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Rules governing attorney conduct in cases of inadvertent disclosure of privileged or protected materials must strike an appropriate balance between two competing bedrocks of American jurisprudence:[1] an attorney's ethical duty to represent her client zealously,[2] and the evidentiary shield from discovery afforded privileged or protected documents.[3] The California Supreme Court's

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1. Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 EMORY L.J. 1255, 1263 (1999) (Inadvertent disclosure "involves two values that are central to the law of lawyering: confidentiality and zealous representation of client interests. In the inadvertent disclosure context, these values conflict and produce a case of true ethical dilemma, a situation in which neither choice made by the receiving lawyer can easily be justified"). Courts throughout the nation have also weighed these conflicting values. *See, e.g.*, Amgen, Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 291 (D. Mass. 2000) (adopting a rule that "strikes a balance between [the] two rigid solutions" of always waiving a privilege, thus favoring the side of zealous representation, and never waiving the privilege, thus favoring protection of privilege); *see also* SEC v. Cassano, 189 F.R.D. 83 (S.D.N.Y. 1999).

2. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

3. *See, e.g.*, CAL. CIV. PROC. CODE § 2018.020 (West 2007) (California attorney work product protection); FED. R. CIV. P. 26(b)(3)(A) (federal attorney work product protection); *see also* CAL. EVID. CODE § 954 (West 1995) (California attorney-client privilege). Zealous client representation and evidentiary shields provided to protected or privileged documents are, by no means, the *only* interests at stake in cases of inadvertent disclosure. *See, e.g.*, State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 808 (Cal. Ct. App. 1999) ("An 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.").

holding in *Rico v. Mitsubishi Motors Corp.*[4] represents California's response to this balancing act, harmonizing two conflicting precedents governing the inadvertent disclosure of privileged documents—one favoring an attorney's duty of zealous representation,[5] and the other supporting an attorney's evidentiary privileges and protections.[6] The *Rico* court, consistent with ethical standards adopted in states throughout the nation,[7] held that an attorney "who receives privileged documents through inadvertence . . . may not read a document any more closely than is necessary to ascertain that it is privileged" and must notify the disclosing attorney immediately in order to "resolve the situation."[8] The court's decision, however, does not entirely foreclose a receiving attorney,[9] under limited circumstances,[10] from using information from an inadvertently disclosed document to her client's advantage.[11] Nevertheless, while *Rico* shed much needed light on ethical standards governing attorney conduct in cases of inadvertent disclosure, the *Rico* rule

4. 171 P.3d 1092 (Cal. 2007).

5. *See* Aerojet-General Corp. v. Transp. Indem. Ins., 22 Cal. Rptr. 2d 862, 867–68 (Cal. Ct. App. 1993) (holding an attorney's "professional obligation demands" the use of nonprivileged portions of an otherwise privileged, inadvertently disclosed document "on his client's behalf," and reversing sanctions imposed by trial court for failure to notify opposing counsel of the disclosure).

6. *See* State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799 (Cal. Ct. App. 1999) (holding attorney's ethical duty, upon receipt of inadvertently disclosed documents, is to read only as much as reasonably necessary and to immediately notify opposing counsel of disclosure, but reversing sanctions against attorney due to lack of controlling authority in California).

7. Many states based their rules governing inadvertent disclosure on ABA Formal Opinion 92-368, which stated, "A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide by the instructions of the lawyer who sent them." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992) (withdrawn by Formal Op. 05-437 because of conflict with new ABA Model Rule 4.4(b)). *See, e.g.*, Delta Fin. Corp. v. Morrison, 819 N.Y.S.2d 425, 431 (N.Y. Sup. Ct. 2006) (New York rule); Herman Goldner Co. Inc. v. Cimco Lewis Indus., 58 Pa. D. & C.4th 173, 176 (Ct. C.P. 2002) (Pennsylvania rule); Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Décor, Inc., 698 So. 2d 276, 279 (Fla. Dist. Ct. App. 1997) (Florida rule citing the "well-justified dictate that '[a]n attorney who receives [inadvertently disclosed] confidential documents . . . is ethically obligated to promptly notify the sender of the attorney's receipt of the documents'" and forbidding use of the documents at trial).

8. *Rico*, 171 P.3d at 1094. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt.

9. Throughout this note, I will use "receiving attorney" or "receiving counsel" to describe the attorney receiving inadvertently disclosed materials and "disclosing attorney" or "disclosing counsel" to describe the attorney whose documents are inadvertently disclosed.

10. These limited circumstances would likely involve cases of implied waiver of privilege or protection stemming from "conduct inconsistent with claiming the protection." Regents of Univ. of Cal. v. Superior Court, 81 Cal. Rptr. 3d 186, 190 (Cal. Ct. App. 2008). In *Rico*, receiving counsel never advanced an argument for a finding of implied waiver of work product protection. *See* Appellant's Opening Brief on the Merits at 39, Rico v. Mitsubishi Motors Corp., 171 P.3d 1092 (Cal. 2007) (No. S123808), *available at* http://www.courtinfo.ca.gov/courts/supreme/documents/s123808a.pdf.

11. The disclosing attorney would either need to waive the privilege—either expressly or impliedly, through conduct more egregious than disclosing counsel's in *Rico*—or the information must be clearly nonprivileged as in *Aerojet*. *See Rico*, 171 P.3d at 1094–96, 1097 n.8; Aerojet-General Corp. v. Trans. Indem. Ins., 22 Cal. Rptr. 2d 862, 863–66 (Cal. Ct. App. 1993).

highlights a fundamental problem with the state's work product protection scheme: in conjunction with California's limited crime-fraud exception for attorney work product protection,[12] the *Rico* rule leaves all civil actions in California vulnerable to criminal or fraudulent conduct inadvertently disclosed by counsel during the course of litigation.[13]

The underlying dispute in *Rico* involved a fatal SUV rollover that resulted in a product liability suit against Mitsubishi Motors.[14] At an expert witness deposition, plaintiff's counsel inadvertently received[15] one of defense counsel's privileged documents:[16] a twelve-page summary, written in transcript form, of a strategy meeting between defense counsel and an expert witness.[17] The document was dated but not labeled as "work product" or "confidential."[18] Moreover, it contained defense counsel's handwritten notes in the margins, but lacked any indication of who wrote the notes or created the document. Although "after a minute or two of review" receiving counsel "realized the notes related to the case and that [disclosing counsel] did not intend to reveal them," receiving counsel made copies of the document and distributed it to other members of his legal team.[19] A week later, receiving counsel used the document to impeach a defense witness during a deposition.[20] While the disclosing attorney, to whom the notes belonged, was not present at the deposition, the defense attorney conducting the deposition immediately objected to the use of the "unknown document" by receiving counsel.[21] After consulting with the attorney responsible for the document's creation and ascertaining its origins,[22] the defense moved to disqualify the plaintiff's

12. *See* CAL. CIV. PROC. CODE § 2018.050 (West 2007) (abrogating work product protection only in "official investigation[s] by a law enforcement agency or proceeding[s] or action[s] brought by a public prosecutor"). In federal courts, the crime-fraud exception applies to both attorney-client privilege and work product protection. *See, e.g.*, United States v. Zolin, 491 U.S. 554, 562–63 (1989); United States v. Reeder, 170 F.3d 93, 106 (1st Cir. 1999); *In re* Grand Jury Subpoenas (Jane Roe and John Doe), 144 F.3d 653, 660 (10th Cir. 1998); *In re* Murphy, 560 F.2d 326, 337 (8th Cir. 1977).

13. In comparison, the crime-fraud exception to the attorney-client privilege applies as a rule of evidence in both civil and criminal trials in California. CAL. EVID. CODE § 956 (West 1995).

14. *Rico*, 171 P.3d at 1094.

15. While the lower court concluded that the document was inadvertently disclosed, the parties disputed the circumstances surrounding the receipt of the document. Disclosing counsel argued that receiving counsel had stolen the document, while receiving counsel maintained, and the lower court held, that the documents had been mistakenly given to him by the court reporter. *See id.* at 1095.

16. *See id.* at 1097.

17. *See id.* at 1095.

18. *Id.* at 1094.

19. *Id.* at 1095, 1099.

20. *See id.* at 1095.

21. *Id.* at 1096.

22. To further complicate the facts, the document was not actually written by an attorney, but by a paralegal acting under instructions from the disclosing attorney. *See id.* at 1904.

attorneys and witnesses.[23] The trial court held that receiving counsel had violated his ethical duty to notify the disclosing attorney of the document's inadvertent disclosure, and the court concluded that receiving counsel's conduct warranted disqualification as an appropriate remedy.[24] The Court of Appeal affirmed.[25]

On appeal to the California Supreme Court, the receiving attorney argued that the precedent set forth by the California court of appeal in *Aerojet-General Corp. v. Transport Indemnity Insurance* bound him to use the nonprivileged portions of the document to his client's advantage and that no ethical duty existed to inform disclosing counsel of such use.[26] Because the document appeared to be a transcript from an expert witness meeting, the receiving attorney contended that the expert statements therein were fully discoverable, nonprivileged, and open to use under *Aerojet*.[27] Notably, the receiving attorney also argued that the disclosed document demonstrated that the defense's expert witnesses were intentionally offering contradictory testimony, and therefore the document constituted evidence of perjury.[28] Thus, receiving counsel argued, California's crime-fraud exception to work product protection should apply to the documents in question, thereby waiving any claim of protection.[29]

By contrast, the disclosing attorney argued that the rule established by the California court of appeal in *State Compensation Insurance Fund v. WPS, Inc.* controlled.[30] Under the *State Fund* rule, disclosing counsel argued that the receiving attorney in *Rico* violated his ethical duty to read only as much of the document as necessary to ascertain its privilege and to notify opposing counsel of the inadvertent disclosure.[31]

The California Supreme Court, in a brief but unanimous opinion, affirmed the lower court's decision, distinguishing *Aerojet* on the facts of the case and establishing the *State Fund* rule as the governing standard for inadvertent disclosure in California.[32]

The *Rico* court also rejected receiving counsel's proposed crime-fraud defense, noting that "[b]y its own terms, the crime or fraud exception [to protected work product did] not apply" because the statements in question occurred within the context of a civil action, not an "official investigation by a

23. See *id.* at 1095.

24. *See id.* at 1096.

25. *See id.*

26. *See id.* at 1097–98; Aerojet-General Corp. v. Transp. Indem. Ins., 22 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 1993).

27. *See* Appellant's Opening Brief on the Merits, *supra* note 10, at 25.

28. *See id.* at 37–45; *see also* CAL. PENAL CODE § 118(a) (West 1999).

29. *See Rico*, 171 P.3d at 1100–01.

30. *See* Rico v. Mitsubishi Motors Corp., 10 Cal. Rptr. 3d 601, 610 (Cal. Ct. App. 2004). *Compare* State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799 (Cal. Ct. App. 1999) *with Aerojet-General Corp.*, 22 Cal. Rptr. 2d 862.

31. *See Rico*, 171 P.3d at 1098–99.

32. *See id.*

law enforcement agency or proceeding . . . brought by a public prosecutor."[33]

In all cases of inadvertent disclosure, a rule strengthening disclosing counsel's privilege or protection necessarily comes at the expense of receiving counsel's ability to fulfill the duty of zealous client representation. An attorney is professionally bound to use "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[34] This duty could easily be construed to encourage—or even mandate—receiving counsel to use an inadvertently disclosed document for her client's benefit without notifying opposing counsel of its disclosure, assuming it was obtained through no wrongdoing on the part of the receiving attorney.[35]

On the other hand, some categories of work product are *never* discoverable under California rules,[36] reflecting the opinion that work product protections are critically important to an attorney's ability to adequately represent her client and prepare a case for trial.[37] The California Code of Civil Procedure explicitly states that "[i]t is the policy of the state to . . . [p]reserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly" and to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts."[38] Thus, it is unsurprising that both the *Rico* and *State Fund* opinions—giving specific consideration to these policy goals—favored a rule affording strong shields against disclosure through robust work product protections.[39]

While the court's determination—that the crime-fraud exception was inapplicable to work product protections—is undoubtedly correct,[40] the

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33. *Id.* at 1101 (citing CAL. CIV. PROC. CODE § 2018.050 (West 2007) ("[W]hen a lawyer is suspected of knowingly participating in a crime or fraud, there is no protection of work product under this chapter in any official investigation by a law enforcement agency or proceeding or action brought by a public prosecutor . . . if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud.")). Furthermore, it was not clear that the statements attributed to the experts reflected their actual statements during the meeting. The document was not a verbatim transcript. *See id.*

34. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt.

35. *See* Jones, *supra* note 1, at 1271–72; *see also* Annie Dike, *A Lucky Break or an Ethical Dilemma?: Assessing the Appropriate Response in the Face of Inadvertent Disclosure*, 31 J. LEGAL PROF. 279, 281 (2007).

36. Namely, "core" or "opinion" work product. *See* CAL. CIV. PROC. CODE § 2018.030(a) (West 2007) ("A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.").

37. *See supra* note 3.

38. CAL. CIV. PROC. CODE § 2018.020 (West 2007).

39. *See* Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1094 (Cal. 2007); State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 807 (Cal. Ct. App. 1999). *See also* CAL. CIV. PROC. CODE § 2018.020 (West 2007).

40. The legislative history of the crime-fraud exception for work product clearly demonstrates that the legislature did not intend to extend the exception to civil cases. *Compare* A.B. No. 2055, 2001-02 Leg., Reg. Sess. (Cal. 2002) (original crime-fraud exception for work product, containing language mimicking California's attorney-client crime fraud exception, which would make exception applicable to civil cases), *with* A.B. No. 2055 (amended April 16, 2002), 2001-02 Leg., Reg. Sess. (Cal. 2002) (deleting language and leaving statute for crime-fraud

decision underscores a fundamental flaw in California's work product protection regime. Unlike rules governing the waiver of work product protection in federal and other state courts,[41] California's crime-fraud exception for attorney work product only applies in "official investigation[s] by a law enforcement agency or proceeding[s] or action[s] brought by a public prosecutor."[42] Without a crime-fraud statute applicable in the course of a civil action, the rule established in *Rico* exacerbates the limitations of California's crime-fraud exception for attorney work product: receiving counsel could be prohibited from using inadvertently disclosed documents that detail fraudulent or criminal activity by the disclosing attorney or adverse witnesses within the context of civil litigation, *even if* the information was obtained and handled in conformity with the *Rico* standard and both the receiving attorney *and the court* were aware of the evidence indicating criminal or fraudulent behavior.

While the facts and circumstances of the document at issue in *Rico* did not support a finding that a crime or fraud had occurred, one can easily imagine an analogous scenario: consider, for example, an inadvertently disclosed tape recording between the disclosing attorney and an expert witness clearly discussing preparation for trial, yet equally clearly demonstrating a conspiracy to commit perjury on the part of both the attorney and witness. Assume also that the receiving attorney—listening only to as much of the tape as reasonably necessary to ascertain that it reflected the attorney's trial preparation strategy and was, thus, protected[43]—could still glean that the disclosing attorney and the expert had conspired to commit perjury. Under the *Rico* standard, the receiving attorney would be required to inform his adversary of the inadvertent disclosure, and disclosing counsel would likely demand the tape's return.[44] Of course, it would not be surprising if the receiving attorney resisted returning the tape to disclosing counsel due to its obvious evidentiary value, resulting in judicial intervention to resolve the issue.[45] The court, then, in order to ascertain

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exception for work product as currently written).

41. The federal system allows for waivers of work product protections for crime or fraud in both civil and criminal trials. *See, e.g.*, *In re* Grand Jury Subpoena, 220 F.3d 406 (5th Cir. 2000). Most states that apply the crime-fraud exception to work product have simply followed federal precedent. *See In re* Grand Jury Subpoenas Served Upon Doe, 536 N.Y.S. 2d 926 (N.Y. Sup. Ct. 1988) (New York case applying crime-fraud exception to work product based upon federal precedent); *In re* Sutton, No. 96M-08-024, 1996 WL 659002 (Del. Super. Ct. 1996) (acknowledging applicability of crime-fraud exception to work product protections, based on federal precedent, but refusing to apply due to insufficient evidence of crime); Ocean Spray Cranberries, Inc. v. Holt Cargo Sys., Inc., 785 A.2d 955 (N.J. Super. Ct. Law Div. 2000) (applying crime-fraud exception to attorney work product based on federal precedent).

42. CAL. CIV. PROC. CODE § 2018.050 (West 2007); *see also Rico*, 171 P.3d at 1100–01.

43. Regardless of its content, the receiving attorney would bear the risk of listening to the entire tape, as disqualification could result if the "attorney inadvertently receives confidential materials and fails to conduct himself or herself in the manner specified [in *State Fund*]," and other factors compel disqualification. *Rico*, 171 P.3d at 1100.

44. *See id.* at 1094.

45. *See id.* at 1099.

the protected nature of the recording, would review the tape without "invad[ing] upon the [disclosing] attorney's thought process by evaluating the content of the [tape]," even though a conspiracy to commit perjury was evident simply from listening to the tape's contents.[46] Indeed, under the *Rico* standard, once it became apparent to the court that the inadvertently disclosed tape "contain[ed] an attorney's impressions, conclusions, opinions, legal research or theories, the [listening would] stop[] and the contents of the [tape] for all practical purposes [would be] off limits."[47] Thus, although both receiving counsel and the court would be privy to the disclosing counsel's perjury conspiracy, the *Rico* rule requires the recording to be returned to opposing counsel, without providing recourse for either the court or receiving counsel within the context of the civil litigation.[48]

In situations where inadvertently disclosed material provides evidence of a crime or fraud, it is unclear how the *Rico* standard furthers the state's work product policy goals.[49] By adopting attorney work product protections, California's legislature sought to "preserve the rights of attorneys to prepare cases for trial" and to prevent opposing counsel "from taking undue advantage of their adversary's industry and efforts."[50] The rationale behind attorney work product protection—the prevailing interest underlying *Rico*—does not require a rule that so blindly insulates fraudulent or criminal behavior in civil litigation. In cases where inadvertently disclosed documents demonstrate criminal or fraudulent activities, a modification of the *Rico* standard to allow a judicially imposed waiver of work product protection would comport with the legislature's stated intent.[51]

Two observations support such a modification of the *Rico* rule. First, allowing a waiver for fraud or criminal activity would not stop an attorney or witnesses from preparing for trial; rather, it would stop them from *illegally or fraudulently* preparing for trial, or, at the very least, from concealing their illegal preparations during the course of the litigation.[52] Second, allowing

46. *Id.* at 1100. The same would hold true for reading a small portion of a document that was both necessary in order to ascertain the document's privilege yet still disclosed that a crime or fraud had occurred.

47. *Id.*

48. The court could refer the tape to a prosecutor, who could decide to pursue charges pursuant to section 118 of the California Penal Code. *See* CAL. PENAL CODE § 118 (West 2007). Even assuming a prosecutor would decide to bring charges, receiving counsel would still be left without recourse during the civil trial.

49. CAL. CIV. PROC. CODE § 2018.020 (West 2007); *Rico*, 171 P.3d at 1099 (quoting Kirsch v. Duryea, 578 P.2d 935, 939 (Cal. 1978)).

50. CAL. CIV. PROC. CODE § 2018.020 (West 2007).

51. Such a waiver could be effectuated by allowing a judge to perform an *in camera* review of the content of any document that a receiving attorney claims to provide evidence of fraud or criminal activity. If, after review, the judge's analysis supports the receiving attorney's claim, the document's privilege will be deemed to have been waived, and the receiving attorney will be allowed to use the document at trial.

52. *See* CAL. CIV. PROC. CODE § 2018.020 (West 2007).

receiving counsel to use documents evidencing illegal or fraudulent conduct by an attorney or witness would not constitute an "*undue* advantage."[53] The work product protection was created, in part, to prohibit an attorney from discovering, after extensive preparations, opposing counsel's strategic plan for trial.[54] In this sense, discovery of an attorney's strategic work product by opposing counsel would understandably constitute an undue benefit. However, in the case of fraudulent or criminal activity that has already been disclosed, failure to allow the use of documents by the receiving attorney would likely be unduly beneficial to the *disclosing attorney*, the attorney actually responsible for the illegality or fraud.

Alternatively, the *Rico* decision may provide the impetus for California's legislature to amend the crime-fraud exception to apply in civil cases. In light of the legislative history of the crime-fraud exception statute and the court's firm determination in *Rico* that the exception was inapplicable in civil cases,[55] a statutory amendment is likely the only available remedy. Such an amendment would have the effect of automatically waiving the protections afforded to attorney work product when the inadvertently disclosed material provides evidence of crime or fraud.

Two reasons support such an amendment to the statute. First, waiver of the attorney-client privilege is already applicable in California civil cases where the attorney's services "were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."[56] While the attorney-client privilege is "the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of [the] legal system,"[57] California's legislative scheme currently affords greater protection to attorney work product than the attorney-client privilege.[58] This distinction makes little sense: the same rationale favoring waiver of the attorney-client privilege—that a privilege meant to encourage full and adequate legal representation should not be abused in order to facilitate the commission of crimes—applies equally to attorney work product protections.

Second, a crime-fraud exception for attorney work product applicable in civil cases would have allowed the court to reconcile the holding in *Aerojet* with the rule handed down in *State Fund*. In *Aerojet*, the court rejected

53. *Id.* (emphasis added).

54. Hickman v. Taylor, 329 U.S. 495, 510–11 (1947).

55. *See supra* note 40; Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1100–01 (Cal. 2007).

56. CAL. EVID. CODE § 956 (West 1995).

57. United States v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997). "[The attorney-client privilege] is no mere peripheral evidentiary rule, but is held vital to the effective administration of justice." People v. Superior Court (*Buckner*), 23 P.3d 563, 571 (Cal. 2001).

58. *Compare* CAL. EVID. CODE § 956 (West 1995) (applying crime-fraud exception to attorney-client privilege without regard to the type of proceedings), *with* CAL. CIV. PROC. CODE § 2018.020 (West 2007) (applying crime-fraud exception to work-product only for criminal investigations and actions brought by public prosecutors).

sanctions against receiving counsel for using nonprivileged portions of an otherwise privileged document that revealed the existence of a witness whom opposing counsel had failed to disclose.[59] Instead of relying on the privileged-unprivileged content distinction, the trial court—if the crime-fraud exception had applied—could have held that disclosing counsel committed a fraud on the court[60] based on his abuse of the discovery process by failing to fully disclose witnesses to receiving counsel. Accordingly, the court could have waived work product protection of the document, and receiving counsel could have used the document freely.

Furthermore, such an amendment to California's statutory work product protections would not undermine the court's holding in *Rico*. Receiving counsel would still be ethically bound to read no more of an inadvertently disclosed document than is reasonably necessary to ascertain its privileged nature, and receiving counsel would still be required to notify disclosing counsel of the document's disclosure. The amended statute, however, would enable the receiving attorney to retain and use the document where evidence of a crime or a fraud is disclosed.

Regardless of the mechanism used, extension of the crime-fraud exception to attorney work product would serve to better navigate the tensions between zealous representation and protection of attorney work product. The standard set forth in *Rico* would still apply, and robust work product protections would still be afforded to the vast majority of inadvertently disclosed documents. Through application of the *Rico* rule, receiving attorneys would be discouraged from reading more than reasonably necessary to determine a document's privileged or protected status by the threat of court sanctions or the possibility of disqualification from the case. Moreover, courts could similarly discourage false or unreasonable claims of crime or fraud in an inadvertently disclosed document through sanctions. However, in the course of reasonably ascertaining a document's privilege, if an attorney uncovers evidence of wrongdoing on the part of disclosing counsel or opposing witnesses then she would not be required to "unlearn" the crime or fraud perpetrated upon the court or her client.[61] If adopted, such a scheme would more effectively balance the ethical and evidentiary interests implicated in cases of inadvertent disclosure.

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59. Aerojet-General Corp. v. Transp. Indem. Ins., 22 Cal. Rptr. 2d 862, 867–68 (Cal. Ct. App. 1993).

60. *See* State Farm Fire & Cas. Co. v. Superior Court, 54 Cal. App. 4th 625, 644 (1997) (holding "wrongful tactics" taken by a party in defending litigation constitutes a "fraud on the court").

61. The courts describe this as "unringing the bell"—the amount of "unlearning" necessary (and possible) for a receiving attorney to continue to participate in the trial without doing immitigable harm to disclosing counsel's case. Kanter v. Superior Court, 253 Cal. Rptr. 810, 820 (Cal. Ct. App. 1988).