

PROFESSIONAL LIABILITY UPDATE

November 9, 2004

Issue No. 197

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By Jennifer A. Becker

Jasmine Networks, Inc. v. Marvell Semiconductor, Inc. (2004) 117 Cal.App.4th 794 (rev. granted 7/21/04)

The California Supreme Court accepts a case from the Sixth District that holds that client participation in an inadvertent disclosure of an attorney-client communication waives the privilege. Where there is an inadvertent disclosure the court may consider the content of the communication to evaluate whether the crime-fraud exception to the privilege applies.

Marvell was negotiating with Jasmine Networks, Inc. for purchase of a portion of Jasmine's technology. During the negotiations a conversation among Marvell's officers and lawyers was inadvertently left on Jasmine's voicemail system, indicating that Marvell did not intend to abide by the contract and was going to steal Jasmine's technology. Further investigation revealed that a Jasmine employee had sent Marvell confidential information about compensation of Jasmine employees and propriety patent disclosures. Jasmine then filed suit and Marvell filed a motion for a preliminary injunction to preclude use of the conversation.

Without reviewing a transcript of the conversation, the trial court granted Marvell's request for a preliminary injunction restraining the use or disclosure of the transcript. On appeal Jasmine asserted that the attorney-client privilege was waived through disclosure

and because the conversation fell within the crime-fraud exception.

Under Evidence Code § 912 (a), the attorney-client privilege may be waived in one of two ways: (1) by the privilege holder making an un-coerced disclosure of the information; or (2) by the holder intentionally consenting to disclosure by a third party. Intent to disclose is not required to waive the privilege through un-coerced disclosure.

An attorney's inadvertent disclosure does not waive the privilege without client intent. However, Marvell's corporate officers, not just its general counsel, disclosed the information on the voicemail. Thus the privilege holder inadvertently disclosed the information and pursuant to Evidence Code § 912(a) waived the privilege by disclosure. There is no requirement in the statute, nor in the cases interpreting the statute, that the privilege holder intend to

disclose the information when the holder makes an un-coerced disclosure.

Although Marvell's general counsel initiated the call that resulted in the inadvertent disclosure, he was acting not only as Marvell's general counsel, but also as the vice-president of business affairs and an officer of the corporation, with authority to speak to Jasmine on issues related to the terms of the agreement. In addition the attorney was not acting alone, other corporate officers acting on behalf of Marvell made the call. The only non-attorney executive involved in the call did not object and participated fully in the conversation that was left on Jasmine's voicemail. Thus Marvell, not just its counsel, disclosed the information and waived its attorney-client privilege.

Furthermore, the communication fell within the crime-fraud exception to the attorney-client privilege. Mere assertion of fraud is insufficient to establish the crime-fraud exception; there must be a showing that fraud has some foundation in fact. Jasmine needed only show a prima facie case of Marvell's fraud, and a prima facie case that the voicemail reasonably related to that crime or fraud. The trial court should have reviewed the evidence to determine whether inferences of both a crime or fraud, and a reasonable relationship between that crime or fraud and the attorney communication could be drawn. The trial court erred by elevating the requirement of a prima facie case of crime or fraud to whether Jasmine produced sufficient evidence to demonstrate that such crime or fraud occurred.

In addition, the trial court refused to consider the contents of the voicemail.

Evidence Code § 915, which prevents disclosure in order to evaluate a claim of privilege, is not applicable where the communication has already been disclosed.

The Court of Appeal found that Jasmine presented evidence to the trial court that could raise no conflicting inferences. In the voicemail, Marvell's general counsel and corporate officers openly discussed theft of Jasmine's trade secret and the unlawful hiring of the engineering group, as well as the potential consequence of jail for the conduct. The contents of the conversation demonstrated the theft of Jasmine's trade secret, the potential consequences, and the planned cover up. This satisfied the requirements of a prima facie case of fraud, and a reasonable relationship between the crime or fraud and the attorney-client communication.

In coming to its conclusion, the Court of Appeal noted that courts are required to ensure that the attorney-client privilege is not used to promote or further corporate fraud.

Comment: The Supreme Court is examining a related issue in *Rico v. Mitsubishi Motors* (2004) 116 Cal.App.4th 51 [PL Update No. 184] *Rico* and *Jasmine* present competing public policies of protecting attorney-client privilege from inadvertent disclosure and not allowing the attorney-client privilege to protect the attorney or the client when there is clear evidence of fraudulent conduct.