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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DEAN MARTIN, Plaintiff and Respondent, v. INLAND EMPIRE UTILITIES AGENCY, Defendant and Appellant.	E057871 (Super.Ct.No. CIVRS1000767) OPINION

APPEAL from the Superior Court of San Bernardino County. Janet M. Frangie, Judge. Reversed.

Horvitz & Levy, Lisa Perrochet, Steven S. Fleischman; Sinnott, Puebla, Campagne & Curet, Wanda R. Dorgan and Stephen R. Wong for Defendant and Appellant.

The Mathews Law Group, Charles T. Mathews, George S. Azadian, Zack I. Domb, Jeffrey S. Nakao and Devin E. Rauchwerger for Plaintiff and Respondent.

Plaintiff and respondent Dean Martin (Martin) sued his former employer, defendant and appellant Inland Empire Utilities Agency (the Agency) and his former supervisor, Richard Atwater, for (1) retaliation in violation of the Fair Employment and Housing Act (FEHA); (2) racial discrimination in violation of FEHA; (3) defamation (Civ. Code, § 45 et seq.); and (4) wrongful constructive termination in violation of FEHA. During the discovery process, Martin's attorneys produced documents that the Agency believed were the Agency's privileged and confidential documents (attorney-client privilege and attorney work product privilege); the Agency asserted Martin had misappropriated the documents during his employment. The Agency repeatedly requested Martin's attorneys return the documents. When the documents were not returned, the Agency filed a motion to disqualify Martin's attorneys.

The trial court found the Agency made a prima facie showing that the documents were privileged and/or confidential and that Martin's attorneys violated ethical obligations by (1) excessively reviewing the privileged and confidential documents, and (2) not returning the documents after repeated requests to do so. However, the court found the Agency had not and would not be prejudiced by the ethical breach. Therefore, the court concluded sanctions, rather than disqualification, would be the appropriate remedy. Thus, the court denied the Agency's motion to disqualify, but imposed sanctions on Martin's attorneys.

The Agency contends (1) the trial court made an error of law because the disqualification was mandatory—it was not a discretionary decision; and (2) if the disqualification decision is discretionary, then the trial court abused its discretion. We reverse the judgment.

FACTUAL AND PROCEDURAL HISTORY

In September 2004, Martin was hired by the Agency. Martin was the Agency's Executive Manager of Finance and Administration. In February 2005, the Agency implemented Resolution 2005-2-9, which prohibits Agency employees from disclosing confidential materials without the prior approval of the Agency's general counsel. In Martin's lawsuit against the Agency, he alleges that he was demoted in October 2009, and constructively discharged in January 2010. Martin filed his employment discrimination lawsuit against the Agency in January 2010.

In this paragraph and the next paragraph, we present the factual allegations in Martin's First Amended Complaint. Torres Leiva (Leiva) was African-American and was an employee of the agency. Leiva accused a Caucasian employee Julie Saba (Saba) of racial discrimination. Saba was Atwater's executive assistant. Atwater was Martin's supervisor. Atwater was upset about the accusation against Saba. Atwater complained to Martin about the accusation against Saba. Atwater suggested he wanted to take punitive action against Leiva. Martin refused to retaliate against Leiva. As a result, Martin's and Atwater's relationship deteriorated. Atwater retaliated against Martin by reducing Martin's responsibilities, undermining Martin's authority, and embarrassing Martin.

Atwater allegedly restructured Martin's division, without Martin's input, while Martin was away on a bereavement leave. Atwater then personally distributed memos with the restructuring information, which eroded Martin's authority. Atwater bypassed Martin and offered a safety and risk manager position to one of Martin's subordinates without consulting Martin, which embarrassed Martin. In February 2009, the Agency's board of directors (Board) awarded Martin the title of chief financial officer. From that point, Martin reported directly to the Board. Atwater threatened to resign unless the Board allowed him to continue as Martin's supervisor. Atwater gave Martin a very critical annual review, which was more critical than his prior annual reviews. When Martin expressed displeasure with the annual review, Atwater told Martin "'it was time for [Martin] "to make some decisions."'" At the October 7, 2009, Board meeting, the Board demoted Martin and required him to be supervised by Atwater.

In Martin's defamation cause of action, he alleges, "As a direct and proximate result of Atwater's campaign to injure [Martin's] credibility and embarrass him, the Board met on October 7, 2009, demoted Plaintiff from the position of Chief Financial Officer, retitling him Executive Manager of Finance and Administration and forced [Martin] into a direct reporting relationship with Atwater against [Martin's] will." Martin also alleges Atwater made various false statements about Martin's "competence at work," essentially saying that Martin was incompetent.

In April 2012, in response to the Agency's request for production of documents, Martin produced approximately 2,600 pages of documents. The documents included "numerous" communications between the Agency and its general counsel. The documents included: (1) confidential employment records related to the performance of Agency employees other than Martin; (2) a list of employees "containing sensitive personnel data"; (3) a legal opinion letter drafted by the Agency's general counsel, regarding reimbursing employee expenses; and (4) a legal opinion letter drafted by the Agency's general counsel concerning a solar project and bonding requirements. In total, there were approximately 83 pages of documents produced that were protected by attorney-client privilege.

On April 19, 2012, an Agency attorney informed Martin's attorney, while they were in court together, that Martin produced privileged and confidential materials, which Martin presumably obtained while employed by the Agency, and that the documents should be returned to the Agency and not used in the case. On April 30, the Agency set a letter to Martin's attorneys following up on the April 19 conversation. In the letter, the Agency identified, by Bates numbers, the documents that were protected, requested the return of the documents, and advised that the documents should not be used in Martin's case.

On May 30, Martin's attorneys responded via e-mail. Martin's attorneys claimed to not know of any authority supporting the Agency's requests. Martin's attorneys faulted the Agency for not citing any legal authority reflecting they were required to return the documents. Martin's attorneys also asserted the documents were not

protected because the documents had not "been designated as confidential pursuant to a protective order." Martin's attorneys asked for clarification as to why the documents might be confidential. Martin's attorneys requested authority for the proposition that Martin could not waive the Agency's attorney-client privilege.

On June 1, the Agency, in an e-mail to Martin's attorneys, requested a response to its April 30 letter. The Agency had also provided Martin's attorneys with an e-mail that (1) cited a federal case reflecting an employee cannot waive a corporation's attorney-client privilege, the Agency reasoned that based upon this authority, an ex-employee could not waive the privilege; and (2) the Agency resolution reflecting confidential and privileged documents may not be disclosed without prior approval. On June 1, Martin's attorneys responded via e-mail. One of Martin's attorneys noted the Agency had now supplied legal authority but faulted the Agency for not providing legal analysis. Specifically, the attorney wrote, "I am not a mind reader, so please clarify how specific documents apply under those authorities you claim apply."

June 4 was the first day of Martin's deposition. Martin testified about a document entitled "'Actions Taken Against Me in Retaliation For Refusing To Retaliate Against Torres Waters-Leiva.'" Martin prepared the document himself. The document listed the "key" events that were part of Martin's employment lawsuit. Martin's

document incorporated references to the privileged information, such as the solar panel contract.[1]

At the deposition, Martin's attorney had Martin read the entirety of Martin's document into the record, including the references to privileged information. For example, Martin testified, "Number 8, April 4th, 2008: Atwater accused me of failures and demanded that I explain the supposed failure to the executive team. The failure was not a failure at all because what really happened was that we correctly identified that legal issues existed with the solar panel contract as structured." On June 5, Martin sat for the second day of his deposition. Martin testified that he had read the entirety of the Agency's resolution related to not disclosing confidential/privileged materials.

On June 6, the Agency's attorney replied, via e-mail, to the e-mail from Martin's attorneys, wherein Martin's attorney said he was not a "mind reader" and needed legal analysis to be provided. The Agency's attorney wrote, "You have and are using documents including [the Agency's] attorney-client privileged and confidential records (as previously identified) in violation of Agency Resolution No. 2005-2-9 (and the Brown Act) which your client is aware of by virtue of his testimony yesterday. Although it has now been almost two months since we brought this to your attention and asked for the return of these documents, the documents have not been returned and have been thoroughly reviewed by your office pursuant to [Martin's] testimony."

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[1] As will be explained *post*, Atwater allegedly falsely accused Martin of incompetence related to the solar panel contracts. This allegedly false accusation is connected to Martin's defamation cause of action.

On June 15, the Agency's attorneys sent another letter, via e-mail, to Martin's attorneys. The June 15 letter again identified the particular documents by Bates numbers, explained the documents were protected by attorney-client privilege and/or were confidential, requested the documents be returned to the Agency, and advised the documents not be used in the case.

On June 18, Martin's attorneys sent a letter to the Agency, via e-mail and U.S. mail, regarding a possible settlement.[2] In the settlement letter, Martin's attorneys explained that Martin's supervisor, Atwater, had falsely accused Martin of "'failures' related to the solar panel contract." The evidence of the false accusations being made came from privileged communications, and the evidence that the accusations were allegedly false also came from privileged communications. Martin's attorneys attached the privileged documents to the settlement letter as exhibits.

On June 19, the Agency's attorney sent an e-mail to Martin's attorneys asking if Martin intended to use the privileged documents in the case. On June 22, Martin's attorneys responded that they could not disclose what documents would be used in the case because that information was protected by the attorney work product privilege.

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[2] Offers to settle are inadmissible to prove liability for loss or damage. (Evid. Code, § 1152.) However, this letter is not admitted to prove the merits of the employment lawsuit and it appears Martin did not object to its admission.

On June 27, Martin sat for the third day of his deposition. Martin said he did not ask the Agency's general counsel for permission to disclose the confidential/protected documents. Specifically, Martin said, "I didn't ask [the general counsel] for any of the documents, permission for any of the documents that I produced in this case. I would not have gone to the agency who I'm suing, their counsel, and asked them for permission to use a document." During the deposition, Martin was asked if he recalled a letter, produced in discovery, from the Agency's general counsel to the Board regarding "the Zappa report." Martin responded, "Well, the very nature of the letter appears to be . . . legal advice." Martin admitted he did not ask the Agency's general counsel for permission to disclose the letter.

At the deposition, the Agency's attorney asked, "May I have the document back, please[?]" Martin complied, but his attorney said on the record that Martin was only returning the Agency's copy of the document; Martin was not complying with a request to return documents because the Agency had not produced "binding authority" reflecting the documents must be returned. Earlier in the deposition, the Agency's attorney had referred Martin's attorney to the case of *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 (*Rico*) (but did not give the case cite), which concerns ethical obligations related to privileged communications. The Agency's attorney also explained that it was not her obligation to educate Martin's attorney about his ethical duties.

On June 28, the Agency's attorney sent a follow-up e-mail to Martin's attorneys providing the case cite for *Rico*, *supra*. The Agency's attorney explained that *Rico* and

its progeny support the conclusion that the privileged documents needed to be returned to the Agency and not used in the case.

On July 19, one of Martin's attorneys took Atwater's deposition. Atwater was the Agency's former Chief Executive Officer and General Manager. During the deposition, Martin's attorney asked Atwater questions regarding the privileged documents. As part of the questioning, Martin's attorney read portions of the privileged documents into the record. The Agency's attorney objected to the information being read into the record. The objections were based on the attorney-client privilege. Martin's attorney continued to read portions of the privileged documents into the record.

On July 30, the court held a hearing regarding discovery issues. At the hearing, Martin's attorney openly discussed some of the privileged communications and explained how they helped support Martin's defamation cause of action. The Agency's attorney responded that Martin was relying on privileged communications. The court explained that the issue, combined with other discovery issues, was too complicated to be handled informally, and that a motion would likely need to be filed.

On September 5, 2012, the Agency filed a motion to disqualify Martin's attorneys. The Agency asserted Martin's attorneys excessively reviewed the privileged documents, refused to return the documents, used the documents to support Martin's causes of actions, and disclosed information from the documents on the record during court proceedings. The Agency argued that it repeatedly advised Martin's attorneys to return the documents and not use the documents in the case. The Agency asserted that

Martin's attorneys' misconduct "compromised the integrity of these proceedings and prejudiced [the Agency] in a manner that cannot be rectified in order for the [Agency] to receive a fair trial."

In addition to disqualification, the Agency also requested the trial court (1) sanction Martin's attorneys for the costs and fees associated with the motion for disqualification; (2) order Martin's attorneys to (a) return the privileged documents, and (b) have the court reporters modify the Atwater deposition transcript to remove the privileged information; (3) strike the privileged information from the court record; and (4) preclude Martin from using any privileged or confidential information to support his claims.

On or around September 12, Martin voluntarily dismissed, without prejudice, his defamation cause of action. On September 14, Martin filed his opposition to the Agency's motion for disqualification. Martin asserted he never refused to return the Agency's documents; rather, he was always willing to return the documents once the Agency provided adequate legal authority reflecting Martin was required to return the documents. Next, Martin asserted only six pages of the documents were clearly labeled """ATTORNEY-CLIENT COMMUNICATION[S].""" Martin asserted the other 77 pages of documents the Agency wanted returned were not labeled as privileged. Martin's next argument was that he gave the documents to his attorneys while he was still employed by the Agency, so he had the authority to waive the Agency's privilege.

Additionally, Martin noted he returned the documents to the Agency and destroyed all copies of the documents. Martin asserted the documents were not needed

as part of the case, so he voluntarily returned them to the Agency. Martin reasoned that his use of the documents would not affect the outcome of the case because they would "not be used in furtherance of this case." Martin asserted since the documents were "trivial," that they were voluntarily returned, and would not be further used, there was no need for his attorneys to be disqualified. In regard to sanctions, Martin asserted the Agency's attorney should be sanctioned because the Agency "had no intention to meet and confer in good faith to accomplish the return of [the] documents" and because the Agency brought the disqualification motion only for the purposes of "wast[ing] time and money."

On October 22, the trial court denied the Agency's motion to dismiss Martin's defamation cause of action. The trial court explained it denied the motion because the motion was moot. On November 1, the Agency filed a reply. In a November 1 declaration in support of the reply, the Agency's attorney declared Martin's attorneys had not returned all of the privileged documents to the Agency. For example, Martin's attorneys had not returned the documents marked as exhibits in the Atwater deposition.

The trial court issued a tentative ruling. In the tentative ruling, the trial court found the documents were "clearly documents protected by the attorney-client privilege (i.e. legal opinion letters, communication from in house counsel and materials reviewed only in closed sessions). Other materials were clearly confidential employee and personnel records of [the Agency]." The trial court found Martin's attorneys did not acquire the documents through inadvertence; rather, Martin provided the documents to his attorneys. The trial court noted the "documents were detailed on two privilege logs

provided to [Martin's] attorneys." The trial court found, "[a]t that point, it was incumbent upon [Martin's] counsel to not excessively review them but to notify [the Agency's] attorney that they had them and to turn these documents over to Defendant's counsel." The court found Martin's attorneys did not comply with this requirement, and instead "demanded that [the Agency's] counsel provide authority and educate them on the law."

In regard to Martin's argument that the Agency did not provide him adequate authority concerning his obligation to return the documents, the trial court found, "[t]his was not [the Agency's] obligation . . . ." The trial court further found the Agency notified Martin's attorneys "[n]o less than six different times . . . that they were in possession of documents that were either protected by the attorney-client privilege, protected by the Public Records Act, or Public Resolution or confidential employee records. [¶] Moreover, [Martin's] attorneys did not refrain from examining the materials on a limited basis but apparently used some of them in discovery. The Court finds that Plaintiff's attorneys violated their obligations imposed by applicable law."

Next, the trial court moved to Martin's assertion that the documents were irrelevant to the case. The court was "disturbed that [Martin] did not immediately turn over all the documents" in order to preserve court resources, if the documents were irrelevant. The court then turned to the issue of remedy. The court found that since Martin described the documents as irrelevant and said he would not use them "it is therefore not likely that these documents will affect the outcome of the litigation." The court found sanctions would be the better remedy. Therefore, the court tentatively

denied the motion for disqualification and imposed sanctions in an amount corresponding to (1) the reasonable costs of the Agency retrieving the documents from Martin's attorneys, and (2) the legal fees associated with (a) bringing the motion to disqualify, and (b) the motions to seal. The court also tentatively ordered Martin's attorneys to give the Agency any of the privileged/protected/confidential documents that they still possessed.

On November 28, the trial court held a hearing on the motion to disqualify. Martin's attorney said he would submit on the tentative except for the imposition of sanctions. Martin's attorney argued sanctions should not be imposed because the documents were irrelevant to the causes of action and Martin received the documents within the ordinary course of his employment.

The Agency asserted the motion for disqualification should be granted because Martin used the privileged information "to form key claims that are still in this case." The court explained it was "sort of taking plaintiffs at their word, plaintiff's counsel, at their word as to what they considered relevant." The court then explained that it thought the confidential and privileged information was only relevant to the defamation cause of action, which Martin had voluntarily dismissed. The Agency explained the documents were relevant to Martin's other claims, such as (1) issues with being hired as an executive manager as opposed to chief financial officer; (2) issues with the solar panel contract, and (3) issues related to his expense account. The Agency asserted Martin's attorneys had so thoroughly immersed themselves in the privileged and confidential communications that disqualification was the only solution.

Martin's attorney asserted there were no confidential or privileged communications related to the expense account. Martin's attorney explained that the solar panel contracts were relevant to the defamation cause of action but since that cause of action was "out," they would no longer be using any information related to the solar panel contracts. The court explained that the issue was not whether Martin would be using the documents at trial, but whether the case was tainted due to Martin and his attorneys having used the documents in the past.

Martin's attorney responded, "In any event, the issue will not be present on the plaintiff's case at all." The court said it did not believe disqualification was the appropriate remedy. The Agency asserted the case was tainted by Martin's attorneys repeatedly violating the Agency's attorney-client privilege and that the damage could not be undone. The Agency asserted the confidential and privileged communications could be relevant to Martin's remaining causes of action. The trial court explained that Martin would not be able to use the protected materials at trial, so the court did not believe the Agency suffered any prejudice.

The Agency again asserted it could not have a fair trial given the repeated violations of its attorney-client privilege. The court explained the Agency could have a fair trial since the evidence would be excluded. The court said the Agency had failed to demonstrate how Martin's attorneys' past use of the documents would cause the trial to be unfair, but the court did believe Martin's attorney's actions warranted sanctions.

The Agency asserted disqualification was the appropriate remedy to prevent ongoing violations of the attorney-client privilege. The trial court again explained it did not see a "link between the conduct and the [Agency's] right or ability to get a fair trial." The court adopted its tentative ruling. The court granted the Agency's motions to seal portions of the evidence that contained privileged information, such as portions of the transcript from Atwater's deposition.

The Agency noted that Martin's attorneys still had some of the protected materials. The court explained those materials would have to be returned to the Agency, and that Martin's attorneys would need to make their own redactions to the transcripts.

DISCUSSION

A. MANDATORY DISQUALIFICATION

The Agency contends the trial court was required to disqualify Martin's attorneys due to the findings that (1) Martin's attorneys excessively reviewed the confidential and privileged documents, and (2) Martin's attorneys used the confidential and privileged documents during discovery. Since we are reviewing the legal question of whether the law sets forth a mandatory disqualification rule or an optional disqualification rule, we apply the de novo standard of review. (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 445.)

In *Rico*, when our Supreme Court discussed whether disqualification is a proper remedy where an attorney has violated his ethical obligations, the high court focused on the issue of whether the violation caused "'unmitigable damage,'" which the court

explained as being about whether there was no other way, other than disqualification, to reverse the damage caused by the ethical violation. (*Rico*, *supra*, 42 Cal.4th at p. 819.)

Based upon *Rico*, after the trial court determines there has been an ethical violation, the trial court must then exercise its discretion regarding the proper remedy, i.e., whether to disqualify the attorney who violated his ethical duties. In making that decision, the trial court should consider whether any damage caused by the ethical violation can be mitigated by a remedy other than disqualification. Accordingly, given the *Rico* opinion, a trial court has discretion on the issue of disqualification—it is not mandatory that an attorney be disqualified.

The Agency contends that, pursuant to *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 (*Clark*), a court can disqualify an attorney solely based upon an ethical violation, without giving consideration to damages or other ways to mitigate the damages. In *Clark*, the appellate court found substantial evidence supported the finding that a law firm violated its ethical obligations. (*Id.* at pp. 41, 54.) The appellate court then considered whether the trial court abused its discretion by ordering that the law firm be disqualified. (*Id.* at p. 54.)

In reviewing the trial court's decision, the appellate court focused, in part, on the trial court's finding that "there was a 'genuine likelihood' that [the law firm's] review of the privileged materials could affect the outcome of the proceedings." (*Clark*, *supra*, 196 Cal.App.4th at p. 55.) The appellate court reasoned that there was support for this finding because the law firm's use of privileged materials "had a direct and immediate impact on the legal posture of [the petitioner's] case." (*Ibid.*)

After this conclusion, the appellate court addressed the appellant's argument that the law firm should not have been disqualified because there was not an affirmative showing of an existing injury due to the misuse of the privileged documents. The appellate court addressed that argument by concluding, "disqualification is proper as a prophylactic measure to prevent future prejudice to the opposing party from information the attorney should not have possessed. [Citations.]" (*Clark*, *supra*, 196 Cal.App.4th at p. 55.)

The Agency presents this "prophylactic" rule as support for the idea that an "ethical violation alone, without more, [is] enough to require disqualification." We reject the Agency's interpretation of the case. We interpret *Clark* as reflecting that the victimized party need not present evidence of having currently suffered damages, but must at least present evidence of possible future damage due to the ethical violation. Our interpretation focuses on the portion of the sentence that reads, "disqualification is proper as a prophylactic measure to prevent *future prejudice*." (*Clark*, *supra*, 196 Cal.App.4th at p. 55, italics added.) The *Clark* court is making a conclusion about the timing of damages—present versus future. The *Clark* court is concluding that damages are required, but the prospect of future damages caused by the violation, rather than actual present damage, will suffice. Therefore, an ethical violation alone will not suffice—there must be a showing of damages.

Next, the Agency contends that disqualification was ordered in the *Rico* and *Clark* cases, so disqualification should have been ordered in the instant case because the three cases have analogous facts. We do not find this argument to be persuasive

because a trial court's ability to mitigate damage caused by excessive review of privileged documents will necessarily depend on the unique nature of the privileged materials, the unique procedural posture of the case, and the manner in which the privileged information was used in the case. So, for example, sealing documents could suffice to mitigate any damages in one case, while be insufficient in a different case. Thus, we are not persuaded by the argument that the result of one case must necessarily be followed in a different case given that the question of how damages caused by an ethical violation can be mitigated in a particular case will create a unique answer given the particular circumstances of each case.

B. ABUSE OF DISCRETION

The Agency contends the trial court abused its discretion by not ordering Martin's attorneys be disqualified.

As set forth *ante*, after a trial court finds there has been an ethical violation, the trial court should consider whether there is a remedy, other than disqualification, that will reverse the damage caused by the ethical violation. (*Rico*, *supra*, 42 Cal.4th at p. 819.) So, there are three steps to the process: determining (1) if an ethical violation occurred; (2) if the victim of the violation suffered damages; and (3) if there is a remedy other than disqualification that will mitigate the damage. An abuse of discretion occurs when a trial court exceeds the bounds of reason or disregards the uncontradicted evidence. (*Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1140.)

The record reflects the privileged and confidential documents were used by Martin during discovery. Martin's attorney explained how the privileged and confidential documents supported Martin's defamation cause of action. Ultimately, Martin voluntarily dismissed his defamation cause of action, but did so without prejudice. Martin's attorneys claimed to have returned all of the privileged and confidential documents, but, at the time of the hearing on the motion to disqualify, had not actually returned all of the documents. At the hearing on the motion to disqualify, the trial court, as part of its orders, required Martin's attorneys to return the documents.

The trial court explained it found the Agency would not be damaged by Martin's attorneys' use of the documents because the court was "sort of taking plaintiffs at their word, plaintiff's counsel, at their word as to what they considered relevant." The evidence reflects Martin's attorneys still had the documents at the time of the hearing and the defamation cause of action was dismissed without prejudice. It was unreasonable for the trial court to rely on Martin's attorneys' representations when, based upon the attorneys' actions (not the attorneys' words), the documents were still in jeopardy of being used—the documents had not been returned to the Agency, and the defamation cause of action could be resurrected.

For example, Martin asserted that the documents were voluntarily returned because they were "trivial," so the documents would not be further used, and, as a result, there was no need for his attorneys to be disqualified. However, in reality, the documents had not been returned. Martin's attorneys' actions belied their words. The

failure to return the documents and the past use of the documents reflect the documents did have value to Martin's case.

Accordingly, the Agency was at risk of suffering future damage because it still did not have its documents and Martin's attorneys' actions indicated the documents had value in Martin's case. Therefore, it was unreasonable for the trial court to disregard the actions of Martin's attorneys and instead accept the attorneys' verbal representations, especially in light of the attorneys' shocking ethical violation.

Next, we address the issue of remedy. Disqualification was necessary because (1) Martin's attorneys thoroughly used the documents in discovery; (2) Martin's attorneys still possessed the documents after dismissing the defamation cause of action, which indicates the documents were still relevant to the remaining causes of action, and (3) the defamation cause of action was dismissed without prejudice, indicating the cause of action might be restored. Sanctions alone could not repair these damages because there were too many potential issues going forward. The only manner in which the damages can be effectively mitigated is to disqualify Martin's attorneys. In sum, we conclude the trial court abused its discretion.

C. CROSS-APPEAL

Martin, in his Respondent's Brief, asserts (1) he never refused to return the privileged/confidential documents; (2) the majority of the documents are not clearly labeled "attorney-client communications"; and (3) he already returned all the documents at issue. Martin has not filed a cross-appeal in this case. Accordingly, to the extent Martin is asserting the trial court's findings are not supported by substantial evidence,

we do not address this issue because Martin did not file a cross-appeal. (See Code Civ. Proc., § 906 [respondent may raise arguments related to prejudice without filing a cross-appeal].)

D. SANCTIONS

Martin asserts the Agency's appeal is frivolous and solely intended to delay the case. Therefore, Martin requests this court award $25,000 in attorney's fees, $5,000 in sanctions, and $10,000 to compensate the court for handling this appeal.

"When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." (Code Civ. Proc., § 907.) "'[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.' [Citation.]" (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 188.)

We have reversed the trial court's ruling. Accordingly, we conclude the appeal has merit and was not taken solely for the reason of causing delay. Therefore, we decline to impose sanctions.[3]

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[3] On July 8, 2013, the Agency filed a motion to augment the record with a reporter's transcript from an April 16, 2013, hearing in this case. We deemed the motion to be a request for judicial notice. We grant the request for judicial notice. (§§ 452, subd. (d)(1), 453.)

DISPOSITION

The judgment is reversed in its entirety, including the denial of the disqualification motion and the granting of the request for sanctions. The trial court is directed to enter an order disqualifying plaintiff's counsel. The trial court is directed to exercise its discretion regarding the imposition of sanctions. The trial court may make any further orders as necessary. Appellant, Inland Empire Utilities Agency, is awarded its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

RICHLI
J.