

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2013-188**

ISSUE: If an attorney receives from a non-party a confidential written communication between opposing counsel and opposing counsel's client, what should the attorney do if the attorney reasonably believes that the communication may not be privileged because of the crime-fraud exception to the attorney-client privilege?

DIGEST: If an attorney receives an unsolicited intentionally transmitted written communication between opposing counsel and opposing counsel's client under circumstances reasonably suggesting that it is a confidential communication apparently sent without the consent of its owner, the attorney may not ethically read the communication, even if she suspects the crime-fraud exception might vitiate the privilege. The attorney must notify opposing counsel as soon as possible that the attorney has possession of the communication. The two attorneys should try to resolve the privilege issue or, if that fails, obtain the assistance of a court. Attorney may not read, disseminate, or otherwise use the communication or its contents absent court approval or consent of its owner.

AUTHORITIES

INTERPRETED: Rule 1-100(A) of the Rules of Professional Conduct of the State Bar of California.^{1/}

Code of Civil Procedure section 2018.050.

Evidence Code sections 915, 952, 954, and 956.

STATEMENT OF FACTS

Attorney represents Client in a fraud lawsuit against Company. During discovery, Attorney receives an unsolicited email from an anonymous Sender, with subject line "Client v. Company," and an icon notice of an attachment to the email. Upon opening the email, the first three lines of the email read, "From: [no sender]" / "To: Attorney" / "Subject: Client v. Company." Attorney's replies to the email consistently generate an automatic "undeliverable" bounce-back notification. The text of the email reads as follows:

I am an ex-employee of Company. I wish to remain anonymous. I don't want any legal help from you and do not want to hear from you at all. Providing you with the attached document is all the help you will get from me. The attached document is a confidential communication between Company and your opposing counsel. It proves that Company planned and perpetrated the fraud with the advice and assistance of your opposing counsel, who was retained for that purpose, and who has been actively involved in the fraudulent scheme from the very outset, long before the incidents described in your complaint. The attached document will prove your case. Read it and see for yourself.

May Attorney ethically open and read the attachment? Must Attorney notify Company's counsel that Attorney has the attachment? When may Attorney use the attachment or the information conveyed in it?

^{1/} Unless otherwise indicated, all future references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

DISCUSSION

The attorney-client privilege protects disclosure of a confidential communication between client and lawyer. (Evid. Code, § 954.)

“[C]onfidential communication between client and lawyer” means 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.

(Evid. Code, § 952.)

The attorney-client privilege is a core value of the American justice system. It has been the “hallmark of our jurisprudence for almost 400 years.” *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725 [101 Cal.Rptr.3d 758];

Its fundamental purpose “is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. [Citation.] ... [¶] Although exercise of the privilege may occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship. As this court has stated: ‘The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence.’ [Citations.]” “[T]he privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case. [Citation].”

Id. at p. 732.

In *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 [82 Cal.Rptr.2d 799] (“*State Fund*”), the California Court of Appeal stated:

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 [1] refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and [2] 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. We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact.

Id. at pp. 656-657.^{2/} This same language was adopted by the California Supreme Court in 2007, in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817-818 [68 Cal.Rptr.3d 758] (“*Rico*”), when it extended the *State*

^{2/} Whether Attorney should actually return the email and/or attachments is a matter left to the Attorney’s judgment. See ABA Model Rules Prof. Conduct, Rule 4.4, Comment [3] (“Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.”).

Fund rule beyond materials protected by the attorney-client privilege to materials protected by the attorney work-product doctrine, irrespective of whether the documents are marked as “confidential” or “work product.”

The *State Fund/Rico* rule is an objective one. In assessing whether a lawyer has complied with the 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.” *Rico, supra*, 42 Cal.4th at p. 818, quoting *State Fund, supra*, 70 Cal.App.4th at pp. 656-657.

Improper handling of an opposing party’s confidential document(s) may result in serious adverse consequences to that lawyer and his or her client, such as disqualification of the lawyer and/or co-counsel, as well as the assessment of monetary or evidentiary sanctions. See, e.g., *Rico, supra*, 42 Cal.4th 807 (lawyers and experts disqualified). See also *Bak v. MCL Financial Group, Inc.* (2009) 170 Cal.App.4th 1118 [88 Cal.Rptr.3d 800] (lawyer sanctioned \$7,500 for making cursory review, copying, and sending to arbitration staff privileged documents inadvertently produced by opposing counsel); *County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647 [271 Cal.Rptr. 698] (lawyer disqualified for receiving opposing party’s confidential information from expert consultant).^{3/}

Rico and *State Fund* impose certain ethical duties upon the receiving lawyer when (a) the lawyer receives materials that “obviously appear” to be privileged or “otherwise clearly appear to be confidential and privileged” and (b) “it is reasonably apparent” that the materials were inadvertently disseminated. *State Fund, supra*, 70 Cal.App.4th at p. 656.

1. **“Obviously Appear” or “Otherwise Clearly Appear to Be Confidential and Privileged”**

In *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 49 [125 Cal.Rptr.3d 361], the court determined that the transmission of information between attorney and client is presumed to be privileged, regardless of its content. In that case, VeriSign sought the disqualification of Clark’s lawyer, because the lawyer allegedly received from Clark numerous of VeriSign’s attorney-client privileged documents that Clark had taken when he left VeriSign’s employ. Clark’s attorney did not return, nor did he destroy, the documents despite VeriSign’s demands based upon privilege. VeriSign then successfully moved for disqualification, after Clark admitted to have affirmatively employed the documents to pursue Clark’s lawsuit against VeriSign.

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While California has not adopted the ABA Model Rules, they may nevertheless be used as guidance for lawyers absent on-point California authority or a conflicting state public policy. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal. 4th 839, 852 [43 Cal.Rptr.3d 771]. Thus, in the absence of related California authority, we may look to the Model Rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. Rule 1-100(A) (ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered); *State Fund, supra*, 70 Cal.App.4th at p. 656.

^{3/} This opinion only addresses the ethics issues arising from an attorney’s receipt of another’s potentially privileged documents from a third party, not any legal issues pursuant to, for example, Penal Code sections 496 (receiving stolen property) or 504 (computer crimes), Civil Code sections 3426 *et seq.* (Uniform Trade Secrets Act), or the provisions of any protective order. Conviction of the crimes of receiving or concealing stolen property (which are offenses constituting moral turpitude) may subject an attorney to discipline. See *In re Plotner* (1971) 5 Cal.3d 714 [97 Cal.Rptr. 193] (attorney disbarred after convictions for receiving stolen property and illegally supplying or administering an abortion); see also *Williams v. Superior Court* (1978) 81 Cal.App.3d 330 [146 Cal.Rptr. 311] (attorney convicted of concealing stolen property); and Bus. & Prof. Code, §§ 6100 *et seq.*

This opinion also does not address duties, if any, owed by an attorney to a third party who sends an unsolicited private communication to a lawyer containing such potentially privileged documents. For a discussion of potential duties to a third person who attempts to communicate confidentially with a lawyer, see State Bar Formal Opinion No. 2003-161.

In affirming disqualification, the Court of Appeal focused its inquiry on the relationship of the parties to the communication. It stated that where the party claiming privilege shows that the dominant purpose of the relationship between the parties to the communication was attorney-client, the court treats the communication as protected by the privilege, and review of its content is therefore prohibited. *Clark, supra*, 196 Cal.App.4th at pp. 51-52 (citing *Costco, supra*, 47 Cal.4th at pp. 739-740). Because all the disputed communications at issue were between a VeriSign agent and a VeriSign attorney, they were presumptively privileged, and further review should have ceased. The actions of Clark's attorney violated *Rico* and *State Fund*, because even after he was aware the documents were communications transmitted between VeriSign and its counsel, Clark's counsel continued his review of the content, and also used them to advance Clark's case. Finding these actions went beyond the permissible limits, the *Clark* court rejected Clark's argument that his counsel complied with his ethical obligations because he obtained the documents properly from Clark, did not hide his possession of them, met and conferred with VeriSign, and sequestered the documents. The court reached its conclusion, notwithstanding the fact that the case involved information that was not received by Clark's counsel inadvertently, but rather was information Clark purposefully took with him when he left VeriSign's employ, and which he then purposefully turned over to his counsel for use in his case against VeriSign. *Clark, supra*, 196 Cal.App.4th at p. 54.

Applying the foregoing authorities to our hypothetical, the attachment is privileged. The body of the email expressly states, "[t]he attached document is a confidential communication between Company and your opposing counsel." On its face, it is an attorney-client communication purporting to show advice and assistance from attorney to client, and "obviously appears" or "otherwise clearly appears" to be attorney-client privileged.

2. "Reasonably Apparent" that the Materials Were Inadvertently Disseminated

In our hypothetical, Attorney did not receive Company's document from opposing counsel through the Company's inadvertence. Rather, Attorney received Company's document from Sender, an unknown third party, who intentionally transmitted it. However, given the strong public policies underlying *State Fund* and *Rico*, we conclude the ethical duties set forth in *State Fund* and *Rico* apply both when "it is reasonably apparent that the materials were provided or made available through inadvertence" by the privilege holder's counsel himself, or when a third party intentionally sends privileged materials to another attorney, and it is reasonably apparent that those materials were sent without their owner's authorization. *Rico, supra*, 42 Cal.4th at p. 817.

The Court's analysis in *Rico* supports this conclusion. The *Rico* court adopted the trial court's finding that the receiving lawyer "came into the document's possession through inadvertence," *Rico, supra*, 42 Cal.4th at p. 812, even though the receiving lawyer claimed that a third party – a court reporter – gave him the relevant document in the first instance and, therefore, there was no inadvertence. The salient point of *Rico* was that it was reasonably apparent to the receiving lawyer in *Rico* that neither the author nor the intended recipient of the document authorized its dissemination.

Similarly, in *Clark*, the court rejected Clark's arguments that his attorney did not violate any ethical duties because he did not receive the documents in question inadvertently from VeriSign's counsel, but rather that he received them from Clark. Like the Supreme Court in *Rico*, the *Clark* court focused on the fact that VeriSign clearly did not authorize the document's dissemination. *Clark, supra*, 196 Cal.App.4th at p. 54.

3. Crime-Fraud Exception

Finally, under our hypothetical scenario, the crime-fraud exception to the attorney-client privilege does not vitiate Attorney's duties under *State Fund* and *Rico*. The crime-fraud exception, if established, expressly applies to communications otherwise shielded by the attorney-client privilege. Evidence Code section 956 (no attorney-client privilege if services were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud); *State Farm Fire and Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 643 [62 Cal.Rptr.2d 834] (presumptively privileged statements in declaration by ex-claims specialist who previously worked in insurer's litigation unit discoverable because of crime-fraud exception).^{4/} The burden is on the party claiming that the crime-

^{4/} Conversely, the attorney work-product doctrine generally has no crime-fraud exception. See *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1251 [245 Cal.Rptr. 682]; but see Code of Civil Procedure section 2018.050 ("[n]otwithstanding Section 2018.040, when a lawyer is suspected of

fraud exception applies to make a prima facie showing that the services of the lawyer were “sought or obtained” to enable or to aid the client to plan to commit a crime or fraud. *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1249 [245 Cal.Rptr. 682] (proponent made prima facie showing that opposing counsel’s letter was an attempt to defraud proponent). The mere assertion of a crime or fraud is insufficient to trigger the exception – there must be a prima facie showing by the proponent through non-privileged information, that the allegation that the attorney’s services were sought or obtained to enable the planning of a crime or fraud has some foundation in fact. *Id.*

In *Costco, supra*, 47 Cal.4th at pp. 739-740, the California Supreme Court considered and rejected arguments that *Oxy Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874 [9 Cal.Rptr.3d 621] and *Cornish v. Superior Court* (1989) 209 Cal.App.3d 467, 480 [257 Cal.Rptr. 383] authorized an in camera review of privileged information to determine whether or not an exception to the privilege applied, absent such prima facie showing: “As we have explained, section 915 prohibits disclosure of information claimed to be privileged in order to determine if a communication is privileged. But after the court has determined that the privilege is waived or an exception applies generally, the court to protect the claimant’s privacy may conduct or order an in camera review of the communication at issue to determine if some protection is warranted notwithstanding the waiver or exception.”

Thus, even though Attorney received a purported confidential attorney-client communication under circumstances suggesting that the communication may not be privileged because of the crime-fraud exception, that mere suggestion, standing alone, does not work to abrogate Attorney’s ethical duties under *State Fund* and *Rico*. *Rico, supra*, 42 Cal.4th at p. 817.^{5/}

Our conclusion is also in accord with the deference traditionally afforded the attorney-client relationship. See, e.g., Evid. Code, § 915; *Costco, supra*, 47 Cal.4th 725; and *Titmas v. Superior Court* (2001) 87 Cal.App.4th 738, 740 [104 Cal.Rptr.2d 803] (holding that court may not order disclosure of document claimed to be protected by attorney-client privilege without full hearing with oral argument); but see *Oxy Resources California, supra*, 115 Cal.App.4th at p. 896 (“[C]ourts have recognized, if necessary to determine whether an exception to the privilege applies, the court may conduct an in camera hearing notwithstanding section 915.” (emphasis in original)). “Extreme caution” must be exercised when an accusation is made that will invade the attorney-client relationship in connection with ongoing litigation. See *State Farm, supra*, 54 Cal.App.4th at pp. 644-645.

Accordingly, to establish applicability of the crime-fraud exception in a situation such as our hypothetical, Attorney would have to use non-privileged information to make a prima facie showing that opposing counsel’s services were sought in order to assist the opposing party in committing that crime or fraud. See *BP Alaska, supra*, 199 Cal.App.3d at pp. 1264-1266, 1268-1269 (finding a prima facie showing had been made); see also *Costco, supra*, 47 Cal.4th at pp. 739-740; See also *United States v. Zolin* (1989) 491 U.S. 554, 572 [109 S.Ct. 2619, 2631] (judge should first require a showing of facts adequate to support a good faith belief by a reasonable person that in camera review of privileged materials may reveal evidence the crime-fraud exception applies).

CONCLUSION

Given the state of the law and the value placed on the attorney-client privilege, attorneys must use caution when faced with an inadvertent or unauthorized disclosure situation – even under circumstances that may suggest an exception to the privilege applies. An attorney who receives an unsolicited intentionally transmitted written communication between opposing counsel and opposing counsel’s client under circumstances reasonably suggesting

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knowingly participating in a crime or fraud, there is no protection of work product under this chapter in any official investigation by a law enforcement agency or proceeding or action brought by a public prosecutor in the name of the people of the State of California if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud.”).

^{5/} Whether or not the email in question is sufficient, in fact, to make the prima facie showing required to trigger the crime-fraud exception is a question of law that is beyond the province of this opinion.

that it is a confidential communication apparently sent without the consent of its owner may not ethically read the communication. Attorney must notify opposing counsel as soon as possible that the attorney has possession of the communication. At the very least, the attorneys should then try to resolve the issue of privilege, or the attorneys may seek court guidance as to the applicability of the crime-fraud exception. This opinion does not address what other options Attorney might have, provided that Attorney complies with the ethical obligation to not read the communication and to notify opposing counsel as described above.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.