25 Wash.App.2d 644
Court of Appeals of Washington, Division 3.

Patty HUR, individually, Respondent,
v.
LLOYD & WILLIAMS, LLC, a Washington limited liability company; Dewight L. Hall, Jr., individually; and Tod W. Wilmoth, individually, Petitioners,
Priori Cultivation, Inc., a Washington corporation, Defendant.

No. 38363-6-III
|
FILED January 31, 2023

**Synopsis**

**Background:** In underlying contract dispute, attorney for limited liability company (LLC) and its members, who had inadvertently disclosed information subject to a claim of privilege when he sent electronic discovery responses to opposing counsel, moved to disqualify opposing counsel for failing to take corrective action and citing portions of the documents in her motion for summary judgment. The Superior Court, Kittitas County, Candace Hooper, J., denied the motion. Attorney appealed.

**Holdings:** The Court of Appeals, Pennell, J., held that:

counsel violated rule of professional conduct and discovery rule requiring recipient of inadvertently disclosed information subject to a claim of privilege to take corrective action;

prejudice factor weighed against disqualification as an appropriate sanction;

fault of counsel factor weighed against disqualification as an appropriate sanction;

knowledge of the claim of privilege factor weighed against disqualification as an appropriate sanction; and

lesser sanctions were available.

Affirmed.

**Procedural Posture(s):** On Appeal; Motion to Disqualify Counsel.

****863** Appeal from Kittitas Superior Court, Docket No: 18-2-00383-3, Honorable L. Candace Hooper, Judge

**Attorneys and Law Firms**

George M. Ahrend, Luvera Law Firm, 421 W Riverside Ave. Ste. 1060, Spokane, WA, 99201-0406, for Petitioners.

Heidi Nicole Urness, Attorney at Law, 1424 11th Ave. Ste. 400, Seattle, WA, 98122-4271, for Respondent.

PUBLISHED OPINION

Pennell, J.

***646** ****864** ¶ 1 Electronically stored information is ubiquitous in contemporary law practice. When an attorney responds to a discovery request by sending electronically stored information to opposing counsel, care

  

must be taken to avoid inadvertent disclosure of embedded information that might be subject to a claim of privilege. Nevertheless, if an inadvertent disclosure happens, the receiving attorney must take corrective action, including notifying the sender. Sanctions must be imposed if an attorney fails to take corrective action, with the most severe sanction being disqualification.

¶ 2 Counsel for Lloyd & Williams, LLC, and its members, Dewight Hall Jr. and Tod W. Wilmoth (collectively L & W), inadvertently disclosed information subject to a claim of ***647** privilege when it sent electronic discovery responses to opposing counsel that had been partially redacted but not scrubbed of embedded text. Instead of notifying counsel for L & W and sequestering the documents, opposing counsel cited portions of the embedded text in support of a summary judgment motion. This prompted L & W to move for opposing counsel's disqualification.

¶ 3 The failure of opposing counsel to take corrective action violated rules of civil procedure and professional conduct. Nevertheless, the trial court ruled disqualification was not an appropriate sanction because counsel's rule violations were not intentional. Having accepted discretionary review of this matter, we find no abuse of discretion in the trial court's choice of sanction. Accordingly, we affirm.

## FACTS

¶ 4 Patty Hur is embroiled in a contract dispute with L & W. Responding to a discovery request, L & ’s lawyer, George Ahrend, sent more than 1,000 pages of e-mails to Ms. Hur's lawyer, Heidi Urness. The discovery was sent electronically and was accompanied by a notice stating privileged information had been redacted. Mr. Ahrend later explained he redacted the purportedly privileged e-mails by blacking out the substantive content, leaving the header information (i.e., date, sender, recipient, and subject) visible in lieu of a privilege log. [1]

¶ 5 More than one year after receipt of the discovery responses, Ms. Hur moved for partial summary judgment. Attached to Ms. Hur's declaration in support of the motion were two exhibits taken from Mr. Ahrend's discovery materials. The exhibits are screenshots, and each image has a left-hand column and a right-hand column. The left-hand columns display the results of keyword searches. The search results are sentence fragments containing the search terms ***648** “Maggie” and “rent,” [2] accompanied by a denotation of how many “matches” had been found in the searched documents. Clerk's Papers (CP) at 71-74. Alongside each set of search results, in the images’ right-hand columns, appears a visual of e-mail headers followed by completely blacked out text.

¶ 6 Mr. Ahrend reviewed Ms. Hur's summary judgment submissions and recognized the e-mail fragments as content he had intended to redact. Upon further investigation, Mr. Ahrend discovered his attempt at redaction had been only partially successful. Although portions of the discovery had been ****865** blacked out, the metadata [3] associated with the redacted portions had not been removed from the

documents produced. As a result, the content of the blacked-out text was discoverable upon performing a word search of the document.

¶ 7 L&W moved to disqualify Ms. Urness from the case, alleging her receipt and retention of privileged materials violated ethical and discovery court rules. Ms. Urness denied any wrongdoing. She provided various explanations for her conduct, including assertions that she did not understand metadata and that she had received at least some of the information from a third party. Ms. Urness also argued the e-mails were not privileged and that they revealed L&W had engaged in its own ethical violations by withholding information and making misstatements to the court.[4] Ms. Urness was adamant she had not tried to uncover ***649** privileged information, but had simply performed a word search of the discovery materials.

¶ 8 The superior court denied L&W's motion to disqualify Ms. Urness. The court opined that some of Ms. Urness's explanations were suspicious but credited Ms. Urness's assertion that she did not knowingly search through privileged material. Furthermore, the superior court acknowledged that disqualification is an extraordinary remedy, imposed only in extremely rare circumstances. The court fashioned alternate remedies: it ordered Ms. Urness to destroy the files, promised to banish the e-mail excerpts from the court's decision-making, and instructed the parties to not mention the excerpts again.

¶ 9 L&W sought discretionary review of the superior court's order denying its motion for disqualification. We accepted review.

## ANALYSIS

¶ 10 Our review of the trial court's order denying disqualification involves two steps. First, we assess the nature and extent of the rule violations giving rise to the disqualification motion. This is a legal matter, reviewed de novo. *In re Firestorm 1991*, 129 Wash.2d 130, 135, 916 P.2d 411 (1996). Second, if a violation is found, we assess whether disqualification is an appropriate remedy. We review the trial court's choice of remedy for abuse of discretion, keeping in mind that disqualification is a drastic sanction that should be limited to egregious violations. *Id.* at 140, 916 P.2d 411; *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 338, 355-56, 858 P.2d 1054 (1993).

*1. The nature and extent of the rule violation*

¶ 11 L&W alleges Ms. Urness's conduct violated two court rules governing the handling of discovery that is subject to a claim of privilege. The rules are as follows:

> A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client ***650** and knows or reasonably should know that the document or electronically stored information was

> inadvertently sent shall promptly notify the sender.

RPC 4.4(b).

> If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim. The ****866** producing party must preserve the information until the claim is resolved.

CR 26(b)(6).

¶ 12 Taken together, these rules require a recipient of inadvertently disclosed information subject to a claim of privilege to notify the sender and either return, sequester, or destroy the materials. Under CR 26(b)(6), the attorney can share the materials with the court in camera if privilege is disputed. But until the issue of privilege is resolved, the attorney should not disclose the materials to others, including the public by way of a nonconfidential court filing.

¶ 13 L&W contends Ms. Urness violated the foregoing rules by reading its privileged e-mails. This is incorrect. The rules do not prohibit a lawyer from reading inadvertently disclosed information that is subject to a claim of privilege. The only proscription is of the failure to take corrective action.

¶ 14 L & W also claims Ms. Urness somehow purposefully "looked behind the redactions" to view privileged materials. Pet'rs' Opening Br. at 20. Had this occurred, it would have been a significant ethical breach. *See* Wash. State Bar Ass'n ***651** (WSBA) Rules of Prof'l Conduct Comm., Advisory Op. 2216 (2012). But the record does not support L & W's claim. When Mr. Ahrend's office produced the discovery responses, his staff advised Ms. Urness that information subject to a claim of privilege had been redacted. Proper redaction means taking reasonable steps to prevent disclosure of confidential metadata. *See id.*; RPC 1.6(c). There is nothing improper or unreasonable in conducting a word search on materials containing redactions. Nor is it unethical to simply read the results of that word search. *See* WSBA Advisory Op. 2216 (noting that "[u]nder the ethical rules," a recipient of

  

inadvertently sent metadata is "not required to refrain from reading the document, nor [are they] required to return the document" to the sender). Indeed, it is only by reading the materials, at least cursorily, that a recipient can be expected to discover in the first place that they were inadvertently sent privileged information.

¶ 15 While the rules did not forbid Ms. Urness from reading the e-mail excerpts, the record nevertheless indicates she violated RPC 4.4(b) and CR 26(b)(6). Upon reviewing L & W's discovery materials, Ms. Urness should have understood she was able to discover portions of e-mails that were supposed to have been redacted due to a claim of privilege. Ms. Urness may have disagreed with the claim of privilege, but this did not excuse her from taking corrective action. Upon discovering electronically stored information subject to a claim of privilege, Ms. Urness was required to notify Mr. Ahrend and either return, sequester, or destroy the materials in question. She should not have used the materials in support of Ms. Hur's motion for summary judgment without first obtaining a court order designating the materials as not privileged. Ms. Urness's failure to take corrective action upon discovery of the privileged information and her use of the materials in support of summary ***652** judgment are violations that required some sort of sanction. *Fisons*, 122 Wash.2d at 355, 858 P.2d 1054. [5]

*2. Whether disqualification is an appropriate remedy*

¶ 16 Trial courts have a variety of options when issuing sanctions for discovery violations involving a claim of privilege. Attorney disqualification is the most severe sanction and should not be imposed unless "absolutely necessary." *Firestorm*, 129 Wash.2d at 140, 916 P.2d 411. Our court has identified four factors trial courts must consider in determining whether disqualification is an appropriate remedy for an attorney's access to privileged information: (1) prejudice, (2) counsel's fault, (3) counsel's knowledge of the claim of privilege, and (4) the ****867** possibility of lesser sanctions. *Foss Mar. Co. v. Brandewiede*, 190 Wash. App. 186, 195, 359 P.3d 905 (2015). "No one factor predominates or has greater importance than others." *Id.* at 197, 359 P.3d 905. Though it may be "best practice" for the superior court to enter written findings on each of the factors, the superior court need not do so as long as the record permits the appellate court "to evaluate the trial court's consideration" of the factors. *Id.*

¶ 17 We assess each of the four factors in turn.

*a. Prejudice*

¶ 18 With respect to the first factor, L&W has not suffered significant prejudice as a result of Ms. Urness's rule violations. Ms. Urness would have learned of the information in the e-mails even if she had taken the corrective action required by RPC 4.4(b) and CR 26(b)(6). Furthermore, because Ms. Urness disputed L&W's claim of privilege and because she believed the materials at issue revealed ethical violations by L&W and Mr. Ahrend, she ***653** almost certainly would have disclosed the e-mails in question to the trial judge, in camera, had she followed the applicable rules. Thus, the trial judge, like Ms. Urness, was not exposed to any information that would have

  

gone unknown had Ms. Urness not violated the applicable rules.

¶ 19 The only material change caused by Ms. Urness's rule violations is that L & W's redacted materials have been made public. However, L & W has not articulated any reason why this revelation is prejudicial. During oral argument, Mr. Ahrend represented that the two e-mail fragments were of minor significance because they are consistent with his clients' version of the facts. Wash. Court of Appeals oral argument, *Hur v. Lloyd & Williams, LLC*, No. 38363-6-III (Nov. 8, 2022), at 10 min., 30 sec. to 10 min., 38 sec. ("There's nothing incompatible with those e-mails and [L&W's] testimony as to what happened in this business transaction that went sour."), *video recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-3-court-of-appeals-2022111202/?eventID=2022111202. Prejudice has not been shown and therefore does not weigh in favor of disqualification.

*b. Fault*

¶ 20 While Ms. Urness was at fault for failing to take corrective action once she discovered she had been inadvertently provided materials subject to a claim of privilege, her culpability is not as severe as claimed by L&W. Consideration of fault weighs against disqualification where an attorney gained access to purportedly privileged information through an "inadvertent disclosure by the opposing party." *Foss*, 190 Wash. App. at 196, 359 P.3d 905. There is no evidence suggesting Ms. Urness purposefully sought to uncover privileged information or unredacted metadata. L & W points to Ms. Urness's choice of search terms and posits Ms. Urness would not have known to use the search terms unless she was engaged in sophisticated wrongdoing. We disagree. The record reflects Ms. Urness knew what search terms to use ***654** because she had conferred with her client and her client's former attorney and was looking for documents that corresponded to their version of events. This is not suspicious conduct. It is the type of behavior one would expect of a competent attorney.

*c. Knowledge*

¶ 21 With respect to the third factor, the question is whether Ms. Urness reviewed materials "clearly designated as privileged" or "continue[d] review" after becoming aware she had inadvertently accessed privileged information. *Id.* Here, Ms. Urness violated the discovery rules by failing to take corrective action once a reasonable person would have realized the e-mail excerpts contained information subject to a claim of privilege. But the trial court found this violation was not intentional. We defer to this finding as it was not clearly erroneous.

¶ 22 According to L & W, the facts before the court compel the conclusion that Ms. Urness had lied to the court and engaged in intentional misconduct. We are unpersuaded. Unlike Mr. Ahrend, Ms. Urness was not able to compare the results of her word search with the unredacted discovery responses in order to verify she had accessed information ****868** that was subject to a claim of privilege. Even a sophisticated computer user would likely have been confused upon initially encountering results of a word search that did not match up with the contents of the visible

text. Someone familiar with metadata would likely come to realize that the mismatched content was attributable to embedded text that had been insufficiently redacted. But an individual such as Ms. Urness, who claims an unfamiliarity with metadata, might have a hard time overcoming the initial confusion. [6]

***655** ¶ 23 L&W claims the trial court's credibility determination was tainted by legal error because Ms. Urness's statements to the court were unsworn and because the court improperly utilized a heightened standard of proof. Neither concern is valid. Ms. Urness is a licensed attorney. Her professional oath prohibits knowingly making a false statement of fact or law to the court. RPC 3.3(a)(1). The trial court was entitled to rely on Ms. Urness's explanations of her conduct, made in open court, without the necessity of administering an oath. *See id*. cmt. 3. And while the trial court did comment that it wanted to be "very clear" that Ms. Urness "absolutely knew" she was doing something wrong before disqualifying her, this was in the context of selecting an appropriate penalty, not part of the court's credibility assessment. CP at 204-05. We interpret this comment as simply reflecting the trial court's accurate legal assessment that it should not impose disqualification unless it was convinced doing so was "absolutely necessary." *Firestorm*, 129 Wash.2d at 140, 916 P.2d 411.

*d. Possibility of lesser sanctions*

¶ 24 Disqualification will not always—or even often—be an appropriate sanction when a lawyer has behaved in a troubling or unethical way. *Id*. (noting disqualification's "limited applicability"). Because disqualification is a drastic remedy that severely penalizes parties for their counsel's misconduct, it is warranted only if less severe sanctions are inadequate to address counsel's rule violations. *Id.* at 142-45, 916 P.2d 411; *see also Fisons*, 122 Wash.2d at 355-56, 858 P.2d 1054 (directing trial courts to impose the "least severe" sanction adequate to address counsel's misconduct). Here, the standard for disqualification has not been met. Given Ms. Urness would have learned of the information L&W claimed was privileged even if she had abided by the rules, disqualification was not necessary to deter misconduct or ***656** preserve public confidence in the judicial system. The trial court did issue a lesser remedy designed to ensure Ms. Hur would not profit from her lawyer's rule violation. Specifically, the trial court ruled that not only must Ms. Urness destroy the files, the court also stated it would not consider the e-mail excerpts going forward. This measured sanction was appropriate under the circumstances.

¶ 25 L&W cites *Firestorm* for the proposition that disqualification is required when counsel has accessed an opposing party's privileged materials. But "*Firestorm* did not establish a per se rule that mere access to privileged information taints the judicial process and requires disqualification, regardless of the circumstances." *Foss*, 190 Wash. App. at 197, 359 P.3d 905. Rather, *Firestorm* made disqualification mandatory only in the context of a conflict of interest, which is not at issue here. *Id.* (citing *Firestorm*, 129 Wash.2d at 140, 916 P.2d 411). An attorney's "mere access to an opposing party's privileged information" does *not* "compel[ ] disqualification." *Id.* at 198, 359 P.3d 905.

  

¶ 26 None of the four applicable factors mandate disqualification as an appropriate remedy for Ms. Urness's rule violations. The trial court did not abuse its discretion in denying L&W's disqualification motion and imposing a lesser sanction.

## CONCLUSION

¶ 27 We affirm the trial court's order denying L & W's motion for disqualification. ****869** This disposition is without prejudice to any future case developments. For example, Ms. Urness represented to this court during oral argument that the only redacted materials she accessed were the two e-mail excerpts referenced in Ms. Hur's motion for summary judgment. Wash. Court of Appeals oral argument, *supra*, at 24 min., 45 sec. to 25 min., 10 sec. We expect that, as a licensed attorney, Ms. Urness's representation to this court ***657** was truthful. In the unlikely event this was not the case, a new motion for sanctions may be appropriate.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Fearing, J.

**All Citations**

25 Wash.App.2d 644, 523 P.3d 861

## Footnotes

1 Mr. Ahrend used a software program called “DocReviewPad” to redact the e-mails. He believed this program would remove metadata. Pet'rs’ Opening Br. at 3.

2 According to Ms. Urness, she used these terms because she was searching for evidence supporting Ms. Hur's claim that her former attorney, Maggie Widlund, had discussed the issue of rent payments with L&W's representatives. Clerk's Papers at 170-71, 179.

3 “Metadata is the ‘data about data’ that is commonly embedded in electronic documents.” Wash. State Bar Ass'n Rules of Prof'l Conduct Comm., Advisory Op. 2216 (2012), available at https://ao.wsba.org/searchresult.aspx?year=2216 & arch=False & rpc= & keywords=.

4 The e-mail excerpts appeared to show L&W was aware Ms. Hur had made rent payments on L&W's leased premises, a factual issue that had been the subject of dispute.

5 On discretionary review to this court, Ms. Urness has continued to dispute whether the e-mails were privileged. The trial court has apparently issued an order finding

  

the e-mails privileged. That order is not before this court and the trial court's privilege determination is not material to our disposition. Nothing in our decision should be read as opining on L&W's claim of privilege or whether the claim of privilege should be subject to reconsideration or a later direct review.

6 We do not mean to excuse counsel's lack of familiarity with metadata. The Rules of Professional Conduct require competent representation, including "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." RPC 1.1. To the extent a lawyer uses computer technology in communications, document management, or the exchange of electronic discovery, competent representation requires an understanding of metadata. *See* WSBA Advisory Op. 2216.

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United States District Court, W.D. Oklahoma.

Sheri Kathleen CRUSE, Plaintiff,
v.
Anthony L. CRUSE,
individually, et al., Defendants.

Case No. CIV-22-181-G
|
Signed March 7, 2023

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## ORDER

CHARLES B. GOODWIN, United States District Judge

***1** Now before the Court is Plaintiff Sheri Kathleen Cruse's Motion to Disqualify (Doc. No. 40). Defendant Anthony L. Cruse has responded (Doc. No. 45), Plaintiff has replied (Doc. No. 52), and the matter is now at issue.

### *I. Background*

Plaintiff brings this action against Defendant ("Dr. Cruse," Plaintiff's ex-husband) and Defendant's son, Anthony Lee Cruse Jr. In her Complaint (Doc. No. 1), Plaintiff alleges that Defendants violated federal and state law by intentionally accessing her iCloud account without authorization and by downloading, photographing, and transferring images and videos that were stored in that account. *See* Compl. at 1-3.

Plaintiff and Dr. Cruse were married on December 4, 2019. *Id.* ¶ 16. On May 18, 2021, Dr. Cruse filed a petition for annulment in the District Court of Oklahoma County. *Id.* ¶ 19. On February 3, 2023, the state court granted the petition and entered a decree of annulment. *See In re Cruse*, No. FD-2021-1641 (Okla. Cnty. Dist. Ct.). [1]

In the annulment litigation and trial, Plaintiff was represented by attorney Charles Schem. Dr. Cruse was represented by attorney Laura McConnell-Corbyn from the law firm of Hartzog Conger Cason ("HCC"). For this lawsuit, filed March 2, 2022, Plaintiff has retained new counsel; Dr. Cruse continues to be represented by Ms. McConnell-Corbyn, as well as two additional HCC attorneys.

### *II. Standard of Decision*

  

The determination as to whether an attorney should be disqualified is "committed to the discretion of the court." *Foltz v. Columbia Cas. Co.*, No. CIV-15-1144-D, 2016 WL 4734687, at *2 (W.D. Okla. Sept. 9, 2016) (citing *Weeks v. Indep. Sch. Dist. No. I-89 of Okla. Cnty.*, 230 F.3d 1201, 1211 (10th Cir. 2000)); *accord Cole v. Ruidoso Mun. Schs.*, 43 F.3d 1373, 1383 (10th Cir. 1994). Motions seeking the disqualification of opposing counsel are "viewed with suspicion," however, "and the Court must guard against the possibility that disqualification is sought to secure a tactical advantage in the proceedings." *Foltz*, 2016 WL 4734687, at *2 (internal quotation marks omitted). "A fundamental premise of the adversary system is that individuals have the right to retain the attorney of their choice to represent their interests in judicial proceedings." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 441 (1985) (Brennan, J., concurring).

***2** Two sources of authority govern motions to disqualify. *Cole*, 43 F.3d at 1383. First, district courts consider "the local rules of the court in which [the attorneys] appear." *Id.* This Court has adopted the Oklahoma Rules of Professional Conduct as its governing standard of attorney conduct. *See* LCvR 83.6(b); *see also* Okla. Stat. tit. 5, ch. 1, app. 3-A. Second, motions to disqualify are "decided by applying standards developed under federal law" and are therefore governed "by the ethical rules announced by the national profession and considered in light of the public interest and the litigants' rights." *Cole*, 43 F.3d at 1383 (internal quotation marks omitted). [2]

*III. Discussion*

Plaintiff seeks Ms. McConnell-Corbyn's disqualification as Defendant's counsel in this matter on multiple grounds. *See* Pl.'s Mot. to Disqualify at 11-23. Defendant argues that Plaintiff has waived any objection to Ms. McConnell-Corbyn's representation and, alternatively, that Plaintiff has failed to show that disqualification is warranted. *See* Def.'s Resp. at 8-22.

*A. Waiver*

Defendant contends that Plaintiff has waived her ability to object to Ms. McConnell-Corbyn's representation by failing to diligently seek disqualification in this matter. *See generally Cope v. Auto-Owners Ins. Co.*, 437 F. Supp. 3d 890, 904 (D. Colo. 2020). Ms. McConnell-Corbyn entered an appearance in this case on March 31, 2022. *See* Doc. No. 3. Plaintiff filed the Motion to Disqualify on November 7, 2022. Defendant argues that this gap of about seven months constitutes "unreasonable" delay and "an improper litigation tactic." Def.'s Resp. at 22. [3]

The Court disagrees that this delay constitutes a waiver. Plaintiff represents that she was required to gather evidence to support a disqualification request and argues, reasonably, that this process took some time because the bases for potential disqualification are more "complex" than in many other cases. Pl.'s Reply at 7. Plaintiff further asserts that in September of 2022 she hired an expert to provide an opinion as to whether there were grounds to seek disqualification and that Ms.

  

McConnell-Corbyn was notified of Plaintiff's intent to do so on October 14, 2022. *See id.* at 8-9. Plaintiff also objects that her disqualification request is predicated in part upon Defendant's October 18, 2022 notice that Defendant's counsel intended to subpoena Mr. Schem and that, after seeking to preclude service of that subpoena, Plaintiff filed her Motion to Disqualify in accordance with the Court's deadline. *See id.* at 9.

This record reflects that, while the Motion to Disqualify could have been filed earlier, Plaintiff did not "sit back" and "delay raising the issue" "until a strategically opportune time." *You Li v. Lewis*, No. 1:20-cv-00012, 2020 WL 3217268, at *2 (D. Utah June 15, 2020). This case is still in the pretrial stage and the parties have moved for multiple extensions of deadlines; there will be minimal "disorder" resulting from Plaintiff's presentation of her request at this juncture. *Redd v. Shell Oil Co.*, 518 F.2d 311, 315 (10th Cir. 1975) (finding that the movant's "late filing"—on "the Friday before the Monday on which the trial was to commence"—justified denial of the disqualification request where it "seem[ed] ... likely that the motion was held in reserve until the most expedient time came along to file it"). The Court finds that the Motion to Disqualify is not subject to denial on the grounds of untimeliness or waiver.

### *B. The Witness-Advocate Rule*

***3** Among other alleged grounds for Ms. McConnell-Corbyn's disqualification, Plaintiff cites the requirements of Rule 3.7(a) of the Oklahoma Rules of Professional Conduct ("ORPC"). *See* Pl.'s Mot. to Disqualify at 18-23. This Rule "prohibits a lawyer from serving a dual role in the trial of a case as both an advocate and a witness except in specific circumstances." *Bell v. City of Okla. City*, No. CIV-16-1084-D, 2017 WL 3219489, at *2 (W.D. Okla. July 28, 2017). Rule 3.7 prescribes:

> **Rule 3.7. Lawyer As Witness**
>
> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

ORPC 3.7, Okla. Stat. tit. 5, ch. 1, app. 3-A, R. 3.7.

#### *1. Whether Ms. McConnell-Corbyn Is a "Necessary Witness"*

For purposes of Rule 3.7(a), courts narrowly define "necessary witness" to mean "a witness with knowledge of facts 'to which he will be the only one available to testify.' " *Bell*, 2017

  

WL 3219489, at *2 (quoting *Macheca Transp. Co. v. Phila. Indem. Ins. Co.*, 463 F.3d 827, 833 (8th Cir. 2006)).

> It is not enough, for example, that a party's attorney had direct communications with the opposing party that are relevant to a claim or defense. "Testimony may be relevant and even highly useful, but still not strictly necessary." [*Macheca Transp. Co.*, 463 F.3d at 833]; *see also Mercury Vapor Processing Techs., Inc. v. Village of Riverdale*, 545 F. Supp. 2d 783, 789 (N.D. Ill. 2008) (disqualification depends, in part, on "whether other witnesses would be able to testify to the same matters").

*Bell*, 2017 WL 3219489, at *2.

Plaintiff's Complaint alleges that on or before November 3, 2021, after Defendants unlawfully obtained photos from, or took photos of items stored within, Plaintiff's iCloud account, Dr. Cruse sent at least 16 of those photos to Ms. McConnell-Corbyn. *See* Compl. ¶ 31. Ms. McConnell-Corbyn then Bates-stamped the photos and e-mailed them to Mr. Schem, who forwarded them to Plaintiff. *Id.* ¶¶ 32-33, 47. "Upon ... receiving the photos from her annulment attorney on November 3, 2021," Plaintiff "was instantly afraid her iCloud account had been hacked into by" Dr. Cruse. *Id.* ¶ 34. Plaintiff retained a digital forensic expert the following day. *Id.* ¶ 35. Plaintiff further alleges that certain of the photos contained privileged communications, that Ms. McConnell-Corbyn failed to prevent the unlawful distribution of those communications, and that Ms. McConnell-Corbyn misstated to Mr. Schem who provided the photos to her. *See id.* ¶¶ 47-53.

Ms. McConnell-Corbyn's involvement with the allegedly hacked photos has been identified as an issue for further development by both parties. Defendant seeks to procure Mr. Schem's deposition and documents on various topics, including Mr. Schem's communications with Ms. McConnell-Corbyn "regarding any photographs or other evidence provided to [Mr. Schem] from Anthony Cruse's iPad Mini." Def.'s Notice of Subpoena (Doc. No. 35); *id.* Ex. 1 (Doc. No. 35-1). And Plaintiff has disclosed both Mr. Schem and Ms. McConnell-Corbyn as individuals likely to have discoverable information pursuant to Federal Rule of Civil Procedure 26(a)(1)(A)(i). *See* Pl.'s Initial Disclosures (Doc. No. 45-1) at 3; Pl.'s Suppl. Initial Disclosures (Doc. No. 40-11) at 5.

***4** Although Defendant argues that the facts to which Ms. McConnell-Corbyn could testify may be obtained from one or more other witnesses, it is not clear at the current stage of litigation that any other person could provide nonhearsay or nonprivileged testimony regarding Ms. McConnell-Corbyn's receipt of the disputed photos. Briefly stated, Plaintiff's Complaint alleges that Ms. McConnell-Corbyn's receipt and transmission of the allegedly hacked photos is the reason that Plaintiff discovered she has an actionable lawsuit against Defendants. *See* Compl. ¶ 32-35. Plaintiff also alleges that Ms. McConnell-Corbyn "furthered [Defendant's] unlawful acts and illegal objective" by way of her own handling of those photos. *Id.* ¶ 52. Defendant does not dispute that Ms. McConnell-Corbyn received and then transmitted certain disputed photographs. *See*

  

Def.'s Resp. at 10-11. Indeed, both parties have identified the photo-related communications between Mr. Schem and Ms. McConnell-Corbyn as a proper basis for further discovery, as discussed above.

Policy concerns underpinning Rule 3.7(a) are of relevance here:

> The advocate-witness rule "protects the integrity of the judicial process by: (1) eliminating the possibility that the lawyer will not be an objective witness, (2) reducing the risk that the finder of fact may confuse the roles of witness and advocate, and (3) promoting public confidence in a fair judicial system."

*Bell*, 2017 WL 3219489, at *2 (quoting *Jensen v. Poindexter*, 352 P.2d 1201, 1206 (Okla. 2015)). This matter is set on the Court's jury-trial docket, and the jury "may be confused or misled by a lawyer serving as both advocate an[d] witness." ORPC 3.7 cmt. 2. "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others." *Id.* "It may not be clear whether a statement by [Ms. McConnell-Corbyn] should be taken as proof or as an analysis of the proof." *Id.* [4] Specifically in respect to any deposition of Mr. Schem, an "unfair and difficult situation" may arise if Ms. McConnell-Corbyn "asks a question of the deponent and challenges the response based on [her] recollection of events." *LaFond*, 2019 WL 3734459, at *6 (internal quotation marks omitted). "Any time [Ms. McConnell-Corbyn] challenges the deponent's response, [she] becomes a witness and not an advocate," "which, in turn, prejudices [Plaintiff's] counsel who cannot challenge or cross-examine [Ms. McConnell-Corbyn's] recollection of events during the deposition." *Id.* (internal quotation marks omitted).

For all these reasons, the Court concludes that Ms. McConnell-Corbyn is "likely" to be called upon to provide testimony at trial that is "relevant, material[,] and unobtainable elsewhere." ORPC 3.7(a); *In re Waldrop*, No. 15-14689, 2016 WL 6090849, at *6 (Bankr. W.D. Okla. Oct. 18, 2016) (internal quotation marks omitted).

*2. Whether Disqualification Would Work Substantial Hardship on Defendant*

Because Plaintiff has established that Ms. McConnell-Corbyn "has information to which only [she] can testify" and thus is a necessary witness, Defendant "bear[s] the burden to avoid disqualification due to substantial hardship by demonstrating that [his] interests in retaining [Ms. McConnell-Corbyn] outweigh those of the tribunal and the opposing party in disqualifying [Ms. McConnell-Corbyn]." *Bell*, 2017 WL 3219489, at *3 (internal quotation marks omitted); *see* ORPC 3.7(a)(3). Even if there is a risk of prejudice or confusion resulting from Ms. McConnell-Corbyn's representation of Defendant, "in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client." ORPC 3.7 cmt. 4.

***5** As discussed above, this case is in the preliminary stages, and the Court will consider any requests for modifications to the parties' schedule necessitated by the

  

disqualification. Defendant continues to be represented by two other attorneys, Elizabeth Price and Taylor Weder. The record thus does not show that Defendant would be subject to "substantial hardship" should Ms. McConnell-Corbyn withdraw from this matter. [5]

*3. Conclusion*

Having considered the parties' arguments, the case record, and relevant circumstances, the Court concludes that Ms. McConnell-Corbyn's continued representation of Defendant in this case would result in the violation of Rule 3.7 of the Oklahoma Rules of Professional Conduct. In so concluding, the Court does not find that Ms. McConnell-Corbyn has engaged in any misconduct or that there has been any harm imposed upon Plaintiff that is not fully remedied by Ms. McConnell-Corbyn's withdrawal from this case. Further, the Court expressly declines to reach Plaintiff's assertions regarding Ms. McConnell-Corbyn's alleged possession of confidential information or violation of any other Oklahoma Rule of Professional Conduct.

*C. The HCC Attorneys and Firm*

Plaintiff in her Motion to Disqualify additionally requests that attorneys Price and Weder, as well as all other attorneys at HCC, be disqualified from representing Defendant. *See* Pl.'s Mot. to Disqualify at 1-2, 12, 23. This request is based not on Rule 3.7 [6] but on Plaintiff's other arguments for why Ms. McConnell-Corbyn should not be permitted to continue to represent Defendant—arguments that the Court has found to be unnecessary to reach given its finding that disqualification of Ms. McConnell-Corbyn is impelled by Rule 3.7. Plaintiff has not attempted to show that any HCC attorney would be precluded from representing Defendant by Rules 1.7 or 1.9, which address conflicts of interest. Accordingly, Plaintiff's request to disqualify Ms. Price, Ms. Weder, and other HCC attorneys shall be denied at this time. This denial is without prejudice to Plaintiff reurging the request in the future, if warranted.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Disqualify (Doc. No. 40) is GRANTED IN PART as follows: Ms. McConnell-Corbyn must withdraw from this case within seven days of the date of this Order, as her continued representation of Defendant Anthony L. Cruse would contravene Rule 3.7(a) of the Oklahoma Rules of Professional Conduct, made applicable by Local Civil Rule 83.6(b).

Plaintiff's Motion to Disqualify (Doc. No. 40) is otherwise DENIED.

Plaintiff's Motion to Supplement (Doc. No. 72) is DENIED AS MOOT.

IT IS SO ORDERED this 7th day of March, 2023.

**All Citations**

Slip Copy, 2023 WL 2392737

  

## Footnotes

1 The case docket is publicly available through https://www.oscn.net.

2 "[A]lthough federal courts must consult state rules of professional conduct, they are not bound by state-court interpretations of such rules." *Grant v. Flying Bud Farms, LLC*, No. 22-CV-1, 2022 WL 2955147, at *3 (N.D. Okla. July 26, 2022). "Nonetheless, ... the Court must apply standards developed under federal law, while attempting to avoid any inconsistencies with state law that would create procedural difficulties for practitioners in Oklahoma." *Id.* (alterations, citation, and internal quotation marks omitted).

3 To the extent Defendant argues that Plaintiff has waived her ability to seek Ms. McConnell-Corbyn's disqualification in this matter by failing to do so in the state-court annulment action, the Court rejects this proposition. Defendant offers no authority to find that a failure to seek disqualification in a separate state-court proceeding waives an objection to an attorney representing a party in a contemporaneous or subsequent federal proceeding.

4 Although Defendant suggests that Ms. McConnell-Corbyn could continue in a litigation role but not appear as counsel at trial, *see* Def.'s Resp. at 19 n.9, neither that step nor any other suggested by Defendant would in the Court's view fully alleviate the potential for jury confusion and other negative consequences contemplated by Rule 3.7. *Cf. LaFond Fam. Tr. v. Allstate Prop. & Cas. Ins. Co.*, No. 19-cv-00767, 2019 WL 3734459, at *6 (D. Colo. Aug. 8, 2019) (precluding attorney from taking or defending depositions where the court was "not persuaded that redacting references to [the attorney] in deposition testimony admitted at trial would ... reduce the risk of the jury learning of [the attorney's] dual role during trial").

5 While not determinative of the Court's findings, "[i]t is relevant that" Defendant as well as Plaintiff could have "reasonably foresee[n] that [Ms. McConnell-Corbyn] would probably be a witness" in this matter, based upon the allegations of the Complaint. ORPC 3.7 cmt. 4.

6 Disqualification under Rule 3.7(b) is specific to the affected attorney and does not extend to other attorneys in a firm. The Rule expressly provides that "[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9 [of the Oklahoma Rules of Professional Conduct]." ORPC 3.7(b).

  

2023 WL 2392737

**End of Document**

89 Cal.App.5th 602
Court of Appeal, Second
District, Division 7, California.

Shauneen MILITELLO, et
al., Plaintiffs and Appellants,
v.
VFARM 1509, et al.,
Defendants and Respondents.

B318397
|
Filed March 21, 2023

**Synopsis**

**Background:** Former director of corporation brought action against current directors and one director's husband to recover for breach of contract, breach of fiduciary duty, fraud, and other torts leading to former director's removal. The Superior Court, Los Angeles County, No. 21SMCV00789, Mark A. Young, J., granted motion to disqualify former director's attorney and his law firm on ground that former director had impermissibly downloaded email communications protected by spousal communication privilege between current director and her husband and provided them to her attorneys. Former director, attorney, and firm appealed.

**Holdings:** The Court of Appeal, Perluss, P.J., held that:

former director failed to rebut presumption of spousal privilege;

evidence failed to establish that the email communications fell within crime-fraud exception to the privilege; and

disqualification was not abuse of discretion.

Affirmed.

**Procedural Posture(s):** On Appeal; Motion to Disqualify Counsel.

****202** APPEAL from an order of the Superior Court of Los Angeles County, Mark A. Young, Judge. Affirmed. (Los Angeles County Super. Ct. No. 21SMCV00789)

**Attorneys and Law Firms**

Hosie Rice, Spencer Hosie, Diane S. Rice and Darrell R. Atkinson, San Francisco, for Plaintiffs and Appellants Shauneen Militello, Spencer Hosie and Hosie Rice LLP.

Zweiback Fiset & Zalduendo, Rachel L. Fiset and Jeanine Zalduendo for Defendant and Respondent Ann Lawrence Athey.

**Opinion**

PERLUSS, P. J.

***607** Shauneen Militello, Ann Lawrence Athey (Lawrence) and Rajesh Manek are the co-owners of Cannaco Research Corporation (CRC), a licensed manufacturer and distributor of cannabis products. All three individuals served as officers of CRC until February 2021, when Lawrence and Manek voted to remove Militello from her position, and as directors of CRC until March 2021, when Lawrence and Manek removed Militello from that position as

  

well. In April 2021 Militello sued Lawrence, Manek and others, including Joel Athey, Lawrence's husband, in a multicount complaint alleging causes of action for breach of contract, breach of fiduciary duty, fraud and other torts.

In November 2021 Lawrence moved to disqualify Militello's counsel, Spencer Hosie and Hosie Rice LLP, on the ground Militello had impermissibly downloaded from Lawrence's CRC email account private communications between Lawrence and Athey, protected by the spousal communication privilege (Evid. Code, § 980), and provided them to her attorneys, who then used them in an attempt to obtain a receivership for CRC in a parallel proceeding. Militello opposed the motion, arguing in part Lawrence had no reasonable expectation her electronic communications with her husband were confidential because she knew Militello, as a director of CRC, had the right to review all communications on CRC's corporate network. Militello also argued disqualification is not appropriate when a lawyer has received the adverse party's privileged communications from his or her own client. The trial court granted the motion, finding that Militello had not carried her burden of establishing Lawrence had no reasonable expectation her ****203** communications with her husband would be private, and ordered the disqualification of Hosie and Hosie Rice.

We affirm. The evidence before the trial court supported its finding that Lawrence reasonably expected her communications were, and would remain, confidential. And while we acknowledge disqualification may not be an appropriate remedy when a client simply discusses with his or her lawyer improperly acquired privileged information, counsel's knowing use of the opposing side's privileged documents, however obtained, is a ground for disqualification.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *CRC's and Militello's Lawsuits*

Militello, Lawrence and Manek were business partners, owning, directly or indirectly, singly or in various combinations, several corporate entities forming a vertically integrated cannabis business. All three were shareholders and ***608** directors of CRC, a licensed manufacturer and distributor of cannabis products. Manek owned two dispensaries; Lawrence and Militello had long-term management contracts with the dispensaries with their income tied to store revenue. Militello was the sole owner of Beaux Canna, which developed and marketed cosmetics containing CBD oil.

In September 2020 Militello, with the initial agreement of Lawrence and Manek, moved the email accounts for CRC and the partners' other businesses from Microsoft onto Google Workspace (then known as G Suite). In a lawsuit CRC filed against Militello in Los Angeles County Superior Court on April 7, 2021 for breach of fiduciary duty and violation of the California Comprehensive Computer Data Access and Fraud Act (Pen. Code, § 502), *Cannaco Research Corporation v. Militello* (L.A.S.C. No. 21STCV13314) (CRC action), CRC alleged Militello had improperly interfered with CRC's computer systems and

  

operations. Specifically, CRC alleged Militello, without the knowledge or consent of the CRC board (that is, without informing Lawrence and Manek), set up G Suite, paid for by CRC, to host email accounts for Beaux Canna and assigned herself the exclusive role as super-administrator, which gave her control over all the accounts of the various businesses in the G Suite organizational structure. CRC further alleged Militello searched for and reviewed other individuals' emails, deleted entire email accounts, diverted CRC emails to alias accounts and blocked Lawrence and Manek's access to various electronic documents systems necessary for CRC to conduct its business. CRC sought a permanent injunction requiring Militello to restore administrative control over the G Suite to CRC and preventing her future access to the company's systems.

On April 29, 2021 Militello filed the complaint in the instant action, and on May 18, 2021 a first amended complaint, on behalf of herself and derivatively on behalf of CRC, naming as defendants Lawrence, Manek and various other entities that formed part of the former partners' integrated cannabis business, including cannabis dispensaries. Also named as defendants were Athey, who Militello alleged represented her during certain difficult contract negotiations with Lawrence and Manek, and Athey's law firm, Holmes, Taylor, Cowan & Jones LLP.[1] The first amended ****204** complaint alleged 22 causes of action (in 490 paragraphs) including for breach of contract, breach of fiduciary duty and fraud. In brief, Militello alleged Lawrence, with the cooperation of Manek, conspired with Athey to force Militello out of her position at CRC, as well as from various lucrative consulting agreements ***609** procured through Militello's efforts, to increase their share of the profits from the business and to shield the illicit accounting practices being used in the business. On June 4, 2021 the trial court (Judge Young) denied Militello's application for a receivership for CRC.

On August 13, 2021 Militello filed a cross-complaint, and on September 1, 2021 an amended cross-complaint, in the CRC action against CRC, Lawrence and Manek, again asserting causes of action for breach of contract and breach of fiduciary duty, as she had in the instant action, and also alleging wrongful termination and whistleblower retaliation. On September 28, 2021, now represented by Hosie Rice in both lawsuits, Militello filed a second request for appointment of a receiver, albeit in the CRC action (heard in the writs and receivers department by Judge Chalfant). In support of the motion Spencer Hosie submitted a declaration that attached as exhibits copies of numerous electronic communications between Lawrence and Athey that Militello had obtained from Lawrence's email account on CRC's computer system and provided to her lawyers. Both the motion for a receiver and Militello's declaration in support of it quoted extensively from those communications (sometimes referred to by the parties and trial court as "GChats").

The motion for appointment of a receiver was denied. The court granted Lawrence's application to seal the electronic communications based upon the spousal communication privilege, but stated its ruling "does not mean Militello is foreclosed from

  

revisiting the privilege issues in future motions or at trial."

2. *The Motions To Disqualify Hosie Rice*

a. *The motion in the CRC action*

CRC, Lawrence and Manek moved to disqualify Spencer Hosie and Hosie Rice from representing Militello in the CRC action. The motion argued Hosie's and his firm's disqualification was required because the electronic communications between Lawrence and Athey, which Militello had downloaded, were protected by the spousal communication privilege; Militello did not have permission to access Lawrence's email account or to read her private communications with her husband; and, after being given the confidential communications by Militello, Hosie not only failed to inform Lawrence that he had them but also used them as the basis for renewing Militello's motion for a receivership.

The trial court (Judge Goorvitch) denied the motion. Although acknowledging the communications were privileged, as Judge Chalfant had ruled, subject only to possible application of the crime-fraud exception, the court ***610** concluded disqualification was not necessary because CRC did not demonstrate prejudice: "The Court reviewed the communications at issue and did not find any information that provides Militello's counsel a strategic advantage based upon having learned useful information about the issues in this litigation. CRC's motion speaks only generally about Militello's counsel having obtained such an advantage and does not identify any specific information that provides this advantage. This is especially true because this case relates only to CRC's claims that Militello unlawfully accessed the computer and deprived access to electronic and ****205** physical workspaces. The Court dismissed the cross-complaint on October 29, 2021."[2] The order denying the motion stated it applied only to the CRC action "and shall not preclude CRC from seeking the same relief in Case Number 21SMCV00789 [the case now before this court]."[3]

b. *The motion in the case at bar*

Lawrence moved in the instant action to disqualify Hosie and Hosie Rice, asserting the same grounds (failure to disclose to Lawrence that counsel had received her presumptively privileged communications from Militello and the use of those privileged communications in the CRC action receivership motion) as had been advanced in the CRC action. Militello filed an opposition, arguing Lawrence had no reasonable expectation her communications over the corporate network were private (that is, she knew Militello could access and review them); the communications were part of the scheme to defraud Militello by forcing her out of the parties' cannabis business and thus within the crime-fraud exception; disqualification was unwarranted because counsel's access to the emails provided no strategic advantage in the litigation; and, finally, disqualification is never justified by virtue of a party disclosing confidential information to his or her own counsel.

  

Lawrence filed a reply memorandum and objected to portions of Hosie's declaration in opposition to the motion based on the spousal privilege and lack of authentication.

***611** The trial court granted the motion and ordered disqualification of Hosie and his law firm.[4] The court first ruled Lawrence had presented sufficient evidence to apply the presumption the spousal communication privilege applied to her communications with Athey, referring to Lawrence's declaration describing the daily email exchange she had with her husband from her CRC email account and averring she considered the messages private and confidential and had not given Militello or anyone at Hosie Rice permission to access her account.

The court then found Militello had failed to carry her burden to establish the communications were not confidential. The court explained Militello had not presented evidence she accessed the electronic communications while she was still a director of CRC and, in any event, she was not authorized to do so under Corporations Code section 1602 unless acting in a fiduciary capacity, which she had not established. As for Militello's contention Lawrence had no reasonable expectation of privacy when sending emails over the CRC platform, the court found there was no evidence that CRC had a monitoring policy (whether through its governing bylaws or an employee handbook), that Lawrence had agreed to such a policy or that Lawrence had notice from a Google message warning of the accessibility of her email ****206** account to others at the company. Finally, the court found Militello had failed to make a prima facie showing the communications were made to enable the commission of a crime or fraud (and noted it was prohibited from reviewing the privileged communications themselves to evaluate this contention).

Emphasizing the litigation involved Militello's claim she was the victim of fraud perpetrated by Lawrence and others and Hosie had already attempted to use the emails to the disadvantage of Lawrence, the court found that possession and potential future exploitation of the communications would prejudice Lawrence and undermine the public's trust in the administration of justice. Then, pointing out that Militello was an attorney and should know that the communications between Lawrence and Athey were protected by the spousal communication privilege, the court rejected the argument that disclosure to one's own attorney of confidential information does not justify disqualification.[5]

***612** Militello, Hosie and Hosie Rice filed timely notices of appeal.[6]

## DISCUSSION

1. *Standard of Review*

A trial court's decision to grant or deny a motion to disqualify counsel is generally reviewed for abuse of discretion. (*People v. Suff* (2014) 58 Cal.4th 1013, 1038, 171 Cal.Rptr.3d 130, 324 P.3d 1; *In re Charlisse C.* (2008) 45 Cal.4th 145, 159, 84 Cal.Rptr.3d 597, 194 P.3d 330; *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143, 86 Cal.Rptr.2d 816, 980 P.2d 371

  

(*SpeeDee Oil*).) "As to disputed factual issues, a reviewing court's role is simply to determine whether substantial evidence supports the trial court's findings of fact .... As to the trial court's conclusions of law, however, review is de novo; a disposition that rests on an error of law constitutes an abuse of discretion." (*In re Charlisse C.*, at p. 159, 84 Cal.Rptr.3d 597, 194 P.3d 330; see *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, 76 Cal.Rptr.3d 250, 182 P.3d 579.) While the trial court's " 'application of the law to the facts is reversible only if arbitrary and capricious' " (*In re Charlisse C.*, at p. 159, 84 Cal.Rptr.3d 597, 194 P.3d 330; accord, *Doe v. Yim* (2020) 55 Cal.App.5th 573, 581, 269 Cal.Rptr.3d 613), "where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law." (*SpeeDee Oil*, at p. 1144, 86 Cal.Rptr.2d 816, 980 P.2d 371; accord, *O'Gara Coach Co., LLC v. Ra* (2019) 30 Cal.App.5th 1115, 1124, 242 Cal.Rptr.3d 239 (*O'Gara Coach*); ****207** *California Self-Insurers' Security Fund v. Superior Court* (2018) 19 Cal.App.5th 1065, 1071, 228 Cal.Rptr.3d 546.)

When deciding a motion to disqualify counsel, "[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371; accord, *O'Gara Coach*, *supra*, 30 Cal.App.5th at p. 1124, 242 Cal.Rptr.3d 239.) "[W]here an attorney's continued representation threatens an opposing litigant with ***613** cognizable injury or would undermine the integrity of the judicial process, the trial court may grant a motion for disqualification, regardless of whether a motion is brought by a present or former client of recused counsel." (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1205, 135 Cal.Rptr.3d 545.)

2. *The Spousal Communication Privilege and the Presumption of Confidentiality*

Evidence Code section 980 provides, "Subject to Section 912 [concerning waiver] and except as otherwise provided in this article, a spouse ..., whether or not a party, has a privilege during the marital or domestic partnership relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he or she claims the privilege and the communication was made in confidence between him or her and the other spouse while they were spouses." As the Law Revision Commission Comments make clear, "The privilege may be asserted to prevent testimony by anyone, including eavesdroppers."

Evidence Code section 917, subdivision (a), states, "If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the ... marital or domestic partnership, ... the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential." (Accord, *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733, 101 Cal.Rptr.3d 758, 219 P.3d 736 (*Costco*) [once the party claiming one

of the communication privileges establishes facts necessary to support a prima facia claim of privilege, "the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply"]; *Doe v. Yim*, *supra*, 55 Cal.App.5th at p. 587, 269 Cal.Rptr.3d 613.) Evidence Code section 917, subdivision (b), further provides, "A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication." Notwithstanding subdivision (b), presumptively confidential communications sent from and received on a company-owned computer will not be protected from disclosure as privileged if the computer-user had been ***614** "warned that it was to be used only for company business, that e-mails were not private, and that the company would randomly and periodically monitor its technology resources to ensure compliance with the policy." (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1068-1069, 119 Cal.Rptr.3d 878.)

****208** Subject to certain exceptions not applicable in this case, "the presiding officer may not require disclosure of information claimed to be privileged ... in order to rule on the claim of privilege." (Evid. Code, § 915, subd. (a); accord, *Costco*, *supra*, 47 Cal.4th at p. 739, 101 Cal.Rptr.3d 758, 219 P.3d 736 ["Evidence Code section 915 prohibits a court from ordering in camera review of information claimed to be privileged in order to rule on the claim of privilege"]; cf. *id.* at pp. 738-739, 101 Cal.Rptr.3d 758, 219 P.3d 736 ["nothing in Evidence Code section 915 prevents a party claiming a privilege from making an in camera disclosure of the content of a communication to respond to an argument or tentative decision that the communication is not privileged"].)

3. *Militello Failed To Carry Her Burden To Establish Lawrence's Communications with Athey Were Not Protected by the Spousal Communication Privilege*

The communications at issue are presumptively privileged under Evidence Code section 980. In her declaration in support of the motion to disqualify Hosie Rice, Lawrence identified exhibits attached to Hosie's declaration in support of Militello's motion for appointment of a receiver in the CRC action as "written communications between Joel Athey, my husband, and me, and no one else. The messages indicate they were between the account ann@crcdistro.com, which is my email account at CRC, and my husband's email account." Lawrence declared she considered all the emails with her husband included with Militello's motion to be "private and confidential communications" and explained she had not given Militello or anyone at Hosie Rice permission to access her email account or any chat messages associated with that email account.

  

a. *Lawrence's reasonable expectation of privacy*

Militello attempted to overcome the presumed privileged nature of these communications, arguing Lawrence knew the communications platform she was using was not confidential and, therefore, Lawrence had no reasonable expectation of privacy. Militello pointed to Corporations Code section 1602, which authorizes a director to inspect all books and records of the ***615** corporation of which he or she is a director;[7] CRC's bylaws, which essentially repeat the language of Corporations Code section 1602;[8] and a message Google provided when CRC moved to G Suite that the domain administrator had access to all data.

The trial court found, notwithstanding these provisions, Militello had not carried her burden of establishing Lawrence had no reasonable expectation her communications with her husband would be private. On appeal Militello has not demonstrated the evidence compelled a finding in her favor on this issue as a matter of law. (See *Phipps v. Copeland Corp. LLC* (2021) 64 Cal.App.5th 319, 333, 278 Cal.Rptr.3d 688 ****209** [Where, as here, "the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, generally the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. Specifically, the question becomes whether the appellant's evidence was (1) uncontradicted and unimpeached and (2) of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding" (cleaned up)]; accord, *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 734, 214 Cal.Rptr.3d 113.)

As the trial court emphasized, Militello presented no evidence CRC had a policy of monitoring individual email accounts—there was no CRC company handbook with a policy prohibiting Lawrence from using her CRC email account for personal communications or indicating her account would be monitored to ensure compliance with that restriction—let alone that Lawrence had agreed to such a policy.[9] In addition, the Google welcome message concerning the domain administrator's ability to access data was not directed to Lawrence's email account, and there was no evidence she ever received it.[10]

***616** As for Militello's right as a director to inspect corporate records, as set forth in Corporations Code section 1602 and CRC's bylaws, the trial court ruled Militello had failed to present evidence that she was still a director at the time she accessed Lawrence's email account (that is, before the board removed her on March 24, 2021) or that she was acting in good faith in her fiduciary capacity as a director when she did so. The trial court cited case law holding that current director status is required to pursue inspection rights and the inspection must be performed in furtherance of the director's fiduciary duties. Militello insists the court's analysis, even if correct in terms of her right to download the communications, failed to recognize that, because she could have accessed Lawrence's email account prior to March 24, 2021, Lawrence had no reasonable expectation of privacy as to these email

  

communications, which were made prior to her removal as a director.

Militello is correct as to the proper time to evaluate whether Lawrence's expectation of privacy was reasonable. However, it is by no means clear a director's right to inspect corporate books and records includes the surreptitious review of another director's individual email account on the company's G Suite. (Cf. *Wolf v. CDS Devco* (2010) 185 Cal.App.4th 903, 919, 110 Cal.Rptr.3d 850 [the statutory right of inspection is to be used only to aid the performance of the director's fiduciary duties].) CRC's bylaws do not define the pertinent terms, and neither the bylaws nor any other company document put Lawrence on notice her electronic communications with her husband through G Suite were not confidential.

Neither of the cases cited by Militello supports her assertion the general right to inspect corporate records, absent a specific policy concerning individual email accounts, defeated Lawrence's reasonable expectation her communications with her ****210** husband would remain confidential. As discussed, in *Holmes v. Petrovich Development Co., LLC*, *supra*, 191 Cal.App.4th 1047, 119 Cal.Rptr.3d 878, the employee had been expressly advised communications made over her company computer were not private and would be monitored and had stated she was aware of, and agreed to, that policy. (*Id.* at p. 1068, 119 Cal.Rptr.3d 878.) Similarly, in *United States v. Hamilton* (4th Cir. 2012) 701 F.3d 404 the employee (a teacher) had received and signed a policy stating users of the school's computer system had no expectation of privacy in their emails and that all information sent or stored on the system was subject to inspection and monitoring at any time. (*Id.* at p. 408.)

b. *The crime-fraud exception*

Militello also contends Lawrence's communications with Athey fell within Evidence Code section 981's crime-fraud exception to the spousal communication privilege and argues, at the very least, she made a showing sufficient to ***617** warrant an in camera review by the trial court—without citation to any authority that would except a crime-fraud claim from the prohibition in Evidence Code section 915, subdivision (a), on examining the communication at issue to determine its privileged nature.[11] In support Militello notes only that (1) Athey was serving as her lawyer as she negotiated contractual agreements with Lawrence and Manek in December 2020; (2) prior to and during those negotiations (and afterward, for that matter), Athey and Lawrence communicated with each other; (3) within weeks of signing the new agreements, Lawrence began her efforts to force Militello out of the company; and (4) Lawrence and Manek thereafter entered into a contract to sell CRC's real estate.

As stated in the Law Revision Commission Comments to Evidence Code section 981, the exception provided by the section "is quite limited. It does not permit disclosure of communications that merely reveal a plan to commit a crime or fraud; it permits disclosure only of communications made to *enable* or *aid* anyone to commit or plan to commit a crime or fraud." Nothing in the anodyne evidence presented by Militello—that

  

Lawrence and Athey continued their usual practice of daily, or almost daily, electronic communications during the work day while Athey was purportedly representing Militello in her negotiations with his wife—reasonably supports an inference that the purpose of those communications was to enable or aid a fraud against Militello (even if we were to conclude Militello's evidence adequately made a prima facie showing of fraud). Indeed, given the trial court's finding that Militello had failed to carry her burden of showing a connection between the communications and the fraud she alleged, we could reverse the court's ruling only if the evidence compelled a finding the communications were in aid of a fraud. It does not.

4. *The Trial Court Acted Within Its Discretion in Disqualifying Hosie and Hosie Rice*

Our colleagues in Division Four of this court explained in *Doe v. Yim*, *supra*, 55 Cal.App.5th 573, 269 Cal.Rptr.3d 613, a case involving, in part, the potential misuse ****211** of confidential information protected by the spousal communication privilege, "The power to disqualify counsel is frequently exercised on a showing ***618** that disqualification is required under professional standards governing avoidance of potential adverse use of confidential information. Even in the absence of an official standard on point, counsel may be disqualified where counsel has obtained the secrets of an adverse party because the situation implicates the attorney's ethical duty to maintain the integrity of the judicial process." (*Id.* at p. 586, 269 Cal.Rptr.3d 613, cleaned up.) We articulated the same principle in *O'Gara Coach*, *supra*, 30 Cal.App.5th at page 1129, 242 Cal.Rptr.3d 239, "Richie, even though no longer an officer of O'Gara Coach, has no right to disclose information protected by [the lawyer-client] privilege without O'Gara Coach's consent. [Citations.] And now that Richie is a member of the California State Bar, O'Gara Coach is entitled to insist that he honor his ethical duty to maintain the integrity of the judicial process by refraining from representing former O'Gara Coach employees in litigation against O'Gara Coach that involve matters as to which he possesses confidential information." (See *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 818, 68 Cal.Rptr.3d 758, 171 P.3d 1092 (*Rico*) [" '[a]n attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice' "].)

*Doe v. Yim*, *supra*, 55 Cal.App.5th 573, 269 Cal.Rptr.3d 613 and *O'Gara Coach*, *supra*, 30 Cal.App.5th 1115, 242 Cal.Rptr.3d 239 fully support the trial court's exercise of its discretion to disqualify Hosie and Hosie Rice based on the lawyers' unauthorized possession and use in court filings of Lawrence's confidential communications with her husband. [12] Militello makes three arguments challenging that conclusion: Lawrence's disclosure of the contents of her emails was not inadvertent; the communications did not provide any strategic advantage to Militello, making disqualification of her counsel unduly punitive; and disqualification is not a ***619** proper response to a client's disclosure of an adverse party's confidential information to his or her own attorney. None of Militello's contentions has merit.

  

To the extent Militello's first argument—that Lawrence failed to prove disclosure of her communications with Athey was unintentional—is not simply a repackaged version of the contention Lawrence ****212** should have known Militello could monitor her CRC platform communications, it is belied by the record. In her declaration Lawrence confirmed she believed her communications with Athey were private and stated she had not authorized their disclosure. Even if Militello accessed and downloaded the emails believing she had a right to do so as a CRC director, the record establishes it was not done with Lawrence's actual knowledge or permission.

Militello's second argument is equally without merit. Hosie Rice made aggressive use of the Lawrence emails in its motion for appointment of a receiver in the CRC action and in both cases contended the emails provided evidence of a fraud perpetrated by Lawrence and Ashley that is the foundation for the instant lawsuit. In the opening page of her opposition to the motion to disqualify, for example, Militello asserted, "[T]hese communications were sent as an active part of acknowledged fraud; a fraud that continues to this day."

To be sure, as Militello points out, the court in the CRC action denied the motion for disqualification because it concluded the communications did not provide Militello a strategic advantage in that lawsuit. But the issues in Militello's affirmative lawsuit against Lawrence, Athey and others are very different from those necessary for her defense of the CRC action. And there is a very real potential that lawyers at Hosie Rice, having read the emails, as opposed to simply relying on Militello's recollection of what they may have said, will be able to use that information throughout the litigation, for example, in drafting discovery requests and responses and preparing for trial, as our Division Four colleagues recognized was likely when affirming the similar disqualification order in *Doe v. Yim* based on counsel's improper access to information protected by the spousal communication privilege. (See *Doe v. Yim*, *supra*, 55 Cal.App.5th at p. 588, 269 Cal.Rptr.3d 613.)

Moreover, even if we were confident Hosie Rice would not once again attempt to use Lawrence's emails to its client's advantage, it was well within the trial court's discretion to disqualify Hosie and his law firm because, as the court wrote, given their past improper use of confidential information, allowing them to continue to represent Militello in this case "would negatively affect the public's trust in both the scrupulous administration of justice and the integrity of the bar." That is the essence of the holdings in *Doe v. Yim* and *O'Gara Coach*.

***620** Militello's final argument—disqualification is not appropriate when the lawyers receive the adverse party's privileged communications from their own client—finds some support in the case law, but does not justify reversal of the decision to disqualify Hosie and Hosie Rice under the circumstances here. In *Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 58 Cal.Rptr.3d 275, for example, the court, before holding the moving party had not carried her burden of establishing any

  

confidential information had been shared with opposing counsel, explained disqualification may be warranted when counsel has obtained the secrets of an adverse party other than through a prior representation "not because the attorney has a direct duty to protect the adverse party's confidences, but because the situation implicates the attorney's ethical duty to maintain the integrity of the judicial process." (*Id.* at p. 219, 58 Cal.Rptr.3d 275.) Nonetheless, the *Roush* court observed in dicta, "[W]here the attorney's client is the attorney's source of privileged information relating to the litigation, courts typically refuse to allow the disqualification, concluding that clients do not act inappropriately in providing information ****213** to their own attorney. 'Since the purpose of confidentiality is to promote full and open discussions between attorney and client [citation], it would be ironic to protect confidentiality by effectively barring from such discussions an adversary's confidences known to the client. A lay client should not be expected to make such distinctions in what can and cannot be told to the attorney at the risk of losing the attorney's services.' [Citation.] Further, in such situations, disqualification would do nothing to protect the attorney-client privilege because the client still has the information and may pass it on to new counsel, leaving the adversary in the same position." (*Id.* at pp. 219-220, 58 Cal.Rptr.3d 275; see *Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831, 843-844, 123 Cal.Rptr.2d 202 [holding no confidential information had been disclosed, but stating in dicta, even if it had been, "[d]isclosure to one's own attorney of confidential information does not justify disqualification"].) [13]

In contrast to these general statements untethered to the specific issues decided by the *Roush* and *Neal* courts, in *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 125 Cal.Rptr.3d 361 (*Clark*) the court of appeal denied a writ petition seeking to overturn the trial court's decision to disqualify counsel who received stolen attorney-client privileged documents from his client and affirmatively used information from the documents in a lawsuit against the client's former employer. (*Id.* at pp. 54-55, 125 Cal.Rptr.3d 361.) Explaining its determination that disqualification was not an abuse of discretion, the court held, "On this record, a trier of fact could conclude [the disqualified lawyer's] continued representation of [the client] could trigger doubts over the integrity of the judicial process because whenever [the lawyer's] advocacy against [the ***621** former employer/adverse party] began to touch on matters contained in the privileged documents that [the lawyer] retained (for over nine months) and excessively reviewed, the inevitable questions about the sources of [the lawyer's] knowledge (even if [the lawyer] in fact obtained such knowledge from legitimate sources) could undermine the public trust and confidence in the integrity of the adjudicatory process." (*Id*. at p. 55, 125 Cal.Rptr.3d 361.)

In *O'Gara Coach*, *supra*, 30 Cal.App.5th at page 1130, 242 Cal.Rptr.3d 239 we noted, without attempting to resolve, the apparent conflict between the holding in *Clark* and the dicta in earlier cases stating disqualification was not appropriate when a client improperly disclosed confidential information to his or her own attorney. But we hinted at a resolution.

  

The issue in *O'Gara Coach* was whether Darren Richie's law firm, Richie Litigation, P.C., could represent a former senior executive of O'Gara Coach Company in litigation against O'Gara Coach given evidence that Richie, the former president and chief operating officer of O'Gara Coach, had been a client contact for outside counsel investigating charges of fraudulent conduct at the company and, as such, was privy to attorney-client privileged information relevant to the litigation. (*O'Gara Coach*, *supra*, 30 Cal.App.5th at p. 1119, 242 Cal.Rptr.3d 239.) Even though Richie left O'Gara Coach before becoming a member of the State Bar, we held his possession of O'Gara Coach's confidential information disqualified him from representing the former senior executive; and, because there was no showing Richie had ****214** been effectively screened from other members of his firm, the firm could not continue to represent the former executive. (*Id.* at p. 1131, 242 Cal.Rptr.3d 239.) However, we suggested—expressly noting we were not deciding—it might be proper for Richie Litigation to represent Richie in his own litigation against O'Gara Coach. (*Ibid.*)

Unlike in *Clark*, however, there was no suggestion Richie had taken with him privileged documents from O'Gara Coach. That is the crucial difference, we believe, between *Clark* and the case at bar, on the one hand, and a broad reading of language in cases generally indicating disqualification is not appropriate when it is the lawyer's own client who provided the improperly acquired privileged information, on the other.[14] Courts cannot effectively ***622** police what a client, after reading or hearing another party's confidential communications, chooses to tell his or her lawyer. As the cases indicate, attempting to restrict oral disclosures of that sort risks undue interference with candid discussions between the client and counsel; and disqualification would, in any event, be an ineffective remedy because the client might provide the same information to new counsel. But it is an entirely different matter if the client improperly obtained (or maintained) possession of written or digital copies of an adverse party's confidential information and provided them to counsel for use in litigation. Insisting that counsel not read purloined documents any more closely than is necessary to determine if they are privileged, as described in *Rico*, *supra*, 42 Cal.4th at pages 810 and 818, 68 Cal.Rptr.3d 758, 171 P.3d 1092 and *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657, 82 Cal.Rptr.2d 799, and prohibiting their use if they are, will not inhibit legitimate attorney-client conversations; and a client whose counsel is disqualified for defying such a rule is not likely to repeat the violation. On the other hand, as the trial court ruled here, to allow continued representation of a client after counsel has been provided with, and then used, improperly obtained confidential information would undermine ****215** the public's trust in the fair administration of justice and the integrity of the bar.

## DISPOSITION

The order disqualifying Militello's counsel Spencer Hosie and Hosie Rice is affirmed. Lawrence is to recover her costs on appeal.

  

We concur:

SEGAL, J.

FEUER, J.

**All Citations**

89 Cal.App.5th 602, 306 Cal.Rptr.3d 200, 2023 Daily Journal D.A.R. 2375

## Footnotes

1 Lawrence, Athey and Militello are active members of the California State Bar and apparently worked together at some point at DLA Piper, where Athey and Militello represented Manek. Militello alleged in her first amended complaint that Lawrence was her mentor when she was "a practicing corporate attorney at a large law firm."

2 After the receivership motion was denied, the cross-defendants demurred to Militello's cross-complaint. Militello dismissed all her causes of action except for wrongful termination against CRC. The trial court sustained the demurrer to that remaining cross-claim, leaving only CRC's complaint against Militello in the CRC action.

3 In its order the court noted CRC's counsel had stated he did not intend to waive the privilege by referring to the communications in connection with the motion to disqualify and Militello's counsel confirmed he did not intend to argue waiver. The court then found "no waiver of the marital privilege of Joel Athey and Ann Lawrence Athey based upon the proceedings in this matter, i.e., the arguments on this motion."

4 The court also ordered Militello and her counsel to destroy all privileged communications in their possession "[t]o ensure that this issue does not reoccur."

5 The trial court sustained 13 of 14 objections by Lawrence to exhibits attached to Hosie's declaration filed in opposition to Lawrence's motion "for lack of authentication and spousal privilege." Militello argues the exhibits were properly authenticated but does not address the court's second ground for sustaining the objections. (See *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1237, 151 Cal.Rptr.3d 728 ["[w]hen a trial court states multiple grounds for its ruling," the appellant must address each of them "because 'one good reason is sufficient to sustain the order from which the appeal was taken' "].) Nor does she explain how she could properly use emails exchanged between Lawrence and Athey to argue the court erred in disqualifying Hosie and Hosie Rice.

6 "[T]he order disqualifying [counsel] is appealable." (*URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 880, 223 Cal.Rptr.3d 674; see *Meehan*

  

*v. Hopps* (1955) 45 Cal.2d 213, 215-216, 288 P.2d 267.) "Disqualified attorneys themselves have standing to challenge orders disqualifying them." (*A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli* (2003) 113 Cal.App.4th 1072, 1077, 6 Cal.Rptr.3d 813.)

7 Corporations Code section 1602 provides in part, "Every director shall have the absolute right at any reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the corporation of which such person is a director."

8 Section 4 of the CRC bylaws provided, "Every director will have the absolute right at any reasonable time to inspect all books, records, and documents of every kind and the physical properties of the corporation and each of its subsidiary corporations. This inspection by a director may be made in person or by an agent or attorney, and right of inspection includes the right to copy and make extracts of documents."

9 A company handbook proffered by Militello, which contained a monitoring policy, was for one of the dispensaries, not CRC. Militello had elsewhere stated the dispensary was not affiliated with CRC.

10 We disregard, as we must, Militello's quotation from a presumptively privileged email to support her claim Lawrence knew Militello was reading her communications. (See Evid. Code, § 915, subd. (a); *Costco*, *supra*, 47 Cal.4th at p. 740, 101 Cal.Rptr.3d 758, 219 P.3d 736.)

11 Evidence Code section 915 does identify in subdivisions (a) and (b) several types of privilege claims for which an in camera inspection of the material may be made, for example a claim under Evidence Code section 1060 regarding trade secrets. The crime-fraud exception is not among them. (See *State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 645, 62 Cal.Rptr.2d 834 ["[f]rom these enumerated exceptions to Evidence Code section 915, we conclude that the Legislature does not contemplate disclosure of privileged material in ruling on the crime/fraud exception"].)

12 As an additional ground for disqualifying Hosie and Hosie Rice, Lawrence cites case law holding a lawyer has an ethical obligation upon receiving another party's inadvertently produced attorney-client privileged materials to notify the party entitled to the privilege and to refrain from using the material until any issue of privilege has been resolved. (E.g., *Rico*, *supra*, 42 Cal.4th at pp. 810, 817-818, 68 Cal.Rptr.3d 758, 171 P.3d 1092; *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657, 82 Cal.Rptr.2d 799; see *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1106, 217 Cal.Rptr.3d 47.) Lawrence argues Hosie Rice's disqualification was justified, even if her communications with Athey are ultimately found not to be privileged, because Hosie made full use of presumptively

  

privileged spousal communications without notifying her the firm had obtained her emails and first seeking to resolve the issue whether the communications were confidential or otherwise not properly shielded from disclosure. (See *Rico*, at p. 819, 68 Cal.Rptr.3d 758, 171 P.3d 1092 [disqualification affirmed where attorney " 'not only failed to conduct himself as required under *State Fund*, [citation] but also acted unethically in making full use of the confidential document' "].) Because we hold the communications remain protected by the spousal communication privilege and Hosie Rice's disqualification was proper following its use of that material, we need not address this alternate argument.

13 As the trial court noted in its ruling granting the motion to disqualify Hosie Rice, to the extent this analysis depends on the lack of sophistication of a lay client, it is inapplicable to Militello, who is an active member of the State Bar.

14 In *Roush v. Seagate Technology, LLC*, *supra*, 150 Cal.App.4th 210, 58 Cal.Rptr.3d 275 the disclosure of allegedly confidential information apparently consisted only of discussions involving potential case strategies and evidence, rather than providing counsel with privileged documents. (See *id.* at p. 221, 58 Cal.Rptr.3d 275.) Similarly, in *Neal v. Health Net, Inc.*, *supra*, 100 Cal.App.4th 831, 123 Cal.Rptr.2d 202 the disclosures occurred during "discussions of an adversary's confidences known to the client," rather than through the sharing of privileged documents. (*Id.* at p. 844, 123 Cal.Rptr.2d 202.)

In contrast to the oral disclosures in these cases, in *Cooke v. Superior Court* (1978) 83 Cal.App.3d 582, 147 Cal.Rptr. 915 the client in a dissolution proceeding had given her attorney copies of attorney-client privileged documents belonging to her husband that had been surreptitiously copied and delivered to the wife by her husband's butler. (*Id.* at p. 592, 147 Cal.Rptr. 915.) The trial court prohibited the use of the documents in the dissolution proceedings but declined to disqualify the wife's counsel. The court of appeal denied both the wife's request for writ relief concerning her use of the documents and the husband's request for writ relief on the issue of disqualification. (*Ibid.*) But the court's disqualification ruling was based on its understanding that disqualification was never appropriate based on exposure to privileged information absent an attorney-client relationship between the party moving for disqualification and the attorney sought to be disqualified—not because it was the lawyer's own client who had provided the improperly acquired privileged information. (*Ibid.*) That view of the law, as we explained in *O'Gara Coach*, *supra*, 30 Cal.App.5th at page 1130, 242 Cal.Rptr.3d 239, is inconsistent with the Supreme Court's decision in *Rico*, *supra*, 42 Cal.4th 807, 68 Cal.Rptr.3d 758, 171 P.3d 1092, as well as many subsequent decisions from the courts of appeal.

  

**End of Document**

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## ETHICS

# Hot Documents: Handling Stuff You Arguably Shouldn't Have

*By Lucian T. Pera*

Lawyers and clients are awash in electronic data and documents, and much of our lawyer life involves receiving, viewing, sharing and sending this stuff to clients, opposing counsel, courts and others. That's surely why, more than ever before, every lawyer's life includes moments when we realize that we've come into possession of a document or data that we shouldn't have. Or a document that we just know someone else will argue—rightly or wrongly—that we shouldn't have. Yikes. I believe this problem is becoming more common, and case reports and our common experience confirm this.

The realization that this problem is on your doorstep can bring elation or fear, or sometimes both, depending on what the document is or says. Is it the smoking gun that destroys your opponent's case? The errant note by the opposing party in a deal to their lawyer that lays out their secret negotiating strategy? Or has your client brought you a very interesting document that looks like it may have been stolen? What do you do—especially when you need a very quick answer to the problem?

If this hasn't happened to you yet, it will soon enough.

## REDEFINING THE PROBLEM

Doubtless you have heard and thought about pieces of this topic before. And you've likely experienced an email sent to the wrong recipient.

I've thought for quite some time that many lawyers—and the rules themselves—define the problem too narrowly, and that this narrow view makes it harder both to recognize it and work through it. I submit that there are a number of related kinds of problems we lawyers sometimes see that share much in the way we must address them and that redefining the problem more broadly makes recognizing it and solving it more manageable.

I intentionally cast the net wider. I include inadvertently produced privileged documents, sensitive information received in unusual or murky ways from opposing parties or third parties and even stolen documents received by a lawyer or his or her client.

## THE CONSEQUENCES

I doubt I need to remind you of all the dire consequences that can befall lawyers in these situations, but they have included lawyer disciplinary sanctions, court sanctions of the lawyer or client, monetary penalties, lawyer disqualifications, adverse inferences, dismissal of cases, claims (e.g., invasion of privacy) and even criminal charges.

**My premise is straightforward:** What we do as lawyers requires us to identify problems that are of a common type, so that we can address them in a similar way. This "problem" here is usually too narrowly defined. If you define the problem more broadly, you can more readily spot it. When you define the problem more broadly, a common set of issues arises across a broader array of situations, and there are common approaches to handling these situations.

## THE PROBLEM

So let's try defining the problem this way: What do you do when you have data or documents that someone has claimed, or may claim, that you or your client should not have, usually (but not always) when the documents might somehow help you or your client?

**Exactly what kinds of problems are we talking about**? Any occasion on which you wind up in possession of—or with your client in possession of—documents or data you (arguably) shouldn't have. Suppose you receive ...

- A misdirected fax or email.
- A privileged document nestled amid a document production.
- A flash drive that contains some very interesting documents about your opponent.

- An unreleased confession of a criminal defendant.
- A transcript of the grand jury testimony of a witness.
- A misplaced or stolen laptop (or iPad) of your opponent or your opponent's lawyer.
- An email or memo by an employee of your client to his or her lawyer, one retrieved from the employer's computer system.
- A shoebox full of recordings of phone conversations, or maybe voicemails, brought to you by your client, the wife in a divorce case.
- The iPhone of a married politician's former lover given to your newspaper client's reporter by the former lover.

## THE CUSTOMARY QUESTIONS

**Our usual questions in these kinds of situations are:** (1) Does the lawyer have some obligation—ethical or otherwise—as a result of having this kind of document or information? (2) How can the lawyer or the client use the document or information—if they can use it at all—often in litigation?

**What are the sources of law that might guide decision making on these questions?** They include:

- Ethics rules and interpretations of them, particularly ABA Model Rule 4.4 as adopted in some states. Other rules also may provide some very limited guidance on what we have to do when we get inadvertently produced privileged, confidential or stolen documents.
- Attorney-client privilege law, both on the scope of privilege and its waiver—e.g., Federal Rule of Evidence 502 and similar state rules, which vary a good bit.
- The law on other privileges or confidentiality.
- A whole welter of other laws on information privacy wiretapping, the federal Computer Fraud and Abuse Act, and Stored Communications Act, as well as trade secret law, both state and federal.

It's easy to get lost in this legal morass—to be confused about what laws might apply or which issues need to be addressed first and which can be avoided.

## THE FIVE KEY QUESTIONS

When faced with such a problem, I propose you work through five key, somewhat overlapping questions.

***1. What is the argument that you, as a lawyer, or your client shouldn't have this document or data?*** When whoever might be unhappy with you or your client having this information learns that you have it, what legal argument will they raise about why you or your client shouldn't have it? Will they say it's privileged in some way, or protected work product or a trade secret?

And what is the source of the law (if any) that somehow suggests that you or your client should not have the document?

This does require speculation. In my experience, however, it's critical to try to answer this question first. It's sometimes harder than you might imagine.

This is the point where you should probably get help—perhaps from someone experienced in legal ethics and privilege law but maybe from a trade secrets lawyer if you think you've just been handed the other side's competitively sensitive secret formula for the product.

***2. Is actual possession of the document or data unlawful for the lawyer or for the client?*** This may sound silly and, more often than not, the answer is no. Still, there are rare situations when having the documents or information in your hands will be like holding illegal drugs. Mere possession, however innocent, of child pornography is illegal, for example. Possession of stolen property—documents are property, after all, or are often on property, like a flash drive—can be a crime under almost every jurisdiction's law.

***3. Was there misconduct or illegality of any kind by the lawyer or client in obtaining or receiving the document or data? Did you, as a lawyer, or did your***

*client engage in any misconduct or illegality in connection with getting the document or data?* You probably will care considerably less about impropriety that someone else engaged in (e.g., a disgruntled court clerk who disclosed a sealed court document or an angry former employee who stole or disclosed trade secrets), but you will have to explore this. I guarantee your opponent will care. But your and your client's future conduct will be more complicated if one of you actually stole the document or solicited its theft.

*4. Is there any law that precludes or permits the lawyer or client from using the document or data in some way?* Many laws prohibit the use of certain data in certain ways. The most prominent examples are federal and state wiretap laws that include strict exclusionary rules on use of illegally wiretapped conversations. Just as important, while these laws don't criminalize actual possession, they do criminalize any use. That's why good divorce practitioners everywhere don't even want to hear or hold illegally wiretapped tapes, for fear that they might somehow be accused of "using" them in handling the client's case.

Other laws, from HIPAA to the Fair Credit Reporting Act, may also include such provisions, which is one reason it's critical to know from whence the argument will come that you should not have the information or document.

Remember, however, that there are also laws that specifically permit use. The most prominent example may be the law governing waiver of privilege (e.g., Federal Rule of Evidence 502).

*5. Is there any law (including ethics rules) that requires the lawyer or the client to do anything because they have the document or data?* Of course, this is where the discussion customarily begins. You must review ethics rules or opinions, such as the guidance in ABA Model Rule 4.4. The usual guidance is that, on realizing the inadvertently produced document is or may be privileged, the lawyer must stop his or her review, notify the sender or owner and return the document or follow the owner's instructions or approach a court for guidance.

But these rules are often of only limited help. They may say nothing about the document you received because it's a closely guarded trade secret

but not attorney-client privileged. Or the information may have been intentionally provided. Or the rule may not speak to the situation where your client—not you—has received someone else's HIPAA-protected personal health information. This is the primary reason I cast our net, defining the problem wider.

Answering these five key questions will allow you to decide the substantive legal questions of whether and how you or your client may use the document, and what obligations you may have in doing so. However, you also need a method of approaching these problems as well.

## THE RULES OF THE ROAD

Every experienced driver knows not only the formal rules of the road but those customs that are likely to keep you away from tickets and out of ditches. From experience counseling lawyers and clients who have received potentially troublesome documents, I suggest a few tried-and-true rules that will do the same for you and your clients.

*1.* ***Get help.*** No, really, get help. You might call an ethics nerd. But if you stumble on what you think might be child porn, enlisting a criminal-defense lawyer might be more useful. A health-care lawyer might be invaluable if personal medical information is dumped in your lap.

Still, even if you know the law, find someone whose judgment you trust to walk through the problem with you. There is no substitute for a smart, objective, independent sounding board.

*2.* ***Move very carefully.*** Take only one step at a time. These problems can be hard; sometimes unexpected things happen; move deliberately, carefully. If a golden thread runs through the cases in this area, it's this: Lawyers who try to act correctly and also appear to be trying to do the right thing—getting help, approaching the court when appropriate—get treated much better by courts and disciplinary agencies. Their clients also get treated much better.

*3.* ***Fully document your steps,*** *including* how the document or data came into your possession, or your client's, and especially your good-faith efforts

to "do the right thing." Do this from the very first moment you see the problem. Act as if you expect that, someday, somewhere, someone is going to ask you why you approached the problem the way you did. You need to be able to "show your work," just like you did in high-school math. You may well later need those notes to help prepare an affidavit explaining to a judge why you and your client should not be sanctioned. Keep notes; send yourself emails; whatever it takes.

4. **Think creatively.** There is no cookbook and no single right answer.

Years ago a lawyer hired me before opening a sealed envelope he had gotten anonymously. He told me, "I got a sealed envelope. I think it's got stuff in it that might be useful to me in a case. But I'm worried it might have some privileged stuff in it. I want you to open it and review the contents. If anything in there is privileged, keep it and never give it to me or tell me about it. If there's nothing privileged, I want you to send it to me. And send me a bill."

That lawyer had hired me as a low-tech "taint team," like those federal prosecutors sometimes use to sort producible from privileged seized documents and keep privileged stuff away from their trial teams. When you get this kind of problem, be that guy.

Five questions and four rules of the road. Try them. And be careful out there.

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