

# STOP, DROP AND CALL: WHAT TO DO WHEN YOU RECEIVE A PRIVILEGED DOCUMENT INADVERTENTLY PRODUCED BY YOUR OPPONENT

*by Aileen Banellis*

If it seems too good to be true, it probably is. The California Supreme Court reaffirmed this maxim in its recent decision, *Rico v. Mitsubishi*, 42 Cal.4th 807 (2007), which announces the standard governing an attorney's conduct upon receiving privileged or confidential documents inadvertently produced by the other side.

Justice Carol Corrigan, writing for a unanimous court, summarized the interesting factual background. Various plaintiffs sued Mitsubishi after a Montero rolled over on the freeway. Before trial, Mitsubishi's attorneys and experts held a strategy meeting to discuss the vulnerabilities of their case and to prepare for trial. Mitsubishi's paralegal was present and took notes at the direction of one of the attorneys.

The paralegal later printed these notes, and Mitsubishi's attorney edited and annotated them. Two weeks later, that same attorney arrived to depose one of plaintiffs' experts. When he left the conference room to use the restroom, his briefcase and file were still inside with plaintiffs' legal team. The notes from Mitsubishi's strategy meeting were inside the file.

Unbeknownst to Mitsubishi's counsel, plaintiffs' attorney somehow came into possession of the notes, made copies of them and distributed them to cocounsel and their experts. Two weeks later, over vigorous objections to an "unknown document," plaintiffs' counsel used the notes while deposing defendants' expert. It was only after the deposition that Mitsubishi's attorney received a copy of the questionable document and discovered it was his own privileged set of notes from the strategy meeting.

And so the battle began. Mitsubishi demanded the return of all copies of the document and moved to have plaintiffs' legal team and experts disqualified. The trial court found that the notes were absolutely privileged under the work-product doctrine because they contained the legal team's impressions of the case.

Although Mitsubishi argued that plaintiffs' counsel took the notes from its counsel's file during his restroom break, plaintiffs countered that the court reporter handed them over accidentally. Finding insufficient proof that the notes had been taken from the file, the trial court ultimately determined the notes were inadvertently produced.

The next step was to determine what plaintiffs' ethical duty was upon receipt of the notes. Surprisingly, California's Rules of Professional Conduct are silent on the issue, which left both sides in *Rico* free to argue their positions.

California case law provided some guidance. When this issue was litigated in 1999 in *State Compensation Insurance Fund v. WPS, Inc.*, 70 Cal.App.4th 644 (State Fund), the Second District Court of Appeal found itself unable to uphold sanctions against an attorney for using privileged documents inadvertently produced, even though the attorney used the documents in bad faith. The trial court's ruling sanctioning the receiving party based on the American Bar Association ("ABA") Formal Ethics Opinion No. 92-368 (Nov. 10, 1992) was overruled.<sup>1</sup> The Court of Appeal held that it could not uphold sanctions for conduct that had not yet been condemned by any decision or ethical rule in California. However, the State Fund court did announce a proscription for future cases, and on December 13, 2007, the California Supreme Court announced in *Rico* that this rule will govern all attorneys in California.

Now, once an attorney realizes a document is privileged and was inadvertently produced, the attorney must stop reading the document, drop what he or she is doing, and call opposing counsel, or risk sanctions. If the issue cannot be resolved informally between the parties, then the parties must contact the court for a resolution.

Under the rule, the attorney may read only as far as is necessary to conclude the document is privileged. The line is drawn by an objective standard: The attorney may read only so far as when reasonably competent counsel would have determined the document was privileged. This critical point was obvious in *State Fund*, because the documents were marked "confidential" and "attorney work product." However, the document in *Rico* was not labeled in any manner. Nonetheless, the Supreme Court found the document was not any less privileged, and by plaintiffs' counsel's own admission, he knew within a minute or two of reading the document that it was not something Mitsubishi intended to reveal.

*continued on page 26*

---

## Stop, Drop and Call (continued from page 24)

Additionally, the rule applies regardless of the nature of the privilege. State Fund involved documents protected by the attorney-client privilege. Rico involved documents privileged under the attorney work-product doctrine. The rule does not discriminate between privileged and confidential documents.

Failing to comply with the rule can have drastic effects. In Rico, the entire legal team and their experts were disqualified because of their use and dissemination of the document. To ensure that a party will not tactically slip a privileged document to the opposition in order to disqualify them, the party requesting disqualification bears the burden of establishing the documents were inadvertently produced.

As the Rico court observed, the rule is manageable and ensures that the discovery process will go on efficiently. A party responding to discovery requests will not be forced to spend hours screening a massive production of documents to ensure that a privileged document will not end up in the opponent's hands. And the party receiving the document must simply remember, if it seems too good to be true, it probably is.

---

*Aileen Banellis is an associate in the Litigation Department at Gresham Savage Nolan & Tilden's Riverside office.*



<sup>1</sup> The rule expressed in ABA Formal Ethics Opinion No. 92-368 was added to Rule 4.4 of the ABA Model Rules of Professional Conduct in 2002, and provides that when an attorney receives a document which he or she knows or reasonably should know was inadvertently sent, he or she must notify the sender. The California Legislature and California State Bar have yet to adopt a similar rule.

---

## Donald J. Dunn (continued from page 25)

One of the crowning moments in Don's career occurred in 2006, when he and co-author Roy Mersky of the University of Texas were honored by the American Association of Law Libraries (AALL) for their Fundamentals of Legal Research, voted one of the most influential texts in legal research over the last 50 years (1957-2006) by the AALL's Academic Law Librarians Special Interest Section.

Don touched the lives of many in a meaningful way. From his grandson who wanted to be a doctor for Halloween so he could help his grandfather, to his son who cherishes the role model that his dad set for him, to his colleagues who are so honored to have worked with such a fine scholar and human being, one commonality exists. We are all thankful to have known Don.

The University of La Verne College of Law will hold a memorial service to honor Donald J. Dunn on Saturday,

March 8, 2008 at 2 p.m. at the College of Law. A scholarship fund has been established in Don's memory. Donations to the "Dean Donald J. Dunn Memorial Scholarship Fund" can be sent to the attention of Doug Frost, University of La Verne College of Law, 320 East D Street, Ontario, California, 91764. Doug Frost may be reached at (909) 460-2024 or by e-mail at [dfrost@ulv.edu](mailto:dfrost@ulv.edu).

If you would like to read the many special messages from legal professionals and friends from across the country or post your own message, a special memory book is set up at <http://donaldjdunn.legacy.com>.

---

*Susan Nauss Exon is a Professor of Law at the University of La Verne College of Law.*



---

## MEMBERSHIP

---

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective February 28, 2008.

**Eric S. Barr** – Sole Practitioner, Corona

**Debbie Bowersock (A)** – Hahn & Bowersock Court Reporters, Costa Mesa

**Evelyn Cordner (R)** – Retired Attorney

**Wanda J. Greene** – Law Offices of Wanda J. Greene, Redlands

**Mirna El Hazin** – El Hazin & Associates, Riverside

**Kimberly Lessing** – Law Offices of Kimberly Lessing, Corona

**Sharon Nelson** – Nelson Law Firm, Los Angeles

**Albert Perez, Jr.** – Law Offices of Albert Perez Jr, West Covina

**Anthony T. Perez** – Thompson & Colegate, Riverside

**Robert L. Rancourt, Jr.** – Office of the Public Defender, Riverside

**Delilah Knox Rios** – Sole Practitioner, Diamond Bar

**James R. Robertson** – McCoy Turnage & Robertson APLC, San Diego

**Brent F. Romney** – Blumenthal Law Offices, Riverside

**Daniel Tripathi** – Law Offices of Daniel Tripathi, Riverside

**Paul M. Vargas** – Fiore Racobs & Powers APLC, Riverside

**Mario L. Valenzuela** – Law Office of Mario L. Valenzuela, Riverside

**Roger Walker** – Sole Practitioner, Riverside

**Nicole T. Williams** – Office of the Public Defender, Riverside

**Ying Xu** – Law Offices of Eric K. Chen, City of Industry