THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 06-0004

ISSUE: If an attorney receives from a non-party a confidential communication between opposing counsel and opposing counsel's client, what should the attorney do if the attorney reasonably believes that the communication may not be privileged because of the crime-fraud exception to the attorney-client privilege?

DIGEST: If an attorney receives a confidential written communication between opposing counsel and opposing counsel's client under circumstances reasonably suggesting that the crime-fraud exception precludes application of the attorney-client privilege, the attorney may ethically read the communication. If the document may be privileged but for the crime-fraud exception, the attorney must notify opposing counsel as soon as possible that the attorney has possession of the communication. The two attorneys should try to resolve the privilege issue or, if that fails, obtain the assistance of a court. Until the issue is resolved, the attorney may not disseminate or otherwise use the communication or its contents.

AUTHORITIES INTERPRETED: Rules 3-500 and 3-700(C)(1)(e) of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code section 6068.

Evidence Code sections 915, 952, and 956.

STATEMENT OF FACTS

Attorney represents Client in a fraud lawsuit against Company. During discovery, Attorney receives an unsolicited email from an anonymous Sender. The first three lines of the email read, "From: [no sender]" / "To: Attorney" / "Subject: Client v. Company." Attorney's replies to the email consistently generate an automatic "undeliverable" bounce-back notification. The text of the email reads as follows:

> I am an ex-employee of Company. I wish to remain anonymous. Providing you with the attached document is all the help you will get from me. The attached document is a confidential communication between Company and your opposing counsel. It proves that Company planned and perpetrated the fraud with the advice and assistance of your opposing counsel, who was retained for that purpose, and who has been actively involved in the fraudulent scheme from the very outset, long before the incidents described in your complaint. The attached document will prove your case. Read it and see for yourself.

May Attorney ethically open and read the attachment? Must Attorney notify Company's counsel that Attorney has the attachment? When may Attorney use the attachment or the information conveyed in it?

[1/] Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

DISCUSSION

In *Rico v. Mitsubishi Motors Corp.*, the Supreme Court stated:

> 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. *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758] (*Rico*), *quoting State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-57 [82 Cal.Rptr.2d 799] (*State Fund*).

This is an objective standard. In assessing whether a lawyer has complied with the standard, courts must consider "whether reasonably competent counsel, knowing the circumstances of the litigation, would have concluded the materials were privileged, how much review was reasonably necessary to draw that conclusion, and when counsel's examination should have ended." *Rico*, *supra*, 42 Cal.4th at p. 818, *quoting State Fund*, *supra*, 70 Cal.App.4th at pp. 656-657.[2/]

Improperly handling an opposing party's confidential document may result in serious adverse consequences to a lawyer and his or her client, such as disqualification of the lawyer and/or co-counsel and/or the assessment of monetary or evidentiary sanctions. See, e.g., *Rico*, *supra*, 42 Cal.4th 807 (lawyers and experts disqualified); *Bak v. MCL Financial Group, Inc.* (2009) 170 Cal.App.4th 1118 [88 Cal.Rptr.3d 800] (lawyer sanctioned $7,500 for making cursory review, copying and sending to arbitration staff privileged documents inadvertently produced by opposing counsel); *County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647, 658 [217 Cal.Rptr. 698] (lawyer disqualified for receiving opposing party's confidential information from expert consultant).

Rico and *State Fund* impose certain ethical duties upon the receiving lawyer when (a) the lawyer receives materials that "obviously appear" to be privileged or "otherwise clearly appear to be confidential and privileged" and (b) "it is reasonably apparent" that the materials were inadvertently disseminated. We first address the second circumstance. In our factual scenario, Attorney did not receive Company's document from opposing counsel through inadvertence. Rather, Attorney received Company's document from Sender, a third party who intentionally transmitted it. We believe that the ethical duties set forth in *Rico* and *State Fund* apply not only when "it is reasonably apparent that the materials were provided or made available through inadvertence" (*Rico*, *supra*, 42 Cal.4th at p. 817, *quoting State Fund*, *supra*, 70 Cal.App.4th at p. 656), but also when a third party intentionally sends the materials to the lawyer and it is reasonably apparent that the materials were sent without the owner's authorization.

This approach furthers the important values served by the attorney-client privilege. See, e.g., *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 [101 Cal.Rptr.3d 758] (*Costco*) (calling privilege "a hallmark of Anglo-American jurisprudence for almost 400 years"); *State Fund*, *supra*, 70 Cal.App.4th at p. 657 ("Without it, full disclosure by clients to their counsel would not occur, with the result that the ends of justice would not be properly served."); see also *Rico*, *supra*, 42 Cal.4th at p. 818 (describing similar policies underpinning attorney work product doctrine). Also, the Court's analysis in *Rico* supports this approach. Although the Court adopted the trial court's finding that the receiving lawyer "came into the document's possession through inadvertence" (*Rico*, *supra*, 42 Cal.4th at p. 812), the receiving lawyer claimed that a third party – a court reporter – gave him the relevant

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[2/] We address in this opinion only the ethics issues arising from Attorney's receipt of Sender's email, not any legal issues pursuant to, for example, Penal Code section 496 (receiving stolen property), Civil Code section 3426 *et seq.* (Uniform Trade Secrets Act), or the provisions of any protective order. In addition, this opinion does not address duties, if any, to a third party who sends an unsolicited private communication to a lawyer. The facts of this opinion are intended to make clear that Sender is not a person seeking Attorney's advice or representation. For a discussion of potential duties to a third person who communicates confidentially with a lawyer, see State Bar Formal Opinion No. 2003-161.

document. The salient point is that it was reasonably apparent to the receiving lawyer in *Rico* that the author of the document – opposing counsel – did not authorize its dissemination.

According to *Rico*, certain ethical duties arise also when the materials "obviously appear" to be privileged. See *Rico*, *supra*, 42 Cal.4th at p. 817 (lawyer receives materials "that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged"). In our factual scenario, Sender states that the attachment is "a confidential communication between Company and your opposing counsel" that "proves that Company planned and perpetrated the fraud with the advice and assistance of your opposing counsel, who was retained for that purpose, and who has been actively involved in the fraudulent scheme from the very outset, long before the incidents described in your complaint." If Sender's characterization is accurate, the attachment may not be subject to the attorney-client privilege because of the crime-fraud exception. See Evid. Code, § 956 ("There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.").

The crime-fraud exception, if established, expressly applies to communications ordinarily shielded by the attorney-client privilege. See *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1249 [245 Cal.Rptr. 682] (*BP Alaska*) (proponent made prima facie showing that opposing counsel's letter was attempt to defraud proponent). If the exception applies, the communications are not subject to the privilege. See, e.g., *State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 643 [62 Cal.Rptr.2d 834] (*State Farm*) (presumptively privileged statements in declaration by ex-claims specialist who previously worked in insurer's litigation unit discoverable because of crime-fraud exception); compare *BP Alaska*, *supra*, 199 Cal.App.3d at p. 1251 (attorney work-product doctrine, on the other hand, has no crime-fraud exception).

Does receipt of a confidential attorney-client communication under circumstances suggesting that the communication may not be privileged because of the crime-fraud exception trigger ethical duties to "refrain from examining the materials any more than is essential to ascertain if the materials are privileged"? *Rico*, *supra*, 42 Cal.4th at p. 817. We believe that the answer is yes. Again, we base our conclusion on the deference traditionally afforded the attorney-client relationship. See, e.g., *Titmas v. Superior Court* (2001) 87 Cal.App.4th 738, 740 [104 Cal.Rptr.2d 803] (holding that court may not order disclosure of document claimed to be protected by attorney-client privilege without full hearing with oral argument). Also, this view is consistent with the principle that "extreme caution" must be exercised when an accusation is made that will invade the attorney-client relationship in connection with ongoing litigation. See *State Farm*, *supra*, 54 Cal.App.4th at pp. 644-645.

We conclude, however, that under these circumstances suggesting the applicability of the crime-fraud exception, *Rico* permits Attorney to read the entire attachment. That is, it is reasonably necessary for Attorney to read the entire attachment to determine whether the attachment is privileged. See *Rico*, *supra*, 42 Cal.4th at p. 818. We reach this conclusion even though, in general, a court may not order an in camera review of the communication to determine whether the privilege applies. *Costco*, *supra*, 47 Cal.4th 725 (in connection with ruling on privilege claim, discovery referee erred in ordering in camera review of document at issue – letter from lawyer to corporation client concerning lawyer's investigation and opinions); *Cornish v. Superior Court* (1989) 209 Cal.App.3d 467, 480 [257 Cal.Rptr. 383]; see also Evid. Code, § 915 (absent certain exceptions, person authorized to rule on claim of privilege "may not require disclosure of information claimed to be privileged … in order to rule on the claim of privilege…"). The reason for this general principle is that the court's factual determination typically does not involve the nature of the communication or the effect of disclosure but rather the existence of the relationship at the time the communication was made, the intent of the client and whether the communication emanates from the client. See *Cornish v. Superior Court*, *supra*, 209 Cal.App.3d at p. 480.[3/]

Whether a confidential communication loses its protection because of the crime-fraud exception depends in part upon the communication's content. *Cf. United States v. Zolin* (1989) 491 U.S. 554, 566 [109 S.Ct. 2619] (interpreting crime-fraud exception under federal law). For example, the specific documents in question must have

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[3/] Of course, protected confidential communications include not only information given by a client to his or her attorney, but also the attorney's legal opinion and advice given to the client. Evid. Code, § 952; see also *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 119-120 [68 Cal.Rptr.2d 844] (trial court erred in concluding attorney's pre-litigation report to client on employee's discrimination claims not privileged).

a reasonable relation to the ongoing fraud to be discoverable under the crime-fraud exception. *BP Alaska*, *supra*, 199 Cal.App.3d at p. 1269. Consistent with these authorities pursuant to *Rico*, Attorney, as Client's advocate, may ethically read the entire attachment because it is "reasonably necessary" for Attorney to do so to determine whether the document is privileged. Otherwise, Attorney would effectively be precluded from determining whether it is ethically permissible and in Client's best interest to seek judicial resolution of the issue.

Having read the attachment, what, if anything, should Attorney do next? *Rico* and *State Fund* provide that "[o]nce it becomes apparent that the content is privileged, counsel must immediately notify opposing counsel and try to resolve the situation." *Rico*, *supra*, 42 Cal.4th at p. 810; see also *State Fund*, *supra*, 70 Cal.App.4th at pp. 656-657. Consistent with *Rico* and *State Fund*, if Attorney concludes that, notwithstanding Sender's email, the attachment is privileged, Attorney must advise opposing counsel as soon as possible that Attorney has possession of the attachment and try to resolve the situation informally or, if necessary, obtain assistance from the court.[4/] Under such circumstances, there may be little to resolve. That is, both Attorney and Company's counsel presumably concur that the attachment is privileged. Although *Rico* and *State Fund* do not explicitly require that a lawyer receiving such a document return or destroy it, Attorney should consider doing so after conferring with Company's counsel. In the interim, Attorney must set the attachment aside, not disseminate it to anyone (not even to Client), and not use any of the confidential information reflected in it.

Even if Attorney believes that the attachment is not privileged because of the crime-fraud exception, we conclude that as soon as possible Attorney must also advise Company's counsel of Attorney's receipt of the document and try to resolve the issue. See *State Fund*, *supra*, 70 Cal.App.4th at p. 657 ("[W]henever a lawyer ascertains that he or she *may* have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact.") (italics added). Here too, Attorney must set the attachment aside, not disseminate it, and not use any of its confidential information until the privilege issue has been resolved.

If after reading the attachment, Attorney concludes that Company's counsel has no conceivable argument that the attachment reflects any privileged information – for example, the attachment turns out to be a newspaper clipping – Attorney need not advise Company's counsel that Attorney has it and may use the information contained in it. See *Aerojet-General Corp. v. Transport Indemnity Ins.* (1993) 18 Cal.App.4th 996 [22 Cal.Rptr.2d 862] (receiving lawyer free to use non-privileged information on inadvertently produced memorandum written by opposing lawyer).

The Committee believes that this approach properly balances Attorney's duties to Client, opposing counsel, and the justice system. See *Rico*, *supra*, 42 Cal.4th at p. 818; see also Bus. & Prof. Code, § 6068 (enumerating seven duties to the court and three duties to clients); *Kirsh v. Duryea* (1978) 21 Cal.3d 303, 309 [146 Cal.Rptr. 218] (describing duty to opposing counsel).

Because of the risks of failing to comply with the standards articulated in *Rico* and *State Fund*, Attorney's receipt of sender's email may constitute a significant event that Attorney has an ethical obligation to discuss with Client. See Rules Prof. Conduct, rule 3-500; Bus. & Prof. Code, § 6068, subd. (m). Although Attorney may have an ethical obligation to discuss the matter with Client, it is Attorney's responsibility to be sure that Attorney complies with all applicable ethical obligations. See ABA Model Rules Prof. Conduct, Rule 4.4, cmt. [3] ("Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer."). In the event of a disagreement between Attorney and Client as to how Attorney should proceed, Attorney should consider whether Attorney should withdraw from the representation. See Rules Prof. Conduct, rule 3-700(C)(1)(e).

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

[4/] We can envision situations in which it might be inappropriate for an attorney to return a privileged document or notify opposing counsel immediately when "it becomes apparent that the content is privileged" – for example, when a False Claims Act complaint is still under seal. See 31 U.S.C. § 3730(b)(2).