E057871

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

DEAN MARTIN,
Plaintiff and Respondent,

v.

THE INLAND EMPIRE UTILITIES AGENCY,
Defendant and Appellant.

APPEAL FROM SAN BERNARDINO COUNTY SUPERIOR COURT
JANET M. FRANGIE, JUDGE • CASE NO. CIVRS1000767

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, Fourth APPELLATE DISTRICT, DIVISION Two	Court of Appeal Case Number: E057871
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APPELLANT'S OPENING BRIEF

INTRODUCTION

This appeal challenges an order denying a motion to disqualify counsel who, the court below found, improperly and extensively reviewed an opponent's attorney-client privileged materials and used them during discovery to formulate claims after repeated requests to return the documents went unheeded. Despite counsel's misuse of the documents in crafting plaintiff's theory of the case, the court expressed the view that counsel's ethical violation could be cured by means short of disqualification. The court accepted plaintiff's counsel's representation that he would alter the claims he would assert on behalf of his client so that the materials in question would no longer be relevant to future

proceedings—leaving defendant to face an opponent with knowledge of client confidences, and with no way of identifying or protecting against the continued misuse of those confidences, which had already occurred many times. This was reversible error.

In *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 (*Rico*), the California Supreme Court adopted a bright-line rule governing the ethical obligations of attorneys who come into possession of privileged materials of an opposing party: the attorney must refrain from reviewing the document " 'any more than is essential to ascertain if the materials are privileged.' " (*Id.* at p. 817.) This ethical rule represents the " 'standard governing the conduct of California lawyers in such instances.' " (*Ibid.*) The failure of an attorney to strictly comply with this rule resulted in disqualification. (*Id.* at pp. 819-820.)

Rico was applied by Division One of this court in *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 (*Clark*), a case with virtually identical facts to those present here. *Clark* was an employment case where the plaintiff improperly provided his counsel with communications protected by the attorney-client privilege held by the defendant/employer. Division One affirmed an order disqualifying plaintiff's counsel where counsel: (1) excessively reviewed the privileged documents; (2) did not immediately return the documents; and (3) affirmatively employed the documents to pursue plaintiff's lawsuit against defendant. (*Id.* at p. 41.)

This appeal involves a straightforward application of *Rico* and *Clark*. In this employment case, plaintiff/respondent Dean Martin provided his counsel with privileged attorney-client communications

belonging to the defendant employer, appellant Inland Empire Utilities Agency (the Agency). After Martin produced the privileged documents (which he had apparently retained) in discovery, the Agency immediately—and repeatedly—sought the return of those documents. Martin's counsel steadfastly refused to return the privileged documents while feigning ignorance of any authority requiring that they be returned, thereby violating their ethical obligations under *Rico*. Worse yet, Martin's counsel affirmatively used the documents to prosecute his claims. After multiple requests for the privileged documents to be returned went unheeded, the Agency moved to disqualify Martin's counsel.

In ruling on the motion to disqualify, the trial court made the following findings:

> 1. Martin's counsel came into possession of documents which were "clearly documents protected by the attorney-client privilege." (4 AA 962.)
>
> 2. Martin's counsel did not come into possession of the privileged documents through "seeming inadvertence." (4 AA 962.)
>
> 3. Martin's counsel had an obligation not to "excessively review" the documents any more than was necessary to ascertain that they were privileged. (4 AA 962.)
>
> 4. Martin's counsel did not refrain from examining the privileged documents on a limited basis "but intentionally used some of them in discovery." (4 AA 963.)

5. Given the foregoing, Martin's counsel "violated their obligations imposed by applicable law." (4 AA 963.)

These are substantively the same findings that led to the disqualification of counsel in *Rico* and *Clark*. Notwithstanding these findings, the trial court denied the Agency's motion to disqualify Martin's counsel and, instead, imposed monetary sanctions and ordered that Martin could not use the privileged documents at trial.

The trial court's ruling constitutes error as a matter of law. The gravamen of the trial court's ruling was its acceptance of Martin's assertion that privileged documents were no longer relevant given Martin's voluntary dismissal of his cause of action for defamation—which occurred only *after* the motion to disqualify was filed. In other words, the trial court found that Martin's counsel could avoid the consequences of their breaches of ethical obligations under *Rico* by the remedial action of dismissing one cause of action and by counsel's untested and untestable assertion that the privileged documents were no longer relevant for their remaining claims.

The trial court's focus on the relevancy of the privileged documents was contrary to *Rico*, under which the only inquiry is whether the documents at issue are privileged; if so, relevancy is irrelevant. " '[O]nce the court determines that the writing is absolutely privileged, the inquiry ends. Courts do not make exceptions based on the content of the writing.' " (*Rico, supra*, 42 Cal.4th at p. 820.)

Moreover, the trial court's ruling represents poor public policy. The trial court's ruling permits attorneys to extensively review their opposing party's privileged documents, use them in discovery, and then avoid disqualification under *Rico* and *Clark* simply through the artifice of a *mea culpa* and a promise not to use the privileged documents at trial (when the privileged documents would be excluded in any event). This runs contrary to *Rico's* admonition that its rule was designed to protect the " 'legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.' " (*Rico, supra*, 42 Cal.4th at p. 818.)

The relevant historical facts are undisputed and, thus, the order denying disqualification is reviewed de novo. The trial court's ruling constitutes legal error. The order denying disqualification should be reversed with instructions to order the disqualification of Martin's counsel.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

1. Martin files an employment action against the Agency.

Martin was employed by the Agency as an Executive Manager of Finance and Administration starting in 2004. (1 AA 2 [¶ 7].) In February 2005, a few months after Martin was hired, the Agency implemented Resolution 2005-2-9, which governs the distribution of attorney-client privileged documents and other "confidential" Agency information, and provides that such information may not be

disclosed without prior approval of the Agency's general counsel. (1 AA 183 [¶ 10].)

Martin claims that he was demoted in October 2009 and constructively discharged in January 2010. (1 AA 5, 8-9.) He filed this employment action in January 2010. (1 AA 12.) The operative pleading is Martin's first amended complaint which alleges causes of action for: (1) retaliation in violation of FEHA; (2) racial discrimination; (3) defamation; and (4) wrongful constructive termination. (1 AA 5-9; see also 1 AA 12-20.)

2. During discovery, Martin's counsel produces materials that reveal they have come into possession of, and have extensively reviewed, the Agency's privileged documents.

In response to the Agency's discovery request, Martin produced approximately 2,600 pages of documents in April 2012. (1 AA 42.) These documents included, among other things, privileged communications between the Agency's general counsel (Jean Cihigoyenetche) and Agency personnel. (1 AA 42, 80-87, 181.)[1] The substance of these documents relate to, among other

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[1] The documents produced by Martin also include confidential employment records of Agency employees, including information regarding salary and annual employee evaluations. (1 AA 89-90, 182.) These documents are governed by Agency Resolution 2005-2-9, which prohibits their use by Martin without authorization from the Agency's general counsel, which has not been given. (1 AA 183.) These documents are also protected from disclosure under the (continued...)

things, legal advice given by the general counsel regarding Martin's position and title, as well as projects that would have fallen within Martin's purview in his role as manager of finance and administration, including an Ontario Redevelopment Project, and a solar panel project and related bonding requirements.[2] (1 AA 181-182.) The Agency identified approximately 83 pages of documents as being protected by the attorney-client privilege. (1 AA 130-131.)

(...continued)
California Public Records Act or the Brown Act. (1 AA 42-43.) While the Agency objects to Martin's use of these documents on that ground as well, this appeal focuses on the attorney-client privileged communications that Martin has used in this litigation in violation of *Rico* and *Clark*.

[2] Martin lodged the privileged documents conditionally under seal with the trial court in support of his request that the trial court conduct an in camera inspection. (1 AA 256-257; 2 AA 292-475.) The Agency opposed Martin's request for an in camera inspection on the grounds that it is prohibited by Evidence Code section 915 and *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 (*Costco*). (3 AA 662-664.) The trial court agreed with the Agency's position and ordered the documents returned to the Agency's counsel. (4 AA 961, 969.) However, the trial court ordered the Agency to lodge the documents with this court in the event of an appeal. (4 AA 969.) Therefore, even though an in camera inspection is prohibited by Evidence Code section 915 and *Costco,* the Agency has complied with the trial court's directive by lodging the documents conditionally under seal pursuant to California Rules of Court, rule 8.46. The documents protected by the attorney-client privilege and/or which reflect privileged communications appear in volume two of Appellant's Appendix at pages 311-314, 380, 419, 449-466, 469-475 lodged conditionally under seal.

3. The Agency's repeated requests for a return of the privileged documents go unheeded while Martin's counsel continuously pleads ignorance of their ethical obligations under *Rico*.

On April 19, 2012, the Agency's counsel informed Martin's counsel (The Mathews Law Group) that certain of the documents Martin produced were privileged, and the Agency requested their return. (1 AA 43.) On April 30, 2012, the Agency sent the first of several written communications to Martin's counsel notifying them that Martin had produced privileged documents and requested their return. (1 AA 43, 92-93.)

A month later, on May 30, 2012, Martin's counsel sent their first written communication reflecting what would become their mantra on this issue: they declared ignorance of any authority under which they had to return privileged documents (thus ignoring their ethical obligations under *Rico* and *Clark*) and attempted to shift the burden on the Agency's counsel to provide such authority. (1 AA 43, 95-96.) They further suggested that Martin could waive the attorney-client privilege on behalf of the Agency. (1 AA 95-96.) The Agency's counsel responded the same day providing authorities for the proposition that Martin could not unilaterally waive the Agency's attorney-client privilege. (1 AA 43, 95.)

On June 1, 2012, the Agency's counsel again requested a substantive response to the April 30 letter. (1 AA 44, 128.) Martin's counsel responded the same day again requesting legal

authority for the Agency's position, stating, "I am not a mind reader." (1 AA 127.)

4. Martin's counsel repeatedly uses privileged information in this litigation, rebuffing requests to return the privileged documents.

On June 4, 2012, Martin sat for the first day of his deposition. (1 AA 98.) He testified regarding a key events document that he prepared in connection with building the theories of his lawsuit against the Agency, purporting to identify the key facts supporting his claims. (1 AA 99-101.) The key events document reflects privileged communications between the Agency's general counsel and Agency personnel. (3 AA 627-628.) The key events document also includes references to the solar panel contract, which is the subject of many of the privileged communications that Martin produced. (3 AA 627.) At the direction of his counsel, Martin read the entire key events document into the record at his deposition, including the privileged information used to support Martin's case, including his discrimination and retaliation claims. (3 AA 625-628.)

At the second day of his deposition on June 5, 2012, Martin admitted being aware of resolution 2005-2-9 and admitted that he had not sought approval of the Agency's general counsel before disclosing the privileged information to his counsel. (1 AA 43 [¶ 8], 104-106, 109-110, 118-119.)

The Agency's counsel sent another written communication on June 6, 2012, requesting return of the privileged documents—the

third such written request. (1 AA 125.) A week later, on June 15, 2012, the Agency's counsel sent a *fourth* written request for return of the privileged documents. (1 AA 130-131.)

Far from complying with those requests, Martin's counsel sent a written settlement demand on June 18, 2012 that demonstrates Martin's misuse of the Agency's confidences. (1 AA 133-140.)[3] Specifically, the settlement demand includes references to the solar panel contract issues and privileged information relating to those issues, as well as attaching privileged documents as exhibits. (1 AA 135, 144-146.)[4]

On June 19, 2012, the Agency's counsel emailed Martin's counsel enclosing a copy of her June 15, 2012 letter and asked Martin's counsel to confirm whether they intended to use the privileged documents identified in the letter during the course of this litigation. (3 AA 636.) Martin's counsel responded on June 22, 2012; rather than disclaiming any use or potential relevance of the

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[3] Evidence code section 1152 renders settlement discussions inadmissible for proving liability, but such evidence may be admitted for other purposes. (*Volkswagen of America, Inc. v. Superior Court* (2006) 139 Cal.App.4th 1481, 1491.) In the proceedings below, Martin made no evidentiary objection to the inclusion of the redacted settlement offer, which is relevant to demonstrate Martin's counsel's possession and misuse of privileged information.

[4] Note that at the hearing on the disqualification motion, Martin's trial counsel, Charles Mathews, represented to the court that he had never reviewed the privileged documents. (RT 41:5-7.) This assertion, however, is belied by the settlement letter which is signed by Mr. Matthews and which, as noted, contains privileged information and attaches privileged documents. (1 AA 135, 140, 144-146.)

privileged materials, counsel refused to identify what documents Martin intended to use, citing the work product privilege. (*Ibid.*)

On June 27, 2012, the third day of Martin's deposition was taken. (1 AA 44, 108.) Martin admitted that many of the documents at issue reflect legal advice given by the Agency's general counsel. (1 AA 118-119, 121.) Martin's counsel nonetheless refused to return the privileged documents. Instead, he continued to request authority from the Agency's counsel that the documents must be returned. (1 AA 120, 122.) At that time, the Agency's counsel referred Martin's counsel to *Rico*. (1 AA 114-115.)

The Agency's counsel wrote Martin's counsel for the *fifth* time on June 28, 2012, requesting a return of the privileged documents, citing *Rico* and its progeny. (1 AA 149-151.)

On July 19, 2012, Martin's counsel took the deposition of Richard Atwater, the former Agency CEO and at one time a defendant in this action. (1 AA 45, 153, 169-172.) During the deposition, Martin's counsel asked Atwater questions regarding the privileged communications from the Agency's general counsel. (1 AA 169-172.) In connection therewith, Martin's counsel read privileged communications into the deposition transcript. (1 AA 169-172.)

On July 30, 2012, a hearing was held as an informal discovery conference and on a discovery motion filed by Martin. (4 AA 967.) Martin's counsel disclosed in open court the substance of some of

the attorney-client communications on the court's record. (4 AA 967; Exh. A, pp. 33-36 [under seal].)[5]

5. The Agency's motion to disqualify Martin's counsel is denied; instead, the trial court accepts Martin's counsel's representation that he will revise his theory of the case so that his possession and use of the Agency's confidences is no longer relevant.

Having received from Martin's counsel only disclaimers of any understanding regarding attorneys' duties to protect opponents' confidences that come into their possession, the Agency moved to disqualify Martin's counsel. (1 AA 24-26.) The motion argued primarily that disqualification was mandated under *Rico* and *Clark*. (1 AA 30, 37-38.) The motion was accompanied by declarations of the Agency's counsel and its general counsel, and a request for judicial notice. (1 AA 41-222.)

After the disqualification motion was filed, Martin dismissed his third cause of action for defamation *without* prejudice. (1 AA 246.) Two days later, Martin filed his opposition to the

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[5] This conduct, and others, caused the Agency to make several ex parte applications for orders sealing various court records. (3 AA 479, 670; 4 AA 888.) The trial court ordered certain portions of the relevant transcripts and documents sealed. (4 AA 964-969.) The conduct of Martin's counsel that led to the sealing orders is relevant to the disqualification ruling because it demonstrates their use of privileged documents in violation of *Rico* and *Clark*.

disqualification motion, repeating the position that it was incumbent on the Agency to provide authority that Martin's counsel had to return the privileged documents. (2 AA 254-255.) Martin's counsel did not deny having reviewed the documents. (2 AA 249-264.) Instead, they requested further review, by the trial court in camera, to ascertain how many of the documents at issue were privileged and how many were labeled "attorney-client privilege" or contain other similar notations. (1 AA 256-257.)[6]

The same day Martin filed his opposition to the motion for disqualification, his counsel purported to return the privileged documents. (1 AA 264.) To address the problem of his counsel's knowledge and possession of the Agency's confidences, Martin opposed the disqualification motion simply by professing an intent not to further use the privileged documents in this litigation. (*Ibid.*)

The Agency filed a reply (3 AA 597-603) supported with a declaration of counsel (3 AA 604-649).

The hearing on the motion to disqualify was continued by the court due to court congestion. (RT 3; Augmented RT 15-16.) The hearing was finally held on November 28, 2012. (RT 28.) In its tentative ruling, the court found:

> 1. It was not incumbent on the Agency's counsel to provide citation to authority regarding the obligation to return the privileged documents. (4 AA 944.)

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[6] See *ante*, footnote 2.

2. Like the attorneys in *Clark*, Martin's counsel came into possession of documents which were "clearly documents protected by the attorney-client privilege." But unlike *Clark*, Martin's counsel did not come into possession of the documents through inadvertence. (4 AA 944.)

3. Martin's counsel did not refrain from examining the privilege documents on a limited basis "but apparently used some of them in discovery." As such, Martin's counsel "violated their obligations imposed by applicable law." (4 AA 945.)

The tentative ruling also addressed the various motions to seal documents containing attorney-client privileged communications. (4 AA 946.)

Notwithstanding the above findings, the tentative ruling called for the court to deny the motion to disqualify based on Martin's counsel's unilateral and unsubstantiated representation that he had altered his theory of the case such that the documents were no longer relevant and would not be used again in furtherance of Martin's claims. (4 AA 945.) Accepting that representation, the court expressed the view that monetary sanctions would suffice, along with a direction to Martin's counsel not to use the documents at trial. (*Ibid.*)

At the hearing on the motion, the trial court made further rulings:

1. Martin, as a fiduciary to the Agency, had an obligation not to share the privileged documents with his counsel. (RT 34.)

2. Martin's counsel had an obligation not to review the documents any more than was necessary to ascertain that they were privileged. (RT 35.)

After hearing arguments of counsel, the court issued a written order largely adopting its tentative ruling with modifications accounting for the discussion at the hearing. (4 AA 960-969.)

The Agency timely appealed. (4 AA 970.) The trial court subsequently stayed the action pending this appeal. (4 AA 972.)[7]

STATEMENT OF APPEALABILITY

An order denying a motion to disqualify counsel is separately appealable as an injunction order. (*McMillan v. Shadow Ridge at Oak Park Homeowner's Assn.* (2008) 165 Cal.App.4th 960, 964; *Derivi Construction & Architecture, Inc. v. Wong* (2004) 118 Cal.App.4th 1268, 1271-1272.) Such orders are also appealable under the collateral final order doctrine. (*Meehan v. Hopps* (1955) 45 Cal.2d 213, 216-217; *Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 Cal.App.4th 594, 601.)

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[7] As part of the stay order, the trial court took the hearing to determine the amount of monetary sanctions to be imposed against Martin's counsel off calendar pending resolution of this appeal. (4 AA 972.) Martin has since moved to vacate the stay. A hearing on Martin's request is scheduled for April 16, 2013.

STANDARD OF REVIEW

"Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [citations omitted] . . . However, the trial court's discretion is limited by the applicable legal principles. [citations omitted] . . . In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion. [citations omitted]" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144 (*SpeeDee*).) Where there are no material disputed factual issues, an appellate court independently reviews the trial court's determination de novo as a question of law. (*Id.* at p. 1143.) Because there are no disputed issues of historical facts in this case, this court should review the trial court's ruling de novo. Further, an error of law necessarily constitutes an abuse of discretion. (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1061.)

LEGAL ARGUMENT

I. THE TRIAL COURT COMMITTED LEGAL ERROR IN DENYING THE AGENCY'S MOTION TO DISQUALIFY MARTIN'S COUNSEL.

A. *Rico* requires disqualification when counsel excessively reviews an opponent's privileged communications and uses them in discovery.

Rico is the controlling California Supreme Court authority on this issue.

Rico was a personal injury action in which plaintiff's counsel inadvertently came into possession of defense counsel's notes that, on their face, indicated they reflected the defendant's confidential information. (*Rico, supra,* 42 Cal.App.4th at pp. 811-812.) After acquiring the notes, plaintiff's counsel used them during a deposition of one of the defense's experts. (*Id.* at p. 812.) The defendant successfully moved to disqualify plaintiff's counsel. (*Id.* at p. 813.) In granting disqualification, the trial court found that plaintiff's counsel had acted unethically by (1) "examining the document more closely than was necessary to determine that its contents were confidential"; (2) failing to notify defense counsel that he had a copy of the notes; and (3) "surreptitiously using [the document] to gain maximum adversarial value from it." (*Ibid.*)

The California Supreme Court affirmed the disqualification ruling. In doing so, the court adopted the ethical rule established in

State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal.App.4th 644, 656-657 (*State Fund*):

> 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.

(*Rico, supra,* 42 Cal.4th at p. 817, emphasis added, quoting *State Fund, supra,* 70 Cal.App.4th at pp. 656-657.) The *State Fund* rule applies equally whether the information at issue is protected by the attorney-client privilege or the work product doctrine. (*Id.* at p. 817, fn. 9.)

The court further held that it is not necessary that the documents be clearly identified as privileged for the *State Fund* rule to apply. " '[T]he absence of prominent notations of confidentiality does not make them any less privileged.' " (*Rico, supra,* 42 Cal.4th at p. 818.) Instead, the *State Fund* rule is an objective standard: "courts 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." (*Ibid.*)

Where the attorney in possession of the confidences has recognized and complied with that ethical duty, disqualification

may not be required. Rather, "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." (*Rico, supra,* 42 Cal.4th at p. 817.) However, the attorney in *Rico* violated his ethical duty. Under those circumstances, the *Rico* court affirmed the disqualification ruling. The court did not explore methods short of disqualification that might ameliorate the ethical breach, nor did it remand to the lower court to do so. And understandably so. Even if counsel could have avoided disqualification by offering not to use the experts to whom he had disclosed the confidential information, the defendant could never know what other strategies were informed by knowledge of the defense attorney's work product. Moreover, such a result would encourage attorneys in similar situations in the future to misuse privileged information, knowing that if they are "caught," they will simply offer to give up the advantage gained and move on with the case. To avoid these problems, disqualification was the appropriate remedy for violation of the attorney's ethical duties. (*Id.* at p. 819.)

Here, rather than seeking guidance from the trial court regarding the treatment of the Agency's privileged documents in their possession, Martin's counsel risked disqualification when they unilaterally decided to continue to review the documents and used them to formulate Martin's claims.

B. *Clark* held that an attorney who uses privileged documents to formulate discovery strategy and/or claims for trial should be disqualified.

In *Clark*, Division One of this court applied *Rico* in a case with facts virtually identical to those here.

Clark was an employment action brought by a former executive against the technology company Verisign. (*Clark, supra,* 196 Cal.App.4th at p. 42.) Based on correspondence between counsel, Verisign asserted that the plaintiff was in possession of privileged communications and requested their return. (*Id.* at pp. 42-43.) Plaintiff's counsel responded by denying any improper conduct. (*Id.* at p. 43.) Thereafter, plaintiff produced "numerous privileged documents" during discovery. (*Ibid.*) Verisign's counsel, again, requested return of the privileged documents. (*Ibid.*) Although plaintiff agreed to return the "irrelevant" documents and also agreed to destroy most of the privileged documents, he never did so. (*Id.* at pp. 43-44.) At his deposition, plaintiff conceded that certain of the documents at issue were privileged, but deferred to his counsel to determine whether they would seek to have those documents admitted at trial. (*Id.* at p. 44.) Plaintiff further acknowledged that he was relying on the privileged documents to support certain of his claims. (*Ibid.*)

Verisign successfully moved to disqualify plaintiff's counsel. (*Clark, supra,* 196 Cal.App.4th at p. 44.) In granting the motion, the trial court found: (1) plaintiff's counsel had received dozens of documents from the plaintiff that were privileged; (2) plaintiff's

counsel had a duty not to review the documents more than reasonably necessary to determine that they were privileged and to notify Verisign's counsel of the same; and (3) despite repeated warnings from Verisign's counsel, plaintiff's counsel's review " 'exceeded the limit.' " (*Id.* at p. 45 & fn. 3.)

Division One affirmed the disqualification ruling. The court rejected plaintiff's contention that they had complied with *State Fund* and *Rico* by making no attempt to hide the fact that they had the privileged documents and meeting and conferring with Verisign's counsel on the issue. (*Clark, supra,* 196 Cal.App.4th at p. 52.) Instead, the court focused on the central fact that plaintiff's counsel had excessively reviewed the privileged documents in violation of *State Fund* and *Rico.* (*Id.* at pp. 53-54.) This was confirmed by evidence in the record that plaintiff's counsel used the privileged information to question witnesses, support plaintiff's claims and add an additional claim against Verisign. (*Id.* at p. 54.)

Again, the *Clark* court did not offer plaintiff's counsel a chance to stay in the case subject to mitigating steps. The ethical violation alone, without more, was enough to require disqualification, notwithstanding plaintiffs' counsel's protestations that there was no "risk of prejudice" to Verisign. (*Clark, supra,* 196 Cal.App.4th at p. 54.)

C. *Rico* and *Clark* are on point and should have been followed by the trial court.

Here, the trial court's factual findings, which we accept as undisputed for purposes of this appeal, match up with those in *Rico* and *Clark*: (1) Martin's counsel came into possession of privileged documents belonging to the Agency (4 AA 962); (2) they reviewed the documents more than was necessary to determine that they were privileged attorney-client communications (4 AA 962-963); (3) the documents were not immediately returned (*Ibid.*); and (4) Martin sought to use the documents to his advantage during the litigation—at least right up to the hearing on the disqualification motion (1 AA 99-101, 125-128, 169-172; 3 AA 625-628). Before that time, Martin used the privileged documents (1) to create Martin's key events document which was used at Martin's deposition (3 AA 625-628); (2) as the basis for a written settlement demand (1 AA 133-140); (3) to depose Atwater (1 AA 45, 153, 169-172); (4) at a discovery hearing (Exh. A, pp. 33-36 [under seal]); and (5) in opposition to an ex parte application (4 AA 939 [under seal]).

These historical facts are undisputed (and/or were resolved by the trial court in the Agency's favor) and, thus, the disqualification ruling is reviewed de novo. (*SpeeDee*, *supra*, 20 Cal.4th at p. 1144.) *Rico* and *Clark* are controlling and should have been followed. Like cases should be decided in a like manner. The trial court's refusal to order disqualification was legal error which should be reversed.

Rico and *Clark* require disqualification. Given the findings that the trial court made, the trial court erred as a matter of law in

refusing to order disqualification. The order denying disqualification of Martin's counsel should be reversed.

II. THE TRIAL COURT'S RATIONALES FOR DENYING DISQUALIFICATION ARE LEGALLY INFIRM.

A. Relevance.

The trial court's primary justification for denying disqualification was its acceptance of Martin's contention that his dismissal of the defamation cause of action — without prejudice — rendered the privileged documents no longer relevant to this case and thus cured the ethical violation. (4 AA 964-966.) The trial court's focus on the relevancy of the privileged documents was incorrect as a matter of law.

Nowhere in *Rico* did the Supreme Court remotely suggest that the relevance of the privileged documents improperly reviewed by opposing counsel is a factor a court should consider in deciding disqualification. (*Rico, supra*, 42 Cal.4th at pp. 819-820.) To the contrary, the *Rico* court stated:

> when a writing is protected 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 [it is apparent] 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.*

(*Rico, supra,* 42 Cal.4th at p. 820, emphasis added.) Thus, under *Rico,* the purported relevancy of the privileged documents is immaterial. Focusing on relevancy necessarily requires substantive review and analysis of the privileged communications which is forbidden. (*Ibid.*) Instead, what is controlling is whether counsel violated the *State Fund* rule by reviewing documents that "should never have been subject to opposing counsel's scrutiny and use." (*Ibid.*) Indeed, here the trial court could not have made any relevancy determinations itself because it (properly) declined to conduct an in camera review. (4 AA 961; see also Augmented RT 7.) That fact confirms the trial court's error in relying on representations from Martin's counsel regarding his view of the supposed lack of any continuing relevance of the confidences in counsel's possession.

The trial court's ruling also fails to take into account the important public policy reasons disqualification is required in these circumstances. Disqualification is required under *Rico* and *Clark* in order to " 'respect the legitimate interests of fellow members of the bar, the judiciary and the administration of justice' " (*Rico, supra,* 42 Cal.4th at p. 818) and the " 'paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar' " (*Clark, supra,* 196 Cal.App.4th at p. 47). "[T]he focus of disqualification motions must be on the preservation of public trust in the scrupulous administration of justice and the integrity of the bar." (*Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 436.) The purported relevancy of the privileged documents has no bearing on these issues.

Although disqualification necessarily implicates a litigant's right to counsel of their choice, that right "must yield to ethical considerations that affect the fundamental principles of our judicial system." (*SpeeDee, supra,* 20 Cal.4th at p. 1145.) Protection of the attorney-client privilege is one such principle. (*Id.* at p. 1146 ["Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence"]; see also *Med-Trans Corp. v. City of California City* (2007) 156 Cal.App.4th 655, 664 [right to counsel of choice must yield to " 'ethical considerations that affect the fundamental principles of our judicial process' "].)

Furthermore, the trial court erred in evaluating disqualification at the time of the hearing on the motion rather than at the time the motion was filed. The record demonstrates that the Agency's counsel's requests for return of the privileged documents were repeatedly rebuffed by Martin's counsel. (1 AA 43-44, 92-96, 120-122, 125-128; 3 AA 636.) It was only *after* the Agency filed its motion for disqualification that Martin's counsel purported to return the privileged documents (1 AA 264) and dismissed the defamation cause of action without prejudice (1 AA 246) to try to make the privileged documents appear irrelevant to this action. Indeed, the trial court noted that it was "significant to the Court" that Martin's counsel took none of these actions "until *after*" the disqualification motion was filed. (4 AA 966, fn. 6.) Even after the dismissal of the defamation claim, Martin's counsel remained equivocal about the continued relevance of issues that are the topic

of the privileged communications, thus exemplifying why the lesser sanction is not appropriate under *Rico*. Consider:

> The Court: So is the solar panel contract an issue? Is that an issue still in this case?
>
> Mr. Mathews: *Not really, not at all.*
>
> Mr. Nakao [also Martin's counsel]: No, it's defamation because - -
>
> The Court: *No, "not really" is not the word I'm looking for.*
>
> Mr. Mathews: Not at all, your honor.
>
> The Court: It's the "no" I'm looking for.
>
> Mr. Mathews: All right. No, it's not.

(RT 39:1-9, emphasis added.)

In evaluating disqualification, courts consider the facts that existed at the time disqualification was sought, not those at the time of the hearing on the disqualification motion. For example, where an attorney has a conflict of interest in representing adverse clients, courts have held that the conflicted attorney cannot "solve" their ethical dilemma by taking subsequent remedial measures, i.e., ceasing to represent one of the clients. This is known as the "hot potato" rule. In such circumstances, disqualification cannot "be avoided by unilaterally converting a present client into a former client prior to hearing on the motion for disqualification[.]" (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 288; see also *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.* (1995) 36 Cal.App.4th 1832, 1841 [under the " 'hot potato rule' " a law firm " 'may not avoid

disqualification by withdrawing from the representation of the less favored client before [the] hearing [on a motion for disqualification' "].) This is effectively what Martin's counsel has done in this case. After steadfastly refusing to return the privileged documents, Martin's counsel treated the defamation claim as a "hot potato" and "dropped" (dismissed) that claim after the disqualification motion was filed in order to try to avoid disqualification. Such sharp tactics should not be permitted.

Accordingly, the trial court erred in denying disqualification based on the alleged irrelevancy of the privileged documents in light of the dismissal of the defamation cause of action.

B. Actual Prejudice.

At the hearing on the disqualification motion, the trial court also phrased its ruling in terms that the Agency had not demonstrated actual prejudice to justify disqualification. (RT 44-45.) This too was legal error.

Again, nothing in *Rico* requires that a party seeking disqualification of opposing counsel outline exactly how the party's confidences might be misused in a prejudicial way. (*Rico, supra*, 42 Cal.4th at pp. 819-820.) In fact, *Clark* squarely rejected the plaintiff's contention "that disqualification is improper absent an affirmative showing of existing injury from the misuse of privileged documents," because the court recognized the inherent ongoing threat from a party's knowledge of his adversary's confidences: "disqualification is proper as a prophylactic measure to prevent

future prejudice to the opposing party from information the attorney should not have possessed." (*Clark*, *supra*, 196 Cal.App.4th at p. 55, emphasis added.)

Therefore, the trial court erred in requiring the Agency to demonstrate actual prejudice.

III. THE REMAINING ARGUMENTS RAISED BY MARTIN'S COUNSEL BELOW WERE PROPERLY REJECTED BY THE TRIAL COURT.

A. The trial court properly found an in camera inspection was neither permitted nor required.

In the proceedings below, Martin requested an in camera inspection of the privileged documents to determine if they were privileged.[8] (1 AA 256-257.) The trial court rejected this request and denied the motion without conducting an in camera inspection. (4 AA 961.) The trial court properly rejected Martin's request because a court cannot conduct an in camera hearing to rule on a claim of privilege over the objection of the party asserting the privilege.

Evidence Code section 915, subdivision (a) (section 915(a)) reads in relevant part: "Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division or attorney work product under

---

[8] See *ante*, footnote 2.

subdivision (a) of Section 2018.030 of the Code of Civil Procedure in order to rule on the claim of privilege." (Evid. Code, § 915, subd. (a).) In *Costco, supra*, 47 Cal.4th at pp. 736-738, the California Supreme Court held that section 915(a) prohibits a court from conducting an in camera hearing in order to determine if the documents are privileged. "Evidence Code section 915 prohibits disclosure of the information claimed to be privileged as a confidential communication between attorney and client 'in order to rule on the claim of privilege.' " (*Id.* at pp. 731-732.) An in camera inspection is only permitted when requested by the party claiming the privilege. (*Id.* at p. 740, citing *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 729.)

Thus, *Clark* rejected a party's contention that an in camera inspection was required in order to determine whether the documents at issue were privileged. (*Clark, supra*, 196 Cal.App.4th at pp. 50-52.) Instead, the party claiming the privilege must simply make a prima facie showing that the documents at issue reflect privileged communications between an attorney and a client. (*Id.* at pp. 51-52.)

Here, the Agency made a prima facie showing that the documents at issue reflected privileged communications between Agency personnel and its outside counsel. (1 AA 42-43, 181-183.) Therefore, the trial court correctly rejected Martin's request for an in camera hearing.

B. Martin's counsel had an affirmative ethical obligation not to review or use the privileged documents.

Martin argued below that it was incumbent on the Agency to provide his counsel with authority that he was required to return the privileged documents and not use them. (1 AA 254-256.) The trial court properly rejected this argument. (4 AA 962-963.)

Business and Professions Code sections 6067 and 6077 give the California Supreme Court authority to promulgate rules governing the practice of law in this state. (Bus. & Prof. Code, §§ 6067, 6077.) The Supreme Court has done so by enacting the Rules of Professional Conduct (the Rules or Rule). (*Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1417.)

Rule 1-100(A) provides that members of the bar are "bound by applicable law including . . . opinions of California courts." (Rules Prof. Conduct, rule 1-100(A).) The Rules further provide that an attorney must perform legal services "with competence." (Rules Prof. Conduct, rule 3-110(A).) "[A]ttorneys are expected 'to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.' " (*Camarillo v. Vaage* (2003) 105 Cal.App.4th 552, 561.)

Rico adopted a substantive rule governing the conduct of attorneys: upon receipt of an opposing party's privileged document, the attorney must review the document no more than necessary to

determine that it is privileged. (*Rico, supra*, 42 Cal.4th at p. 817.) This is a "standard governing the conduct of California lawyers." (*Ibid.*, citing *State Fund, supra*, 70 Cal.App.4th at p. 657.)

Therefore, Martin's counsel was affirmatively bound by, and obligated to be aware of, the rules articulated in *Rico* and *Clark*. Claiming not to be a "mind reader" (1 AA 127) was not adequate. Thus, the trial court properly rejected Martin's counsel's invitation to shift that ethical duty onto the Agency's counsel. (4 AA 962-963.) Again, having made that finding, the court should have found the ethical lapse required disqualification.

In any event, the record shows that even after the Agency's counsel provided legal authority to Martin's counsel, the latter refused to do anything until the motion to disqualify was filed. Specifically, on May 30, 2012, the Agency's counsel provided Martin's counsel with authorities providing that Martin could not waive the attorney-client privilege on behalf of the Agency. (1 AA 43, 95.) Similarly on June 27, 2012, the Agency's counsel referred Martin's counsel to *Rico* during a deposition. (1 AA 144-145.) The next day, the Agency's counsel referred Martin's counsel to *Rico* and its progeny. (1 AA 114-115.) As the trial court correctly noted, a simple Shepard's search of *Rico* would have revealed *Clark*. (4 AA 963.) Yet Martin's counsel continued to refuse to return the privileged documents and thereafter continued to use the privileged documents during the Atwater deposition, at a discovery hearing and in opposition to an ex parte application. (1 AA 45, 153, 169-172; Exh. A, pp. 33-36 [under seal]; 4 AA 939 [under seal].) It was only

in response to the disqualification motion that Martin's counsel purported to return the privileged documents. (1 AA 264.)

Therefore, there is no merit to Martin's contention that his counsel can shirk their ethical obligations under *Rico* and shift those obligations onto the Agency's counsel.

C. Martin could not waive the attorney-client privilege on behalf of the Agency.

Martin contended below that he, as a former employee of the Agency, had the authority to waive the attorney-client privilege on behalf of the Agency. (1 AA 259.) The trial court correctly rejected this contention. (4 AA 965.)

"The attorney-client privilege may be claimed only by the holder of the privilege, a person who is authorized by the holder to claim the privilege, or the person who was the attorney at the time of the communication. (Evid.Code, § 954.) As relevant here, the ' "holder of the privilege" ' is defined as the client. (Id., § 953.)" (*Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1096.) When an attorney represents an organization, the organization is the client, not individual employees. (Rules Prof. Conduct, rule 3-600(A).) "In representing a corporation, an attorney's client is the *corporate entity*, not individual shareholders or directors, and the individual shareholders or directors cannot presume that corporate counsel is protecting their interests." (*La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court* (2004) 121 Cal.App.4th 773, 784.)

Thus, in the context of governmental entities, such as the Agency, only the entity, and not the individual employees, are holders of the privilege. (*People ex rel. Lockyer v. Superior Court* (2000) 83 Cal.App.4th 387, 399, disapproved on other grounds by *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703.) As the Ninth Circuit has stated: "It follows *a fortiori* that since a corporate employee cannot waive the corporation's privilege, that same individual as an ex-employee cannot do so. An employee must generally keep an employer's confidences." (*U.S. v. Chen* (9th Cir. 1996) 99 F.3d 1495, 1502.)

Here, the record reflects that the Agency was the general counsel's client. (1 AA 181.) Therefore, Martin could not waive the attorney-client privilege on behalf of the Agency.

Accordingly, there is no merit to Martin's contention below (which did not form any basis for the trial court's ruling) that he had the authority, as a former employee of the Agency or otherwise, to waive the attorney-client privilege.

CONCLUSION

For the foregoing reasons, the order denying the Agency's motion to disqualify Martins' counsel should be reversed with instructions to order Martin's counsel disqualified.

April 11, 2013

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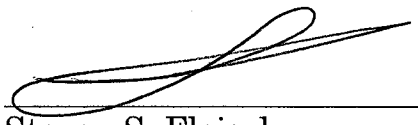
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 7,439 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: April 11, 2013



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On April 11, 2013, I served true copies of the following document(s) described as **APPELLANT'S OPENING BRIEF** on the interested parties in this action as follows:

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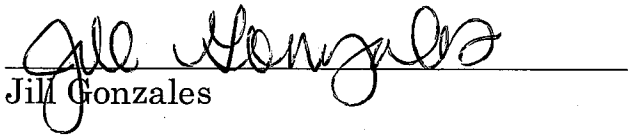
BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 11, 2013, at Encino, California.



Jill Gonzales

SERVICE LIST
Martin v. The Inland Empire Utilities Agency
Court of Appeal Case No. E057871

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Clerk of the Court California Supreme Court 350 McAllister Street San Francisco, CA 94102-3600	Electronic Copy (CRC, Rule 8.212(c)(2)(A)(i) http ://www.courts . ca . gov/9280.htm Submitted to the Second District Court of Appeal through the Appellate Court Case Management System (ACCMS). Service on the California Supreme Court is included.