

PROFESSIONAL LIABILITY UPDATE

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DISQUALIFICATION

California Law

By Anna Kapetanakos

*The Supreme Court has accepted review of a case from the Fourth District that holds an attorney, who inadvertently receives privileged documents, has an ethical and legal duty to refrain from examining them any more than is necessary to determine that they are privileged and to immediately notify the sender. Failure to do so may be grounds for disqualification.*

***Rico v. Mitsubishi Motors Corporation, et al.*** (2004) 116 Cal.App.4<sup>th</sup> 51 (rev. granted 06/09/04)

Attorney Raymond Johnson represented plaintiffs in a civil action against Mitsubishi Motors and other defendants. Johnson inadvertently obtained the notes of defense attorney, James Yukevich. Before returning the notes Johnson shared copies with plaintiff's experts. Johnson used the notes for impeachment purposes during the deposition of another defense expert. Yukevich filed a motion to disqualify Johnson and his experts on grounds that Johnson failed to comply with the ethical requirement that he advise opposing counsel of his receipt of confidential information and that he refrain from using the information.

The trial court found that Johnson's violation of his ethical duties caused an unfair disadvantage to his opponent and granted the motion.

Johnson urged the Court of Appeal to follow *Aerojet-General Corp. v.*

*Transport Indemnity, Inc.* (1993) 18 Cal.App.4<sup>th</sup> 996, which holds that, upon inadvertently discovering a privileged document, counsel is duty-bound to use the non-privileged portions of the document to his client's advantage.

The Court disagreed and followed *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4<sup>th</sup> 644, which holds that it is the ethical duty of an attorney who inadvertently receives plainly privileged documents to refrain from examining the materials any more than is necessary to determine that they are privileged. The attorney must then immediately notify the sender that he is in possession of privileged information.

The Court further found that Johnson's use of the privileged document to undermine the defense experts' opinions placed defendants at a great disadvantage, which was irreversible.

Even if the court omitted all references to the document from the record, the court recognized the practical reality that plaintiffs' counsel and experts had information that inevitably would have been used in preparing for trial. Disqualification of Johnson was necessary to insure a fair trial.

*Comment:* Courts are increasingly vigilant about compliance with ethical rules. *Rico* is more in keeping with this trend and counsel should not rely on earlier case law to excuse the questionable use of opposing counsel's confidential work-product.