

In The News

California Supreme Court Imposes Duty On Attorneys To Refrain From Using Inadvertently Received Privileged Information

Ricov. Mitsubishi Motors Corp., 2007 WL 4335934

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What should you do when an opposing attorney inadvertently provides you with a privileged document? Once you realize it is privileged, can you use it to your client's advantage? Or must you return it to the other side? In a long-awaited decision, the California Supreme Court held that attorneys who receive such documents owe a duty to their profession and to the courts to refrain from using such documents, and must immediately notify opposing counsel and try to resolve the situation. The failure to do so justifies an order disqualifying the attorney.

In *Rico v. Mitsubishi Motors Corp.*, 2007 WL 4335934, several plaintiffs sued Mitsubishi after a rollover accident. During the litigation, the defense attorneys met with several Mitsubishi representatives and two designated defense experts. At this meeting, at which the participants discussed litigation strategy and the weaknesses of Mitsubishi's case, one of the defense attorneys, Yukevich, asked a Mitsubishi representative to type notes on the attorney's computer. Yukevich later printed just one copy of these notes, the sole purpose of which was to help him defend the case. This one copy was not labeled as "confidential" or "work product."

Shortly after this meeting, Yukevich deposed one of the plaintiffs' expert witnesses at the offices of plaintiffs' counsel, Johnson. When Yukevich left the conference room for a few minutes, he left his briefcase and case file behind, including the printed notes from the strategy session. During his absence, Johnson and the expert witness were alone in the conference room.

It was later determined that, somehow, Johnson had obtained Yukevich's summarized notes. Johnson admitted that when he read the document, "he knew within a minute or two that the document related to the defendants' case . . . that Yukevich did not intend to produce it and that it would be a 'powerful impeachment document'" for use against Mitsubishi's experts. Despite this knowledge, Johnson made a copy of the document, scrutinized it, made his own notes on it and gave copies of it to, and discussed it with, his experts. He also used the notes when he deposed one of the defense experts and asked about the expert's participation in the strategy session.

When Mitsubishi's counsel realized that Johnson had these notes, they moved to disqualify him. Yukevich said that Johnson must have taken the notes from his case file at the deposition; Johnson claimed that he got the notes from the court reporter; the court reporter testified that her normal practice does not include giving documents to counsel. The trial court conducted an evidentiary hearing and determined that Johnson obtained the notes through inadvertence. The trial court ruled that Johnson's use of the inadvertently obtained notes was a violation of the work product doctrine and granted the motion to disqualify.

The Supreme Court accepted the trial court's determination that the document had been obtained through inadvertence. After determining that the document consisted entirely of work product, the Court then turned to the obligations of an attorney who receives inadvertently a document that consists of work product.

The Court ruled that the receiving attorney "has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." A court must determine whether an attorney has met this obligation by applying an objective standard: the court "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 that conclusion, and when counsel's examination should have ended."

Applying this standard to the facts before it, the Supreme Court ruled that Johnson's conduct warranted his disqualification. While the Court held that a "mere exposure" to a confidential document might not warrant disqualification, it was Johnson's "full use" of the document that justified disqualification. By using the document at deposition, by sharing it with his experts, Johnson caused "unmitigable damage" to Mitsubishi's ability to defend the case.

Practice Note: This decision provides attorneys with a practical guideline for their conduct upon receipt of documents from opposing counsel. Once receiving counsel realizes that any particular document may be privileged in some fashion, counsel should immediately cease reading the document and notify opposing counsel. The attorneys can then determine the method required to remedy the situation. In most cases, an easy remedy would be to return or destroy the privileged document.

The Supreme Court's objective standard can also be applied in situations involving the production of large quantities of documents. Assume, for example, that an attorney produces several thousand pages of documents and inadvertently includes some documents that are confidential. The receiving attorney starts the review process, but does not come across the inadvertently produced privileged documents for some time. It would appear that, so long as the receiving attorney promptly notifies the producing attorney upon discovery of the privileged documents, disqualification would not be warranted, because "mere exposure" to privileged documents, without actual improper use, is an insufficient ground for disqualification.

So, when faced with this situation, just follow the Golden Rule: Do unto others as you would have them do unto you.