LOS ANGELES
Daily Journal

www.dailyjournal.com 915 EAST FIRST STREET, LOS ANGELES, CA 90012 (213) 229-5300 **TUESDAY, JANUARY 08, 2008**

The Ethical Lawyer

By Charles S. Doskow
FORUM COLUMN

Sometimes, the courts surprise us. Occasionally, a court comes up with a decision that is so correct on the facts, so well-written and so reflective of the highest ethical principles of what the law should be that we can but wonder about all the decisions that disappoint.

The subject at issue is a purely ethical one: What is an attorney to do when he or she inadvertently acquires a litigation opponent's confidential documents?

These situations usually arise in one of three ways: (1) a fax or an E-mail containing confidential information and intended for internal use on one side of a case is sent to the other side by mistake (the "missent fax case"); (2) a confidential document is erroneously produced on discovery among a large quantity of papers (the "erroneous submission case"); (3) at the conclusion of a meeting, usually a deposition, papers used by counsel for all parties are strewn about the table and collected in piles for each party to put in its briefcases (the "mistaken pile case").

Rico v. Mitsubishi Motors, 2007 DJDAR 18307 (Cal. Dec. 13, 2007), is a case of the last type. The Supreme Court of California recently decided it unanimously.

During the deposition of one of the defendant's witnesses in a personal-injury lawsuit, one of the defense lawyers privately used a particular document. That document contained detailed notations by a paralegal of an earlier meeting among defense lawyers, clients and expert witnesses concerning the expert's deposition. It was part of the file at the deposition and clearly subject to the attorney-client privilege.

The document somehow found itself in the possession of the plaintiff's counsel (the wrong pile) at the conclusion of the deposition. The plaintiff's attorney, who conceded at trial that he had recognized the nature of the document upon first seeing it, did not inform the other party and used it as a basis for questions a week later in deposing the defendant's expert witness.

When the defendant learned the facts, it moved the court for an order disqualifying the plaintiff's law firm. The trial court granted the motion and barred the firm from further participation in the case. The Court of Appeal upheld the disqualification.

The California Supreme Court affirmed the trial court's disqualification order. It set down an objective standard for the attorney's conduct: Should a reasonably competent lawyer, aware of the status of the litigation, have recognized the privileged nature of the document? Once that recognition occurs, the lawyer must stop his or her review of the document and notify the opposition.

It was not crucial for the court to determine the mechanics of the mistaken delivery. The trial court characterized it as "inadvertence"; the appellate courts did not dispute the finding. The attorney's conduct after recognizing the nature of the document created the ethical issue.

Justice Carol A. Corrigan's opinion characterized the document as attorney "work product." Work product is any document that reflects an attorney's "impressions, conclusions, opinions or legal research." The definition includes notes of witness interviews. If a document is work product, it is absolutely privileged and undiscoverable by the other side.

From that easy characterization, the court glided seamlessly to its holding, consistent with an earlier Court of Appeal decision, that the lawyer, coming upon the document and recognizing its source and confidential nature, was under an absolute obligation (1) to refrain from reading it beyond the point necessary to comprehend its nature, and (2) to notify the other side. Then, the parties are either to resolve the situation by agreement or apply to the court for instructions.

The traditional statement of this rule is that the recipient is to refrain (from further reading), inform (the opposition) and obey (the opposition's instructions). What is clear is that the document may not be used in any manner.

A state Supreme Court decision like the *Rico* case becomes the law of the land for California lawyers. No ifs, ands or buts.

One interesting aspect of the case is that the court is stating a rule which was, for many years, the official position of the American Bar Association. That group, the largest voluntary association of lawyers in the world, had incorporated the "refrain, inform and obey" rule in its Model Rules of Professional Responsibility. A recent amendment to those rules eliminated all but the first requirement and provided that the obligation of the attorney after notification was not the subject of those rules but was to be decided by each state.

Why this most august and prestigious promulgator of ethical rules should back off from incorporating the highest standards of the profession in its suggested rules is a matter for conjecture. California clearly has taken the high road.

The practice of law is regulated by a voluminous and complex body of rules and decisions. Those rules should reflect the highest values of the profession. The California Supreme Court has resolved this issue properly to achieve that result.

Charles S. Doskow is dean emeritus and professor of law at the University of La Verne College of Law in Ontario.