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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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D. EDSON CLARK,

Appellant/Intervenor,

v.

SMITH BUNDAY BERMAN BRITTON, P.S., *et al.*,

Respondents.

CORRECTED RESPONSE BY RESPONDENTS
SMITH BUNDAY BERMAN BRITTON, P.S., AND
SHARON ROBERTSON TO BRIEF OF APPELLANT

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I. INTRODUCTION

The notices of appeal filed by appellant D. Edson Clark (plaintiffs' expert witness and intervenor in the trial court action) seek review of a single order: the Order Granting on Motion to Intervene and Denying on Motion to Unseal, filed December 5, 2008 ("the appealed order"). (CP 231-33) No other order of the trial court is at issue on this appeal, despite Clark's efforts to cloud the record before this Court by repeated discussion of other trial court orders such as the Stipulation and Protective Order, filed December 11, 2007 (CP 1-5) and the Stipulation and Order Replacing Documents with Redacted Documents, filed December 5, 2008 (CP 227-30).

The appealed order requires the sealing of only two documents first filed on November 14, 2008: plaintiff Horrobin's brief in opposition to defendants' summary judgment motion (Docket #153) and Clark's declaration (as plaintiffs' expert witness) in support of that brief (filed twice as Docket #154 & #159). (CP 295-315, 204-26 & 316-22) The appealed order (and therefore this appeal) does not involve the sealing of thousands of pages of discovery, despite Clark's current efforts to suggest otherwise.

Further, the appealed order expressly states that, although

Docket #153, #154 and #159 were to be filed under seal, redacted versions of those documents would be placed in the public record. (CP 233) As a result, the appealed order does not deny the public (including Clark) open access to those 2 documents but only to some redacted portions of plaintiff Horrobin's brief and Clark's declaration in support of that brief; further, only a few pages of, not all, exhibits to Clark's declaration were sealed. The limited redactions and sealing were agreed to by plaintiff Horrobin (under whose employ Clark was working) and defendants through a stipulated order on redaction, which neither plaintiffs nor even Clark have asked to have reviewed by this Court. (CP 227-30)

Despite all these facts, Clark now argues that the trial court erred in reaching the measured decision reflected in the appealed order. Respondents Smith Bunday Berman Britton, P.S., and Sharon Robertson (defendants in the trial court action and collectively "Smith Bunday" or "respondents" herein) respectfully disagree and ask this Court to affirm the trial court's decision. That decision should be affirmed because the trial court applied the proper standard and did not abuse its discretion in issuing the appealed order. The trial court properly concluded there was good cause not to unseal confidential discovery documents or pleadings

reflecting their content that were filed in the public record by plaintiff Horrobin but that were never reviewed or used by the trial court in any decision in the case.

II. ASSIGNMENT OF ERROR

Smith Bunday does not assign error to the appealed order. Smith Bunday disagrees with each of appellant Clark's assignments of error.

III. STATEMENT OF THE CASE

The facts material to this appeal are set forth in Defendants' Response to Nonparty Ed Clark's Motion to Intervene (with subjoined declaration of counsel), filed November 25, 2008 (CP 135-38), in Defendants' Response to Nonparty Ed Clark's Motion to Unseal (with subjoined declaration of counsel), filed December 3, 2008 (CP 167-68), and in the Response of [Nonparty] Todd Bennett to Motion to Intervene, filed November 25, 2008 (CP 145-48), and are summarized here.

Respondents are certified public accountants who provide tax preparation services. (CP 135) After filing this action, plaintiffs served discovery requests for production of Smith Bunday's documents for several of its tax clients who were *not* parties to the case, including but not limited to the limited liability company

Heritage Corporate Center, LLC (“HCC”). *Id.* Further, all members except one of that LLC (plaintiff Horrobin) were not parties to this case. *Id.* Smith Bunday’s tax workpapers disclosed tax-related information regarding the LLC itself and all its individual members (such as the managing member, Todd Bennett), again, none of whom were parties to this case except one individual member, plaintiff Horrobin. *Id.*

As tax preparers, respondents are expressly prohibited by Internal Revenue Code sections 6713 and 7216 and their supporting regulations from disclosing tax-related information without written consent (in a prescribed form) from the taxpayers whose information is sought or a court order authorizing the requested disclosures. *See* 26 U.S.C. §§ 6713 & 7216, 26 C.F.R. § 301.7216. No such written consent was provided by nonparties Todd Bennett, HCC and the other members of HCC or by any other nonparty tax clients of Smith Bunday. (CP 135)¹ As such,

¹ The trial court record shows that Smith Bunday repeatedly told the trial court and plaintiffs’ counsel that they were mere stakeholders of documents containing confidential and personal financial information relating or referring to federal income tax returns and were therefore prohibited by the Internal Revenue Code from disclosing such documents without first receiving written consent from all taxpayers whose information was sought or a court order authorizing the requested disclosures. *See, e.g.,* Defendants’ Opposition to Plaintiffs’ Motion to Compel Discovery, filed February 5, 2008, at 2 & 9-10 (Docket #25; Supp. CP 324 & 331-32); Defendants’ Response to Plaintiff’s Motion

respondents were required by these federal laws to object to the requested discovery and they did so in written responses to them after having discussed such objections with plaintiffs' counsel in a November 26, 2007 discovery conference. *Id.* See also Defendants' Opposition to Plaintiffs' Motion to Compel Discovery, filed February 5, 2008, at 5-7 (Docket #25; Supp. CP 327-29).

To address the confidentiality objection and, at the same time, to expedite discovery, Smith Bunday agreed to plaintiffs' proposed protective order, which was prepared by plaintiffs' counsel, and on December 11, 2007, that order was entered so that confidential tax-related and other personal financial information of both parties and nonparty witnesses could be produced in discovery in this case. (CP 1-5 & 135) That order permitted the parties to designate as "confidential" any documents produced that contain "confidential . . . financial information . . . or other sensitive information of a non-public nature" and expressly

to Remove Documents from the Protective Order, filed November 4, 2008, at 2-3 (Docket #146; Supp. CP 351-52); Defendants' Response to Nonparty Ed Clark's Motion to Intervene, filed November 25, 2008, at 2 (CP 135); Defendants' Response to Nonparty Ed Clark's Motion to Unseal Court Records, filed December 3, 2008, at 1-3 (CP 166-68). Nonparty Todd Bennett underscored this issue with his own filings in which he expressly asked the trial court to consider the detrimental impact on nonparties of disclosing their confidential financial and tax information in the public record without sealing or redaction. (*See, e.g.*, CP 145-48)

provided that “confidential documents and all information contained therein” shall be used “**solely** for the prosecution and/or defenses of **this action**, and shall not be further disseminated.” (CP 2-3) (emphasis added) The protective order also did not permit use of “confidential” documents and information in this action “unless the **document, or the portion of the court paper where the document is revealed**, is appropriately marked and separately filed under seal.” (CP 3) (emphasis added)

The confidentiality of tax-related documents and personal financial information was an issue brought before the trial court early in the proceedings. Specifically, when plaintiffs filed a motion to compel in an effort to obtain such confidential documents from Smith Bunday, nonparty Todd Bennett filed and was granted a motion for an order that allowed him (through counsel) to participate “in the oral argument and discovery proceedings in this matter related to his personal and business financial records.” Order Granting Motion to Participate in Oral Argument Regarding Plaintiff’s Motion to Compel, filed March 18, 2008 (Docket #48, Supp. CP 348). This early order was a clear recognition by the trial court that important privacy interests of **nonparties** were at stake in the discovery and motion practice in the case for which

the court would have to weigh the competing interests of “privacy vs. access” in deciding what documents and information were discoverable and/or in the public record, just as it later did in deciding what records to seal. *See also* note 1, *supra*.

On August 1, 2008, the trial court dismissed with prejudice all of plaintiff Rondi Bennett’s (and some of plaintiff Horrobin’s) claims in response to Smith Bunday’s motion for judgment on the pleadings. Order, dated August 1, 2008 (CP 243-44). As reflected in the trial court’s docket, Smith Bunday then moved on October 7, 2008 to dismiss all plaintiff Horrobin’s remaining claims on summary judgment.

On October 28, 2008, plaintiff Horrobin identified Ed Clark as an expert witness in this action in his primary witness disclosure served on respondents. (CP 136) Under the express terms of the protective order, an expert witness, including Clark, was required to read that order and agree “in writing to be bound by its terms” before plaintiffs’ counsel disclosed to him documents produced in discovery and designated by Smith Bunday as “confidential.” (CP 3)

On October 29, 2008, plaintiff Horrobin filed a motion for an order to remove certain documents from the protective order so

they could be attached to the declaration of plaintiffs' expert witness Clark to be filed in response to Smith Bunday's pending summary judgment motion. See Plaintiff's Motion to Remove Documents from the Protective Order, filed October 29, 2008 (CP 56-76). Respondents opposed that motion. (Docket #146; Supp. CP 350-60) The trial court subsequently entered an order deferring a decision on that motion, stating that the motion would "be decided upon receipt of said documents," at which time the court would "review them first to make a determination" on the motion to remove them from the protective order. See Order, filed November 10, 2008 (CP 273-74).

At 10:47 a.m. on November 14, 2008 and before the deadline for plaintiff Horrobin to file his opposition papers to Smith Bunday's summary judgment motion, counsel for nonparty Todd Bennett sent an email to plaintiffs' counsel, copied to Smith Bunday's counsel, which "confirm[ed]" acceptance by "both Smith Bunday and Todd Bennett" of plaintiff Horrobin's earlier "offer" to resolve his remaining claims in the case as well as threatened claims against nonparty Todd Bennett and attaching a "CR 2A agreement that reflects" the terms of the agreement, including that Smith Bunday agreed to strike its pending summary judgment

motion. (CP 136-37) Plaintiffs' counsel did not respond until 2:02 p.m., at which point he requested a new term but stated: "If you make that change, I think we are good to go." (CP 137)

Plaintiffs' counsel signed and sent defense counsel the CR 2A agreement at 4:00 p.m., which incorporated the new term with Smith Bunday's and nonparty Todd Bennett's consent. *Id.* At 4:09 p.m., plaintiffs' counsel advised Smith Bunday's counsel and counsel for nonparty Todd Bennett **for the first time** that "[u]nfortunately, I have to run and am not able to wait to see if the CR 2A Agreement gets signed by everyone prior to filing Mr. Horrobin's response to Smith Bunday's sj motion." *Id.* The trial court file shows that plaintiff Horrobin's brief and Clark's supporting declaration were first filed nearly an hour before this message at 3:18 p.m., at which point Smith Bunday had not been served or notified of the filing. *Id.* At 4:17 and 4:26 p.m., respectively, counsel for nonparty Todd Bennett and Smith Bunday signed and sent the CR 2A agreement to plaintiffs' counsel. *Id.*²

² At an unknown time on November 14, 2008, this Court may take judicial notice that Clark also moved to amend his complaint in one of three actions he then had pending against the Washington State Board of Accountancy in Thurston County (Thurston County Superior Court nos. 08-2-00890-5, 08-2-02136-7, and 08-2-02649-1), relating to that Board's prior disciplinary proceeding against Clark. (CP 137) This Court may also take judicial notice that, on November 24, 2008, Clark filed yet another lawsuit

The pleadings filed by plaintiff Horrobin on Friday, November 14, included his brief and the declaration of plaintiff's expert witness Clark in opposition to Smith Bunday's summary judgment motion. (CP 295-315, 204-26 & 316-22) Clark's declaration consists primarily of his opinion, which was largely based on his review of confidential documents produced by Smith Bunday in this action and on the declarations of defendant/respondent Sharon Robertson and nonparty witness Todd Bennett filed in support of Smith Bunday's summary judgment motion. Neither defendant/respondent Robertson nor nonparty Todd Bennett was deposed in this case nor did plaintiffs ever seek such depositions, or, in fact, any other deposition in the 13 months after they filed this action. (CP 139)

As required by the CR 2A agreement, Smith Bunday told the trial court on Monday, November 17, that the action was resolved by agreement and that, under that agreement, the trial court could remove Smith Bunday's summary judgment motion from its calendar. (CP 137) The same day, Smith Bunday's

relating to the Board's disciplinary action against him, this time in King County Superior Court (cause no. 08-2-40644-0). The King County court records show that Clark's complaint was filed by the same attorneys who represented plaintiffs in the present case and who had employed Clark as their expert witness in the trial court action underlying the present appeal.

counsel and counsel for nonparty Todd Bennett told plaintiffs' counsel that portions of some of the documents filed by plaintiff Horrobin on Friday, November 14 should have been filed under seal because of the protective order and/or should be redacted because there was not a good faith basis in the factual record for certain arguments in them. *Id.*

Specifically, Smith Bunday objected to 2 sentences in plaintiff Horrobin's brief because, in the absence of any testimony authenticating the author of certain documents attached as exhibits to Clark's declaration, respondents did not believe there was factual support in the record for those 2 sentences. (CP 168-69) Also, since Clark's declaration was based solely on his view of carefully selected portions of only some of the confidential discovery documents produced by Smith Bunday, without any testimony from the authors or even recipients of those documents as to the facts and circumstances of their creation, use or purpose, respondents did not believe there was factual support for many of Clark's subjective (and self-serving) opinions in his declaration. (CP 139)

More importantly, Smith Bunday and nonparty Todd Bennett both objected to disclosures within plaintiff Horrobin's brief and

Clark's declaration "revealing" the content of documents marked "confidential" in violation of the express terms of the protective order. (CP 137 & 227-30)³ Smith Bunday and nonparty Todd Bennett also objected then to the copies of several confidential documents attached as exhibits to Clark's declaration because they had been altered by the addition of post-production, handwritten notes (presumably by Clark), which would make the documents misleading to the trial court in their altered form. (*See, e.g.*, CP 204-26 (Exhibit 1); *see also* CP 147 & 169)

After several conversations on all these objections, plaintiffs and Smith Bunday stipulated on November 24, 2008 to a proposed order requiring the clerk of the court to replace plaintiff Horrobin's brief and Clark's declaration in response to Smith Bunday's summary judgment motion (both first filed November 14, 2008) with redacted versions of those documents, while requiring those exhibits to Clark's declaration that consisted of copies of Smith Bunday's "confidential" discovery documents to remain under seal. (CP 138 & 227-30)

³ As of November 17, Smith Bunday's and Todd Bennett's counsel believed the exhibits to Clark's declaration had been filed under seal because they were then told by plaintiffs' counsel that all exhibits to Clark's declaration were filed under seal and they did not, as a result, raise any objection then to their filing. (*See* CP 231-32)

Because plaintiff Horrobin and Smith Bunday resolved this action on November 14, 2008 as reflected in their CR 2A agreement, Smith Bunday's summary judgment motion was never heard and the trial court never considered papers filed by the parties in support of and opposition to that motion, including plaintiff Horrobin's opposition brief and the declaration of plaintiff's expert witness Clark first filed late in the day on November 14 (after Smith Bunday believed the action had been resolved by the parties' earlier oral and written communications that same day). Further, since the court never considered Smith Bunday's summary judgment motion, it also never considered the papers filed in support or in opposition to plaintiff Horrobin's motion to remove that it had earlier deferred until "receipt of said documents" (*i.e.*, until after plaintiff Horrobin actually filed his papers in opposition to Smith Bunday's summary judgment motion (and Smith Bunday filed reply papers) and the trial court read all the parties' papers to decide the motion). (CP 274) *See also* discussion at 21-22, *infra*.

Despite the CR 2A agreement resolving the actual case as well as striking Smith Bunday's pending summary judgment motion, plaintiffs' expert witness Clark then moved to intervene

and unseal the documents he thought had been filed under seal on November 14, 2008 by plaintiff Horrobin (his employer). Smith Bunday as well as nonparty Todd Bennett opposed the requested unsealing for the same reasons they had requested redactions in plaintiff Horrobin's brief and Clark's declaration in support. (CP 138-43, 145-48 & 168-72) In response, the trial court entered the appealed order which, among other things, noted that "none of the contested documents related to defendant and nonparties['] income tax information were in fact filed under seal by plaintiffs." (CP 231) As a result and after stating its findings of fact and conclusions of law, the trial court then ordered that the original brief and Clark declaration filed on November 14, 2008 be sealed and that, "[b]y prior stipulation," redacted versions of those documents would "remain in the record" for access by the public. (CP 233)

On February 2, 2009, a Stipulation and Order of Dismissal with Prejudice was filed in the trial court action, terminating all remaining claims asserted by plaintiff Horrobin against Smith Bunday. (See CP 246-47)

IV. STANDARD OF REVIEW

On appeal, review to determine the applicable standard to be used by a trial court for sealing or unsealing records is *de novo*. *In re Marriage of R.E.*, 144 Wn. App. 393, 399 & n. 9, 183 P.3d 339 (2008). However, if the trial court applied the correct standard, then appellate review of the trial court's "decision to seal or unseal records [is] for abuse of discretion." *Id.* The trial court here applied the correct standard for sealing/unsealing records, so review of the appealed order is only for abuse of discretion.

V. ARGUMENT & AUTHORITY

The gist of intervenor Clark's argument is that the trial court purportedly "failed to apply the correct standard in deciding to keep the records sealed" and "failed to perform the required analysis necessary to justify overriding the public's right of access to court records." Appellant's Br at 13.

Clark acknowledges that the standard set forth in "*Ishikawa* is the proper standard for determining whether documents should be sealed or unsealed." Appellant's Br at 30, citing *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). In the appealed order, the trial court expressly referred to the "factors" set forth in the *Rufer* case that a court should "follow" in deciding

whether documents should be sealed. (CP 233, citing *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 114 P.3d 1182 (2005)) The “factors” that the Washington Supreme Court “follow[ed]” in *Rufer* were the same as the standard it applied in *Ishikawa*, specifically:

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. We are merely articulating the standard a trial court should use when confronted with a motion to seal records. It is within the trial court’s discretion to apply that standard and determine if the interests asserted by the party wishing to seal records are compelling enough to override the presumption of openness. . . . [T]his analysis must be done on a case-by-case basis.

154 Wn.2d at 549-50 (emphasis added). Thus, the trial court applied the correct standard – the *Ishikawa/Rufer* standard – for sealing or unsealing records. *See also State v. Waldon*, 148 Wn. App. 952, 965, 202 P.3d 325 (2009) (“The constitutional standard for restricting access to court proceedings and records is articulated in *Ishikawa* and its progeny”).

Applying the correct (*Ishikawa/Rufer*) standard, the trial court was then permitted to exercise its discretion to decide whether to unseal records as requested by Clark. *See In re*

Marriage of R.E., 144 Wn. App. at 399 & n. 9. Before reaching that decision, the trial court found as a matter of fact that it “did not review or consider the summary judgment papers or supporting documents involved [and] made no decision based upon” those documents, noting that “the parties settled the very day of the filing of the documents seeking to be unsealed.” (CP 232)

In light of those facts, the trial court then properly exercised its discretion and held as a matter of law that “there is no public interest involved where this Court has made no decision and has never even considered the documents” filed under seal (CP 233), citing *Rufer* in which the Washington Supreme Court ruled:

We have already held that article I, section 10 is not relevant to documents that do not become part of the court’s decision making process. . . . As long as the opposing party has a valid interest in keeping the information confidential, there is very little, if any, interest of the public or the moving party to balance against that asserted interest.

Rufer, 154 Wn.2d at 548 (citation omitted).

In reaching this decision, the trial court reasoned that, as the Washington Supreme Court acknowledged in *Rufer*, the Washington constitution “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.” (CP 232-33, quoting *Rufer*, 154 Wn.2d at 541, quoting *Dreiling v. Jain*, 151 Wn.2d 900, 909-10, 93 P.3d 861 (2004)) The trial court further noted: “The documents sealed here involve income tax information of persons and corporations [and] are of a sensitive nature and might be sealed in any case.” (CP 232-33)

However, the trial court expressly declined to reach that issue, which is therefore not before this Court on appeal. Clark's discussion of the Internal Revenue Code and some of its supporting regulations is not only misguided then but also not relevant to the merits of his appeal and should be disregarded by this Court. *See, e.g.*, Appellant's Br at 38-41.⁴ In short, the trial court applied the correct standard under *Ishikawa/Rufer* and then properly exercised its discretion in reaching its decision that the

⁴ And, at various points, Clark's irrelevant argument misstates the record in any event. For example, Clark states that “one of the records is an email between Smith Bunday and Todd Bennett that is completely out of the purview of the federal tax regulations.” Appellant's Br at 41. That is not correct. Exhibit 1 to Clark's declaration is an email between Smith Bunday and Todd Bennett that expressly refers to the federal income tax returns of two nonparties and some of the specific content of those returns. (CP 204-26, Exh 1) Exhibit 3 to Clark's declaration is another email between Smith Bunday and Todd Bennett that expressly refers to federal income tax issues relating to the tax returns of at least five nonparties. *Id.*, Exh 3.

records at issue should remain sealed, providing citation to applicable case law supporting its decision.

Although the appealed order does not discuss each and every factor in the *Ishikawa* test for sealing/unsealing documents, all those factors had been extensively briefed by the parties before the trial court reached its decision. *See, e.g.*, Defendants' Response to Nonparty Ed Clark's Motion to Intervene, filed November 25, 2008 (CP 140-43, specifically discussion at 7 (CP 140) re sections 6713 and 7216 of the Internal Revenue Code and the U.S. Constitution giving taxpayers a right of privacy "so they may expect their federal income tax information to be treated in a confidential manner and not simply filed in open court"); Defendants' Response to Nonparty Ed Clark's Motion to Unseal, filed December 3, 2008 (CP 169-72, specifically discussion at 5 (CP 170) stating: "In contrast to Clark's unarticulated 'public' need, the individual 'need' of nonparties for privacy and sealing the record is specifically articulated in the Internal Revenue Code, which gives all taxpayers a right of privacy"). *See also* Response of [Nonparty] Todd Bennett to Motion to Intervene, filed November 25, 2008 (CP 145-48); (Nonparty) Bennett's Response

to Mr. Clarke's [sic] Motion to Unseal, filed December 15, 2008 (CP 187-88) and discussion at 4-7, *supra*.

It is apparent on the face of the appealed order that the trial court saw no need to discuss each and every requirement of the *Ishikawa* test since the key requirement (public interest) for unsealing had not been met. In this sense, Judge Rogers' reasoning closely tracks the expressly approved trial court procedure affirmed in *Rufer*. There, the Washington Supreme Court observed in 2005 that "the trial court did not specifically apply the *Ishikawa* analysis" in that case but "it effectively did so by allowing all parties to assert their respective interests, weighing those interests, and applying the compelling interest standard in making its determination. It appears from the record that both parties were given ample opportunity to assert their positions to the trial court regarding whether or not records should be sealed following trial." *Rufer*, 154 Wn.2d at 551. In any event, the actual 1982 *Ishikawa* test only expressly requires the court to specifically articulate the 4th factor (court must weigh competing interests of proponent of sealing vs. public), which is precisely what the trial court did here. See *Ishikawa*, 97 Wn.2d at 38 (the trial court's

consideration “of these issues [referring only to 4th factor] should be articulated in its findings and conclusions. . . .”)

Despite its excessive verbiage, there is nothing in Clark’s brief to show that the trial court abused its discretion in issuing the appealed order.⁵ For example, Clark’s reliance on *Treseler* for the proposition that documents filed with but not considered by the trial court should not be sealed is misplaced. See Appellant’s Br at 14-15, citing *In the Marriage of Treseler & Treadwell*, 145 Wn. App. 278, 187 P.3d 773 (2008). *Treseler* is distinguishable because, in *Treseler*, the trial court **did** consider some of the documents at issue, making the situation there quite different than the situation in the present case. *Id.* at 285.

Clark then tries to argue that the trial court, in the appealed order, “fail[ed] to explain why it allowed sealing of records filed **and reviewed** by the court in connection with [plaintiff Horrobin’s]

⁵ [Footnote deleted]

Motion to Remove” Documents from the Protective Order. Appellant’s Br at 33 (emphasis added). But Clark is incorrect in stating that the trial court “reviewed” the contested documents in response to the motion to remove. Plaintiff Horrobin’s motion to remove was brought because, as part of his opposition to Smith Bunday’s then pending summary judgment motion, he purportedly wanted to file without seal certain documents he had obtained in discovery that were marked “confidential.” However, by December 5, the trial court had already explained in its November 10, 2008 Order Deferring Plaintiffs’ Motion to Remove Specific Documents from the Protective Order (CP 273-74) that it would wait to decide that motion until *after* it had “receipt of said documents” actually filed by plaintiff Horrobin in opposition to the summary judgment motion. (CP 274) Only then would the court “review them” to “make a determination” on sealing. *Id.* Since the summary judgment motion was never heard (and Smith Bunday did not even file reply papers), the trial court confirmed in the appealed order that it “did not review or consider the summary judgment papers or supporting documents involved” (CP 232), which would include those referenced and attached to plaintiff Horrobin’s earlier motion

to remove. Clark's argument to the contrary ignores the clear trial court record.⁶

Clark further argues that GR 15 required a motion on sealing, but the trial court did, in fact, hear (and decide) Clark's motion to unseal, which addressed the very issues that Clark now seems to suggest were not properly heard. *Compare* Appellant Br at 23-24 *with* CP 170, specifically stating, "In contrast to Clark's unarticulated 'public' need, the individual 'need' of nonparties for privacy and sealing the record is specifically articulated in the Internal Revenue Code, which gives all taxpayers a right of privacy" In any event, GR 15 does not require a party to move to seal records and states only that "any party *may* request a hearing to seal or redact the court records" (emphasis added). Similarly, KCLGR 15 indicates which judges shall hear motions to seal or redact that are presented "in accordance with GR 15" but does not require a party to file such a motion. Even Clark admits that a "hearing [on a motion to seal] may not be required to be in person,"

⁶ Clark is also incorrect in stating that "[t]he parties here were allowed to file [the contested] records under seal merely because of a 'confidential' stamp on the documents and not after a motion and hearing." Appellant's Br at 33. The record shows that the court clerk sealed the contested documents only after the trial court issued the appealed order, which was fully briefed by the parties and by intervenor Clark himself. *See* discussion at 14, *supra*.

which at minimum is a concession that oral argument is not required on a motion to seal. Appellant's Br at 23.

Clark then argues that "the trial court must consider redaction when deciding to seal or unseal – there is no indication this was done here." (*Id.* at 27) That is not correct. The trial court expressly stated in the appealed order that it "reviewed all pleadings in the matter," including the parties' stipulated order on redaction (including sealing some but not all exhibits) of the two pleadings at issue (plaintiff Horrobin's brief opposing summary judgment and Clark's declaration in support) and then ordered that those two documents "will remain in the record **with certain redactions.**" (CP 231 & 233) (emphasis added) Further, the redacted versions, which the trial court plainly saw (as opposed to the sealed documents, including exhibits, that the court said it never reviewed) before it ordered their filing, speak for themselves and show that the overwhelming majority of the content of the two pleadings (including many unsealed exhibits to Clark's declaration) is publicly accessible. (*See, e.g.*, CP 248-56)

Clark further argues that the appealed order violates KCLGR 15(b) because "the Order caption does not mention sealing or redaction other than in the 'Clerk's Action Required'

section.” Appellant’s Br at 29. However, that local rule only requires that the order be “clearly captioned” as an order to “destroy, redact or seal all or part of a court record.” KCLGR 15(b). The appealed order is captioned “Order Granting on Motion to Intervene and Denying on Motion to Unseal / Clerk’s Action Required on Sealing Docket Nos. 153, 154, 159.” (CP 231) An order “denying on motion to unseal” is, on its face, an order to seal. And there is nothing in KCLGR 15(b) that disallows as part of an order’s caption the “clerk’s action” language. The caption of the appealed order is crystal clear that it is an order sealing three specific documents identified on the trial court’s docket as nos. 153, 154 and 159. As such, the caption does not violate KCLGR 15(b).

Clark finally argues that the appealed order is “overbroad in that there appears to be no set time limit, and the records are still sealed after the conclusion of the underlying case.” Appellant’s Br at 38. The trial court did not state a “set time limit” for the sealing because the appealed order was ordered at the conclusion of the case and only after the parties had signed a CR 2A agreement that ultimately ended the litigation between them. Thus, when the trial court entered the appealed order, it was obviously ruling that

certain records be sealed permanently because (as the court stated) it never considered the sealed records in its decision-making process since Smith Bunday's summary judgment motion was never heard. Those facts will not change at some future date so there was no reason for the trial court to set an "expiration date" for the sealing order.

In reality, Clark's arguments are a transparently self-serving tempest in a teapot. The record shows that Clark was hired by plaintiffs as their expert witness and, in that capacity, was required to read and agree in writing to be bound by the protective order previously entered in this case, which required the parties to file under seal documents designated as "confidential." (CP 1-5) Clark then prepared a declaration for his employer's (plaintiff Horrobin's) use in opposing Smith Bunday's summary judgment motion. (CP 204-26) Clark obviously had access to all the documents and information in his own declaration and its exhibits since he signed that declaration under penalty of perjury. *Id.* It seems fair to presume that Clark also had access to the information disclosed in plaintiff Horrobin's brief in opposition to Smith Bunday's summary judgment motion, since his employer (plaintiff Horrobin) prepared it based to great extent on the content

of Clark's own declaration. Therefore it strains credulity to believe that Clark needs a trial court order or even this Court's order so that he can gain access to the documents and information he wants unsealed. He has already *had* access and his arguments are therefore moot.

The situation the trial court faced here was unusual, to say the least. Clark's declaration and plaintiff Horrobin's brief in opposition to Smith Bunday's summary judgment motion were filed on the same day that plaintiff Horrobin earlier settled with Smith Bunday. (CP 232) Plaintiff Horrobin (Clark's employer) then agreed that limited portions of his agent Clark's declaration and certain of its attached exhibits as well as an extremely limited part of plaintiff's opposition brief would be redacted or filed under seal. (CP 227-30) However, Clark then made what the trial court described as the "unusual request to unseal documents he himself used as an expert, allegedly for use in his personal litigation" with the Washington State Board of Accountancy. (CP 232) *See also* note 2, *supra*.

Given all these circumstances, the trial court did not abuse its discretion in issuing the appealed order requiring two documents (plaintiff Horrobin's brief and expert witness Clark's

declaration in opposition to Smith Bunday's summary judgment motion first filed on November 14, 2008 (apparently unsealed)) to be refiled under seal and redacted versions of those documents instead to be filed in the public record. Nor did it abuse its discretion to refuse to unseal copies of Smith Bunday's "confidential" documents attached as exhibits to Clark's declaration, which were copies produced in discovery under an agreed protective order (by which Clark was bound as plaintiffs' expert) and which copies the record shows included confidential tax return and other personal financial information regarding nonparty witnesses, including nonparty Todd Bennett, who intervened in the case as one of several affected taxpayers to file his objections to their disclosure. (Docket #48; Supp. CP 348) This is particularly true since, under *Rufer's* standard for sealing documents never "part of the court's decision-making process," the trial court had "good cause" to leave confidential such highly personal financial information where there was no true "interest of the public" to balance against it. *Rufer*, 154 Wn.2d at 548.

VI. ATTORNEYS' FEES AND COSTS

Intervenor Clark's request for an award of attorneys' fees and costs should be denied, and Smith Bunday should be awarded

its fees under applicable law, including (if this Court deems appropriate) RAP 14.2, 14.3 and 18.1 and RCW 4.84.080.

Clark should be denied fees and costs even if he is deemed the “prevailing party” on this appeal. The record shows that Clark was hired as plaintiffs’ expert witness in the trial court proceeding. (CP 136) As plaintiffs’ expert, he was required to read and agree in writing to be bound by the protective order entered in the trial court action. (CP 1-5) As such, Smith Bunday had a right to expect that Clark would obey the protective order and not seek to contravene it after the parties had settled.

Further, Clark is a certified public accountant. (CP 204) It is therefore fair to presume that Clark is familiar with the Internal Revenue Code statutes and regulations that prohibit tax return preparers (like Smith Bunday) from disclosing tax-related information and documents without first receiving either written taxpayer consent or a court order authorizing such disclosure. See 26 U.S.C. §§ 6713 & 7216; 26 C.F.R. § 301.7216 (copies of which are attached hereto as Appendix A). This is especially true since Clark was hired by plaintiffs as an expert witness to opine on some of Smith Bunday’s services as tax return preparers. (CP 136 & 205)

Since Smith Bunday did not receive any such written consent or order (and Clark cannot point to any), respondents were required to take positions in the trial court action and now on appeal to protect the confidentiality of multiple nonparty taxpayers' tax-related documents and information. *Accord Ameriquest Mortgage Co. v. State Attorney General*, 148 Wn. App. 145, 156-57, 199 P.3d 468 (2009) (despite Public Records Act request, "nonpublic personal information" of loan customers was required to "remain confidential" where nothing in the record indicated that all such customers had been "contacted [or] made aware of this tug of war over their confidential information"). Smith Bunday could not take an opposing position without violating the Internal Revenue Code and its supporting regulations. Therefore Smith Bunday should not be penalized for trying to uphold the federal law that governs the services of tax return preparers.

Further, as plaintiffs' expert, Clark already had complete access to all the documents he now seeks to have unsealed. In fact, the trial court judge described Clark's "request to unseal documents he himself used as an expert" as "somewhat unusual." (CP 232) Smith Bunday should not be required to pay Clark's

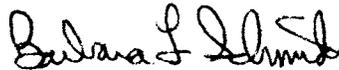
attorneys' fees and costs to gain access to documents to which he already had access as plaintiffs' expert witness.

VII. CONCLUSION

For all the reasons discussed herein, Smith Bunday respectfully asks the Court to affirm the appealed order, dismiss intervenor Clark's appeal and award respondents their attorneys' fees and costs.

DATED this 1st day of June, 2009.

EKLUND ROCKEY STRATTON



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on June 1, 2009, I caused delivery by depositing in the U.S. Mail (first class, postage prepaid) a copy of the foregoing Response by Respondents Smith Bunday Berman Britton, P.S., and Sharon Robertson To Brief Of Appellant to:

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DATED this 1st day of June, 2009.



Barbara L. Schmidt, WSBA 20049

D. Edson Clark v. Smith Bunday Berman Britton, P.S., et al.,
Court of Appeals Division I no. 62824-11

Response by Respondents Smith Bunday Berman Britton, P.S.,
and Sharon Robertson to Brief of Appellant

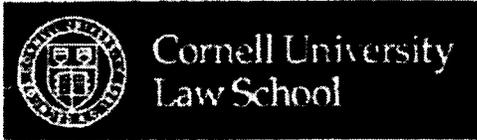
Appendix A

26 U.S.C. § 6713

26 U.S.C. § 7216

26 CFR § 301.7216

NOTE: Attached are copies of the above-referenced federal statutes and regulations that were in effect during the pendency of the trial court action underlying the present appeal. Although some changes were made in the referenced regulations effective January 1, 2009, those changes are not relevant to issues in the present appeal.



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TITLE 26 > Subtitle F > CHAPTER 68 > Subchapter B > PART I > § 6713

§ 6713. Disclosure or use of information by preparers of returns

(a) Imposition of penalty

If any person who is engaged in the business of preparing, or providing services in connection with the preparation of, returns of tax imposed by chapter 1, or any person who for compensation prepares any such return for any other person, and who—

- (1) discloses any information furnished to him for, or in connection with, the preparation of any such return, or
- (2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return,

shall pay a penalty of \$250 for each such disclosure or use, but the total amount imposed under this subsection on such a person for any calendar year shall not exceed \$10,000.

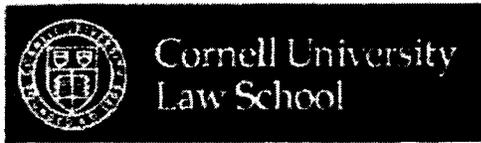
(b) Exceptions

The rules of section 7216 (b) shall apply for purposes of this section.

(c) Deficiency procedures not to apply

Subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes) shall not apply in respect of the assessment or collection of any penalty imposed by this section.

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TITLE 26 > Subtitle F > CHAPTER 75 > Subchapter A > PART I > § 7216

§ 7216. Disclosure or use of information by preparers of returns

(a) General rule

Any person who is engaged in the business

of preparing, or providing services in connection with the preparation of, returns of the tax imposed by chapter 1, or any person who for compensation prepares any such return for any other person, and who knowingly or recklessly—

- (1) discloses any information furnished to him for, or in connection with, the preparation of any such return, or
- (2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return,

shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.



(b) Exceptions

(1) Disclosure

Subsection (a) shall not apply to a disclosure of information if such disclosure is made—

- (A) pursuant to any other provision of this title, or
- (B) pursuant to an order of a court.

(2) Use

Subsection (a) shall not apply to the use of information in the preparation of, or in connection with the preparation of, State and local tax returns and declarations of estimated tax of the person to whom the information relates.

(3) Regulations

Subsection (a) shall not apply to a disclosure or use of information which is permitted by regulations prescribed by the Secretary under this section. Such regulations shall permit (subject to such conditions as such regulations shall provide) the disclosure or use of information for quality or peer reviews.

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with the offer, including all installments paid on the offer, will be refunded, without interest, after the conclusion of any review sought by the taxpayer with Appeals. Refund will not be required if the taxpayer has agreed in writing that amounts tendered pursuant to the offer may be applied to the liability for which the offer was submitted.

(1) *Statute of limitations—(1) Suspension of the statute of limitations on collection.* The statute of limitations on collection will be suspended while levy is prohibited under paragraph (g)(1) of this section.

(2) *Extension of the statute of limitations on assessment.* For any offer to compromise, the IRS may require, where appropriate, the extension of the statute of limitations on assessment. However, in any case where waiver of the running of the statutory period of limitations on assessment is sought, the taxpayer must be notified of the right to refuse to extend the period of limitations or to limit the extension to particular issues or particular periods of time.

(j) *Inspection with respect to accepted offers to compromise.* For provisions relating to the inspection of returns and accepted offers to compromise, see section 6103(k)(1).

(k) *Effective date.* This section applies to offers to compromise pending on or submitted on or after July 18, 2002.

(T.D. 9007, 67 FR 48029, July 21, 2002; 67 FR 53879, Aug. 20, 2002)

Crimes, Other Offenses, and Forfeitures

CRIMES

GENERAL PROVISIONS

§ 301.7207-1 Fraudulent returns, statements, or other documents.

Any person who willfully delivers or discloses to any officer or employee of the Internal Revenue Service any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both. Any person required pursuant to section 6047 (b) or (c) or, sec-

tion 6104(d), to furnish information to any officer or employee of the Internal Revenue Service or any other person who willfully furnishes to such officer or employee of the Internal Revenue Service or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both.

(T.D. 7127, 36 FR 11505, June 15, 1971, as amended by T.D. 8026, 50 FR 20758, May 20, 1985)

§ 301.7209-1 Unauthorized use or sale of stamps.

(a) Any person who buys, sells, offers for sale, uses, transfers, takes or gives in exchange, or pledges or gives in pledge, except as authorized in the Code or in regulations made pursuant thereto, any stamp, coupon, ticket, book, or other device prescribed by the Commissioner under the Code for the collection or payment of any tax imposed by the Code, shall, upon conviction thereof, be fined not more than \$1,000, or imprisoned not more than 6 months, or both.

(b) For use or resale of unused documentary stamps, see paragraph (c) of § 43.6802-1 of this chapter (Documentary Stamp Tax Regulations).

§ 301.7214-1 Offenses by officers and employees of the United States.

Any officer or employee of the United States acting in connection with any revenue law of the United States required to make a written report under the provisions of section 7214(a)(8) shall submit such report to the Commissioner, or to a regional commissioner or district director.

§ 301.7216-1 Penalty for disclosure or use of tax return information.

(A) *In general.* Section 7216(a) provides in effect that, except as provided in section 7216(b), any tax return preparer (as described in paragraph (b)(2) of this section) who on or after January 1, 1972, discloses or uses any tax return information (as described in paragraph (b)(3) of this section) other than for the specific purpose of preparing, assisting in preparing, or obtaining or providing

services in connection with the preparation of, any tax return of the taxpayer by or for whom the information was made available to a tax return preparer, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Pursuant to section 7216(b), the provisions of section 7216(a) and this paragraph do not apply to any disclosure or use permitted under § 301.7216-2 or § 301.7216-3.

(b) *Definitions.* For purposes only of section 7216 and §§ 301.7216-1 through 301.7216-3—

(1) *Tax return.* The term "tax return" means any return (or amended return) of the income tax imposed by chapter 1 or 2 of the Code, or any declaration (or amended declaration) of estimated tax made under section 6015.

(2) *Tax return preparer.* (i) The term tax return preparer means any person—

(A) Who is engaged in the business of preparing tax returns,

(B) Who is engaged in the business of providing auxiliary services in connection with the preparation of tax returns,

(C) Who is remunerated for preparing, or assisting in preparing, a tax return for any other person, or

(D) Any individual who, as part of his duties or employment with any person described in (A), (B), or (C) of this subdivision, performs services which assist in the preparation of, or assist in providing auxiliary services in connection with the preparation of, a tax return.

For example, assume that a bank is a tax return preparer within the meaning of (A) of this subdivision and it employs one individual to solicit the necessary tax return information for the preparation of a tax return and another individual to prepare the return on the basis of the information that is furnished. Under these circumstances, both employees are tax return preparers. Also, for example, a secretary to a tax return preparer who types or otherwise works on returns prepared by the preparer is a tax return preparer.

(ii) A person is engaged in the business of preparing tax returns as described in subdivision (i)(A) of this sub-

paragraph if, in the course of his business, he holds himself out to taxpayers as a person who prepares tax returns, whether or not tax return preparation is his sole business activity and whether or not he charges a fee for such services.

(iii) A person is engaged in the business of providing auxiliary services in connection with the preparation of tax returns as described in subdivision (i)(B) of this subparagraph if, in the course of his business, he holds himself out to tax return preparers or to taxpayers as a person who performs such auxiliary services, whether or not providing such auxiliary services is his sole business activity and whether or not he charges a fee for such services. For example, a person part or all of whose business is to provide a computerized tax return processing service based on tax return information furnished by another person is a tax return preparer.

(iv) A tax return preparer described in subdivision (i)(C) of this subparagraph includes any person who—

(A) For remuneration but not in the course of a business prepares a tax return for another person, or

(B) For remuneration and on a casual basis helps a relative, friend, or other acquaintance to prepare the latter's tax return.

(v) A person is not a tax return preparer merely because he leases office space to a tax return preparer, furnishes credit to a taxpayer whose tax return is prepared by a tax return preparer, or otherwise performs some service which only incidentally relates to the preparation of tax returns. For example, assume that a tax return preparer contracts with a department store for the rental of space in the store, and that the store advertises that taxpayers who use the tax return preparation service may charge the cost of having their tax return prepared to their charge account with the department store. Under such circumstances, the department store is not a tax return preparer.

(3) *Tax return information.* The term "tax return information" means any information, including but not limited to a taxpayer's name, address, or identifying number, which is furnished in

any form or manner by a taxpayer for, or in connection with, the preparation of a tax return of such taxpayer. Information furnished by a taxpayer includes information which is furnished on behalf of the taxpayer by any person; for example, any person required under section 6012 to make a return for such taxpayer, such as a guardian for a minor, by a duly authorized agent for his principal, by a fiduciary for an estate or trust, or by a receiver, trustee in bankruptcy, or assignee for a corporation.

[T.D. 7310, 39 FR 11538, Mar. 29, 1974]

→ **§ 301.7216-2 Disclosure or use without formal consent of taxpayer.**

(a) *Disclosure pursuant to other provisions of Internal Revenue Code.* The provisions of section 7216(a) and § 301.7216-1 shall not apply to any disclosure of tax return information if such disclosure is made pursuant to any other provision of the Code or the regulations thereunder. Thus, for example, the provisions of such sections do not apply to a disclosure pursuant to section 7269 to an officer or employee of the Internal Revenue Service of information concerning the estate of a decedent or a disclosure pursuant to section 7602 to an officer or employee of the Internal Revenue Service of books, papers, records, or other data which may be relevant to the liability of any person for the income tax.

(b) *Disclosure or use of information in the case of related taxpayers.* (1) A tax return preparer may use, in preparing a tax return of a second taxpayer, and may disclose to such second taxpayer in the form in which it appears on such return, any tax return information which the preparer obtained from a first taxpayer if—

(i) The second taxpayer is related to the first taxpayer within the meaning of subparagraph (2) of this paragraph (a).

(ii) The first taxpayer's tax interest in such information is not adverse to the second taxpayer's tax interest in such information, and

(iii) The first taxpayer has not expressly prohibited such disclosure or use.

(2) For purposes of subparagraph (1) of this paragraph (a), one tax-

payer is related to another taxpayer if they have any one of the following relationships: husband and wife, child and parent, grandchild and grandparent, partner and partnership, trust or estate and beneficiary, trust or estate and fiduciary, corporation and shareholder, or members of a controlled group of corporations as defined in section 1563.

(3) See § 301.7216-3(a)(3) for disclosure or use of tax return information of the taxpayer in preparing the tax return of a second taxpayer where the requirements of this paragraph are not satisfied.

(c) *Disclosure pursuant to an order of a court or a Federal or State agency.* The provisions of section 7216(a) and § 301.7216-1 do not apply to any disclosure of tax return information if such disclosure is made pursuant to any one of the following documents:

(1) The order of any court of record, Federal, State, or local, or

(2) A subpoena issued by a grand jury, Federal or State, or

(3) An administrative order, demand, summons or subpoena which is issued in the performance of its duties by—

(i) Any Federal agency, or

(ii) A State agency, body, or commission charged under the laws of the State or a political subdivision of the State with the licensing, registration, or regulation of tax return preparers. Information must be clearly identified in the document in order to be disclosed under this paragraph (c).

(d) *Disclosure for use in revenue investigations or court proceedings.* A tax return preparer may disclose tax return information (1) to his attorney, or to an employee of the Internal Revenue Service, for use in connection with an investigation of such tax return preparer conducted by the Internal Revenue Service or (2) to his attorney, or to any officer of a court, for use in connection with proceedings involving such tax return preparer before the court, or before any grand jury which may be convened by the court.

(e) *Certain disclosure by attorneys and accountants.* The provisions of section 7216(a) and § 301.7216-1 do not apply to any disclosure of tax return information permitted by this paragraph (e):

(1) A tax return preparer who is lawfully engaged in the practice of law or accountancy and prepares a tax return for a taxpayer may use the tax return information of the taxpayer, or disclose such information to another employee or member of the preparer's law or accounting firm who may use it, to render other legal or accounting services to or for such taxpayer. Thus, for example, a lawyer who prepares a tax return for a taxpayer may use the tax return information of the taxpayer for, or in connection with, rendering legal services, such as estate planning or administration, or preparation of trial briefs or trust instruments, for the taxpayer or the estate of the taxpayer; or if another member of the same firm renders the other legal services for the taxpayer, the lawyer who prepared the tax return may disclose the tax return information to that other member for use in rendering those services for the taxpayer. In further illustration, an accountant who prepares a tax return for a taxpayer may use the tax return information, or disclose it to another member of the firm for use, for, or in connection with, the preparation of books of account, working papers, or accounting statements or reports to or for the taxpayer. Further, in the normal course of rendering such legal or accounting services to or for the taxpayer, the attorney or accountant may, with the express or implied consent of the taxpayer, make such tax return information available to third parties, such as stockholders, management, suppliers, or lenders.

(2) A tax return preparer who is lawfully engaged in the practice of law or accountancy and prepares a tax return for a taxpayer may (i) take such tax return information into account, and may act upon it, in the course of performing legal or accounting services for a client other than the taxpayer or (ii) disclose such information to another employee or member of the preparer's law or accounting firm to enable that other employee or member to take the information into account, and act upon it, in the course of performing legal or accounting services for a client other than the taxpayer, when such information is or may be relevant to the subject matter of such legal or ac-

counting services for the other client and its consideration by those performing the services is necessary for the proper performance by them of such services. In no event, however, may such tax return information be disclosed to a person who is not an employee or member of the law or accounting firm unless such disclosure is exempt from the application of section 7216(a) and § 301.7216-1 by reason of another provision, other than this paragraph, of § 301.7216-2 or § 301.7216-3.

(3) The application of this paragraph may be illustrated by the following examples:

Example 1. A, a member of an accounting firm, renders an opinion on a financial statement of M Corporation that is part of a registration statement filed with the Securities and Exchange Commission. After the filing of such registration statement, but before its effective date, B, a member of the same accounting firm, prepares an income tax return for N Corporation. In the course of preparing such income tax return, B discovers that N does business with M and concludes that information he is given by N should be considered by A to determine whether the financial statement reported on by A contains an untrue statement of material fact or omitted to state a material fact required to keep the statement from being misleading. B discloses to A the tax return information of N for this purpose. A determines that there is an omission of material fact and that an amended statement should be filed. A so advises M and the Securities and Exchange Commission. A explains that the omission was revealed as a result of confidential information which came to A's attention after the statement was filed, but A does not disclose the identity of the taxpayer or the tax return information itself. Section 7216(a) and § 301.7216-1 do not apply to the foregoing disclosure of N's tax return information by B to A and the use of such information by A in advising M and the Securities and Exchange Commission of the necessity for filing an amended statement. Section 7216(a) and § 301.7216-1 would apply to a disclosure of N's tax return information to M or to the Securities and Exchange Commission unless such disclosure is exempt from the application of section 7216(a) and § 301.7216-1 by reason of another provision of either § 301.7216-2 or § 301.7216-3.

Example 2. A, a member of an accounting firm, is conducting an audit of M Corporation, and B, a member of the same accounting firm, prepares an income tax return for D, an officer of M. In the course of preparing such return, B obtains information from D

indicating that D, pursuant to an arrangement with a supplier doing business with M, has been receiving from the supplier, a percentage of the amounts which the supplier invoices to M. B discloses this information to A who, acting upon it, searches in the course of the audit for indications of such a kickback scheme. As a result, A discovers information from audit sources which also, but independently, indicates the existence of such a scheme. Without revealing the tax return information A has received from B, A brings to the attention of officers of M the audit information indicating the existence of the kickback scheme. Section 7216(a) and § 301.7216-1 do not apply to the foregoing disclosure of D's tax return information by B to A, the use by A of such information in the course of the audit, and the disclosure by A to M of the audit information indicating the existence of the kickback scheme. See also § 301.7216-2(j). Section 7216(a) and § 301.7216-1 would apply to a disclosure to M, or to any other person not an employee or member of the accounting firm, of D's tax return information furnished to B.

(f) *Corporate fiduciaries.* A trust company, trust department of a bank, or other corporate fiduciary which prepares a tax return for a taxpayer to or for whom it renders fiduciary, investment, or other custodial or management services may (1) disclose or use the tax return information of such taxpayer in the ordinary course of rendering such services to or for the taxpayer or (2), with the express or implied consent of the taxpayer, make such information available to the taxpayer's attorney, accountant, or investment advisor.

(g) *Disclosure to taxpayer's fiduciary.* If after furnishing tax return information to a tax return preparer the taxpayer dies or becomes incompetent, insolvent, or bankrupt, or his assets are placed in conservatorship or receivership, the tax return preparer may disclose such information to the duly appointed fiduciary of the taxpayer or his estate, or to the duly authorized agent of such fiduciary.

(h) *Disclosure by tax return preparer to tax return processor.* A tax return preparer may disclose tax return information of a taxpayer to another tax return preparer described in § 301.7216-1(b)(2)(i)(B) for the purpose of having the second tax return preparer transfer that information to, and compute the tax liability on, a tax return of such taxpayer by means of electronic, me-

chanical, or other form of tax return processing service.

(i) *Disclosure by one officer, employee, or member to another officer, employee, or member.* An officer, employee, or member of a tax return preparer may transfer any tax return information to another officer, employee, or member of the same tax return preparer for the purpose of performing services which assist in the preparation of, or assist in providing auxiliary services in connection with the preparation of, the tax return of a taxpayer by or for whom the information was furnished.

(j) *Identical information obtained from other sources.* The provisions of section 7216(a) and § 301.7216-1 shall not apply to the disclosure or use by a tax return preparer of information which is identical to any tax return information which has been furnished to him if such identical information was obtained otherwise than in connection with the preparation of, or providing auxiliary services in connection with the preparation of, a tax return.

(k) *Disclosure or use of information in preparation or audit of State returns.* The provisions of section 7216(a) and § 301.7216-1 shall not apply to the disclosure or use by any tax return preparer of any tax return information in the preparation or audit of, or in connection with the preparation or audit of, any tax return or declaration of estimated tax required of the taxpayer under the law of any State or political subdivision therefor, of the District of Columbia, or of any possession of the United States.

(l) *Retention of records.* A tax return preparer may retain tax return information of a taxpayer, including copies of tax returns or data processing tapes prepared on the basis of such tax return information, and may use such information in connection with the preparation of other tax returns of the taxpayer or in connection with an audit by the Internal Revenue Service of any tax return. The provisions of paragraph (m) of this section respecting the transfer of a taxpayer list apply also to the transfer of any records and related workpapers to which this paragraph applies.

(m) *Lists for solicitation of tax return business.* Any tax return preparer may

compile and maintain a separate list containing the names and address of taxpayers whose tax returns he has prepared or processed. This list may be used by the compiler solely to contact the taxpayers on the list for the purpose of offering tax information or additional tax return preparation services to such taxpayers. The compiler of the list may not transfer the taxpayer list, or any part thereof, to any other person unless such transfer takes place in conjunction with the sale or other disposition of the tax return preparation business of such compiler. A person who acquires a taxpayer list, or a part thereof, in conjunction with such a sale or other disposition shall be subject to the provisions of this paragraph with respect to such list as if he had been the compiler of such list. The term "list", as used in this paragraph, includes any record or system whereby the names and addresses of taxpayers are retained.

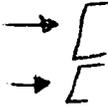
(n) *Disclosure to report the commission of a crime.* The provisions of section 7216(a) and § 301.7216-1 do not apply to the disclosure of any tax return information to the proper Federal, State or local official in order, and to the extent necessary, to inform the official of activities which may constitute, or may have constituted, a violation of any criminal law. In addition, such a disclosure made in the bona fide but mistaken belief that the activities constituted a violation of criminal law is not subject to section 7216(a) and § 301.7216-1.

(o) *Disclosure or use of information for quality or peer reviews.* The provisions of section 7216(a) and § 301.7216-1 do not apply to any disclosure of tax return information permitted by this paragraph (o) made after December 28, 1990. Tax return information may be disclosed for the purpose of a quality or peer review to the extent necessary to accomplish the review. A quality or peer review is a review that is undertaken to evaluate, monitor, and improve the quality and accuracy of a tax return preparer's tax preparation, accounting or auditing services. A quality or peer review may be conducted only by attorneys, certified public accountants, enrolled agents, and enrolled actuaries who are eligible to

practice before the Internal Revenue Service. See Department of the Treasury Circular 230, 31 CFR part 10. Disclosure of tax return information is also authorized to persons who provide administrative or support services to an individual who is conducting a quality or peer review under this paragraph (o), but only to the extent necessary for the reviewer to conduct the review. Tax return information gathered in conducting a review may be used only for purposes of a review. No tax return information identifying a taxpayer may be disclosed in any evaluative reports or recommendations that may be accessible to any person other than the reviewer or the preparer being reviewed. The preparer being reviewed shall maintain a record of the review including the information reviewed and the identity of the persons conducting the review. After completion of the review, no documents containing information that may identify any taxpayer by name or identification number may be retained by a reviewer or by the reviewer's administrative or support personnel. Any person (including administrative and support personnel) receiving tax return information in connection with a quality or peer review is a tax return preparer for purposes of sections 7216(a) and 6713(a).

(p) *Disclosure of tax return information due to a tax return preparer's incapacity or death.* The provisions of section 7216(a) and § 301.7216-1 do not apply to any disclosure of tax return information permitted by this paragraph (p) made after December 28, 1990. In the event of incapacity or death of a tax return preparer, disclosure of tax return information may be made for the purpose of assisting the tax return preparer or his legal representative (or the representative of a deceased preparer's estate) in operating the business. Any person receiving tax return information under the provisions of this paragraph (p) is a tax return preparer for purposes of sections 7216(a) and 6713(a).

[T.D. 7310, 39 FR 11539, Mar. 29, 1974, as amended by T.D. 7676, 45 FR 11471, Feb. 21, 1980; T.D. 7780, 45 FR 49547, July 25, 1980; T.D. 7948, 49 FR 8602, Mar. 8, 1984; T.D. 8383, 56 FR 66996, Dec. 27, 1991; 57 FR 12, Jan. 2, 1992; T.D. 8427, 57 FR 37065, Aug. 18, 1992.]



§ 301.7216-3 Disclosure or use only with formal consent of taxpayer.

(a) *Written consent to use or disclosure—(1) Solicitation of other business.* (1) If a tax return preparer has obtained from the taxpayer a consent described in paragraph (b) of this section, he may use the tax return information of such taxpayer to solicit from the taxpayer any additional current business, in matters not related to the Internal Revenue Service, which the tax return preparer provides and offers to the public. The request for such consent may not be made later than the time the taxpayer receives his completed tax return from the tax return preparer. If the request is not granted, no follow up request may be made. This authorization to use the tax return information of the taxpayer does not apply, however, for purposes of facilitating the solicitation of the taxpayer's use of any services or facilities furnished by a person other than the tax return preparer, unless such other person and the tax return preparer are members of the same affiliated group within the meaning of section 1504. Thus, for example, the authorization would not apply if the other person is a corporation which is owned or controlled directly or indirectly by the same interests which own or control the tax return preparer but which is not affiliated with the tax return preparer within the meaning of section 1504(a). Moreover, this authorization does not apply for purposes of facilitating the solicitation of additional business to be furnished at some indefinite time in the future, as, for example, the future sale of mutual fund shares or life insurance, or the furnishing of future credit card services. It is not necessary, however, that the additional business be furnished in the same locality in which the tax return information is furnished.

(1) For prohibition against solicitation of employment in matters related to the Internal Revenue Service, see 31 CFR 10.30 (Treasury Department Circular No. 230) and section 7 of Rev. Proc. 68-20, 1968-1 C.B. 812.

(2) *Permissible disclosures to third parties.* If a tax return preparer has obtained from a taxpayer a consent described in paragraph (b) of this section, he may disclose the tax return information of such taxpayer to such third persons as the taxpayer may direct. However, see § 301.7216-2 for certain permissible disclosures without formal written consent.

(3) *Disclosure or use of information in connection with another person's return.* A tax return preparer may disclose or use any tax return information, which was obtained from a first taxpayer, in preparing a tax return of a second taxpayer if the tax return preparer has obtained from the first taxpayer a written consent described in paragraph (b) of this section. See § 301.7216-2(b) for disclosure or use in certain cases without formal consent.

(b) *Form of consent.* A separate written consent, signed by the taxpayer or his duly authorized agent or fiduciary, must be obtained for each separate use or disclosure authorized in paragraph (a) (1), (2) or (3) of this section and shall contain—

- (1) The name of the tax return preparer,
- (2) The name of the taxpayer,
- (3) The purpose for which the consent is being furnished.
- (4) The date on which such consent is signed,
- (5) A statement that the tax return information may not be disclosed or used by the tax return preparer for any purpose (not otherwise permitted under § 301.7216-2) other than that stated in the consent, and
- (6) A statement by the taxpayer, or his agent or fiduciary, that he consents to the disclosure or use of such information for the purpose described in subparagraph (3) of this paragraph (b).

(c) *Illustrations.* The application of this section may be illustrated by the following examples:

Example 1. In order to stimulate the making of loans, a bank advertises that it is in the business of preparing tax returns. A taxpayer goes to the bank to have his tax return prepared. After the return has been completed by the bank, the employee of the bank who obtained the tax return information from the taxpayer explains that the taxpayer owes an additional \$400 in taxes and that the bank's loan department may be able to offer the taxpayer a loan to pay the tax due. If the taxpayer decides to accept the opportunity offered to apply for a loan, the bank must first have the taxpayer execute a written consent described in paragraph (b) of this

section for the bank to use any of such information which is required in determining whether to make the tax loan.

Example 2. An individual who sells life insurance and shares in a mutual fund is also in the business of preparing tax returns. A taxpayer who has gone to the individual to have his tax return prepared is requested, at the time he picks up his completed tax return, to give his consent to the individual's use of his tax return information in connection with such individual's solicitation of the taxpayer's purchasing a life insurance policy and shares in the mutual fund. Before the individual may use such tax return information as a basis for soliciting such additional business from the taxpayer, the taxpayer must execute separate written consents under paragraph (b) of this section, one authorizing the use of such information as a basis for soliciting the sale of the mutual fund shares and a second authorizing the use of such information as a basis for soliciting the sale of the life insurance.

Example 3. The facts are the same as in example 2 except that the individual does not sell life insurance but does sell shares in several mutual funds. If the request is for the purpose of using the tax return information as a basis for soliciting the sale at one time of shares in mutual funds A and B, only one written consent under paragraph (b) of this section is required of the taxpayer. If, however, the request is for the purpose of using the tax return information as a basis for soliciting the sale of shares in fund A at one time, and the sale of shares in fund B at a later time, two written consents under such paragraph are required of the taxpayer.

(T.D. 7310, 39 FR 11540, Mar. 29, 1974)

PENALTIES APPLICABLE TO CERTAIN
TAXES

**§ 301.7231-1 Failure to obtain license
for collection of foreign items.**

For provisions relating to the obtaining of a license for the collection of foreign items, see section 7001 and § 301.7001-1.

Other Offenses

**§ 301.7268-1 Failure to produce
records.**

Whoever fails to comply with any duty imposed upon him by section 6018, 6036 (in the case of an executor), or 6075(a), or, having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, or, having in his possession

or control any property comprised in the gross estate of the decedent, fails to exhibit the same upon request of any officer or employee of the Internal Revenue Service who desires to examine the same in the performance of his duties under chapter 11 of the Code (relating to estate taxes) shall be liable to a penalty of not exceeding \$500, to be recovered with costs of suit, in a civil action in the name of the United States.

§ 301.7272-1 Penalty for failure to register.

(a) Any person who fails to register with the district director as required by the Code or by regulations issued thereunder shall be liable to a penalty of \$50 except that on and after September 3, 1958, this section shall not apply to persons required to register under subtitle E of the Code, or persons engaging in a trade or business on which a special tax is imposed by such subtitle.

(b) For provisions relating to registration under sections 4101, 4412, 4455, 4722, 4753, and 4804(d), see the regulations relating to the particular tax. For regulations under section 7011, see § 301.7011-1.

FORFEITURES

PROPERTY SUBJECT TO FORFEITURE

**§ 301.7304-1 Penalty for fraudulently
claiming drawback.**

Whenever any person fraudulently claims or seeks to obtain an allowance of drawback on goods, wares, or merchandise on which no internal tax shall have been paid, or fraudulently claims any greater allowance of drawback than the tax actually paid, he shall forfeit triple the amount wrongfully or fraudulently claimed or sought to be obtained, or the sum of \$500, at the election of the district director.

PROVISIONS COMMON TO FORFEITURES

§ 301.7321-1 Seizure of property.

Any property subject to forfeiture to the United States under any provision of the Code may be seized by the district director or assistant regional commissioner (alcohol, tobacco, and firearms). Upon seizure of property by