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## **ISSUES PRESENTED**

- I. In light of the now utterly conflicting published appellate court decisions, what is the status of the law regarding inadvertently received documents, and does the fact that the document does not appear privileged change the result?
- II. Given that the “absolute” work-product privilege already has certain judicial exceptions, should an additional exception be recognized where an inadvertently received document evidences potential perjury?
- III. When, if ever, can the ultimate sanction of disqualification be applied where an attorney relied upon uncriticized, published case law in making a decision about an ethical dilemma?

## INTRODUCTION

Shortly before trial in a four-year-old, complex products-liability case involving catastrophic injuries and death, the trial court disqualified plaintiffs' entire legal team and two primary expert witnesses. The reason: the court concluded that counsel used a document entitled to work-product protection for impeachment purposes during expert depositions. That unsigned document evidenced statements made at an admittedly non-privileged meeting between declared experts and opposing counsel. Disqualification was ordered notwithstanding: A) the trial court expressly found plaintiffs' counsel received the document inadvertently; B) nothing on the document stated "privileged," "work-product," or even "confidential" – and nothing indicated who had prepared it; and C) if the anonymous document had been prepared by one of the experts, rather than a paralegal, no arguable claim of protection could ever arise.

Nonetheless, because it was later revealed (through an evidentiary hearing) that the document had been prepared by a paralegal (acting under unspecified, general instructions from defense counsel about memorializing the unprivileged conversations), the court declared the document "absolute" work-product privileged, and ordered disqualification.

The Court of Appeal affirmed the disqualification. Although it expressly found that plaintiffs' counsel had conducted himself according to the dictates of a theretofore-never-criticized opinion, *Aerojet-General Corp. v. Transport Indemnity Insurance* ["*Aerojet*"] (1993) 18 Cal.App.4th 996, it concluded that *Aerojet* had been effectively superseded by *State Compensation Ins. Fund v. WPS, Inc.* ["*State Fund*"] (1999) 70 Cal.App.4th 644. We demonstrate that: A) the court erred in asserting *Aerojet* is not good law; and B) even under *State Fund*, alone, plaintiffs' counsel did nothing wrong or unethical. (Section I, *infra*.)

Likewise, the court's legal conclusions concerning the work-product privilege were multi-flawed. For example, assuming the document should be protected at all, it is at most "qualified" not "absolute" work-product. Additionally, the crime-fraud exception should not have been dismissed out-of-hand. (Section II, *infra*.)

In addition to these purely legal errors, the court's order should be reversed for an independent reason – it is plainly an abuse-of-discretion for the multiple reasons detailed in Section III, *infra*. Given that plaintiffs' counsel inadvertently received the document, and had no reason to believe it was allegedly privileged, the harsh penalty cannot be justified under any level of abuse-of-discretion review – much less the "careful review" required for disqualification rulings.

But here, the ruling is even worse. In a truly unprecedented action, the appellate court disqualified an attorney who had relied upon uncriticized case law (*Aerojet*) in deciding what ethical course to follow.

Worse yet, in violation of the controlling legal principles, this draconian penalty was really imposed as punishment, not because any alleged harm could not otherwise be cured. Indeed, defendants made no real showing of any prejudice; the only concrete harm the trial court could identify (after a lengthy evidentiary hearing) was that plaintiffs' counsel used the experts' own statements (recorded in the document) to impeach them when three weeks later the experts contradicted those statements.

Finally, in affirming disqualification due to plaintiffs' alleged "unethical" conduct, the appellate court turned a blind eye to evidence of conduct by defendants' expert witnesses that raised the most serious questions of perjury and other wrongful conduct. While under oath, defendants' two expert witnesses repeatedly and directly contradicted their earlier opinions/statements. By returning the document to defendants – and ordering its contents sealed – the court has insulated those experts' contradictory statements and biases from the jury's scrutiny, and effectively rewarded their conduct. Our system tolerates some encroachments on the "search for truth" where truly privileged material must be protected. But

sanctioning seemingly perjurious conduct in purported defense of a phantom privilege, turns law and policy on their head.

## **FACTUAL BACKGROUND**

The underlying product liability case involves the instability and lack of crashworthiness of a Mitsubishi sport utility vehicle which caused a devastating rollover collision. (AA:001-087.)<sup>1</sup> The rollover killed one eleven-year-old girl (Denise Rico) and caused catastrophic physical and neurological injuries to her eighteen-year-old sister (Zerlene Rico) who remains mentally incompetent, partially paralyzed, and essentially bedridden. (AA:001-038.) The girls' father, mother, sister and brother-in-law were also injured in the collision. (*Id.*) After nearly four years of litigation, the matter was finally set to commence trial on September 23, 2002. (AA:175.)

At the conclusion of the second deposition session of plaintiff's biomechanical expert, Anthony Sances – plaintiff's lead counsel, Ray Johnson, innocently received a document.<sup>2</sup> (AA:425/Statement of Decision [“SOD”].)

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<sup>1</sup> The Appellants' Appendix is comprised of two (2) volumes of materials with sequentially numbered pages. Volume I has pages 1 through 265, and Volume II starts at page 266 and ends at page 524.

<sup>2</sup> The depositions of all of plaintiffs' liability experts (except the third session of Dr. Sances' testimony) had already been taken at the time that Johnson inadvertently received the document. (11/19/02-RT 29:12-15.)

The twelve-page document was typed on plain bond paper, was untitled and unsigned. (AA:422, 425/SOD and AA:107-118[**sealed**].) Nothing on the document stated “privileged,” “work-product,” or “attorney-client privileged.” (*Ibid.*). In fact, the only entry at the top of the first page was the date, time, and the initials “[REDACTED].”<sup>3</sup> (AA:107[**sealed**].) Otherwise, the document was not labeled in any fashion and had no signatures or signature blocks. (AA:107–118[**sealed**].)

The document’s transcript-like format identified the initials of persons at a meeting on the left side, followed by colons, and to the right, statements attributed to the particular speaker.<sup>4</sup> (AA:107[**sealed**].) The document appeared to be a typed transcript or partial transcript of statements made during a meeting between defense counsel and their declared experts. (AA:107-118[**sealed**].)

Upon review, Johnson did not believe it had been prepared by a lawyer. In fact, he concluded the document probably had been prepared by an expert or expert’s assistant due to its highly technical nature, the fact that non-

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<sup>3</sup> Plaintiffs’ counsel testified that upon inadvertent receipt of the document, he had no idea what “[REDACTED]” meant, and had never heard of the Mitsubishi term “Legal Engineering Conference.” (11/14/02-RT 54:23–26 and 12/03/02-RT 70:14–20[**sealed**].)

<sup>4</sup> In the entire 12-page, single-spaced document there are only four handwritten marks plus a few underlines (AA:107, 111, 113-117[**sealed**].)

lawyerly comments (e.g. “[REDACTED]”) were typed, and, most importantly, the fact that the lawyers themselves were quoted in the document. (11/14/02-RT 42:18-43:6, 52:14-53:19, 55:13-17 and 11/26/02-RT 6:10-18.)

Johnson used the nonprivileged material contained in the inadvertently-received document to impeach defendants’ declared experts during their depositions. The document provides striking evidence that defendants’ experts appeared to be lying under oath about what they had actually observed or concluded. The contrast between the opinions voiced at the meeting versus their sworn deposition testimony three weeks later is powerful.<sup>5</sup>

1. At the August 28, 2003 “[REDACTED]” meeting, Dr. Germane admitted: “[REDACTED]  
[REDACTED]  
[REDACTED].” (Emphasis added.) However, at his deposition he swore that [REDACTED]  
[REDACTED]. (AA:284–285[sealed].)

2. At the “[REDACTED]” meeting, Dr. Germane admitted: [REDACTED]  
[REDACTED].” (Emphasis added.) However, a few weeks later at his deposition he swore that [REDACTED]  
[REDACTED]  
[REDACTED]. (AA:284[sealed].)

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<sup>5</sup> See also AA:284–287[sealed].

3. At the “[REDACTED]” meeting, Dr. Schneider admitted: [REDACTED]  
[REDACTED].” (Emphasis added.) Incredibly, despite the  
forcefulness of that statement, Dr. Schneider was soon denying it under oath.  
At his deposition he swore that [REDACTED]  
[REDACTED]. (AA:286[**sealed**].)

4. At the “[REDACTED]” meeting, Dr. Schneider stated: “[REDACTED]  
[REDACTED]  
[REDACTED].” (Emphasis added.) Conversely, at his  
deposition, Dr. Schneider conveniently forgot that evidence and swore [REDACTED]  
[REDACTED]  
[REDACTED]. (AA:286–287[**sealed**].)

This list is not exhaustive. (See also AA:284-287[**sealed**].)

Johnson’s possession of the inadvertently-received document was  
disclosed at Dr. Germane’s deposition. Johnson repeatedly used the document  
to impeach Germane about statements attributed to him in the document that  
contradicted his deposition testimony. Defendants’ attorney, Alex Calfo,  
interposed 19 objections to the use of the document, without once invoking  
any alleged work-product or attorney-client privilege. (AA:124-136[**sealed**].)  
This is especially striking because Calfo had been in attendance at the very



“[REDACTED]” meeting in question. (11/12/02-RT 49:21-50:12.)<sup>6</sup> The significance of this fact is that – by itself – it obliterates the Court of Appeal’s contention that the document was “plainly” privileged. (Opn. 26.)

During a subsequent evidentiary hearing on defendants’ motion to disqualify plaintiffs’ counsel, the court found that the document had been prepared by a non-lawyer, Jerry Rowley, a Mitsubishi employee who was acting as a paralegal during the LEC. (AA:422/SOD.) During the evidentiary hearing the trial court found that “no specific instructions were provided” to Rowley by James Yukevich (defendants’ counsel) regarding what information should be typed. (AA:421/SOD.) Calfo and Yukevich attended the LEC along with defendants’ previously disclosed and declared expert witnesses. (AA:420–421/SOD.) Defense counsel freely stipulated during the evidentiary hearing that all discussions between counsel and the declared experts at the meeting were unprivileged. (11/25/02-RT 94:26-95:15.)

## **PROCEDURAL BACKGROUND**

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<sup>6</sup> The Opinion inaccurately stated: “Calfo did not attend the meeting at which the document was created.” (Opn. 11.)

On September 19, 2002, defendants brought an *ex parte* application for an order (1) disqualifying plaintiffs' counsel; (2) disqualifying two of plaintiffs' experts; (3) striking portions of the Germane deposition transcript; and (4) requiring return and suppression of all copies of Exhibit 52. (AA:137–174 [portions **sealed**].) Plaintiffs filed opposition. (AA:175–204[portions **sealed**].) After brief argument, the court ordered live testimony and it placed Exhibit 52 under seal. (09/19/02-RT 2:19-26; 9:6-10; 13:26-14:19.)

Thereafter, defendants filed a formal motion to disqualify (AA:205–264 [portions **sealed**]); plaintiffs filed opposition (AA:266–407 [portions **sealed**]); and defendants replied (AA:408–418). The court then conducted ten days of hearings.

Thereafter, the court filed a document, entitled “Statement of Decision and Order After Hearing,” disqualifying all counsel for plaintiffs and their two primary liability experts. (AA:419–438/SOD.) Plaintiffs thereafter filed objections to the purported “Statement of Decision.” (AA:460–465.)

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Plaintiffs appealed the disqualification order. The appellate court affirmed the trial court's order in a published Opinion.<sup>7</sup>

Plaintiffs filed a Petition for Rehearing which was summarily denied. Finally, plaintiffs' Petition for Review was granted.

## I.

### LEGAL DISCUSSION

#### **THE COURT OF APPEAL'S OPINION CREATED A NEW – AND HIGHLY UNDESIRABLE – RULE. IT HELD THAT COUNSEL WHO INADVERTENTLY RECEIVE A “POSSIBLY” CONFIDENTIAL DOCUMENT CANNOT EVEN REVIEW IT, MUCH LESS USE NONPRIVILEGED PORTIONS FOR LEGITIMATE PURPOSES**

##### **A. Overview of the inadvertent receipt problem.**

The document-intensive and frenzied pace of modern litigation leads to situations involving the inadvertent-receipt of a range of documents in a host of circumstances. Sometimes the documents are clearly privileged; but other times they may only be potentially privileged, or not privileged at all.

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<sup>7</sup> It is noteworthy that the Court of Appeal upheld the disqualification ruling even though it found that the trial court had erroneously believed that the document was also subject to the attorney-client privilege. The Court of Appeal nonetheless found the error should not affect the disqualification ruling, even though (1) the trial court had relied heavily on the attorney-client privilege in reaching its result, and (2) the case that the trial court had relied upon (*State Fund*) was purely an attorney-client privilege case, not a work-product doctrine case. (AA:426-436/SOD.)

The reasons for the inadvertent receipt can be just as varied. Sometimes documents are negligently misdirected to the wrong location; other times attorneys accidentally leave them at opposing counsel's office, or third parties may mail them to unsuspecting counsel. And, as the case law sadly recognizes, there is very real danger such documents may be intentionally planted to sow possible grounds for disqualification. (*State Fund*, 70 Cal.App.4th at 657.)

Inadvertent receipt of documents raises a plethora of legal, ethical and societal issues of the greatest importance. The Court of Appeal opinion resolved them in a simplistic way, inconsistent with either of the two leading California appellate cases that have considered the inadvertent-receipt issue. Worse, its resolution turned the public policy analysis inside out.

**B. The Court of Appeal erred in rejecting *Aerojet* and in misapplying *State Fund*.**

**1. *Aerojet* set the standard for the proper use of nonprivileged portions of privileged documents that are innocently received.**

The Court of Appeal expressly found that “throughout the proceedings below” plaintiffs’ counsel (Johnson) had relied upon *Aerojet*, 18 Cal.App.4th 996 in deciding to use Exhibit 52 for impeachment, rather than immediately informing defendants he had received a copy. (Opn.17; accord, AA:431/SOD.)

It held, however, that Johnson’s reliance was misplaced because *Aerojet* – allegedly – was no longer good law. (Opn. 24.) Before addressing the flaws in that conclusion, it is useful to explain *Aerojet*’s holding and why Johnson acted properly in following it.

*Aerojet* reversed the lower court’s sanctions order against an attorney (DeVries). The lower court believed that DeVries acted unethically when he failed to notify opposing counsel “of his innocent receipt of privileged documents” and instead used those documents to his client’s advantage. (*Aerojet*, 18 Cal.App.4th at 999-1000, emphasis added.) The key document at issue was a “memorandum” prepared by opposing counsel (from the Bronson law firm) which: a) revealed “the existence” of a percipient witness (Michaels); b) described the opposing attorney’s interview with him; and c) set forth “the attorney’s assessment of Michaels’ ‘witness potential’ in the litigation.” (*Id.* at 1000, emphasis added.)<sup>8</sup> After learning of the existence and relevance of Michaels, DeVries took his deposition. Opposing counsel

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<sup>8</sup> The appellate court in *Aerojet* noted that the record did not reveal whether or not any discovery DeVries had propounded should have led to the identification of Michael’s identity. (*Aerojet*, 18 Cal.App.4th at 1001.) However, it pointedly stated that “whether respondents should have disclosed Michaels [in discovery responses] is irrelevant to our ultimate decision.” (*Id.* at 1004.) This statement fully rebuts the Court of Appeal’s incorrect assertion in *Rico* that, in *Aerojet*, the appellate court “noted that [defendant] should have disclosed certain information” that was not privileged. (Opn. 19.)

became curious about how DeVries had learned of Michael's existence. It was then revealed that the information had come from a document that originated with the Bronson law firm and had been intended for Bronson's client. (*Ibid.*)

DeVries was deposed about his receipt of the memo (in connection with Bronson's sanctions motion). He candidly acknowledged that: "he had no reason to believe that Bronson or its clients had consented to the disclosure of the document." (*Id.* at 1001, emphasis added.) In affirming the appropriateness of DeVries' conduct, the *Aerojet* court focused upon the following factors:

1. The memorandum in question was on "plain paper" rather than legal letterhead, and was simply labeled as a memo "To Aerojet file From [¶] RAC." (*Id.* at 1003.) Given those factors (plus the large number of documents and attorneys in the case), the court concluded that DeVries could not be faulted for "examining the document." (*Ibid.*) Additionally, it noted that there was no State Bar rule of conduct, no court rule and no statute "specifically addressing this situation and mandating or defining any duty under such circumstances." (*Ibid.*)

2. DeVries had been free of any wrongdoing in his "initial receipt" of the document. (*Id.* at 1002.)

3. Although the document was undeniably privileged, the only portion of the document that DeVries used was certain nonprivileged information

contained therein (the knowledge of the existence of the previously unknown witness, Michaels). (*Id.* at 1004-1005.) Likewise, defendants were not in any position to claim they were damaged by DeVries's use of nonprivileged information. "[T]he problem would be no different if DeVries had obtained the same information from someone who overheard respondents discussing the matter in a restaurant" rather than as the result of having received the misdirected document. (*Id.* at 1006.)

4. Despite the defendants' various claims that they were "damaged" by DeVries' access to the memo, "they did not specify how or why . . . ." and, in any event, defendant prevailed at trial (although that result was subject to an ongoing "separate appeal"). (*Id.* at 1004, 1002.)

5. DeVries owed a duty of loyalty to his own client. Once he had innocently acquired the information, "he cannot purge it from his mind. Indeed, his professional obligation demands that he utilize his knowledge . . . on his client's behalf." (*Id.* at 1006, emphasis added.)

Given the foregoing factors, the *Aerojet* court articulated the rule that properly governed DeVries' conduct. The same basic factors are present here and should have been held to govern Johnson's conduct, especially since he read and relied upon *Aerojet* in deciding what to do.

**2. *Aerojet*, not *State Fund*, should have been recognized as the controlling authority in this case.**

Under *Aerojet*'s clear holding, attorney Johnson was permitted – indeed, he was duty-bound – to use any nonprivileged material in the document (even if we assume the inadvertently-received document was otherwise-privileged)<sup>9</sup> to impeach defendants' incredibly forgetful/deceitful expert witnesses. (*Id.* at 1005-06.) This is the fundamental holding of *Aerojet* that the Court of Appeal failed to grasp. *Aerojet* specifically pointed out that a privileged document – even one prepared by an attorney – may contain both privileged and nonprivileged matters:

“Consequently, 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 information. This fundamental concept was lost in the skirmish below.” (*Id.* at 1004, emphasis added.)<sup>10</sup>

*Aerojet*'s teaching concerning the propriety of using any nonprivileged portions of even otherwise-privileged documents (obtained through no fault of counsel) is dispositive of our case. Here, the trial court found Exhibit 52 was obtained by inadvertence. Here, defendants conceded that anything said

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<sup>9</sup> Throughout this brief, for convenience, we will use the word privileged to include material subject to work-product protection although there is a dispute over whether work-product is a “privilege” or merely a limited protection against forced discovery.

<sup>10</sup> On this point, *State Fund* is in complete accord. Indeed, it quotes the foregoing passage with approval. (70 Cal.App. 4th at 655.)



by (or to) their declared experts at the meeting was unprivileged and subject to inquiry. Here, the entirely legitimate use plaintiffs' counsel made of the document was to refresh/impeach declared experts who suffered from egregious lapses of memory and/or candor.

Yet, the Court of Appeal refused to apply *Aerojet*, holding that it had been effectively superceded by *State Fund* (Opn. 24.)<sup>11</sup> No other court (or

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commentator) had ever reached such a conclusion.<sup>12</sup> In fact, rather than clashing, *Aerojet* and *State Fund* complement each other.

*State Fund* clearly framed the “primary issue” before it: “[W]hat is a lawyer to do when he or she receives through the inadvertence of opposing counsel documents plainly subject to the attorney-client privilege?” (70

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<sup>11</sup> The Opinion states that “[a]lthough *State Fund* did not “expressly disapprove” *Aerojet*, it “severely limited its holding.” (Opn. 24.) Elsewhere, it states that *State Fund* supplied the “decisional authority that was lacking in *Aerojet*” to govern future cases. (*Ibid.*) In short, under the court’s analysis, *State Fund* superceded *Aerojet*, leaving it worthless and irrelevant.

<sup>12</sup> Indeed, just the opposite. For example, the 2000 version of Witkin’s treatise contains an extensive discussion of *Aerojet*’s holding, never once suggesting that the decision’s viability had been eroded. (2 Witkin, Cal. Evidence (4<sup>th</sup> ed. 2000) Witnesses, § 109, p. 365.) Likewise, a Westlaw Keycite search shows that other than *Rico*, no case has ever criticized *Aerojet* or suggested that it had been superceded.

Cal.App.4<sup>th</sup> at 651, emphasis added.) That issue arose when an attorney received his opponents' privileged materials which had been inadvertently mailed to him. There was no question that the materials in question were plainly attorney-client privileged – “the forms themselves were designed to make clear to even a casual observer that they were intended to be confidential attorney-client communications.” (*Id.* at 653, emphasis added.) Nonetheless, the recipient attorney passed State Fund's privileged documents along to an expert witness who, in turn, passed them along to attorneys who were litigating against State Fund in an entirely separate action; those attorneys, in turn, used the documents to State Fund's detriment in the other case. (*Id.* at 647, 655.) The trial court ordered sanctions against the attorney whose conduct led to the dissemination of the clearly privileged documents.

On appeal, the attorney argued that the case should be controlled by *Aerojet*. The appellate court disagreed, finding *Aerojet* distinguishable (as discussed below.) (*State Fund*, 70 Cal.App.4<sup>th</sup> at 654-655.) Nonetheless, it reversed the sanctions order for another reason. It found that the ABA Formal Ethics opinion upon which the trial court had relied was not (and is not) binding upon California attorneys; therefore it was unfair to sanction an attorney for not following it. (*Id.* at 655-656.) The court then announced a prospective hybrid-rule intended to govern cases involving inadvertent-receipt

of documents which “obviously” appear to be subject to the attorney-client privilege. (See subsection B-3, *infra*.)

As noted, *State Fund* did not criticize *Aerojet*, but found it distinguishable on two grounds. But the very items that *State Fund* found so “distinguishable” in *Aerojet* destroy the force and logic of the Opinion in our case.

*State Fund*’s first basis for distinguishing *Aerojet* was that in *Aerojet* the privileged memorandum was on “plain white paper” and was not identified as anything other than a mere “memorandum” to the file. (*State Fund*, 70 Cal.App.4<sup>th</sup> at 654–655.) In stark contrast, each of the subject documents before the court in *State Fund* had a heading at the top of every form that read: “ATTORNEY-CLIENT COMMUNICATION/ ATTORNEY WORK PRODUCT” followed by “DO NOT CIRCULATE OR DUPLICATE.” (*Id.* at 648.) The documents also contained the word “CONFIDENTIAL” which was “repeatedly printed around the perimeter of the first page of the form.” (*Id.*) In short, as the court had earlier stressed, it would be “clear” to “even a casual observer” that the documents were “confidential attorney-client communications.” (*Id.* at 653, emphasis added.)

Obviously, this basis for distinguishing *State Fund* is at least as strong (if not stronger) in our case as in *Aerojet*. Here, Exhibit 52 is also on plain paper, it contains no warnings about “privilege” or “confidentiality” and,

indeed, no indication of even who prepared it. (AA:107–118[sealed].) Moreover, the one thing that would be clear after reading Exhibit 52 was that it reflected unprivileged statements made during an unquestionably nonprivileged meeting (because the declared experts were present.)

*State Fund*'s other basis for distinguishing *Aerojet* was that, in *Aerojet*, the document had been used for a legitimate purpose, i.e., to identify a potential witness with pertinent information. The court noted that ““deposing a relevant witness”” was hardly improper, and the objecting parties in *Aerojet* “failed to specify how or why they were damaged.” (*State Fund*, 70 Cal.App.4th at 655.)

In stark contrast, the objecting party in *State Fund* showed that the clearly marked and privileged materials “had been disseminated to another law firm representing a claimant in a different action against State Fund,” and that “unless preventive measures were taken” State Fund could expect to be “regularly subjected” to requests from counsel in “numerous other cases” that it produce the clearly privileged documents in question. (*Id.*)

Here, again, our case fits squarely on the *Aerojet* side of the ledger. The only use plaintiffs have made – or would intend to make – of Exhibit 52 is the legitimate use of the portions of that document containing the prior inconsistent statements made by defendants’ declared expert witnesses. Those portions will be needed to impeach the experts when they deny making prior

statements that thoroughly undercut the opinions they will be offering to the jury. Indeed, it is not the legitimate interests of defendants, but rather of plaintiffs (and the integrity of the judicial system) that will be harmed if defendants' experts are allowed to deny with impunity the many impeaching statements they made during the pre-deposition meeting.

Besides distinguishing *Aerojet* on the two grounds described above, the *State Fund* court otherwise fully embraced that decision. Indeed, it cited *Aerojet* approvingly for the key proposition – relied upon here – that parties are “entitled to use” nonprivileged information, however it is received. (*Id.* at 655.) In short, on the fundamental point at issue in our case, both *Aerojet* and *State Fund* reached the identical conclusion. Indeed, the lawyers' duty to zealously represent their clients within the bounds of the law and ethics compels such affirmative use of such non-privileged information.

In contrast, the Court of Appeal's opinion in our case confuses the law in this area and destroys the careful balance between competing policy considerations that *Aerojet* and *State Fund* had jointly fashioned.

**3. While paying lip service to *State Fund*'s holding, the Court of Appeal's Opinion actually violates and confuses it.**

As noted above, after holding the attorney could not be sanctioned for failing to obey the non-binding ABA opinion, *State Fund* fashioned a rule which it recommended for future cases:

“Accordingly, we hold that the obligation of an attorney receiving privileged documents due to the inadvertence of another is as follows: When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that 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.” (70 Cal.App.4th at 656, emphasis added.)

The most telling point in the foregoing standard is that it focuses upon receipt of materials that “obviously” appear to be attorney-client privileged or “clearly” appear to be confidential and privileged. The court thus emphasized that no duty could arise unless a reasonable attorney in the shoes of the recipient would unmistakably know that he or she had obtained privileged materials.

*State Fund*’s adamant insistence makes sense for important reasons. One is basic fairness to the unsuspecting, receiving attorney (and his/her client) who should not be penalized for not knowing that the received materials are somehow privileged. This is especially true because, as the court noted, there is a real danger that an opposing party could seek to gain a tactical

advantage by intentionally sending [or leaving] materials intended to secure the disqualification of an opponent. (*Id.* at 657.)

In our case, the Court of Appeal paid lip service to *State Fund*'s strict standard, but then undercut it in various important respects.

**a. The Opinion erroneously asserts Exhibit 52 was “plainly privileged,” ignoring what Johnson knew (or reasonably should have known) about the unlabeled, unidentified document at the time of receipt.**

The Court of Appeal baldly asserts that Exhibit 52 (erroneously referred to as “Johnson’s notes”) was “plainly privileged.” (Opn. 26.) Not so.

First, that assertion goes well beyond the trial court’s factual findings. While the SOD concluded the document was privileged, it never suggested the document was “plainly” privileged. (AA:425/SOD.) Indeed, the trial court’s findings concerning the appearance of the document were quite limited and focused on the fact that it was “not labeled in any fashion” and it had not been marked “Work-Product” or “Confidential.” (AA:422, 425/SOD.)

Second, the overriding problem is that the Opinion confuses and treats as interchangeable: (1) Johnson’s contemporaneous state of mind, versus (2) the information subsequently-learned by all as the result of the ten-day evidentiary hearing (e.g., that Rowley, serving as paralegal and acting under Yukevich’s general instructions, typed the statements at the meeting.) (Opn. 15; AA:420-422/SOD.) The trial court never suggested, much less made a

finding, that Johnson knew anything about the document's preparer upon his innocent receipt. Nor could Johnson possibly have ascertained this information from the four corners of the unlabeled, unsigned document which contained no indication of who the author was. (AA:107-118[**sealed**].)<sup>13</sup>

In defending its finding that the document is allegedly "plainly privileged," the Opinion asserts, "[w]hile markings, including 'Confidential,' 'Privileged,' or 'Attorney Work Product' would have made light work of examining the document, the absence of such markings does not make the document any less obviously privileged." (Opn. 26-27.) Not true. As noted, the determination that the document was privileged only evolved as the result of a multi-day hearing the trial court conducted to determine the purpose, author, and genesis of the document. None of this key information was "obvious" from the document itself.

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<sup>13</sup> The Court of Appeal's conclusion also ignores Johnson's testimony that he believed the document was a transcript of statements prepared by a declared expert or the expert's technical assistant to memorialize their meeting with the attorneys. (11/14/02-RT 42:18-43:5, 47:10-13 [**sealed**].) In fact, Johnson expressly testified that he did not think it was prepared by attorneys Jim Yukevich ("█") or Alex Calfo ("█") because they, themselves, were cited and quoted on the very first page, and quoted later in the document for such immaterial statements as, "██████████." (11/14/02-RT 52:14-53:19, 55:13-16.) Attorneys do not take notes like that.



The only other explanation for the Court of Appeal’s conclusion is the unstated premise that the meeting in question was “privileged” because it was a conversation between attorneys and defense experts. However, the law is clear that because the meeting was held with declared experts prior to their depositions, the meeting was unprivileged and everything said by anyone during the meeting was also unprivileged – whether stated by the declared experts or said to them by the attorneys. (See, e.g., *People v. Milner* (1988) 45 Cal.3d 227, 241; see also *County of Los Angeles v. Sup. Ct.* (1990) 224 Cal.App.3d 1446, 1458.)<sup>14</sup> Indeed, defendants’ counsel herein stipulated during the hearing that plaintiffs’ counsel was free to discover “what they [defendants’ declared experts] talked about with us.” (11/25/02-RT 94:26–95:15.)

Therefore, if the writing in question had been prepared by one of the experts (or his staff member) – as Johnson believed it probably had been – there could be no legitimate claim that the document was privileged. The critical fact is that the information known by Johnson at the time was fully

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<sup>14</sup> We hasten to clarify that we agree that notes prepared by an attorney would generally be privileged from discovery under the work-product doctrine. Our point is that the subject matter of notes does not create the privilege; rather the identity of the person who prepared them does, i.e., notes prepared by an attorney (or paralegal) are privileged whereas the identical notes prepared by a declared expert would not be. Here, it was impossible to know who prepared the document from the pages alone.

consistent with his reasonable belief that the document was prepared in such a manner. Thus, the Court of Appeal's assertion that the document was "clearly" or "plainly" privileged has no basis.

**b. The Opinion blurs the key distinction between "plainly privileged" and "privileged."**

*State Fund* announced a strict test – that no duty arose unless the document was "clearly" privileged. Unfortunately, the Court of Appeal undercut that strict standard by alternatively asserting that the receiving attorney's duty is triggered upon receipt of "privileged information," "plainly privileged information" or "potentially privileged documents." (Opn. 24.) Which is it? The opinion spawns only ambiguity on this critically important point.

**c. The Opinion blurs the critical distinction between documents that are truly "privileged" versus those that are merely "confidential."**

The Opinion's logic is plagued by another key error. It fails to respect the critical distinction, drawn by both *Aerojet* and *State Fund*, that the mere confidentiality of a document does not trigger the ethical duties at issue.

In upholding disqualification the Court of Appeal stressed its conclusions that "[t]he document was 'not intended for an audience' and

‘Johnson should have known that he was not entitled to the document.’ (Opn 26-27.) But any such realization would merely have been a part of the early analysis – not the ending point – of the inquiry mandated by *State Fund*.<sup>15</sup> Referring back to the first sentence of the lengthy excerpt quoted in subsection B-3 above, *State Fund*’s use of the word “and” makes clear that the attorney’s obligation arises only when there is a confluence of two factors: confidentiality and privilege. It is not enough that “it is reasonably apparent that the materials were provided . . . through inadvertence.” It is also necessary that the materials “obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged.” (70 Cal.App.4<sup>th</sup> at 656, emphasis added.)

**d. The Opinion ignores the fact that *State Fund*’s actual holding is properly limited to attorney-client documents, not work-product documents.**

Throughout its Opinion, *State Fund* made clear that its holding was squarely predicated on the fact that the documents were clearly attorney-client privileged. (*Id.* at 651 [2 times], 652 [4 times], 653-656 [6 times], and 657 [6 times].) “The conclusion we reach is fundamentally based on the importance

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<sup>15</sup> Likewise, in *Aerojet* no wrongdoing was found (nor criticism suggested) despite the fact that the attorney “acknowledged that he had no reason to believe” opposing counsel consented to disclosure of the documents. (18 Cal.App.4<sup>th</sup> at 1001.)

which the attorney-client privilege holds in the jurisprudence of this state.” (*Id.* at 657, emphasis added.)<sup>16</sup>

Yet, *Rico* treats *State Fund* as if it were a work-product case, rather than an attorney-client privilege case. Indeed, it self-consciously asserts that the work-product doctrine is “equally fundamental” to the justice system as the attorney-client privilege and – as purported proof – it cites the one line of *dicta* from *State Fund* that we discussed in footnote 16. (Opn. 25, fn. 42.)

Given the 400-plus-year history of the attorney-client privilege and the fundamental purpose it serves (to promote honest attorney-client dialogue), its importance to our judicial system is unique. Thus, the attorney-client privilege and the work-product doctrine should not and cannot be treated as interchangeable or analyzed indiscriminately.

If the same standard governing attorney-client privilege is to be applied to work-product documents, that conclusion must be the product of a

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<sup>16</sup> Although *State Fund* contains one sentence concerning the obligations of attorneys confronted with any documents that “otherwise clearly appear to be confidential and privileged,” we believe this statement is actually *dicta*. (70 Cal.App.4th at 656.) We so conclude, even though the language in question does follow shortly after the court’s statement that “we hold. . . .” (*Id.* at 656.) This is *dicta* because, earlier in the opinion, the court emphasized that the documents at issue “were designed to make clear to even a casual observer that they were intended to be confidential attorney-client communications.” (*Id.* at 653, emphasis added.) Given that fact, any analysis of the theoretical obligations upon receipt of other types of privileged and confidential documents was wholly unnecessary to the decision.

conscious decision based upon careful analysis and the proper weighing of competing policy considerations. It cannot be the by-product of uncritical assumptions.

And, if it is to become an ethical norm in California, it must be announced clearly and applied prospectively, just as *State Fund* did when it announced a future rule to govern attorney-client privilege cases.

**C. This Court should embrace *State Fund*'s test for documents that "obviously" are attorney-client privileged, extend that test to work-product documents (prospectively), and embrace *Aerojet*'s treatment of documents that are not "clearly privileged."**

Because the issues herein have not previously come before this Court, we believe it may be useful to add some thoughts concerning the rules which this Court may wish to adopt to govern future inadvertent-receipt cases.

**1. *State Fund* correctly held ethical duties are only triggered if the document is "obviously" attorney-client privileged.**

*State Fund* sought to establish a rule to govern future situations; accordingly, it carefully balanced competing policy concerns. After doing so, it intentionally established a rigorous threshold, holding that an attorney's ethical obligations would only be triggered if the document in question was "obviously" attorney-client privileged.

We believe that *State Fund* struck the correct balance, and this Court should adopt it. Nothing in the Court of Appeal's Opinion justifies watering down or rejecting the standard *State Fund* articulated for attorney-client privileged materials.

**2. This Court should adopt a similar test to govern (prospectively) inadvertent-receipt of materials that are “clearly” work-product protected.**

Besides its actual holding (concerning receipt of attorney-client privileged materials), *State Fund* contains *dicta* addressing an attorney’s obligations upon receipt of documents that “otherwise clearly appear to be confidential and privileged.” (70 Cal.App.4th at 656, emphasis added.)

Unlike *State Fund*, the present case does pose questions regarding the legal and ethical issues posed by the inadvertent-receipt of material claimed to be work-product. In addressing such questions, we believe *State Fund* provides an excellent starting point.

**a. The subject document must be “clearly” or “obviously” privileged. With rare exceptions, no ethical duties should arise if the document is not labeled as “work-product.”**

The very facts in *State Fund* – which included BOLD labels – defined what the court meant when it referred to documents that “otherwise clearly appear to be confidential and privileged . . . .” (70 Cal.App.4th at 656, emphasis added.) We submit that any attorney who wants protection from inadvertent-disclosure for work-product-should at least be expected to clearly label the material as “work-product.”

Although affixing such a label is not proof that the document is, in fact, privileged, it should certainly be a necessary first step to later claiming any entitlement to protection.<sup>17</sup>

There are a few obvious reasons. First, this requirement imposes only the slightest of burdens on the attorney who generated the document, but it creates a critical, initial safety net (i.e., fair warning) for the receiving attorney.

Second, such labeling evidences that the necessary intent to create the work-product privilege did exist when the document was generated. Not all writings that an attorney generates are “work-product.”

Third, a labeling requirement would make cases such as the present one easier for courts (and the parties) to administer. In fact, *State Fund* pointed to the labeling factor as one that distinguished that case from *Aerojet* where the document was unlabeled. (*Id.* at 654-655.)

This proposal is predicated on the need to create fair warning for the recipient attorney. The facts of this case demonstrate why that is critically important. Here, nothing in the document gave Johnson reason to believe he had received a document entitled to work-product protection.

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<sup>17</sup> Rare exceptions may be made in compelling circumstances.



Finally, labeling would reduce the effectiveness and instances of the gamesmanship *State Fund* warned about where counsel purposely tries to create grounds for disqualification.

**b. Even if the inadvertently-received document is labeled, the recipient should not be required to instantly stop reading.**

The obvious problem with requiring labeling is that so many attorneys already over-label materials (e.g., fax cover sheet) as “confidential,” “privileged” or “work-product.” But, that reality is no reason to eliminate the requirement that materials intended to remain privileged be clearly labeled as such.

Rather, the problem of over-labeling is simply a reason to recognize that labeling – though it ought to be a prerequisite – cannot be the determinative factor of whether a document is entitled to protection. Indeed, mere labeling has never been viewed as dispositive in addressing privilege disputes. That is precisely why parties are often required to generate privilege logs describing foundational facts concerning documents that they have stamped as “privileged.”

There are compelling reasons why labels cannot be dispositive. Assume, for example, that a document labeled as “attorney-client” privileged contains a “re:” line entitled “Meeting with client and television reporter.” No

amount of labeling could make such a document legitimately attorney-client privileged. Likewise, assume the document showed “CC’s” were sent to six journalists. Same result. Other information contained in the text might similarly reveal that (1) the document was mislabeled (intentionally or otherwise); (2) it was never privileged (because the requisite confidential intent or other prerequisites were lacking); or (3) any privilege was clearly waived (e.g., by allowing non-privileged persons access to the meeting or document).

We believe that the proper rule must recognize that even a document that has been labeled as such may not truly be privileged. Therefore, upon inadvertent-receipt, the attorney must be permitted to read enough to ascertain whether, in fact, the document truly is *prima facie* privileged and whether or not the document contains indicia that any privilege was previously waived.

If such an investigation by the receiving attorney evidences that the document is in fact properly privileged and the privilege was not waived, the recipient attorney should – subject to the exception described in subsection 3 *infra* – promptly notify his opponent and either return it or submit it to the court for in-camera inspection.

Conversely, if the investigation reveals that the document was not privileged (or the privileged was waived), the receiving attorney should not be constrained from using the document for any legitimate litigation purposes.<sup>18</sup>

**c. If compelling reasons, such as the exposure of possible perjury or other wrongdoing, dictate a different course, they should control.**

The principles described above should govern the vast majority of cases. However, as the facts of our case forcefully illustrate, an additional guiding principle will occasionally be needed to protect the integrity of the judicial process or to serve other overriding policy objectives.

Here, when Johnson inadvertently obtained Exhibit 52 he recognized the strong probability that the statements of opinion spoken by defendants' declared experts at the meeting would probably differ markedly from the positions they would later take while testifying under oath. (See 11/14/02-RT 68:13-69:17.) In short, the document contained "admissions" by defendants' declared experts that could prove critical to the litigation.

Plaintiffs were absolutely entitled to that underlying information (the "admissions") because, as declared experts, any opinions they expressed while

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<sup>18</sup> If the review does not point in one clear direction or the other, the attorney should then follow the directions set forth in *State Fund*, i.e., notify the other party and then either resolve the "situation by agreement" or "resort to the court for guidance. . ." (70 Cal.App.4th at 656-657.)

meeting with counsel who retained them were subject to full disclosure. However, the gravity of those admissions created a strong probability that, when deposed, the experts would either feign forgetfulness or flatly deny having made the admissions.

That is exactly what happened. As described above, when Drs. Schneider and Germane were deposed they repeatedly stated under oath the opposite of what they had opined a few short weeks earlier. The contrary statements of those experts, reflected in Exhibit 52, stand as the lone bulwark against wholesale defrauding of the jury in this case. If the order compelling Exhibit 52's suppression is allowed to stand (and the disqualification order affirmed), the integrity of the judicial system will suffer an irreparable injury, as will plaintiffs in this case.

We submit that any future rule governing the inadvertent-receipt of even clearly privileged documents has to recognize an exception to prevent suspected perjury or any similar defrauding of the court or jury, if the same is revealed to the receiving attorney during the initial analysis of the document. In the (hopefully) rare case where the inadvertently-received document may uncover – or prevent – such conduct, the ethical rule should be the one that supports that result, not one that *de facto* encourages the fraud in question.<sup>19</sup>

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<sup>19</sup> The same considerations militate in favor of application of the “crime-fraud” exception to work-product. (See discussion in Section II, *infra*).

## II.

### **EVEN IF, IN HINDSIGHT, EXHIBIT 52 IS DEEMED WORK-PRODUCT, IT SHOULD BE USEABLE FOR IMPEACHMENT TO PRECLUDE PERJURY**

#### **A. The work-product doctrine does not protect all attorney work, and both types of work-product have recognized exceptions.**

California's work-product doctrine exists to: "encourage [attorneys] to prepare . . . thoroughly [and]. . . prevent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018, emphasis added.) This doctrine stems from the seminal case *Hickman v. Taylor* (1947) 329 U.S. 495. *Hickman*, however, recognized that the doctrine does not apply to all attorney-prepared materials:

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye towards litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and . . . are essential to the preparation of one's case, discovery may be properly had. (*Id.* at 511, emphasis added.)

California recognizes that factual information (e.g., witness statements) gathered by an attorney are subject to disclosure no matter how the attorney came to possess them. (*Kadelbach v. Amaral* (1973) 31 Cal.App.3d 814, 823.)

Here, the Opinion acknowledged that Exhibit 52 was “written in dialogue format with information provided by Mitsubishi experts.” (Opn. 16, emphasis added.) Furthermore, defense counsel stipulated that plaintiffs were free to discover what was said by everyone who spoke at the meeting. (11/25/02-RT 94:26–95:15.) How then can purely factual information (what was said by and to declared experts) – open to disclosure – be suppressed by the work-product doctrine? The fact that a lengthy evidentiary hearing later revealed that the document had been prepared by a paralegal, as opposed to an expert, should not be enough.

In short, Exhibit 52, an accurate account of what was said at the meeting, is not subject to wholesale suppression. Assuming, *arguendo*, that Exhibit 52 is entitled to some qualified work-product protection, plaintiffs still should be able to use the experts’ statements because as *Hickman* recognized even materials “prepared by an adversary’s counsel . . . might . . . be useful for purposes of impeachment.” (329 U.S. at 511, emphasis added.) Such is the case here.

Most attorney work receives only “conditional” or “qualified” protection. It can only be compelled if denial of discovery will “unfairly prejudice” the opposing party or “result in an injustice.” (Code Civ. Proc., § 2018, subd. (b).) California recognizes “good cause” when no adequate

substitute exists for the materials and fairness requires production. (See *National Steel Products Co. v. Superior Court* (1985) 164 Cal.App.3d 476, 488 and *Petterson v. Superior Court* (1974) 39 Cal.App.3d 267, 272.)

Higher protection is given material that reflects an attorney's cognitive processes (e.g., conclusions and theories); loosely known as "absolute" or "core" work-product.<sup>20</sup> (Code Civ. Proc., § 2018, subd. (c).) "Absolute," however, is a misnomer because exceptions exist. For example, while section 2018, subd. (c) makes an attorney's cognitive work immune from discovery, other statutes create exceptions. (See, e.g., Code Civ. Proc., § 2025, subd. (m)(1) ["work-product protection waived if specific objections are not timely made at deposition"].) Here, if we accept the Court of Appeal's conclusion that Exhibit 52 was "plainly-privileged," that court should have held that

defense counsel Alexander Calfo waived any purported work-product protection for Exhibit 52 when he failed to raise any work-product objection at his expert's deposition. (AA:124-136 [**sealed**].)

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<sup>20</sup> The terms "qualified" versus "core" work-product really describe two levels of protection: a "lesser level" for so-called "qualified" work-product and a "greater level" for an attorney's mental thoughts, impressions and conclusions. (*Metro-Goldwyn Mayer v. Superior Court* (1994) 25 Cal.App.4th 242, 249, fn. 8.)

Judicial exceptions also apply – such as express and implied waiver. (See, e.g., *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1239; *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 214; and *Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d. 683, 685-689; see also 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 41.2.)

And still another exception to core work-product was recognized in *Aerojet, supra*, 18 Cal.App.4th 996. (See Subsection C, *infra*.)

**B. At most, Exhibit 52 should be entitled to only qualified work-product protection.**

The Court of Appeal concluded Exhibit 52 was entitled to “absolute” work-product protection. (Opn. 16.) However, Exhibit 52 dutifully recorded statements such as “[REDACTED] and “[REDACTED] [REDACTED].” (AA:107-118[**sealed**].) This hardly reflects the preparer’s cognitive processes. (11/25/02- RT 94:26–95:15.) In short: paralegal Rowley was merely a scribe.

Because Exhibit 52 simply records a meeting, rather than reflecting attorney analysis, opinions and impressions under section 2018(c)’s intent, the court erred in labeling it “absolute” work-product. At most, even in hindsight, only “qualified” protection should apply.



With Exhibit 52 recognized as qualified work-product, the error in barring its use becomes manifest. Serious injustice will result if plaintiffs are denied use of the document which radically contradicts the sworn opinions of defendants' declared experts. (See, e.g., Code Civ. Proc., § 2018, subd. (b); and *Petterson*, 39 Cal.App.3d at 272.)

This Court itself has agreed that “[t]he [work-product] rule. . . *is a shield* to prevent a litigant from taking undue advantage of his adversary’s industry and effort, not a sword to be used to thwart justice. [Citation omitted.]” (*Williamson v. Superior Court of Los Angeles* (1978) 21 Cal.3d 829, 836-837; see also *Jasper Construction, Inc. v. Foothill Junior College Dist.* (1979) 91 Cal.App.3d 1, 17 [recognizing impeachment may outweigh the protection of work-product].)

The Court of Appeal committed another significant error; it ignored the fact that the declared expert’s statements were easily segregable from any purported “core” work-product material. (See *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 647-648 [recognizing that if a witness’ prior inconsistent statements appear in a document that also contains an attorney’s mental impressions or conclusions, then “[t]hat part of [the attorney’s] notes which recorded [the witness’] statements would not be protected . . . [because] . . . statements of a prospective witness are

considered material of a nonderivative . . . nature”].<sup>5</sup>) By its very format, Exhibit 52 segregates the statements made by the declared experts from statements made by others. This principle of segregability should govern here.

**C. Assuming *arguendo* that Exhibit 52 was “core” work-product, any non-privileged information therein could still be used under the *Aerojet* exception.**

Even if Exhibit 52 was “core” work-product, *Aerojet*’s exception should control. As detailed in Section I, *supra*, *Aerojet* involved an inadvertently-received document containing “absolute” work-product (a memo containing the attorney’s assessment). Nonetheless, *Aerojet* held that, because the memo was inadvertently-received and also contained nonprivileged information, the recipient was duty-bound to use it to protect his clients’ interests. (18 Cal.App.4th at 1000, 1005.) Here, the need is far greater than in *Aerojet*; the information is not merely useful – it is absolutely crucial to protect both the clients’ and court’s interest as other evidence will preclude the prospective perjury that looms here.

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<sup>5</sup> Core protection applies only when attorney statements are too “intertwined” with witness’ statements to separate out. (See *Rodriguez*, 87 Cal.App.3d at 647-648 .)

**D. The Court of Appeal erred in holding that the crime-fraud exception is inapplicable to the work-product doctrine.**

Relying upon *B.P. Alaska Exploration, Inc. v. Superior Court* (“*B.P. Alaska*”) (1988) 199 Cal.App.3d 1240, the Court of Appeal held that, because Exhibit 52 was entitled to “absolute” work-product protection it could not be used to impeach experts, even if they otherwise had testified and will testify falsely under oath. (Opn. 31.)<sup>6</sup> We submit that *B.P. Alaska* was wrongly decided insofar as it held there is no crime-fraud exception to the work-product doctrine.

*B.P. Alaska*’s holding resulted from two basic considerations. First, the court cited another case which stated “‘absolute’ work-product is ‘not subject to discovery under any circumstances.’” (*Id.* at 1251 [citation omitted].) But as demonstrated above, there is no such “absoluteness” to the doctrine.

The second basis was that the language of the crime-fraud exception (Evidence Code section 956) precludes “privilege under this article” if the attorney’s advice was sought in furtherance of crime or fraud. Because

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<sup>6</sup> If this Court concurs that the document is, at most, “qualified” work-product, the crime-fraud exception should apply. (See *People v. Superior Court (Bauman & Rose)* (1995) 37 Cal.App.4th 1757 [noting that *BP Alaska* only held the crime-fraud exception inapplicable to core work-product].)

work-product protection is contained within the C.C.P., not Evidence Code Article 4, the court concluded the exception did not apply. (*Id.*, emphasis added.)

This reasoning suffers at least two fundamental problems. First, it ignores the public policy underlying the crime-fraud exception. If our most sacrosanct privilege (attorney-client) must give way to those policy considerations, it defies logic to conclude that the lesser policies protected by work-product (encouraging thorough preparation and discouraging attorney coat-tail riding) can trump it.<sup>7</sup> Besides, the rule leads to absurd consequences. Assume an attorney and client conspired together to commit a fraud. If counsel simply wrote “work-product” on correspondence, the entire mechanism established by Evidence Code section 956 would be rendered impotent. Justice Best, dissenting in *B.P. Alaska*, flagged this prospective absurdity and properly labeled it as such. (*Id.* at 1276.)

Secondly, *B.P. Alaska*’s reasoning affords too much weight to the fact that Evidence Code section 956 used the phrase “this article.” In fact,

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<sup>7</sup> Modern scholars have seen the need and sound logic for applying a crime-fraud exception to the work-product doctrine. (See, e.g., Weimer, *Review of Selected 2002 California Legislation: Business and Professions: Attorney Work-Product Crime-Fraud Exception: Chapter 1059* (2003) 34 McGeorge L. Rev. 327.)

the underlying logic of that reasoning was implicitly rejected by this court as described below.

Although described as a “privilege,” the work-product doctrine is not one of the privileges enumerated in the Evidence Code. This fact led some California courts to conclude that work-product is merely a limit on pre-trial discovery, not a limit on evidence at time of trial. (See, e.g., *Mize v. Atchison, Topeka & S.F. Ry. Co.* (1975) 46 Cal.App.3d 436, 449; *Brokopp v. Ford Motor Company* (1977) 71 Cal.App.3d 841, 857.) This is the same logic that led *B.P. Alaska* to refuse to apply the crime-fraud exception to work-product. (*B.P. Alaska*, 199 Cal.App.3d 1240.)

Other cases, however, disagreed with *Mize*’s view. (See, e.g., *Rodriguez*, 87 Cal.App.3d at 649.) In *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 718, this Court cited *Rodriguez* with approval on this point. We submit, that, to the degree *Rodriguez* reflects the better view than *Mize*, *B.P. Alaska*’s reasoning about the dispositive force of a statute’s location in the Code, cannot be accepted. Thus, the “crime-fraud exception” is and should be applicable to work-product.

### III.

#### DISQUALIFICATION HERE VIOLATED LOGIC,

## PRECEDENT, POLICY AND, ARGUABLY, DUE PROCESS.

### A. The disqualification order requires “careful review,” not the deference that normally governs discretionary rulings.

As detailed in Sections I and II above, the disqualification order was the product of multiple errors of legal reasoning and should therefore be reversed for each of those reasons. But there are independent reasons to reach the identical conclusion. The trial court abused its discretion in imposing – and the Court of Appeal in affirming – such a draconian penalty under the circumstances of this case.

Before addressing those factors, it is important to emphasize that the Court of Appeal erred in using the normal “abuse of discretion” standard, rather than the more constricted one that governs disqualification motions. (Opn. 28-29.) The Court focused solely on the following broad language: “Generally, a trial court’s decision on a disqualification motion is reviewed for abuse of discretion.” (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (“*Speedee Oil*”) (1999) 20 Cal.4th 1135, 1143–1144.)

However, the “discretion” in cases involving disqualification motions is far more limited – and subject to far greater appellate scrutiny – than other rulings falling within a trial court’s purview (such as evidence

rulings, etc.). Indeed, this Court has recognized that disqualification motions involve “concerns that justify careful review of the trial court’s exercise of discretion.” (*Speedee Oil*, 20 Cal 4<sup>th</sup> at 1144, emphasis added.) *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1048, aptly summarizes why that discretion is limited: “Exercise of [the disqualification] power requires a cautious balancing of competing interests. The court must weigh the combined effect of a party’s right to counsel of choice, an attorney’s interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding.”

The disqualification ruling herein is subject to another major limitation. Where the trial court’s ruling involves legal conclusions based on material facts that are not in dispute, the applicable standard of review is independent determination of the issues by the reviewing court. (*Speedee Oil*, 20 Cal 4<sup>th</sup> at 1144) (“We need not defer to a trial court’s resolution of disputed facts and inferences. . . . [W]e are concerned with the legal significance of the undisputed facts in the record [and] therefore review the trial court’s exercise of its discretion as a question of law.” (Emphasis added.)

**B. Imposition of the ultimate sanction – disqualification – was unjustifiably harsh given the factors militating against any sanction whatsoever and given the very standards *State Fund* ordained.**

In affirming disqualification, the Court of Appeal purported to follow *State Fund*. (Opn. 26, 29-30) But, in reality, the court merely cited a few of *State Fund*'s lines out of context, while distorting its spirit, reasoning, and actual holding.

For example, the court effectively treated disqualification as if it were the “default setting” that was applied whenever an attorney has allegedly failed to follow *State Funds*' instructions governing the treatment of privileged attorney-client<sup>8</sup> documents. But *State Fund* repeatedly stressed just the opposite, i.e., that disqualification should only be the sanction of last resort:

“We do not rule out the possibility that in an appropriate case, disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in the manner specified above, assuming other factors compel disqualification.” (70 Cal.App.4th at 657, emphasis added.)

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<sup>8</sup> Again, we must emphasize that with one narrow exception (the dicta concerning materials that “otherwise clearly appear to be confidential and privileged” discussed in section B-3 *supra*), every portion of *State Fund*'s analysis, reasoning and holding is premised on the fact that the documents in question were clearly protected by the attorney-client privilege. (See, e.g., *State Fund*, 70 Cal.App.4th at 651-53, 655 and 657.)



Indeed, the last five words of the court’s statement underscore that, even if an attorney does fail to conduct himself or herself in the manner specified, disqualification still cannot be imposed unless other factors literally “compel” (not merely permit or justify) disqualification.

In ignoring *State Funds*’ strict admonition,<sup>9</sup> the Court of Appeal turned its back on logic. For example, in dismissing the absence of any markings (such as “privileged” or “confidential”) the court brusquely concluded the fact that Yukevich’s notes “were not intended for an audience” was, somehow, enough. (Opn. at 26-27.) That fiat violates the holding and reasoning of both *Aerojet* and *State Fund*.

As noted earlier, in *Aerojet* “DeVries acknowledged that he had no reason to believe that [the opposing side] had consented to the disclosure of the documents.” (*Aerojet*, 18 Cal.App.4th at 1001.) Nonetheless, once DeVries inadvertently acquired the documents “his professional obligation demands that he utilize it” for his client’s benefit. (*Id.* at 1006.)

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<sup>9</sup> The Court of Appeal did note that *State Fund* cautioned against the “draconian” penalty of disqualification and it made passing note of other cautionary comments in that opinion. (Opn. 23, 30.) However, in its actual treatment of the disqualification issue, the court ignored those cautionary points and essentially treated this matter as if using privileged material were a strict liability offense requiring almost automatic disqualification.

The Court of Appeal’s treatment of “not intended for an audience” as if it was interchangeable with “privileged” runs equally afoul of *State Fund*. Even if we treat *State Fund*’s *dicta* as if it were a holding, the court there stated that no duty arises unless the materials at issue “otherwise clearly appear to be confidential and privileged.” (70 Cal.App.4th at 656, emphasis added.) By treating “not intended for an audience” as the dispositive question – and ignoring whether the document was clearly privileged – the Court of Appeal re-wrote the very *State Fund* test which it was purporting to apply.<sup>10</sup>

- C. The court’s purported weighing process got it directly backwards. It created imaginary “prejudice” to defendants while ignoring the real prejudice that disqualification imposes both on plaintiffs and on the very integrity of the judicial system.**
- 1. Disqualification requires a showing of concrete and specific harm, not the speculative assumptions that were indulged here.**

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<sup>10</sup> In addition, the court committed another clear error. It correctly held that the trial court had erred in finding the document was protected by the attorney-client privilege. (Opn. 9-10.) But, then, it nonetheless affirmed the trial court’s disqualification ruling even though the trial court’s mistaken belief about violation of the attorney-client privilege lay at the very heart of its decision on disqualification. (AA:427/SOD [trial court’s belief that document was protected by the attorney-client privilege was one of the “dispositive” issues concerning disqualification].)

*State Fund*'s teaching is clear. In cases involving inadvertent-receipt, a party seeking disqualification bears the burden to show that it has been improperly and unfairly damaged by the opposing side's use of the document, and that no lesser remedy could possibly suffice under the circumstances. The court explained that "'mere exposure'" to attorney-client confidences does not, standing alone, "warrant disqualification" and even if an attorney's access to such materials was the result of having violated the prospective ethical rule announced in *State Fund*, disqualification would still not be appropriate unless "other factors compel" such a result. (70 Cal.App.4<sup>th</sup> at 657 [citation omitted].)

The strictness of this standard is well-illustrated in numerous cases that both pre-date and post-date *State Fund*. *Neal v. Health Net, Inc.* ("Neal") (2002) 100 Cal.App.4<sup>th</sup> 831, provides an excellent example of the latter. There, after engaging in a thorough analysis of the trial court's exercise of discretion, the appellate court reversed the disqualification order for various reasons, including the fact that lesser sanctions "can suffice." (*Id.* at 844.)

In so ruling, *Neal* highlighted the twin pillars that have evolved in disqualification law: (a) "The [California] cases have consistently concluded that mere exposure to confidential information of the opposing

party does not require disqualification” and (b) an attorney “may not be disqualified purely as a punitive or disciplinary measure.” (*Id.* at 843-844, emphasis added.)<sup>11</sup> These two, overriding points have been given meaning in a variety of different settings that have raised disqualification issues.

In *Smith, Smith & Kring v. Superior Court (Oliver)* (1997) 60 Cal.App.4<sup>th</sup> 573, 581, for example, the issue arose in the context of calling an adverse attorney as a material witness. In overturning the recusal order, the appellate court noted the real danger that disqualification motions are often used for tactical purposes. The court concluded that disqualification could only be based on “an adequate evidentiary showing” and reaffirmed the long-recognized principle that “[s]peculative contentions of conflict of interest cannot justify disqualification of counsel.” (*Id.* at 582, [citation omitted], emphasis added.)

The foregoing language was relied upon in *Addam v. Superior Court* (2004) 116 Cal.App.4<sup>th</sup> 368, 372. The court there reversed the trial court’s

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<sup>11</sup> We note that the opinion in *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 589, 591-592, fully agrees with the first prong, but partially takes issue with the second prong of this standard which was first articulated in *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 308-309.) (At least in the context of “employee misconduct” which threatens to produce a violation of the attorney-client privilege.) (*Id.* at 592.) Subsequent case law, however, has reaffirmed the continuing viability of *Gregori*’s standard as *Neal*, itself, reflects. (See also e.g., *Hetos Investments, Ltd. v. Kurtin* (2003) 110 Cal.App.4<sup>th</sup> 36, 48 and cases there cited.)

disqualification order, concluding that a mere belief, “unsupported by any facts,” cannot justify disqualification based on fear that confidential information will be passed on and used to complainant’s disadvantage. (*Ibid.*) Finally, in *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (“*Strasbourger*”) (1999) 69 Cal.App.4<sup>th</sup> 1399, 1408-1409, the appellate court reversed a disqualification order, noting that although it would “not lightly reject the trial court’s implied findings,” it could not sustain an order based upon “unsupported conclusions and assumptions.”

Here, Mitsubishi never came close to making the necessary showing that it suffered any legally cognizable harm. Even if we assume, *arguendo*, that Johnson’s review or use of Exhibit 52 was wrongful in any way (which it was not as discussed in Section I-B above), Mitsubishi was never able to show in any concrete, non-speculative way how it was even remotely prejudiced.

During the 10-day evidentiary hearing, Mitsubishi had ample opportunity to introduce whatever evidence it could muster to show how Johnson’s exposure to the contents of Exhibit 52 could cause Mitsubishi actual harm. Other than conclusory assumptions, it mustered nothing. Thus, the trial court’s 19-page Statement of Decision was unable to point to a single unfair item of information that plaintiffs improperly used. Instead,

the Statement of Decision talks in vague and abstract terms about the court's inability to "'un-do' the damage" and how the use of the document "prejudiced the defense" without pointing out how. (AA:435/SOD.)

The Court of Appeal's opinion reflects the same conclusory assumptions that, somehow, the defense must have been injured by Johnson's access to the defense-prepared record of unprivileged statements made by declared experts and counsel during the unprivileged deposition-preparation session. (See e.g., Opn. 27 ["based his litigation strategy upon"], 28 ["made full use" and "fully exploited the document's potential to damage the defense case"].) (Emphasis added.) How? With the lone exception of Johnson's admitted use of the document to impeach the dissembling declared experts during their depositions (discussed below) the court never explains what it means by these generalized speculations. In short, though it lacked any evidentiary basis to conclude that the information caused unfair prejudice to Mitsubishi, the Court of Appeal could not overcome its gut reaction that Johnson's mere exposure to a document not intended for his eyes must, somehow, have given him an unfair advantage, and he deserved to be punished for reading it.

Even in cases where opposing counsel has been exposed to actual attorney-client confidences of their opponents (which is not this case), such

generalized assumptions about resulting prejudice have been roundly rejected. *Cooke v Superior Court* (“*Cooke*”) (1978) 83 Cal.App.3d 582, a marital dissolution action, provides an excellent example. There, H.G., the family servant, copied ten documents – including eight which contained privileged and confidential communications between Cooke and his attorneys – and transmitted these documents to the opposing party’s attorneys. (*Id.* at 586.) The appellate court concluded that the trial court acted properly in simultaneously barring the recipient attorneys from using the privileged information but refusing to disqualify them – even though they had been exposed to numerous privileged attorney-client communications. In finding that disqualification was uncalled for, the court held: “Our function is to protect Mr. Cooke from improper use of any privileged data” and such protection has been afforded by the trial court’s order enjoining any use of the privileged material. (*Id.* at 592.)

The court in *Neal*, relying upon *Cooke*, and other cases, emphasized that disqualification could not be used for punitive purposes, but only if no lesser course could prevent real harm to the other party. (100 Cal.App.4<sup>th</sup> at 844.) *Neal* also forcefully illustrates that no matter how privileged or sensitive the information may be, resultant harm must actually be proven, not merely presumed.

In *Neal*, defendant Health Net was sued for its allegedly discriminatory discharge of its former human resources manager (Neal). Health Net sought to disqualify Neal’s counsel (Traylor) when it discovered that: (1) Traylor had also agreed to represent Brokett, a legal secretary formerly employed by Health Net; and (2) shortly before her own termination, Brokett had accessed Health Net’s computer file containing attorney-client information related to Neal’s employment litigation against Health Net. (*Id.* at 834.)

In successfully convincing the trial court to disqualify Traylor, Health Net had shown that Brokett had spent two and one-half hours reviewing confidential files in the Neal matter. (*Id.* at 839.) The files at issue included “attorney notes of privileged communications” and “privileged correspondence and reports from outside litigation counsel.” (*Id.* at 835.)

Nevertheless, the Court of Appeal reversed the disqualification order. In doing so, it accepted the truth of the trial court’s factual determinations, but it refused to accept the trial court’s factual conclusion that “there was a reasonable probability that Ms. Brokett shared the confidential information with Mr. Traylor.” (*Id.* at 839.) It noted the absence of direct evidence supporting that conclusion and rejected the



propriety of indulging any presumption on the matter. (*Ibid.*) And, as noted above, it concluded that even if the confidential information was disclosed to Traylor, the interests of Health Net could be protected by “less drastic measures” than disqualification such as protective orders, sealing of pertinent records, etc. (*Id.* at 844.)

In our case, once assumptions and speculation are stripped away, the only concrete factual finding the trial court made on the subject of use or harm was its statement that Johnson “intensely studied the document and made surreptitious use of it so as to obtain maximum value (i.e., impeachment) from the document.” (AA:435/SOD, emphasis added.) Thus, we must now address whether the impeachment was even wrongful – much less terrible enough to justify the devastating disqualification order herein. It was neither.

Purporting to rely on *State Fund*, the Court of Appeal disqualified Johnson because he used the statements attributed to the declared experts in Exhibit 52 to impeach them. But, in so ruling, the court perverted *State Fund*’s logic. For example, as earlier noted, *State Fund* expressly cited *Aerojet* with approval on the following critical point relied upon by plaintiffs’ counsel throughout these proceedings:

“‘Consequently, 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 information. This fundamental concept was lost in the skirmish below.’”(70 Cal.App.4<sup>th</sup> at 655, quoting *Aerojet*, 18 Cal.App.4<sup>th</sup> at 1004, emphasis added.)

Here, there is no dispute that the substance of what the declared experts said at the meeting was nonprivileged and that Johnson obtained that information inadvertently. Under *State Fund*’s unmistakable conclusion, he was therefore “entitled to use” that “information” for legitimate impeachment.

If, after a ten-day evidentiary hearing, the worst prejudice the court could find was that plaintiff’s counsel “intensely studied” the document and then used it to impeach expert witnesses (whose sworn testimony was incredibly suspect), the motion should have been rejected without the need even to consider the other side of the equation – the enormous harm that plaintiffs, and the judicial system’s integrity, would suffer if the motion were granted.<sup>12</sup>

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<sup>12</sup> Even if we assume *arguendo* that such use for impeachment was improper (though it clearly was not), disqualification would still make no sense. It would be easy enough simply to order Exhibit 52 returned to defendants (or held by the court as was ordered in *Cooke*), to seal the two depositions in question, and to enter a strict *in limine* order barring plaintiffs’ attorneys (and their experts) from mentioning any of the contents of Exhibit 52. (See, e.g., *Neal*, 100 Cal.App.4<sup>th</sup> at 844.)

**2. While presuming that defendants suffered prejudice, the Court of Appeal essentially ignored the very real, countervailing harm suffered by plaintiffs and the judicial system itself.**

While consumed by the alleged impropriety of Johnson's conduct, the Court of Appeal showed no real appreciation for the extreme and multi-faceted harm its sweeping disqualification order imposed on plaintiffs. Here, the court affirmed disqualification of plaintiffs' entire legal team at the tail-end of four years of complex product liability litigation just as the case was about to go to trial<sup>13</sup>. As detailed in the trial court, the record developed in this case is huge, consisting of the depositions of more than 63 witnesses (77 deposition volumes). (AA:450, ¶ 4.) Even if an extended continuance were granted, there is no way that entirely new counsel would be able to become nearly as familiar with the basic facts – much less the nuances of witness demeanor, credibility and the like – at this late stage. Furthermore, the order imposed phenomenal additional expense because plaintiffs' two main expert witnesses were also disqualified.

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<sup>13</sup> See *Speedee Oil*, 20 Cal.4<sup>th</sup> at 1149, fn. 3 [disqualification at “late stage of the proceedings” where conduct at issue gave offending party no unfair advantage would be improper.]

Other serious prejudice arises because plaintiffs are being denied the counsel of their choice, here a highly-skilled products liability attorney.<sup>14</sup>

In general, great deference should be paid to a client's choice of counsel. (See, e.g., *State Fund*, 70 Cal.App.4<sup>th</sup> at 657.) Here, that factor is multiplied exponentially because this lawsuit will define plaintiffs' future in far-reaching ways unlike most other litigation. This litigation involves the death of one family member, plus permanent and incapacitating injuries (including paralysis and mental incompetency) to other members of a single family. Although defendant Mitsubishi has a lot of money at stake, the future of the company is not in jeopardy. Conversely, loss of this case by plaintiffs would devastate this family beyond words.

The list of actual prejudice to plaintiffs as a result of the disqualification order could go on and on. But to what end? Given the phantom showing of "prejudice" offered by Mitsubishi (who bore the burden on this issue), any showing at all by plaintiffs is gilding the lily.

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<sup>14</sup> For example, plaintiffs' lead counsel, Mr. Johnson, is a nationally-recognized lawyer in the field of products liability, holds a master of science degree in engineering, has been prosecuting rollover cases in California and across the country for more than fifteen (15) years, and is author of a nationally-published book entitled *Defective Product: Evidence to Verdict* (Lexis Law) and innumerable articles on product liability and rollover litigation. (See further 11/19/02-RT 77:9–81:11.)

Finally, there is one terrible prejudice which will occur if the present order is allowed to stand. That prejudice will not merely harm plaintiffs' opportunity to prevail in this case, it will stain the integrity of the judicial system as well.

The record shows that when two of defendants' declared experts were deposed, they repeatedly expressed opinions and took positions under oath that directly contradicted the many admissions they had made just a few weeks earlier during the August 28, 2002 meeting. (12/03/02-RT 104:2–105:22 [sealed].) Some graphic examples were set forth in the Statement of Facts, *supra*. We repeat one here (No. 3) as a typical example:

3. At the “[REDACTED]” meeting, Dr. Schneider [referring to Denise Rico's seat belt] admitted: “[REDACTED]” (Emphasis added.) Incredibly, despite the forcefulness of that statement, Dr. Schneider was soon denying it under oath. At his deposition he insisted that [REDACTED]  
[REDACTED]. (AA:286/  
Opposition [sealed].)

This is intolerable. It is sadly ironic that in disqualifying plaintiffs' counsel (and experts) the Court or Appeal mouthed the sentiment (taken from the *Neal* case) that “the paramount concern must be to preserve

public trust in the scrupulous administration of justice,” and yet the disqualification order at issue allows defendants’ witnesses to dissemble under oath without the slightest concern that they will be impeached or otherwise held accountable. (AA:435/SOD.)

Our system of justice insists that once an expert is designated to testify, they become a “counter” in the litigation and the other side is entitled to cross-examine them about anything they have said that impeaches their testimony. (*National Steel*, 164 Cal.App.3d at 488.) Yet here, the Court of Appeal has effectively handed Mitsubishi’s experts a shredder, and invited them to destroy the very evidence that would hold them accountable if they sought to lie about what they said (and believed) on certain subjects critical to the litigation.

In *Williamson*, *supra*, 21 Cal.3d 829, this Court issued a writ to compel disclosure of an expert’s report where, as the result of a settlement and indemnity agreement, one of two co-defendants sought to silence the true opinions of an expert who had been retained by the other defendant. In granting that relief *Williamson* emphasized that agreements between parties that have the effect of suppressing evidence are void as contrary to public policy. (*Id.* at 836-837.)

How can the result be different if the suppression of key evidence occurs, instead, as the result of a misguided disqualification order? In deciding *Williamson*, this Court cited an appellate case which had refused to apply the work-product doctrine and quoted the following language from that case with approval:

“The [work-product] rule predicated on fairness articulated in the decisions *is a shield* to prevent a litigant from taking undue advantage of his *adversary’s industry and effort, not a sword* to be used to *thwart justice* or to defeat the salut(a)ry objects of the Discovery Act. [Citation omitted]” (21 Cal.3d at 838, emphasis added.)

That identical logic applies to our case and the attempted suppression of crucial admissions by defendants’ declared experts. This Court should not sanction that suppression of critically important evidence.

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**D. Disqualification of counsel for relying upon uncriticized case law is improper, contrary to precedent, and raises serious due process and public policy problems.**

This case raises an important question: When – if ever – can disqualification be an appropriate sanction for an attorney who followed uncriticized case law in deciding what ethical course to follow. Here,

plaintiffs (and their attorneys) were subjected to the harshest of all penalties, disqualification of counsel and experts. Yet, even the Court of Appeal conceded the attorneys had relied upon *Aerojet* (Opn. 17, 28.) At the time of that reliance, no case had ever questioned or criticized *Aerojet*. Given that counsel undisputedly relied on solid, published case law, disqualification should not have been a legitimate option – much less the remedy of first choice.

One paramount feature of any justice system is adherence to the fundamental principle that the rules do not change midstream. Explaining to any litigant (much less the devastated family in this case) that her attorneys (and expert witnesses) all have to be disqualified because a different appellate court decided it no longer wanted California lawyers to follow *Aerojet's* holding raises an intolerable stench of unfairness. Worse, to justify such a patently unjust result in the name of promoting the “interests of justice” adds insult to injury.

In this regard, it is especially ironic that the Court of Appeal dispensed with *Aerojet* by extolling *State Fund*. As noted above, in deference to basic fairness, the court in *State Fund* took pains to make its particular holding prospective only. (70 Cal.App.4th at 656 [providing “a standard for future application”].) *State Fund* did not even purport to



declare an existing authority no longer reliable; rather it filled a perceived vacuum on the subject. If filling a neutral vacuum demands prospective effect only, how much more so does declaring that theretofore uncriticized law may no longer be relied upon?

Besides basic fairness and precedent, this problem also raises serious due process implications. Hornbook law recognizes that one may not be punished for violating a law unless a person of reasonable intelligence would know “what is prohibited.” (See, e.g., *Kasler v. Lockyer* (2000) 23 Cal.4<sup>th</sup> 472, 498-499; and *Maltman v. State Bar* (1987) 43 Cal.3d 924, 951[“no attorney should be sanctioned simply for acting in good faith on a plausible claim of right.”].)

And in addition to fairness there is an important, related consideration – the danger of chilling forceful advocacy. For example, in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, this Court established that sanctions for “frivolous appeals” could only be issued in rare circumstances and only when any reasonable attorney would understand what conduct was proscribed. “Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal.”

This highlights the final irony of this case. In virtually every attorney disqualification case, the public policy that in-the-end demanded imposition of that ultimate remedy was protection of client confidences and the loyalty that must exist between attorney and client. This is not surprising because the issue normally arises where one (attorney, paralegal, or other) who formerly represented a client has become involved with a litigation opponent of the former client. (See, e.g., *In re Complex Asbestos*, 232 Cal.App.3d at 588 [“we deal here with a prophylactic rule necessary to protect the confidentiality of the attorney-client relationship and the integrity of the judicial system, and with the appropriate scope of the remedy supporting such a rule”].)

Our case involves the flip-side of the client loyalty issue. The Court of Appeal here reasoned that:

Johnson-knew-Exhibit 52-did-not-belong-to-him-so-he-should-have-just-given-it-back. Period. Nothing else matters.

But other things do matter. They matter a lot. In *Gregori, supra*, 207 Cal.App.3d at 308, fn. 13, for example, the court observed that an attorney’s “duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to

subject him or the legal profession to criticism.” ([Citation omitted],  
emphasis added.)

Here, simply returning Exhibit 52 – rather than using it to expose the  
perjury that appeared extremely likely to occur – might have won the  
approval of this particular Court of Appeal and of certain members of the  
public who share that court’s perception of “right vs. wrong.” But it would  
not have served Johnson’s clients who, as *Aerojet* instructed him, had the  
right to expect him to zealously use the inadvertently-received  
nonprivileged information to protect their interests. Nor would it ultimately  
have served the public whose greater interest is to ensure that perjury is not  
permitted, and that the integrity of the judicial process remains intact.

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## CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the disqualification order be reversed in its entirety, including the portions precluding use of Exhibit 52 to impeach defendants' experts, and that plaintiffs be awarded their appellate costs.

Respectfully submitted,

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ZERLENE RICO, *et al.*

## **CERTIFICATE OF WORD COUNT**

In compliance with California Rules of Court, Rule 14(c)(1), I certify that the text of Plaintiff and Appellant's Opening Brief on the Merits contains 13,637 words, including footnotes, as determined by the word count function of WordPerfect, Version 11, the program used to generate this brief.

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