

**LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE**

OPINION NO. 531

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IN LITIGATION, WHAT ARE A LAWYER'S ETHICAL OBLIGATIONS WHEN OFFERED EVIDENCE RETAINED BY A FORMER EMPLOYEE OF THE OPPOSING PARTY WHO REVEALS THAT RELEVANT DOCUMENTS HAVE BEEN CONCEALED FROM PRODUCTION?

SUMMARY

Digest:

When a lawyer ("Lawyer") is offered access, by a witness who is an unrepresented former employee of the opposing party ("Witness"), to potential documentary evidence and is informed that it will show the adverse party's failure to comply with discovery obligations, the lawyer is faced with competing public policy considerations and difficult ethical and legal issues.

The first question the lawyer must address is whether Witness is lawfully in possession of the data. Lawyer must carefully evaluate the facts and determine not only whether possession of the data is proper, but also whether lawyer may lawfully and ethically review it. Lawyer is prohibited from facilitating, taking advantage of, engaging in, advising or assisting others to engage in criminal conduct. If Lawyer is not competent to make this evaluation, Lawyer should consult with a practitioner who is competent in criminal law. If Lawyer concludes that Witness's acquisition or possession of the evidence was a crime and Lawyer has taken possession of it, Lawyer may be ethically required to turn the evidence over to the court or the appropriate authorities.

The second question the lawyer must address is whether the data includes writings the lawyer knows or reasonably should know are privileged or subject to a claim of work product. Lawyer is prohibited from accessing the content of privileged communications between the adverse party and opposing counsel. Analogizing to the rule and applicable case law governing inadvertently produced documents subject to the attorney-client privilege or work product protection, once it is reasonably apparent to the Lawyer that privileged

documents of another party or documents entitled to work product protection have been obtained, Lawyer will be ethically obligated to give notice to the privilege holder, the owner of the work product or their counsel, and discontinue review of the material beyond the extent necessary to ascertain that they are entitled to such protections as provided by the rules.

Because Witness is an unrepresented person and not a current employee of the adverse party, Lawyer is not prohibited from communicating with Witness, but may not state or imply that Lawyer is disinterested. Lawyer also may not seek to obtain privileged or other confidential information from Witness that Lawyer knows or reasonably should know Witness is not entitled to reveal without violating a duty to another, or which Lawyer is not otherwise entitled to receive.

If receiving access to the evidence from Witness is a significant development or leads to any relevant limitation on actions the client expects Lawyer to take, Lawyer must reasonably consult with the client regarding the means by which to accomplish the client's objectives, including keeping the client reasonably informed and advising the client regarding any limitations imposed on Lawyer's conduct by the Rules of Professional Conduct and the State Bar Act. Such communication should include discussion of the significance of this development and the potential consequences of the client's proposed course of action. Lawyer may not participate in, advise or assist Employee or the client to gain unlawful access of information that is confidential, privileged or subject to work product protection.

FACTS

Lawyer A represents Client A in a civil lawsuit for theft of trade secrets against Company B, represented by Lawyer B. Witness is a former administrative assistant of an executive of Company B and familiar with discovery conducted in the case. Witness is not a party and is not represented by counsel.

Witness initiated contact with an officer of Client A, who, without Lawyer A's knowledge or direction, met Witness and discussed Witness's knowledge of the case. Officer tells Lawyer A that Officer had been contacted by Witness, who claimed to be a former administrative assistant for an executive of Company B. Officer tells Lawyer A that Witness claims that Company B is withholding important documents from production in discovery. Officer also explains to Lawyer A that Witness possesses a copy of electronic data described as a duplicate of a folder on Company B's server that will establish Company B's possession and use of Client A's trade secrets. Officer did not learn how Witness came into possession of the electronic data. According to Officer, Witness said:

“[y]ou guys should check out the file called ‘Hot Docs’ – that’s the stuff they are hiding from you.” However, Officer did not obtain a copy of the data.

Client A asks Lawyer A to meet with Witness and take possession of the data.

AUTHORITIES CITED

Statutes

Business and Professions Code section 6068, subdivision (a)

Business and Professions Code section 6106

Penal Code section 496

Penal Code section 502

Civil Code section 47, subdivision (b)

Civil Code sections 3426 et seq.

Code of Civil Procedure section 425.16

Financial Code sections 4050 et seq. (California Financial Information Privacy Act)

California Rules of Professional Conduct:

Rule 1.0.1

Rule 1.1

Rule 1.2.1

Rule 1.4

Rule 4.2

Rule 4.3

Rule 4.4

Rule 8.4

Cases

Aerojet-General Corp. v. Transport Indemnity Insurance (1993) 18 Cal.App.4th 996

Clark v. Superior Court (2011) 96 Cal. App. 4th 37, 48

Conn v. Superior Court (1987) 196 Cal.App.3d 774, 781

In re Plotner (1971) 5 Cal.3d 714

Finton Construction, Inc. v. Bidna & Keys APLC (2015) 238 Cal.App.4th 200

McDermott Will & Emery LLP v. Superior Court (2017) 10 Cal.App.5th 1083

Nalian Truck Lines, Inc. v. Nakano Warehouse and Transportation Corp. (1992) 6 Cal.App.4th 1256

People v. Lee (1970) 3 Cal.App.3d 513

People v. Meredith (1981) 29 Cal.App.3d 682

People v. Superior Court (Fairbank) (1987) 192 Cal.App.3d 32
Pillsbury Madison & Sutro v. Schechtman (1997) 55 Cal.App.4th 1279
Rico v. Mitsubishi Motors Co. (2007) 42 Cal.4th 807
Scalzo v. Baker (2010) 185 Cal.App.4th 91
Snider v. Superior Court (2003) 113 Cal.App.4th 1187
State Farm Fire & Casualty v. Superior Court (1997) 54 Cal. App. 4th 625
Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal.App.3d 131, 144
Williams v. Superior Court (1978) 81 Cal.App.3d 330

Ethics Opinions

Cal. State Bar Form. Opn. 2013-188

Other

Restatement (Third) of the Law Governing Lawyers section 102 (2000)

Restatement of Employment Law sections 8.01 *et seq.*

DISCUSSION

I. An Attorney May Not Participate in the Commission Of, or Advise or Assist a Client to Engage in a Criminal Act

According to the statements of Client A's officer, Witness is offering access to data that purportedly is evidence of documents wrongfully being withheld from production by Company B or its lawyers. An initial concern for Lawyer A should be whether possession of the data is lawful. If the data has been misappropriated by Witness or otherwise unlawfully obtained, and if Lawyer A takes possession of the data or encourages Client A to do so, Lawyer A may be engaging in unlawful conduct, or advising Client A to engage in criminal conduct.¹ Lawyer A can neither engage in criminal conduct nor counsel a client to engage in, or assist a client in conduct that Lawyer A knows is criminal, fraudulent or a violation of law. See Cal. Rules of Professional Conduct, rule 1.2.1 (a), and rule 8.4(b), (c) and (d).² While this opinion does not address whether there has been criminal conduct, it is a significant ethical issue to be considered. Lawyer A should at the outset determine whether it is possible that a

¹ This opinion does not analyze the Penal Code or other potentially applicable statutes or opine whether Witness has committed a crime, or whether Lawyer's conduct would constitute a crime but merely notes that the possibility the data could be the product of theft or a computer crime warrants serious consideration of the ethical implications. See, for example, Penal Code sections 496, 502.

² Unless otherwise indicated, all references to "rule" or "rules" are to the California Rules of Professional Conduct (eff. 11/1/18). An asterisk appearing within a quoted rule reflects the use of terminology that is defined in the rules. Such definitions are found in rule 1.0.1.

crime has been committed or would otherwise result if Lawyer A or Client A take possession of the electronic data or review its contents.

As a preliminary matter, Lawyer A must determine how Witness obtained possession of the data and, without reviewing the data itself, the general content or types of information it contains. Insofar as Witness is unrepresented by counsel and not employed as a managing agent by Company B, rule 4.2 does not prohibit Lawyer A from communicating with Witness directly. However, under rule 4.3, Lawyer A may not inquire into the content of privileged communications between Lawyer B and Lawyer B's client, and should not ask questions of Witness that would compromise Company B's attorney-client privilege or reveal information for which Witness, although a former employee of Company B, still has an obligation to protect, such as confidential communications or trade secrets.³

In meeting with Witness and inquiring about the data, Lawyer A should be cognizant of the duty to refrain from assisting a wrongdoer in criminal conduct and the potential consequences of committing a breach of ethical duties.⁴ If the data constitutes or contains stolen information, Lawyer A may have an ethical obligation, *sua sponte*, to turn it over to the court or to law enforcement. See *People v. Superior Court (Fairbank)* (1987) 192 Cal.App.3d 32, 39 (stating that the duty of attorneys to turn evidence over to law enforcement is "self-executing" and requires no court order or prosecution motion). Lawyer A's communications with Witness and information obtained are likely to be deemed to be non-privileged. See, *People v. Lee* (1971) 3 Cal.App.3d 513 (in a criminal case involving the transmission by a third party of tangible evidence to the defendant's counsel, the "privilege does not protect information coming to an

³ Rule 4.3 specifically prohibits a lawyer who is communicating on behalf of a client with a person not represented by counsel from seeking "to obtain privileged or other confidential information the lawyer knows or reasonably should know* the person* may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive." (Rule 4.3(b).) Lawyer A may not invade privileged attorney-client communications or work product of Lawyer B and Lawyer B's client, Company B. *State Farm Fire & Casualty v. Superior Court* (1997) 54 Cal. App. 4th 625, 652; *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1194 ("[C]ounsel should not ask questions that could violate attorney-client privilege."). See also, *Restatement (Third) of the Law Governing Lawyers* section 102 (2000). ("A lawyer communicating with a nonclient in a situation permitted under [the general anti-contact rule] . . . may not seek to obtain information that the lawyer reasonably should know the nonclient may not reveal without violating a duty of confidentiality to another imposed by law."). See also, *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 144, and *Nalian Truck Lines, Inc. v. Nakano Warehouse and Transportation Corp.* (1992) 6 Cal.App.4th 1256, both being cases which predate the current rules but provide guidance as to communicating with present or former employees. With respect to the continuing duty of confidentiality to a former employer, see, e.g., *Restatement of Employment Law* sections 8.01 *et seq.*

⁴ See *In re Plotner* (1971) 5 Cal.3d 714 (attorney disbarred after convictions for receiving stolen property and illegally supplying or administering an abortion); and *Williams v. Superior Court* (1978) 81 Cal.App.3d 330 (attorney convicted of concealing stolen property).

attorney from a third person who is not a client unless such person is acting as the client's agent." *Id.*, at 527). The lawyer who takes possession of evidence of a crime risks the potential for search by law enforcement authorities or of being compelled to testify as to the origins and condition of the data. See *People v. Meredith* (1981) 29 Cal.App.3d 682, 694 (identifying an exception to attorney-client privilege when counsel has removed or altered evidence, depriving law enforcement of the opportunity to find evidence in its original location).

Whether taking possession of the data or reviewing its content constitutes a crime would depend on the specific facts and circumstances of the situation, and the controlling law. Whether or not the data is ultimately determined to be stolen property will normally be resolved by a trier of fact. There are circumstances in which a former employee is legally entitled to possess evidence of employer data, and there are circumstances when the former employee is not so entitled.⁵ If Lawyer A does not have the experience necessary to competently evaluate this concern, the duty of competence may be satisfied by consulting with other counsel who is competent to make that determination. (Rule 1.1(c).)⁶ Lawyer A may not engage in criminal conduct or advise, enable or aid anyone else to do so.

II. Accessing and Possessing An Opposing Party's Data Without the Party's Knowledge or Consent May Violate Ethical Duties

Gaining access to the confidential or privileged data of an adversary outside of the normal discovery process presents ethical risks apart from the question of whether or not the data was lawfully obtained. Such data might be subject to various privileges, work product protection, Non-Disclosure Agreements, court-ordered confidentiality or trade secret protection. While this opinion does not address whether disqualification of counsel is appropriate, many of the authorities cited here arise in the context of cases involving

⁵ This opinion does not address protections that may be available to an employee or lawyer representing an employee in the context of whistleblowing, where materials are reviewed after being taken from a corporate employer whose conduct may be criminal in nature. See, for example, *Erhart v. Bofl Holding, Inc.*, (S.D. Cal., Feb. 14, 2017), No. 15-cv-02287-BAS NLS, 2017 WL 588390 (California Labor Code section 1102.5 may provide protections for a bank's internal audit employee who took possession of confidential information from the employer in the belief that it evidenced unlawful conduct that was later reported to federal authorities.)

⁶ Rule 1.1(c) provides in relevant part:

"(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent"

disqualification and thus provide judicial guidance for evaluating ethical duties. In connection with the duty to refrain from reading or using an opposing party's inadvertently produced confidential information, California law recognizes that every attorney has the obligation to "respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice."⁷

Lawyer A's ethical duties here may be analogized to the situation in which the lawyer received privileged documents from an opposing party that were inadvertently produced. A lawyer's duties regarding the receipt of a writing relating to the lawyer's representation of a client where it is reasonably apparent that the writing was inadvertently sent or produced are now explicitly addressed in the Rules of Professional Conduct. Rule 4.4 provides that "where the lawyer knows* or reasonably should know* that the writing is privileged or subject to work product doctrine, the lawyer shall: [¶.] (a) refrain from examining the writing any more than necessary to determine that it is privileged or subject to the work product doctrine, and [¶.] (b) promptly notify the sender."⁸ The rule only addresses the situation in which it is reasonably apparent that the lawyer has received writings that were inadvertently sent or produced, and would be inapplicable here where Lawyer A has not yet received any writings from Witness.

Before the adoption of rule 4.4, however, State Bar Formal Opinion 2013-188 concluded that, given the strong public policies underlying *Rico* and *State Fund*, when a lawyer receives an apparently privileged writing from a third-party witness and it was reasonably apparent that the materials were sent without their owner's authorization, the lawyer has a duty not to read or use the privileged information. (State Bar Formal Opn. 2013-188, p. 4). We agree with that conclusion. Even where the material is transmitted by a person other than the holder of a privilege, if it is reasonably apparent that it was provided without the owner's authorization, Lawyer A's compliance with the notice requirements of rule 4.4 would be prudent.

⁷ See, *Rico v. Mitsubishi Motors Co.* (2007) 42 Cal.4th 807, 818 ("*Rico*"); *Clark v. Superior Court* (2011) 196 Cal.App. 4th 37, 48; *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1107 (citing *Rico, supra*); and *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 ("*State Fund*"). See also, rule 8.4(d) ("it is professional misconduct for a lawyer to... engage in conduct that is prejudicial to the administration of justice...")

⁸ Comment [1] to rule 4.4 notes, referencing *Rico*, that if the lawyer determines that this rule is applicable, the lawyer should either return the writing to the sender, reach an agreement with the sender regarding disposition of the writing, or seek guidance from a tribunal.

It should be noted that the receipt of evidence originating from an opposing party does not always involve ethical impropriety. In *Aerojet-General Corp. v. Transport Indemnity Insurance* (1993) 18 Cal.App.4th 996 (“*Aerojet-General*”), a case that predated the *Rico v. Mitsubishi* line of decisions, the court found no fault in the conduct of an attorney who received from a third party a privileged memorandum that was inadvertently produced. The receiving lawyer reviewed and used the memorandum to identify a witness. The court concluded that an attorney may have a professional obligation to utilize for the benefit of the client the nonprivileged factual information even though the source of the information was a privileged memorandum of the opposing counsel.⁹ The Supreme Court in *Rico* distinguished but did not overrule *Aerojet-General* on the basis that the information learned by the receiving lawyer – the identity of a witness – was not privileged and there was no claim that the opponent’s case had been prejudiced.¹⁰ Lawyers faced with the receipt of potentially protected materials should refer to rules 4.3 and 4.4, as well as existing case law cited herein, for ethical guidance.

It also has been held that employees do not generally have the right to simply take documents from the files of their employers without the knowledge or consent of the employers. *Conn v. Superior Court* (1987) 196 Cal.App.3d 774, 781 (disqualification denied, but lawyer and client were held in contempt for failing to return privileged and other improperly obtained documents taken from client’s former employer); *Pillsbury Madison & Sutro v. Schechtman* (1997) 55 Cal.App.4th 1279 (preliminary injunction upheld to compel the return of confidential personnel documents where lawyer obtained them from employees of the adverse party.) In *Pillsbury*, the court stated: “Any litigant or potential litigant who converts, interdicts or otherwise purloins documents in the pursuit of litigation outside the legal process does so without the general protections afforded by the laws of discovery and risks being found to have violated protected rights.” *Id.*, at 1289.

In the anti-SLAPP context (Code of Civil Procedure section 425.16), claims against attorneys who allegedly received or used illegally obtained evidence have been dismissed based upon the protections of litigation privilege (Civil Code section 47, subdivision (b)). See, for example, *Scalzo v. Baker* (2010) 185 Cal.App.4th 91 (Anti-SLAPP dismissal affirmed where the defendant attorney received from the clients the credit card records of the adverse party, alleged to be an invasion of privacy and to violate the California Financial Information

⁹ *Aerojet-General* noted at p. 1004: “[T]he attorney-client privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts upon which the communications are based [citations]”

¹⁰ *Rico v. Mitsubishi*, 42 Cal.4th, *supra* at 815-16.

Privacy Act¹¹) and *Finton Construction, Inc. v. Bidna & Keys APLC* (2015) 238 Cal.App.4th 200 (Anti-SLAPP dismissal of claims for conversion and receipt of stolen property affirmed where attorneys received from their client and former employee of the plaintiff an allegedly stolen hard drive taken from the former employer).

The conclusion to be drawn from these authorities is that there are circumstances where Lawyer A might be deemed to have improperly received or reviewed protected information, but there are also circumstances where a lawyer having possession of and examining the evidence may be ethically permitted. Thus, lawyers facing a situation similar to Lawyer A should conduct a thorough analysis before accepting possession of or reviewing any evidence whose provenance is uncertain.

III. Witness' Offer to Provide Potentially Confidential Data is a Significant Development, and Lawyer A Must Communicate with Client A about its Risks

Lawyer A has a duty to diligently represent Client A, which may warrant further investigation pertaining to the information that Witness represents is contained in the electronic data. Where there is a concern whether the evidence may be lawfully possessed or reviewed, and the client is requesting the attorney to take such action, this would likely be a significant development in the representation, triggering duties under rule 1.4. Lawyer A is obligated to keep the client reasonably informed regarding such developments, which could include discussion of the financial impact, legal costs and delay resulting from any battle over the entitlement to the evidence, the possibility of disqualification, the potential loss of the counsel of client's choice, and the possibility of evidence preclusion or other forms of sanctions that could be incurred. Lawyer A's duty to communicate significant developments under rule 1.4 would thus require, under these facts, that risks of this nature be discussed with the client.

Rule 1.4(a)(4) also requires that Lawyer A advise the client about any relevant limitation on the lawyer's conduct when Lawyer A knows that Client A expects assistance that is not permitted by the rules or other law. If Lawyer A concludes that taking possession of the data or reviewing its contents is likely to involve acts that are prohibited, Lawyer A must consult with and advise Client A of the limitations on Lawyer A's ability to act as the client requests. Other recently adopted rules may also be applicable to Lawyer A's actions if

¹¹ Financial Code sections 4050 et seq.

dishonest or criminal conduct is involved, or the lawyer otherwise engages in conduct prejudicial to the administration of justice.¹²

IV. Conclusion

When a lawyer is offered access by a former employee of the opposing party to evidence a reasonably prudent lawyer would suspect contains protected or privileged information, the ethical risks and potential adverse consequences of taking possession or reviewing the material are significant. The lawyer should first ascertain whether the evidence was lawfully obtained. The lawyer must take great care to carefully analyze the lawyer's ethical and legal duties, and to refrain from committing, advising or assisting in commission of a crime. Even if not illegally obtained, the lawyer must take care to refrain from reviewing or using information that is privileged or otherwise protected by confidentiality or work product protections. The lawyer should take appropriate steps to advise the client of the reasonably foreseeable adverse consequences of using such material and of the remedial steps that may be required, including giving notice to the opposing counsel. Finally, if the materials reasonably appear to be attorney-client privileged or subject to work product protection, and are being provided without the knowledge or consent of the owner, Lawyer A must comply with the requirements of the *Rico* line of cases discussed in this opinion.

[This opinion is issued by the Los Angeles County Bar Association's Committee on Professional Responsibility and Ethics. It is not binding on the courts, the State Bar of California, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.]

¹² See, for example, rule 8.4 (a), (b) and (d).