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# Duncan v. State Bd. of Accountancy Respondent's Brief Dckt. 35804

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL A. DUNCAN,

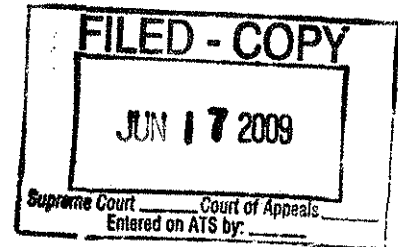
Plaintiff/Appellant,

vs.

IDAHO STATE BOARD OF  
ACCOUNTANCY,

Defendant/Respondent.

Supreme Court No. 35804



**RESPONDENT'S BRIEF**

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

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Honorable Carl B. Kerrick, District Judge presiding

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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

Attorneys for Plaintiff/Appellant

Larry C. Hunter, ISB No. 1989  
Special Deputy Attorney General

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208)-345-2000  
lch@moffatt.com  
15184.0086

Attorneys for Defendant/Respondent

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**I.**  
**STATEMENT OF THE CASE**

**A. Nature of the Case.**

The Respondent agrees with the Appellant's Statement of the Nature of the Case (Ap. Br. p. 1, ¶ A) with one minor clarification. The discipline imposed on Mr. Duncan was for violating the State of Idaho Accounting Rule 4.01 (IDAPA 01.01.01.004.01)<sup>1</sup> which incorporates by reference the standards of the American Institute of Certified Public Accountants ("AICPA"),<sup>2</sup> including AICPA Rule 102.3 (also referred to as Rule 102.03). The discipline consisted of a written reprimand, a requirement to take four hours of ethics in a Continuing Professional Education course, an administrative penalty of \$1,000 and reimbursement of costs of up to \$2,000. (Clerk's Record p. 13.)

**B. Course of Proceedings.**

The Respondent adds the following information to the Appellant's section on the Course of Proceedings. After the hearing before the entire Idaho State Board of Accountancy ("Board") on July 18, 2007, it issued its decision. The entire Board agreed with the findings contained in the Findings of Fact, Conclusions of Law and Order issued by the Board and signed by its Chair Lisa L. Donnelly on August 16, 2007.

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<sup>1</sup> IDAPA is the Idaho Administrative Procedures Act.

<sup>2</sup> AICPA is the American Institute of Certified Public Accountants. There is an ISCPA – Idaho Society of CPAs. Unlike the integrated Bar that governs the admissions and discipline of Idaho lawyers as well as serving as the professional organization of lawyers, those two functions are separated in the Accountancy profession. The Idaho State Board of Accountancy is responsible for the process of testing, licensing and discipline.

The Appellant then filed a Petition for Judicial Review. The matter was fully briefed and argued before the Honorable Carl B. Kerrick, District Judge, on July 15, 2008. On September 3, 2008, Judge Kerrick entered an Order denying Appellant's Motion to Dismiss and affirming the Findings of Fact, Conclusions of Law and Order issued by the Idaho State Board of Accountancy. The Appellant has appealed the district court's affirmation of the Board's decision.

**C. Concise Statement of the Facts.**

The Respondent agrees that the pertinent facts presented by Appellant as being "undisputed and uncontroverted" are accurate. However, there are a number of facts germane to the issues of the case which are not included.

The following undisputed facts (with references to the record) were not contained in the Appellant's recitation and are germane to the Board's Order, the district court's decision and the consideration of this Court:

- Mr. Duncan admits that a conflict of interest regarding Mr. Forsmann arose as soon as he recommended counsel to Mrs. Forsmann in May 2004. (Transcript<sup>3</sup> pp. 8-9, 28.)
- The personal relationship between Mr. Duncan and Mrs. Forsmann developed in May, 2004, before she filed for a divorce. (Transcript pp. 8-9.)

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<sup>3</sup> Transcript refers to the transcript of the hearing before the Idaho State Board of Accountancy. It is contained as an exhibit in the Clerk's Record. The page numbers referred to are the page numbers of the exhibit.

- Mr. Duncan admits that he did not tell Mr. Forsmann that there was a conflict at either time or any time thereafter. (Transcript pp. 8-9, 28.)
- Mr. Duncan was the supervisor for the Forsmann account whether he did the actual work or not. (Transcript pp. 9, 24.)
- The personal relationship between Mr. Duncan and Evelyn Forsmann between May and September 2004 consisted at least of her visiting his home with her family, her calling him on the telephone at least 500 times between May 1 and mid-August, “dating” after the divorce was final in August, and a joint vacation in August 2004. (Transcript pp. 11, 14-15, 20.) Mr. Duncan did not discuss any of these contacts with Mr. Forsmann. (Transcript p. 30.)
- The earliest that the evidence at the hearing shows that Mr. Forsmann knew of the relationship between Evelyn Forsmann and Michael Duncan was late July 2004, and perhaps not until August 18, 2004. (Transcript p. 30.)
- Mr. Duncan continued to retain responsibility for the filing of joint tax returns. Finding of Fact #3, even though no active work was being done on the returns.

## **II. ISSUES PRESENTED ON APPEAL**

Although the Appellant makes passing reference to the issue, a significant issue for the Court to consider on appeal is the scope of review. As an administrative agency the decision of the Idaho State Board of Accountancy is to be given deference pursuant to Idaho Code Sections 67-5270, 67-5279 and case law cited further in this brief.



### III. ARGUMENT

#### A. Introduction.

The Idaho State Board of Accountancy is charged in Chapter 2 of Title 54 of the Idaho Code with prescribing and assessing the qualifications and regulating the conduct of licensees. IDAHO CODE § 54-202. To facilitate that responsibility the Board is empowered to:

Adopt and amend rules . . . including but not limited to:

\* \* \*

- (d) Rules of professional conduct directed to controlling the quality and probity of professional services by licensees, and dealing among other things with *independence, integrity and objectivity*; competence and technical standards; responsibilities to the public; and *responsibilities to clients*;
- (e) Rules governing the professional standards applicable to licensees.

(Emphasis added.)

The Board takes its legislative mandate very seriously. It is important for many reasons, including public confidence in the accuracy of documents prepared and reviewed by CPAs and public confidence in the integrity of the profession, that the Board guard the profession's *independence, integrity and objectivity*. And it is imperative that the Board take appropriate steps within the bounds of due process to assure that such rules are adopted and enforced.

One of the manifestations that a CPA has maintained his or her independence, integrity and objectivity is that the CPA avoid conflicts of interest. AICPA Rule 102.01 states:

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.

**B. Standard of Review.**

Challenging an administrative order under the Idaho Administrative Procedure Act (“IDAPA”) is generally a two-step process. *See, e.g., Barron v. Idaho Dep’t of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). First, the Appellant must demonstrate the agency violated a standard in Idaho Code Section 67-5279(3):

(3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, 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.

IDAHO CODE § 67-5279(3) (emphasis added). Second, the Appellant must demonstrate that substantial rights of the Appellant have been prejudiced by the agency action. IDAHO CODE § 67-5279(4); *see Barron*, 135 Idaho at 417, 18 P.3d at 222. In this case, the Appellant raises only (d) and (e). Therefore, the agency’s findings must be affirmed unless the findings are not supported by substantial evidence in the record as a whole or the findings are arbitrary,

capricious, or an abuse of discretion. IDAHO CODE § 67-5279(3)(d)(e). Substantial evidence is more than a scintilla of proof, but less than a preponderance. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 280, 939 P.2d 854, 856 (1997). Thus, the burden is on Mr. Duncan to show that there is not substantial evidence in this record to support the Board's order or he must show that the findings of the Board are arbitrary, capricious, or an abuse of discretion. He has not met either burden. In addition, there must be a showing that the Appellant's substantial rights were prejudiced. Since no action was taken against his license, there is no showing that meets this requirement.

The Board will discuss in the next section the evidence which supports its decision. Regarding the position taken by the Appellant that the Board's decision was arbitrary, capricious or an abuse of discretion, Mr. Duncan's argument essentially is that the Board misinterpreted the relevant Rule. That Rule, the law governing the interpretation of statutes (and rules) and case law regarding an administrative body's decisions are discussed in the remainder of this brief.

**C. Appellant Violated AICPA Rule 102.3.**

**1. The American Institute of Certified Public Accountants ("AICPA") publishes the Code of Professional Conduct and Bylaws.<sup>4</sup>**

AICPA Section 102 sets forth the rules relating to integrity and objectivity.

Rule 102.3 defines "Conflicts of Interest" as follows:

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<sup>4</sup> The AICPA Code of Professional Conduct is incorporated by reference into the Rules of the Board of Accountancy, Idaho Code Section 54-204(1)(i) and IDAPA 01.01.01.004.01.

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 (emphasis added).

**2. The Law Relating to Construction and Interpretation of Rules Supports the Board's Decision.**

The Idaho State Board of Accountancy has incorporated the rules of the AICPA into its Accountancy Rules in Rule 004.01 (4.01).<sup>5</sup> That includes AICPA Rule 102.03 which then becomes a rule of the ISBOA. The Appellant has challenged the Board's interpretation of that rule. A discussion of the reasons why the Board's interpretation is appropriate appears in

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<sup>5</sup> As set forth in the Idaho Accountancy Act (Chapter 2, Title 54, Idaho Code), the Board is the self-governed 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.

**.004 INCORPORATION BY REFERENCE (RULE 004).**

The following documents are hereby incorporated by reference into IDAPA 01.0.01 . . . . Licensees are required to comply with the following standards when applicable

**01. AICPA Standards.**

later sections of this brief. This section contains some basic law relating to the interpretation of administrative rules.

In *Mason v. Donnelly Club*, there were two issues raised on appeal. The first challenged whether the rule in question that had been promulgated by the Department of Employment was enforceable. That issue has not been raised here. Therefore, only the second issue, the interpretation of the rule, is relevant.

In interpreting the rule in question, which involved the payment of unemployment benefits, this Court found that the interpretation of the rule regarding the meaning of “short time” which was adopted by the Department of Labor was a reasonable interpretation of the rule. In so doing, the court held as follows:

Administrative regulations are subject to the same principles of statutory construction as statutes. *Rhoades v. Industrial Commission*, 125 Idaho 139, 142, 868 P.2d 467, 470 (1993). Interpretation of such a rule should begin, therefore, with an examination of the literal words of the rule. *Thomas v. Worthington*, 132 Idaho 825, 829, 979 P.2d 1183, 1187 (1999) (citing *State ex rel. Lisby v. Lisby*, 126 Idaho 776, 779, 890 P.2d 727, 730 (1995)). The language of the rule, like the language of a statute, should be given its plain, obvious and rational meaning. *Id.* In addition, this language should be construed in the context of the rule and statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement. *Grand Canyon Dories v. Idaho State Tax Com'n*, 124 Idaho 1, 5, 855 P.2d 462, 466 (1993).

*Mason v. Donnelly Club*, 21 P.3d 903, 908, 135 Idaho 581 (2001).

Applying that reasoning to the present case, this AICPA rule as incorporated into the Idaho Accountancy Rules has the basic intent to require accountants to examine their

professional relationship to avoid conflicts of interest. The plain, obvious and rational meaning of the phrase “the relationship is disclosed to and consent is obtained from such client” is that it is the professional making the disclosure and obtaining the consent.

Furthermore, there is a long line of Idaho cases upholding “the administrative law canon that great weight should be given to an agency’s interpretation of its own rules. *Angstman v. City of Boise*, 917 P.2d 409, 128 Idaho 575, 578 (Ct. App. 1996); *S. Fork Coal. v. Bd. of Comm’rs of Bonneville County*, 117 Idaho 857, 792 P.2d 882 (1990). The Court should uphold the interpretation of the Idaho State Board of Accountancy in requiring Mr. Duncan to give notice of the relationship and hence conflict or to withdraw and receive consent to continue his representation, none of which he did.

The Appellant cites the case of *Preston v. Idaho State Tax Commission*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998), for the proposition that this Court need only give deference to an agency’s construction of a rule if the agency’s interpretation is reasonable. A closer review of the *Preston* case shows that this Court did find the Tax Commission’s interpretation to be reasonable. The statute being interpreted did not even address the taxation issue posed by the case. Yet the Court held that the Commission’s interpretation was reasonable. In the case at bar, the rule does address the issue in question, and the Board’s interpretation should be given deference.

The court in *Preston* discusses a four-prong test established first in *J.R. Simplot Co. v. Idaho State Tax Commission*, 120 Idaho 849, 862, 870 P.2d 1200, 1219 (1991). The Appellant challenges only the second prong of that list: the reasonableness of the interpretation

of the statute. As will be demonstrated more fully below, the Board's interpretation is eminently reasonable.

The court in *Preston* goes on to discuss the five rationales underlying the rule of deference, which are:

(1) the rationale requiring that a practical interpretation of the statute exists, (2) the rationale requiring the presumption of legislative acquiescence, (3) the rationale requiring agency expertise, (4) the rationale of repose, and (5) the rationale requiring contemporaneous agency interpretation.

*Preston*, 131 Idaho 502, 505, 820 P.2d 185.

As only one of the rationales need be present and the Respondent will show in this brief that at least (1), (3), and (5) exist, *Preston* is strong support for the Respondent's position in this case.

**3. The Board's findings show a violation of 102.3.**

Relevant to Mr. Duncan's violation of Rule 102.3, the Board specifically found in the Findings of Fact, Conclusions of Law and Final Order that his action violated the Rule as follows (Mr. Duncan is referred to in these findings as the "Respondent"):

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.

.....

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.

\* \* \*

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.

Finding of Fact 2, 3, 4, and 6 and Conclusions of Law 2-6.

**4. The Appellant was required to withdraw or disclose his relationship with Mrs. Forsmann to his client Mr. Forsmann.**

Rule 102.3 does not require that a conflict exist, only that the appearance of a conflict exist. Integrity is a fundamental aspect of the profession. AICPA Art. III, .01.

“Integrity requires a member to be, among other things, *honest and candid* within the constraints of client confidentiality.” *Id.* at .02 (emphasis added). The same article goes on to state,

“Integrity also requires a member to observe the principles of objectivity and independence and of due care.” *Id.* at .04.<sup>6</sup> Given the importance of integrity and the emphasis on being candid

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<sup>6</sup> **Article III—Integrity**

*To maintain and broaden public confidence, members should perform all professional responsibilities with the highest sense of integrity.*

**.01** Integrity is an element of character fundamental to professional recognition. It is the quality form which the public trust derives and the benchmark against which a member must ultimately test all decisions.

**.02** Integrity requires a member to be, among other things, honest and candid within the constraints of client confidentiality. Service and the public trust should not be subordinated to personal gain and advantage. Integrity can accommodate the inadvertent error and the honest difference of opinion; it cannot accommodate deceit or subordination of principle.

**.03** Integrity is measured in terms of what is right and just. In the absence of specific rules, standards, or guidance, or in the face of conflicting opinions, a member should test decisions and deeds by asking: “Am I doing what a person of integrity would do?”

and independent as an accountant, the responsibility to properly disclose any conflicts rests with the accountant. These duties cannot be satisfied merely by a third party gaining knowledge through others' efforts as Appellant would argue. Appellant attempts to take a very narrow reading of the Rule and, in effect, by so doing significantly weakens the Rule. Appellant argues that Rule 102.3 is silent on **who** must disclose the relationship and **how** the relationship must be disclosed; when, in actuality, the rule states who must make the disclosure and, further, that the disclosure cannot be a mere discovery of the relationship by happenstance. It is noteworthy that Appellant concedes that a conflict of interest arose out of the relationship that developed between Appellant and Evelyn Forsmann in late May of 2004, before the filing of the 2003 tax return as will be developed more fully later.

More specifically, Rule 102.3 states that when a conflict situation arises out of a relationship with another person and the accountant chooses not to withdraw, such a conflict situation can be avoided only **if** two things occur: first, the accountant must determine whether he or she can represent the client objectively; and second, **the relationship must be disclosed and consent obtained from the client.** From the unambiguous language of the Rule, the

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Have I retained my integrity?" Integrity requires a member to observe both the form and the spirit of technical and ethical standards; circumvention of those standards constitutes subordination of judgment.

**.04** Integrity also requires a member to observe the principles of objectivity and independence and of due care.

AICPA III, .01, .02, .03, and .04.

imposition of the duty to disclose the conflict and obtain the consent is clearly on the accountant, considering the following:

1. The Rules are directed to accountants.
2. The accountant must take the first step to determine if he or she can perform his or her services objectively. No one else can make that determination.
3. In the same sentence in which the accountant's determination of objectivity is described, an obligation is imposed that "the relationship is disclosed to *and* consent is obtained from such *client*. (Emphasis added.)
4. Only the accountant has the relationship of client with the person to whom disclosure must be made and consent obtained. Furthermore, the use of the prepositions *to* and *from* indicate not only the source of the information but the receiver of the information.
5. The terms used in the Rule are that the relationship is "disclosed to" the client, not "found out by" the client and consent is "obtained from" not "inferred from" the client's actions.
6. The last sentence of Rule 102.3 states, "*when making the disclosure*, the member should consider Rule 301."<sup>7</sup> (emphasis added). The last line explicitly imposes a duty to actively make the disclosure of the conflict to the client on the accountant as it refers to his or her duty "when making the disclosure." Therefore, contrary to Appellant's position, Rule 102.3 does state **who** needs to disclose the relationship—the accountant.

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<sup>7</sup> Rule 301 relates to disclosure of the client's confidential financial information.

7. Finally, the Appellant would have this Court believe that an accountant with a conflict could avoid any mention of the conflict, trust that it would eventually be known and continue to work for a client and then claim consent through acquiescence. This do nothing approach to ethics is exactly what accountancy regulations are trying to avoid in the post-Enron environment. Furthermore, this interpretation would in effect nullify the rule in question. A standard used in interpreting statutes and rules<sup>8</sup> is that the court should give the statute (or rule) a meaning that will not in effect nullify it. *Walker v. Nationwide Fin. Corp. of Idaho*, 629 P.2d 662, 102 Idaho 266, 268 (1981).

**5. Appellant failed to obtain consent from the Complainant to continue in the representation.**

Appellant contends that AICPA 102.3 does not state how consent must be obtained. He further argues that because Complainant signed the return, and filed a tax return prepared by Appellant, that he had received consent for the conflict of interest. He claims that when proper consent is obtained, the consenting party waives its right to object to the conflict. Idaho case law is clear: “a waiver is a *voluntary, intentional* relinquishment of a known right” and “the party asserting the waiver ‘must show that he acted in reasonable reliance upon it and that he thereby has altered his position to his detriment.’” *Fullerton v. Griswold*, 142 Idaho 820, 824, 136 P.3d 291, 295 (2006) (quoting *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 256, 846 P.2d 904, 907 (1993)) (emphasis added).

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<sup>8</sup> Administrative regulations are subject to the same principles of statutory construction as statutes. *Mason v. Donnelly Club*, 21 P.3d 903, 135 Idaho 581 (2001).

In this case, Appellant argues that Complainant's signing, filing, and receiving the benefits of the tax return constitute an implied consent to the Appellant's continued representation of him and therefore an implicit waiver of the conflict of interest. However, such actions do not demonstrate that Complainant "voluntarily, intentionally relinquished a known right." Appellant had an affirmative duty under Rule 102.3 to disclose the conflict and then obtain the client's consent to continue in his representation. Part of the disclosure would necessarily require a disclosure of the conflict, and the client's right to take his business elsewhere. The client cannot be expected to know the accountant's rules of ethics or conflicts. Appellant did not discuss with Complainant any conflicting relationship, rather Appellant sat idly by and allowed Complainant to believe that his relationship with his accountant was unchanged at the same time (April-July) that his wife was having a personal relationship with that accountant. Consent requires a knowing act that foregoes a right. This did not occur, therefore consent, either implied or express, was not obtained as required by Rule 102.3.

The Appellant concentrates his arguments regarding disclosure of the conflict on the period of time in August and September 2004. However, the conflict existed long before that and Mr. Duncan acknowledged as much. The following testimony appears on pages 8 and 9 of the transcript:

Hunter:           And why did you suspend the services on April 28, 2004?

Duncan:           Oh I didn't, that was the last work that was done, and somewhere between that time I was notified Evelyn was going to seek a divorce. And I knew that that was a conflict, an automatic conflict. I had

a choice at that point to either stop work or to call Randy and say, Oh, by the way, your wife was going to seek a divorce. I didn't believe it was my place to call Randy, so I stopped work.

Hunter: Well there was another choice, wasn't there? You did not have to tell him the source of your conflict. You could have just called him on May 4, after she called you, and said, I'm not going to be your accountant any more. You didn't have to disclose why, did you?

Duncan: No, I did not have to disclose why.

Hunter: But this suspension that you made on this account, you never advised Mr. Forsmann [sic] that you were suspending work on the account, did you?

Duncan: No we did not.

Hunter: And you didn't call him and tell him there was a conflict.

Duncan: No I did not.

Hunter: But you recognized that there was a conflict as soon as Mrs. Forsmann called you and asked you for advice about [inaudible]?

Duncan: Yes, I did recognize there was a conflict.

When he recognized the conflict Mr. Duncan felt his only alternative was to stop working on the file since he did not want to disclose to Mr. Forsmann that he had been consulted about a divorce lawyer. However, in the hearing he recognized that he could have terminated the relationship without disclosing the reason (which he eventually did on August 13, 2004—*see* Transcript p. 16). He also admits that he did not advise Mr. Forsmann that he was terminating the relationship, nor that there was a conflict that he admits existed.

Appellant's defense is that Mr. Forsmann "knew of the conflict" and, therefore, he did not have to notify him. However, Mr. Forsmann was not self-informed of the conflict in May 2004, since the divorce complaint was not filed until the end of June (*see* Transcript p. 11). By that time Mr. Duncan's relationship had gone beyond merely being asked for a referral, as disclosed in the following testimony from pages 11-12 and 14-15 of the transcript.

Hunter: Would you please describe your relationship with Evelyn Forsmann from May, when she called you, though [sic] the time that the divorce was filed. And by that I mean, tell me what kind of contacts you had with her and the nature of that contact.

Duncan: I had contact with her by phone. I had contact with her when she came over to my residence with her children and her friends. All of that contact between would have been basically personal relationship.

\* \* \*

Hunter: She called you often, didn't she?

Duncan: Yes she did.

\* \* \*

Duncan: I do not deny that she called me.

Hunter: And she called you often, at your office.

Duncan: I don't remember how often she called me at the office.

Hunter: There are 67 telephone calls to your office during that period of time. And so at least some of those would be to you.

Duncan: I have no doubt that [inaudible].

Hunter: And there are 510 cell phone calls, calls to your cell phone, during this three-and-a-half month period. Those would be to you. No one else answered your cell phone.

Duncan: No one else answered my cell phone.

Hunter: So, 510 cell phone calls in a period of May, June, July and half of August, was approximately 100 days; so that averages out to about five to six telephone calls a day from Mrs. Forsmann. Does that sound about right?

Duncan: It doesn't sound right, but you have the records.

Hunter: If that's what the records show then you would agree that—she did call you a lot.

Duncan: Yes, she did call me a lot.

Hunter: Now looking at Exhibit 2, please . . . it would appear that the, on August 11 a second extension entry was made by your secretary.

Duncan: That is correct.

Hunter: And that's under your supervision?

Duncan: Yes. She would have brought me a list of August 15 deadlines and said, What are we going to do with these.

To summarize: as of the end of April or early May Mr. Duncan had a conflict of interest that he recognized existed because Mrs. Forsmann disclosed she was looking for a divorce attorney and asked him for a recommendation. At that time he claims to have “suspended activity on the file,” but actually any work necessary to prepare the return and the request for an extension had been completed by that time and he did not disclose the conflict.



A second conflict arose in May and June. He developed a “personal relationship” with Mrs. Forsmann. That second conflict was not disclosed. Mr. Forsmann eventually became aware of that conflict at least by mid-August when the divorce was final on the 11th or when he left a message at the Duncan office on the 18th. On the 13th of August, Duncan told Forsmann that he would no longer be doing his accounting. However, the force of that withdrawal is mitigated by the fact that a second extension was filed on or about August 15 by Solomon & Duncan acting on behalf of their clients, the Forsmanns, and by the fact that they did the couple’s taxes in September.

Mr. Duncan could have and should have terminated the client/accountant relationship in May, or in June or July, but he did not. He could have disclosed the conflict and sought a waiver, but he did not. A “suspension of activity” on the file without disclosure to the client is not one of the options of Rule 102.3. That is the gist of the Board’s Conclusions of Law Nos. 5 and 6 and it is supported by the Appellant’s own testimony. Because the Board relied on the language of the Rule coupled with the evidence presented, the Board’s conclusion that Appellant failed to properly obtain consent from his clients is supported by substantial evidence and is neither arbitrary, capricious nor an abuse of discretion.

**6. Appellant’s conduct is expressly defined as a conflict of interest in the comments to AICPA Rule 102.3.**

Despite Appellant’s posturing that no conflict existed that needed to be disclosed, several examples are set forth in Rule 102.3 indicating situations which could be viewed as

impairing a member's objectivity. One example, which the Board also relied upon, states as follows:

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 services for both parties during the divorce proceedings.

AICPA RULE 102.3, cmts. The above example is exactly the situation that faced Appellant.

Appellant argues that Rule 102.3 does not apply to tax preparation. Such a distinction is curious because tax preparation is a tax service that is covered by the above comment to Rule 102.3. The term "services" within the comment modifies both tax and personal financial planning (PFP), which are two distinct services, not a single service. The language of the comment contemplates both tax services, which includes tax preparation and personal financial planning services.

Despite Appellant's attempt to parse the language "tax services" into financial or tax planning advice, any distinction is a distinction without a difference. This argument is also undermined by the fact that Mr. Duncan admits in his testimony at pages 8 and 9 of the Transcript that he knew there was a conflict of interest on his part as soon as Mrs. Forsmann talked to him about getting a divorce.

The fact that the tax events in question could not be changed or were not changed is irrelevant to the inquiry of whether Appellant acted inappropriately in failing to disclose a conflict of interest or withdraw and the ensuing discipline by the Board. Further, that the tax work was substantially completed when the conflict arose is irrelevant to the inquiry because the Rule is clear, that once a conflict arises, regardless of the stage in the tax work, the conflict must

be disclosed by the accountant and consent of the client obtained in order to continue the representation of the client. *See* AICPA RULE 102.3.

**7. The relationship Appellant had with his client is a conflict of interest that must be disclosed pursuant to AICPA Rule 102.3.**

Mr. Duncan does not contend that he disclosed the relationship. In fact, he admits that he did not. (Transcript pp. 8-9.) Because the Board relied on the language of the Rule coupled with the evidence that has been conceded, its conclusion that Appellant's failure to disclose the relationship was a violation of the accounting standards was supported by substantial evidence. Furthermore, the decision was not arbitrary, capricious, or an abuse of discretion because it was based on the language of the Rule, as well as common sense. If a licensed accountant begins an affair with a married woman and that woman and her husband are and have been clients of the accountant and his firm, the obligation on the accountant to take some affirmative action is obvious.

Appellant also argues that AICPA Rule 102.3 does not require the disclosure of the conflict, only the relationship. However, the two terms are one and the same. The Rule requires the consideration of a conflict and the disclosure of that conflict, the conflict being the inappropriate relationship. Any distinction is a distinction without a difference. Ultimately, Appellant had a duty to properly disclose his relationships that may be objectionable by a client pursuant to Rule 102.3. In this case, no relationship was disclosed by Appellant, nor was consent to continue in the representation properly obtained. As such, any failure to properly disclose the

relationships that constituted the conflict of interest, and obtain consent, is a violation of the Rules—as the Board found.

It should also be emphasized that the Appellant’s argument that “the relationship” was known to the Complainant is not true for the months of May, June, and part or all of July. During those months when the first conflict (Duncan’s knowledge of Mrs. Forsmann seeking a divorce) and the second conflict (the development of the “personal relationship”) arose, Mr. Forsmann was not knowledgeable of the relationship. Duncan recognized the conflict, but he neither withdrew nor disclosed the relationship and asked for a consent to continue.

#### **IV. COSTS AND FEES**

The Respondent Board of Accountancy has incurred costs and fees in defending against the Petition for Judicial Relief and this Appeal. The Board not only acted appropriately, but leniently in this matter. The Appellant’s position is undermined by the undisputed facts and his own testimony that during a five-month period in 2004, he went from being a confidant to being a “personal friend” of Evelyn Forsmann, his client, and the wife of his client Randy Forsmann. During that time his firm was the accountant of record for the Forsmanns and he was the partner in charge of the account. He failed to withdraw and he failed to disclose the relationship and ask for a consent of the clients to continue the relationship. He presents no excuse for his failure to act in May, June and July, except that he “suspended activity on the file,” which is not an alternative under AICPA Rule 102.3. This petition was brought

frivolously, unreasonably, or without foundation and attorneys fees are awardable under Idaho Code Section 12-121 and Idaho Rule of Civil Procedure 54(e)(1).

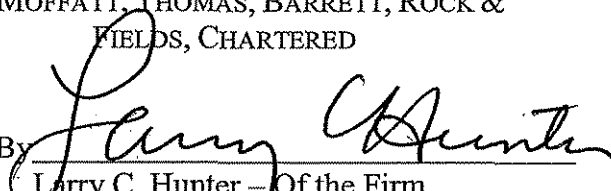
**V.  
CONCLUSION**

For the reasons described above, Respondent respectfully requests that the Court uphold the Idaho State Board of Accountant's Findings of Fact, Conclusions of Law, and Final Order and that it award the Respondent its costs and fees incurred in responding to the Petition and the Motion to Dismiss.

DATED this 17<sup>th</sup> day of June, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By

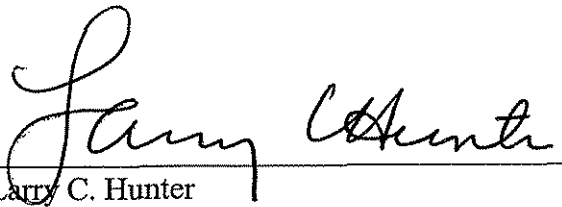
  
Larry C. Hunter – Of the Firm  
Special Deputy Attorney General  
Attorneys for Defendant/Respondent

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 17<sup>th</sup> day of June, 2009, I caused a true and correct copy of the foregoing **RESPONDENT'S BRIEF** 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