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Inadvertently produced documents create a conflict between lawyers' duties to their clients and to the courts

On the Receiving End

by Kurt L. Schmalz

What should a lawyer do when he or she receives, through the inadvertence of opposing counsel, documents clearly subject to the attorney-client privilege or attorney work product doctrine? This question was how the court of appeal framed the issue in *State Compensation Insurance Fund* v. *WPS, Inc.* (commonly referred to as the *State Fund* case).[1] The issue, like so many others facing the appellate courts, is easier to state than it is to resolve. Indeed, it has perplexed courts and ethics experts for a long time.

Now, this troublesome issue involving the inadvertent production of documents is before the California Supreme Court in *Rico* v. *Mitsubishi Motors Corporation*, which could be one of the court's most important legal ethics decisions in recent years. In *Rico*, the supreme court will review the decision by the Fourth District Court of Appeal to affirm the trial court's order disqualifying an attorney who was the recipient of a privileged document through the inadvertence of opposing counsel.[2]

For more than 20 years, California courts have vacillated between

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two opposing positions. Initially, courts found that an attorney receiving inadvertently produced documents had no duty to return the documents or to refrain from looking at them—and may even use the documents to benefit his or her client in the case. Later courts have held that an attorney must immediately return the inadvertently produced documents to opposing counsel, looking at the documents only to the extent necessary to determine their privileged nature.

One of the early seminal decisions on this issue is *Aerojet-General Corporation* v. *Transport Indemnity Insurance*.[3] In *Aerojet*, the court of appeal reversed a sanctions order against the recipient attorney, noting that: "Once he had acquired the information in a manner that was not due to his own fault or wrongdoing, he cannot purge it from his mind. Indeed, his professional obligation demands that he utilize his knowledge about the case on his client's behalf."[4] The *Aerojet* court found it significant that the attorney receiving the purportedly privileged information did not violate any statutes, judicial decisions, rules of court, or rules of professional conduct in using the information he received to his client's advantage. In fact, the court noted that the attorney's primary duty was "to protect the interests of his own clients."[5]

The *Aerojet* decision, however, was not the final word on the inadvertent production issue. As discovery in complex litigation became more wide-ranging and voluminous, and the routine use of facsimile transmission made document production instantaneous, the problem of inadvertently produced privileged documents became even more prevalent and difficult. In 1992, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 92-368, which addressed the inadvertent disclosure of confidential material.[6] The committee stated in its opinion that a lawyer who mistakenly receives privileged or confidential documents from opposing counsel should refrain from examining the documents, immediately notify opposing counsel who sent the documents, and return the documents if opposing counsel requests their return.[7] The ABA opinion represented a departure from the standard rule enunciated in *Aerojet*, which seemed to place a greater emphasis on the lawyer's duty to zealously represent the interests of the client than on the lawyer's duty of fair play as an "officer of the court." For this reason, ABA Formal Opinion 92-368 was not well received.[8]

Bowing to criticism, the ABA modified its position two years later in Formal Opinion 94-382, which created a course of action for a lawyer who, as a result of opposing counsel's mistake, receives privileged or confidential material. In this circumstance, the lawyer 1) may review the materials only to the extent necessary to determine whether they are privileged and how appropriately to proceed, 2) should promptly notify opposing counsel that he or she has the materials, and 3) should follow the instruction of opposing counsel about the documents or refrain from using the materials until the court rules on how the materials should be handled.[9] Even though the ABA Model Rules of Professional Conduct and ABA Formal Opinions are not controlling in California, California courts tend to give them substantial weight and deference—especially when the California Rules of Professional Conduct and the State Bar Act do not address the issue and the rule does not conflict with California public policy.[10]

State Fund and the ABA Opinions

In 1999, the Second District Court of Appeal in *State Fund*[11] moved California away from the *Aerojet* decision and closer to the ABA standard. Although it did not disapprove *Aerojet*, the court in *State Fund* limited *Aerojet* to its facts and adopted a rule for California that was nearly identical to ABA Formal Opinions 92-368 and 94-382. In *State Fund,* the appellate court reversed a sanctions order against an attorney who received—through the mistake of opposing counsel—privileged documents, which the attorney used against his opponent and even gave to another attorney litigating claims against the State Compensation Insurance Fund. After the receiving attorney refused opposing counsel's request to return the documents, the trial court found the attorney's conduct to be unethical and in bad faith and imposed monetary sanctions on the attorney and his client.[12]

In reversing the sanctions order, the *State Fund* court noted that the receiving attorney had not violated any California decision, statute, or rule of professional conduct. The court found that the attorney did not comply with ABA Formal Opinion 92-368 but emphasized that California did not follow the ABA rules. Nonetheless, the court used ABA Formal Opinion 92-368 as a guide in formulating a rule for California attorneys to follow.[13] The court ruled that a lawyer who receives clearly privileged documents from an adversary should: 1) stop reading the documents as soon as the privileged nature of the documents become apparent, 2) immediately notify opposing counsel that the lawyer has the documents, and 3) resolve any disputes about the handling of the documents with opposing counsel or refrain from using the documents until the court determines their disposition.[14]

The court in *State Fund* devised this rule after balancing the competing duties that lawyers owe to their clients and to "the administration of justice."[15] Placing great weight on the "sanctity of the attorney-client privilege," the court made a pronouncement: "We believe a client should not enter the attorney-client relationship fearful that an inadvertent error by its counsel could result in a waiver of privileged information or the retention of the privileged information by an adversary who might abuse and disseminate the information with impunity."[16]

Notwithstanding the rule in *State Fund*, which places clear obligations on the lawyer receiving privileged documents, the court offered some consolation to the receiving attorney in its opinion. In reversing the sanctions order, the court held that "whenever a lawyer seeks to hold another lawyer accountable for misuse of inadvertently received confidential materials, the burden must rest on the complaining lawyer to persuasively demonstrate inadvertence." The court commented further that an attorney should not be subject to disqualification simply because he or she has been exposed to the confidential information of an adversary. Nevertheless, even though the court referred to disqualification as a "draconian" remedy, the court made it clear that in an appropriate case—presumably when the recipient attorney fails to follow the court's newly articulated rule—disqualification might be warranted.[17]

The *Rico* Challenge

The *State Fund* court's discussion of disqualification of the receiving attorney as a possible sanction seems to have set the stage for the court of appeal's decision in *Rico*. The *Rico* court moved the rule on the receiving lawyer's ethical duty 180 degrees from the rule established in 1993 by *Aerojet* and well beyond the middle ground staked out by the court in *State Fund*.

Rico arose when counsel for a plaintiff in an SUV rollover case obtained a written summary of a conference between the defense attorney and defense experts about certain strengths and weaknesses in their case.[18] The plaintiff's attorney testified that he got the summary when a court reporter mistakenly delivered the document to him at a deposition. Defense counsel claimed that the plaintiff's attorney took the document from his files while defense counsel was out of the room. Despite the apparent conflict in the evidence, the trial court determined that the document had been inadvertently produced to plaintiff's counsel.[19] The production of the defense memorandum came to light when plaintiff's counsel used the document at a subsequent deposition in the case. Defense counsel learned of the document's use and demanded its prompt return.

After plaintiff's counsel refused to return

the document, defense counsel immediately filed a motion to disqualify the plaintiff's attorney and the plaintiff's experts, who had also reviewed a copy of the document. Following a lengthy hearing, the trial court found that the defense memorandum was subject to the attorney-client privilege and work product doctrine and that plaintiff's counsel violated his ethical duty by failing to notify opposing counsel that he had the document and was using it. The court, relying on the *State Fund* decision, granted the motion and disqualified the plaintiff's attorney and experts because the attorney's review and use of the privileged document caused "unmitigatable prejudice" to the defense. The Fourth District Court of Appeal affirmed the disqualification order,[20] and the California Supreme Court granted review on June 9, 2004. At press time, oral argument in the case had not yet been scheduled.

The appellate court in *Rico* found that the rule for attorney conduct enunciated in *State Fund* provided the decisional basis that was lacking when the *Aerojet* case was decided. Even though the *State Fund* court considered disqualification of the receiving attorney a draconian remedy, the court in *Rico* had no difficulty in affirming the disqualification order. Both the trial and appellate courts in *Rico* were highly critical of the receiving attorney because he "studied the document carefully, made his own notes on it, discussed the meaning of the notes with the experts and based his litigation strategy and expert witness cross-examination upon the information contained in the document."[21] The appellate court acknowledged that the receiving attorney relied on the *Aerojet* case but still found his conduct to be unethical because he failed to make any "further inquiry into his ethical responsibilities," and "made full use of the privileged document" in violation of the ethical standards in *State Fund*.[22]

Hopefully, in deciding *Rico*, the state supreme court will resolve the uneasy tension between the *Aerojet* and *State Fund* decisions and give California attorneys a clear ethical standard to follow when they receive privileged documents through the mistake of opposing counsel. The situation in states that follow the ABA Model Rules is even more confusing. Last year, as *Rico* came under review by California's highest court, the ABA reversed itself and withdrew Formal Opinion 92-368—the opinion that strongly influenced the *State Fund* decision.[23] On October 1, 2005, the ABA's ethics committee adopted Formal Opinion 05-437, which states:

> A lawyer who receives a document from opposing parties or their lawyers and knows or reasonably should know that the document was inadvertently sent should promptly notify the sender in order for the sender to take protective measures. To the extent that Formal Opinion 92-368 opined otherwise, it is hereby withdrawn.

Under ABA Model Rule 4.4(b), "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The commentary to the rule confirms that the receiving lawyer's only duty is to promptly notify the sender so that the sender can take appropriate action. However, the commentary states, "Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived."[24] The ABA standard is further clouded because even though ABA Formal Opinion 92-368 was withdrawn, ABA Formal Opinion 94-382—which addresses a lawyer's duty when the lawyer inadvertently receives "privileged or confidential materials" of an adverse party—apparently is still viable.

Thus, it is unclear whether the lawyer's duty is simply to notify opposing counsel of the receipt of the materials or if the more extensive duty outlined in ABA Formal Opinion 94-382 controls. Nonetheless, ABA Model Rule 4.4 and its commentary would most likely control in the jurisdictions that follow the ABA standards. The attorney's only duty under the rule is to disclose the receipt of the documents to the opposing counsel. However, an argument could be made that the more rigorous standard in Formal Opinion 94-382 applies when the inadvertently produced documents are clearly privileged or confidential. Rule 4.4 does not expressly address the inadvertent production of privileged documents.

The Privilege Issue

With these sometimes conflicting developments, the California attorney who has the fortune (or misfortune) to receive, through the mistake of opposing counsel, possibly privileged or confidential documents that opposing counsel did not want the attorney to see, faces some significant dilemmas. Certainly, the rule in *State Fund* is still good law in California, although its basis has been undermined by the ABA's withdrawal of ABA Formal Opinion 92-368 and the California Supreme Court's impending review of *Rico*. However, the efficacy of an ethical rule should be measured in its clarity and consistent application. At this point, at least until *Rico* is decided, California's standard—as well as the national standard—regarding what a receiving attorney should do with inadvertently produced documents is neither clear nor consistent.

The most problematic portion of the rule outlined in *State Fund*, and expanded in the *Rico* court of appeal decision, is the determination of whether the inadvertently produced document is actually privileged.[25] The difficulty begins with discerning when the receiving attorney's duty to contact opposing counsel about a mistakenly produced document arises. In *State Fund*, the inadvertently produced documents were clearly stamped with the heading "Attorney-Client Communication/Attorney Work Product" and the word "Confidential" on the first page of each form.[26] Thus, on their face, the documents put receiving counsel on notice that the opposing party believed the documents to be privileged and/or confidential. However, the documents inadvertently produced in *Aerojet* and *Rico* were not labeled "Confidential" or "Privileged," or any similar markings.[27] In

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each of those cases, the appellate court offered an in-depth analysis of whether and to what extent the mistakenly produced documents were privileged at all.

In *Aerojet*, the court concluded that the document itself may have been confidential or even privileged, but the underlying information in the document (the identity of potential witnesses) was not privileged. This conclusion that the mistakenly produced information was not privileged was used by the *State Fund* court to distinguish *Aerojet* and limit the case to its facts. But how can the receiving attorney make the kind of analysis necessary to determine the privileged nature of a document if extensive review and analysis of the document is considered improper? There was no way the receiving attorney could have properly determined whether the document was privileged or not without reading and thoroughly analyzing it.

In *Rico*, the privilege issue was even more complicated. The trial court based its ruling on its assumption that any reasonable attorney would have known that the defense memorandum was subject to the attorney-client privilege and the work product doctrine. However, the appellate court found that the trial court was only half right. After extensive analysis, briefing, and oral argument by counsel, the trial court ruled that the memorandum was subject to the attorney-client privilege.[28] This was an error, according to the appellate court. Nonetheless, the appellate court found that the memorandum was still protected because it consisted of attorney work product, even though the document had been prepared by a paralegal, apparently at a lawyer's request.

The appellate court reached this conclusion after an extensive analysis of the document and how it was prepared. According to the court, if the memorandum had been a transcription of a discussion between defense counsel and defense experts, it would not have been subject to absolute work product protection.[29] However, the trial court found that the document included the thoughts and impressions of the defense attorney—and was therefore entitled to absolute attorney work product protection.

If a proper determination of the privileged nature of a document requires the extensive analysis of a trial court and an appellate court—after full briefing and oral argument of counsel—then it is difficult to fault an attorney for "meticulously examining" and analyzing a document that the attorney inadvertently received.[30] Indeed, as the court observed 23 years ago in *Aerojet*, an attorney has an ethical duty not only to examine and analyze the adversary's document but to use the evidence to further the interests of the attorney's client.[31]

Of course, an ethical dilemma arises when the inadvertently produced document clearly appears to be privileged, such as when the document is so labeled or when the document appears on the producing party's privilege log. Even then, the receiving attorney should not be faulted for reviewing and analyzing the document before contacting opposing counsel. Upon thorough review, the document may not be legitimately privileged or counsel may reasonably believe that any privilege has been waived. Moreover, given the high volume of documents produced in many cases and tight trial deadlines, the receiving lawyer may not appreciate the importance or privileged nature of the document until later in the case during trial preparation or expert discovery. In a close case, it would not be unreasonable for the receiving attorney to err on the side of protecting his or her client's interests in using the documents rather than to help opposing counsel clean up an embarrassing mistake.[32]

And what if a clearly privileged document mistakenly produced to opposing counsel revealed that the producing party had destroyed key discoverable documents, was hiding witnesses, or was encouraging them to lie under oath? Indeed, in *Rico*, the court of appeal rejected the plaintiff's argument that the use of the inadvertently produced defense memorandum was justified because it revealed that the defense experts were lying about the technical evidence in the case. The court found that:

> Once the unintended reader ascertains that the writing contains an attorney's impressions, conclusions, opinions, legal research or theories, the reading stops and the contents of the document for all practical purposes are off limits….Unlike with the attorney-client privilege, there is no crime-fraud exception to the attorney work product rule. The absolute attorney work product privilege is just that, absolute.[33]

If the *Rico* court's analysis survives supreme court review, then the smoking gun document that a litigator receives and reads may become a ticking time bomb that could result in the attorney facing disqualification, monetary sanctions, and public reproval from the courts for being "unethical."

Perhaps the courts have put an unreasonable, and ultimately unworkable, burden on attorneys who receive, through no misconduct of their own, privileged documents from the opposing side. The courts can, without imposing severe punishments on the receiving attorney, preserve the integrity of the judicial process and sanctity of the attorney-client privilege and other privileges and protections by excluding from evidence on dispositive motions or at trial inadvertently

MCLE Test No. 149

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education legal ethics credit by the State Bar of California in the amount of 1 hour.

1. To determine the scope of a lawyer's ethical duties when he or she receives, through the inadvertence of opposing counsel, privileged documents of the opposing side, the California Supreme Court currently has under review the lower court ruling in:

A. *Aerojet-General Corporation* v. *Transport Indemnity Insurance*.
B. *State Compensation Insurance Fund* v. *WPS, Inc.* (*State Fund*).
C. *Rico* v. *Mitsubishi Motors Corporation*.
D. All of the above.

2. The American Bar Association Model Rules of Professional Conduct and the ABA Formal Opinions are not controlling in California.

True.
False.

3. According to ABA Formal Opinion 94-382, a lawyer who receives an adverse party's privileged or confidential material as a result of a mistake by opposing counsel should:

A. Promptly notify opposing counsel that the lawyer has the material.
B. Immediately return the material to opposing counsel without reviewing it and before talking to opposing counsel.
C. Use the material against the adverse party to further the interests of the lawyer's client.
D. All of the above.

4. In *Aerojet*, the court noted that:

A. The attorney's primary duty was "to protect the interests of his own clients."
B. An attorney who receives and reviews inadvertently produced documents from the opposing side is subject to automatic disqualification.
C. "[A] client should not enter the attorney-client relationship fearful that an inadvertent error by its counsel could result in a waiver of privileged information by an adversary who might abuse and discriminate the information with impunity."
D. None of the above.

5. The ABA has withdrawn its Formal Opinion 05-437.

True.
False.

6. What do *Aerojet* and *State Fund* have in common?
A. Both resulted in the court of appeal affirming the disqualification of a lawyer who received the opposition's privileged documents through the inadvertence of opposing counsel.
B. Both resulted in the court of appeal reversing a sanctions order against a lawyer who received the opposition's privileged documents through the inadvertence of opposing counsel.
C. Both resulted in the court of appeal affirming an award of monetary sanctions against a lawyer who received the opposition's privileged documents through the inadvertence of opposing counsel.
D. None of the above.

7. In *State Fund*, the court of appeal was highly critical of ABA Formal Opinion 92-368.
True.
False.

8. Which competing duties of lawyers did the *State Fund* court of appeal try to balance?
A. The duties of loyalty and confidentiality.
B. The duties to zealously represent the client and to serve the administration of justice.
C. The duties of candor and to serve the administration of justice.
D. The duties of loyalty and to avoid conflicting interests.

9. In California, a lawyer's inadvertent production of privileged documents to opposing counsel results in an automatic waiver of the attorney-client privilege for those documents.
True.
False.

10. According to the court in *State Fund*, a lawyer who receives clearly privileged documents from an adversary should stop reading the documents as soon as the privileged nature of the documents becomes apparent.
True.
False.

11. The *State Fund* court distinguished *Aerojet* because:
A. The rule in *Aerojet* conflicted with ABA Formal Opinion 92-368.
B. *Aerojet* was bad law and should be overruled.
C. The information in the inadvertently produced document in *Aerojet* was not privileged.
D. The privileged document in *Aerojet* was not inadvertently produced.

12. The court in *State Fund* referred to disqualification of the attorney receiving inadvertently produced documents as:
A. The best remedy.
B. An improper remedy that is not recognized in California.
C. A better remedy than monetary sanctions.
D. A draconian remedy.

13. The court of appeal in *Rico* relied heavily on *Aerojet*.
True.
False.

14. In *Rico*, the trial court and the appellate court were highly critical of the receiving attorney because he extensively reviewed the inadvertently produced document and showed it to his expert witnesses.
True.
False.

15. Under ABA Model Rule 4.4, the attorney's only duty upon receiving inadvertently produced documents is to promptly disclose receipt of the documents to opposing counsel.
True.
False.

16. In a dispute over an inadvertent production of confidential or privileged documents, who has the burden of proving that the production of contested documents was inadvertent?
A. The producing attorney.
B. The receiving attorney.
C. The client.
D. The issue has not yet been determined.

17. Until the California Supreme Court rules in *Rico*, the prevailing rule governing the conduct of California lawyers who receive their opponents' privileged documents through the inadvertence of opposing counsel is set forth in:
A. ABA Model Rule 4.4.
B. *State Fund*.
C. The court of appeal decision in *Rico*.
D. *Aerojet*.

18. The court of appeal in *Rico* found that inadvertently produced documents protected by the attorney work product doctrine—but not the attorney-client privilege—could be reviewed and used by the receiving attorney without limitation or risk of sanctions.
True.
False.

19. While the scope of a receiving attorney's duty is not entirely clear, the most important single thing for the receiving attorney to do when he or she receives possibly privileged documents inadvertently produced by the opposing side is to:
A. Promptly notify opposing counsel in writing of the receipt of the documents.
B. Immediately send the documents back to opposing counsel without reading them.
C. Initiate judicial proceedings to determine how the documents should be handled.
D. Do nothing.

20. In *Aerojet* and *State Fund*, the parties that inadvertently produced the documents to the opposing side ended up winning their respective cases at trial.
True.
False

MCLE Answer Sheet #149

ON THE RECEIVING END

Name

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ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1.	☐ A	☐ B	☐ C	☐ D	
2.	☐ True		☐ False		
3.	☐ A	☐ B	☐ C	☐ D	
4.	☐ A	☐ B	☐ C	☐ D	
5.	☐ True		☐ False		
6.	☐ A	☐ B	☐ C	☐ D	
7.	☐ True		☐ False		
8.	☐ A	☐ B	☐ C	☐ D	
9.	☐ True		☐ False		
10.	☐ True		☐ False		
11.	☐ A	☐ B	☐ C	☐ D	
12.	☐ A	☐ B	☐ C	☐ D	
13.	☐ True		☐ False		
14.	☐ True		☐ False		
15.	☐ True		☐ False		
16.	☐ A	☐ B	☐ C	☐ D	
17.	☐ A	☐ B	☐ C	☐ D	
18.	☐ True		☐ False		
19.	☐ A	☐ B	☐ C	☐ D	
20.	☐ True		☐ False		

produced privileged materials and any other evidence derived directly from those materials.[34] While the receiving attorney may have obtained some actual or perceived advantage over his or her opponent as a result of receiving an inadvertently produced document, this advantage is minimal if the attorney is unable to use the document or privileged information at trial.[35] Moreover, the courts should not be in the business of compelling attorneys to clean up their opposing counsel's mistakes. A lawyer should adhere to a duty of fair play as an officer of the court. However, the courts should be careful not to advance amorphous interpretations of fair play at the expense of the lawyer's fundamental duty to zealously represent his or her client.

In this time when ethical rules are not entirely clear and thus appear to be more like a moving target than they should be, California attorneys are well advised to protect themselves and their clients by promptly disclosing to opposing counsel in writing that they have received documents that may have been inadvertently produced. Thereafter, the burden should be on the producing attorney to put the issue before the court and demonstrate that: 1) the documents were given to opposing counsel through mistake, inadvertence, or neglect, 2) the documents are truly privileged, and 3) the privilege has not been waived.

The disclosure by the receiving attorney should be a safe harbor to defeat any subsequent motions by opposing counsel to disqualify the receiving attorney or experts or for monetary and other sanctions directed at the receiving attorney or his or her client. If appropriate, the court, after the disclosure, can exclude the privileged document from evidence and make any other in limine orders to protect the sanctity of privileged communications and the administration of justice. ■

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[1] State Comp. Ins. Fund v. WPS, Inc. (State Fund), 70 Cal. App. 4th 644, 651 (1999).
[2] Rico v. Mitsubishi Motors Corp., 116 Cal. App. 4th 51, 10 Cal. Rptr. 3d 601 (2004), Cal. Sup. Ct. Case No. S123808 (rev. granted June 9, 2004). The supreme court's grant of review in *Rico* had the effect of depublishing the court of appeal decision so that it is no longer citable authority on this issue.
[3] Aerojet-General Corp. v. Transport Indem. Ins. Co., 18 Cal. App. 4th 996, 1005 (1993).
[4] *Id.* at 1005-06.
[5] *Id.* at 1005.
[6] *See The "OOPS" Factor*, ABA J., Feb. 2006, at 26.
[7] ABA's Standing Committee on Ethics & Professional Responsibility, ABA Formal Op. No. 92-368.
[8] ABA J., *supra* note 6.
[9] ABA's Standing Committee on Ethics & Professional Responsibility ABA Formal Op. No. 94-382.
[10] State Comp. Ins. Fund v. WPS, Inc. (State Fund), 70 Cal. App. 4th 644, 656 (1999) ("[T]he ABA Model Rules of Professional Conduct *may* be considered as a collateral source, particularly in areas where there is no direct authority in California and there is no conflict

with the public policy of California." (emphasis in original)).

[11] *Id*. at 644.

[12] *Id*. at 651.

[13] *Id*. at 655-56. Interestingly, the court did not appear to consider ABA Formal Opinion 94-382, which modified Formal Opinion 92-368. However, the rule developed by the court in *State Fund* is very similar to ABA Formal Opinion 94-382.

[14] State Fund, 70 Cal. App. 4th at 656-57.

[15] *Id*. at 657.

[16] *Id*.

[17] *Id*.

[18] Rico v. Mitsubishi Motors Corp., 116 Cal. App. 4th 51, 10 Cal. Rptr. 3d 601, 603-04 (2004), Cal. Sup. Ct. Case No. S123808 (rev. granted June 9, 2004).

[19] *Id*., 10 Cal. Rptr. 3d at 604. If the trial court had found that the receiving attorney had pilfered the document from opposing counsel, then the attorney would have been clearly guilty of misconduct and deserving of severe sanctions.

[20] *Id*. at 616-17.

[21] *Id*. at 613-14.

[22] *Id*. at 614-15.

[23] ABA J., *supra* note 6.

[24] ABA MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt.

[25] Even more perplexing is how to treat inadvertently produced documents that are "confidential" but not privileged. Most businesses consider their internal documents produced in discovery to be confidential. It seems unworkable for an attorney's obligation to be triggered every time he or she receives inadvertently produced confidential documents—especially when the documents (or information contained within them) are not privileged. Aerojet-General Corp. v. Transport Indem. Ins. Co., 18 Cal. App. 4th 996, 1005 (1993).

[26] State Comp. Ins. Fund v. WPS, Inc. (State Fund), 70 Cal. App. 4th 644, 648 (1999).

[27] Aerojet, 18 Cal. App. 4th at 1003; Rico, 10 Cal. Rptr. 3d at 614.

[28] Rico, 10 Cal. Rptr. 3d at 606.

[29] *Id*. at 609.

[30] *Id*. at 614-15.

[31] Aerojet, 18 Cal. App. 4th at 1005.

[32] *See* Mansell v. Otto, 108 Cal. App. 4th 265 (2003). The *Mansell* court declined to apply the rule in *State Fund* to a case in which a crime victim was suing a criminal defense attorney for reviewing her mental health records. The court found that defense counsel received the privileged medical records inadvertently from the prosecution. However, since the documents were produced pursuant to subpoena and defense counsel's discovery requests, the court found that defense counsel could not reasonably have known that production of the records was "inadvertent." *Id*. at 286.

[33] Rico, 10 Cal. Rptr. at 616.

[34] Courts for decades have used exclusionary rules of evidence in criminal cases to protect defendants from evidence obtained by the government through unlawful searches and seizures. In these cases—in which there is arguably more at stake than in most civil litigation—the exclusion of improperly obtained evidence is sufficient to protect the defendant's interests and the administration of justice. Rarely are prosecutors or government officials punished for obtaining or trying to use evidence obtained from an unlawful search. With inadvertently produced documents in civil litigation, the receiving lawyer has not broken any laws or taken any intentional acts to violate the legal rights of the opposing party.

[35] In *Aerojet* and *State Fund*, the parties that inadvertently produced the documents ultimately won their respective cases. Aerojet-General, 18 Cal. App. 4th at 1003-04; State Comp. Ins. Fund v. WPS, Inc. (State Fund), 70 Cal. App. 4th 644, 648 (1999).