

**No. S123808**

**In the Supreme Court of the  
State of California**

Zerlene Rico, by and through her Guardian *ad litem*, Fernando Rico; Estate of Denise Rico, by and through its Special Administrator, Fernando Rico; Fernando Rico, individually; Silvia Rico; Michael O. Bassi, and Lenette M. Abassi,

Appellants,

v.

Mitsubishi Motors Corporation; Mitsubishi Motor Sales of America, Inc.,

Respondents.

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Court of Appeal Case No. E033616  
San Bernardino County Superior Court Case No. RCV39233  
Honorable Ben Kayashima

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**Respondents' Answering Brief on the Merits  
[Public Redacted Version]**

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## Introduction

Secretary of State Henry Stimson once famously said, “Gentlemen do not read each other’s mail.” See <http://www.bartleby.com/73/1531.html>. Here, the Ricos’ attorney, Raymond Johnson, had a quite different view. Under disputed circumstances, he obtained defense attorney James Yukevich’s work product notes of a meeting with Mitsubishi’s experts and others defending the case. Johnson was “stunned” to see the document and immediately knew Yukevich did not mean for him to have it. Yukevich did not know that Johnson had obtained the notes, believing that the single copy he had printed remained in his possession.

Rather than following Secretary Stimson’s admonition and telling Mr. Yukevich he had the document and returning it to him, Johnson sought to exploit the notes. He studied them intensely, distributed them to co-counsel and his experts, prepared for depositions of Mitsubishi experts using the notes, and directed his expert to undertake new testing. Once Yukevich discovered that Johnson had obtained the notes, Mitsubishi moved to disqualify Johnson, his co-counsel, and his experts. Following a hearing, the trial court entered a disqualification order and the court of appeal affirmed. This court should do likewise.

Johnson did not research the law before deciding to exploit the notes. Had he done so, he would have found a 1999 court of appeal case admonishing lawyers that whenever they “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.” *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 657. Such a test has the salutary effect of protecting privileges by encouraging communication and

informal resolution, while reserving the ability of either side to seek judicial intervention if necessary. Here, Johnson preferred self-help.

While the Ricos raise a host of arguments in an attempt to avoid disqualification, none has merit.

### **Statement of the Facts**

#### **A. Following an accident, Zerlene Rico and others sue Mitsubishi for product liability**

Following a rollover accident in which Denise Rico was killed and three other family members were injured, Zerlene Rico and others sued Mitsubishi Motors Corporation, Mitsubishi Motor Sales of America, Inc., California Department of Transportation, Lenette Rico, and Michael Abbasi for damages. Plaintiffs' claims against Mitsubishi were based on a variety of theories including strict products liability. [AA 2-35.] Michael Abbasi and Lenette Rico-Abbasi, defendants in Zerlene Rico's suit along with Mitsubishi, filed their own complaint against the two Mitsubishi entities as well. [AA 40-86.]

#### **B. Mitsubishi's lawyers meet with their experts and others to discuss the case; Mitsubishi lawyer Yukevich directs a Mitsubishi case manager to take notes, which Yukevich edits and keeps solely for himself**

On August 28, 2002, as the case was nearing trial, two of Mitsubishi's trial lawyers, James Yukevich and Alexander Calfo, held a meeting—known as a legal engineering conference or “LEC”—with its disclosed experts and others assisting in the defense. The purpose of the LEC was to discuss litigation strategy and case vulnerabilities. [AA 427.] One of the attendees was Jerry Rowley, a Mitsubishi case manager employed in Mitsubishi's legal department. [RT 63-64 (11/12/02).] Rowley

had been assisting Yukevich on the Rico case since it was filed three years earlier. [RT 65 (11/12/02).]

Before the meeting got started, Yukevich directed Rowley to take notes on Yukevich's new laptop, explaining to Rowley what he wanted Rowley to take down. [RT 13-15, 50-51, 66 (11/12/02).] The trial court found that Rowley also had an understanding what Yukevich needed based on their history of working together and that Rowley was acting as Yukevich's paralegal in the meeting. [AA 421, ¶ 6; AA 422, ¶ 14.] Rowley was not intending to make a verbatim transcript of what occurred but to take down the highlights. [RT 67 (11/12/02).] Though Rowley did most of the typing, at breaks during the meeting—which lasted nearly six hours—and immediately after, Yukevich personally edited the document on-screen to make corrections, add his thoughts, and the like. [RT 15 (11/12/02); RT 56-58 (11/26/02).]

The notes were for the singular purpose of helping Yukevich defend the case. [RT 55-56 (11/26/02).] He never intended to give a copy of the document to anyone—experts included. [RT 58 (11/26/02).] To that end, Yukevich printed for himself one copy—and one copy only—of this 12-page document. [RT 15 (11/12/02); Ex. 52.] After printing it, he added some handwritten notes. [RT 19.] What happened to Yukevich's sole copy of the document is why the parties are before this court.

**C. Plaintiffs' attorney, Raymond Johnson, obtains a copy of Yukevich's privileged notes under disputed circumstances at an expert's deposition**

About ten days after the LEC, on September 9, 2002, Yukevich took the deposition of one of plaintiffs' expert witnesses, Anthony Sances. [RT 15-16 (11/12/02).] The deposition was to take place at the office of plaintiffs' attorney Raymond Johnson. [RT 16 (11/12/02).] Yukevich

arrived at the appointed hour, but neither Sances nor Johnson was there. [RT 4-5 (11/13/02).]

While Yukevich was waiting for Johnson and Sances to arrive, he took his briefcase into the conference room, set up his computer, and began to wait. [RT 18 (11/12/02); RT 89 (11/13/02).] The notes from the LEC meeting either remained in his briefcase or in a folder on the table. [RT 18, 28 (11/12/02); RT 16, 18 (11/26/02).] Darrin Flagg (a lawyer for co-defendant CalTrans), Jack Mattingly (counsel for the Abbasi plaintiffs), and Karen Kay (the court reporter), were cooling their heels as well. [RT 17 (11/12/02); RT 88 (11/13/02).]

After he had been waiting about two hours, Yukevich left the conference room. [RT 17 (11/12/02).] When he returned, he found Flagg and Kay in a waiting room outside the conference room. [RT 17.] The conference room door was closed; Flagg and Kay explained that they had been kicked out because plaintiffs' attorneys Johnson, Mattingly, and Johnson's associate, Robert Balbuena, and the expert witness, Sances, were in the conference room "doing something." [RT 17 (11/17/02).] The plaintiffs' lawyers and Sances had already been in the conference room about five-to-ten minutes by the time Yukevich found Flagg and Kay in the waiting room. [RT 15 (1/13/02).] Plaintiffs' attorneys admittedly made no effort to find Yukevich to allow him to remove his briefcase, files, and computer before they excluded him from the conference room. [RT 14 (11/13/02); RT 106 (11/19/02).]

Yukevich waited about five more minutes, but became concerned because his materials were in the room and he had never before been locked out of a conference room. [RT 18 (11/12/02).] He knocked on the door, and with the door still closed, told them that "If you guys are going to stay in

there, I want my stuff.” [*Id.*] After a short delay, they opened the door, Yukevich took his materials, and left. [RT 18, 30 (11/12/02); RT 10, 92 (11/13/02); RT 13 (11/14/02).] Johnson, Balbuena, and Mattingly all denied rifling through Yukevich’s files while he was excluded from the conference room. [RT 7, 93 (11/13/02); RT 14 (11/14/02).]

Ultimately, the plaintiffs’ lawyers and their expert finished their conference and the deposition began. That session of the deposition did not finish until nearly 9:00 p.m. [RT 27 (11/14/02).] Yukevich did not know it, but when he left Johnson’s office that night, Johnson had the only printed version of Yukevich’s notes from the LEC meeting.

According to Johnson, he obtained the document from the court reporter, not by stealing it from Yukevich’s folder when Yukevich had been locked out of the conference room. Johnson testified that after Yukevich had left when the deposition was over, the court reporter continued to organize the exhibits used during the Sances deposition before packing up and leaving herself. According to Johnson, the court reporter came to him with the document that was Yukevich’s LEC notes, and said something to the effect that “‘Mr. Yukevich wants to make sure I leave with all the marked exhibits. I found this. Is it marked or is it one of the exhibits that were [sic] marked.’ Something like that.” [RT 18 (11/20/02 p.m.).] For her part, the court reporter did not recall having any such conversation with Johnson nor did she recall handing him a document. Moreover, she denied ever having seen the LEC notes Johnson claimed she handed him until much later, when she was presented with them at her own deposition once Mitsubishi filed its motion to disqualify Johnson and his experts for having improperly retained and used the LEC notes. [RT 42-44 (11/12/02).]

On the disputed issue of how Johnson had obtained the document, the trial court did not affirmatively find that Johnson had received it from the court reporter, but instead found that Mitsubishi did “not sustain [its] burden of showing that Mr. Johnson stole the document from [Yukevich’s] files . . . . Accordingly, this Court further finds that Mr. Johnson obtained possession of this document, Exhibit 52, inadvertently.” [AA 425, ¶ 19.]

**D. Johnson immediately recognizes the document’s importance and that he is not meant to have it; he resolves not to let Mitsubishi know he has it, and lies to the court reporter and a Mitsubishi lawyer**

Regardless how he obtained it, Johnson immediately recognized that he was not supposed to have the document and that it was important to the case. He never considered calling Yukevich to tell him he had inadvertently left it behind, but instead resolved not to let Mitsubishi or its lawyers know he had it, and he later lied to Calfo about how he had obtained it.

**1. Almost immediately, Johnson recognizes the document’s importance and that Yukevich left the document inadvertently**

Johnson testified that after the court reporter handed the document to him, he realized within one or two *minutes* that Yukevich had inadvertently left the document behind. [RT 43 (11/14/02); RT 21-24, 52 (11/20/02 p.m.).] Johnson testified that he was “stunned” that such a document would exist, be brought to the Sances deposition, and be left behind. [RT 43 (11/14/02); RT 25 (11/20/02 p.m.).]<sup>1</sup> He thought that the document was “truly unique in the world.” [RT 66-67 (11/14/02).] He recognized many of

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<sup>1</sup> Johnson testified that one of the reasons he was stunned was his claim that the document contradicted deposition testimony of one of Mitsubishi’s experts, Dennis Schneider. [RT 34 (11/14/02).] In fact, however, as Johnson later conceded, he had not yet taken Dr. Schneider’s deposition by this time. [RT 31-32 (11/20/02 p.m.).]

the initials on the document as Mitsubishi experts and lawyers and that the document reflected what had occurred at a meeting of Mitsubishi experts on August 28. [AA 191; RT 35 (11/14/02).] Though he told the court reporter that he would need to check his deposition notes to determine if the document was used during the Sances deposition, that was untrue. At the hearing, he conceded that he *knew* without looking at his notes that the document was not a marked deposition exhibit. [RT 38 (11/20/02 p.m.).] Though insisting that he thought the document was discoverable, Johnson did not explain why this conclusion permitted him to keep secret from Yukevich that he had the document and avoid the ordinary situation where a party *knows* what documents it has produced to the other side. [*Id.*]

## **2. Johnson decides to copy the document without telling the court reporter**

Within ten minutes of looking at the document, he decided to copy it because he realized he had to give the original back to the court reporter “because she handed it to me.” [RT 25-27, 36 (11/20/02 p.m.).] He did not tell the court reporter, however, of his plan to copy the document. [RT 24 (11/20/02 p.m.).] Unfortunately for Johnson, because the deposition had ended after regular work hours, no staff was available to make the copy. He couldn’t get his firm’s new copier to work, so—desperate for a copy—he made one on his secretary’s fax machine, which he knew how to work. [RT 59 (11/14/02); RT 37 (11/20/02 p.m.).] He made two copies and gave one to his co-counsel, Mattingly, who was still present. [RT 59 (11/14/02).] He then took the original back to the court reporter, telling her he didn’t *think* it was a marked exhibit. [RT 59-60 (11/14/02); RT 27-28 (11/20/02 p.m.).] Of course, he *knew* it was not. [RT 21-22 (11/20/02 p.m.).]

But the reporter did not leave with the document. After the reporter finished packing and left, Johnson returned to the conference room where

he saw the original on the conference room table. [RT 60 (11/14/02); RT 11-12 (11/21/02).] Johnson snapped it up. [RT 60-61 (11/14/02); RT 11-12 (11/21/02).] The fax copy he had made was blurry and Johnson was determined to “conquer” the photocopy machine so he could have good copies of the document. [RT 12 (11/21/02).] He got the manual for the photocopy machine, figured out how to work it, and “made two copies of it.” [*Id.*]

**3. Johnson studies the document that very night and leaves a note for his secretary to fax it the next day to two of his experts**

Though knowing that Yukevich had left the document inadvertently without intending Johnson to have it, before Johnson left the office that night, he studied the document about two hours. [RT 5 (11/26/02).] He left a note for his office assistant to fax it the next day to two of his experts, Sances and Bob Anderson. [RT 61 (11/14/02); RT 29 (11/20/02 p.m.).] He claimed to be familiar with the court of appeal’s opinion in *Aerojet-General Corp. v. Transport Indemn. Ins.* (1993) 18 Cal.App.4th 996, and testified that later in the evening, he pulled *Aerojet* off the shelf to review it. [RT 47-48 (11/14/02); RT 28-29 (11/20/02 p.m.).] He didn’t bother to see if there was any more recent case law bearing on his ethical responsibilities. [*Id.*]

**4. Johnson is determined not to let Yukevich know that he has, and intends to use, Yukevich’s private notes**

Johnson never considered calling Yukevich to tell him that he had the document and make arrangements to return it. [RT 41-42 (11/20/02 p.m.); RT 19 (11/21/02).] Instead, Johnson stashed the document in one of the file boxes his expert Sances had left behind. [RT 28 (11/14/02); RT 13 (11/21/02).]

The third session of Sances' deposition began a few days later on September 14, 2002. [RT 18 (11/21/02).] During the course of that session, Johnson recalled that he had stowed the original LEC notes in one of Sances' boxes and had not taken it out. [RT 18-19 (11/21/02).] Because Johnson did not want Yukevich to know that Johnson had the original LEC notes, Johnson was afraid to remove the document from the Sances' box—even during a break in the deposition. He explained at the hearing that he was afraid that Yukevich “might see me moving the document, and then [Yukevich] would ask to see the document, [Yukevich] would ask about it and it would destroy the impeachment value of the document.” [RT 19-21 (11/21/02).]<sup>2</sup>

Continuing his efforts to hide from Yukevich that he had Yukevich's document, even though Sances produced additional documents at this third session of his deposition, neither Johnson nor Sances disclosed to Yukevich that Johnson had faxed a copy of the LEC notes to Sances just a few days before. [RT 21 (11/12/02): RT 20 (11/21/02).] So, after completing Sances' deposition, Yukevich still did not know the integrity of his notes had been compromised.

**5. Johnson uses Yukevich's private notes to depose a Mitsubishi expert and lies to Mitsubishi's attorney about how he obtained the document**

Two days later, on September 16, Johnson took the deposition of Mitsubishi's accident reconstructionist, Geoffrey Germane. Yukevich was not present; his partner, Calfo, defended Germane. [RT 51 (11/12/02).] At the very end of the deposition, when Johnson knew Germane was in a rush

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<sup>2</sup> Throughout the hearing, Johnson repeatedly insisted that he had no obligation to disclose that he had the document because it would destroy its impeachment value. [*E.g.*, RT 41-42 (11/20/02 p.m.); RT 74-75 (11/25/02).]

to catch an airplane, Johnson questioned Germane using a copy of the LEC notes. [RT 51-52 (11/12/02); RT 42, 50 (11/25/02); Ex. 66 at 372.] Johnson did not give a copy to Calfo, who was reduced to looking over Germane's shoulder to try to see what document Johnson was using to question Germane. [RT 52, 61 (11/12/02); RT 39, 42-43 (11/25/02).]

Calfo did not recognize the document, so he asked Johnson where he had obtained it. [RT 52 (11/12/02).] At the disqualification hearing, Johnson conceded he did not give Calfo the "full story." [RT 48 (11/25/02).] Instead of the truth, Johnson told Calfo that the document was put into Sances' file—without telling Calfo that *he* had been the one to put it into Sances' file. Repeating his misstatement, Johnson later stated at the deposition that he was "trying to establish foundation for this thing *that was in the file, left in the file.*" [AA 233; RT 52 (11/12/02); RT 44, 48-49 (11/25/02); Ex. 66 at 376 (emphasis added).]<sup>3</sup> Calfo continued to object. [AA 235-44; RT 43 (11/25/02); Ex. 66 at 376-85.] Only after the deposition had concluded did Johnson give a copy to Calfo. Looking at it after Johnson had left, Calfo recognized that it appeared to be notes from a legal engineering conference, with Yukevich's handwriting on the document as well. [RT 52, 61 (11/12/02).] Because Calfo did not understand how the notes had been created, he called Yukevich immediately. [RT 54 (11/12/02).]

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<sup>3</sup> In contrast to his testimony at the hearing, Johnson did not tell Calfo that the court reporter at the earlier Sances' deposition had given it to him. [RT 52 (11/12/02); RT 49 (11/25/02).]

**E. Immediately upon discovering Johnson has Yukevich's private notes, Mitsubishi demands that Johnson return the original and all copies as well as demanding other relief; Johnson adamantly refuses**

At the time, Yukevich was heading home from San Francisco. [RT 19 (11/12/02).] Based on Calfo's description, Yukevich realized what document Johnson had used at Germane's deposition and he pulled it up on his laptop to confirm. [RT 19 (11/12/02).] When he arrived at LAX, Yukevich went straight to his office. [*Id.*]

Once Yukevich arrived at his office that evening, he and Calfo prepared a letter to Johnson demanding that he return all copies as well as any notes or summaries and that Johnson identify all individuals with whom he had shared the notes. [RT 62 (11/12/02); Ex. 60.] The letter also gave notice that Mitsubishi would be moving to disqualify Johnson, Sances, and any other experts with whom Johnson had shared the notes. [Ex. 60.] They faxed it to Johnson the next day, September 17. [RT 62 (11/12/02); Ex. 60.]

Johnson responded that same day with a letter claiming that the notes were in fact a "transcript of the meeting among your C.C.P. § 2034 experts on August 28, 2002" and that the document was "in no way, no how privileged." [RT 98-99 (11/19/02); Ex. 61.] Asserting the LEC conference had been tape recorded, Johnson additionally demanded "[t]he full tape recording of the meeting." [Ex. 61.]<sup>4</sup> These assertions were contrary to Johnson's testimony at the hearing where he testified that he knew the first evening he had the document that it was *not* a transcript.

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<sup>4</sup> On direct examination, Johnson had testified that a different letter, not Exhibit 61, was his response letter. [RT 71-74 (11/19/02); Ex. 1.] On cross-examination, however, he recanted that testimony. [RT 98-99 (11/19/02).]

[RT 50, 82 (11/18/02).] Though Johnson demanded an apology, conspicuously absent from Johnson's letter was any explanation how he obtained the notes. [Ex. 61.] And after receiving the ex parte notice, Johnson still tried to take advantage of the document by attempting to use it at the deposition of expert Dennis Schneider on September 18. [RT 55-56 (11/25/02).]

Other facts will be added to the argument sections where appropriate.

### **Statement of the Case**

On September 18, 2002, just two days after learning that Johnson had Yukevich's notes of the LEC meeting, Mitsubishi moved ex parte to disqualify Johnson and plaintiffs' experts and for other relief. [AA 137.] Plaintiffs opposed. [AA 175.] The trial court decided to set a briefing schedule and hold an evidentiary hearing where it could hear live witnesses. [RT 2 (9/19/02).] The court did order Johnson, pending the hearing, to get back all copies of the LEC notes, not disseminate any further copies, and advise anyone to whom he had given a copy not to discuss it with anyone. [RT 13-14 (9/19/02).]

The court heard testimony over ten days principally on the issue whether Johnson had received the document inadvertently or had taken it from Yukevich's briefcase. After taking the matter under submission, the court issued a statement of decision. [AA 419-37.] The court's principal rulings were:

- Johnson obtained the LEC notes inadvertently. [AA 425.]
- The LEC notes constituted matter protected by both the attorney-client privilege and the work product doctrine. [AA 426.]

- Mitsubishi did not waive the attorney-client privilege.

[AA 426.]

- Johnson breached his ethical duties by intensely studying the LEC notes, making “surreptitious” use of them, and not notifying Yukevich that he had the notes. [AA 434-35.]

- Plaintiffs’ attorneys Johnson, Balbuena, and Mattingly and experts Sances and Anderson were disqualified from further participation in the case. [AA 437.]

- Two depositions Johnson took with the aid of the LEC notes were stricken, but plaintiffs’ new counsel were given leave to retake those depositions.

- Johnson, Mattingly, and Balbuena were “specifically ordered to keep the contents of the documents confidential and are not to reveal any information regarding the document to plaintiffs and their new attorneys and to return any copies of the document that still remain in their possession.” [AA 437.]

Though finding the document protected solely by the work product doctrine and not the attorney-client privilege as well, the court of appeal, in a (formerly) published opinion, affirmed. This court should affirm the judgment of the court of appeal.

## Legal Discussion

### I

#### **One Who Inadvertently Receives Privileged Documents Must Respect the Privilege, Not Subvert It**

##### **A. Introduction**

This is a somewhat unusual inadvertent disclosure case, requiring that the legal issues be viewed through the prism of these unusual facts.

In the typical inadvertent disclosure case, the receiving party has a colorable basis for assuming it is entitled to the documents. That is because normally the document claimed to be protected has been inadvertently included within a much larger document production containing materials to which the receiving party is indisputably entitled to have. *See generally*, Ken M. Zeidner, Note, *Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance* (2001) 22 Cardozo L. Rev. 1315, 1317 (“In the typical scenario, a party inadvertently discloses a privileged document . . . during discovery . . . . The inadvertent disclosure of privileged documents has become more common in recent years as cases become larger and more complex and discovery rules become more liberal.”).

Here, Johnson did not receive the LEC notes in a discovery response with materials—voluminous or scanty—he was entitled to receive. Indeed, he did not receive the notes by *any* intentional delivery. The trial court found that Yukevich inadvertently left them behind at the Sances deposition. And Johnson realized within moments of looking at the notes that they were Yukevich’s and that Yukevich had not intended to leave them behind.

**B. If a lawyer has a reasonable suspicion he or she has received privileged or confidential documents inadvertently, he or she should be required to notify the opposing lawyer**

**1. This court should adopt *State Fund's* rule and clarify that it applies whenever a lawyer has a reasonable suspicion he or she has inadvertently received privileged or confidential documents**

**a. The *State Fund* holding**

In *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, State Fund sought sanctions against an opposing party and its lawyer when the lawyer distributed to others and refused to return to State Fund privileged materials State Fund had inadvertently produced. The trial court imposed sanctions on defendant's counsel. Though stating that it "agree[d] in principle with the trial court," the court of appeal reversed the sanctions award because "there is no established California law governing what the obligation of a lawyer is upon receiving obviously privileged materials through the inadvertence of another." 70 Cal.App.4th at 648. The court used its opinion to fill this gap and to "declare[] the standard governing the conduct of California lawyers confronted by the dilemma presented by this appeal." *Id.* at 657.

*State Fund* stated its standard as follows: 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." *Id.* at 656 (emphasis added). At that point, the court observed, the parties could either work out

the issue through agreement or “resort to the court for guidance . . . .” *Id.* at 656-57. The court emphasized, however, 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 657 (emphasis added).

**b. Indisputable evidence shows that Johnson flouted *State Fund*'s rule**

The *State Fund* rule could be read to state different tests. At one point, the court refers to documents that are “obviously” privileged or “clearly” confidential and privileged, while at other points it tells lawyers to stop reading if the materials “appear” to be privileged and requires the lawyer to notify the other side if he or she “may have” inadvertently provided privileged materials. Not having read *State Fund* until after he studied and disseminated the document, Johnson cannot claim to have been led astray by any inconsistencies in its language.

Even under the strictest reading of the *State Fund* rule, however, it is indisputable that Johnson flouted, rather than obeyed, his obligations. The court of appeal described the document as “plainly privileged.” [Typed Op’n at 26.] The trial court also considered the document to be plainly privileged. The trial court found as a matter of fact that Johnson knew almost immediately upon looking at the document that it was from a meeting of Mitsubishi’s counsel and experts, that Yukevich had inadvertently left it behind, and that Johnson was not meant to have it. [AA 434-35.]

Consistent with *State Fund*, the trial court stated that while Johnson was entitled to review the document “so as to make that identification, once he understood the nature of the pages, his obligation was to stop reviewing

the document and inform Mr. Yukevich of his find.” [AA 434.] Johnson did just the opposite. Contrary to his obligation, Johnson readily admitted that he never called Yukevich to advise him that he had Yukevich’s private notes, instead repeating more than once that he wanted to keep his “find” secret to enhance its impeachment value. [RT 41-42 (11/20/02 p.m.); RT 19-21 (11/21/02); RT 74-75 (11/25/02).]

Put simply, Johnson flouted *State Fund’s* rule and in so doing, acted at his peril.

**c. Appropriate clarification to the *State Fund* rule would promote desired conduct by lawyers; the Ricos’ reading of *Aerojet* promotes subterfuge and dishonesty**

Given the somewhat inconsistent language in *State Fund’s* test, this court ought to take the opportunity to clarify the standard. In so doing, this court should hold that the duty to notify arises whenever a lawyer has a reasonable suspicion that he or she has inadvertently received privileged or confidential documents. Such an approach would have several salutary effects.

Clarifying the rule in this way would resolve an ambiguity in the *State Fund* opinion. Even though the opinion uses the words “clearly” and “obviously” at times, the opinion concludes by requiring the receiving party to notify the party entitled to the privilege “*whenever* a lawyer ascertains that he or she *may have* privileged attorney-client material.” *Id.* at 657 (emphasis added). This latter statement, Mitsubishi submits, is a proper statement of the rule.

More important, clarifying that the standard requires a lawyer who is on “reasonable inquiry” or who has “reason to suspect” a document may be

privileged to notify the other side of his or her receipt of the document has several benefits. First, it would encourage open conduct and judicial intervention, rather than gamesmanship and subterfuge over what is “plainly” privileged, a defense the Ricos assert here. Second, such a standard protects, rather than undermines, privileges. Third, a reasonableness standard is common throughout the law and can be easily applied. Fourth, it would reduce or eliminate satellite litigation such as occurred here. In most cases, it would take no more than a simple phone call between lawyers to confirm whether the document was properly received. In those cases where the parties cannot agree, the issue can then be presented to a court, while the privilege is at least temporarily maintained. These benefits point up the shortcomings of *Aerojet*.

*Aerojet* and *State Fund*, Mitsubishi submits, approach the problem of inadvertent disclosure from fundamentally different perspectives. *Aerojet* adopts the view that once the lawyer “acquired the information in a manner that was not due to his own fault or wrongdoing . . . his professional obligation demands that he utilize his knowledge about the case on his client’s behalf.” 18 Cal.App.4th at 1006. While arguably the *Aerojet* court’s statement is predicated on the assumption that “the underlying information . . . is not privileged” (*id.* at 1005; *see State Fund*, 70 Cal.App.4th at 654-55), the *Aerojet* court does state that its rule applies when “an attorney, who, without misconduct or fault, obtains or learns of a *confidential* communication.” *Id.* at 1002.<sup>5</sup> *Aerojet* thus tilts the balance decidedly—if unintentionally—in favor of abrogating privileges.

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<sup>5</sup> Adding to the confusion about whether its rule would apply to privileged information, the *Aerojet* court also said that, “whether the existence and identity of a witness *or other nonprivileged information* is revealed through formal discovery or inadvertence, the end result is the same: the opposing party is entitled to the use of that witness or

*State Fund*, on the other hand, encourages communication and judicial resolution if necessary, not self-help. That court imposes a duty on a lawyer who “ascertains that he or she *may have* privileged attorney-client material that was inadvertently provided by another [to] notify the party entitled to the privilege of that fact.” 70 Cal.App.4th at 657. At that point, the parties “may then proceed to resolve the situation by agreement or may resort to the court for guidance . . . .” *Id.* at 656-57. This is the general approach taken by the ABA in its two formal opinions on the subject. ABA Comm. on Ethics & Prof’l Responsibility, Formal Ops. 92-368 (1992), 94-382 (1994).<sup>6</sup> *See generally* California Law Revision Comm’n Study #K-301 (Staff Draft Recommendation November 2004), “Waiver of Privilege by Disclosure” (“Report K-301”) (discussing inadvertent disclosure generally and proposing standard for finding waiver).<sup>7</sup>

The *Aerojet* rule encourages the type of improper conduct found here. Rather than notifying Yukevich that he had inadvertently left his notes behind, and trying to resolve the situation in an open manner, Johnson took it upon himself as prosecutor, judge, and jury to determine that he could exploit the notes in any secret way he chose—with no thought of protecting privileges but instead abrogating them. He embarked on a disinformation campaign and resolved to hide his secret “find” from Mitsubishi even though he *knew* Yukevich did not intend for him to have the notes. A rule that a lawyer is duty-bound to use privileged materials inadvertently

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information. This fundamental concept was lost in the skirmish below.” *Id.* at 1004 (emphasis added).

<sup>6</sup> The two ABA opinions apply not only to privileged materials but also to materials that are “otherwise confidential.”

<sup>7</sup> While the report is dated November 2004, it is accompanied by a staff memorandum dated October 14, 2004. Both are available here: <http://www.clrc.ca.gov/pub/2004/MM04-54.pdf>.

received thus encourages the kind of subterfuge and lying Johnson did here. This court should discourage such conduct, not encourage it. “While all may be fair in war, such is not the case in the judicial arena—the courtroom is not a battlefield.” *Gomez v. Vernon* (9th Cir. 2001) 255 F.3d 1118, 1122.<sup>8</sup>

**2. *Aerojet* should be limited to its facts and Johnson’s effort to bring himself within *Aerojet* fails**

*Aerojet* should not control here. In that case, a privileged document was inadvertently produced in the context of a document-intensive case; the receiving lawyer had no reason to suspect he was not entitled to the document; and the only pertinent information embedded in the privileged memorandum was the identity of a witness, an objective fact that was not privileged.

In *Aerojet*, the receiving lawyer received a packet of documents and found within them an unmarked memo labeled “To: Aerojet File [¶] From: RAC.” 18 Cal.App.4th at 1003. That case was “complex” and involved “hundreds of insurance policies and parties, numerous law firms, scores of individual attorneys and a great number of documents. The files were voluminous—the attorneys were swamped with pleadings, correspondence, discovery, and other documents.” *Id.* There is no indication in the opinion that the receiving attorney knew who “RAC” was, though at some point the receiving lawyer learned that the document “had originated from the Bronson [law] firm.” *Id.* at 1000. The *only* matter of interest to the

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<sup>8</sup> The rule stated by the court of appeal here did not, as the Ricos assert, require Johnson to “instantly” stop reading. [OBM at 33.] The court simply repeated *State Fund’s* rule that a party must “refrain from examining the materials any more than is necessary to determine they are privileged . . . .” [Typed Op’n at 24, 26.]

receiving lawyer in the document was the identity of a witness—which is nonprivileged—named in the memo. *Id.* at 1000, 1005.<sup>9</sup>

The receiving lawyer noticed and took the witness’s deposition. *Id.* About a year later, the Bronson firm learned that the receiving lawyer had a copy of the memo. It then moved for sanctions. The trial court sanctioned the receiving lawyer based his failure to *timely* advise opposing counsel of his receipt of the memo. *Id.* at 1001. The court of appeal reversed.

It held that since the memorandum was written on plain paper and identified the sender solely as “RAC,” the receiving lawyer could not be faulted for examining it. *Id.* at 1003. Second, the court pointed out that the insurance company had not been damaged by any claimed disclosure of its litigation strategy because the motion only sought limited sanctions without specifying any such harm. *Id.* at 1003-04. The court pointed out that the underlying information that the receiving lawyer used—the identity of the witness—was not privileged.

In summarizing its conclusion that sanctions were inappropriate, the court then stated that, “[o]nce he had acquired the information in a manner that was not due to his own wrongdoing, he cannot purge it from his mind [and] his professional obligation demands that he utilize knowledge about the case on his client’s behalf.” *Id.* at 1006.

Here, Johnson claims that “[t]he same basic factors [relied on in *Aerojet*] are present here and should have been held to govern Johnson’s

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<sup>9</sup> Thus, *Aerojet* stands in sharp contrast to *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, where the court found that a list of witnesses *interviewed* by counsel was protected because it showed counsel’s thoughts in determining the importance of witnesses.

conduct, especially since he read and relied upon *Aerojet* in deciding what to do.” [Opening Brief on the Merits (“OBM”) at 16.] Nonsense.

First, unlike the receiving lawyer in *Aerojet*, Johnson *knew* he was not entitled to the document. Johnson realized immediately upon looking at the document that Yukevich had left the document inadvertently. [RT 47 (11/14/02).]

Second, Johnson did *not* read *Aerojet* in deciding what to do. *Before* he pulled *Aerojet* off the shelf, Johnson had already studied the document, copied it on his fax machine, snatched the original off the table after the court reporter had left, made more copies once he figured out how to work the new photocopy machine, gave a copy to counsel for the co-plaintiffs, Mattingly, and left instructions for his office assistant to fax it to two experts, Sances and Bob Anderson. [RT 47-48, 59-61 (11/14/02).] Only then did he claim to have picked up a copy of *Aerojet* to read. [RT 47-48 (11/14/02); RT 28-29 (11/20/02 p.m.).]<sup>10</sup>

Third, at the time the lawyer in *Aerojet* received the documents, neither *Aerojet* nor *State Fund* was available for guidance. By contrast, when Johnson pocketed Yukevich’s LEC notes, *Aerojet* was by then nine years old. Johnson did not shepardize it [RT 43-44 (11/20/02 p.m.)], which would have led him to *State Fund* where he would have found its rule explaining “the obligation of an attorney receiving privileged documents due to the inadvertence of another.” 70 Cal.App.4th at 656. Indeed, it is undisputed that in the nearly ten-day period between Johnson’s obtaining the LEC notes and his receipt of Yukevich’s letter demanding it back, neither Johnson nor anyone in his office did any legal research of any kind

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<sup>10</sup> He claimed to have had knowledge of *Aerojet* because he has been “an aviation lawyer for two decades.” [RT 47 (11/14/02).]

about the proper way of handling the document beyond his late night perusal of *Aerojet*. [RT 29-30, 58, 60-64 (11/13/02); RT 48, 59 (11/14/02).]

Fourth, the facts of *Aerojet* are strikingly different than the facts here. There is no indication in the opinion that the receiving attorney in that complex case involving voluminous documents and many law firms knew who “RAC” was or even whether he or she was a lawyer. Here, by contrast, Johnson is not free from fault. Johnson did not receive the LEC notes in a discovery response with other materials and he immediately knew that the document was Yukevich’s and that Yukevich had left the LEC notes behind by mistake. [RT 43 (11/14/02); RT 21-24, 52 (11/20/02 p.m.).] Johnson’s decision to study the document despite his immediate knowledge it was not meant for his eyes, completely undercuts the Ricos’ argument that the absence of an explicit label that the document was work product somehow exonerates Johnson. As the trial court found, “The lack of notation or warning of privilege on the face of the document does not change the finding of protection here. Mr. Johnson *knew* that Mr. Yukevich had not intended to produce to him the document . . . .” [AA 434 (emphasis added).]<sup>11</sup>

Further, in *Aerojet* the *only* matter of interest to the receiving lawyer in the document was the identity of a witness, which is nonprivileged. *Id.* at 1000, 1005. Here, by contrast, as shown in Part II.A, below, the *entire* document is privileged because it represents, in the words of the trial court, “not only the strategy, but also the attorney’s opinion as to the important issues in the case” and that “the attorney’s impressions of the case were the filter through which all the discussions at the conference were passed

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<sup>11</sup> Imposing a “warning” or “labeling” requirement would impose a tremendous burden on counsel, requiring every note, draft, or scrap of paper to be labeled to avoid the gamesmanship the Ricos seek to promote.

through on the way to the page.” [AA 429.] The document—which the trial court found to be absolute work product [AA 426.]—gave Johnson a roadmap for his cross-examination of defense witnesses. As the court of appeal observed, “Johnson’s testimony and his copy of Yukevich’s notes indicate that he meticulously examined the document noting potential inconsistencies and weaknesses in defendant’s case. Johnson consulted with plaintiff’s experts on the document’s technical content. Johnson then used the document to prepare questions and impeach the defense experts during their depositions.” [Typed Op’n at 27.]

**C. *State Fund* fully answers the Ricos’ argument that disclosure could be used improperly for tactical purposes**

At two points in their brief, the Ricos argue that unless a document is “obviously” or “plainly” privileged, there is a danger to the “unsuspecting, receiving attorney” because “an opposing party could seek to gain a tactical advantage by intentionally sending [or leaving] materials intended to secure the disqualification of an opponent.” [OBM at 23; *see also* OBM at 33.]

*State Fund* fully answers this concern. Because of this very concern, the *State Fund* court explained that the party seeking the document’s return must “persuasively demonstrate inadvertence.” *State Fund*, 70 Cal.App.4th at 657. Without doubt that is the case here. By no means is Johnson an “unsuspecting, receiving attorney.” Johnson was stunned to see the document, knew it was not meant for his eyes, and knew within minutes Yukevich had inadvertently left it behind. Instead of calling Yukevich to arrange for its safe return, Johnson decided instead to exploit the document. Johnson has no one to blame but himself for the fix he created.

## II

### **None of the Ricos' Arguments to Justify Johnson's Use of the LEC Notes Has Merit**

The Ricos make a number of arguments to try to justify Johnson's use of the LEC notes. None has merit.

#### **A. Contrary to the Ricos' argument, Yukevich's private notes were absolute work product**

A fundamental flaw that permeates the opening brief is its assertion that Johnson did nothing wrong because was “duty-bound” under “*Aerojet's* clear holding” to use “*any nonprivileged material* in the document.” [OBM at 16 (emphasis added).] The underlying premise that there is nonprivileged material in the LEC is false. There is *no* nonprivileged material in the LEC notes. The trial court found that the LEC notes represent Yukevich's absolute work product and the court of appeal affirmed. This conclusion is correct.

The Legislature has declared that it “is the policy of the state to: (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases . . . .” Code Civ. Proc. § 2018(a). To that end, “[a]ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.” Code Civ. Proc. § 2018(c). Yukevich's LEC notes are absolute work product protected from discovery—plain and simple.

To begin with, work product of an attorney includes “[m]aterial of a derivative or interpretative nature obtained or produced in preparation for trial. Such material includes . . . findings, opinions, or reports of experts.”

*National Steel Prods. Co. v. Superior Court* (1985) 164 Cal.App.3d 476, 487. While the Ricos argue that either the writing as a whole, or parts of it, are not protected by the work product doctrine (or is only qualified work product) because the writing allegedly reflects statements of experts, they are wrong for three reasons.

First, it is undisputed that the 12-page document is not a transcript of everything that was said at the six hour meeting and that Johnson knew it.<sup>12</sup> If it were, it would be hundreds of pages long. Indeed, the trial court found that—as directed by Yukevich—Rowley intended only to “summarize[] the important points” and that Yukevich would give Rowley additional instructions and “add his own comments to the document.” [AA 421, ¶¶ 7, 8; *see* RT 67 (11/12/02).]

Second, given that it is not a transcript, but instead a subjective assessment of what was important to take down, the work product nature of the document comes into sharper focus. The document is analogous to the list of witnesses found protected in *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214. In that case, the court of appeal held that a plaintiff could not be compelled to specify which witnesses her counsel had interviewed. The court ruled that such an order would necessarily reveal counsel’s thought processes about the case:

Compelled production of a list of potential witnesses interviewed by opposing counsel would necessarily reflect counsel’s evaluation of the case by revealing which witnesses or

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<sup>12</sup> Though insisting at the hearing that he initially thought he had a transcript of a meeting between the Mitsubishi lawyers and expert witnesses, Johnson also conceded that he knew the very first evening he obtained the document that it was *not* a transcript. [RT 79-81 (11/13/02); RT 34-35 (11/14/02); RT 50 (11/19/02).]

persons . . . counsel deemed important enough to interview.

47 Cal.App.4th at 217. So too, here, the LEC notes “necessarily reflect counsel’s evaluation” by revealing which statements counsel thought important enough to take down. This is pure work product.

Third, this court cannot sever, as the Ricos would have it do, the statements attributed to the speakers the Ricos assert are Mitsubishi experts and hold them to be discoverable. Even if the statements had been recorded as opposed to being selectively filtered through a professional’s judgment and then edited, that is insufficient to strip them of work product protection. As the court of appeal has held in affirming work product protection, “[The investigator’s] comments were so intertwined with [the witness’s] recorded statement that all portions of the notes should be held protected by the *absolute* portion of the attorney’s work-product privilege.” *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 648 (emphasis in original).

Here, the trial court found that Rowley and Yukevich took down certain points they considered to be important; Yukevich edited the document at the end of the day; and that “its very existence is owed to the lawyer’s thought process.” [AA 429; *see also* AA 421-22.] The court also found that the notes are the result of “selective discrimination” and that “[t]he attorney’s impressions of the case were the filter through which all the discussions at the conference were passed through on the way to the page.” [AA 429.] Based on these (and other findings) the trial court applied *Rodriguez* to hold that “the notes are covered by the absolute work product, as the choices in the statements to record show the thought processes and are too intertwined with the document.” [AA 430.] Nor is this result suspect because Rowley, a nonlawyer, played a role in the notes’ preparation. *E.g.*,

*Insurance Co. of North Am. v. Superior Court* (1980) 108 Cal.App.3d 758, 771 (paralegal notes not discoverable); *Rodriquez, supra*, 87 Cal.App.3d at 647-48 (investigator's notes protected by work product).

The Ricos' argument otherwise [OBM at 40-42.] is nothing more than a disguised attack on the trial court's findings. But those findings are supported by substantial evidence. In determining whether substantial evidence supports a judgment, a reviewing court resolves all conflicts in the evidence in favor of the prevailing party and indulges in all legitimate inferences in favor of that party. *Associated Builders & Contractors, Inc. v. San Francisco Airports Comm'n* (1999) 21 Cal.4th 352, 374. The testimony of one witness, no matter how many others offer contradictory testimony, constitutes substantial evidence. *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614. Based upon the trial court's unassailable findings that the document's very existence is owed to the lawyer's thought process, the finding that they are absolute work product should be affirmed. *See State Fund, supra*, 70 Cal.App.4th at 651-52 (refusing to disturb trial court's privilege finding).

**B. Documents protected by the work product doctrine should be treated no differently than documents protected by a statutory privilege**

The court of appeal opinion here held that the same principles that apply to a document protected by the attorney-client privilege apply as well to the work product doctrine. [Typed Op'n at 26.] It was right.

As the court of appeal explained, the work product privilege is fundamental to our system of justice. [Typed Op'n at 25, *citing PSC Geothermal Servs. Co. v. Superior Court* (1994) 25 Cal.App.4th 1697, 1708-10.] The court of appeal also stated that "[t]here is no reasonable basis for drawing a distinction between the attorney-client privilege and the work

product privilege in this context. The *State Fund* case certainly did not draw such a distinction.” [Typed Op’n at 26.] And *State Fund* can be read to suggest that its holding concerning an attorney’s ethical duties upon inadvertent receipt of documents applies to matters that are simply “confidential.” *State Fund*, 70 Cal.App.4th at 657 (e.g., “disqualification might be justified if an attorney receives confidential materials and fails to conduct himself or herself in the manner specified above.”).

That Yukevich’s notes are work product, rather than matter protected by the attorney-client privilege, does not change a lawyer’s ethical duties when he or she inadvertently receives such documents.

**C. The Ricos’ claim that the privilege has been waived or may otherwise be breached is without merit**

**1. Mere inadvertence is insufficient to waive a privilege: the subjective intent of the holder is determinative**

The court of appeal observed that the Ricos did not argue in that court that they were “claiming waiver based on any inadvertent disclosure of the document.” [Typed Op’n at 10.] Nor do the Ricos press the point here. Nevertheless, because California law is not entirely clear on this point, this court may choose to confirm that inadvertence, by itself, does not waive a privilege and confirm that the subjective intent of the holder is determinative.

Courts have developed three tests for deciding whether an inadvertent disclosure of a document waives a privilege. *State Fund, supra*, 70 Cal.App.4th at 652 n.2. One line of cases follows a “strict responsibility” approach, so that any gaffe or mistake by a lawyer waives the privilege. 70 Cal.App.4th at 652 n.2 (citing cases). A second line of authority adopts a balancing approach, taking into account the

circumstances under which the document was inadvertently produced. *Id.* The third line of approach “focuse[s] specifically upon whether the client intended to waive the privilege.” *Id.*, quoting Ayres, *Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases* (1986) 18 Pacific L. J. 59, 60-61.

*State Fund* opted for the third approach, holding that “‘waiver’ does not include accidental inadvertent disclosure of privileged information by the attorney.” *Id.* at 653-54. To hold otherwise the court said, would result in a “‘gotcha’” theory of waiver.” *Id.* at 654, citing *O’Mary v. Mitsubishi Elecs. America, Inc.* (1997) 59 Cal.App.4th 563, 577.

This is the same approach the California Law Revision Commission has before it in Report K-301, *supra*. That staff report, which concerns potential amendments to Evidence Code section 912 to clarify the law of inadvertent disclosure, “proposes to codify the subjective intent approach with regard to all disclosures, whether by the privilege holder or by someone else.” Report K-301 at 21.

The report explains that the subjective intent approach has several advantages: “First, it avoids drawing a distinction between a disclosure by a privilege holder and someone else.” *Id.* at 22. Second, the subjective intent approach is “most consistent with the case law interpreting Section 912. Codifying the approach would not be a break with past practice and precedent, but would simply maintain the longstanding status quo.” *Id.* Third, besides being consistent with case law, the subjective intent approach is most consistent with the statutory scheme and would result in consistent principles being applied to determine in the first instance if a document is privileged and later whether the privilege has been waived. *Id.* Fourth, the report concludes that the subjective intent approach “does not

unduly impede the search for truth in a trial or other legal proceeding” because it “only ensures that information protected by a confidential communication privilege remains privileged unless the holder of the privilege chooses to disclose the information.” *Id.* at 23. The subjective intent approach thus creates “no more of a burden on the use of evidence than the privilege itself . . . .” *Id.*

Besides these factors, the report explains that the subjective intent approach “is good policy” because this approach “establishes a clear standard, yields predictable results, and thus is readily-self-administered instead of routinely requiring court adjudication.” *Id.* Further the subjective intent approach safeguards privileges by “restrict[ing] waiver to situations in which it is clear that disclosure of the privileged communication is acceptable to the holder of the privilege.” *Id.* at 24.

## **2. Mitsubishi never stipulated that the notes are not privileged**

Notwithstanding the trial court’s finding that the LEC notes are absolute work product, the Ricos argue that Johnson’s use of the document was entirely legitimate because “defendants conceded that anything said by (or to) their declared experts at the meeting was unprivileged and subject to inquiry.” [OBM at 17.]<sup>13</sup> This argument misstates what Yukevich said. At the hearing, Yukevich stated that *in an expert deposition* it would be “appropriate for them to ask our *experts* what they talked about with us; for us to ask their *experts* what they talked about with them.” Yukevich continued that he would be “willing to stipulate there’s not a problem with asking the other side’s *experts* what it is that they talked about, his side or my side, if it speeds it along.” [RT 94-95 (11/25/02) (emphasis added).]

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<sup>13</sup> Plaintiffs repeat this misstatement of what Yukevich said in at least three other places in their brief as well. [See OBM at 9, 26, 38.]

Yukevich did *not* say that it would be appropriate to ask *him* or review *his* notes to find out what the experts said. He simply said that it would be appropriate to ask a declared expert what he or she talked about with the party's lawyer. As the court of appeal explained in its opinion, "[t]here is a significant difference between a witness' statement and an attorney's notes concerning the prior statement. While the former may be discoverable, the latter is protected from discovery . . . ." [Typed Op'n at 13, citing *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 69; *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217-18; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 647-48.]

**3. The Ricos' argument that Calfo's failure to object on work product grounds at Germane's deposition should be rejected**

In a throw-away argument, the Ricos assert that the protection was waived because Calfo did not raise any work-product objection at Germane's deposition. [OBM at 40.] The court of appeal thoroughly refuted this argument in its opinion. [Typed Op'n at 10-12.] That court's reasoning is sound, but additionally, in making this argument the Ricos display great chutzpah. This was the deposition, after all, where Johnson lied to Calfo about how he had obtained the document, stating twice on the record that it had been placed into Sances' file. No waiver occurred at the Germane deposition.

**4. No compelling reason justifies breaching the privilege: at bottom, the Ricos' argument is that they want the benefit of surprise**

The Ricos' arguments that alleged "compelling reasons" should justify an exception to a rule requiring a receiving lawyer to notify his

opponent of the inadvertent receipt of privileged documents need not long detain this court.

First, apparently a compelling reason is whatever the receiving lawyer wants it to be. The Ricos argue, for example, that Johnson's claim to have recognized "the strong probability" that Mitsubishi's experts' *future* deposition testimony would "*probably* differ markedly" from the statements attributed to them in the LEC notes justifies a receiving attorney keeping secret his or her receipt of a privileged document. [OBM at 35.] This is sheer speculation, proved wrong as part II.D shows.

Second, even if an attorney's speculation were accurate, all a failure to notify achieves is surprise. Notifying the other lawyer that the receiving lawyer has an inadvertently produced document does not necessarily mean that the receiving lawyer cannot keep it; it just means, as *State Fund* requires, the decision will be made by agreement or by a judge, not the lawyer himself. And if the lawyer is entitled to the document, he or she may still use it to impeach if it is inconsistent with the witness's other testimony. Just like any other ordinarily produced document, however, the lawyer or party from whom the document originated will know that the receiving attorney has it. So, what the Ricos are really complaining about is their inability to spring on a witness a document received from a party or attorney aligned with that witness. That is no justification to avoid the *State Fund* rule.

**D. The Ricos' argument that Johnson was entitled to use the document to counteract claimed perjury by Mitsubishi experts should be rejected**

**1. No perjury occurred: the Ricos' perjury claim is based on Johnson's assertions, which the trial court impliedly rejected**

The trial court rejected the wild perjury claims that Johnson made at the hearing, identifying the flaw in Johnson's argument to be his assumption that the statements attributed to the experts in the LEC notes were in fact made by them. Since the experts had never seen the notes, nor adopted the statements as their own, the court was properly concerned that the LEC notes may not have been accurate:

**The Court:** The difficulty with that concept [Johnson's theory that he can impeach the Mitsubishi experts with the LEC notes] is that you're assuming it's a direct quote?

**Johnson:** I'm assuming that.

**The Court:** That not correct?

**Johnson:** That's an evidentiary issue, Your Honor, that's true.

**The Court:** No, listen to me very carefully. You're assuming all along that this is a direct quotation from the so-called experts, the four that you recognize. Whereas, in truth, it may be that it is an interpretation of what someone said through somebody else's mind.

[RT 70-71 (11/14/02).]

The Ricos' opening brief does not show that any expert adopted any statement in the LEC notes as his own. And the record shows they did not. The Ricos' brief simply quotes from statements in the LEC notes attributed to two experts—Geoffrey Germane and Dennis Schneider—and contrasts

those notes with statements from their depositions. [OBM at 7-8.] This is insufficient to demonstrate any inconsistency. Further, reviewing the Germane deposition, which was put into evidence in its entirety, reveals the perjury charge is baseless.

**a. Alleged Germane perjury re** redacted

The Ricos' brief asserts that at the LEC meeting Germane said that it

redacted

First, Johnson did not ask Germane in deposition about the specific statement quoted in the opening brief.

redacted

He did not adopt the

statement.

Second, the notes in the LEC document are different than the Ricos' brief makes them out to be.

redacted

Third, Germane's deposition shows that he testified consistently, not inconsistently. In the first session of his deposition rather than making any

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<sup>14</sup> Germane's full name is Geoffrey James Germane. [Ex. 63.]

redacted

At the second session of his deposition, Germane testified that he had done some additional work since his first session but he still made no

redacted

**b. Alleged Germane perjury re**

redacted

The second way the Ricos' opening brief claims Germane testified inconsistently is to point to a statement in the LEC attributed to "JG" that

redacted

redacted

Again, the record does not support the Ricos' assertions.

redacted

Second, Germane testified consistently in deposition. For example,

redacted

Third, the Ricos put a false light on the statements by taking one unadorned statement in the LEC notes and contrasting it with some, but not all, of Germane's deposition testimony on the subject.

redacted

So, the Ricos' assertion that Germane [redacted] not supported by the record.

**c. Alleged Schneider perjury re [redacted]**

The Ricos first assert [OBM at 8.] that Dr. Schneider committed perjury by [redacted]

[redacted]

[redacted] he did not show him the LEC notes or ask him if he had made the statement during the LEC meeting. [AA 291-92; Exs. 6B, 6C.] When Johnson finally tried to use the LEC notes at a later session of Schneider's deposition, Mitsubishi had by then demanded their return, so its lawyers instructed Schneider not to answer any questions about the LEC notes. [RT 81-82 (12/04/02).]

**d. Alleged Schneider perjury re [redacted]**  
[redacted]

The Ricos' second claim that Schneider testified at odds with the LEC notes concerns [redacted]

[redacted] This claim suffers from the same flaw—Schneider never adopted this statement—plus one more: There is no evidence of Schneider's deposition testimony on this topic. Only a few pages from his deposition were marked as exhibits and they contain no information at all on this topic. [Exs. 6 through 6E.]

**e. Other, general perjury claims**

The Ricos claim that the four examples set out above are "not exhaustive," citing to their trial court memorandum of points and authorities. [OBM at 8, citing AA 284-87.] Their trial memorandum contains only two more examples and neither stands up on analysis.

With respect to Dr. Schneider, their trial court memorandum claims

redacted

This is selective use of the notes. redacted

redacted

In summary, plaintiffs' perjury claims shed much more heat than light and should not affect this court's decision on the key issues presented. If anything, all they show is that rollover accident reconstruction is complicated and sometimes uncertain, leading to brainstorming—not perjury—about what might have happened.

**2. Permitting plaintiffs to use the notes—even to make a perjury argument—would completely undermine the work product privilege**

The work product privilege exists to encourage attorneys to “investigate not only the favorable but the unfavorable aspects of [their] cases.” Code Civ. Proc. § 2018(a)(1). If plaintiffs could use their counsel’s sinister spin on the privileged notes to impeach Mitsubishi’s experts, it would open Pandora’s box. Mitsubishi would be forced to rebut by calling its counsel and paralegal at trial to explain why they wrote what they wrote, whether it was accurate, why they thought it was significant, why the notes did not mean what plaintiffs claimed they meant. It is hard to imagine a greater invasion of the work product privilege or a greater disincentive to candid case assessment. *See, e.g., Rumac, Inc. v. Bottomley* (1983) 143 Cal.App.3d 810, 815 (“Were [the lawyer’s work product] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own.”).

**3. The crime-fraud exception does not apply to work product unless there is an official investigation**

Even if this court were to find that the experts committed perjury—which the preceding section shows did not occur—the notes are still privileged notwithstanding the Ricos’ argument the document should be “useable for impeachment.” [OBM at 37 *et seq.*] The crime-fraud exception to the attorney-client privilege is not a basis to invade matters protected by the absolute work product privilege.

Section 2018, subdivision (c) of the Code of Civil Procedure says in no uncertain terms that “[a]ny writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories *shall not*

*be discoverable under any circumstance.*” (Emphasis added). The statute contemplates exceptions only for an “official investigation by a law enforcement agency . . . or action brought by a public prosecutor.” Code Civ. Proc. § 2018(d). Relying on this unambiguous language, several court of appeal opinions hold that the Legislature intended that the crime-fraud exception to the attorney-client privilege cannot be invoked to obtain absolute work product in ordinary civil proceedings. *E.g.*, *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1250-51; *State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 650; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 120 & n.5.

The Ricos acknowledge that *BP Alaska* is squarely contrary to their position, but urge this court to overrule it as wrongly decided. [OBM at 43-46.] Such an argument should fail because *BP’s* reasoning is both sound and in accord with fundamental principles of statutory construction. *See, e.g., People v. Loewen* (1997) 17 Cal. 4th 1, 8-9 (1997) (in interpreting a statute, court follows “the Legislature’s intent as exhibited by the plain meaning of the actual words of the law, whatever may be thought of the wisdom, expediency, or policy of the act.”) (internal quotations omitted); *In re Lance W.* (1985) 37 Cal.3d 873, 888 (where an exception is specified by statute, other exceptions may not be implied).<sup>15</sup>

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<sup>15</sup> The Ricos’ implication that the dissenting justice in *BP Alaska* disagreed with the majority’s holding on the crime-fraud rule is wrong. [OBM at 44-45.] The *concurring* and dissenting justice expressly stated that he believed that holding to be correct; he parted company with the majority on the question whether work product protection is lost when the document sought to be protected is delivered to the client. 199 Cal.App.3d at 1275 (“Assuming the majority’s holding that the crime-fraud exception . . . does not apply to the attorney’s work product to be correct, *and I believe it is . . .*”) (emphasis added).

### III

#### **Because Plaintiffs' Counsel Intensely Studied the Notes and Distributed them to his Co-Counsel and Experts Rather than Complying with his Ethical Responsibilities, the Trial Court Did Not Abuse Its Discretion in Disqualifying the Lawyers and the Experts**

As this court has explained, “[g]enerally, a trial court’s decision on a disqualification motion is reviewed for abuse of discretion. If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court’s express or implied findings supported by substantial evidence. When substantial evidence supports the trial court’s factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion.” *People ex rel. Dept. of Corps. v. Speedee Oil Change Sys., Inc.* (1999) 20 Cal.4th 1135, 1143-44 (internal citations omitted) (citing *In re Complex Asbestos Litig.* (1991) 232 Cal.App.3d 572, 585; *Cho v. Superior Court* (1995) 39 Cal.App.4th 113, 119). An abuse of discretion occurs only where the trial court’s action exceeds the bounds of reason, all of the circumstances before it being considered. *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566. In other words, an abuse of discretion occurs only if it could be said after a calm and careful reflection of the entire record, that no judge reasonably could have made the same order. *In re Marriage of Norton* (1976) 71 Cal.App.3d 537, 541 (1976). No abuse occurred here.

The trial court carefully considered the appropriate factors in deciding whether to enter a disqualification order, recognizing that doing so would deprive the Ricos of their chosen counsel. [AA 434.] The trial court looked at “the actions of Mr. Johnson in using the document, the ability of the Court to ‘un-do’ the damage, and the extent of the prejudice to the defendant should Mr. Johnson and his associated attorneys continue to litigate the case.” [AA 435.] The court observed that Johnson had more

than “mere exposure” to the information, but instead “studied the document carefully, made his own notes on it, dispensed the information to his associates and experts, discussed the meaning of the notes with experts and based his litigation strategy and expert witness cross-examination upon the information contained in the document.” [AA 436.]

All of this adds up to an exercise of discretion that was appropriate, not an abuse, as the court of appeal found.

**A. Johnson has no one to blame but himself for the disqualification order**

Johnson has no one to blame but himself for the disqualification order. Determined to engage in subterfuge and gamesmanship, Johnson failed to consider the applicable law—*State Fund*—in deciding how to handle a document he knew he should not possess. Had he bothered to find and read *State Fund* Johnson could have followed *State Fund*'s admonition to notify Yukevich. If he and Yukevich could not resolve how to handle the notes, they could seek court guidance. But Johnson chose self-help and concealment.

It bears emphasis that other cases predating *State Fund* have admonished lawyers faced with potential conflicts that might lead to disqualification to adopt a prophylactic approach by calling opposing counsel to put the issue on the table before taking a potentially disqualifying step. See *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067; *County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647. When the lawyers chose not to, like Johnson here, disqualification resulted.

In *Shadow Traffic*, lawyers representing a plaintiff met with potential experts from a “Big Six” accounting firm to determine whether to

hire the accountants as expert witnesses. During a one-hour meeting the lawyers and accountants talked about the case, including “aspects of [plaintiff’s] action against [defendant].” 24 Cal.App.4th at 1071. Plaintiffs’ lawyers did not hire the accountants. *Id.* at 1071-72.

Sometime later, *defendant’s* lawyers met with some of the same accountants to discuss whether to hire them as experts for defendant in the same case. The accountants disclosed to defendant’s lawyer that they previously had met with plaintiff’s lawyers but had not been retained. *Id.* at 1072. Rather than calling plaintiff’s lawyers to clear any potential conflicts of interest, defendant’s lawyers hired the accountants.

Much later, when plaintiff learned that defendant had hired the accountants, it moved to disqualify the entire law firm representing defendant. (At this point, the experts withdrew.) *Id.* at 1072-73. Because the accountants had received privileged information from plaintiff’s lawyers during their brief meeting, the trial court granted the disqualification motion and the court of appeal affirmed. *Id.* at 1075, 1089.

Relying on *County of Los Angeles, supra*, the court of appeal rebuked defendant’s counsel for not calling plaintiff’s lawyers before pursuing the matter with the potential experts. “The prophylactic effect of such a small step, regardless whether or not the expert has been retained as a consultant is manifest. If opposing counsel consents, no problem is created. Likewise if the parties can agree on the acceptable parameters of a discussion with the expert no problem is created.” 24 Cal.App.4th at 1082 n.10.

Had Johnson followed the admonitions in *County of Los Angeles*, *Shadow Traffic*, and *State Fund* this problem never would have arisen. He has only himself to blame.

**B. The Ricos' argument that Mitsubishi would suffer no harm ignores the evidence and the standard of review**

The Ricos argue that “Mitsubishi never came close to making the necessary showing that it suffered any legally cognizable harm.” [OBM at 53.] Not so. This argument ignores the trial court’s factual findings, which are supported by substantial evidence.

The LEC notes contained a distillation of the important points of a meeting with experts as filtered by Mitsubishi’s counsel into an absolute work product document. Johnson had more than “mere exposure” to the information; he “studied the document carefully, made his own notes on it, dispensed the information to his associates and experts, discussed the meaning of the notes with experts and based his litigation strategy and expert witness cross-examination upon the information contained in the document.” [AA 436.] Johnson’s study and dissemination of the document is far more egregious and prejudicial than the conduct that gave rise to disqualification in *Shadow Traffic*.

In that case, even though it was disputed whether the accounting experts passed on to defense counsel any confidential information they had obtained about plaintiff’s legal strategies, the court still ordered disqualification because the accountants were “privy to confidential information about Metro’s action against Shadow, including counsel’s theories on damages.” 24 Cal.App.4th at 1086. The accountants’ knowledge, the court said, would consciously or subconsciously shape their advice:

Even assuming [defense lawyer] did not expressly ask [the accountant] about the contents of his discussion with [plaintiff’s counsel] . . . the data, consciously or subconsciously, could shape or affect the

analysis and advice [the accountant] rendered to Shadow. . . . [I]t is highly unlikely that [the accountant] could conscientiously discharge his duty to Shadow as its retained expert and at the same time discharge his duty not to divulge confidential information received from Metro.

*Id.* Given these facts, and the stringent standard of review, the court of appeal concluded that the trial judge had not “exceeded the bounds of reason” by disqualifying defense counsel. *Id.* at 1087.

The same reasoning applies here. While Johnson was studying the document the very night he obtained it, he resolved to use it in the depositions of Schneider and Germane—just days away—and he prepared for their depositions using the document. [RT 25 (11/12/02); RT 67 (11/14/02); RT 63 (11/19/02); RT 30 (11/20/02 p.m.).] He faxed the document to his experts in the same field to consult with them. [RT 15 (11/19/02).] And he used the document to bolster his case. Not until after Johnson had appropriated and studied the LEC notes did he redacted

redacted

The prejudicial effect of Johnson’s conduct is supported by substantial evidence. The trial court’s disqualification order is not an abuse of discretion.

**C. The Ricos’ argument that they and the justice system will suffer harm ignores the court’s curative orders, the need for integrity in the legal system, and the standard of review**

The Ricos claim that the court of appeal ignored the very real harm they will suffer from the loss of their chosen counsel. [OBM at 59-63.] Essentially, their claim is that they will be deprived of counsel of their

choice after several years of pretrial preparation. There are several answers to this plea.

First, when disqualification is properly ordered, that is the inevitable effect because the “paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar [such that] [t]he important right to counsel of one’s choice must yield . . . .” *Speedee Oil, supra*, 20 Cal.4th at 1145. Second, to ameliorate any potential prejudice, the court said it would give the Ricos ample time to find new counsel. [AA 436.] Third—with respect—Mr. Johnson is not indispensable. This court can judicially notice that many, many skilled plaintiffs product liability attorneys practice in the Los Angeles area. Plaintiffs’ claims of prejudice should fall on deaf ears.

**D. The Ricos’ claim that counsel and the experts were disqualified for relying on uncriticized case law ignores the evidence and the standard of review**

The Ricos argue that disqualification is inappropriate because Johnson was doing no more than following uncriticized case law—*Aerojet*. [OBM at 64-67.] This argument severely mischaracterizes why Johnson was disqualified.

Johnson was disqualified because in his eagerness to exploit Mitsubishi’s counsel’s inadvertence, he ignored his fidelity to the law to Mitsubishi’s prejudice. He did not bother to find—or read—*State Fund* (much less *Shadow Traffic* and *County of Los Angeles*)—which give clear statements of his obligation to raise the issue with opposing counsel before embarking on a self-help excursion. He intensely studied the document, made notes on it, shared it with experts and co-counsel, and cross-examined experts using the notes. The notes—which he never should have had—became part of his fiber.

**E. The Ricos never suggested a lesser remedy; having adopted an all or nothing approach, it is too late for them to seek a lesser order**

Plaintiffs did not ask the trial court for any lesser sanction. They took an all-or-nothing stance, insisting that the notes were not privileged, that counsel and the experts thus knew nothing improper, and so they had nothing to purge from their minds. The trial court asked Johnson to “assume” the notes were privileged and to tell the court “how do you unring the bell” short of disqualification of all tainted people. [RT 77 (12/04/02).] Johnson continued to deny any privilege and had no answer if there was one: “I have trouble trying to give a prescription to the court as to what we can do if there is.” [RT 77-78 (12/04/02).]

Where plaintiffs did not request any lesser sanction, they cannot complain on appeal that a lesser sanction was not ordered. *See In re Aaron B.* (1996) 46 Cal.App.4th 843, 846 (“a party is precluded from urging on appeal any point not raised in the trial court”); *Doers v. Golden Gate Bridge, Hwy. & Transp. Dist.* (1979) 23 Cal.3d 180, 184 n.1 (“it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial”).

Indeed, in *Shadow Traffic*, the court of appeal rejected just such an argument in the context of a lawyer disqualification motion. In that case, even though only a few lawyers out of several hundred in the law firm met with the experts, the trial court disqualified the entire firm. The court of appeal affirmed because the law firm had taken an “all or nothing” approach in the trial court:

[G]iven the manner in which Shadow has litigated the matter, we have no alternative other than to uphold the order disqualifying the entire firm. Neither in its initial opposition to the

recusal motion, its subsequent motion for reconsideration, or its petition in this court, has Shadow ever suggested that the recusal order be narrowed to disqualify only certain personnel . . . . Thus, Shadow has essentially taken the position that review of the disqualification order is an “all or nothing” proposition. We therefore have no choice but to give Shadow “nothing” on this issue.

24 Cal.App.4th at 1088.

### **Conclusion**

The trial court’s order disqualifying the plaintiffs’ attorneys and experts and granting other relief should be affirmed.

November 15, 2004

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**Certificate of Compliance with Rule 29.1(c)**

The undersigned certify, under rule 29.1(c), that pursuant to the word count feature of the word processing program used to prepare this brief, it contains 13,780 words, exclusive of the matters that may be omitted under rule 29.1(c)(3).

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## Proof Of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 1920 Main Street, Suite 1200, Irvine, California 92614-7230.

On November \_\_\_\_\_, 2004, I served, in the manner indicated below, the foregoing document described as **Respondents' Answering Brief on the Merits [Public Redacted Version]** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Irvine, addressed as follows:

*Please see attached Service List*

- BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Irvine, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).
- BY FACSIMILE: (C.C.P. § 1013(e)(f)).
- BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).
- BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)).

\*\*\*\*\*

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

Executed on November \_\_\_\_\_, 2004, at Irvine, California.

\_\_\_\_\_  
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