**DISCOVERY LAW**

***Production of Work Product Documents***

**by Jeff Temple**
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Picture this nightmare. You take an expert deposition at the opposing attorney's office. At some point, before, during or after the deposition, you leave your laptop and/or case file with your case notes unattended. The deposition proceeds more or less as you expected. However, days or weeks after the deposition you come to the understanding that the opposing attorney is, *somehow*, now in possession of a copy of your work product -- your notes concerning your and your expert's strategy for the entire case! This nightmare came true for James Yukevich, an attorney in Los Angeles with the firm Yukevich & Sonnett, and was played out in the matter of *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807.

In *Rico v. Mitsubishi Motors Corp.,* James Yukevich and his firm defended the Mitsubishi corporation in litigation involving a rollover. At one point in the case, Yukevich, his associate, a paralegal, two designated experts and, apparently, Mitsubishi representatives, met during a six-hour meeting to plan the case strategy. At the meeting, the paralegal took notes at the direction of Yukevich on Yukevich's computer. The notes of the meeting were not taken verbatim, but were in a dialogue style which summarized the various conversations between the participants at the meeting. At some point after the meeting, Yukevich printed the 12 pages of notes which he later edited and annotated. At no point were the notes stamped or written upon with the words "Confidential" or "Work Product." "Yukevich never intentionally showed the notes to anyone and the court determined that the sole purpose of the document was to help Yukevich defend the case." *Id.* at 1095.

Weeks after the six-hour case strategy meeting, Yukevich took the deposition of one of plaintiffs' expert witness at the offices of plaintiffs' attorney, Raymond Johnson. Upon arriving at Johnson's offices, Yukevich, an attorney for a co-defendant and the court reporter were informed that Johnson and plaintiff's expert were running late. During this wait, Yukevich left the conference room to use the restroom, leaving his briefcase, computer, and case file in the room. Included in the case file were the 12 pages of notes from the strategy meeting. During Yukevich's absence, opposing counsel, Johnson, and plaintiff's expert arrived. Johnson then asked the attorney for the co-defendant and the court reporter to leave the conference room. Upon his return from the restroom, Yukevich found the co-defendant's attorney and the court reporter waiting outside the conference room door. Yukevich then *waited* approximately 5 minutes, knocked, and asked to retrieve his computer and case file. "After a brief delay," Yukevich was allowed back into the conference room.

*Id.* at 812.

Subsequently, Yukevich became aware that Johnson was in possession of the notes taken at the strategy meeting when Johnson used the notes in taking the depositions of Mitsubishi's experts. Johnson claimed the notes "were **accidentally** given to him by the court reporter" *(Id.* at 813; emphasis added) and/or were "put in Dr. Sances' file" (plaintiff's expert whom Yukevich was deposing).

Yukevich insisted that the notes were taken from his file while Johnson and plaintiff's expert were alone in the conference room. Yukevich wrote Johnson, demanding that any and all copies of the 12-page document be returned. Mitsubishi then moved to disqualify plaintiffs' attorneys and experts because they had unethically read and used Yukevich's work product which irremediably prejudiced defendants.

The trial court "ultimately concluded that the defense had failed to establish that Johnson had taken the notes from Yukevich's file. It thus ruled that Johnson came into the document's possession through inadvertence." *Id*. at 13. However, Johnson admitted that he knew within a minute or two that the document related to the defendants' case, that Yukevich did not intend to produce it and that it would be a "powerful impeachment document." Nevertheless, Johnson made a copy of the document, studied it and made his own notes on it. He gave copies to his co-counsel and his experts, who also studied the document and discussed the contents with Johnson. *Id.*

The trial court found that Johnson's notes were absolutely privileged as attorney work product and held that "Johnson had acted unethically by examining the document more closely than was necessary to determine that its contents were confidential, by failing to notify Yukevich that he had a copy of the document, and by surreptitiously using it to gain maximum adversarial value from it." This "violation of the work product rule had prejudiced the defense and 'the bell cannot be unrung' by use of in limine orders." Accordingly, the trial court ordered plaintiffs' attorneys and experts disqualified. Plaintiffs appealed.

The Court of Appeal affirmed and found as follows: (1) the notes were attorney work product, (2) the opposing attorney owed an ethical duty upon receipt of the work product, and (3) the violation of the ethical duty led to the proper disqualification of Johnson and plaintiff's experts.

**SUPREME COURT OPINION**

**(1) Attorney Work Product**

The Legislature has declared that it is state policy to "[p]reserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases." Code of Civil Procedure ("C.C.P.") §2018.020, subd. (a). In addition, the Legislature declared its intent to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." C.C.P. §2018.020, subd. (b).) *Id*. at 814. The Supreme Court went on to explain:

**Thus, the codified work product doctrine absolutely protects from discovery writings that contain an "attorney's impressions, conclusions, opinions, or legal research or theories." (Citation omitted.) . . . . When a witness's statement and the attorney's impressions are inextricably intertwined, the work product doctrine provides that absolute protection is**

**afforded to all of the attorney's notes. (Citation omitted.)**
*Id*. at 814.

Additionally, the Supreme Court agreed with the trial court which found: "As to the content of the document, although it doesn't contain overt statements setting forth the lawyer's conclusions, its very existence is owed to the lawyer's thought process. The document reflects not only the strategy, but also the attorney's opinion as to the important issues in the case. Directions were provided by Yukevich as to the key pieces of information to be recorded, and Yukevich also added his own input as to the important details, by inserting other words in the notes. The attorney's impressions of the case were the filter through which all the discussions at the conference were passed through on the way to the page." The court concluded, "[T]his court determines that the attorney's directions to record only portions of the conference specific to the attorney's concerns in the litigation are sufficient to support the finding that the notes are covered by the absolute work product [doctrine], as the choices in statements to record show the thought process and are too intertwined with the document."

(2) **Ethical Duty Owed Upon Receipt Of Attorney Work Product**
To answer this question, the Supreme Court turned to *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, which holds:

**When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified.**
*State Comp. Ins. Fund v. WPS, Inc., supra*, 70 Cal.App.4th at 656-657.

The *Mitsubishi* Court held that the *State Comp. Ins. Fund* "standard was properly and easily applied here. Johnson admitted that after a minute or two of review he realized the notes related to the case and that Yukevich did not intend to reveal them. Johnson's own admissions and subsequent conduct clearly demonstrate that he violated the *State Fund* rule. We note, however, that such admissions are not required for the application of the objective standard in evaluating an attorney's conduct." *Rico v. Mitsubishi Motors Corp., supra*, 42 Cal.4th at 819.

Additionally, plaintiffs argued that under *Aerojet-General Corp. v. Transport Indemnity Insurance* (1993) 18 Cal.App.4th 996, Johnson was "duty bound" to use the nonprivileged portions of the 12 pages of notes to his clients' advantage. The Supreme Court disagreed and found that *Aerojet* was distinguishable because there were no "unprivileged portions" in the 12 pages of notes from the Mitsubishi case meeting. Although *Aerojet* is not detailed in this article, it is an important case that should be reviewed with regard to producing or receiving documents containing information that could be construed as work product.

(3) **Disqualification Of Counsel And Experts**
Having affirmed the lower court's finding that Johnson violated the *State Fund* rule, the Supreme Court then determined that disqualification was a proper remedy due to Johnson's actions of making full use of the document.

**CONCLUSION**
So as not to live out your own nightmare, here are some things we all should take away from *Rico v. Mitsubishi:*

(1) Don't leave your notes, deposition questions or anything else unattended while in the office of opposing counsel;

(2) Although not mandatory under *State Fund,* use those self-inking stamps "CONFIDENTIAL" and "ATTORNEY WORK PRODUCT". It will at least be unavoidably noticed by an opposing attorney if a work product document is ever inadvertently produced;

(3) Never have a secretary, paralegal or anyone else take verbatim notes at a meeting with experts which could later be transcribed;

(4) Be ethical. If you happen to be on the receiving end of a work product document that is inadvertently produced to you, under *State Fund*, "refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and . . . immediately notify the sender" that you have material that appears to be privileged. However, review *Aerojet-General Corp. v. Transport Indemnity Insurance* (1993) 18 Cal.App.4th 996, for a detailed discussion of when inadvertently produced documents give the receiving party a duty to use the non-privileged portions of it to the clients' advantage.