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There is no authority for disclosure of a taxpayer's return or return information to State Bar authorities, absent consent from the taxpayer(s) involved.

The Tax Court petition is public information and may be disclosed to the State Bar. While section 6103 nor any other provision of the Code contains any express exception authorizing publication of returns or return information that have become a matter of public record.

The Supreme Court has held that what transpires in a court of law is a matter of public record and can be reported with impunity. No reasonable expectation of privacy attaches to information that is a matter of public record. *Nixon v. Warner Commc'ns., Inc.*, 435 U.S. 589, 609 (1978) (media is entitled to portions of tapes already released during trial); *Cox Broad. v. Cohn*, 420 U.S. 469, 491-92 (1975) ("even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record"); *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property"). See also Restatement (Second) of Torts § 652D, cmt. b (1977) ("There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public. Thus, there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record..."). But see *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762-67 (1989) (inherent privacy interest in the nondisclosure of something that may once have been public but has, with passage of time, passed into practical obscurity).

In the context of unauthorized disclosure lawsuits, however, the circuits are split regarding the proper treatment of returns and return information that have become a matter of public record in connection with tax administration.

The Seventh Circuit (which would be the circuit at issue with respect to the matter at hand) has adopted a hybrid test referred to as the "immediate source" test, *i.e.*, "that the definition of return information comes into play only when the immediate source of the information is a return, or some internal

document based on a return, as these terms are defined in § 6103(b)(2), and not when the immediate source is a public document lawfully prepared by an agency that is separate from the Internal Revenue Service and has lawful access to tax returns.” *Thomas v. United States*, 890 F.2d 18, 21 (7th Cir. 1989) (IRS release of court’s opinion in tax case to newspaper, which then published article based on the decision, was not an unauthorized disclosure because the information was obtained from the court’s opinion).

Here, a copy of the tax court petition as filed with the court would pass the immediate source test.

With respect to the Form 2848, the public record exception would not apply. The Form 2848 would not fall within the definition of the return information of the taxpayer with respect to whom the Form 2848 was filed in that it was not gathered with respect to the taxpayer’s liability under the Code. (This is, however, a close call.) If the Form 2848 is disclosed to the State Bar, the TIN and the tax years and tax matters at issue should be redacted.

The safest course would be to ask the taxpayer to consent to the disclosure of the Form 2848.