INTRODUCTION

The Product Liability Advisory Council ("PLAC") has submitted an amicus brief on behalf of defendant Mitsubishi whose subsidiary is one of PLAC's members. PLAC's other members, who include many of the largest corporations in the world, comprise a veritable *Who's Who* of defendants in product liability actions. Needless to say, PLAC's so-called concern with the "ethical 'high ground'" arises from a very special vantage point. Indeed, we dare say that the ethical high road PLAC claims to travel leads directly to Wall Street and the desire to protect major corporations from liability exposure.

As we discuss in Section I, below, PLAC's proposed solution to the problem of inadvertent-production of privileged documents offers other major financial benefits to its members' interests as well. PLAC's "solution" will shift all the economic burdens (and the commensurate risks) away from the manufacturers who generated the documents and onto the shoulders of the consumer victims who can ill-afford to carry them.

Simply put, PLAC's position is that the party generating a document should no longer bear the prime responsibility for ascertaining whether or not it ought to be considered privileged, nor the burden of carefully pre-screening the production of its own documents to see if arguably privileged

documents are included. PLAC insists that such monitoring is impossible given the huge size of document productions. Mistakes and failure are, in PLAC's words, "inevitable." Indeed, even the "burden" of putting a simple label on the document is considered too much for the largest manufacturers in the world to bear.

No, in PLAC's *Alice in Wonderland* view of the litigation world, it is far better to shift all the expense, burdens, and concomitant risks which the world's largest companies cannot bear unto the shoulders of undersized and out-manned consumer's lawyers. If PLAC's proposal is accepted, every consumer's attorney who receives a massive document production will suddenly be left with the sword of Damocles hanging over his or her head. That sword will fall every time a document which a defendant contends "should have been suspected" to be privileged is buried amidst the numerous other documents received and the receiving attorney does not return it – or return it <u>fast enough</u>. In short, when the consumer's attorneys <u>inevitably</u> fail at this impossible task (as PLAC assures us they will) the answer is simple – "Off with their heads!"

Besides addressing the inequities and absurdities in PLAC's unique "solution," we must also correct certain fundamental errors which infest PLAC's brief. For example, PLAC offers a lengthy discussion concerning

why this Court should hold that "inadvertent disclosure does not waive privilege." (Amicus Brief ["AB"] at 16, 22-26.) But our case does not concern that proposition, nor do we have a quarrel with it. This, and other red herrings injected by PLAC are discussed and exposed in Section II, below.

Finally, much of the balance of PLAC's brief is a rehash of highly partisan arguments made by defendant Mitsubishi. To save unnecessary repetition, where we have already refuted those arguments we will refer this Court back to our Opening Brief on the Merits ("OBM") rather than repeating the same arguments in any detail here. In Section III below we discuss many of these points, particularly PLAC's desire to "cut and paste" the *State Fund* decision to lead to the result that most helps Mitsubishi achieve its twin goals of: (a) disqualifying the Rico's prominent trial counsel; and (b) silencing the document which raises very serious questions about whether two of Mitsubishi's declared experts have perjured themselves in this litigation.

I.

PLAC'S PROPOSAL WOULD SHIFT ALL THE BURDENS, EXPENSE AND COMMENSURATE RISKS AWAY FROM THE PARTIES WHO SHOULD (AND CAN) SHOULDER THEM AND PLACE THEM ON PARTIES WHO HAVE NO HOPE TO DO SO.

As discussed in our Introduction, PLAC has great concerns about the dangers that privileged documents will be produced given the sheer size of document productions in modern litigation. It points to the production "of tens of thousands – sometimes even hundreds of thousands – of documents" and warns that, with such size, it is "inevitable" that privileged documents will be produced. (AB 10–11.)

PLAC ominously warns that if *Aerojet's* holding is not repudiated, the producing parties (invariably the defendant-manufacturers in product liability cases) would be forced to "engage in tremendously costly and time-consuming screening efforts that would bring the discovery process to a virtual standstill." (AB 7.) In short, if PLAC's members are forced to screen for privileged documents "what is at stake" is nothing less than "the continued viability" of "the discovery process itself." (*Id*. at 18, emphasis added.)

But, as noted above, PLAC's membership list includes the largest and wealthiest corporations in the world. It includes, e.g., Bayer Corporation, Boeing Company, Chevron Corp., Eli Lilly and Company, Exxon Mobil Corporation, General Electric Company, General Motors Corporation, Mitsubishi Motors North America, Inc., Pfizer Inc., Shell Oil Company, Toshiba America Incorporated, and Toyota Motor Sales, USA,

Inc. to name but a select few. (See PLAC Appendix to Application.)

These mammoth corporations hire the largest, richest and best-equipped law firms to defend them. If the mammoth corporations, with their Blue Chip law firms, are bowled over by the size and expense of screening their enormous document productions, how, exactly, is plaintiff Zerlene Rico supposed to accomplish that goal? The absurdity is obvious. But, as we demonstrate below, that absurdity is precisely what PLAC is really advocating in advancing its proposed solution to the inadvertent production problems.

Simply consider the following all-too-real scenario that would undoubtedly occur if PLAC's perverse solution were adopted. Assume a giant manufacturer produced hundreds of thousands of documents to the consumer's lawyer in a product liability case. It might well take many months before the receiving attorney could review those documents in any detail, much less absorb them. And some might never be reviewed due to the sheer press of time. Yet, every document production would be a ticking time-bomb. As PLAC assures us, it is "inevitable" that some documents marked "privileged" will be included in the production. What if the consumer's attorney did not return those documents to the manufacturer – not because he or she was "exploiting" them, but, rather, simply because

he/she did not discover them?

Under PLAC's view of the litigation universe, once a respectable time period elapsed, the producing attorney could cry "Foul!" and accuse the consumer's attorney of having read, and then "exploited," the privileged document to learn of the other side's "litigation strategy." We are confident that, in most cases, the trial judge would afford the consumer's attorney the benefit of the doubt. But, in at least some cases, that would not occur. Unfair disqualifications would be the result, causing tremendous, and potentially fatal, harm to the litigation position of the plaintiff-victims.[1] This is not some idle, law school hypothetical. *State Fund*, itself, voiced a concern about the dangers of the strategic use of disqualification motions. [**MW get cite and quote]** Other courts have expressed similar concerns. (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal. App. 4th 573, 581 [citations omitted].) **[MW be sure this is accurate, I didn't read case**] Just imagine how simple it would be, in a hundred thousand document production, for an ethically-challenged attorney to slip in a few documents clearly marked "attorney-client privilege" and then set a timer for two months down the road before yelling: "Gotcha."

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[1] Obtaining new counsel to take over a case always caries some problems, but in large and complex litigation, especially with trial dates on the horizon, the problems may be insurmountable even if generous continuances are allowed.

There is even a more chilling scenario, as the fact pattern of our case demonstrates.[2] In the foregoing hypothetical, the document was clearly labeled as "attorney client privileged." But, in our case, Johnson was disqualified for reading (and later using for impeachment) an unsigned, unlabeled, unmarked, and unidentified document.

Imagine how many similarly unidentified and unlabeled documents (handwritten notes, unsigned memos, etc.) might be contained in a hundred thousand document production. Here is one good example of one that might appear. What if the production contained a handwritten note that says: "the seat belt could be made safer at a relatively minor cost." Is this work product? Maybe. If it was written by a lawyer, it could well be work product (depending on other factors). But, if it was written by an engineer working for the defendant, it would not be work product. What should the recipient lawyers do, assuming they ever stumble across such a note in the document production? Do they need to call the other side and ask who wrote it? What if there are 500 other documents which are also unsigned and could theoretically be work product (or attorney-client

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[2] We stress that we are not suggesting that Exhibit 52 was intentionally planted. We have no reason to believe that happened here and would never impugn opposing counsel without clear evidence. We are simply making the point that PLAC's proposal would lend itself to the very dangers of "sharp practice" and "unscrupulous counsel" about which its brief purports to sound warnings. (See e.g., AB at 20.)

communications) depending on a variety of circumstances? Does the receiving lawyer have to call up and ask about every one? Dare he/she not do so?

Under PLAC's proposal, any such document which the receiving attorney might "reasonably suspect" could be privileged (under any privilege), will have an immediate obligation to call the other side and make arrangements for its "safe return." (AB at 32, 34-35.) If the mammoth corporations do not have the time and resources to determine if privileged documents are in their hundred thousand document productions, how can the consumer's attorney be expected to do so, much less be subject to disqualification for failure to identify and return ambiguous documents such as the one we postulated above?

There is a related problem. The search for truth will be seriously compromised if PLAC's burdensome approach is adopted. Assume the document above ("the seat belt could be made safer at a relatively minor cost") was a memo written and signed by Sally Smith, one of the defendant-manufacture's engineers. If Smith wrote it in the ordinary course of her work, it would be nonprivileged and would constitute a critically important document subject to deposition examination. But, if it were written in response to a company lawyer's request (e.g., as part of the

litigation process) it could arguably be work product or otherwise privileged. If the receiving lawyer were under an obligation to call opposing counsel to inquire about these circumstances, the potential "smoking gun" document would be highlighted well before Smith's deposition. Any element of surprise would therefore be forever lost. The company's lawyers would meet with Smith and, at a minimum, "coach" her about the enormous legal implications her memo could have, much less about how she might "respond" to questions about the memo in the light most favorable to the company. If counsel were less-than-ethical, he or she might falsely claim that Smith prepared the memo in response to counsel's litigation preparation and that the memo was therefore "privileged" and had to be destroyed. In product liability cases, where millions of dollars are usually at stake, the pressure to fabricate helpful answers is all too great. We hate to suggest that such things might occur, but we cannot turn a blind eye towards them. Nor can this Court.

There is one other powerful reason to reject PLAC's proposal. In every future document production, it would improperly shift the burden of ensuring that "privileged" documents did not slip through the cracks away from the manufacturer-defendants. Yet, it is the manufacturers whose documents are at issue and who have astronomically-greater resources to

monitor the documents for "privilege" than do the plaintiff-victims. We understand why – selfishly speaking – PLAC would want such a shift in responsibility. What we do not understand is how public policy could possibly favor it. Of course, for many reasons, it could not.

- The manufacturer is in the best possible position to monitor, track, index and review its own documents. It presumably has systems – already in place – that distribute and monitor company documents.

- The manufacturer is infinitely more familiar with its own documents, abbreviations, notations and personnel than is the consumer. Ambiguities and questions that would stump any consumer's counsel reviewing the document would usually pose no problem to the manufacturer and its counsel. Answers to questions could more quickly be provided in an in-house setting.

- The enormous disparity in resources between Mitsubishi Motors versus Zerlene Rico presents its own reason for not allowing this shift in burdens and responsibility.

- Basic fairness points to the identical conclusion. The hundred thousand documents in question were generated in the regular course of the manufacturer's business, for the financial benefit and profit of the manufacturer. Fairness, therefore, dictates that it is the one who should shoulder the cost/burdens of screening those documents, rather than the

victim of one of the manufacturer's products.

There is a final group of problems stemming from PLAC's proposal. That proposal is certain to generate a wealth of additional litigation. In case after case, disqualification motions will fly every time a document which might "reasonably be suspected" to have been privileged is produced to the other side and is not reported promptly (or promptly "enough") after the document production has occurred. The very defendants who now complain (through PLAC) that they lack the resources to pe-screen their documents will suddenly discover the many benefits that can be gained by post-screening them!

The terrible burdens of all this additional litigation over disqualification motions will fall on two groups unable to bear them. The first victim will be the court system, itself, which is already over-taxed with litigation. The other victim group will be the consumers and their attorneys. The consumers, who need to be compensated for their injuries, will suffer greatly by all the additional delays that the disqualification motions will engender. The consumer's attorneys, who are invariably working on a contingency basis (unlike their defense bar colleagues who are being paid on an hourly basis for all the work they perform) will suffer by being forced to spend substantial additional time litigating the flood of disqualification motions that will be filed.

One other victim will emerge from all this additional litigation. The honor of the legal profession itself will suffer as charges and counter-charges, about ethical violations are traded. The defendants will often charge the plaintiffs' lawyers breached their ethical duties to return privileged documents. The plaintiffs lawyers will often charge that the documents in question were intentionally planted, for strategic purposes, to artificially create grounds for disqualification. The public, and the courts, will soon be sick of it all.

In short, besides being unmanageable, unfair, and illogical, PLAC's proposed solution would also generate terrible burdens on the court system and the honor of the legal profession. This is truly a case where the proposed cure is far worse than the purported disease.

II.

PLAC'S KEY MISSTATEMENTS, MISCONCEPTIONS, AND RED HERRINGS, MUST BE ADDRESSED.

A. Our case has nothing to do with whether inadvertent disclosure constitutes a "waiver" of privilege.

As noted, PLAC devotes much ink to why this Court should hold that "inadvertent disclosure does not waive privilege." (AB at 16, 22-26.) But the foregoing proposition has nothing to do with our case! In fact, if we did need to reach the issue, there is a very good chance we would agree

with PLAC's position that, if a truly privileged document is produced by mistake, the producing side has not, thereby, waived its right to assert whatever privilege legitimately exists. There are three factors which make our case so different from the above scenario.

First, our case revolves around *Aerojet-General Corp. v. Transport Indemnity Insurance* ["*Aerojet*"] (1993) 18 Cal.App.4th 996, 1004-1005, which involves use of nonprivileged information[3] contained in an otherwise privileged document. (See OBM at 15-17.) Nothing in *Aerojet* suggested that the inadvertent production of the document "waived" any privilege, or that privileged material (as distinct from nonprivileged information) could be used by the recipient. Nor does anything in our case pose that issue.

Second, PLAC conspicuously (and conveniently) ignores a key issue posed by our case which differs from the typical inadvertent-production case. Here, as detailed in our OBM, the inadvertently-produced document (Exhibit 52) revealed the strong possibility of prospective perjury, i.e., that Mitsubishi's expert witnesses held opinions favorable to the plaintiffs which, in all likelihood, those experts would later deny under oath. (OBM

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[3] The nonprivileged information at issue here are the recorded statements of Mitsubishi's declared expert witnesses concerning their candid opinions about the facts of this case on which they were soon to be deposed. Even Mitsubishi conceded that what those declared experts stated during the meeting was unprivileged and the subject of fair inquiry by the plaintiffs herein. [**MW add cites**]

7-8.) Thus, here, unlike the typical inadvertent production case, an exception might have to be made to any general rule. For example, our case raises the issue whether the crime-fraud exception applies to work-product documents.[4] (OBM at 43-46.) There are other good reasons the crime fraud exception should apply to work product.[5]

Third, PLAC's discussion of this issue suggests that the attorney recipient of Exhibit 52 (Ray Johnson) knew that it was clearly "privileged" and, nonetheless, insisted upon using it anyway under a "waiver" theory. But, as detailed in our OBM, Johnson had no way to know (and no reason even to suspect) that the document was "privileged." Rather, Exhibit 52 appeared to be otherwise; indeed, it was only after a ten-day evidentiary hearing that the authorship, origins, purpose, etc., of the unmarked, unlabeled, and unsigned document were finally revealed. (OBM at [**MW get cites]**

Each of the foregoing distinctions make our case a particularly

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[4] For the limited purposes of our response to PLAC'a amicus brief, we shall assume that the document is "core" work-product. For the reasons set forth in our OBM, we seriously question that proposition. (OBM 37-42.)

[5] Modern scholars have seen the need and logic for applying a crime-fraud exception to the work product doctrine, especially in the wake of scandals such as Enron, Westcom, etc. (See e.g., Laura Weimer, *Review of Selected 2002 California Legislation: Business and Professions: Attorney Work Product Crime-Fraud Exception: Chapter 1059*, 34 McGeorge L. Rev. 327 (2003) [suggesting the need for new law].)

inapposite vehicle for this Court to use in fashioning what California's position should be on the important question of whether or not inadvertent production of a privileged document should constitute a waiver of the privilege. PLAC's invitation notwithstanding, we do not believe this Court should issue an advisory opinion on that meaty subject.

B. PLAC's pretense about claiming the "ethical 'high ground'" is so much nonsense.

PLAC says this case requires a choice between the "ethical 'high ground'" represented by *State Compensation Ins. Fund v. WPS, Inc.* ["*State Fund*"] (1999) 70 Cal.App.4th 644, and the [implied-but-not-expressly-stated] "ethical low ground" which, PLAC says "arguably derive[s] some comfort from *Aerojet*." (AB at 9, 20-21.) Wrong on every count.

First, the very portion of *State Fund* which PLAC quotes shows why our case is so distinguishable from *State Fund:* "`When a lawyer who [sic] receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged . . .'" (AB at 9, fn. 4, quoting 70 Cal. App. 4th at 656, emphasis added.) As noted above, and also discussed in great detail in our OBM, there was nothing in the unlabeled, unsigned document at issue here that would have

made it "clearly" privileged in any way.[6]

The other half of PLAC's equation is just as inaccurate. *Aerojet* did not lend "some comfort" to the proposition that nonprivileged information in an inadvertently-received document could be legitimately used to further the interests of the clients of the receiving attorney. Rather, it forcefully proclaimed that once the lawyer (DeVries) had innocently acquired the nonprivileged information in the document, it was his ethical duty to do so. The court held: "he cannot purge it from his mind. Indeed, his professional obligation demands that he utilize his knowledge . . . on his client's behalf." (18 Cal. App. 4th at 1006, emphasis added.)

Besides, the so-called "ethical high ground" that PLAC seeks to claim is one that would ignore, justify or even reward prospective perjury. We cannot accept that premise.

In fact, the crime-fraud exception recognizes that even truly privileged attorney-client information must give way when crime or fraud is involved. *A fortorari*, how could nonprivileged information be treated as more sacred? This is all the more so when that nonprivileged information is contained in a document which, itself, does not even appear to be privileged.

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[6] PLAC tries to escape from this truth by re-interpreting *State Fund*. This effort fails, as discussed in Section III, below.

Seeking to head off this obvious vulnerability in its argument, PLAC argues that any "claim that precluding exploitation impairs the search for truth also is without merit. The establishment of the privilege represents a policy decision that any claimed benefits of disclosure are outweighed by other considerations." (AB at 20.) Three obvious flaws exist.

- As noted, Johnson never contended that whatever privilege arguably existed had been waived; rather, following *Aerojet*, he simply used the nonprivileged information contained in Exhibit 52 in order to cross-examine the declared experts and to seek to unmask their apparent perjury.

- The crime-fraud exception reflects society's decision that the search for truth does trump even the most fundamental privilege, the attorney-client privilege.

- Use of the pejorative word "exploitation" to refer to the unmasking of perjury is inappropriate, offensive[7]-- and quite telling. Elsewhere PLAC extolls requiring attorneys to do "what intuitively appears to be the right and honorable thing" and it preaches about "a profession that views honorable behavior as a mandate not an option." (AB at 21, emphasis

[7] PLAC used forms of the word "exploit" a staggering 24 times in its 40 page brief. This is not a true amicus discussing important policy issues, but rather, a true partisan seeking to smear opposing counsel (Johnson) through highly-charged language.

added.) But in *Williamson v. Superior Court of Los Angeles* (1978) 21 Cal.3d. 829, in an analogous situation where truth might otherwise be compromised this Court issued a writ to compel disclosure of an expert's report:

> "The [work-product] rule predicated on fairness articulated in the decisions is a shield to prevent a litigant from taking undue advantage of his adversary's industry and effort, not a sword to be used to thwart justice . . . . (*Id*. at 838, emphasis added.)

We submit that *Williamson*, *Aerojet*, and the crime-fraud exception all argue that a lawyer's duty to the truth and to his or her client are every bit as important – if not more so – than what PLAC describes as the intuitively "honorable" course.

C. PLAC's brief often treats as interchangeable the concepts of "privilege" and "confidentiality."

Throughout its brief, PLAC often conflates what are two very distinct concepts, privilege and confidentiality. (See, e.g., AB at 12 ["'privileged or confidential materials will be produced . . . .'"; *id.* at 8 [section heading I.A] (emphasis added.) They are not interchangeable. Whereas all privileged documents were at one time also confidential, the opposite is certainly not true. There are many "confidential" documents which are not privileged. Our OBM pointed out that *State Fund* does not purport to protect merely "confidential" documents, but rather only

documents which are "privileged and confidential." (OBM at 27-28, quoting 70 Cal.App.4th at 656.)

III.

PLAC'S TRANSPARENT ATTEMPTS TO RE-WRITE *STATE FUND*'S HOLDING TO PRODUCE THE PRECISE RESULT WHICH PLAC PREFERS CANNOT BE ACCEPTED.

A. *State Fund* is an integrated opinion tackling an important policy issue, not a take-out menu.

Like its member, Mitsubishi, PLAC is confronted with a vexing dilemma. Without *State Fund*, there is no basis at all to sustain the disqualification ruling in this case. But, *State Fund*'s actual holding contains limitations that are equally fatal to the disqualification ruling.

PLAC's solution to this dilemma is quite straightforward – and quite partisan. It reads the *State Fund* opinion like a take-out menu, carefully selecting just those portions which appeal to it and disregarding anything in the opinion that it finds at all distasteful. The latter portions have their "threshold language refined" by PLAC. (See, e.g., AB at 34.)

For example, PLAC cannot stand the portion of the decision which states that its ethical standard only applies where the document in question

is "clearly" or "obviously" privileged. Indeed, it accuses us of "[s]eizing on some language" in reaching that conclusion. (AB at 31.)

Of course the language which we "seized upon" is the portion that immediately follows the court's statement of its holding.[8] Conversely, the language which PLAC offers as a purported rebuttal to our point ("may have inadvertently received") is taken not from the opinion, itself, but from the headnotes! (AB at 32, fn. 8, citing to 70 Cal.App.4th at 646.)

Likewise, PLAC contests our point that *State Fund*'s actual holding is limited to documents which are covered by the attorney-client privilege, not the work product privilege. (AB at 26-27.) In doing so, PLAC seizes on the court's passing phrase about "the obligation of an attorney receiving privileged documents . . . ." (AB 27.) But the context of that loose useage was made clear earlier in the opinion where the court stated:

"The conclusion we reach is fundamentally based on the importance which the attorney-client privilege holds in the jurisprudence of this state." (70

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[8] We quoted the following language:

> "Accordingly, we hold that the obligation of an attorney receiving privileged documents due to the inadvertence of another is as follows: 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 . . . ." (70 Cal.App.4th at 656, emphasis added.)

Cal.App.4th at 657, emphasis added.) Moreover, as discussed in our OBM, the court repeatedly used the works "attorney client" throughout its opinion. (OBM at 28 and footnote 16.) The lone exception is dicta, for the reasons we detailed. (*Ibid*.)

Implicitly recognizing that *State Fund*'s holding is limited to attorney-client privilege, PLAC contends that the "policy considerations underlying the decision warrant applying the decision to work product as well." (AB at 27-30.) With two key caveats we agree that public policy would support the extension of *State Fund*'s holding to work product documents as well as attorney-client documents. In fact, we offered a detailed proposal that this Court might consider in deciding whether, and how, to extend *State Fund* into the area of work product. (OBM 30-37.)

The two caveats should be are clear. First, any such extension would have to be <u>prospective only</u>. Obviously it would be improper to disqualify Johnson for violating a rule that was not yet adopted. *State Fund*, itself, recognized that any new ethical standard could only be applied prospectively. **(MW ADD CITE)**

Second, extending *State Fund* means extending the same balanced approach reflected in the opinion as written. (See OBM at 30.) It does not mean plucking out the portions that serve PLAC's narrow agenda and disregarding the rest.

B. PLAC's brief reinforces why, ordinarily, no protection should attach to documents which have not been clearly labeled as "privileged.

PLAC argues that requiring the party that generated a document to label it as "privileged" would somehow "frustrate the policy interests at stake." (AB 30.) Its two arguments makes no sense. Moreover, its strong insistence that labeling not be required suggests that PLAC is quite content to see consumer's attorneys (such as Johnson) caught up in disqualification disputes for reviewing documents which were unlabeled. This is the essence of the "gotcha" tactics that PLAC purports to condemn.

Our OBM detailed the reasons why labeling should ordinarily be required before an attorney can be disciplined for reading any document generated by the other side. (OBM 31-33.) Many of those reasons are reniforced in the discussion above about how PLAC's solution would create unfair traps for the unwary.

In response, PLAC's first argument is that it would be too burdensome to label all the privileged documents! (AB 30-31.) We do not even understand this argument. The essence of a privileged communication is that it was intended *ab initio* to remain confidential. If that original intent was not present, the document was never privileged. If that original

intent was present, there is simply no burden in writing or stamping the word "Privileged" at the top of the document. In addition, even if there were any "burden" in doing so, that relatively minuscule "burden" pales in comparison to the burdens imposed on the receiving attorney if labeling were not required. (See Section I, above.)

PLAC's second argument fares no better. PLAC argues that requiring labeling is allegedly unfair because "even a massive effort could not ensure that every privileged document was properly labeled." (AB at 31.) This argument blows up in PLAC's face. If the person who generated the document cannot always be counted on to label it, how much greater is the danger that the person who receives an unlabeled document will fail to recognize that it is allegedly privileged? Obviously the latter danger dwarfs the former. Thus, the fairness argument tips decisively against PLAC's claim that labeling should not be required.

There is another reason to reject PLAC's position that labeling is not essential. Elsewhere, PLAC argues for the following clear bright line test: "[s]o long as the disclosure is inadvertent, `waiver' is a non-issue." (AB 24.) But how is the recipient of a document supposed to know whether disclosure was intentional or inadvertent? Normally, the only indicia will be whether or not the document was labeled as "privileged." If not, the strong presumption should be that it was not produced inadvertently.

C. PLAC offers no principled reason to overrule *Aerojet*.

PLAC argues that this Court should overrule *Aerojet*. (AB 36.) It claims that allowing any use of even nonprivileged information would run counter to *State Fund*.

Not so. Indeed, *State Fund* had a full opportunity to distance itself from *Aerojet* or to reject its holding. As discussed in our OBM, it did no such thing. Although it distinguished *Aerojet* on certain grounds (helpful to the Ricos in our case) the *State Fund* Court cited the key holding of *Aerojet* with approval. (**MW ADD CITE)**

Moreover, PLAC argues that any use of information (even nonprivileged information) in a privileged document would be "utterly impractical" because the "implied assumption" would be that the recipient would first "study" the document; information learned that way could not be mentally "deleted." (AB 37.)

We disagree that such detailed "study" would be required. Our OBM discussed why some review of an unlabeled (but potentially privileged) document would be required to ascertain whether or not the document was privileged and whether any privilege may have been waived by sending copies to persons (other than the receiving attorney) who were not part of the legitimate privileged group, e.g., sharing the document with third

parties. (OBM at 33-35.) If during that process, nonprivileged information is gleaned, the attorney should be able to use that nonprivileged information for legitimate purposes, as was done in *Aerojet*.

In any event, as we have detailed eslewhere, if in that process the receiving attorney discovers evidence of possible perjury or other evidence that would trigger the crime-fraud exception, that discovery should fully justify using the document as was done in the present case.

D. PLAC's disqualification discussion adds nothing new.

PLAC's brief ends with a throwaway argument that disqualification should be a possible option if knowledge has been gained which would create "unfair prejudice." (AB at 40.) Our OBM discussed this subject in detail and demonstrated that there was no concrete showing here of any prejudice. (OB 51-59.) We cited numerous cases which establish that mere conclusory labels will not justify disqualification. (*Ibid*.)

PLAC has no real response to that showing. Thus, there is nothing else to say.

CONCLUSION

Nothing in PLAC's amicus brief should change what the result in this case should be. Nothing therein alters, or undercuts, the analysis of the controlling law, facts, and equities which our OBM offered.

We therefore respectfully submit that, for all the reasons set forth in our OBM and for the additional reasons amplified herein, the disqualification order entered in this case should be reversed in its entirety, including the portions precluding use of Exhibit 52 to impeach Mitsubishi's experts. We also request that plaintiffs be awarded their appellate costs.

Dated: Respectfully submitted,

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CERTIFICATE OF WORD COUNT

In compliance with California Rules of Court, Rule 14(c)(1), I certify that the text of Plaintiffs' and Appellants' Response to Amicus Brief of Product Liability Advisory Counsel, Inc. contains words, including footnotes, as determined by the word count function of WordPerfect, Version 11, the program used to generate this brief.

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