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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ZERLENE RICO et al., Plaintiffs and Appellants, v. MITSUBISHI MOTORS CORPORATION et al., Defendants and Respondents.	E033616 (Super.Ct.No. RCV39233) OPINION

APPEAL from the Superior Court of San Bernardino County. Ben T. Kayashima, Judge. (Retired Judge of the San Bernardino Superior Court, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Pine & Pine, Norman Pine; Law Offices of Raymond Paul Johnson, Raymond Paul Johnson; Law Offices of Jack L. Mattingly and Jack L. Mattingly; for Plaintiffs and Appellants.

Yukevich & Sonnett, James J. Yukevich, Alexander G. Calfo and Stephanie A. Hingle; Bingham McCutchen LLP, Leslie G. Landau and Claudia Y. Sanchez for Defendants and Respondents.

1. Introduction

In a sports utility vehicle (SUV) rollover case with serious injuries and death, counsel for plaintiffs obtained a document that provided a summary, in dialogue form, of a defense conference between attorneys and defense experts in which the participants discussed the strengths and weaknesses of the defendants' technical evidence. Despite the fact that the notes were clearly the confidential work product of defense counsel, plaintiffs' counsel made no effort to notify defense counsel of his possession of the document and instead examined, disseminated, and used the notes to impeach the testimony of defense experts during their deposition, all in contravention of the legal and ethical standards established in *State Comp. Ins. Fund v. WPS, Inc.*[1]

Although the document did not implicate the attorney-client privilege, we uphold the court's finding that defense counsel's notes did constitute attorney work product. We also uphold the court's disqualification order because substantial evidence supported the court's finding that the dissemination and use of the document placed defendants at a significant disadvantage that could not have been removed by lesser sanctions. We affirm the court's order.

2. Factual and Procedural History

On March 15, 1999, plaintiffs Zerlene Rico, Estate of Denise Rico, Fernando Rico, and Silvia Rico, individually or through a guardian ad litem or administrator, filed a

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[1] *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644.

complaint for various causes of actions including negligence, strict liability, and breach of warranties, against Mitsubishi Motors Corporation, Mitsubishi Motor Sales of America, Inc. (collectively Mitsubishi or defendants), the California Department of Transportation (the Department), Lenette Rico-Abassi, and Michael Abassi. On June 16, 1999, plaintiffs Lenette Rico-Abassi and Michael Abassi filed a complaint with similar claims against Mitsubishi and the Department. By the parties' stipulation, the trial court consolidated the two cases. In their complaint, the plaintiffs alleged that, on June 21, 1998, Lenette Rico-Abassi drove a Mitsubishi Montero along Interstate 10 and, when Rico-Abassi maneuvered the vehicle, the vehicle overturned, resulting in both fatal and debilitating injuries to the other plaintiffs who were passengers in the vehicle.

On September 18, 2002, defendants filed a motion to disqualify plaintiffs' legal team and experts on the grounds that plaintiffs' attorney obtained and used confidential and privileged materials prepared by defense counsel.

Plaintiffs' attorney Raymond Johnson obtained the notes of one of the defense attorneys, James Yukevich, after a deposition with Yukevich and defense expert, Anthony Sances. While Johnson stated that a court reporter accidentally delivered the document to Johnson, Yukevich claimed that the document was taken from his files when Johnson temporarily commandeered the deposition room for a personal meeting.

The document, later identified as exhibit 52, has the following heading:

"August 28, 2002

"LEC

"10:30"

The 12-page document is written in the form of a dialogue between the defense attorneys, including Yukevich and Alexander Calfo, and the defense experts. All the participants are referred to by their initials only. The document also contains a few handwritten notes or comments.

Yukevich testified that, under his instructions, James Rowley, a case manager for Mitsubishi who had worked with Yukevich for three years, drafted the document during an August 28, 2002 legal engineering meeting (LEC). During the breaks and after the meeting, Yukevich edited the typewritten notes and later added his own handwritten comments. At some point before Sances's deposition, Yukevich printed one copy of these notes for his own personal use.

When Johnson received the document, he knew that Yukevich had unintentionally left it in the deposition room. Realizing that he had in his hand a "powerful impeachment document," Johnson made a copy for himself before returning the original to the court reporter. Johnson then made additional copies and sent them to plaintiffs' experts and the other attorneys.

On September 16, 2002, Johnson used the document for impeachment purposes during the deposition of defense expert Geoffrey Germane. During the deposition, Johnson showed Germane a copy of the document and proceeded to ask questions concerning the comments attributed to Germane (JG) in the document. Yukevich did not attend Germane's deposition, but cocounsel Calfo was present. Calfo did not know the

source of the document or its significance. Although he did not object to the document as confidential or privileged, Calfo raised several objections on other grounds, including lack of foundation, hearsay, and inaccuracy. Johnson provided no explanation as to the source of the document, except to say that, "[i]t was put in Dr. Sances' file."

On the day after Germane's deposition, Yukevich, after discovering that Johnson had a copy of his personal notes, accused Johnson of reading and using a privileged document. Yukevich demanded all copies of the document and advised Johnson of his intent to request that the court disqualify Johnson, Anthony Sances, and any other experts who had seen the document.

As threatened, on September 18, 2002, Yukevich filed a motion to disqualify plaintiffs' attorney and experts. Yukevich argued that Johnson failed to comply with the ethical requirement of advising opposing counsel of his receipt of the confidential document.

After a lengthy hearing on the motion, the trial court granted the motion. The trial court made the following factual findings: Rowley acted as Yukevich's paralegal in preparing the notes; Yukevich created the document for his own personal use; Johnson obtained the document inadvertently; Johnson provided copies to attorneys Robert Balbuena and Jack Mattingly and experts Sances and Robert Anderson; the document is protected under both the attorney-client privilege and the attorney work product doctrine; Johnson violated his ethical duty by failing to notify opposing counsel and using the document; and, as a result of the unmitigatable prejudice, disqualification was the

appropriate remedy. The court then continued the case to provide the plaintiffs an opportunity to retain new counsel.

3. Standard of Review

Generally, appellate courts review a trial court's decision to grant a disqualification motion for an abuse of discretion.[2] A court abuses its discretion when it acts arbitrarily or without reason.[3] In applying the abuse of discretion standard in this context, we carefully review the record to make the following determinations: whether the court's factual findings were supported by substantial evidence; whether the court properly exercised its discretion in reaching its ultimate factual conclusions; and whether, based on our independent review, the court properly understood and applied the law.[4]

4. Privileged Document

Plaintiffs claim that the trial court erred in finding that the document was protected as both an attorney-client communication and as attorney work product. For the reasons provided below, we conclude that the document was not protected by the attorney-client privilege. The document was, however, confidential and privileged as attorney work product. Therefore, while the court misapplied the attorney-client privilege, the court did

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[2] *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc*. (1999) 20 Cal.4th 1135, 1143.

[3] See *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 762; *McPhearson v. Michaels Co*. (2002) 96 Cal.App.4th 843, 851.

[4] *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc., supra*, 20 Cal.4th at pages 1143-1144.

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not abuse its discretion in reaching the ultimate conclusion that the document was privileged.

A. Attorney-Client Privilege

Plaintiffs argue that the document did not constitute a confidential communication under Evidence Code section 952.

Evidence Code section 952 defines a "confidential communication" as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." As the holder of the privilege, the client may refuse to disclose and prevent others from disclosing confidential communications.[5] The privilege safeguards the confidential relationship between the client and his attorney and allows the two to engage in full and open discussion about the facts and legal strategies.[6]

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[5] Evidence Code section 953 and 954; *Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 456-457.

[6] *Solin v. O'Melveny & Myers, supra*, 89 Cal.App.4th at page 457.

These general principles envision some communication or transmission of information between an attorney and his client. The document in this case, however, does not fall within this general description. The document did not memorialize any attorney-client communication and, contrary to defendants' argument, the document was not transmitted between an attorney and his client.

First, the conversation encapsulated in the 12-page document was not a communication between an attorney and his client. The dialogue was primarily between defense attorneys and defense experts. While the privilege may extend to the client's agents and employees, the privilege attaches to the client's communication as relayed by the representative, not to communication originating from the representative.[7] An attorney-client privilege does not attach to a communication that has no connection to the client. A conference between attorneys and experts, who are simply stating their own opinions, is not protected by the attorney-client privilege.

Moreover, even if the expert's communication is somehow protected, any privilege is lost once the expert is called to testify at trial. During cross-examination, the opposing party is entitled to delve into all matters relied on or considered by the expert in reaching his conclusions.[8]

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[7] See *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 601; see also *People v. Gurule* (2002) 28 Cal.4th 557, 593; *People v. Lines* (1975) 13 Cal.3d 500, 513.

[8] *People v. Milner* (1988) 45 Cal.3d 227, 241.

Second, the document in this case was not the instrument through which the client or the attorney transmitted confidential information. Defendants argue that the document was a communication between Yukevich and Rowley, Mitsubishi's representative and case manager. Defendants note that privileged information may be communicated by electronic means.[9] Defendants therefore contend that, as Rowley entered the notes into Yukevich's personal computer and Yukevich edited the notes during the August 28, 2002 conference, they were exchanging confidential information.

The trial court found, however, that Rowley, in summarizing and transcribing the comments made during the conference, assumed the role of Yukevich's paralegal. Substantial evidence supports the court's finding. Yukevich testified that Rowley was acting under his directions. Rowley merely included information that Yukevich wanted in the document. Rowley confirmed that he was acting under Yukevich's directions to take notes of specific subject areas addressed during the conference. Under these facts, Rowley was not acting in his capacity as Mitsubishi's representative. Rowley also was not providing nor receiving information on Mitsubishi's behalf. The exchange was simply between an attorney and an individual acting as the attorney's paralegal.

We conclude therefore that neither the document nor the subject matter of the document involved an attorney-client communication. While the court was correct

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[9] Evidence Code section 915, subdivision (b).

concerning the foundational facts, the court erred in reaching its ultimate conclusion that the document was privileged as an attorney-client communication.

B. Attorney Work Product

Plaintiffs also argue that the trial court erred in concluding that the document, which contained notes from a conference between defense attorneys and defense experts, was protected by the absolute work product privilege. Plaintiffs specifically argue that the document was no longer privileged after defendants designated the same defense experts as witnesses at trial.[10] Plaintiffs also argued that defendants waived their right to assert the work product privilege by failing to raise an objection on this specific ground during Germane's deposition on September 16, 2002.

In regards to the waiver argument, plaintiffs explain that they are not claiming waiver based on any inadvertent disclosure of the document. Rather, plaintiffs claim that defendants failed to raise a timely objection during Germane's deposition. Plaintiffs note that, although Yukevich did not attend Germane's deposition, Calfo represented the defense during the deposition and had ample opportunity to object to the offending document. Generally, waiver is the intentional relinquishment of a right with knowledge of the facts.[11] The burden is on the party claiming waiver to prove the existence of an intentional and knowing waiver.[12]

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[10] *Williamson v. Superior Court* (1978) 21 Cal.3d 829, 834.

[11] See *Padres Hacia Una Vida Mejor v. Davis* (2002) 96 Cal.App.4th 1123, 1136; *Monteleone v. Allstate Ins. Co*. (1996) 51 Cal.App.4th 509, 517.

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Calfo did not attend the meeting at which the document was created and he did not recognize it when plaintiffs' counsel began to cross-examine defendants' expert. It was not until after the deposition that Calfo concluded that the document was privileged on its face. Calfo testified that he had no opportunity to read the document, but only peered over Germane's shoulder. The excerpted transcript of Germane's deposition shows that, while Calfo did not know what to make of the document, he clearly objected to its use in cross-examining the witness. He first asked about the source of the document, to which Johnson vaguely responded, "It was put in Dr. Sances' file." Calfo then challenged any statement in the document as being "attributed to Mr. Germane." He objected on the ground that there was "no foundation for this document." He objected to Johnson's attempt to use a quote from the document as Germane's actual words. As he continued to raise one objection after another, Calfo asserted that he objected "to the exhibit as a whole." As Johnson again attempted to use the document, Calfo interrupted with, "I don't even know where this exhibit came from." Johnson continued his question as Calfo continued his onslaught of objections. Calfo objected "to this whole line of inquiry with respect to an unknown document." We cannot fault defendants for failing to object to a document that was sprung on the defense at the deposition, that was erroneously identified by plaintiffs' counsel, and that was not recognized by defense counsel.

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12 See *Ringler Associates Inc. v. Maryland Casualty Co*. (2000) 80 Cal.App.4th 1165, 1188.

After the deposition, Johnson handed Calfo a copy of the document. Calfo informed Yukevich and Yukevich immediately sent a letter to Johnson stating that the document consisted of personal notes reflecting his thoughts and impressions. Two days after the deposition, defendants filed their motion to disqualify plaintiffs' counsel on various grounds, including that Johnson violated the attorney work product privilege. Based on Calfo's objections to the unknown document during the deposition and Yukevich's formal objection shortly thereafter, the record flies in the face of plaintiffs' waiver argument.

In the absence of waiver, we turn to a determination of whether the document was immune from discovery under the attorney work product doctrine. Code of Civil Procedure section 2018 codifies the attorney's work product privilege doctrine. That provision states in part:

"(a) It is the policy of the state to: (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and efforts.

"(b) Subject to subdivision (c), the work product of an attorney is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

"(c) Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances."

While subdivision (b) sets forth the conditional or qualified privilege, subdivision (c) provides an absolute privilege for certain writings.[13]

An attorney's notes containing his impressions, conclusions, opinions, or legal theories regarding a witness' prior statement is absolutely immune from discovery. There is a significant difference between a witness' statement and an attorney's notes concerning that prior statement. While the former may be discoverable, the latter is protected from discovery based on its derivative or interpretive nature.[14] The materials no longer consist solely of the witness' statements, but they also expose the attorney's impressions, including his evaluation of the strengths and weaknesses of the case.[15] When the notes consist an attorney's impressions concerning the witness' statement, the notes are protected absolutely under the attorney work product doctrine.[16]

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[13] See *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 120.

[14] *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 69.

[15] See *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217-218; see also *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 647-648.

[16] See *Rodriguez v. McDonnell Douglas Corp., supra*, 87 Cal.App.3d at page 648.

This rule applies equally to lay and expert witnesses despite the discovery rules set forth in Code of Civil Procedure section 2034. Code of Civil Procedure section 2034, subdivision (a)(3) provides: "Any party may also include a demand for the mutual and simultaneous production for inspection and copying of all discoverable reports and writings, if any, made by an expert described in paragraph (2) in the course of preparing that expert's opinion." Under Code of Civil Procedure section 2034, the attorney's work product privilege does not apply to an expert's pretrial statements once that expert is designated as a witness at trial.[17] The statute, however, only pertains to various items including the expert's reports, writings, and declarations.[18] The provision does not require the production of an attorney's personal notes concerning the expert's pretrial statements.[19] While the statute specifically requires that the item be "discoverable," an attorney's work product is privileged and, hence, not discoverable.

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[17] *Rodriguez v. McDonnell Douglas Corp., supra*, 87 Cal.App.3d at page 648; see also *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 857-858.

[18] See *Williamson v. Superior Court* (1979) 21 Cal.3d 829, 834-835 (expert's report); *County of Los Angeles v. Superior Court* (1990) 224 Cal.App.3d 1446, 1458 (physician's deposition responses); *National Steel Products Co. v. Superior Court* (1985) 164 Cal.App.3d 476, 485-492 (expert's report); see also *People v. Martinez* (Colo. 1998) 970 P.2d 469, 474-476 (witness' statements).

[19] *Rodriguez v. McDonnell Douglas Corp., supra*, 87 Cal.App.3d at page 647 (attorney's agent's notes of witness' prior statement); *People v. Boehm* (1969) 270 Cal.App.2d 13, 21-22 (district attorney's notes on witness); see also *Hurtado v. Western Medical Center* (1990) 222 Cal.App.3d 1198, 1203 (attorney's analysis of percipient witness); see generally *Nacht & Lewis Architects, Inc. v. Superior Court, supra*, 47 Cal.App.4th at pages 217-218; *Scotsman Mfg. Co. v. Superior Court* (1966) 242 Cal.App.2d 527, 531.

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An attorney's derivative or interpretive notes, including notes pertaining to an expert's prior statements or opinions, are absolutely privileged and protected from discovery.[20] "[A]ny such notes or recorded statements taken by defendant's counsel would be protected by the absolute work product privilege because they would reveal counsel's 'impressions, conclusions, opinions, or legal research or theories' within the meaning of Code of Civil Procedure section 2018, subdivision (c). [Citation.]"[21]

Here, the document was not merely a transcript of the August 28, 2002 conference. As found by the court, Rowley, who was acting under Yukevich's instructions, summarized the important points addressed during the meeting. Substantial evidence supported the court's finding. Rowley testified that he did not record the statements verbatim, but only noted the important points. The conference lasted for about six hours including breaks beginning at about 10:30 a.m. and ending at about 4:00 p.m. Although the attorneys and experts met for several hours, Rowley only produced 12 pages of notes. This evidence alone suggests that the notes were not a transcript of the conference, but the product of a selective screening process. Both Yukevich and Rowley testified that the notes reflected Yukevich's desired content. Johnson also agreed that the notes consisted of major points, rather than a verbatim transcript. Yukevich's thoughts

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[20] *Rodriguez v. McDonnell Douglas Corp., supra*, 87 Cal.App.3d at page 649; see also *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 135.

and expectations were the screening process for gathering specific data, or, to use the trial court's language, "the filter through which all the discussions and the conference were passed through on the way to the page."

The court correctly concluded that the 12-page document was attorney work product. Although the document was written in dialogue format with information provided by Mitsubishi experts, the above evidence shows that the document was not simply an expert's report, writings, declaration, or deposition testimony. Instead, the document contained Yukevich's thoughts and impressions concerning the evidence and the case.

Furthermore, contrary to plaintiffs' argument, the fact that Rowley primarily drafted the notes did not affect the character of the document. The attorney's work product doctrine covers documents created not only by an attorney, but also his agents or employees, including his paralegal.[22] As the evidence established, Rowley wore multiple hats. During the August 28, 2002 hearing, he assisted Yukevich as his paralegal. The evidence indicated that, in addition to essentially guiding Rowley's hand, Yukevich also edited the notes and finalized the document before printing a hard copy. Yukevich testified that he deleted certain language and added several sentences. Although the

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[21] *Nacht & Lewis Architects, Inc. v. Superior Court, supra*, 47 Cal.App.4th at page 217.

[22] See *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 385-386; *Rodriguez v. McDonnell Douglas Corp., supra*, 87 Cal.App.3d at page 647.

document was created by Yukevich and Rowley's joint efforts, it was Yukevich's work product.

As Yukevich's work product containing his thoughts and impressions of the case, the document was not discoverable under any circumstances.

5. Attorney's Ethical Duty in Regards to a Privileged Document

The question in this case is what was Johnson's ethical duty once he received the privileged document.

Throughout the proceedings here and below, plaintiffs have relied on the *Aerojet-General Corp. v. Transport Indemnity, Inc.* (hereafter *Aerojet*).[23] case for the rule that, upon inadvertently discovering a privileged document, plaintiffs were duty-bound to use the nonprivileged portions of the document to their client's advantage. In stark contrast, defendants, relying on *State Comp. Ins. Fund v. WPS, Inc.*,[24] claim that Johnson, upon happening upon the privileged document, was required immediately to notify defendants without even reading beyond what was necessary to ascertain the privileged nature of the materials.

In *Aerojet*, several liability insurers sued Aerojet over a dispute regarding insurance coverage after an incident involving the widespread contamination at or near an *Aerojet* facility. During a break in the discovery process, an attorney for the plaintiffs

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[23] *Aerojet-General Corp. v. Transport Indemnity Insurance* (1993) 18 Cal.App.4th 996 (Aerojet).

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received a packet of documents from an Aerojet employee, who had received the packet from Aerojet's insurance brokers. Among the documents was a memorandum revealing the existence of a witness, an independent insurance adjuster who had investigated a prior industrial accident at the same facility, and the attorney's assessment of that witness's potential. Upon discovering the memorandum, the plaintiffs' attorney reviewed the document and did not notify opposing counsel or the court of his find.

In reversing the trial court's monetary sanction order, the appellate court concluded the plaintiffs' attorney could not be faulted for examining the memorandum based on the volume of documents involved in the case and the inconspicuous nature of the unmarked document.[25] The document was on plain paper without any identifying characteristics. The court found that, without reviewing the document, it would be impossible to discern what counsel had in his possession.[26]

The *Aerojet* court focused primarily on two essential considerations. First, the court noted that the Aerojet had failed to demonstrate any specific prejudice. "They did not claim any specific damage or harm to their case based on the disclosure of the

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[24] *State Comp. Ins. Fund v. WPS, Inc*., *supra,* 70 Cal.App.4th 644 (State Fund).

[25] *Aerojet, supra*, 18 Cal.App.4th at page 1003.

[26] *Aerojet, supra*, 18 Cal.App.4th at page 1003.

documents, nor did they seek sanctions for such."[27] The secreted witness never testified at trial. And the jury decided the case in their favor.

The court also noted that Aerojet should have disclosed certain information that was neither privileged as attorney-client communication or attorney work product. "The attorney-client privilege is a shield against deliberate intrusion; it is not an insurer against inadvertent disclosure. Further, not all information that passes privately between attorney and client is entitled to remain confidential in the literal sense. The most obvious example is information that is required to be disclosed in response to discovery, such as the identification of potential witnesses. Consequently, whether the existence and identity of a witness or other nonprivileged information is revealed through formal discovery or inadvertence, the end result is the same: the opposing party is entitled to the use of that witness or information."[28]

The court went on to say, "'[T]he attorney-client privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts upon which the communications are based [citations]' [citation], 'and it does not extend to independent witnesses [citations]' [citation] or their discovery. [Citations.] Nor can 'the identity and location of persons having knowledge of relevant facts' be concealed under the attorney

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[27] *Aerojet, supra*, 18 Cal.App.4th at pages 1003.

[28] *Aerojet, supra*, 18 Cal.App.4th at page 1004.

work product rule of Code of Civil Procedure section 2018. [Citations.]"[29] The court made clear that, while the packet may have contained privileged materials, the targeted information, the existence of a potential witness, was not privileged.[30]

The court held that the plaintiffs' attorney was duty bound to use the information. "Once he had acquired the information in a manner that was not due to his own fault or wrongdoing, he cannot purge it from his mind. Indeed, his professional obligation demands that he utilize his knowledge about the case on his client's behalf."[31]

Therefore, under *Aerojet*, an attorney who inadvertently discovers a privileged document has no duty to inform opposing counsel, but instead has a duty to use any unprivileged information contained in the document that would be advantageous to his client. Notably, the court conditioned its holding on the grounds that, "[t]here is no State Bar rule of professional conduct, no rule of court nor any statute specifically addressing this situation and mandating or defining any duty under such circumstances."[32] At the end of its opinion, the court again conditioned its holding, as follows: "In the absence of any clear statutory, regulatory or decisional authority imposing a duty of immediate

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[29] *Aerojet, supra*, 18 Cal.App.4th at page 1004.

[30] *Aerojet, supra*, 18 Cal.App.4th at pages 1004-1005.

[31] *Aerojet, supra*, 18 Cal.App.4th at page 1006.

[32] *Aerojet, supra*, 18 Cal.App.4th at page 1003.

disclosure of the inadvertent receipt of privileged information, we conclude the sanction order cannot stand."[33]

In retrospect, the court had good reason for caution in formulating its holding. In *State Fund*, National Commercial Recovery, Inc., State Fund's assignee, sued WPS, Inc. for underpaying its workers' compensation insurance premiums. The defendant cross-complained for bad faith. After the discovery cutoff date, plaintiff sent defendant's attorney three boxes of documents that were identical to the documents provided during the discovery, with the exception of 273 pages of forms entitled, "Civil Litigation Claims Summary." These inadvertently included documents were marked as "Attorney-Client Communication/Attorney Work Product" and with the admonition, "Do Not Circulate or Duplicate."[34] The forms were created by plaintiff's legal department to identify litigation issues and to assist outside cocounsel in their understanding of the strengths and weakness of the cases. One of the forms involved the subject of the litigation. When the plaintiff's attorney realized the mistake, he contacted the defendant's attorney and demanded the return of the documents. The defendant's attorney refused and plaintiff sought relief from the court. The trial court found the defendant's attorney violated his ethical obligations in refusing to return the documents. The trial court relied on American Bar Association (ABA) Formal Ethics Opinion No. 92-368 (Nov. 10, 1992).

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[33] *Aerojet, supra*, 18 Cal.App.4th at pages 1006-1007.

[34] *State Fund, supra*, 70 Cal.App.4th at page 648.

In finding a breach of counsel's ethical obligations, the court imposed monetary sanctions.

In reviewing the trial court's decision, the appellate court phrased the issue as follows: "what is a lawyer to do when he or she receives through the inadvertence of opposing counsel documents plainly subject to the attorney-client privilege?"[35] After preliminarily concluding that the documents were privileged and that inadvertent disclosure did not waive the privilege, the court discussed an attorney's obligation after inadvertently discovering privileged documents. The court distinguished the *Aerojet* case based on the plainly privileged nature of the State Fund documents and the specific demonstration of resulting prejudice.

In *State Fund*, the appellate court disagreed with the trial court's application of the ABA opinion. Although the court acknowledge that the ABA Model Rules of Professional Conduct may provide guidance in resolving ethical questions, the court found that defendant's attorney could not have been found to have acted in bad faith when there was no decision, statute, or ethical rule applicable in California.[36] Nevertheless, the appellate court found the analysis in the ABA opinion useful in formulating a standard for future cases.[37] The court established the following standard:

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[35] *State Fund, supra*, 70 Cal.App.4th at page 651.

[36] *State Fund, supra*, 70 Cal.App.4th at page 656.

[37] *State Fund, supra*, 70 Cal.App.4th at page 656.

"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."[38]

A significant consideration in determining the appropriate judicial remedy is whether the injured party can demonstrate specific damages. The court explained, "'Mere exposure to the confidences of an adversary does not, standing alone, warrant disqualification. Protecting the integrity of judicial proceedings does not require so draconian a rule. Such a rule would nullify a party's right to representation by chosen counsel any time inadvertence or devious design put an adversary's confidences in an attorney's mailbox. Nonetheless, we consider the means and sources of breaches of attorney-client confidentiality to be important considerations.' [Citation.] Having so noted, however, we do not rule out the possibility that in an appropriate case, disqualification might be justified if an attorney inadvertently receives confidential

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[38] *State Fund, supra*, 70 Cal.App.4th at pages 656-657.

materials and fails to conduct himself or herself in the manner specified above, assuming other factors compel disqualification."[39]

Although the *State Fund* court did not expressly disapprove the *Aerojet* case, it severely limited its holding. While unnecessarily broad in its holding, *Aerojet* was right in its narrow application. In regards to its application, the case essentially involved nonprivileged information, namely, a witness' identity, which was never used to the other party's detriment.[40] In regards to its holding, *State Fund* provided the decisional authority that was lacking in *Aerojet*. For cases following *State Fund*, there is an ethical duty immediately to disclose inadvertently received privileged information. More precisely, an attorney who inadvertently receives plainly privileged documents must refrain from examining the materials any more than is necessary to determine that they are privileged, and must immediately notify the sender, who may not necessarily be the opposing party, that he is in possession of potentially privileged documents.[41]

Although *State Fund* specifically involved documents that were privileged as attorney-client communications, the court did not limit its holding to only those documents that are covered under the attorney-client privilege. The *State Fund* rule

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[39] *State Fund, supra,* 70 Cal.App.4th at page 657; see also *Mansell v. Otto* (2003) 108 Cal.App.4th 265, 272-273.

[40] *Aerojet, supra*, 18 Cal.App.4th at pages 1003-1104; see also *Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 109.

[41] *State Fund, supra*, 70 Cal.App.4th at pages 656-657.

applies to not only materials that obviously appear to be covered under "an attorney-client privilege," but also materials that "otherwise clearly appear to be confidential and privileged."[42]

Like the attorney-client privilege, the work product privilege is equally fundamental to the justice system.[43] "'Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways-aptly though roughly termed by the Circuit Court of Appeals in this case [citation] as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An

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[42] *State Fund, supra*, 70 Cal.App.4th at page 656.

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attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.' [Citation.]"[44]

There is no reasonable basis for drawing a distinction between the attorney-client privilege and the work product privilege in this context. The *State Fund* court certainly did not draw such a distinction. The *State Fund* standard applies to documents that are plainly privileged and confidential, regardless of whether they are privileged under the attorney-client privilege, the work product privilege, or any other similar doctrine that would preclude discovery based on the confidential nature of the document.

In applying the *State Fund* standard to the present case, we conclude that Johnson, upon his discovery of Johnson's notes, which were plainly privileged, should not have examined the document any more than was necessary to determine that it was privileged, and should have notified Yukevich immediately to avoid any potential prejudice. While markings, including "Confidential," "Privileged," or "Attorney Work Product," would have made light work of examining the document, the absence of such markings does not

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[43] *PSC Geothermal Services Co. v. Superior Court* (1994) 25 Cal.App.4th 1697, 1708.

[44] *PSC Geothermal Services Co. v. Superior Court, supra,* 25 Cal.App.4th at pages 1709-1710, quoting *Hickman v. Taylor* (1947) 329 U.S. 495, 510-511.

make the document any less obviously privileged. Yukevich's notes were not intended for an audience. Thus, if Yukevich alone intended to use his own notes, it does not strain logic to understand why he did not mark the document. Even without such markings, a brief examination of the document would reveal its confidential nature. Johnson should have known that he was not entitled to the document that he had in his possession.

A brief look and a simple phone call could have resolved the matter. Instead, Johnson, as the court found, "studied the document carefully, made his own notes on it, dispensed the information to his associates and experts, discussed the meaning of the notes with the experts and based his litigation strategy and expert witness cross-examination upon the information contained in the document."

The court's finding was supported by substantial evidence. According to his own testimony, after receiving the document from the court reporter, Johnson studied and analyzed the document. Without informing the court reporter, Johnson copied the document, keeping the copy and returning the original to the court reporter. After examining the document, Johnson showed it to cocounsel, Balbuena and Mattingly, and faxed copies to plaintiffs' experts.

Johnson's testimony and his copy of Yukevich's notes indicate that he meticulously examined the document, noting potential inconsistencies and weaknesses in defendants' case. Johnson consulted with plaintiffs' experts on the document's technical content. Johnson then used the document to prepare questions and impeach the defense experts during their depositions.

Relying on the *Aerojet* case, and without further inquiry into his ethical responsibilities, Johnson decided to conceal his possession of the document and use the information to his clients' advantage. The record shows that, rather than informing opposing counsel of his inadvertent discovery, Johnson surreptitiously copied the document, disseminated it to the key players of plaintiffs' legal team, and made full use of the privileged document. Johnson's conduct constituted a breach of the ethical standards established in *State Fund*.

6. Remedy for Breach of Ethical Duty

After concluding that Johnson breached his ethical obligations, we must now determine whether the trial court's disqualification order was the proper remedy.

The trial court settled on disqualification as the proper remedy because of the unmitigable damage caused by Johnson's dissemination and use of the document. The court noted that beyond mere exposure to the documents, Johnson fully exploited the document's potential to damage the defense case. Disqualification, the court concluded, was necessary to insure a fair trial.

As previously stated, we review the trial court's disqualification decision for an abuse of discretion.[45] "Our task is to decide, as a question of law, whether under applicable legal principles the trial court acted beyond the allowable scope of its judicial

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[45] *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc., supra,* 20 Cal.4th at page 1143; *Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831, 838.

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discretion in determining disqualification of plaintiff[s'] counsel was the appropriate remedy under the circumstances of this case."[46]

A judge may disqualify an attorney under Code of Civil Procedure section 128, subdivision (b).[47] "A judge's authority to disqualify an attorney has its origins in the inherent power of every court in the furtherance of justice to control the conduct of ministerial officers and other persons in pending judicial proceedings. [Citations.] In [*People ex. rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*], the Supreme Court held: 'Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process. [Citations.]'"[48]

The court properly concluded that the damage was irreversible and, hence, disqualification was justified. "[I]n an appropriate case, disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct

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[46] *Neal v. Health Net, Inc., supra*, 100 Cal.App.4th at page 839.

[47] See *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc., supra*, 20 Cal.4th at page 1145.

[48] *Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831, 840.

himself or herself in the manner specified above, assuming other factors compel disqualification."[49]

As discussed in the previous section, the record shows that Johnson not only failed to conduct himself as required under the *State Fund* case, but also acted unethically in making full use of the confidential document. The liability issues hinged on the technical evidence and the expert opinions based on that evidence. Johnson's use of the document to undermine the defense experts' opinions placed defendants at a great disadvantage.

As the court found, the damage could not have been undone. Even if the court omitted all references to the document from the record, the court recognized the practical realities that plaintiffs' counsel and experts had information that inevitably would have been used in preparing for trial. We conclude that the trial court did not abuse its discretion in determining that disqualification was necessary to insure a fair trial.

In reaching this conclusion, we have given serious thought to plaintiffs' accusations that the defense experts provided false testimony during their earlier depositions. Plaintiffs repeatedly note that the statements attributed to the defense experts in Yukevich's notes contradicted their earlier deposition statements. Plaintiffs accuse the defense experts of lying about the technical evidence involved in the case.

In affirming the court's order to disqualify plaintiffs' attorneys, this court's intention is not to reward any wrongdoing. Nevertheless, when a writing is protected

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[49] *State Fund, supra*, 70 Cal.App.4th at page 657.

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under the absolute attorney work product privilege, courts do not invade upon the attorney's thought processes by evaluating the content of the writing. Once an unintended reader ascertains that the writing contains an attorney's impressions, conclusions, opinions, legal research or theories, the reading stops and the contents of the document for all practical purposes are off limits. In the same way, once the court determines that the writing is absolutely privileged, the inquiry ends. Courts do not make exceptions based on the content of the writing. Unlike with the attorney-client privilege, there is no crime-fraud exception to the attorney work product rule.[50] The absolute attorney work product privilege is just that, absolute.

In preserving this fundamental principle of our justice system, while the goal of justice is to unearth the truth, this goal cannot be achieved through means that deprive its participants of a fair process. A process that recognizes the state's policy to "preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases."[51] In this case, regardless of its

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[50] See *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1249; accord *Wellpoint Health Networks, Inc. v. Superior Court, supra*, 59 Cal.App.4th at page 120; *State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 650.

[51] Code of Civil Procedure section 2018, subdivision (a).

potential impeachment value, Yukevich's personal notes should never have been subject to opposing counsel's scrutiny and use.

We recognize the potentially serious effect of the court's order on plaintiffs' case. Plaintiffs themselves have done nothing to cause the disqualification. In accordance with the trial court's order, plaintiffs must be given ample opportunity to retain new counsel and experts, who in turn should be afforded every opportunity to complete discovery and prepare for trial.

7. Disposition

We affirm the trial court's disqualification order. Defendants shall recover their costs on appeal, and, in the interests of justice, plaintiffs' attorneys shall be liable for such costs.[52]

CERTIFIED FOR PUBLICATION

s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/McKinster
J.

[52] California Rules of Court, rule 26(a)(4).