 S.E.2d 253 (Va. 1988), a party brought a wrongful death action, including a claim of medical malpractice, against several individual and corporate

defendants. The trial court agreed to seal all the files in the action, and a newspaper successfully intervened to challenge the sealing order. 368 S.E. at 253-54. The appellate court vacated the sealing order, ruling that the party arguing in favor of sealing had not met its burden: “Nor do we believe that risks of damage to professional reputation, emotional damage, or financial harm, stated in the abstract, constitute sufficient reasons to seal judicial records.” *Id.* at 256. Similar to the court in *Coopersmith*, the court noted that when dealing with professional malpractice cases, such as those in the medical realm, “the people have a vital interest, one of personal and familial as well as community concern[.]” *Id.*

Analogous to the medical malpractice scenario, the public has an undeniable interest in whether or not the private businesses that manage their personal financial and tax records are scrupulous and ethical. Because of the manner in which the court sealed, and then refused to unseal the records at issue, the constitutional access right of the public (subsumed in the *Ishikawa* test) was never addressed. Public disclosure of evidence of fraudulent accounting practices can only aid in the detection and prevention of such practices by CPAs and accounting firms that have the “integrity” so valued by the WSCPA. Relying on only nebulous assertions of the confidential nature of the records at issue and how they could impact the privacy rights “third-parties” (presumably referring at

least in part to Mr. Bennett) cannot be, and is not, legally sufficient, especially since Rondi Bennett and Gerald Horrobin, two of Mr. Bennett's partners in the subject enterprise, have consented to the disclosure of the records of this business.

III. CONCLUSION

This case demonstrates the necessity of applying the *Ishikawa* test whenever a court contemplates sealing or redacting court records. Without it, and with vague assertions of "confidentiality" being all that the WSCPA argues is required to preserve secrecy, parties whose cases implicate issues that greatly concern the public welfare would be allowed to litigate in private, settle matters quietly, and with the presumption in place *against* public scrutiny: a totally opposite standard to that mandated under the State Constitution and all the relevant case law.

Respectfully submitted this 28th day of December, 2009.

By: 
Michele Earl-Hubbard, WSBA #26454
David Norman, WSBA #40564
Allied Law Group, LLC
2200 Sixth Avenue, Suite 770
Seattle, WA 98121
Attorneys for Intervenor/Appellant



CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on December 28, 2009, I caused the delivery by U.S Mail a copy of the foregoing Answer to:

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

Rondi Bennett
PO Box 53224
Bellevue, WA 98015
Plaintiff, *pro se*/Respondent

Gerald Horrobin
303 2nd St. S. #C3
Kirkland, WA 98033
Plaintiff, *pro se*/Respondent

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

FILED
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
2009 DEC 29 AM 10:33

Katherine George
Harris Benis & Spence, LLP
2101 Fourth Avenue, Suite 1900
Seattle, WA 98121
Attorney for Amicus ADNW and WNPA

Catherine Smith
Edwards, Sieh, Smith & Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101
Attorney for Respondents

Dated this 28th day of December, 2009 at Seattle, Washington.


David M. Norman