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Beware of Opposing Counsel Bearing "Gifts"

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In 440 B.C., Sophocles stated, "Foes' gifts are no gifts: profit bring they none," and the same holds true today.

The California Supreme Court's recent decision in *Rico v. Mitsubishi Motors Corporation* upheld the disqualification of party's attorneys and experts, and serves as a valuable reminder for attorneys to be wary of unintended "gifts" from opposing counsel. The supreme court held that when a lawyer receives materials that obviously appear to be the opponent's attorney work product, the receiving attorney is to do the following: (1) "refrain from examining the materials any more than is essential to ascertain if the materials are privileged," and (2) "immediately notify the sender that he or she possesses material that appears to be privileged."[1] The supreme court encourages the parties to then agree upon a resolution of the issue, but if that does not work, the parties "may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified."[2] It should be noted that nowhere in the opinion does the supreme court state the document is to be immediately returned to opposing counsel.

With respect to the removal of counsel and/or experts, the supreme court acknowledged mere exposure to privileged material is not sufficient to warrant disqualification.[3] The supreme court stated the lower "courts must consider whether reasonably competent counsel, knowing the circumstances of the litigation, would have concluded the materials were privileged, how much review was reasonably necessary to draw the conclusion, and when counsel's examination should have ended."[4] The supreme court also instructs the lower courts to abstain from examining the contents of the inadvertently produced document in making their rulings on this subject. "Once [it is apparent] that the writing contains an attorney's impressions, conclusions, opinions...the reading stops and the contents of the document for all practical purposes are off limits."[5] The supreme court further held one cannot get around this protection by arguing the contents constitute a crime or fraud exception to the work product doctrine, as "[b]y its own terms, the crime or fraud exception does not apply [to work product]."[6]

In *Rico v. Mitsubishi Motors Corp*., the trial court concluded plaintiffs' counsel came into possession of a document containing the opponents' work product "through inadvertence."[7] Upon receipt of a confidential memo, plaintiff's counsel proceeded to review the document and discovered it was the defense counsel's notes on meetings with defense experts. What happened next sealed his fate as counsel of record: The attorney kept the discovery a secret and sought to capitalize on the element of surprise rather than disclosing the discovery and embargoing the document pending a green light from the trial court. Specifically, plaintiff's counsel made notes upon the memo and then sent copies of the memo to plaintiff's experts. Plaintiff's counsel later sprang the trap by using the memo when questioning the defendants' experts, which lead to defendants successfully moving the trial court to disqualify both plaintiff's counsel and plaintiff's expert.[8]

Unfortunately, the temptation to read and use everything the opponent "inadvertently" provides is almost invited by the supreme court's apparently favorable reference to *Aerojet-General Corp. v. Transport Indemnity Ins.*[9] The supreme court did not overrule the *Aerojet* case; rather, it distinguished the case on the basis that the inadvertently produced documents did not contain exclusively privileged information, i.e., the name of a key witness that represented discoverable information.[10] This is where the *Rico* holding can tempt an attorney to open Pandora's box. The supreme court distinguished its situation from *Aerojet* in that the document in *Rico* was

entirely privileged, but how is an attorney to determine the entire document is privileged without reading and examining the entirety of what has been inadvertently produced?[11] Based upon the tone of the supreme court in *Rico*, it appears the supreme court would treat such a document as if it were all privileged based upon the sacrosanct treatment of work product. However, the supreme court's reference to and failure to overrule *Aerojet* clouds this issue.

The supreme court notes an attorney's duty to not invade the other side's privileges is based upon an attorney's duty to the administration of justice.[12] However, it makes no mention of an attorney's duty to zealously represent the client (which featured prominently in *Aerojet*),[13] which would arguably include examining the documents for all nonprivileged information, i.e., to see if the document identifies any undisclosed and improperly withheld witnesses. Nor does the supreme court tackle the question of documents containing both privileged and nonprivileged information.

In time, these issues will be worked out.[14] However, in the interim, the safest bet would be to remain wary of "gifts" from opponents and to limit review of those "gifts" to a minimum to determine if they are privileged. An attorney would not want to lose the client nor have the client lose the entire litigation team. The supreme court's ruling provides a reasonable balance, leveling the playing field by the notice requirement, and then restraining the adverse party from running with the ball until the referee can view the play. If the production constitutes a waiver, the issue can be promptly and safely resolved. While the intercepting party will not have the advantage of surprise, it won't be surprised by a disqualification order, either.

[1] Rico v. Mitsubishi Motors Corporation, 42 Cal. 4th 807, 817 (2007). The supreme court's holding is an affirmation of the ruling in *State Comp. Ins. Fund v. WPS, Inc*. (1999) 70 Cal. App. 4th 644 and an application of its holding to information that is purely protected by the attorney-work product doctrine. The *State Fund* case dealt with inadvertent receipt of information protected by the attorney-client privilege.
[2] Rico, 42 Cal. 4th at 817.
[3] *Id*. at 819.
[4] *Id*. at 818.
[5] *Id*. at 820.
[6] *Id*.
[7] *Id*. at 812. How plaintiff's counsel came into possession of the document was disputed. The disqualified attorney claimed it was somehow given to him by a court reporter at the conclusion of a deposition of one of plaintiff's experts. The defendants charged that plaintiff's counsel pilfered the document out of defense counsel's brief case while he was absent from the conference room to allow plaintiff's counsel to confer privately with his expert. Apparently plaintiff's counsel forgot the words of Franklyn Jones: "Nothing makes it easier to resist temptation than a proper bringing-up, a sound set of values—and witnesses." Nonetheless, the ruling of both the trial court and the supreme court assumed the innocent explanation.
[8] *Id*. at 812-13.
[9] *Id*. at 816 citing *Aerojet-General Corp. v. Transport Indemnity Ins*., 18 Cal. App. 4th 996 (1993).
[10] *Id*.
[11] *Id*.
[12] *Id*. at 818.
[13] Aerojet, 18 Cal. App. 4th at 1006.
[14] The next major inadvertent disclosure case on the supreme court's radar is *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc*., 117 Cal. App. 4th 794 (2004). *Jasmine* is an appeal from the Sixth District and addresses the issue of whether inadvertently recorded voicemail of illicit discussions of wrongdoing constitutes a waiver of the attorney-client privilege.