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IN THE SUPREME COURT OF WASHINGTON

D. EDSON CLARK,

Appellant,

v.

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

Respondents.

**FILED**  
APR 05 2011

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

APPELLANT CLARK'S SUPPLEMENTAL BRIEF

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**ALLIED**  
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## I. INTRODUCTION

Intervenor/Appellant D. Edson Clark (“Clark”) is challenging the sealing of court records below and Division I’s Opinion which upheld the sealing, held Clark’s GR and KCLR based arguments were not preserved, and imposed on Clark and all future members of the public a burden to prove records were relied upon by a court as a precursor to application of Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) (“Ishikawa”). The sealings and redactions in the underlying case were allowed without a sealing motion by either party solely pursuant to a blanket stipulated protective order, without a hearing, without review of the records by a judge or written findings by the trial court justifying the actions, without a meaningful opportunity for those opposing the actions to be heard, and without the trial court considering less restrictive alternatives. Approximately 4,000 pages of records were produced by the Defendants in discovery, all of which were designated “confidential” pursuant to a Stipulated Protective Order, which required the parties to file all such designated records under seal. Numerous records were thereafter filed under seal by the parties without a sealing motion, sealing order, court review, hearing or findings. The materials included records reviewed by the court in connection with hearings and others allegedly not reviewed by the court prior to the case settling. The parties also entered into a

subsequent agreement after the case settled, granted by the trial court on the same day Clark's Motion to Unseal was denied, that replaced previously-filed court files with redacted versions and sealed the originals. This Order was also entered without sufficient written findings by the trial court justifying the sealing and redaction of court documents. On appeal, Division I upheld the sealings finding Clark had to prove records were not just filed with a court in anticipation of a decision, but that they had actually been considered by a court in rendering such decision and that records filed but not proven to be relied upon in such a decision could be sealed for mere good cause.

Clark contends (1) all the sealings were improper and violated state and federal constitutional law, the court's own General and Local Rules, and the common law of court access; (2) that the records cannot be lawfully sealed or remain sealed in accordance with these authorities; (3) that denial of his motion to unseal was error; and (4) that Division I's Opinion conflicts with governing constitutional and common law.

Rather than address these important—and for Defendants—difficult issues concerning access, Defendants instead attack the messenger and seek to portray Clark as a rogue expert trolling court records for alleged support for personal lawsuits—allegations Defendants should know are false and ridiculous. Clark is a CPA and intervened in this case when he

realized after a settlement that numerous court filings were sealed and everything was about to go underground. This case is about constitutional and common law rules governing access to court records and sealing procedures for all persons and all cases in the future, and should be addressed and decided without regard to the irrelevant (and false) personal attacks on the Intervenor argued by Smith Bunday.

## II. ASSIGNMENTS OF ERROR AND ISSUES FOR REVIEW

Assignments of Error: The trial court erred in issuing the December 5, 2008, Order denying Clark's Motion to Unseal court documents and the accompanying order sealing additional documents; Division I erred in upholding the Order, requiring Clark to prove records had been considered by a court as a precursor to proving the need for application of Ishikawa, and in holding Clark's GR and KCLR arguments were not preserved and declining to rule in favor of them.

### Issues Pertaining to Assignment of Error:

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

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

3. Whether Division I's conclusion is incorrect that records are presumptively open only if they are relevant to the "fairness of the fact-finding process" or to "evaluate the performance of the court," presuming only the *court's* actions matter, and the public has no legitimate interest in the actions of prosecutors, lawyers, litigants, witnesses, or others who influence the courts and consume their resources?

4. Whether the test set forth in Ishikawa, must be applied to seal, or to keep sealed, court records filed in anticipation of a decision, regardless

of whether the court ultimately makes such a decision, or whether the court relies upon the records in making such a decision?

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

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

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

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

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

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

11. Whether the records at issue should have been ordered sealed and should have remained sealed had the court performed the requisite Ishikawa analysis.

12. Whether the trial court failed to comply with the requirements for sealing under GR 15 and local rule KCLGR 15.

13. Whether sealing by a party pursuant to a Stipulated Protective Order based on solely the confidential designation of documents by a party, without a motion to seal and order to seal and judicial review of the proposed sealed documents, violates Article I, Section 10 of the

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<sup>1</sup> Clark v. Smith Bunday Berman Britton, et. al., 156 Wn. App. 293, 296, 234 P.3d 236 (2010) (emphasis added).

Washington Constitution, the First Amendment of the U.S. Constitution, the common law, and GR 15.

### **III. STATEMENT OF THE CASE**

This case addresses the substantive test for sealing and unsealing records filed with a court in anticipation of a decision, and the burden borne by those seeking unsealing. Clark was an expert witness for plaintiffs in a civil action against their former accountant and accounting firm alleging that the defendants assisted plaintiffs' former business partner Todd Bennett in embezzling from their joint companies, and hid the embezzlement in the books. CP 260-72. Defendants (hereinafter "Smith Bunday") designated more than 4000 records produced in discovery as "confidential" pursuant to a stipulated protective order that required parties to file all records so designated under seal; the trial court subsequently allowed many documents to be placed under seal, without any sealing order or review by the trial court under this order. CP 1-5; CP 56-57. When the parties sought to seal Clark's own Declaration and its attachments filed in connection with a response to a motion for summary judgment, Clark independently intervened and moved to unseal all sealed court records and to prevent sealing of records in the future. CP 123-33. The case settled before the summary judgment motion was heard, but other motions for which sealed documents had been filed had been heard in open court; and while the trial court had deferred rulings on some

motions, the materials were reviewed by the court in connection with the motions. CP 243-44; CP 273-74; CP 323-33. The trial court granted Clark's Motion to Intervene, but denied his Motion to Unseal, and ordered additional records which had been filed and accessible by the public to be re-filed under seal, including Clark's Declaration and its exhibits. CP 231-33. The judge stated that he had not reviewed the summary judgment materials and thus did not believe the Ishikawa standard applied. The trial judge did not address the previously-sealed records at issue, or the fact it appeared clear from the record that such records were reviewed by the court, even if no decision had been rendered. CP 232-33.

Clark appealed the denial of his Motion to Unseal and the new sealing order to Division I of the Court of Appeals. Division I issued its published Opinion on May 24, 2010, upholding the sealing. Clark v. Smith Bunday Berman Britton, et. al., 156 Wn. App. 293, 234 P.3d 236 (2010) ("Clark"). Clark timely moved for reconsideration which was denied. This Court accepted review.

#### IV. ARGUMENT

##### **A. Division I's Opinion Conflicts with Binding Precedent and Well-Settled Law and Must be Reversed.**

Division I's Opinion is in conflict with binding precedent and well-settled law and must be reversed for the following reasons. First, the Opinion holds that the proponent of *unsealing* has the initial burden of

showing both that (1) the court records he or she seeks to unseal were filed in anticipation of a decision, and (2) were actually considered by the court in rendering a decision, before the public's interest in the records is triggered.<sup>2</sup> Second, the Opinion holds that the public's presumptive constitutional right to access filed court records is limited to only records considered by the court, and not all records that have been filed in anticipation of a court decision. Third, the Opinion holds that absent a showing by the person challenging sealing that records have been filed and considered by the court, those records may be sealed or kept sealed upon a mere showing of "good cause" (which was not even shown here) as defined in the discovery rules for pre-trial protective orders. These holdings conflict with numerous decisions both of this Court, Federal courts, and the Washington Courts of Appeal and well settled doctrines regarding access to court records and sealing.

**1. The burden is always on the proponent of sealing to rebut the presumption that filed court records are open to the public.**

The Opinion imposes an initial burden on the party seeking to *unseal* sealed court records to show that: the documents both (1) were filed in anticipation of a court decision, and (2) were reviewed by the court (and

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<sup>2</sup> As Clark has noted repeatedly on appeal, the conclusion that none of the documents sealed in this case were ever considered by the trial court is erroneous. Specifically, the records filed under seal in May of 2008 under the December 2007 stipulated protective order were attached to substantive briefing and were considered in open court, and the trial court was wholly silent as to why those records should not be unsealed. CP 231-33.

only then became part of the court's decision-making process) — *before* the presumption of openness to the public is triggered under Article I, Section 10<sup>3</sup> and Ishikawa, supra. Clark, 156 Wn. App. at 311. This burden shift conflicts with this Court's precedents establishing that the burden is always on the proponent of sealing or continued sealing to show that the presumption of openness and the five-part Ishikawa test does not apply.<sup>4</sup> This Courts' precedents make clear that all documents filed with a court carry a presumption of openness that can only be overridden with a showing of a serious and imminent threat to a compelling interest by the proponent of sealing. See, e.g., Dreiling v. Jain, 151 Wn.2d 900, 909, 93 P.3d 861 (2004); Rufer v. Abbott Labs., 154 Wn.2d 530, 540, 114 P.3d 1182 (2005); Ishikawa, 97 Wn.2d at 37-38. This Court has further held that the burden is always on the party seeking to seal or keep sealed court documents to show that another interest overrides the public's constitutional interest in open courts. See, e.g., Dreiling, 151 Wn.2d at 909; Rufer, 154 Wn.2d at 540; Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-12, 848 P.2d 1258 (1993).

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<sup>3</sup> Article I, Section 10 of the Washington State Constitution is attached hereto as Appendix A.

<sup>4</sup> See, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558-59, 569-70, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); Ishikawa, 97 Wn.2d at 37-39; see also State v. Waldon, 148 Wn. App. 952, 958-59, 202 P.3d 325 (2009) (emphasizing that Ishikawa requires a showing of a "serious and imminent threat to some other important interest", and not merely a "compelling interest" as this Court characterized it in Rufer and Dreiling); see also Brief of Appellant at 16-18; 11-13, and Reply Brief of Appellant at 16-17.

Further, the Opinion conflicts with decisions of the lower appellate courts, which hold that filed court records are presumed open to the public, and that the Ishikawa test must be met to justify any limitation on access to those records. See, e.g., Waldon, 148 Wn. App. at 957 (2009); Indigo Real Estate Svcs. v. Rousey, 151 Wn. App. 941, 948, 215 P.3d 977 (2009) (“[A]ny request to redact court records implicates the public’s right of access to court records under Article I, Section 10 of the Washington State Constitution.”); McCallum v. Allstate Property and Casualty Ins. Co., 149 Wn. App. 412, 420, 204 P.3d 944 (2009) (same) (citation omitted); In Re Marriage of R.E., 144 Wn. App. 393, 399, 183 P.3d 339 (2008) (“To the extent documents in court files are intended to inform a judicial decision, they are presumed open.”); In Re Marriage of Treseler and Treadwell, 145 Wn. App. 278, 283, 187 P.3d 773 (Div. I 2008) (same); and Woo v. Fireman's Fund Ins. Co., 137 Wn. App. 480, 486, 154 P.3d 236 (Div. I 2007) (same). The lower appellate courts likewise hold that the burden is on the party seeking to seal or keep sealed records to show that some other interest overrides the public’s interest in filed court records. See, e.g., Waldon, 148 Wn.2d at 958; Indigo Real Estate Svcs., 151 Wn. at 948-49; Treseler, 145 Wn. App. at 283.

Here, all the sealed documents were filed with the trial court in connection with substantive motions, as the record before Division I made

clear—a fact never challenged by Respondents. All court documents that have been filed in anticipation of a court decision are presumed open to the public, meaning that the proponent of sealing or continued sealing must meet the constitutional test from Ishikawa. See Rufer, 154 Wn.2d at 540. This means that *Respondents* had the initial burden of showing that the records were *not* filed in anticipation of a decision in order to rebut the presumption that the public had no constitutionally-protected interest in accessing the records, and that the records could be sealed or kept sealed under a standard less stringent than Ishikawa. Not only did Respondents fail to argue below that the records were not filed in anticipation of a court decision and that the “good cause” discovery standard should apply, they in fact argued that Ishikawa did apply and that they had met that constitutional burden. See CP 168-172.

The trial court stated it had not reviewed the summary judgment materials, held that Ishikawa did not apply to records filed with the court but not actually reviewed by the court, and then with no findings of “good cause” or any basis to seal or keep records sealed, the court permanently sealed those records. CP 231-33. The trial court did not address the other sealed records filed in connection with motions that had been heard by the court, and made no findings that even “good cause” had been met to justify the continued sealing of those records, and yet denied Clark’s

Motion to Unseal. **Id.** Division I found no error because Clark allegedly failed to meet a burden he did not legally bear, held “good cause” was sufficient to seal these records and yet failed to make findings establishing “good cause” or that Respondents had met any burden for sealing.<sup>5</sup>

The Opinion confuses the burdens on this issue and misreads the portion of **Rufer** it cites. **See Clark** 156 Wn. App. at 308 (citing **Rufer**, 154 Wn.2d at 540). **Rufer** did not hold that the party seeking to unseal or prevent records from being sealed must first show that the records were “filed in anticipation of a court decision” in order to obtain the presumption of openness—such a conclusion would preclude describing the public’s ability to access filed court records as a “presumption” in the first place. Instead, **Rufer** held that records filed in anticipation of a court decision are presumed open, meaning that to redact, seal or keep those records sealed, a party must meet **Ishikawa. Rufer**, 154 Wn.2d at 549.

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

Division I affirmed the trial court regarding the sealed summary judgment-related documents because it concluded the public’s

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

constitutionally-protected interest in the records did not arise because the trial court never reviewed the records. See Clark, 156 Wn. App. at 303-311. The trial court and Division I misinterpreted Dreiling and Rufer as to “unfiled discovery” and the sealing standard for such materials. Neither Dreiling nor Rufer stand for the principles that the public only has an interest in accessing filed court records if they were considered by the court, or that the “good cause” standard from discovery applies to keeping records *attached to motions*, as opposed to raw discovery, sealed. Instead, those cases hold that the public has a constitutional interest in accessing all court records filed in anticipation of a decision, regardless of whether attached to dispositive or non-dispositive motions, and regardless of whether the court uses the records in rendering a decision or considers the records at all. This Court’s differentiation between “dispositive motions” and “mere discovery” in Dreiling made clear that unfiled discovery had a lower than Ishikawa sealing standard because “information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action” and therefore “does not become part of the court’s decision making process.” 151 Wn.2d at 909-10. This Court further explained that the “materials attached to a summary judgment motion” are not akin to unused records gleaned in discovery where access is restricted because of a protective order, stating “when previously sealed

discovery documents are attached in support of a summary judgment motion, they lose their character as the raw fruits of discovery”, and cannot be kept from the public view without complying with Ishikawa. Id. at 910. This Court, moreover, was explicit in emphasizing “[the good cause standard] applies primarily to *unfiled discovery*, not documents filed with the trial court in support of a motion that can potentially dispose of a case.” Id. at 912 (emphasis in original). Dreiling does not require that the records actually be considered by the court in order for the records to “become part of the court’s decision making process” and for the public’s right of access to those records to be triggered under Article I, Section 10.

This Court later clarified the Dreiling rule in Rufer, where the Court extended the presumption of public access to filed court records attached to non-dispositive motions, specifically rejecting the federal court’s limitation to solely dispositive motions in Foltz v. State Farm, Rufer, 154 Wn.2d at 549. This Court explicitly rejected the notion that the public only has an interest in the outcome of the court’s decision making, emphasizing that Article I, Section 10 addresses “our *entire judicial system*.” Id. (emphasis in original). The Court did not limit the holding to those records reviewed and relied upon by a court. Rather, Rufer limited the good cause standard to discovery materials that were *not* used at trial *or* as an “attachment to any motion.” Id. at 550 (emphasis added). The

black letter rule from Rufer is that “any records that were filed with the court in anticipation of a court decision (dispositive or not) should be sealed or continue to be sealed only when the court determines—pursuant to Ishikawa—that there is a compelling interest which overrides the public’s right to the open administration of justice.” Id. at 549. There is no limiting language that requires the court to consider the records before the presumption of openness, and thus compliance with Ishikawa, applies. Nor is there any language supporting the notion that the party moving to unseal has the initial burden of demonstrating that the records were filed in anticipation of a decision or that they were used by the court in some manner before that presumption arises. Instead, this Court in Rufer explicitly held that the relevance, or irrelevance, of the documents is subsumed in the Ishikawa test. Id. at 547-48.

If filed documents are not considered by the court and truly “irrelevant to the motion” to which they are attached, then the interest of the party that is attaching the documents is necessarily low enough where the Ishikawa test could likely be met by the sealing party. Id. at 548. This does not equate to a conclusion that Ishikawa does not apply in the first place to documents that are “truly irrelevant to the merits of the case and the motion before the court,” but only that it would be likely in such a circumstance that Ishikawa would allow the records to be sealed.

The Opinion here also conflicts with prior well-reasoned opinions of the Court of Appeals, as Division I in Treseler expressly rejected the argument that the “good cause” standard for protective orders in discovery should apply to the sealing of “filed documents [that] are not used by the court to make a decision.” 145 Wn. App. at 282. Instead, Division I correctly noted, consistent with Rufer, that a court record is presumed to be open to the public once filed in anticipation of a decision, and that the Ishikawa standard applies equally to records filed in anticipation of a court decision but were “never part of the court’s determination, similar to unused discovery documents.” Id. at 285. Rejecting the argument that the court must consider the records in order for Article I, Section 10 to be implicated, Treseler stated:

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

Id. at 285-86. Here, the records were filed in anticipation of a court decision. The documents, which were attached to motions and pleadings or were briefs themselves, are not akin to the “raw fruits” of discovery, such as deposition transcripts opened but never cited or used as support in

connection with a motion. In fact, most of the records at issue here were filed in anticipation of a **dispositive** decision. Despite this and the above case law from this Court and its own court, Division I ruled that if a court never reviewed the filed court records, the public has no interest in them, and **Ishikawa** therefore did not apply. This holding must be reversed.

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

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

records filed under seal because of a protective order. This means that to comply with GR 15, there must be written findings justifying the sealing (not present here), a specific finding of a compelling interest in the sealing (not present here), etc. Despite the total absence of these requirements, and the fact that party agreement was the sole basis for sealing (violating GR 15(c)(2)), Division I affirmed the trial court—a ruling that directly conflicts with its own prior case law. See, e.g., Indigo Real Estate Servs., 151 Wn. App. at 946 (remanding because it was “ambiguous” as to whether the trial court applied GR 15); In Re Marriage of R.E., 144 Wn. App. at 403 (remanding because of lack of adequate findings justifying sealing). GR 15 clearly says it applies to all court records, and thus Division I’s Opinion simply cannot be affirmed.<sup>6</sup> If this Court perceives a conflict between the two standards, or believes that filed court records allegedly not reviewed by a court do not implicate GR 15 (despite GR 15(c)(1) stating that the rule’s sealing requirements apply to “civil cases”) it should establish that rule with clear and well-articulated justifications.

Clark clearly raised and preserved the issue related to GR 15 and KCLR 15 below, and they must be addressed here. See CP 128-131; Motion for Reconsideration at 18-25.

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

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

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

Here, the trial court permanently sealed records with no showing of good cause or particularized harm and based its ruling solely on its conclusion that **Ishikawa** did not apply. This is in direct opposition to this Court’s requirements for a particularized showing to seal under the standard adopted in **Dreiling** and **Rufer** and the lower appellate courts. **See McCallum**, 149 Wn. App. at 423. Smith Bunday has not established

good cause for sealing. The “taxpayers” it claims to be protecting are but one—the client they allegedly aided in embezzling from the other clients and hiding it on the books. Plaintiffs, the other owners of the entities, support unsealing and asked to have the records removed from the protective order below, and no one else has come forward to intervene or file a response of any kind. Further, Smith Bunday has not established the records are tax records or return information. See December 28, 2009, Answer to WSCPA Amicus Br. at 11-14. The records should be unsealed.

**B. This Case Involves Significant Questions of State Constitutional Law and Issues of Substantial Public Interest That Must be Determined by this Court.**

At the heart of this case is the extent to which our judicial system remains open, accessible and accountable to the public—the basis for the public’s constitutional right to open court proceedings and records, as repeatedly recognized by the Washington and U.S. Supreme Courts. See Dreiling, 151 Wn.2d at 915 (policy for granting public access to civil courts “relate to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.”); see also Allied Daily Newspapers, 121 Wn.2d at 211 (“it is the right of the

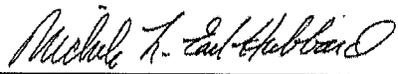
people to access open courts where they may freely observe the administration of civil and criminal justice”).<sup>7</sup>

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

#### V. CONCLUSION

For the foregoing reasons, this Court should overturn the trial court Order and Division I Opinion and order the records unsealed.

Respectfully submitted this 5th day of April 2011.

By:   
Michele Earl-Hubbard, WSBA #26454  
Chris Roslaniec, WSBA #40568  
Attorneys for Appellant D. Edson Clark



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<sup>7</sup> See also Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (value of openness in the knowledge that proper procedures are followed in addition to actual observation); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 604, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (Blackmun, J., concurring) (“[T]he public has an intense need and a deserved need to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, other public servants, and all the actors in the judicial arena....”).

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on April 5, 2011, I caused the delivery of the foregoing Supplemental Brief by the method indicated to:

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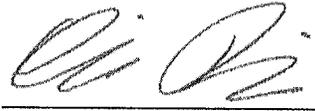
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Dated this 5th day of April, 2011 at Seattle, Washington.



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Chris Roslaniec

# APPENDIX A

[Legislature Home](#) > [Laws and Agency Rules](#) > Washington State Constitution

## Washington State Constitution

### PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

### Documents

[PDF version of the Washington State Constitution \(1.2 MB\)](#)

### ARTICLE I DECLARATION OF RIGHTS

**SECTION 1 POLITICAL POWER.** All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

**SECTION 2 SUPREME LAW OF THE LAND.** The Constitution of the United States is the supreme law of the land.

**SECTION 3 PERSONAL RIGHTS.** No person shall be deprived of life, liberty, or property, without due process of law.

**SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE.** The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

**SECTION 5 FREEDOM OF SPEECH.** Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

**SECTION 6 OATHS - MODE OF ADMINISTERING.** The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

**SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED.** No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED.** No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

**SECTION 9 RIGHTS OF ACCUSED PERSONS.** No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

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

**SECTION 11 RELIGIOUS FREEDOM.** Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship,

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Please see for filing the attached Appellant Clark's Supplemental Brief for Clark v. Smith Bunday Berman Britton, et. al, Supreme Court No. 84903-0.

Thank you,  
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