

# CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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## **Clark v Superior Court 6/2/11**

### **Attorney Client Privilege; Dominant Purpose of Relationship; Disqualification**

Plaintiff Clark, a member of the California State Bar, was employed by defendant VeriSign, a provider of internet infrastructure services. Plaintiff was hired as Chief Administrative Officer by defendant in September 2007. He signed a nondisclosure agreement, which included a promise he would not remove VeriSign's confidential or privileged information, and would return all such information upon termination of his employment. In late 2008, plaintiff's position was eliminated, and his termination was effective at the end of the year. In January 2009, plaintiff retained the Higgs law firm and sued defendant.

In March of 2009, counsel for plaintiff indicated he would be moving to amend the complaint to include allegations related to the termination of another employee. VeriSign's lawyer suspected plaintiff was referring to an email (the Bond memo) sent by general counsel concerning a confidential internal investigation. Counsel believed the memo was a privileged communication plaintiff had improperly taken from defendant in violation of the nondisclosure agreement. Counsel immediately demanded return of the document, and all other attorney client privileged information, and that plaintiff "cease and desist" using the information and documents. Plaintiff's counsel failed to respond, and a second such demand drew a response denying any improper conduct.

In February 2010, plaintiff produced documents pursuant to a discovery demand and defendant recognized the production included many privileged documents. Again, defendant's counsel demanded return of the privileged materials. Plaintiff eventually agreed to return irrelevant documents and destroy most of the identified material, but indicated he would be unable to destroy

others which would be needed by plaintiff in answering questions at deposition. When that deposition took place, plaintiff conceded certain documents contained privileged material but stated his counsel would decide whether to use them at trial. Clark also testified he used the Bond memo for one of his claims.

After the deposition, defendant moved to disqualify counsel Higgs, and for other relief, on the basis plaintiff had used privileged documents and gained an improper advantage from that conduct. Defendant's general counsel attested to the circumstances and privileged nature of the documents. Plaintiff opposed on the basis defendant failed to show the dominant purpose of the communications was for legal, not business, reasons. He also averred defendant suffered no disadvantage. The trial court granted the motion, holding the documents had been clearly marked as privileged, and Higgs had a duty to immediately notify defendant that it had possession of the documents. The order disqualified the Higgs firm, required return of the documents, and enjoined use of the contents in the action. Clark timely filed a writ petition, and the Fourth Appellate District issued an order to show cause.

A trial court's authority to disqualify an attorney derives from its inherent power to control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto. (CCP section 128) [A disqualification motion involves a conflict between a client's right to counsel of his or her choice, on the one hand, and the need to maintain ethical standards of professional responsibility, on the other.](#) (*Responsible Citizens v Superior Court* (1993) 16 Cal.App.4<sup>th</sup> 1717) When ruling on a motion to disqualify, 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.](#) (*People ex rel Dept. of Corporations v Spee Dee Oil Change Systems, Inc.* (1990) 20 Cal.4<sup>th</sup> 1135)

In *State Comp. Ins. Fund v WPS, Inc.* (1999) 70 Cal.App.4<sup>th</sup> 644, the appellate court evaluated the ethical obligations of a lawyer when that lawyer comes into possession of privileged materials without the holder of the privilege having

waived it. Where it clearly appears the documents are 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 v Mitsubishi Motors Corp.* (2007) 42 Cal.4<sup>th</sup> 807, adopted the obligations in *State Fund* and extended them to materials protected by the attorney work product privilege, noting those obligations were rooted in the attorney's obligation to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice. That court noted that although disqualification is a draconian remedy, in an appropriate case, it might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself appropriately, and other factors compel disqualification.

Here the trial court expressly found plaintiff Clark gave Higgs numerous documents subject to the attorney client privilege. The evidence shows the documents were explicitly designated *by Clark himself* as attorney client privileged while he was employed by defendant. Higgs conceded at oral argument that some of the documents were privileged. In *Costco Wholesale Corp. v Superior Court* (2009) 47 Cal.4<sup>th</sup> 725, the court explained that when a trial court examines a claim of attorney client privilege, the party claiming the privilege has the burden of establishing the preliminary facts to support the claim. Once established, the communication is presumed to be made in confidence and the opponent has the burden to show it was not confidential or the privilege does not apply for other reasons.

Plaintiff argued that in camera review of the documents was a prerequisite to determining whether the documents were in fact privileged. Plaintiff cited *2,022 Ranch v Superior Court* (2003) 113 Cal.App.4<sup>th</sup> 1377, asserting that the determination of privilege turns on the "dominant purpose" of each communication. That case does discuss an evaluation of the dominant purpose of the communications by in camera inspection. The Fourth DCA pointed out

that under Evidence Code section 915 disclosure of the information claimed to be privileged as a confidential communication between attorney and client “in order to rule on that privilege” is prohibited. (Costco, at p. 731) The Costco court continued by disapproving two cases, including 2,022 Ranch, and added that, “the focus of the inquiry is the dominant purpose of the relationship between the parties to the communication.” If it is one of attorney and client, the communication is protected by the privilege.

The Justices then employed the Costco approach to this case, finding there was substantial evidence to support the trial court’s finding that all of the disputed communications, including the Bond memo, were privileged because the declarations established all of the communications involved an officer or employee of the company transmitting a communication to an attorney. Plaintiff claims that the Bond memo was not privileged because the dominant purpose of the memo was Mr. Bond’s expression of frustration concerning an investigation. The Justices found that irreconcilable with Costco’s point that **the relationship of the communicators, not the content of the communication was the relevant inquiry**. The privilege would thus apply to all communications here.

After Higgs came into possession of the documents, it was obligated not to review them more than was reasonably necessary to make the determination that they were privileged and to immediately notify defendant that it was in possession of defendant’s privileged documents. The trial court found Higgs violated these obligations. The Appellate Justices agreed that Higgs did violate State Fund and Rico. These cases make clear, **“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...must refrain from examining the materials any more than is essential to ascertain if the materials are privileged and immediately notify the sender that he or she possesses material that appears to be privileged.”** (State Fund, at p. 655) Under Costco, the mere fact the document has been transmitted from an officer or employee to a lawyer representing the defendant would suffice to ascertain the materials are privileged. **Any further examination would exceed permissible limits.** (Costco, at p. 733)

Here, Higgs went beyond the mere fact of transmission to examine the

dominant purpose of the transmittals. This necessarily involved an assessment of its contents. Higgs also used the documents to question witnesses at deposition. The Bond memo was used to craft a claim against the defendant. As such, Higgs violated its obligation under *State Fund* and *Rico*.

Finally the Justices addressed the question of remedy when the attorney violates the obligations set forth in *State Fund* and *Rico*. The cases cautioned that “mere exposure to an adversary’s confidences is insufficient, standing alone, to warrant an attorney’s disqualification.” (*Rico*, a p. 819) The opinions noted, however, that in an appropriate case, disqualification might be justified. Here the trial court found disqualification was necessary, “not only to protect the rights of VeriSign, but also to preserve the integrity of the judicial proceedings” and found there was a genuine likelihood that Higgs’ review of the materials could affect the outcome of the proceedings. The court in *SpeeDee* stated that **the paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar.** (*SpeeDee*, at p. 1145)

The 4<sup>th</sup> DCA stated, “On this record, a trier of fact could conclude Higgs’ continued representation of Clark could trigger doubts over the integrity of the judicial process because whenever Higgs’ advocacy against VeriSign began to touch on matters contained in the privileged documents that Higgs retained (for over nine months) and excessively reviewed, the inevitable questions about the sources of Higgs’ knowledge (even if Higgs in fact obtained such knowledge from legitimate sources) could undermine the public trust and confidence in the integrity of the adjudicatory process. The finding there was a “genuine likelihood” Higgs’ review of the documents could affect the outcome of the proceedings has evidentiary support.

In addition, disqualification is proper as a prophylactic measure to prevent future prejudice to the opposing party from information the attorney should not have possessed. (See, *Chronometrics, Inc. v Sysgen, Inc.* (1980) 110 Cal.App.3d 597) The Justices concluded the trial court did not so exceed the bounds of reason in its decision to disqualify Higgs that its decision was an abuse of discretion. The petition for writ is denied. The stay is vacated, and real parties in interest will recover costs in the writ proceeding.

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