INTRODUCTION

Quoting Secretary of State Stimson, defendants preach that "Gentlemen do not read each other's mail." (Answer Brief on the Merits ("ABM"):1.) We are confident Secretary Stimson would have added, "Nor do they expect their opponents to turn a blind eye to potential perjury in the name of good manners."

Such was Attorney Johnson's dilemma when he inadvertently received Exhibit 52 which he quickly realized: (1) documented a nonprivileged meeting with declared experts; and (2) evidenced the strong likelihood that defendants' declared experts would perjure themselves when deposed. Johnson knew what the law required. The published and never-criticized *Aerojet* opinion told him that, under these circumstances, his overriding duty was to use the information to protect the clients to whom Johnson owed the highest duty of loyalty. He discharged that duty – with the same courage, honor and integrity he had always observed – whether as a decorated Air Force combat pilot, honored Space-Shuttle engineer or highly-respected attorney.

As a result, he has become the target for defendants' vicious attacks on his honesty. He has been falsely accused of stealing the document and of repeated perjury. Indeed, he and his two co-counsel were all accused of perjury, notwithstanding that the evidentiary hearing devoted to

determining how he obtained the document resulted in an unchallenged express factual finding that the receipt was inadvertent.

Before dealing with the many legal errors which plague defendants' positions, we are forced to devote the first section of our Reply to:

(1) correcting the misstatements that permeate defendants' ABM; and

(2) restoring the professional reputations that defendants' campaign of snipe and smear has sought to destroy.

I.
HONOR, INTEGRITY AND DUTY MOTIVATED JOHNSON TO USE EXHIBIT 52 TO GUARD AGAINST PERJURY.

A. Defendants' continuous insinuations that Johnson "stole" Exhibit 52 – despite the judge's unchallenged finding that it was inadvertently-received – are improper.

Three attorneys with spotless records of professional integrity (Johnson, Mattingly and Balbuena) swore that no one touched Yukevich's belongings. (11/13/02:6-7,93; 11/14/02:14-15; 11/25/02:65.) Defendants' court reporter's recollection of everything was equivocal and evasive.[1] (11/12/02:40-43.)

[1] Defendants baldly state that their court reporter "denied" ever seeing the document (ABM:5), but they conveniently omit the remainder of her testimony. She admitted it was "possible" she had taken a document to Johnson to see whether it was an exhibit. (11/12/02:42).

More importantly, defendants concede that inadvertent-receipt was the "principle" issue to be determined by the hearing. (ABM:12.) The judge, having ample opportunity to evaluate witness credibility during the 10-day evidentiary hearing, expressly found that Johnson's receipt was inadvertent. (AA:425.)

Defendants eschewed every proper legal channel available for challenging the inadvertence finding. They never objected to the Statement of Decision, never cross-appealed the court's ruling, and never raised the alleged theft question as an "additional issue" for review.

But none of this stopped them from repeatedly making scurrilous insinuations that Johnson "locked" the conference room,[2] rifled through Yukevich's belongings, and stole the document. (ABM:3-6.) For example, they have the temerity to write that "[a]ccording to Johnson, he obtained the document from the court reporter, not by stealing it." (ABM:5.) No! That is "according to" the trial judge who heard all the evidence on this fact issue and found receipt to be inadvertent.

In the face of the substantial evidence rule, this backdoor attack through insinuation is bad enough. But, to engage in such improper practices in order to impugn the honesty and integrity of three respected

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[2] Yukevich, himself, testified he had no idea whether the door was "locked." (11/12/02:30.)

members of the Bar is unconscionable.

B. Defendants twist the record concerning Johnson's motivations and actions.

Swiping again at Johnson's credibility, defendants repeatedly state that Johnson "immediately knew" he was not supposed to have the document. (ABM:1,6,16,23, etc.) This is misleading.

Defendants sidestep Johnson's full testimony that when he first reviewed the document, and recognized the defense experts' typed initials, he realized both that the document was unprivileged and that he was not intended to receive it. (11/14/02:42-43.) His testimony is unmistakably clear. Johnson never believed the document was privileged because it reflected statements at an unprivileged meeting between declared experts and attorneys. (11/14/02:54-56; 11/21/02:54:10-16.) Furthermore, he concluded that (because of its technical content) Exhibit 52 had been prepared at the meeting by an expert or expert's technical assistant. (11/14/02:42-43.)

Given his knowledge of *Aerojet* and his belief that Exhibit 52 was not privileged, Johnson concluded his foremost obligation was the duty he owed his client (and the justice system). He felt obligated to use Exhibit 52 for impeachment, if the defense experts reversed themselves under oath

during deposition (which, as he predicted, they later did).[3] (11/14/02:34-38.)

C. Johnson is a prominent litigator, an engineer, and highly-decorated veteran.

Defendants paint Johnson as unprofessional, unethical and in desperate need of Exhibit 52 to understand technical aspects of the litigation. (ABM:1,7.) Johnson's background is the best rejoinder to any suggestion that he needed Exhibit 52 to assist his litigation strategy. Indeed his leadership and accomplishments explain why defendants have been so intent to oust him.

Besides his J.D., Johnson holds a Masters degree in engineering. (11/19/02:77.) His engineering work with NASA on the Space Shuttle Program earned him the national Meritorious Service Medal. (11/19/02:78-79.) He has been published nationally in both engineering[4] and law including co-authoring a national treatise on product liability (DEFECTIVE PRODUCT: EVIDENCE TO VERDICT) and publishing many law articles in

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[3] In quoting Secretary Stimson at page 9 of its ABM, Mitsubishi attempts to compare Johnson's innocent receipt of the document with reading another's mail. Mitsubishi conveniently ignores that mail identifies the author, recipient and nature of the correspondence. Exhibit 52 lacks all such attributes.

[4] For example, his "Time-Optimal Rendezvous" for the Space Shuttle System was published by the preeminent *American Institute of Aeronautics and Astronautics*. (11/19/02:78-79.)

California and nationally. (11/19/02:80.) For over 20 years, Johnson has participated as member/officer of national and local attorney organizations and has been lead counsel *pro hac vice* in product liability cases throughout the nation.[5] (12/4/02:49-50.)

Johnson was also a military officer for 10 years and, as a volunteer combat pilot, served with distinction in Vietnam. (11/19/02:77-79.)[6] His professionalism, honor and duty have always been at the forefront of his career. Despite Johnson's impeccable background, defendants – spewing prejudicial verbs such as "stashed," "pocketed," "lied," "flouted," "snapped up," and "stowed" – stoop to portray him as sneaky and even a thief. (ABM *passim*).

D. Defendants apply a strange double standard when it comes to telling "the full story."

Defendants repeatedly assert that Johnson "lied" when Calfo asked him at Germane's deposition where he had obtained Exhibit 52. (ABM:6,9,32.) In the midst of impeaching Germane, Johnson did deflect

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[5] For the past 9 years, Johnson has served on the Board of Governors of the Consumer Attorneys Association of Los Angeles. He also chaired both the national products liability and aviation law sections of the Association of Trial Lawyers of America.

[6] His combat medals include the Distinguished Flying Cross for heroism, the Vietnamese Gallantry Cross, and five (5) Air Medals. (11/19/02:78.)

Calfo's questions by stating that the document had been put in Sances' file.[7] (11/25/02:44, 46-48.) But Johnson's main concern was that he needed to impeach Germane before anyone had the opportunity to prepare false explanations concerning Germane's statements in Exhibit 52. (11/25/02:48-49; 11/14/02:36-37.)

Contrast this with how defendants (before they knew live testimony would be taken) misled both the court and plaintiffs about who prepared the document. In their *ex parte* motion to disqualify plaintiffs' counsel and in open court, defendants were anything but straightforward, claiming the "notes in question were prepared by Mr. Yukevich" – not a word about Rowley who actually prepared the document. (AA:140, emphasis added.)

In addition, Yukevich submitted a highly misleading declaration, swearing under oath that "notes" containing his "thoughts, impressions and analysis" were entered "directly into my personal computer." (AA:147, ¶3; 11/19/02:87-88.) No reader, certainly not the judge, would have ever suspected that another person – not Yukevich – was the one who prepared the document. Moreover, these failures to tell the full story were not uttered in the heat of a deposition battle, but rather as part of a motion to

[7] Johnson was referring to the fact that originally Yukevich mixed it among Sances' file materials on the deposition table. Johnson explained at the hearing that "I was being honest, and what I said was true. But it was not the full story." (11/25/02:48.)

obtain judicial relief.

This case should be decided on its substantive legal merits, not the series of snide, side-issues raised by defendants. But, we could not let defendants repeatedly claim the high ground, talking about how Johnson allegedly "lied," given what they, themselves, told the court under oath.

E. With only one month before trial, the case issues were fully established prior to Johnson's receipt of Exhibit 52.

Defendants repeatedly allege that Exhibit 52 gave plaintiffs great insight into defendants' case. (ABM:6, 9, 17, 23-24, 45.) Nonsense. Defendants' suggestion that plaintiffs were still developing their theories is incredible given that the depositions of all of plaintiffs' liability experts (except the third session of Sances) had been taken before the inadvertent-receipt; thus the final positions of plaintiffs' experts had already been challenged and nailed-down. (11/14/02:62-63.)

F. Defendants' attempts to explain away the apparent perjury fail.

Johnson believed defendants would try to emasculate Exhibit 52's impeachment power if they received advanced warning and therefore ample time to fabricate explanations about inconsistent statements. (11/20/02[P.M.]:27.) He proved prophetic; the ABM devotes six pages trying to explain away the apparent perjury. (ABM:34-39.) That effort fails.

First, defendants repeatedly assert their experts never "adopted" the statements in Exhibit 52. (ABM:34-39.) So what? No requirement exists that a witness "adopt" evidence of his prior inconsistent statements. Defendants cite no authority for their assertion because none could exist. If a witness had to concede that evidence of his prior inconsistent statement is accurate before impeachment could proceed, any witness could simply short-circuit any impeachment.

Second, defendants do not explain the significant contradictions away – they simply attempt to add layers of confusion. Because we are mindful that this Court's role is not to decide the perjury issue, but rather to determine whether a jury is ever allowed to do so, we address only one example.

Exhibit 52 clearly documents Schneider's crucial statement that the seat belt "[redacted]." (AA:114[sealed].) Subsequently, at deposition, Schneider testified that he had never expressed such an opinion, and he also affirmatively testified the [redacted]. (AA:390-393[sealed].) The inconsistencies remain glaring.

II.

DEFENDANTS TWIST *AEROJET* AND *STATE FUND*

BEYOND RECOGNITION.

A. Defendants cannot distinguish *Aerojet*.

Defendants argue that *Aerojet* is distinguishable because there the lawyer believed the document was part of a discovery response and, thus, "had a colorable basis" for assuming he was "entitled" to receive it. (ABM:14,20,23.)

Nonsense. In *Aerojet*, the document was received when "all discovery was stayed." (*Aerojet-Gen. Corp. v. Transport Indemnity Ins*. (1993) 18 Cal.App.4th 996, 1000, emphasis added.) Also false is defendants' related assertion that "the receiving lawyer had no reason to suspect he was not entitled to the document." (ABM:20, 22.) *Aerojet* could not have been any clearer: "DeVries acknowledged that he had no reason to believe that Bronson or its clients had consented to the disclosure . . . ." (*Aerojet*, 18 Cal.App.4th at 1001, emphasis added.)

Defendants next argue that the "only pertinent information embedded in the privileged document was the identity of a witness . . . ." (ABM:20.) Another fabrication. The memo also contained pure work-product, i.e., counsel's "assessment" of "'witness potential.'" (*Id*. at 1000.)

Defendants' fall-back argument is that "the *only* matter of interest" to the receiving lawyer was nonprivileged, i.e., the witness's identity.

(ABM:20,23.) But in our case, the only useful matters of interest were the nonprivileged statements of the declared experts. (11/14/02:70:17-19).

What was said at the unprivileged meeting to and (especially) by the declared experts is just as much a nonprivileged "objective fact" as the witness's identity in *Aerojet*. Indeed, defendants have conceded[8] that plaintiffs were entitled to depose the experts concerning everything said at the meeting.[9] (11/25/02:94:26–95:15.)

Similarly, it does defendants no good to argue that the "*entire* document" here is privileged because it allegedly contains strategy and opinion. (ABM:23.) In *Aerojet*, likewise, there is no doubt that the entire "witness assessment" was privileged work-product. The key point is that nonprivileged information may be contained in an otherwise "entirely

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[8] Defendants' attempt to obfuscate that concession is addressed below in Section III.A.

[9] This destroys defendants' attempt to rely upon *Nacht & Lewis Architects Inc. v. Superior Court* ("*Nacht*") (1996) 47 Cal.App.4th 214. There the list of witnesses interviewed by counsel was work-product, because it showed counsel's thoughts in determining whom to interview. (ABM:21, fn. 9.) But here defendants forget their admission that Johnson was entitled to depose the declared experts and ask about everything said at the meeting. Therefore, to the degree the matters "discussed" could theoretically be "work-product," defense counsel waived that protection by discussing those matters with declared experts who were duty-bound to truthfully answer questions concerning what was discussed. We do not claim the document, itself, was discoverable, only that the subjects recorded therein were open to full interrogation.

privileged" document. As long as the information used is nonprivileged (and was received through inadvertence), the fact that it was housed in an "entirely privileged" document did not matter in *Aerojet*, and should not matter here.

Defendants misleadingly suggest that DeVries (Aerojet's attorney) was sanctioned based on his "failure to *timely* advise opposing counsel" about receiving the memo. (ABM:21, emphasis added.) "Timely" had nothing to do with it. The memo's existence only came to light because opposing counsel's "curiosity" developed about how DeVries learned of Michael's existence and confronted DeVries about it. (*Aerojet*, 18 Cal.App. 4th at 1000.)

Defendants' further attempts to hide from *Aerojet* get worse. Defendants disingenuously suggest that Johnson's reliance on *Aerojet* was an afterthought. Quoting snippets of testimony, they assert "he did *not* read *Aerojet* in deciding what to do." (ABM:22.)

This ignores Johnson's testimony that he was "intimately familiar" with the decision. (11/14/02:47:17-27.) It also ignores the fact that Johnson did nothing irretrievable <u>until after</u> he re-read *Aerojet* that night, and made sure he "knew all" its points, "because <u>if</u> I was going to do something further with the document, <u>I wanted to do something right</u>." (11/14/02:58:26-59:1; 61:15-19, emphasis added.)

Johnson's sincere reliance on *Aerojet* has never before been questioned. Both the trial court and appellate court affirmatively noted that Johnson genuinely relied upon *Aerojet* in formulating his course of conduct. (Opn.17; AA:431.)

Finally, defendants argue Johnson should be faulted because he was better situated to do the "right thing" than the lawyer in *Aerojet* who lacked the benefit of any published authority. (ABM:22) This argument is cruelly ironic. Johnson, who did have the "benefit" of case authority, has thus far been severely penalized for following the uncriticized *Aerojet* decision.

B. After re-writing *State Fund*'s "rule" to suit their purposes, defendants then accuse Johnson of "flouting" a "rule" that never before existed.

Under *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 a lawyer's ethical obligation is triggered only:

> "When a lawyer . . . [inadvertently] receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged . . . ." (Emphasis added.)

Our Opening Brief on the Merits ("OBM") demonstrated that a lawyer who receives materials that are less-than-obviously privileged does not have any of the obligations which *State Fund* created. (OBM:22-23; 26-28.) Indeed, *State Fund* declared that one of the "predicate issues" before it was whether the documents in issue "in fact contain patently privileged

information." (70 Cal.App.4th at 651, emphasis added.) That important limitation presumably flowed from the court's expressed concern with the danger of fabricated disqualification motions for tactical advantage. (*Id*. at 657.)

Nonetheless, defendants re-write the test and then try to apply it retroactively against plaintiffs. They begin by quoting the following snippet which appears after the foregoing test was set forth: "'whenever a lawyer ascertains that he or she *may* have privileged attorney-client material . . . that lawyer *must* notify the [opposing] party. . . .'" (ABM:16, underlining added.)

The latter-quoted language, however, is expressly limited to "attorney-client material," not to materials that "otherwise clearly appear to be confidential and privileged." This distinction destroys defendants' argument. Therefore, defendants simply delete the phrase "attorney-client" and baldly assert *State Fund* "requires the lawyer to notify the other side if he or she 'may have' inadvertently-provided privileged materials." (ABM:16.)

Nothing in *State Fund* creates such an immediate-notification obligation for non-attorney-client-privileged material. Because even the Court of Appeal ruled Exhibit 52 was not attorney-client privileged, this

immediate-notification argument is disingenuous.[10]

Defendants' immediate fallback position is that the trial court allegedly "considered the document to be plainly privileged." (ABM:16, citing AA:434-435.) Once again, defendants have deleted the key words: "attorney-client." The trial judge's actual statement was that Johnson knew "Yukevich had not intended to produce to him the document regarding the attorney-client-expert legal engineering conference and "once he understood the nature of the pages, his obligation was to . . . inform Mr. Yukevich." (AA:434, emphasis added.) If, as the judge mistakenly believed, the material had been plainly attorney-client, that would have been true under *State Fund*.

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[10] This Court should summarily reject defendants' urging that a lawyer be disqualified for reading any inadvertently-received document if he/she has a "reasonable suspicion" it may be confidential. Even if this proposed new rule were limited to documents which were stamped "confidential" (unlike Exhibit 52 which provided no warning label at all), it would still constitute a radical and dangerous change in California law. It would obliterate the careful balance *State Fund* struck in broadening ethical obligations but only when the document is "clearly" attorney-client privileged.

Even if defendants' proposal included some labeling requirement, it would still violate public policy because: (1) anything merely stamped "confidential" would then receive the same protection previously afforded only to those longstanding privileges recognized by the Evidence Code and intended to promote critical relationships; and (2) documents that are not properly privileged would nonetheless remain secret because the receiving attorney would fear reading beyond the confidential stamp to determine whether a privilege truly exists or whether it was waived.

But, as the Court of Appeal pointed out, the judge was wrong in believing that any attorney-client privilege was implicated. (Opn:9.) Indeed, the very fact that the trial judge wrongly concluded that Exhibit 52 was protected by the attorney-client privilege underscores the magnitude of the appellate court's error in rotely affirming the disqualification order.

Although the judge never suggested Exhibit 52 was "plainly" work-product privileged, we acknowledge that the Court of Appeal, itself, made such a statement. (Opn:26.) But our OBM fully rebutted that assertion, discussing in depth the critical difference between what Johnson knew when he received the document versus what he later learned through the 10-day evidentiary hearing. (OBM:23-26.) That detailed rebuttal stands unrefuted.

There is another glaring counter to defendants' false claim that the document was "plainly privileged." While defending Dr. Germane's deposition, defendants' own counsel, Alex Calfo (Yukevich's partner), interposed 19 objections to questions based on Exhibit 52, but not a single one was that the document appeared to be work-product. (AA:124-136). This is striking because – unlike Johnson – Calfo knew that Exhibit 52's first notation ("LEC") was defendants' acronym for "Legal Engineering Conference" and Calfo had actually attended the very "LEC" in question. (11/12/02:50:4-9, 12/3/02:70:1-7.) If Calfo could not recognize the

document as potentially work-product, how could Johnson reasonably be expected to do so?[11]

III.

DEFENDANTS' WORK-PRODUCT DISCUSSION SPINS AND ULTIMATELY SPLATTERS.

A. Defendants cannot sidestep one dispositive fact – everything the declared experts said was nonprivileged.

Defendants take issue with our reliance upon their stipulation that "anything said by (or to) their declared experts at the meeting was unprivileged and subject to inquiry." (ABM:31, quoting OBM:17.) Defendants claim we misstated their stipulation because "Yukevich did *not* say that it would be appropriate to ask *him* or review *his* notes." (ABM:32.)

We agree. Yukevich's "notes" or testimony could not be compelled. But, this is a red herring.

What we did say – and repeat now – is that the underlying information about what was said by or to the declared experts during the meeting was never privileged. Indeed, when deposed, those experts were

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[11] Defendants' desperate argument that Calfo was somehow prevented from seeing the document is nonsensical. (ABM:10.) Calfo is a partner at Yukevich's firm and an experienced product-liability attorney who would hardly permit questioning of his expert about some unknown document unless Calfo, himself, was fully able to read it. (11/12/04:49, 55-56.) In fact, Calfo never once commented that he was unable to see the document, or that Johnson prevented him in any way from viewing it. (AA:232-244[sealed].)

legally obligated to report, exactly, every statement voiced during the meeting. Defendants did concede this. (11/25/02:94-95.)[12]

The critical significance is that our case directly parallels the situation in *Aerojet.* There, once the attorney inadvertently-obtained the privileged memo he was obligated to use any nonprivileged information to which he had been exposed. Here, the nonprivileged information is the declared experts' statements – information about which defendants themselves conceded the experts could be questioned.

B. Defendants repeatedly obfuscate what can be "compelled" through discovery versus what can be used when inadvertently-received.

Defendants insist that no portion of the inadvertently-produced document can be used because it is "absolute work product." (ABM:25.) Given the knowledge Johnson later acquired through the hearing, we submit that the document could be classified as "qualified" (but not "core") work-product. (OBM:39.) However, even assuming, *arguendo*, the document was "core" work-product, defendants' argument still fails.

Defendants' argument emanates from the assumption that discovery is being sought. (ABM:25-27.) But this case has nothing to do with compelling discovery. Rather, it only concerns inadvertently-received

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[12] Even without a concession, the result is identical under the caselaw. (OBM:25-26.)

documents.

Defendants dispute our contention that the declared experts' statements in Exhibit 52 were easily severable from any alleged "core" work-product – unlike the intertwined statements in *Rodriguez v. McDonnell Douglas Corp*. (1978) 87 Cal.App.3d 626, 647-648. (Compare OBM:41-42 and ABM:27.) Of course, they cannot challenge our point that the very structure of Exhibit 52 invites severance. (OBM:41-42.)

Instead, they rely on the trial court's faulty legal analysis of *Rodriguez*. The trial judge concluded *Rodriguez*'s severance principle did not apply because only certain portions of the meeting were actually recorded, thus revealing the lawyer's selective choices. (AA:430.)

But this could not possibly be what *Rodriguez* meant by "intertwined." (87 Cal.App.3d 626, 647-648.) Whenever an attorney interviews a witness and takes notes, some selection-process necessarily occurs. Therefore, by "intertwined" *Rodriguez* had to mean something different, i.e., witness statements and lawyer impressions blended into single thoughts thereby precluding segregation. That is not our case.

C. Defendants' remaining work-product arguments fall flat.

According to defendants, no distinction exists between work-product and attorney-client privilege, and *State Fund* certainly drew none. (ABM:28-29.) That is odd. Our OBM demonstrated that *State Fund*

pointedly used the phrase "attorney-client" privilege at least 18 distinct times. (OBM:28.) Defendants never suggest why the court would have repeatedly drawn that distinction if it were irrelevant to its holding.

Next, defendants have no persuasive response to our argument that the crime-fraud exception should apply, even if we assume, *arguendo*, that Exhibit 52 is entirely "core" work-product and that *Aerojet's* exception does not control. (OBM:43-46.)

BP Alaska Exploration Inc. v. Superior Court (1988) 199 Cal.App.3d 1240, 1262 makes clear (albeit in the context of attorney-client privilege) that the crime-fraud exception does not require proof of a "completed crime or fraud." Rather, it is sufficient to make a prima facie showing of the intent "to *plan to commit* a fraud." (*Ibid*., court's italics.) This same reasoning should apply to work-product.

Defendants also argue that Johnson failed to show why "surprise" was so important that it justified not immediately disclosing receipt of the document. Ironically, the dissembling on display at pages 34-39 of their ABM ("no perjury occurred") provides the vivid answer. It shows that, with ample warning, learned counsel and expert witnesses can at least confuse, if not whitewash, almost any contradiction. That is precisely why impeachment material does not have to be disclosed prior to trial. (See Evid. Code §§ 769-770 and 780(h).) Indeed, Evidence Code section 769

eliminated any pre-disclosure requirement of inconsistent statements. The accompanying 1995 Comment explained why: "The forewarning gives the dishonest witness the opportunity to reshape his testimony in conformity with the prior statement." (See Assembly Committee on Judiciary, 1995 com., West's Ann. Evid. Code § 769 (2005); see also, L.A. Sup.Ct. Rule 8.60.)

IV.

THE DISQUALIFICATION ORDER VIOLATED LOGIC, PRECEDENT, POLICY AND DUE PROCESS.

Assuming, *arguendo*, Johnson committed any wrongdoing (though he did not) the disqualification order would still have to be reversed for the independent reasons detailed in our OBM, Section III. Virtually all cases and arguments therein are ignored in the ABM. For example, defendants persist in pretending routine abuse-of-discretion standards apply here, rather than the modified abuse-of-discretion review standard ("careful review") this Court recognizes in disqualification cases. (OBM:46-47.)

A. There is no showing of concrete prejudice.

We previously laid down an unmistakably clear challenge to defendants: Show us the concrete prejudice allegedly suffered. Defendants' silence is deafening.

Our OBM detailed the long line of cases unambiguously holding that

disqualification is proper only if the movant demonstrates concrete and specific harm. (OBM:51-58.) For instance, we cited *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1408-1409, where 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 disqualification based upon "unsupported conclusions and assumptions."

Defendants not only ignore *Strasbourger* – they repeat the very mistake exposed therein. They persist in quoting the precise "unsupported conclusions" in the trial court's Statement of Decision ("SOD") which we pinpointed as lacking any concrete support. (Compare OBM:54-55 and ABM:42-43.)

For instance, defendants repeatedly quote the judge's statement (AA:436) that Johnson:

> "studied the document carefully, made his own notes on it, dispensed the information to his associates and experts, discussed it [with them] and based his litigation strategy and expert witness cross-examination upon the information contained in the document." (See e.g.. ABM 43,45,47.)

But defendants studiously ignore the portion of the SOD (highlighted in our OBM) which explains exactly what that excerpt means and which defines how Exhibit 52 was specifically "used": "[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, emphasis added.)

Competent impeachment would naturally require Johnson to "study" the document containing the impeachment material, make "notes," and coordinate it with his experts. But nothing else in the entire SOD, or in the ABM, shows how Johnson derived any non-impeachment benefit from the document. The naked phrase "based his litigation strategy [on it]" is unsupported by any substantial evidence.

This gaping hole in defendants' argument for disqualification is key for two reasons. First, as detailed above, Johnson used nonprivileged information which he was entitled to know, i.e., the statements expressed by declared experts at a nonprivileged meeting with counsel.

Second, the absence of any concrete showing of prejudice is also key because it affects the appropriate remedy. We submit that, clearly under *Aerojet*'s principles (and public policy considerations against perjury), Johnson's use of Exhibit 52 to impeach/refresh the witnesses is laudable. But, even *arguendo*, if this Court determines such use was improper, disqualification would not be the answer. The obvious lesser remedy would be an *in limine* order precluding such impeachment and requiring Exhibit 52's destruction.

Desperate to show "prejudice," defendants try to manufacture some from whole cloth. They imply that Exhibit 52 led Johnson to direct his expert (Sances) to do a "spool-out" test. False. The record proves that Dr. Sances had been repeatedly challenged by Mitsubishi regarding spool-out at his second deposition (well before inadvertent-receipt of Exhibit 52) and, therefore, Dr. Sances had previously decided to conduct further related testing. (11/21/2002:40:16-26.) Mitsubishi omits this known fact.

B. Defendants' admission that *State Fund* created an "ambiguous" standard is fatal to the disqualification ruling.

Tellingly, defendants now abandon the very argument they rode to victory in the courts below. There, they argued, and convinced the Court of Appeal that, when *Aerojet* was decided, there had not been "any clear . . . authority" defining one's ethical obligations in inadvertent-receipt cases. (Opn:24.) Supposedly, *State Fund* "provided the decisional authority" that previously had been lacking. (*Ibid*.)

This argument now blows up in defendants' faces. Before this Court, defendants concede that *State Fund*'s so-called test is anything but "clear."

They painfully admit that "the *State Fund* rule could be read to state different tests," and suffers "ambiguity" and "inconsistencies." (ABM:16-

17.)

Given that admission, the disqualification order must fail. Indeed, *State Fund* itself said so, entitling Section III: "Sanctions Were Not Properly Awarded Because Adam Telanoff's Conduct Was Not Clearly Proscribed . . . ." (70 Cal.App.4th at 654, emphasis added.)

Defendants' desperate fallback is that *State Fund*'s fatal ambiguity is irrelevant. "Not having read" the decision until after disseminating the document, "Johnson cannot claim to have been lead astray by any inconsistencies." (ABM:16.)

Not only is this argument factually defective,[13] it is legally absurd. In America, a law, if unenforceably vague, is unenforceable as to all. Therefore, if applied to anyone, it must be applied uniformly to all persons whether they have read it or not. By defendants' logic, if *State Fund* had been overruled, Johnson could still be disqualified for violating it unless he specifically read the case that overruled it.

An unclear ethical standard is no standard at all. Unless and until the conflicting obligations in *State Fund* are reconciled, no one can fairly be sanctioned for violating them. Defendants' invitation that this Court

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[13] Johnson testified that when he made his decision, he was familiar with *State Fund*'s holding regarding inadvertently-received attorney-client material, although he did not remember the case's name. (11/25/02:52-54.)

provide "appropriate clarification" of the test – while simultaneously punishing Johnson and his clients under the admittedly-ambiguous former test – is, in a word, perverse.

C. *Shadow Traffic* bears no conceivable relation to our case.

Our research discloses: (a) no California published case resulting in attorney disqualification for use of an inadvertently-received work-product document; and (b) that disqualification has only occurred when one side has hired or retained a key individual (attorney, paralegal, expert witness, etc.) who formerly received privileged information from the other side in the same (or related) litigation, i.e. what might be termed "switched-loyalty" cases.

Here, lacking any authority that justifies the disqualification ruling, defendants have resorted to highlighting a switched-loyalty case, *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App. 4th 1067. There, defense counsel met with accountants whom he knew had previously consulted with plaintiff's counsel. Despite this explosive – indeed, pivotal – knowledge, he hired the accountants and, therefore, was later disqualified.

But, the differences between that case and ours are overwhelming:

(1) There, the offending attorney knew he was interviewing and hiring undeclared experts who had consulted with opposing counsel. Thus,

he knew he was dealing with inherently-privileged information.[14] (24 Cal.App.4th at 1082.) Conversely, our case involves inadvertent-receipt of an ambiguous document, not believed to be privileged and concerning unprivileged statements by and to declared experts.

(2) There, the accountants had never been "declared experts" by the plaintiffs. Therefore, everything plaintiffs' counsel had said to them was not merely privileged work-product, it was also infused with attorney-client privileged information (actual or at least potential.)[15] The latter portion of the opinion is filled with discussion of the expert's access to potential attorney-client information. In fact, *Shadow Traffic* draws heavily upon *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, a switched-loyalty case involving "confidential attorney-client information" that the paralegal could bring to the new firm. (24 Cal.App.4th at 1084-1088,

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[14] Contrary to defendants' suggestion, the critical point was not that the expert knew counsel's "theories of damages." (ABM:45.) Rather, it was that when counsel openly disclosed that information (and more), it was a privileged communication – totally unlike Yukevich's discussion with the declared experts which Yukevich knew was subject to full disclosure to the other side (especially given the rapidly upcoming expert depositions.)

[15] The court noted that statements from counsel to undeclared experts disclosing client confidences, where the disclosure is in furtherance of the client's interests, fall "within the ambit of attorney-client privilege." (*Id.* at 1078-1079.)

emphasis added.) None of those concerns are present in our case.

(3) There, it was impossible to know the scope of what plaintiffs' counsel had disclosed to the undeclared experts because there was no record of the precise conversation. *Shadow Traffic* therefore relied on *In Re Complex Asbestos'* reasoning that a rebuttable presumption of shared confidences was necessary "because the party seeking disqualification will be at a loss to prove what is known" by the adversary. (*Id*. at 1085.) Conversely here, the only information Johnson could have "known" is readily there for all to see – that which appears within Exhibit 52's four corners. Any possible prejudice is therefore far easier to measure and selectively cure.[16]

Finally, defendants' reliance on *Shadow Traffic* to prove that Johnson should have called Yukevich is misplaced. There, the new attorney had no legitimate reason not to contact his adversary before interviewing an expert known to have consulted with his adversary.

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[16] Besides *Shadow Traffic*, defendants also mention a case quite similar, *County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647. The key difference is that in *County*, plaintiff's counsel retained a doctor who had been declared – but was recently-withdrawn – as defendants' designated expert even though he continued as a defense consultant. Because he was un-designated before actually testifying, everything shared between counsel and him remained privileged. (222 Cal.App.3d at 656.) This is totally unlike our case where the conversation at issue was admittedly nonprivileged.

Here, such advance notification would have gutted the impeachment value of Exhibit 52. Immediately calling Yukevich might have satisfied defendants' sense of propriety – but it also might have made Johnson an unwitting facilitator of potential perjury, and violated his overriding duty to protect his clients from such perjury.

D. Disqualification as punishment was improper.

Defendants' brief drips with purported righteousness. They urge disqualification to punish Johnson for what they describe as "subterfuge," "self-help" and "concealment." (ABM:43.) They also accuse him of allegedly ignoring his "fidelity to the law."(ABM:47.)

Defendants pour on these pejoratives to fill-in the gaping hole in their disqualification claim. Our OBM detailed the controlling principle that disqualification cannot be justified as a punishment, but rather only as a last resort where no lesser remedy will cure actual, proven prejudice. (OBM:52-53, 56-57.) *State Fund* makes clear that even where an ethical violation has occurred, disqualification is still improper unless it is "compelled." (OBM:49.)

Defendants also argue that Johnson should be estopped for failing to suggest any "lesser remedy." (ABM:48.) Again, untrue. During the hearings, plaintiffs' counsel stated: "If the Court should find any remotely privileged information in the document, it can be severed and [there] can be

orders in limine addressing the fact that no one should address those parts that the Court feels are privileged."[17] (12/04/02:63:4-7.)

Finally, our OBM pointed out the unfairness and impropriety of punishing Johnson for relying upon *Aerojet*. In the face of all this,

defendants' feeble rejoinder is that Johnson did not read *State Fund*. (ABM:47.)

This response self-destructs for many reasons we have already detailed above in Section IV.B. Suffice it to say, if he had read it again (he was already familiar with its holding) he would have reviewed a "test" (as defendants now concede) which is highly ambiguous. If anything, reliance on *Aerojet* would have been underscored.

CONCLUSION

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

Respectfully submitted,

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[17] Obviously, if the court concluded the entire document was privileged, the *in limine* order would bar all use.

DATED: May 18, 2005 PINE & PINE

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CERTIFICATE OF WORD COUNT

In compliance with California Rules of Court, Rule 29.1(c)(1), I certify that the text of Appellants' Reply Brief on the Merits [PUBLIC REDACTED VERSION] contains 5,983 words, including footnotes, as determined by the word count function of WordPerfect, Version 11, the program used to generate this brief.

Dated: May 18, 2005

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