

4-6-2009

# Duncan v. State Bd. of Accountancy Clerk's Record v. 1 Dckt. 35804

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/  
idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Duncan v. State Bd. of Accountancy Clerk's Record v. 1 Dckt. 35804" (2009). *Idaho Supreme Court Records & Briefs*. 111.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/111](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/111)

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law.

# LAW CLERK

Vol. 1 of 2

In the  
**SUPREME COURT**  
of the  
**STATE OF IDAHO**

MICHAEL A. DUNCAN,

Plaintiff-Appellant,

v.

IDAHO STATE BOARD OF ACCOUNTANCY,

Defendant-Respondent.

**FILED - COPY**

**APR - 6 2000**

Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by: \_\_\_\_\_

## CLERK'S RECORD ON APPEAL

Appealed from the District Court of the  
Second Judicial District of the State of Idaho,  
in and for the County of Nez Perce

The Honorable Carl B. Kerrick

Supreme Court No. 35804

LARRY C. HUNTER  
ATTORNEY FOR DEFENDANT-RESPONDENT

PAUL THOMAS CLARK  
ATTORNEY FOR PLAINTIFF-APPELLANT

# 35804

IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL A. DUNCAN, )  
 )  
Plaintiff-Appellant, ) SUPREME COURT NO 35804  
 )  
vs. )  
 )  
IDAHO STATE BOARD OF ACCOUNTANCY, )  
 )  
 )  
Defendant-Respondent. )

CLERK'S RECORD

Appeal from the District Court of the Second Judicial District  
of the State of Idaho, in and for the County of Nez Perce

BEFORE THE HONORABLE CARL B. KERRICK, DISTRICT JUDGE

Counsel for Defendant

Mr. Larry Hunter  
P O Box 829  
Boise, ID 83701

Counsel for Plaintiff

Mr. Paul Thomas Clark  
P O Drawer 285  
Lewiston, ID 83501

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

MICHAEL A. DUNCAN,	)	
	)	
Plaintiff-Appellant,	)	SUPREME COURT NO 35804
	)	
vs.	)	
	)	TABLE OF CONTENTS
IDAHO STATE BOARD OF ACCOUNTANCY,	)	
	)	
Defendant-Respondent.	)	
	)	

Page

Petition for Judicial Review filed September 6, 2007	....	1-16
Order for Stay Pending judicial Review filed September 6, 2007	.....	17-18
Order Granting Agency Request for Extension to file Agency Record filed October 26, 2007	.....	19-20
Memorandum Opinion and Order on Motion to Dismiss and Petition for Judicial Review filed September 3, 2008	.....	21-31
Notice of Appeal filed October 8, 2008	.....	32-34
Amended Notice of Appeal filed December 17, 2008	.....	35-36
Clerk's Certificate	.....	37-38
Certificate of Service	.....	39-40
Objection to Clerk's Record filed February 20, 2009	.....	41-46
Order filed March 16, 2009	.....	47-48
Amended Clerk's Certificate	.....	49-50
Amended Certificate of Service	.....	51-

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

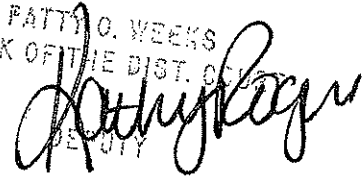
MICHAEL A. DUNCAN,	)	
	)	
Plaintiff-Appellant,	)	SUPREME COURT NO 35804
	)	
vs.	)	
	)	INDEX
IDAHO STATE BOARD OF ACCOUNTANCY,	)	
	)	
Defendant-Respondent.	)	

	<u>Page</u>
Amended Certificate of Service .....	51-
Amended Clerk's Certificate .....	49-50
Amended Notice of Appeal filed December 17, 2008 .....	35-36
Certificate of Service .....	39-40
Clerk's Certificate .....	37-38
Memorandum Opinion and Order on Motion to Dismiss and Petition for Judicial Review filed September 3, 2008 .....	21-31
Notice of Appeal filed October 8, 2008 .....	32-34
Objection to Clerk's Record filed February 20, 2009 .....	41-46
Order filed March 16, 2009 .....	47-48
Order for Stay Pending judicial Review filed September 6, 2007 .....	17-18
Order Granting Agency Request for Extension to file Agency Record filed October 26, 2007 .....	19-20
Petition for Judicial Review filed September 6, 2007 .....	1-16

FILED

2007 SEP 6 AM 10 45

PATTY O. WEEKS  
CLERK OF THE DIST. COURT



1  
2 PAUL THOMAS CLARK  
3 CLARK and FEENEY  
4 Attorneys for Respondent  
5 The Train Station, Suite 201  
6 13th and Main Streets  
7 P. O. Drawer 285  
8 Lewiston, Idaho 83501  
9 Telephone: (208) 743-9516

10 IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
11 STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

12 In the Matter of )

Case No. **CV07-01946**

) Docket No. 2006-06

13 MICHAEL A. DUNCAN, )  
14 License No. CP-2297 )

**PETITION FOR JUDICIAL REVIEW**

15 Respondent. )

16 COMES NOW MICHAEL A. DUNCAN, the Respondent in the above-entitled matter by  
17 and through his attorney of record, Paul Thomas Clark of the law firm Clark and Feeney, and  
18 pursuant to I.C. §§54-224 & 67-5270 et seq. hereby respectfully petitions this Court for Judicial  
19 Review of the Findings of Fact, Conclusions of Law, and Final Order entered by the Idaho State  
20 Board of Accountancy on August 16, 2007, in Docket No. 2006-06. A copy of said final order is  
21 attached hereto as Exhibit "A". Said proceeding and Findings of Fact, Conclusions of Law, and  
22 Final Order were entered following a hearing held on July 18, 2007 pursuant to I.C. § 54-219.  
23 Venue is proper because the Respondent resides in Nez Perce County. See I.C. § 67-5272(1)(c).

24 PETITION FOR JUDICIAL REVIEW -1-

DATED this 10<sup>th</sup> day of August, 2007.

CLARK and FEENEY

By [Signature]  
Paul Thomas Clark, a member of the firm  
Attorneys for Respondent.

I hereby certify on the 10<sup>th</sup> day  
of September, 2007, a true copy  
of the foregoing instrument  
was:  Mailed  
 Faxed  
 Hand delivered to:

Larry C. Hunter  
Moffatt Thomas Barrett Rock & Fields  
US Bank Plaza Building, 10th Fl  
PO Box 829  
Boise, ID 83701

CLARK and FEENEY

By [Signature]  
Attorneys for Respondent.

# EXHIBIT A

*Findings of Fact, Conclusions of Law, and Final Order*



BEFORE THE IDAHO STATE BOARD OF ACCOUNTANCY

In the Matter of	)	Docket No. 2006-06
	)	
MICHAEL A. DUNCAN,	)	<b>FINDINGS OF FACT, CONCLUSIONS OF</b>
License No. CP-2297	)	<b>LAW, AND FINAL ORDER</b>
_____	)	

The contested case regarding the complaint against Michael A. Duncan, a Certified Public Accountant in the State of Idaho, License No. CP-2297, duly came for hearing before the Idaho State Board of Accountancy on Wednesday, July 18, 2007, at the offices of Moffatt, Thomas, Barrett, Rock & Fields, Chartered, at 101 South Capitol Blvd., 11<sup>th</sup> Floor, Boise, Idaho. The members of the Idaho State Board of Accountancy who were present and who served as the hearing body for purposes of this administrative proceeding were as follows: Lisa L. Donnelley, CPA, Chair; Charles W. Clark, CPA, Vice Chair; Stanley C. Wood, CPA, Secretary; Bette Jo Berryman, LPA, Treasurer; Samuel K. Cotterell, CPA; Louann Krueger, Public Member; and Monte E. Warwick, CPA. Roseanne R. Hardin was the duly appointed Hearing Officer designated to act as the presiding officer for this hearing, with authority limited to conducting the hearing as defined in 04.11.01.413.c. of the Idaho Administrative Procedures Act (hereinafter referred to as "IDAPA"). The Respondent, Michael A. Duncan, CPA (hereinafter referred to as "Respondent"), was present, and was represented by his legal counsel, Thomas Clark of the firm Clark and Feeney. The Idaho State Board of Accountancy (hereinafter referred to as "the Board") was represented by Barbara R. Porter, its Executive Director; and its legal counsel, Larry C. Hunter of the firm Moffatt, Thomas, Barrett, Rock & Fields, Chartered. Respondent and the Board may be hereinafter collectively referred to as "the Parties."

The issues presented in this contested case are as follows:

**RECEIVED**  
**AUG 21 2007**  
 BOARD OF ACCOUNTANCY

1. Whether the Complaint filed in this matter contained sufficient cause or grounds that, if proven, warranted and required disciplinary action by the Board against the Certified Public Accountant's license of Respondent; and
2. If sufficient cause or grounds were proven, what disciplinary action, if any, would be appropriate?

The hearing body, after considering the Complaint, after having heard and considered the testimony and arguments of the respective parties presented during the course of the administrative hearing, after having reviewed the record of this matter including the Parties' exhibits admitted herein, and being otherwise fully advised in the premises, does hereby issue the following Findings of Facts, Conclusions of Law, and Final Order.

**I.**

**SUMMARY OF THE PROCEEDINGS**

**A. Legal Authority of the Board and Statutory Standards for Disciplinary Action Regarding a License.**

As set forth in the Idaho Accountancy Act (Chapter 2, Title 54, Idaho Code), the Board is the self-governing agency for the State of Idaho that, among other matters, is responsible to promulgate necessary administrative rules, to initiate or receive complaints against licensees, to investigate complaints against licensees, and to conduct disciplinary proceedings against licensees in the State of Idaho.

A "licensee" is defined as any person who holds a current valid license issued by the Board authorizing that person to practice public accountancy. Idaho Code § 54-206(16). The Board issues original and renewal licenses to qualified persons to practice as certified public accountants in the state of Idaho. Idaho Code § 54-211(1). After notice and an opportunity for hearing, the Board may revoke, suspend, refuse to renew, administratively penalize, reprimand, restrict, or place on probation the holder of a license for cause shown. Idaho Code §§ 54-219 and 67-5254.

In any action brought against a licensee under authority of the Idaho Accountancy Act, evidence of the commission of a single prohibited act shall be sufficient to justify disciplinary action. Idaho Code § 54-219(4). Acceptance of licensure as a certified public accountant in Idaho establishes an affirmative obligation by the holder of the license to be diligent in the performance of professional services, and to be fair and honest in relations with clients, fellow practitioners, and the public and shall observe the standards incorporated by reference in Rule 004. IDAPA 01.01.01.400.01 and 02.

**B. The Complaint Against Respondent.**

A former client filed the Complaint in this matter on September 22, 2006. The complaint alleged a conflict of interest and violation of Board of Accountancy rules, specifically, Rules of Professional Conduct 400.01 and 400.02, based upon the personal relationship that was established between the Respondent and the Complainant's then wife and the continuation of a professional relationship regarding the preparation of joint tax filings for the complainant and his then former wife.

The Executive Director alleges that Respondent violated Rule 102.03 of the AICPA Code of Professional Conduct which is incorporated by reference into the Rules of the Board of Accountancy, Idaho Code § 54-204 (1)(i) and IDAPA 01.01.01.004.01. Rule 102.03 of the AICPA states:

**Conflicts of Interest.**

A conflict of interest may occur if a member performs a professional service for a client or employer and the member or his or her firm has a relationship with a person, entity, product, or service that could, in the member's professional judgment, be viewed by the client, employer, or other appropriate parties as impairing the member's objectivity. If the member believes that the professional service can be performed with objectivity, and

the relationship is disclosed, consent is obtained from such client, employer, or other appropriate parties, this rule shall not operate to prohibit the performance of the professional service. In making the disclosure, the member should consider Rule 301.

The following are examples, not all inclusive, of situations that should cause a member to consider whether or not the client, employer or other appropriate parties could perceive the relationship as impairing the member's objectivity:

...

- A member has provided tax or personal financial planning (PTP) service for a married couple who are undergoing a divorce, and the member has been asked to provide the services for both parties during the divorce proceedings.

(Comment to rule.)

...

**C. Contested Case Proceedings Under the Idaho Administrative Procedures Act.**

The Board is authorized to conduct hearings in furtherance of its licensing function. Idaho Code §§ 54-204(4), 54-219, and 67-5254. The Idaho Accountancy Act states that hearings are to be conducted in accordance with the provisions of IDAPA. Idaho Code § 54-219(1). An administrative hearing conducted in accordance with IDAPA is denominated a "contested case". Idaho Code § 67-5201(6). In conducting a contested case proceeding and issuing findings of fact, conclusions of law, and final orders, the presiding officer and hearing board are guided by express provisions of IDAPA.

The Board has adopted the Idaho Rules of Administrative Procedure of the Attorney General as standards for the procedures it employs in conducting contested cases. IDAPA 01.01.01.003. The Board, through the complainant, as the moving party in this proceeding, has the burden of proof.

**D. Summary of the Testimony and Evidence Presented at the Administrative Hearing.**

At the hearing held on July 18, 2007, the Board presented evidence through the testimony of Respondent and Executive Director Barbara R. Porter. Additionally, eleven (11) exhibits were admitted without objection:

Exhibits of the Board:

- Exhibit 1 Hand written billing statement for Randy & Evelyn Forsman FYE 12/31/03
- Exhibit 2 Hand written billing statement for Randy & Evelyn Forsman FYE 12/31/04
- Exhibit 3 Statement Sellman and Duncan—last entry 06/10/2004 date 1/24/2007
- Exhibit 3 a Statement Sellman and Duncan—last entry 11/09/2004 date 1/24/2007
- Exhibit 4 Check to Sellman and Duncan dated 6/10/04 signed Evelyn Forsman
- Exhibit 5 Check to Sellman and Duncan dated 11/08/2004 signed Michael A. Duncan
- Exhibit 6 Letter to Michael Duncan from Randy Forsman
- Exhibit 8 Cover letter and 2003 tax return for Randy and Evelyn Forsman (multiple pages)
- Exhibit 9 Telephone records for Evelyn J. Forsman 208-305-1667 (multiple pages)

Respondent provided testimony and also offered the following exhibits that were admitted without objection.

Exhibits of Respondent:

Exhibit 4      Typed statement of telephone call by Fran Givens –Aug 25, 2004

Exhibit 5      Timeline of Events prepared by Michael Duncan

The remaining two Exhibits of Respondent were admitted over objection:

Exhibit 2      Transcript of Answering Machine Tape

Exhibit 3      CD of Answering Machine message(s)

Witnesses testifying in person were Barbara R. Porter, Executive Director, and Respondent Michael A. Duncan.

Respondent testified that he had been licensed in the State of Idaho as a CPA since 1986 and that he had prepared the taxes of Complainant and his wife (hereinafter “Complainant and Evelyn”) since 2001. Respondent stated that he “suspended” those services on April 28, 2004 when Evelyn contacted him asking for a referral to an attorney who could handle a divorce for her. Respondent stated that the notice of a pending divorce action was an automatic “conflict” so all work was stopped at that time. Respondent was the supervising CPA for the preparation of the tax return, not the individual who was preparing the actual return for Complainant and Evelyn.

Sometime during the month of May 2004 a personal relationship developed between the Respondent and Evelyn. There was animosity between the Respondent and the Complainant and Complainant had some knowledge of the personal relationship that was established between Respondent and Evelyn. Evelyn’s divorce from Complainant became final on August 13, 2004.

A letter was sent from Respondent's accounting firm to Complainant on August 11, 2004 stating that a second extension would be filed for Complainant and Evelyn's joint tax return. Respondent was listed as the contact person regarding that tax return. Correspondence under Respondent's signature was sent to Complainant and Evelyn regarding the preparation of the joint tax return on September 9, 2004.

Exhibit 9 shows that during the period between April 29, 2004 and the August 10, 2004, hundreds of telephone calls were placed between Evelyn's telephone number and Respondent's telephone number. Respondent wrote a check on his personal account for \$275 made payable to his accounting firm on November 8, 2004 that was applied to the balance due on the account of Complainant and Evelyn.

Subsequent to Evelyn's divorce, Respondent and his wife were divorced and Respondent and Evelyn were married in April of 2005.

Respondent states that at no time did he give notice to the Complainant or to Evelyn that he (Respondent) had a conflict of interest that would prevent him from continuing to represent the Complainant or Evelyn for tax preparation. At no time did Respondent provide notice to either Complainant or Evelyn that due to the divorce proceedings there was a conflict existing and that he (Respondent) could not represent both parties. Respondent stated that he did not give notice to Complainant or Evelyn that he could not represent both parties due to the personal relationship that was established between Respondent and Evelyn. Respondent argues that because Complainant had knowledge of the personal relationship, there was no duty of disclosure, and that Respondent's tax preparation was not impacted by the personal relationship, so there was no need for consent.

## II.

### BOARD OF ACCOUNTANCY DISCIPLINARY STANDARDS

The Board was created by the Idaho Legislature as the “public authority competent to prescribe and assess the qualifications and to regulate the conduct of licensees . . . and that the use of titles that have a capacity or tendency to deceive the public as to the status or competence of the persons using such titles be prohibited.” Idaho Code § 54-202.

The issue presented in this contested case is whether the Complaint filed in this matter, contains sufficient cause or grounds that, if proven, required and warranted disciplinary action by the Board against the Certified Public Accountant license of Respondent, and, if so, the nature of that disciplinary action, if any.

## III.

### FINDINGS OF FACT

1. The Board has jurisdiction in this matter. Respondent has been a Certified Public Accountant in the state of Idaho since 1986. He is currently licensed as a Certified Public Accountant.
2. Respondent had prepared taxes for Complainant and his wife Evelyn since 2001. Respondent established a personal relationship with Evelyn in May 2004, but did not make a disclosure to the Complainant-spouse that he had a conflict of interest that prevented him from continuing to represent both parties in tax preparation. He did not seek the consent of either party to continue such representation. Respondent stated that tax preparation was completed in a client neutral manner.
3. Respondent continued to retain responsibility for the filing of joint tax returns for both clients.



4. Complainant was aware of the personal relationship that was established between Respondent and Evelyn and was antagonistic toward both Respondent and Evelyn.

5. AICPA Rule 102.03 is applicable to Respondent as such rules are incorporated by reference into the rules promulgated by the Idaho Board of Accountancy.

6. AICPA Rule 102.03 does not create an exception from the duty to disclose a conflict of interest and seek consent to continuation of the professional services relationship for the situation in which the client is aware of the relationship.

#### IV.

#### CONCLUSIONS OF LAW

1. The Board may revoke, suspend, refuse to renew, administratively penalize, reprimand, restrict, or place on probation the holder of a license for a violation of the Idaho Accountancy Act or the Idaho Accountancy Rules promulgated thereunder.

2. Any single act prohibited in the Idaho Accountancy Act shall be sufficient to justify a suspension, revocation, fine, administrative penalty, restriction, reprimand, injunction, restraining order, conviction, or any other remedy authorized in by the Idaho Accountancy Act. Evidence of a general course of conduct shall not be required.

3. If an individual licensed by the Board of Accountancy establishes a personal intimate relationship with one spouse and a relationship of antagonism with the other spouse, one may reasonably view the relationships to impair the member's objectivity.

4. If an individual licensed by the Board of Accountancy believes the professional service can be performed with objectivity, and the relationship is disclosed to the client(s) and consent of the client(s) is obtained, AICPA 102.3 does not prohibit the performance of the professional service.

5. Respondent had a duty to terminate the professional relationship or to make disclosure of a conflict of interest to both clients due to the divorce proceedings and finalization of the divorce or the personal relationship that was established between the Respondent and one client. Respondent did not make such required disclosures and did not seek the consent of either client prior to continuation of the professional services relationship.

6. Respondent violated the Idaho Accountancy Act, Idaho Code §§ 54-219(1)(d), specifically Idaho Accountancy Rule 004.01 by not making the disclosures or seeking/receiving the consent(s) required by AICPA 102-3.

V.

FINAL ORDER

1. It is the order of the Idaho State Board of Accountancy that Respondent shall receive a written reprimand to address the violations of IACPA rule 102-3 conflict of interest.
2. Respondent shall attend four (4) hours of approved ethics training prior to the end of the calendar year. Such training shall include conflicts of interest.
3. The Board also levies the administrative penalty of \$1,000 upon Respondent as well as reimbursement of up to \$2000 of the out of pocket expenses of the Board incurred in prosecution of this complaint. The penalty and expenses shall be paid in full consistent with reasonable terms and timelines established by the Executive Director.
4. Additionally, any violations of the Idaho Accountancy Act and/or Rules, or of this Final Order of the Board, by Respondent shall be reported to the Board immediately for further consideration and possible action.
5. If the Board staff has reason to believe that Respondent has violated or failed to comply with this Final Order or any subsequent order based therein, the Board may

impose additional discipline following notice and an opportunity for a hearing as required by Idaho Code § 54-219.

DATED this 16<sup>th</sup> day of August, 2007.

IDAHO STATE BOARD OF ACCOUNTANCY

By Lisa L. Donnelley  
Lisa L. Donnelley, Chair

THIS IS A FINAL ORDER OF THE PRESIDING OFFICERS. In pertinent part, Idaho Code §§ 54-224 and 67-5246 set forth available procedures and applicable time limits for seeking reconsideration or other administrative relief as follows:

**67-5246. Final Orders—Effectiveness of final orders.**

\* \* \*

(4) Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of any final order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) the petition for reconsideration is disposed of; or

(b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

\* \* \*

Petitions for reconsideration may be filed with the Idaho State Board of Accountancy, Owyhee Plaza, Suite 470, 1109 Main Street, P.O. Box 83720, Boise, Idaho 83720-0002. Judicial review of this Final Order is governed by the provisions of Idaho Code §§ 67-5270 through 67-5279. Pursuant to those sections, any party aggrieved by this Final Order may appeal this case to district court by filing a petition in the district court of the county in which the hearing was held, the final agency action was taken, the party seeking review of the order resides or operates its principal place of business, or the real property or personal property that was the subject of the agency action is located. An appeal must be filed within twenty-eight (28) days of 1) the service date of this Final Order, 2) an order denying a petition for reconsideration, or 3) the failure

within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

FILED

2007 SEP 6 PM 2 30

PATTY O. WEEKS  
CLERK OF THE DISTRICT COURT  
*P. O. Weeks*  
DEPUTY

1  
2 PAUL THOMAS CLARK  
3 CLARK and FEENEY  
4 Attorneys for Respondent  
5 The Train Station, Suite 201  
6 13th and Main Streets  
7 P. O. Drawer 285  
8 Lewiston, Idaho 83501  
9 Telephone: (208) 743-9516

10 IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
11 STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

12 In the Matter of )

Case No. **CV07-01946**

) Docket No. 2006-06

13 MICHAEL A. DUNCAN, )  
14 License No. CP-2297 )

**ORDER FOR STAY**

**PENDING PETITION FOR JUDICIAL  
REVIEW**

15 Respondent. )  
16 )

17 The ex parte motion of the Respondent for stay pending judicial review having been presented before  
18 this court, and good cause appearing therefore,

19 NOW, THEREFORE, IT IS HEREBY ORDERED that the execution and/or enforcement of the  
20 Findings of Fact, Conclusions of Law, and Final Order previously entered in this matter on August 16, 2007,  
21 is hereby stayed during the pendency of judicial review of said order.

22 DATED this 6<sup>th</sup> day of September 2007.

23 *[Signature]*  
24 \_\_\_\_\_  
District Court Judge

25 ORDER FOR STAY  
26 PENDING JUDICIAL REVIEW -1-

I hereby certify on the 4th day  
of September 2007, a true copy  
of the foregoing instrument

was:  Mailed  
 Faxed  
 Hand delivered  
 Overnight mail to:

Larry C. Hunter  
Moffatt Thomas Barrett Rock & Fields  
US Bank Plaza Building, 10th Fl  
PO Box 829  
Boise, ID 83701

Paul Thomas Clark - *messenger*  
Clark and Feeney  
PO Box 285  
1229 Main Street, Ste 201  
Lewiston, ID 83501

CLERK OF DISTRICT COURT

By *J. W. Damman*  
Clerk/Deputy



ORDER FOR STAY  
PENDING JUDICIAL REVIEW -2-

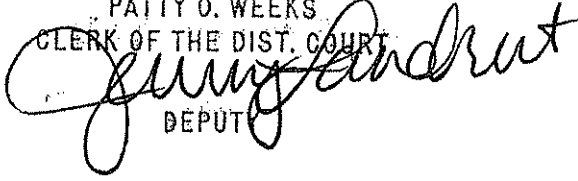
2

18

FILED

2007 OCT 26 PM 3 29

PATTY O. WEEKS  
CLERK OF THE DIST. COURT  
DEPUT



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

In the Matter of,

MICHAEL A. DUNCAN,  
License No. CP-2297

Respondent.

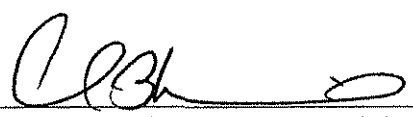
Case No. CV 07-01946

**ORDER GRANTING AGENCY  
REQUEST FOR EXTENSION TO FILE  
AGENCY DEMAND**

The Court, having reviewed the Idaho State Board of Accountancy's request for further time to file the Agency record with the Court, and the Court finding good cause therein;

IT IS HEREBY ORDERED that the Idaho State Board of Accountancy shall have until October 31, 2007, to file a copy of the record as required by Idaho Code Sections 67-5249 and 67-5242.

DATED this 26<sup>th</sup> day of October, 2007.



The Honorable Carl B. Kerrick  
Judge



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20<sup>th</sup> day of October, 2007, I caused a true and correct copy of the foregoing **ORDER GRANTING AGENCY REQUEST FOR EXTENSION TO FILE AGENCY DEMAND** to be served by the method indicated below, and addressed to the following:

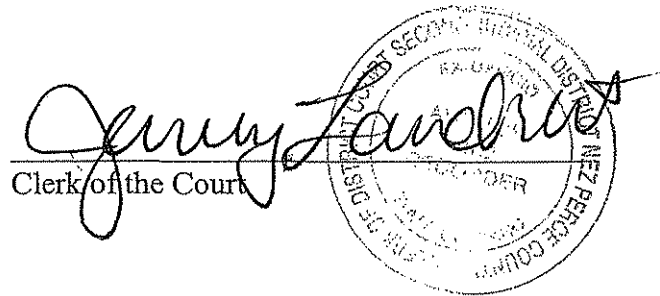
Paul Thomas Clark  
CLARK AND FEENEY  
The Train Station, Suite 201  
13th and Main Streets  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Facsimile: (208) 743-9516

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Larry C. Hunter, ISB No. 1989  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Facsimile (208) 385-5384

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Clerk of the Court



The image shows a handwritten signature in cursive that reads "Jerry Landrum". Below the signature is a circular official seal. The seal contains the text "CLERK OF THE DISTRICT COURT" around the perimeter and "SECOND JUDICIAL DISTRICT" at the top. The date "OCTOBER 20 2007" is stamped in the center of the seal.

FILED

2008 SEP 3 AM 11 53

PATTY O. WEEKS  
CLERK OF THE DIST. COURT  
DEPUTY



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

In the matter of:

MICHAEL A. DUNCAN,  
License No. CP-2297

CASE NO. CV 07-1946

MEMORANDUM OPINION AND  
ORDER ON MOTION TO  
DISMISS AND PETITION FOR  
JUDICIAL REVIEW

This matter came before the Court on a petition for judicial review from the Idaho State Board of Accountancy's Findings of Facts, Conclusions of Law, and Final Order dated August 16, 2007. The Petitioner also filed a motion to dismiss the matter due to an inadequate transcript of the agency hearing. The Court heard oral argument on the matter on July 15, 2008. The Petitioner, Michael A. Duncan, was represented by Paul Thomas Clark, of the firm Clark and Feeney. The Respondent, Idaho State Board of Accountancy, was represented by Larry Hunter, of the firm Moffatt, Thomas, Barrett, Rock & Fields. The Court, having heard the argument of counsel and being fully advised in the matter, hereby renders its decision.

## FACTS AND PROCEDURAL HISTORY

On September 22, 2006, a verified complaint was filed with the Idaho State Board of Accountancy (hereinafter "Board"). The Complaint was filed by Randy Forsmann, against accountant Michael Duncan. The Complaint alleged that Mr. Duncan continued accounting work on behalf of both Mr. Forsmann and his wife, Evelyn, after a conflict of interest arose; namely, that Mr. Duncan became aware that Evelyn would be seeking a divorce, and that Mr. Duncan engaged in a personal relationship with Evelyn while still continuing to act as both Mr. Forsmann and Evelyn's accountant. The Complaint centers upon the filing of the Forsmanns' 2003 tax return subsequent to the time their divorce was entered in August, 2004. Mr. Duncan was a partner with the Lewiston, Idaho, accounting firm of Sellman & Duncan, PLLC, at the time the Complaint was filed.

A response to the verified complaint was received and filed with the Board on October 17, 2006. A hearing was held before the Board on July 18, 2007. Findings of Fact, Conclusions of Law, and Final Order were issued on August 16, 2007.

On April 25, 2008, the Petitioner filed a timely Petition for Judicial Review of the Board's Findings of Facts, Conclusions of Law, and Final Order; to which the Board responded on May 29, 2008. In addition to the Petition for Judicial Review, the Petitioner filed a Motion to Dismiss this matter on April 25, 2008, based upon the Petitioner's claim that the Board failed to provide a complete transcript of the July, 2007, hearing. The Board responded to the motion to dismiss on May 21, 2008. Both matters are currently before this Court.

## ISSUE ON APPEAL

Did the Hearing Body err when it determined the Petitioner violated AICPA 102.3?

## STANDARD OF REVIEW

Judicial review of an agency action is governed by the Idaho Administrative Procedure Act. *See* I.C. § 67-5270. In reviewing an order issued by an agency, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67-5279(3). Further, the agency action shall be affirmed "unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4). The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

I.C. § 67-5279(1). If the action of the agency is not affirmed, it must be set aside in whole or in part and remanded to the agency for further proceedings as necessary. I.C. § 67-5279(3).

## DISCUSSION

There are two issues currently before the Court: The Petitioner's Motion to Dismiss and the Petition for Judicial Review. The Motion to Dismiss will be addressed first, followed by the Petition for Judicial Review.

## 1. Motion to Dismiss

The Petitioner filed a motion to dismiss this matter based upon the failure of the Board to provide an adequate transcript of the hearing held before the Board on July 18, 2007. The Petitioner claims he is prejudiced and cannot adequately present his position to the Court for judicial review. *See Affidavit of Counsel in Support of Motion to Dismiss*, at 2.

The Board is required to record such hearings pursuant to I.C. § 67-5242(3)(d).

At the hearing, the presiding officer:

(d) Shall cause the hearing to be recorded at the agency's expense. Any party, at that party's expense, may have a transcript prepared or may cause additional recordings to be made during the hearing if the making of the additional recording does not cause distraction or disruption.

*Id.* The Board complied with the requirements of I.C. § 67-5242(3)(d), that the presiding officer of the hearing shall cause the hearing to be recorded at the agency's expense, as the proceedings in this matter were recorded to an audio tape. The Petitioner was unable to have the recorded tapes of the hearing transcribed. As a result, the Board itself had a transcript prepared. A copy of this transcript, including portions listed as "inaudible," was provided to the Court. *See Affidavit of Counsel in Support of Motion to Dismiss, Exhibit B.*

The Court is unpersuaded by the Petitioner's argument that he is prejudiced and cannot adequately present his position to the Court for judicial review. The Court agrees that the copy of the transcript in this matter is less than ideal, however, it is not so lacking that it fails to set forth the details necessary for appellate review.<sup>1</sup> Further, the Petitioner has provided no authority which supports his argument that the matter should be

---

<sup>1</sup> The Court does not mean to make light of the fact that this transcript is incomplete, and recommends that the Board take caution so that an adequate transcript can be created when making such recordings in the future.

dismissed because the transcript is inadequate. The Petitioner has not established how the quality of the transcript has prejudiced him, or prevented him from setting forth argument on appeal. Therefore, the motion to dismiss the Complaint against Mr. Duncan due to an inadequate transcript of the hearing is denied.

## 2. Petition for Judicial Review

The Petitioner, Michael Duncan, is seeking review of the Findings of Fact, Conclusions of Law, and Final Order issued by the Board on August 16, 2007. The Board found that Mr. Duncan had a conflict of interest that prevented him from continuing to prepare the joint tax forms for both the Complainant, Randy Forsmann, and his ex-wife, Evelyn.<sup>2</sup> As a result, the Board concluded that Mr. Duncan had a duty to terminate the professional relationship or make a disclosure of a conflict of interest to both clients.<sup>3</sup> The Board determined that the Petitioner failed to do so, and as a result, he

---

<sup>2</sup> The Board made the following findings of fact:

2. Respondent had prepared taxes for Complainant and his wife Evelyn since 2001. Respondent established a personal relationship with Evelyn in May 2004, but did not make a disclosure to the Complainant-spouse that he had a conflict of interest that prevented him from continuing to represent both parties in tax preparation. He did not seek the consent of either party to continue such representation. Respondent stated that tax preparation was completed in a client neutral manner.
3. Respondent continued to retain responsibility for the filing of joint tax returns for both clients.
4. Complainant was aware of the personal relationship that was established between Respondent and Evelyn and was antagonistic toward both Respondent and Evelyn.
5. AICPA Rule 102.03 is applicable to Respondent as such rules are incorporated by reference into the rules promulgated by the Idaho Board of Accountancy.
6. AICPA Rule 102.03 does not create an exception from the duty to disclose a conflict of interest and seek consent to continuation of the professional services relationship for the situation in which the client is aware of the relationship.

*Findings of Fact, Conclusions of Law, and Final Order, at 8-9.*

<sup>3</sup> In addition, the Board made the following conclusions of law:

3. If an individual licensed by the Board of Accountancy establishes a personal intimate relationship with one spouse and a relationship of antagonism with the other spouse, one may reasonably view the relationships to impair the member's objectivity.
4. If an individual licensed by the Board of Accountancy believes the professional service can be performed with objectivity, and the relationship is disclosed to the client(s) and consent of the client(s) is obtained, AICPA does not prohibit the performance of the professional service.

“violated the Idaho Accountancy Act, Idaho Code §§ 54-219(1)(d), specifically Idaho Accountancy Rule 004.01 by not making the disclosures or seeking/receiving the consent(s) required by AICPA 102-3.” *Findings of Fact, Conclusions of Law, and Final Order*, at 10. The Board issued the following sanctions: the Petitioner was issued a written reprimand by the board; required to attend four hours of approved ethics training; levied an administrative penalty of \$1,000; and required to pay expenses of \$2,000. *Id.*

The Petitioner asks this Court to determine whether the Board erred when it concluded that Mr. Duncan violated Rule 102.03 of the AICPA Code of Professional Conduct. Rule 102.03 states in pertinent part:

A conflict of interest may occur if a member performs a professional service for a client or employer and the member or his or her firm has a relationship with another person, entity, product, or service that could, in the member’s professional judgment, be viewed by the client, employer, or other appropriate parties as impairing the member’s objectivity. If the member believes that the professional service can be performed with objectivity, and the relationship is disclosed to and consent is obtained from such client, employer, or other appropriate parties, the rule shall not operate to prohibit the performance of the professional service. When making the disclosure, the member should consider Rule 301.

AICPA Rule 102.3.

“An agency’s interpretation of its statutes is entitled to deference.” *Pearl v. Bd. of Prof’l Discipline of the Idaho State Board of Medicine*, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002); citing *Simplot v. Idaho State Tax Comm’n*, 120 Idaho 849, 820 P.2d.

- 
5. Respondent had a duty to terminate the professional relationship or to make disclosure of a conflict of interest to both clients due to the divorce proceedings and finalization of the divorce of the personal relationship that was established between the Respondent and one client. Respondent did not make such required disclosures and did not seek the consent of either client prior to continuation of the professional services relationship.
  6. Respondent violated the Idaho Accountancy Act, Idaho Code §§ 54-219(1)(d), specifically Idaho Accountancy Rule 004.01 by not making the disclosures of seeking/receiving the consent(s) required by AICPA 102.3.

*Findings of Fact, Conclusions of Law, and Final Order*, at 9-10.

1206 (1991). If the following four-prong test is met, the court must give “considerable weight to the agency’s interpretation. *Id.*

(1) the court must determine whether the agency has been entrusted with the responsibility to administer the statute at issue, (2) the agency’s statutory construction must be reasonable, (3) the court must determine that the statutory language at issue does not treat the precise issue, and (4) a court must ask whether any of the rationales underlying the rule of deference are present.

*Id.*

This Court must give considerable weight to the Board’s determination because each requirement of the four-prong test is met.<sup>4</sup> The Petitioner is challenging only the second prong of this four-part test, whether the agency’s statutory construction is reasonable. This construction is set forth in Findings of Fact 1-5, and Conclusions of Law 3-6. *See Findings of Fact, Conclusions of Law, and Final Order*, at 8-10.

Specifically, the Petitioner argues that the relationships were properly disclosed to both the Complainant and Evelyn, thus there was no violation of AICPA Rule 102.3. He argues that disclosure occurred because the Complainant was aware of the conflict simply due to the fact that the Complainant and Evelyn were seeking a divorce.

First, the Petitioner is critical of the Board’s reference to an example of a conflict located in the comment to AICPA Rule 102.3. The comment sets forth examples which

---

<sup>4</sup> The other three prongs of the test have been met. The first prong is met because the Board is entrusted with the responsibility to administer the statute at issue. *See* I.C. § 54-204(1)(i). The third prong of the test is also met: the statutory language at issue does not treat the precise issue; in this case, the determination of whether the conflict was properly disclosed, and whether consent was obtained from both parties. The fourth prong, whether any of the rationales underlying the rule of deference are present, is also met. First, the Petitioner does not suggest these rationales are not present, and second, “The rationales for deference are that interests have arisen in reliance on the agency’s statutory interpretation, that the agency has a practical interpretation, that the legislature acquiesces to the interpretation, and that agency expertise is required.” *Pearl*, 137 Idaho at 113, 44 P.3d at 1168.



are hypothetical situations that should cause a member<sup>5</sup> to consider whether or not a client, employer or other appropriate parties could perceive the relationship as impairing the member's objectivity. The example in the comment that the Board refers to is stated as follows:

A member has provided tax or personal financial planning (PTP) service for a married couple who are undergoing a divorce, and the member has been asked to provide the services for both parties during the divorce proceedings.

*Findings of Fact, Conclusions of Law, and Final Order*, at 4. The Petitioner attempts to distinguish his situation from this example in the comment by claiming first, that tax form preparation is different from tax or personal financial planning; especially in light of the fact that the prepared tax form in question was for the tax year of 2003, a year prior to the Complainant and Evelyn's divorce in 2004. The Petitioner claims the tax form preparation would be done in the same manner, regardless of whether the parties were seeking a divorce. *See Petitioner's Brief*, at 8. The Petitioner also argued that the tax return in question was substantially completed before the conflict arose in 2004. However, the filing of the Forsmanns' 2003 tax forms was extended and did not actually occur until after the divorce decree was entered in 2004. Key to the Petitioner's argument is the claim that disclosure of the conflict to the parties was not necessary, because the parties were already aware of the conflict because "the parties obviously knew they were getting a divorce." *Petitioner's Brief*, at 9.

In addition, the Petitioner argues that AICPA Rule 102.3 was not violated because both clients consented to the continuation of the professional relationship. The Petitioner claims that Mr. Forsmann consented simply by the fact that he signed the tax return, filed

---

<sup>5</sup> Use of the term "member" refers to accountants who are members of the Idaho State Board of Accountancy.

it, and kept the refund. The Petitioner's arguments are fairly similar to those which were posed to the Board at the hearing held on July 18, 2007.

After reviewing the record, this Court finds that the Board's determinations are reasonable and supported by substantial evidence on the record as a whole, thus the Petitioner's argument that the Board's actions were arbitrary, capricious, and an abuse of discretion is unfounded. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The Petitioner asks this Court to make its own factual determinations regarding whether the Complainant's knowledge of the divorce provided him notice of the conflict in question, and further, whether the Complainant's act of signing the tax return amounted to the Complainant's consent to the Petitioner's accountant work. The Board found otherwise, and this Court does not disagree.

Further, an agency's action shall be affirmed "unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4). The Petitioner has not shown how his substantial rights have been prejudiced. While the Petitioner was reprimanded and sanctioned, there has been no showing of prejudice. Therefore, the Board's Findings of Fact, Conclusions of Law, and Final Order are affirmed.

### CONCLUSION

The Idaho State Board of Accountancy sanctioned the Petitioner for failing to disclose a conflict of interest and failing to receive permission to continue representation as an accountant, in violation of AICPA Rule 102.3. Based upon the foregoing opinion, the actions of the Board are affirmed.

**ORDER**

IT IS HEREBY ORDERED that the Petitioner's Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law, and Final Order, issued by the Idaho State Board of Accountancy on August 16, 2007, are hereby AFFIRMED.

Dated this 3<sup>rd</sup> day of September, 2008.

  
\_\_\_\_\_  
CARL B. KERRICK—District Judge

CERTIFICATE OF MAILING

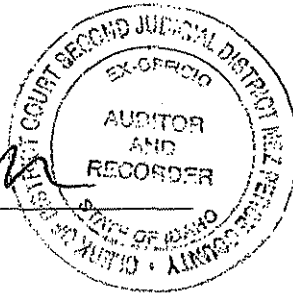
I hereby certify that a true copy of the foregoing MEMORANDUM OPINION AND ORDER ON MOTION TO DISMISS AND PETITION FOR JUDICIAL REVIEW was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 3<sup>rd</sup> day of September, 2008, on:

Paul Thomas Clark *messenger*  
CLARK AND FEENEY  
P O Drawer 285  
Lewiston ID 83501

Larry C. Hunter  
MOFFATT THOMAS  
BARRETT ROCK & FIELD  
P O Box 829  
Boise ID 83701

PATTY O. WEEKS, CLERK

By: *JWS Damm*  
Deputy



FILED

2008 OCT 8 AM 11 43

PATRICIA WEEKS  
CLERK OF THE DIST. COURT  
*Patricia Weeks*  
DEPUTY

1 PAUL T. CLARK  
Idaho State Bar No. 1329  
2 CLARK and FEENEY  
The Train Station  
3 P.O. Drawer 285  
Lewiston, Idaho 83501  
4 Telephone: (208) 743-9516  
5 Facsimile: (208) 746-9160  
6 Attorneys for Petitioner/Appellant

7  
8  
9 IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

10  
11 In the matter of: ) Case No. CV 07-1946  
12 )  
13 MICHAEL A. DUNCAN ) NOTICE OF APPEAL  
License No. CP-2297 )  
14 )  
15 ) Fee Category:  
16 ) Fee Amount:

17 TO: IDAHO STATE BOARD OF ACCOUNTANCY and to its attorney, LARRY HUNTER, and THE  
18 CLERK OF THE ABOVE ENTITLED COURT:

19 NOTICE IS HEREBY GIVEN THAT:

- 20 1. The above named Appellant, MICHAEL A. DUNCAN, appeals to the Idaho Supreme Court  
21 from the Memorandum Opinion and Order on Motion to Dismiss and Petition for Judicial entered the 3rd  
22 day of September, 2008, by the Honorable Carl B. Kerrick.  
23 2. The appeal is taken on issues of law and fact. A more specific detailing of the issues on  
24 appeal will be supplied upon the submission of briefing in this matter.  
25  
26

1           3.       That Appellant Duncan has a right to appeal to the Idaho Supreme Court. The Memorandum  
2 *Opinion and Order* described in paragraph 1 above is an appealable order under and pursuant to Rule 11(f).

3           4.       That Appellant Duncan requests the preparation of the standard reporter's transcript as  
4 defined in Rule 25(a), I.A.R.

5           5.       The Appellant Duncan requests the clerk's record be prepared as provided for under Rule  
6 28(a)(1), I.A.R.

7           6.       I certify:

8           (a)      That a copy of the Notice of Appeal has been served on the reporter.

9           (b)      That the Clerk of the District Court has been paid the estimated fee for preparation of the  
10 reporter's transcript.


11           (c)      That the estimated fee for preparation of the clerk's record has been paid to the Clerk of the  
12 District Court.

13           (d)      That the appellate filing fee has been paid.

14           (e)      That service had been made upon all parties required to be served pursuant to I.A.R., Rule  
15 20.  
16

17           DATED this 8<sup>th</sup> day of October, 2008.

18                               CLARK AND FEENEY

19                               By:   
20                               Paul Thomas Clark, a member of the firm.  
21                               Attorneys for Petitioner/Appellant


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

I hereby certify on the 8th  
day of October, 2008, a true copy  
of the foregoing instrument  
was:  Mailed  
 Faxed  
 Hand delivered  
 Overnight mail to:

Larry C. Hunter  
Moffatt Thomas Barrett Rock & Fields  
US Bank Plaza Building, 10th Fl  
PO Box 829  
Boise, ID 83701

Nancy Towler  
Court Reporter  
Nez Perce County  
PO Box 896  
Lewiston, ID 83501

CLARK and FEENEY

By   
Attorneys for Petitioner/Appellant

FILED

2008 DEC 17 PM 12 15

THOMAS WELLS  
CLERK OF THE DIST. COURT  
DEPUTY

*Thomas Wells*

PAUL T. CLARK  
Idaho State Bar No. 1329  
CLARK and FEENEY  
The Train Station  
P.O. Drawer 285  
Lewiston, Idaho 83501  
Telephone: (208) 743-9516  
Facsimile: (208) 746-9160

Attorneys for Petitioner/Appellant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

In the matter of:	)	Supreme Court No. 35804
	)	Case No. CV 07-1946
	)	
MICHAEL A. DUNCAN	)	AMENDED NOTICE OF APPEAL
License No. CP-2297	)	

TO: IDAHO STATE BOARD OF ACCOUNTANCY and to its attorney, LARRY HUNTER:

NOTICE IS HEREBY GIVEN THAT THE PLAINTIFF/APPELLANT AMENDS PARAGRAPH 2 OF THE APPELLANT'S NOTICE OF APPEAL AS FOLLOWS:

2. The appeal is taken on issues of law and fact. A preliminary statement of the issues on appeal which the Plaintiff intends to assert is as follows:

Did the District Court err in not overturning the Idaho State Board of Accountancy's decision that the Appellant violated the Idaho Accountancy Act, specifically Idaho Accountancy Rule 004.01, by not making the disclosures or seeking/receiving the consent(s) required by AICPA 102.3, when:


(a) AICPA 102.3 is silent about who needs to make a disclosure of a relationship and how the disclosure of that relationship is to be made and the uncontrovertible evidence in the record established that the Complainant was aware of the relationship requiring disclosure prior to the finalization of the tax return; and



1 (b) AICPA 102.3 is silent about how consent must be obtained and the uncontrovertible  
2 evidence in the record established that all parties consented to the Appellant continuing to  
3 provided professional services, including the Complainant who got a copy of final tax  
return, signed the final tax return, filed the final tax return, kept the refund, and never  
alleged that the professional services provided by the Appellant where in any way suspect.

4 DATED this 16th day of December, 2008.


5 CLARK AND FEENEY

6  
7 By:   
8 Paul Thomas Clark, a member of the firm.  
Attorneys for Petitioner/Appellant

9  
10 I hereby certify on the 16th  
11 day of December, 2008, a true copy  
of the foregoing instrument  
12 was:  Mailed  
 Faxed  
 Hand delivered  
13  Overnight mail to:

14 Larry C. Hunter  
15 Moffatt Thomas Barrett Rock & Fields  
16 US Bank Plaza Building, 10th Fl  
PO Box 829  
Boise, ID 83701

17 CLARK and FEENEY

18  
19 By:   
Attorneys for Petitioner/Appellant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

	)	
	)	
MICHAEL A. DUNCAN,	)	
	)	
Plaintiff-Appellant,	)	SUPREME COURT NO 35804
	)	
vs.	)	
	)	CLERK'S CERTIFICATE
IDAHO STATE BOARD OF ACCOUNTANCY,	)	
	)	
	)	
Defendant-Respondent.	)	
	)	

I, DeAnna P. Grimm, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, do hereby certify that the foregoing Clerk's Record in the above-entitled cause was compiled and bound by me and contains true and correct copies of all pleadings, documents, and papers designated to be included under Rule 28, Idaho Appellate Rules, the Notice of Appeal, any Notice of Cross-Appeal, and additional documents that were requested.

I further certify:

1. That no exhibits were marked for identification or admitted into evidence during the course of this action.

2. That the following will be submitted as an exhibit to this record on appeal:

Agency's Record - a copy of Defendant's exhibit #3 is being submitted in place of the original. The original was a DSS file and not readable. Clark and Feeney burned a CD in the WAV format.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court this 23 day of January 2009.

PATTY O. WEEKS, Clerk

By *Debra J. Sumari*  
Deputy Clerk

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

	)	
	)	
MICHAEL A. DUNCAN,	)	
	)	
Plaintiff-Appellant,	)	SUPREME COURT NO 35804
	)	
vs.	)	
	)	CERTIFICATE OF SERVICE
IDAHO STATE BOARD OF ACCOUNTANCY,	)	
	)	
	)	
Defendant-Respondent.	)	
	)	

I, DeAnna P. Grimm, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, do hereby certify that copies of the Clerk's Record and Reporter's Transcript were delivered on the 23 day of January 2009 to, Larry C. Hunter, Attorney for Respondent, by United States Mail and to Paul Thomas Clark, Attorney for Appellant, by Valley Messenger Service.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed  
the seal of the said Court this 23 day of January 2009.

PATTY O. WEEKS  
CLERK OF THE DISTRICT COURT

**DEANNA F. GRIMALI**

By \_\_\_\_\_  
Deputy Clerk

FILED

2009 FEB 20 PM 1 15

PATRICIA WHEELAS  
CLERK OF THE DIST. COURT  
DEPUTY

Larry C. Hunter, ISB No. 1989  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
lch@moffatt.com  
15184.0086

Attorneys for Idaho State Board of Accountancy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

In the Matter of

MICHAEL A. DUNCAN,  
License No. CP-2297,

Petitioner.

Case No. CV-07-01946

**OBJECTION TO CLERK'S RECORD**

COMES NOW the Respondent Idaho State Board of Accountancy and files the following in the way of an Objection to Clerk's Record and Transcript:

1. At page 38 of the Clerk's Record, the Clerk indicates that the Agency's Record is being submitted as an exhibit. The Respondent wants to make sure that the transcript of the hearing is part of the Clerk's Record and if it is not, that it be included.

2. While portions of the AICPA Code of Professional Conduct Rule 102.03 is included in the record as part of the lower court's decision, the Respondent asks the Court to take judicial notice of the entire Rule as it is attached hereto.

DATED this 20<sup>th</sup> day of February, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED


By Larry C. Hunter  
Larry C. Hunter - Of the Firm  
Attorneys for Respondent  
Idaho State Board of Accountancy

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20<sup>th</sup> day of February, 2009, I caused a true and correct copy of the foregoing **OBJECTION TO CLERK'S RECORD** to be served by the method indicated below, and addressed to the following:

Paul Thomas Clark  
CLARK AND FEENEY  
The Train Station, Suite 201  
13th and Main Streets  
P.O. Drawer 285  
Lewiston, Idaho 83501  
Facsimile: (208) 746-9160

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
\_\_\_\_\_  
Larry C. Hunter





AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

*AICPA Professional Standards:*

*Code of  
Professional  
Conduct*

and

*Bylaws*

*As of June 1, 2006*

## ET Section 102

### *Integrity and Objectivity*

**.01 Rule 102—Integrity and objectivity.** In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others.

[As adopted January 12, 1988.]

#### *Interpretations under Rule 102—Integrity and Objectivity*

**.02 102-1—Knowing misrepresentations in the preparation of financial statements or records.** A member shall be considered to have knowingly misrepresented facts in violation of rule 102 [ET section 102.01] when he or she knowingly—

- a. Makes, or permits or directs another to make, materially false and misleading entries in an entity's financial statements or records; or
- b. Fails to correct an entity's financial statements or records that are materially false and misleading when he or she has the authority to record an entry; or
- c. Signs, or permits or directs another to sign, a document containing materially false and misleading information.

[Revised, effective May 31, 1999, by the Professional Ethics Executive Committee.]

**.03 102-2—Conflicts of interest.** A conflict of interest may occur if a member performs a professional service for a client or employer and the member or his or her firm has a relationship with another person, entity, product, or service that could, in the member's professional judgment, be viewed by the client, employer, or other appropriate parties as impairing the member's objectivity. If the member believes that the professional service can be performed with objectivity, and the relationship is disclosed to and consent is obtained from such client, employer, or other appropriate parties, the rule shall not operate to prohibit the performance of the professional service. When making the disclosure, the member should consider Rule 301, *Confidential Client Information* [ET section 301.01].

Certain professional engagements, such as audits, reviews, and other attest services, require independence. Independence impairments under rule 101 [ET section 101.01], its interpretations, and rulings cannot be eliminated by such disclosure and consent.

The following are examples, not all-inclusive, of situations that should cause a member to consider whether or not the client, employer, or other appropriate parties could view the relationship as impairing the member's objectivity:

- A member has been asked to perform litigation services for the plaintiff in connection with a lawsuit filed against a client of the member's firm.

45

## 4442

## Independence, Integrity, and Objectivity

- A member has provided tax or personal financial planning (PFP) services for a married couple who are undergoing a divorce, and the member has been asked to provide the services for both parties during the divorce proceedings.
- In connection with a PFP engagement, a member plans to suggest that the client invest in a business in which he or she has a financial interest.
- A member provides tax or PFP services for several members of a family who may have opposing interests.
- A member has a significant financial interest, is a member of management, or is in a position of influence in a company that is a major competitor of a client for which the member performs management consulting services.
- A member serves on a city's board of tax appeals, which considers matters involving several of the member's tax clients.
- A member has been approached to provide services in connection with the purchase of real estate from a client of the member's firm.
- A member refers a PFP or tax client to an insurance broker or other service provider, which refers clients to the member under an exclusive arrangement to do so.
- A member recommends or refers a client to a service bureau in which the member or partner(s) in the member's firm hold material financial interest(s).

The above examples are not intended to be all-inclusive.

[Replaces previous interpretation 102-2, *Conflicts of Interest*, August 1996, effective August 31, 1995.]

**.04 102-3—Obligations of a member to his or her employer's external accountant.** Under rule 102 [ET section 102.01], a member must maintain objectivity and integrity in the performance of a professional service. In dealing with his or her employer's external accountant, a member must be candid and not knowingly misrepresent facts or knowingly fail to disclose material facts. This would include, for example, responding to specific inquiries for which his or her employer's external accountant requests written representation.

[Effective November 30, 1993.]

**.05 102-4—Subordination of judgment by a member.** Rule 102 [ET section 102.01] prohibits a member from knowingly misrepresenting facts or subordinating his or her judgment when performing professional services. Under this rule, if a member and his or her supervisor have a disagreement or dispute relating to the preparation of financial statements or the recording of transactions, the member should take the following steps to ensure that the situation does not constitute a subordination of judgment:<sup>1</sup>

<sup>1</sup> A member in the practice of public accounting should refer to the Statements on Auditing Standards. For example, see SAS No. 22, *Planning and Supervision* (AU section 311), which discusses what the auditor should do when there are differences of opinion concerning accounting and auditing standards.

ET §102.04

OBJECTION TO THE RECORD

46

FILED

2009 MAR 16 PM 1 06

CLERK OF THE DISTRICT COURT  
DEPUTY  
*[Signature]*

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

In the Matter of,

MICHAEL A. DUNCAN,  
License No. CP-2297

Petitioner.

Case No. CV 07-01946

**ORDER**

The Objection to Clerk's Record of the Respondent Idaho State Board of  
Accountancy having come before the Court and the Court being fully apprised in the situation;

IT IS HEREBY ORDERED that the Clerk's Record in this matter include the  
transcript of the hearing before the Idaho State Board of Accountancy as it was presented to this  
Court.

DATED this 16<sup>th</sup> day of March, 2009.

*[Signature]*  
The Honorable Carl B. Kerrick  
District Judge

CLERK'S CERTIFICATE OF SERVICE

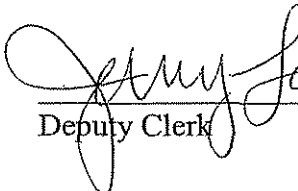
I HEREBY CERTIFY that on this 10<sup>th</sup> day of March, 2009, I caused a true and correct copy of the foregoing **ORDER** to be served by the method indicated below, and addressed to the following:

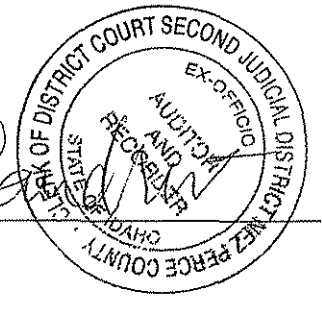
Paul Thomas Clark  
CLARK AND FEENEY  
The Train Station, Suite 201  
13th and Main Streets  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Facsimile: (208) 743-9516

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Larry C. Hunter  
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Facsimile (208) 385-5384

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
Deputy Clerk



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

MICHAEL A. DUNCAN,	)	
	)	
Plaintiff-Appellant,	)	SUPREME COURT NO 35804
	)	
vs.	)	
	)	AMENDED CLERK'S
	)	CERTIFICATE
IDAHO STATE BOARD OF ACCOUNTANCY,	)	
	)	
Defendant-Respondent.	)	
	)	

I, DeAnna P. Grimm, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, do hereby certify that the foregoing Clerk's Record in the above-entitled cause was compiled and bound by me and contains true and correct copies of all pleadings, documents, and papers designated to be included under Rule 28, Idaho Appellate Rules, the Notice of Appeal, any Notice of Cross-Appeal, and additional documents that were requested.

I further certify:

1. That no exhibits were marked for identification or admitted into evidence during the course of this action.
2. That the following will be submitted as an exhibit to this record on appeal:

Agency's Record - a copy of Defendant's exhibit #3 is being submitted in place of the original. The original was a DSS file and not readable. Clark and Feeney burned a CD in the WAV format.

Affidavit of Counsel in Support of Motion to Dismiss

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court this 1 day of April 2009.

PATTY O. WEEKS, Clerk



By *William P. Gumm*  
Deputy Clerk

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

MICHAEL A. DUNCAN, )  
 )  
 )  
 Plaintiff-Appellant, ) SUPREME COURT NO 35804  
 )  
 vs. )  
 ) AMENDED CERTIFICATE  
 ) OF SERVICE  
 )  
 IDAHO STATE BOARD OF ACCOUNTANCY, )  
 )  
 )  
 Defendant-Respondent. )  
 )

I, DeAnna P. Grimm, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, do hereby certify that copies of the additions and corrections to the Clerk's Record were delivered on the 1st day of April 2009 to, Larry C. Hunter, Attorney for Respondent, by United States Mail and to Paul Thomas Clark, Attorney for Appellant, by Valley Messenger Service.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 1st day of April 2009.

PATTY O. WEEKS  
CLERK OF THE DISTRICT COURT



By DeAnna P. Grimm  
Deputy Clerk