Morgan Lewis

Robert A. Brundage
Of Counsel
(415) 442-1243
robert.brundage@morganlewis.com

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CLERK SUPREME COURT

January 13, 2017

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Honorable Tani G. Cantil-Sakauye, Chief Justice
Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: Sun v. Superior Court of Orange County (Young), No. S239018

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The International Association of Defense Counsel (IADC) urges the Court to grant the Petition for Review ("Petition") in *Sun v. Superior Court of Orange County (Young),* No. S239018.

The IADC's interest. The IADC is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The Court should grant review to clarify a lawyer's obligations upon receiving inadvertently-produced confidential (but not privileged) information. *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 holds that when an attorney receives inadvertently-produced privileged or work-product information, the attorney should refrain from

examining the materials more than essential to ascertain if the materials are privileged, and immediately notify the sender that he or she possesses material that appears to be privileged. *Rico* affirms disqualification of an attorney who violated these standards and used the materials to obtain an advantage in the litigation. The issue presented by the current Petition is whether attorney disqualification is proper under *Rico* where attorneys excessively review inadvertently produced confidential or privileged information, absent irrefutable proof that they have already affirmatively misused that information. Petition 1.

One aspect of this question is of particular concern to IADC members: whether *Rico* applies to a lawyer who receives inadvertently-produced information that is confidential, but is not protected by the attorney-client privilege or work-product doctrine. *See* Petition 2-3, 14-20 (describing how case presents question). If *Rico* applies, a lawyer who receives such confidential information must read no further than needed to ascertain that it is protected, stop reviewing it, and notify opposing counsel to try to resolve the situation. Rico, 42 Cal.4th at 810, 817-18. If *Rico* does not apply and no similar obligation is imposed, the attorney is entitled to use the information. *See Aerojet-General Corp. v. Transp. Indem. Co.* (1993) 18 Cal.App.4th 996, 1005 (holding that if information is non-privileged and is revealed to attorney through no fault or misconduct of attorney's own, attorney is entitled to use it).

Rico sometimes describes the rule as applying to "privileged and confidential" information, sometimes to "privileged *or* confidential" information, and sometimes to "confidential" information, leaving unclear whether the rule applies to information that is confidential but not privileged.

Specifically, *Rico* adopts the standard of attorney conduct set forth in *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644. *See Rico,* 42 Cal.4th at 816-19. When initially describing the *State Fund* standard, *Rico* suggests that the documents must be confidential *and* privileged: "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be *confidential and privileged* and where it is reasonably apparent that the

materials were provided or made available through inadvertence," the lawyer should refrain from examining them further than needed to ascertain if they are privileged and notify the sender. 42 Cal.4th at 817 (quoting *State Fund,* 70 Cal.App.4th at 656-57) (emphasis added). Elsewhere, *Rico* suggests that the document need only be confidential *or* privileged. *See Rico,* 42 Cal.4th at 818 ("The *State Fund* rule holds attorneys to a reasonable standard of professional conduct when confidential *or* privileged materials are inadvertently disclosed.") (emphasis added); *id.* at 819 (noting that *State Fund* court "did not 'rule out that in an appropriate case, disqualification might be justified if an attorney inadvertently receives *confidential* materials and fails to conduct himself or herself in the manner specified above, assuming other factors compel disqualification.'") (emphasis added) (quoting *State Fund,* 70 Cal.App.4th at 657).

Still other language in *Rico* could be read to support either view. *Rico* states that the "*State Fund* standard applies to documents that are plainly *privileged and confidential*, regardless of whether they are *privileged* under the attorney-client privilege, the work product privilege, *or any other similar doctrine that would preclude discovery based on the confidential nature of the document.*" *Rico,* 42 Cal.4th at 817 fn.9 (emphasis added); *accord, Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1188. This statement can be read to require that the document be privileged ("plainly privileged *and* confidential," "privileged"), or to suggest that *State Fund* covers information protected against discovery by a doctrine *similar* to the attorney-client or work-product privilege and based on the document's confidentiality ("any other similar doctrine....").

In the case before the Court, the parties take diametrically opposite positions about whether *Rico* applies to confidential documents or only to privileged documents. Each side argues that *Rico*'s plain language favors its position. *Compare* Petition for Review 14-16 (quoting "any other similar doctrine" language from *Rico* and *Ardon* and arguing that this "plain language ... suggests that attorney disqualification can arise from inadvertently produced confidential information, in addition to information protected by the attorney-client privilege and work product doctrine") *with* Answer to Petition for Review 20 (arguing that *Rico* "plainly extends only to materials that obviously appear to be subject to an attorney-client privilege

or otherwise appear to be confidential *and* privileged") (emphasis in original Answer) (quoting *Rico,* 42 Cal.4th at 817).

Whether *Rico* applies to confidential, but not privileged, information has significant practical importance. A variety of information is not privileged under the Evidence Code, but is protected from discovery based on its confidentiality, particularly under the constitutional right of privacy. *See* Cal. Const. art. I § 1. For example, there is no statutory privilege for bank customer information. *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656. But the constitutional right of privacy protects "confidential information given to a bank by its customers" and under some circumstances precludes or limits discovery. *Id.* at 656-58. This protection is explicitly based on the confidential nature of the information. *Id.* at 656 ("we may safely assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life,"), 658 ("in evaluating claims for protection of bank customers, the trial courts are vested with the same discretion which they generally exercise in passing upon other claims of confidentiality"), 658 (defining bank's duties "before confidential customer information may be disclosed in the course of civil discovery"). The right of privacy has also been held to prevent discovery of many other kinds of information not protected by a statutory privilege, or to provide broader protection than the privilege, based on the confidentiality of the information. *See, e.g., Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1013-1020 (medical records); *Heda v. Superior Court* (1990) 225 Cal.App.3d 525, 528-30 & fn.1 (medical records); *Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th 640, 651-56 (employees' confidential personnel information); *El Dorado Savings & Loan Assn. v. Superior Court* (1987) 190 Cal.App.3d 342, 345-46 (employee's confidential personnel information); *Tien v. Superior Court* (2006) 139 Cal.App.4th 528, 536-41 (identities of persons who consulted attorneys); *Hooser v. Superior Court* (2000) 84 Cal.App.4th 997, 1003-1007) (identities of attorney's clients).

Thus, the constitutional right of privacy may be a "similar doctrine that would preclude discovery based on the confidential nature of the document." *Rico,* 42 Cal.4th at 817 fn.9. However, the right of privacy may not qualify as a "privilege." It is not a statutory privilege. Unlike the attorney-client privilege and absolute work product-doctrine, the

constitutional privacy right is generally not absolute and must be balanced against other interests such as the need for discovery. *Pioneer Electronics (U.S.A.), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 371. So if *Rico* applies only to privileged information, as Sun contends, it apparently would not apply to information protected only by the constitutional right of privacy. If *Rico* applies to confidential-but-non-privileged information, as Young contends, it apparently would apply.[1]

The IADC currently takes no position on which interpretation is correct. But it submits that the ambiguity should be resolved. Given "today's reality that document production may involve massive numbers of documents," *Rico,* 42 Cal.4th at 818, it is a fact of life that documents will sometimes be inadvertently produced. Lawyers need to know whether they can review such documents. If the documents are protected by the *Rico/State Fund* standard, a lawyer who continues to review and use them can potentially be disqualified, as in *Rico,* impinging on the client's choice of counsel. Short of disqualification, a lawyer who violates the *Rico/State Fund* standard may be subject to monetary sanctions. *See State Fund,* 70 Cal.App.4th at 651, 655-657 (trial court imposed monetary sanctions for refusing to return inadvertently-produced privileged documents; Court of Appeal reversed because attorney's obligations had not been clear); *Bak v. MCL Financial Group, Inc.* (2009) 170 Cal.App.4th 1118, 1123-27 (affirming refusal to vacate sanctions imposed by arbitration panel on attorney who copied

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[1] The facts of this case appear to raise just this right of privacy. The IADC understands that the inadvertently-produced recycle bin here included plaintiff and his wife's personal medical records and their financial statements. (Exhibits Supporting Petition for Writ of Mandate ["Exhibits"] Vol. 1 at 23 (medical records, bank account statements, wiring instructions, investment account statements), 216 (Medicare cards), 218-25 (Young and wife's brokerage statement detailing their investments), 227 (Young and his wife's bank account information for checking, savings, brokerage, IRA and health savings accounts). The constitutional right of privacy applies to, *inter alia,* medical records (*Davis,* 7 Cal.App.4th at 1013-20; *Heda,* 225 Cal.App.3d at 528-30) and financial institutions' information about their customers. *Valley Bank,* 15 Cal.3d at 656-58.

inadvertently-produced privileged documents before returning them). And if *Rico* does not apply, the receiving lawyer needs to know so that she can review the documents and use them to her client's advantage. Either way, the receiving lawyer needs to know whether *Rico* applies so she can comply with her obligations while zealously representing her client.

Clear guidance is also needed to protect the party that inadvertently produced the documents. If *Rico* applies, the best protection for the producing party is a clear obligation on the opposing lawyer not to review the documents.

In short, a variety of sensitive information is confidential but not privileged. The interests of lawyers and clients alike would be best served by clear guidance about whether lawyers can review such information when it is inadvertently produced. The Court should grant review.

Sincerely,

Robert A. Brundage

Robert A. Brundage

CERTIFICATE OF SERVICE

I, Davace Chin, declare that I am a resident of the State of California, County of San Francisco. I am over the age of eighteen years and not a party to the within action; my business address is Morgan, Lewis & Bockius LLP, One Market Street, Spear Tower, San Francisco, California 94105.

On January 13, 2017, I caused the following document to be served:

AMICUS CURIAE LETTER SUPPORTING PETITION FOR REVIEW

via U.S. Postal Service – by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below:

James S. Azadian and Cory L. Webster
Enterprise Counsel Group
Three Park Plaza, Suite 1400
Irvine, CA 92614
Attorneys for Defendant and Petitioner Andrew Sun

Jeffrey G. Huron and Phu C. Nguyen
Dykema Gossett LLP
333 South Grand Avenue, Suite 2100
Los Angeles, CA 90071
Attorneys for Defendant and Petitioner Andrew Sun

Andra B. Greene and Cathy Moses
Irell & Manella LLP
840 Newport Center Drive, Suite 400
Newport Beach, CA 92660
Attorneys for Defendant and Petitioner Andrew Sun

Judge Kim Dunning
Superior Court of Orange County
700 Civic Center Drive West, Dept. CX104
Santa Ana, CA 92701
Respondent

Mary-Christine Sungaila
Haynes and Boone, LLP
600 Anton Boulevard, Suite 700
Costa Mesa, CA 92626
Attorneys for Real Parties in Interest John Young and United American Properties, Inc.

Jennifer L. Keller and Yen-Shyang Tseng
Keller/Anderle LLP
18300 Von Karman Avenue, Suite 930
Irvine, CA 92612
Attorneys for Real Parties in Interest John Young and United American Properties, Inc.

Clerk of Court
California Court of Appeal
Fourth Appellate District, Division Three
601 West Santa Ana Boulevard
Santa Ana, CA 92701

Clerk of Court
Orange County Superior Court
Civil Complex Center
751 West Santa Ana Boulevard
Department CX104
Santa Ana, CA 92701

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct. Executed on January 13, 2017, at San Francisco, California.

By: _____
Davace Chin