

Using an Adversary's Privileged Documents May Lead to Disqualification

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Attorney's Review Of Privileged Documents From Client Results In Attorney's Disqualification

An attorney who views and uses an adversary's privileged documents supplied to him by his own client may, under certain circumstances, be disqualified, according to *Clark v. Superior Court*, 196 Cal. App. 4th 37 (2011) (petition for review pending). This new decision from the Court of Appeal for the Fourth Appellate District, Division One, expands the *State Fund* rule beyond inadvertent disclosure by a third party to documents provided by the attorney's own client, at least where the client's possession of those privileged documents is wrongful.

Background to the *Clark* case: the *State Fund-Rico* Rule for Receipt of Inadvertently Disclosed Privileged Documents

In *State Compensation Insurance Fund v. WPS, Inc.*, 70 Cal. App. 4th 644 (1999), the Court of Appeal laid out a protocol for handling the inadvertent disclosure of privileged documents:

When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. (*Id.* at 656-57)

The court warned that in some circumstances, failure to follow the steps outlined could justify disqualification of the attorney. *Id.* at 657.

In *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807 (2007), the California Supreme Court upheld the disqualification of an attorney who had obtained and secretly used his opposing counsel's confidential work product. In doing so, the court adopted the *State Fund* protocol as "a fair and reasonable approach" (*id.* at 817), and extended the *State Fund* rule to materials protected by the work product doctrine. *Id.* at 818 & n.9. The court found that disqualification was justified because the attorney failed to follow the *State Fund* protocol and "acted unethically in making full use of the confidential document." *Id.* at 819.

The *Clark* Decision

The *Clark* decision expands the *State Fund-Rico* rule beyond the "inadvertent disclosure" scenario to an attorney's receipt of an adversary's privileged documents from his own client, at least where the client's possession of those privileged documents is wrongful.

Clark was an officer at Verisign. In connection with his hiring, Clark signed a nondisclosure agreement prohibiting removal of his employer's confidential or privileged documents. After Clark was fired, he took some of his employer's privileged documents with him and then turned them over to his attorney. 196 Cal.

App. 4th at 42-43. The attorney reviewed and then used the privileged documents as a basis to assert a claim in a lawsuit against Verisign. Clark's attorney refused to return the documents to Verisign. *Id.* at 43. Verisign then successfully moved to disqualify Clark's attorney on the grounds that he and his client had improperly obtained, retained, reviewed and used privileged documents, and in doing so, had obtained an improper advantage. *Id.* at 44-45.

The Court of Appeal affirmed. It held that once the attorney realized the documents were privileged, he should have complied with the rules established in *State Fund* and *Rico*. The attorney's failure to do so warranted disqualification. The court focused on two considerations: (1) the attorney's continued representation of the former employee "could trigger doubts over the integrity of the judicial process" because the source of his knowledge would inevitably be questioned; and (2) the attorney's review of the privileged documents "had a direct and immediate impact on the legal posture" of the case because the attorney had used the documents to develop an additional cause of action against the employer. *Id.* at 55. The court did not expressly address Clark's argument that *State Fund* and *Rico* have no application unless the documents are inadvertently provided.

Prior Authority Permits An Attorney To Review Privileged Information Provided By A Client To The Extent Reasonably Necessary

In the past, California courts have taken a different approach to privileged information an attorney obtains from his client. In *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294 (2001), the Court of Appeal affirmed the denial of a motion to disqualify an attorney who learned privileged information from his client. In that case, Fox terminated an in-house attorney. The attorney then sued Fox for wrongful termination and, in so doing, shared Fox's privileged information with her attorney. *Id.* at 298-99. Fox moved to disqualify the employee's attorney based on his access to Fox's privileged information. The Court of Appeal affirmed denial of the motion. The Court held that "the former in-house counsel may disclose to her attorney all facts relevant to the termination, including employer confidences and privileged communications," so long as the disclosure is limited to information the in-house counsel "reasonably believes is necessary to her attorney's preparation and prosecution of the case." *Id.* at 308, 310-11 (emphasis added). At that point, it is up to the attorney, in consultation with the client, to determine if, when and how the privileged information can be utilized in conformity with applicable ethical rules and California law. *Id.* at 315.

What Are The Implications Of Clark?

Instead of following the analytic framework of *Fox Searchlight*, *Clark* applied *State Fund* and *Rico* to privileged documents that a client wrongfully obtained and intentionally disclosed to the client's own counsel. In doing so, *Clark* potentially expanded *State Fund* to any disclosure of privileged documents. That said, *Clark* appears to be limited to privileged documents that are wrongfully possessed, although it does not make this distinction expressly. A petition for review to the California Supreme Court is pending in *Clark*, so it is possible that the Supreme Court will weigh in. In the meantime, there appears to be some tension in the law between the *Fox Searchlight* and the *Clark* approaches.

In light of *Clark*, attorneys should be thoughtful about whether and how to obtain privileged documents from a client whose right to possess the documents may be wrongful or disputed. Each situation needs to be considered based on all of the facts and circumstances. Attorneys may wish to interview the client ahead of time about the nature of documents being turned over to the attorney to avoid a situation where a lawyer comes to possess information that creates complications once in the lawyer's hands. Other steps



lawyers may consider would be, depending on the circumstances, alerting the other side before reviewing the documents and, if necessary, obtaining a court order to permit such review.

If you have questions about any of the issues raised in this alert, contact [Jon Hughes](#) at 415.677.6380, [Amy Bomse](#) at 415.677.6590, [Diana DiGennaro](#) at 415.677.6365 or your usual Howard Rice attorney.

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