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INSURANCE PROFESSIONALS, ACCOUNTANTS AND STOCK BROKERS



## Clark v. Superior Court: Disqualification of Attorney Warranted Due to Excessive Review of Inadvertently-Received Privileged Documents

By [Mark Hancock](#)

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In a [published opinion](#), the California Court of Appeal (Fourth Appellate, Division One) denied a petition to vacate an order disqualifying plaintiff's chosen law firm. The trial court had disqualified counsel for the receipt and excessive review of the opposing party's privileged material. The case is *Clark v. Superior Court* (2011) 196 Cal.App.4th 37.

Counsel was found to have violated its obligations under *Rico v. Mitsubishi Motors Corp* (2007) 42 Cal.4th 807 and *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, which require a lawyer to refrain from examining materials any more than is essential to ascertain if the documents are privileged, and immediately notify the sender that he or she possesses material that appears to be privileged.

Plaintiff asserted that an in camera review of the documents was a prerequisite to determining whether the materials were in fact privileged. In doing so, plaintiff claimed that the determination of privilege turns on the "dominant purpose" of each communication. Contrary to plaintiff's contention, the trial court held that the relevant inquiry is not the *content* of the communication but is instead the *relationship* of the communicators.

When the party claiming privilege shows the dominant purpose of the relationship between the parties to the communication was one of attorney-client, the communication is protected by the privilege. Once the party establishes a prima facie claim of privilege, the burden of proof shifts to the opponent of the claim to establish the communication was not confidential or that the privilege does not for other reasons apply.

Here, the court found substantial evidence supporting the ruling that counsel violated its ethical obligations under *Rico* and *State Fund*. The disqualifying order was justified because there was a genuine likelihood that the conduct could affect the outcome of the litigation. Any infringement of the right to counsel of choice was found to be outweighed by the paramount concern of the court in protecting the public trust in the administration of justice and integrity of the bar.