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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KENNETH E. PROULX,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

INTER-CON SECURITY SYSTEMS, INC., et al.,

Real Parties in Interest.

No. B238890

(Super. Ct. No. GC043699)

ORIGINAL PROCEEDING; petition for writ of mandate. Jan A. Pluim, Judge. Writ granted in part.

Hadsell Stormer Keeny Richardson & Renick, Anne Richardson, Cindy Pánuco; and Robert D. Newman for Petitioner.

No appearance for Respondent.

Quinn Emanuel Urquhart & Sullivan, Susan R. Estrich, James R. Asperger and Joseph C. Sarles for Real Parties in Interest Inter-Con Security Systems, Inc., Enrique Hernandez and Michael P. MacHarg.

Defendant and cross-complainant Kenneth E. Proulx petitions this court for a writ of mandate to overturn an order of respondent Superior Court of Los Angeles (Jan A. Pluim, Judge) entered December 12, 2011, upon the motion of plaintiffs and cross-defendants Inter-Con Security Systems, Inc., Enrique Hernandez, and Michael P. MacHarg. The plaintiffs' motion sought to disqualify Proulx's counsel, to require Proulx and his counsel to return privileged documents, and to "claw-back" other privileged documents that it had inadvertently produced in discovery.

The trial court's order denied the claw-back motion; however, it ordered Proulx and his counsel to return all Inter-Con documents (except those subject to the claw-back motion), and disqualified Proulx's counsel, the firm of Hadsell Stormer Keeny Richardson & Renick, LLP, and Robert D. Newman, from further representing Proulx in this action. On December 20, 2011 the court granted the parties' stipulation to stay all trial court proceedings pending final resolution of any interlocutory challenges to the order.

Having issued an order to show cause on March 9, 2012, we grant the requested writ in part.

Inter-Con's Complaint and First Amended Complaint

On September 9, 2009, Inter-Con Security Systems, Inc. filed a complaint against Kenneth E. Proulx, its former vice president of international relations, alleging claims for breach of fiduciary duty, breach of contract, intentional interference with contract, violation of Business and Professions Code section 17200 et seq., and intentional interference with prospective economic advantage. Inter-Con alleged that it is a security company situated in Pasadena, California, "providing a full range of physical security services to commercial and industrial customers world-wide." On December 26, 2006, Inter-Con had hired Proulx under a written employment agreement, terminating him two years later on December 5, 2008. During his tenure as Inter-Con's vice president of international relations, Inter-Con alleged, Proulx entered into transactions on Inter-Con's behalf in the United States and in some 14 or more countries in Africa and South

America, and had access to "all of Inter-Con's proprietary information." After his termination, it alleged, Proulx wrongfully disclosed and used its proprietary information to induce other employees to leave Inter-Con's employment, to induce clients to cease doing business with Inter-Con, and to intentionally undermine and harm Inter-Con's business reputation both domestically and internationally. For these alleged breaches of his obligations, Inter-Con sought substantial compensatory and punitive damages.

Inter-Con filed a first amended complaint on January 25, 2010, attaching Proulx's employment agreement. The agreement, signed by Proulx and by Hernandez, Inter-Con's president and chief executive officer, outlined Proulx's duties, compensation, employment benefits, and loyalty and confidentiality obligations. It provided that Proulx would not disclose or use Inter-Con's confidential and proprietary information except as required by his employment.

Proulx's Cross-Complaints

On April 19, 2010, Proulx cross-complained against Inter-Con, as well as individual cross-defendants Hernandez and MacHarg, alleging (among other claims) breach of contract, wrongful termination and retaliation in violation of public policy, and various Labor Code violations. His cross-complaint (and his amended pleadings filed in September and November 2010) alleged that he had successfully managed Inter-Con's international division with 14 subsidiary and branch-office businesses, more than 17,000 employees, and over 1,800 government and private contracts in 14 different countries; that his termination was without good cause and Hernandez's oral explanation of its cause was pretextual; and that Inter-Con had breached his employment agreement in a number of ways.[1]

Proulx's pleadings allege that he was actually discharged for having voiced objections to Inter-Con's and Hernandez's commission of a wide range of illegal

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[1] Proulx later elsewhere alleged that on November 5, 2009, he obtained a Labor Department administrative award for Inter-Con's withholding of employment benefits upon his termination.

activities in the United States and abroad. The alleged misconduct included acts such as bribery of Mexican officials, tax fraud and under-reporting of income to foreign and United States taxing authorities, violations of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. § 78dd-1 et seq.) and attempts to procure a false and fraudulent will for Hernandez's deceased father in order to enable an after-death transfer of certain Mexico City properties to Hernandez.

Proulx's pleadings alleged specifically that in August and September 2008, he had learned of bribery of Mexican governmental officials by an Inter-Con employee, and of massive tax fraud by Inter-Con's Liberia branch. However, he had been chastised by Hernandez after he reported his concerns about these conditions to Hernandez in a September 11, 2008 email. And he alleged that after he had reported to Hernandez that a disclosure Inter-Con was required to make to the United States government in order to maintain its security status contained significant inaccuracies, the form was filed without correction of its "misrepresentation of this vital information to the United States government."

Proulx's pleadings contain references to internal Inter-Con email communications, including communications about legal issues involving Inter-Con.

When Inter-Con answered Proulx's second amended cross-complaint on January 14, 2011, the case was at issue. Inter-Con's answer alleged a general denial and 32 affirmative defenses, including allegations that it had at all times acted in good faith.

Continuing Discovery

On January 27, 2011, Inter-Con served Proulx with a request for production of documents (set two), special interrogatories (set two), and requests for admission (set two). Many of these discovery requests sought the identification and production of documents concerning the illegality and other wrongs alleged in Proulx's cross-complaint.

For example, Inter-Con's requests asked Proulx to identify and produce emails concerning his allegations about efforts to transfer Mexico City properties from

Hernandez's deceased father to Hernandez; about bribery of officials in Mexico; about Liberian tax misreporting; and about erroneous security reporting by Inter-Con to the United States government. Other interrogatories sought identification of documents concerning his allegations about Inter-Con's ownership of assets, claimed to be illegal under Tunisian law; about the legality of certain Inter-Con transactions under Columbian law; about Inter-Con bribes in violation of the Foreign Corrupt Practices Act; about tax fraud by Inter-Con in Liberia; and about Inter-Con's filing of erroneous security information to the United States government. Inter-Con asked Proulx to admit that he had had authority as Inter-Con's vice president of international relations to seek attorneys' advice in the localities where Inter-Con did business; that he had received email communications from an Inter-Con employee telling him that he was mistaken about the illegality of Inter-Con's actions under Columbian law; and that he had relied on the advice of Inter-Con's attorney in Mexico when he reported to Hernandez about the transfer to him of the Mexico City properties.

On March 11, 2011, Inter-Con responded to a Proulx document request, producing documents numbered 1 through 292. The response included a privilege log identifying documents that Inter-Con withheld from production, as privileged.

On March 14, 2011, and June 17, 2011, Proulx produced documents to Inter-Con (which Inter-Con later described as over 5,000 documents), apparently withholding others as privileged.

Proulx Substitutes New Counsel

On June 16, 2011, the law office of Hadsell Stormer Keeny Richardson & Renick LLP, (Hadsell Stormer) and Robert D. Newman, Attorney At Law, substituted into the case in place of Proulx's former attorneys of record, the Law Office of Vincent W. Davis & Associates.[2] According to their declarations, before and after they had been engaged to represent Proulx, certain attorneys at Hadsell Stormer, and Newman, had reviewed the

[2] This opinion sometimes refers collectively to Proulx's attorneys as Hadsell Stormer, without separate identification of Newman.

pleadings and documents that had been produced in discovery, as well as some documents that had not been produced. Some documents they reviewed in detail; others they had merely "scanned," or "skimmed." Hadsell Stormer also arranged for the documents that had already been produced to be Bates-numbered.

Mediation is Unsuccessful

On July 6, 2011, Hadsell Stormer served notices for the depositions of a number of Inter-Con officers, including cross-defendants Hernandez and MacHarg. The parties then agreed to postpone the depositions until after a mediation session to be held in early September, and Inter-Con's counsel indicated to Hadsell Stormer that Inter-Con would obtain new counsel if the case did not settle. Meanwhile, Proulx served additional discovery requests on Inter-Con, related to issues raised both by Inter-Con's complaint and by his cross-complaint.

The mediation on September 2, 2011 did not result in a settlement. Between September 2, 2011 and October 6, 2011, the parties' counsel exchanged telephone and email messages concerning scheduling of future discovery, Proulx served further discovery notices and requests, and Inter-Con served responses to document requests.

Inter-Con Substitutes New Counsel

On October 10, 2011, the firm of Quinn Emanuel Urquhart & Sullivan, LLP (Quinn Emanuel) served notice of its substitution as attorneys for Inter-Con, Hernandez, and MacHarg. Quinn Emanuel replaced these parties' former attorney of record, an in-house attorney at Inter-Con.

Inter-Con Claims Privilege With Respect To Documents Produced In Discovery

On October 13, 2011, Quinn Emanuel notified Hadsell Stormer by letter that when it reviewed the documents produced in discovery, it found that Proulx's production "consists almost entirely of confidential documents he apparently stole from Inter-Con upon his departure and wrongfully possesses to this day." The letter demanded immediate return of all Inter-Con documents in the possession of Proulx and his present and former attorneys, and included a nine-page "non-exhaustive list" of "documents

produced to date that are protected by the attorney-client privilege or the work product doctrine." The letter also states Inter-Con's intention to seek Hadsell Stormer's and Newman's disqualification as attorneys for Proulx, "based on improper access to and use of Inter-Con's privileged and work product documents and information . . . ."

In response to the October 13 letter, Hadsell Stormer notified Quinn Emanuel on October 25, 2011, that it had sequestered all the documents it had received from Proulx, pending resolution of the privilege and disqualification claims. Hadsell Stormer also set forth its position that no privileges apply to the documents listed in the October 13 letter, upon three grounds: First, Inter-Con had waived any privileges by putting the privileged communications at issue, by specifically requesting discovery of documents containing or reflecting privileged communications, by itself producing documents containing attorney-client communications, and by failing to assert any privilege claim for the months since Proulx had produced the documents in March and June, 2011. Second, many of the communications claimed to be privileged are within the crime/fraud exception to the attorney-client privilege, under Evidence Code section 956. And third, the dominate purpose of many of the communications was business transactions, rather than legal advice, notwithstanding that some of the parties to those communications are attorneys.

Inter-Con Seeks To "Claw-Back" Certain Documents.

By letter of October 26, 2011, Quinn Emanuel formally asserted a claw-back demand for four documents, numbered 191-198, 238-243, 244-250, and 251-257 (the claw-back documents), which Inter-Con claimed it had inadvertently produced on March 11, 2011. Inter-Con described the contested documents as each consisting of "a lengthy email chain, a portion of which contains privileged and/or work product information involving Inter-Con's outside counsel, including the law firm of Baker & McKenzie, as well as Alonso Paredes of the Columbian law firm Cahn-Speyer Paredes & Asociados." And it claimed that certain of the documents produced by Inter-Con "relate to Proulx's allegations that he was terminated because he supposedly discovered something improper about Inter-Con's business structure in Columbia." The claw-back

motion was not supported by any declaration identifying when the documents' production and the failure to assert privileges with respect to them had been discovered by Inter-Con, or that it had been inadvertent.[3]

Inter-Con Moves To Disqualify Hadsell Stormer, and For Return Of Documents

On October 26, 2011, Inter-Con moved to disqualify Proulx's attorneys, Hadsell Stormer, and Newman, from representing Proulx; to require Proulx and his counsel to return all documents "protected by privilege or work product"; and to enjoin Proulx's counsel from discussing the contents of any of these documents or providing them to Proulx or his representatives. Attached as an exhibit to Inter-Con's motion was an Inter-Con confidentiality agreement signed by Proulx on January 7, 2007, shortly after his employment at Inter-Con. In the confidentiality agreement Proulx promised to protect Inter-Con's "trade secrets or confidential or proprietary information" from disclosure, and upon the end of his employment with Inter-Con to "return to Inter-Con everything that belongs to Inter-Con, including but not limited to . . . any of Inter-Con's confidential or proprietary information."[4]

The declaration of Natalie Griffiths, an in-house attorney for Inter-Con, in support of Inter-Con's motion identified over 1,000 pages of documents that had been produced by Proulx, and identified various attorneys involved in the communications reflected in those documents.[5] She stated that the documents "are internal, confidential emails and

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[3] On November 9, 2011, Hadsell Stormer moved for a ruling on Quinn Emanuel's claw-back request, while applying ex parte (without opposition) for leave to file the contested documents conditionally, under seal, pending the court's ruling on the claw-back issue. On November 9, 2011, Hadsell Stormer filed the claw-back documents with the trial court under seal.

[4] In mid-November 2011, Inter-Con moved for leave to file a second amended complaint alleging Proulx's breach of the confidentiality agreement, and alleging a cause of action for violation of California Penal Code section 496.

[5] The claimed attorney-participants to the privileged communications include Aaron Silberman of Rogers, Joseph & O'Donnell; cross-defendant attorney Rick Hernandez of Inter-Con; unidentified "lawyers in Equador"; Neil O'Donnell; Inter-Con general counsel

other correspondence of Inter-Con," protected by the attorney-client and work product privileges. The declaration of Joseph C. Sarles, a Quinn Emanuel attorney, documented Quinn Emanuel's correspondence exchanges with Hadsell Stormer with respect to the privilege claim and identified the pleadings, the confidentiality agreement, and Proulx's discovery responses. Neither of the supporting declarations identified when, or how, Inter-Con or any of its attorneys had become aware that Proulx's case against Inter-Con involved privileged communications, that documents identified and produced by Proulx in discovery contained privileged information, or that Proulx possessed privileged documents.

Proulx's opposition to Inter-Con's motion was supported by declarations of Proulx, Newman, and attorney Anne Richardson of Hadsell Stormer. Proulx averred that when he was terminated from Inter-Con he was asked to, and did, surrender his Blackberry phone; that he left his company-issued laptop computer in his office; and that he returned the key to his office filing cabinet when it was requested shortly thereafter. He denied taking any documents when he left Inter-Con, and denied that Inter-Con had ever asked him to return any other property or documents. He stated his belief that all the documents claimed by Inter-Con to be privileged were generated, sent to, or used by him in his employment, at his office, at his home, and while traveling for Inter-Con. And he averred that he had regularly backed up his laptop computer. He denied disclosing any of the documents to anyone other than his attorneys.

Attorney Richardson's declaration states that before being engaged by Proulx she had reviewed the file and documents Proulx provided her—some in detail, some merely

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Michal McEnroe; outside counsel in Chile, Octavio Mardones; outside counsel for Inter-Con in Mexico, Carlos Moreno, Jose Carriles, and Raul Trinidad Combaluzier; cross-defendant Inter-Con attorney Michael MacHarg; outside counsel Chris Sherman; outside counsel Alonso Paredes; outside counsel Jose Arias; outside counsel Maria Fernanda Caicedo Cardenas; unidentified attorneys in Chile; unidentified outside counsel in Tunisia; outside counsel Anthony Oncidi of Proskauer Rose LLP; outside counsel in India, Sumit Sinha of TriLegal; and Dominican Republic outside counsel Monica Villafana of Russin, Vecchi & Heredia.

by scanning them—including pleadings, discovery responses, and some documents that had not been produced. She had directed Bates-numbering of the documents that both parties had produced, and she directed another attorney to obtain leave to file the claw-back documents under seal.

Richardson averred that in reviewing the documents produced by both sides during discovery, "it never occurred" to her that the documents that had been sent to and by Proulx during his employment at Inter-Con regarding attorney-client communications would be privileged. Rather, she believed it was clear that any potential privilege had been waived, by virtue of the time that had passed since Proulx's pleadings alleging his reports to Inter-Con of illegal practices, and the parties' discovery exchanges.

Attorney Newman's declaration reviewed the history of the parties' discovery requests and exchanges after his engagement in early July 2011, noting that until October 13, 2011, Inter-Con's counsel had not expressed any concern about Proulx's counsel having been exposed to privileged documents, and had not requested the return of any documents in Proulx's possession. He averred that he had reviewed many of Proulx's documents and had skimmed others, but (like Richardson) he believed that any potential privilege had been waived by the time he saw them. And he stated that the California State Bar website identifies defendants Hernandez and MacHarg as active members of the State Bar since 1980 and 1999, respectively.[6]

A declaration by Hadsell Stormer attorney Cindy Pánuco identified Inter-Con's discovery requests, Inter-Con's responses to a Proulx document production request, Inter-Con's privilege log, and certain correspondence exchanged between counsel. When Quinn Emanuel's reply to Proulx's opposition noted the absence of any denial that Pánuco had reviewed the privileged documents, Pánuco filed a supplemental declaration averring that she had reviewed some of the documents produced by the parties in

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[6] Richardson and Newman each recalled that Proulx had shown them a purported email he had received from an anonymous source sometime after he was fired. Each averred their determination not to use the document in any way due to its doubtful legitimacy and authenticity.

discovery, in preparation for the mediation, in preparing discovery requests, in reviewing Inter-Con's redactions to documents it had produced, and in overseeing the documents' Bates-numbering and organization. She, too, denied believing that any privilege applied to the documents produced by the parties before Hadsell Stormer's engagement as Proulx's counsel.

The Trial Court Orders Hadsell Stormer To Return All Inter-Con Documents, and Orders Hadsell Stormer's Disqualification To Represent Proulx.

The trial court heard argument on Inter-Con's motion for return of documents and disqualification of Hadsell Stormer on December 12, 2011. Inter-Con's counsel argued in support of the motion that on March 14, 2011, Proulx "for the first time produced over 5,000 documents, dozens, if not more, of which were clearly privileged when a careful review was done." Without citation to anything in the record, and although Inter-Con's counsel conceded that seven months had elapsed between that production and Inter-Con's assertion of its privilege claims with respect to those documents, Inter-Con argued that "it's absolutely clear that there was no intent to waive the privilege."

Hadsell Stormer argued in response that Inter-Con's waiver of any privilege is shown by a number of factors. Long before Proulx produced the documents in March 2011, his April 2010 cross-complaint had alleged the existence of written communications concerning the legality of Inter-Con's conduct and legal advice about it. So from April 2010, until Hadsell Stormer's substitution as Proulx's counsel in June 2011, about 14 months later, counsel argued, Inter-Con knew that Proulx's lawsuit was grounded at least in part on Inter-Con's communications with its attorneys, but did not assert any privilege with respect to those communications. And in January 2011 Inter-Con propounded discovery seeking identification and production of those documents, and admissions with respect to the legal advice they contain, still without identifying them as privileged, without claiming that Proulx's possession of them was improper, and without demanding their return until after Proulx had retained new counsel months later. Under those circumstances, Hadsell Stormer argued, its attorneys had every reason to believe,

when they were engaged in June 2011, that Inter-Con had long since intentionally foregone any claim of privilege.

The trial court disagreed. It found that (except for the documents subject to Proulx's claw-back motion), Inter-Con had not waived its privilege through its pleadings, through inadvertence, or through delay in raising the privilege issue, and that the crime-fraud exception to the attorney-client privilege does not apply. It ordered Proulx "to return all Inter-Con documents, except those that are subject to the 'claw-back' motion," and it disqualified Hadsell Stormer from representing him further in the case.

With respect to Inter-Con's effort to claw back documents, however, the trial court found that Inter-Con had waived any privilege that might otherwise have been available to it. When it produced the documents on March 11, 2011 in response to Proulx's discovery requests, Inter-Con's counsel had carefully reviewed the documents, and had prepared a privilege log identifying those that were being withheld as privileged, while producing others. "Inter-Con cannot now claim that such production was inadvertent," the court held. It denied Inter-Con's motion to require return of the documents that were subject to the claw-back request.

Proceedings for Review of the Trial Court Order

On January 13, 2012, Proulx filed a notice of appeal from the trial court's rulings, and on February 6, 2012 he petitioned this court for writ relief. In response to this court's March 9, 2012 order to show cause, Hernandez and MacHarg have filed formal opposition to Proulx's petition, and Proulx has replied to the opposition.

DISCUSSION

Jurisdiction

An order granting an attorney disqualification motion is directly appealable. (See, Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2011) ¶ 4:329; *Truck Ins. Exchange v. Fireman's Fund Ins. Co*. (1992) 6 Cal.App.4th 1050, 1052, fn. 1.) An attorney disqualification is also reviewable by writ petition in the Court of Appeal's discretion. (*Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th

1253, 1263-1264.) We have concluded that writ review is appropriate in this case. "'The specter of disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for an appeal.'" (*Id*. at p. 1264.)

Standard of Review

Whether a communication comes within the attorney-client privilege or work product doctrine, and whether there has been a waiver of any such privilege, are issues of fact. When the facts are disputed, review of the trial court's ruling on the evidence is governed by the substantial evidence rule. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733; *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 598.) When there is no dispute in the material facts, the trial court's ruling is reviewed as a question of law, applying a de novo standard of review. (See *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144.)

The order disqualifying Hadsell Stormer from representing Proulx in this litigation is reviewed for abuse of discretion, with all conflicts in the evidence resolved in favor of the trial court's ruling. (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 46-47 (*Clark*); *McMillan v. Shadow Ridge at Oak Park Homeowner's Assn.* (2008) 165 Cal.App.4th 960, 964-965.) However, where no material factual issues are in dispute, here, too, the trial court's ruling is reviewed de novo. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, *supra*, 20 Cal.4th at pp. 1143-1144.)

A. The Trial Court Erred In Requiring Return Of Documents Not Identified In The Plaintiff's Motion Or The Order.

In support of its motion for return of documents and disqualification of Hadsell Stormer, Inter-Con proffered the declaration of Natalie Griffiths, identifying documents produced by Proulx as protected by the attorney-client privilege and work product

doctrine. Proulx's trial-court opposition to the motion did not dispute that the identified documents are within the protection of these privileges.[7]

Inter-Con's motion, and the trial court's order, however, are not confined to the documents identified in the motion. The motion sought an order requiring Proulx and his counsel to return not only the documents identified in the Griffiths declaration as privileged, but also "any other Inter-Con documents in their possession, custody, or control protected by privilege or work product." And the trial court's order granting Inter-Con's motion required Proulx to return "all Inter-Con documents, except those that are subject to the 'claw back' motion.'"

The order does not confine its reach to documents that are privileged. Nor does anything in the record or the decision of the trial court disclose the identity of any "other" Inter-Con documents—privileged or not—in the possession, custody, or control of Proulx or his counsel. The order therefore is overbroad, by ordering the return of Inter-Con documents beyond those claimed or shown to be either privileged, or in Proulx's possession.

Inter-Con has moved to amend its complaint to allege that Proulx is in wrongful possession of many of its documents, in violation of the terms of the confidentiality agreement he signed when he was hired. However, that claim is not yet pled, nor has summary adjudication of such a claim been sought. It is possible that specific enforcement of the parties' confidentiality agreement may be justified by some future showing, but until then the record contains no basis for the order requiring Proulx to return documents that have neither been identified nor shown to belong to Inter-Con or to be subject to privilege.

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[7] The record in the trial court and the parties' presentations in this court provide no basis on which to distinguish between the attorney-client privilege (Evid. Code, § 954) and the work product doctrine (Code Civ. Proc., § 2018.030), or their respective applications to particular documents or communications. In this opinion our references to privilege, without further identification, are to both the attorney-client privilege and work product doctrine, without distinction.

B. The Record Does Not Support The Trial Court's Order Requiring Return Of The Documents Identified As Privileged By Inter-Con's Motion.

Settled jurisprudence tells us that "[t]he attorney-client privilege, set forth at Evidence Code section 954, confers a privilege on the client 'to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . . .'" (*Costco Wholesale Corp. v. Superior Court*, *supra*, 47 Cal.4th at p. 732.) It embodies a legislative determination that although the privilege may sometimes suppress relevant evidence, those concerns "'are outweighed by the importance of preserving confidentiality in the attorney-client relationship.'" (*Ibid.*)

1. Inter-Con Failed To Show That Its Failure To Object To Proulx's Use Of Communications And Documents Identified And Produced In Discovery Did Not Waive Any Privilege.

In this court Proulx contends that Inter-Con waived any privilege that otherwise would apply to the documents he had produced in discovery, just as the trial court found Inter-Con had waived any privilege with respect to the claw-back documents it had produced. The trial court's December 12, 2011 order does not expressly find that the documents claimed by Inter-Con's motion to contain privileged communications are privileged; however, Proulx did not dispute that contention in the trial court, and that implied finding is unchallenged in this court.

Inter-Con's motion identified 417 emails and email chains (by our count), most of which contain multiple pages that had been produced by Proulx. They are identified by number, date, participants, and subject matter. According to Inter-Con, all of the identified emails either contain or relate to "information transmitted between a client and his or her lawyer in the course of" an attorney-client relationship. (Evid. Code, § 952; see *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 600 [attorney-client privilege encompasses non-attorney communications that "presuppose a communication between attorney and client . . . , and cannot be answered without impliedly affirming that such conversation occurred"].) Inter-Con's evidence thus supports a prima facie showing of

privilege, establishing a rebuttable presumption that the communications reflected in the documents produced by Proulx and identified in Inter-Con's motion were confidential and privileged. (*Costco Wholesale Corp. v. Superior Court*, *supra*, 47 Cal.4th at p. 733; *Clark*, *supra*, 196 Cal.App.4th at p. 49; Evid. Code, §§ 917, subd. (a), 952.) Proulx offered no evidence to rebut the presumption. The trial court therefore was justified in concluding that all of the communications identified in Inter-Con's motion involve communications made in the course of an attorney-client relationship with Inter-Con, to which privileges potentially apply.

Proulx contends that the evidence shows Inter-Con's waiver of privilege with respect to the identified documents, in a number of ways: by its placement of the privileged communications in issue in the litigation; by its failure to assert a privilege when Proulx's cross-action pled reliance on certain potentially privileged communications; by itself producing potentially privileged documents (the claw-back documents) without asserting any privilege as to them, while simultaneously asserting privileges as to other documents; and, most of all, by its failure to object or to assert any privilege when Proulx produced potentially privileged documents in response to Inter-Con's discovery requests.

The mere fact that a document or communication has been disclosed in discovery does not necessarily constitute a waiver of privilege, however. An inference that the party intended to waive an available privilege claim may arise from the communication's intentional disclosure; but a waiver does not result from an "accidental, inadvertent disclosure of privileged information" during discovery. Without more, "'an underling's slip-up in a document production'" should not become "'the equivalent of actual consent.'" (*State Comp. Ins. Fund v. WPS, Inc*. (1999) 70 Cal.App.4th 644, 654 (*State Fund*).)

This principle is exemplified in *O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, where a document that had been prepared at the direction of the defendant's attorney for an in-house legal evaluation was inadvertently produced to

the plaintiffs' counsel during discovery. Immediately upon discovery of the error the document's return was demanded, but was refused. (*Id.* at p. 577.) The court held that the document's disclosure in discovery—which in that case undisputedly had been inadvertent—did not itself show the defendant's consent to the document's disclosure, and therefore would not constitute a waiver of the otherwise-applicable privilege. (At the same time, however, it held that a waiver of the privilege might be shown if the communication's contents were disclosed under circumstances such as their voluntary production in another lawsuit that "would show a bona fide consensual waiver.") (*Ibid*.)

Similarly, in the *State Fund* case, hundreds of pages of documents clearly marked as privileged were produced as part of a 7,000-page document production. The trial court received evidentiary showings that the privileged documents' production had resulted from an error in trial counsel's office, the manner in which the error had occurred, and that the documents' return had been demanded immediately when the producing party discovered that documents subject to privilege were among those produced. On that basis the trial court held that the inadvertent production had not waived the documents' privileged character, and the Court of Appeal affirmed that ruling.[8] (70 Cal.App.4th at pp. 658-661.)

The trial court held in this case that Inter-Con's production of the claw back documents, while it was at the same time claiming privilege as to other documents and withholding them from production, was not consistent with its claim that the documents' production had been inadvertent. Lacking any indication that the documents' production

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[8] The trial court went on to sanction the receiving attorney for having refused to return the inadvertently produced documents upon demand. However, the Court of Appeal reversed the sanction award, finding that the law did not then clearly proscribe the receiving attorney's conduct—a gap in the law that the decision in *Rico v. Mitsubishi Motors, Inc.* (2007) 42 Cal.4th 807 (*Rico*), has since filled. (*State Farm, supra*, 70 Cal.App.4th at pp. 654-657.)

had been inadvertent, the inference of waiver arising from the production was unrebutted, and the privilege as to those documents had been waived.[9]

As to the documents that were identified in Inter-Con's motion—the documents described in Proulx's pleadings and identified and produced by Proulx in March and June, 2011—the trial court reached the opposite conclusion. It concluded that "Inter-Con has not waived the privilege through its pleadings, through inadvertence, or by any delay in raising the privilege, and the crime-fraud exception does not apply here." The conclusion that Inter-Con has not waived the privilege is not supported by the record, however.

Proulx contended that Inter-Con waived any privilege by failing to take reasonable steps to prevent disclosure of its privileged documents. (*Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 683.) Such contentions often are supported by the fact that the party asserting the privilege had itself produced the documents (as in *State Fund*, and *Rico*, for example). Here, it was Proulx rather than Inter-Con who had produced the documents. The inference of waiver therefore arises from Inter-Con's delay in asserting the privilege and seeking their return until mid-October 2011, although as early as April 2010—18 months earlier—Proulx's pleadings had alleged his reliance on apparently privileged communications, and the documents containing those communications had been produced five and seven months earlier, in March and June, 2011.

Proulx's April 2010 cross-complaint, as well as his September and November, 2010 amended pleadings, contained explicit references to apparently privileged communications. These included references to consultations with Inter-Con's legal counsel in Mexico, his email to Hernandez reporting what he believed to be violations by Inter-Con's officials of the Foreign Corrupt Practices Act, a spreadsheet showing Inter-Con's under-reporting of information to Liberian taxing authorities, an email from

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[9] Neither party challenges the portion of the trial court's ruling that concerns the claw-back documents.

Hernandez chastising Proulx for his report of illegal activities, and Inter-Con documents that illegally misreported its ownership status to the United States government. Yet Proulx's verified petition contends, and Inter-Con's responsive evidence does not dispute, in the face of these references to seemingly privileged documents and communications, Inter-Con made no request or demand for Proulx to return any Inter-Con documents in his possession until October 2011.[10]

In January 2011, Inter-Con's discovery requests sought production of documents identified in Proulx's pleadings, including at least some potentially privileged documents. For example, its request for production of documents (set two) asked for emails regarding legal transfer of properties from Hernandez's deceased father, regarding alleged bribery in Mexico, regarding alleged underreporting of Liberian taxes, and regarding allegedly erroneous security reporting to the United States government.

On March 11, 2011, Inter-Con responded to Proulx's document request, producing "several hundred documents" and asserting an attorney-client privilege as to those numbered 1 through 41. But Inter-Con claimed no privilege with respect to the documents its later claw-back motion identified as clearly privileged.

Proulx produced documents in response to Inter-Con's discovery requests on March 14, 2011 and June 17, 2011, including what Inter-Con has said are dozens of "clearly privileged" documents. Yet it was not until after Quinn Emanuel had substituted into the case as attorneys for Inter-Con, Hernandez, and MacHarg on October 10, 2011, about five weeks after the unsuccessful mediation on September 2, 2011, that Quinn Emanuel made its October 13, 2011 demand that Proulx and Hadsell Stormer return all Inter-Con documents (both privileged and non-privileged).

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[10] Even Inter-Con's September 2009 lawsuit and its January 2010 amended pleading had charged Proulx with improperly using and disclosing confidential "information in his possession" after the termination of his employment. However, unlike Proulx's cross-complaint and amended cross-complaint that identified emails containing privileged communications, Inter-Con's pleadings do not establish that Inter-Con then knew that Proulx actually possessed Inter-Con documents (as opposed to just "information"), or that any such documents contained privileged communications.

In ascertaining whether Inter-Con waived its privilege to prevent the use of these communications and documents, the trial court was required to determine whether Inter-Con's conduct was so inconsistent with an intent to claim the privilege as to induce a reasonable belief that it had intentionally waived any right to the privilege that it might otherwise have had. "Although courts frequently define 'waiver' as the intentional relinquishment of a known right, waiver may also stem from conduct 'which, according to its natural import, is so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.'" (*Savaglio v. Wal-Mart Stores, Inc.*, *supra*, 149 Cal.App.4th at p. 598, quoting *Rheem Mfg. Co. v. United States* (1962) 57 Cal.2d 621, 626.) And because waiver depends in part on "the subjective intent of the holder of the privilege," Inter-Con's subjective intent must be considered along with the objective manifestations of its intent. (*State Fund, supra*, 70 Cal.App.4th at pp. 652-653 (*State Fund*).)

The objective manifestations of Inter-Con's intent to waive any privilege is shown by the documents' disclosure, and by Inter-Con's delay in asserting the privilege and demanding the documents' return long after knowing of the disclosure. Evidence Code section 912, subdivision (a), provides that the privilege is waived with respect to a privileged communication if its holder manifests an intent to disclose a significant part of the communication by (among other things), "failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." Inter-Con's failure to assert the privilege when it knew (or should have known) that it had a right to do so, long after the communications' disclosure and the documents' production, therefore constituted an objective manifestation of its intention to waive the privilege. The question therefore must be whether the record reflects anything to rebut the inference of waiver arising from those objective manifestations—anything that could support a determination that Inter-Con's delay in asserting the privilege resulted from some circumstance showing that it had acted as it did for some reason inconsistent with an intention to waive the privilege.

Once the facts showing an objective manifestation of an intention to waive the privilege have been shown, it is the burden of the party claiming the privilege to show that, notwithstanding its manifestation of an intent to waive the privilege, its actual intention was otherwise. In light of the statutory presumption that a failure to assert the privilege in the face of an opportunity to do so constitutes a waiver of the privilege, it was up to Inter-Con to show that it did not intend to waive the privilege.

However, Inter-Con produced no such evidence. It offered no evidence that its failure to claim privilege when the communications were identified, and when the documents were produced, resulted from inadvertence, and (if it did) no evidence as to how any such inadvertence might have occurred and persisted for so long. It offered no evidence that Inter-Con's attorneys were unaware that privileged communications had been identified and privileged documents had been produced, and no evidence showing how that could be so. It offered no evidence as to when or how Inter-Con's attorneys first became aware that Proulx was relying on privileged communications, or that he had produced privileged documents. And it offered no evidence even to support its suggestion in argument (apparently adopted by the trial court) that its attorneys had postponed examining the documents produced in discovery until after the mediation was completed.[11]

In short, Inter-Con produced nothing to satisfy its burden of producing evidence sufficient to overcome the statutory presumption of waiver otherwise shown by its failure to assert the privilege when the communications were identified and the documents were produced. In the absence of evidence on this point, the trial court's ruling that there was no waiver is unsupported.

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11 The Quinn Emanuel attorney who argued on Inter-Con's behalf in the trial court suggested that the litigation was "kicked up in earnest" only after the mediation was unsuccessful; however, that attorney apparently lacked personal knowledge of that supposed fact, for Quinn Emanuel had not substituted into the case until more than a month after the mediation. At the hearing the trial court agreed, suggesting that even without a stay order "you kind of stay the case" if you anticipate mediation.

2. The crime-fraud exception to the attorney-client privilege does not apply.

Proulx contends that the crime-fraud exception should be applied to prevent the privilege's application to the documents produced in this case. Evidence Code section 956 provides that there is no privilege for attorney-client communications "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." But here, apart from citing the allegations of his own pleadings, Proulx cites nothing in the record to make the required showing. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1262.) Moreover, the crime-fraud exception in any event does not apply to the privilege under the work product doctrine. (*Rico*, *supra*, 42 Cal.4th at p. 820.)

C. The Order Disqualifying Hadsell Stormer From Representing Proulx In This Litigation Was Unjustified.

In *Rico*, *supra*, 42 Cal.4th 807, the Supreme Court addressed the obligations of attorneys who receive materials they should recognize as being their opponents' privileged documents. In that case an attorney for the plaintiffs had obtained an opposing attorney's notes, containing the opposition attorney's conclusions and legal strategies, plainly within the protection of the work product doctrine. (*Id.* at pp. 812-815.) Adopting the standard of attorney ethics articulated earlier in the *State Fund* case, the Supreme Court affirmed the trial court's holding that the plaintiffs' attorney had acted unethically, even if his receipt of the confidential document resulted from the opposing party's inadvertence and involved no misconduct on his part. (*Id*. at p. 810; *State Fund*, *supra*, 70 Cal.App.4th at pp. 656-657.) Holding that "'[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,'" the court held, attorneys must adhere "to a reasonable standard of professional conduct when confidential or privileged materials are inadvertently disclosed." (*Rico*, *supra*, at p. 818.) Once it becomes apparent that the documents are privileged, an attorney must promptly notify opposing counsel of his or her possession of the documents, and must try to

resolve the situation without their use. (*Id.* at p. 817; *State Fund, supra*, 70 Cal.App.4th at pp. 656–657.)

In *Rico*, the attorney's violation of that ethical standard was clear. The attorney who had received the opposition's confidential notes had admitted "that after a minute or two of review he realized the notes related to the case and that [the opposition attorney] did not intend to reveal them." (*Rico, supra*, 42 Cal.4th at p. 819.) He had then failed to notify the opposition that he had a copy of the document, and he had attempted "to gain maximum adversarial value" by "surreptitiously" using the document's confidential information to prepare himself and his witnesses for the trial. (*Id*. at p. 813.) The compromise of the opposing party's litigation strategies resulting from his unethical use of the document's confidential information without disclosure, the Supreme Court held, justified the trial court's disqualification of the offending attorney from representing the plaintiffs in that case. (*Id.* at p. 819.)

The rules are no different when an attorney receives plainly privileged documents from his or her own client, rather than through opposing counsel's inadvertence. (*Clark, supra*, 196 Cal.App.4th 37.) In that case the plaintiff, who had been the defendant's chief administrative officer, sued the defendant for wrongful termination. During the course of the litigation one of his attorneys disclosed to the opposition an intention to rely on a specified email memorandum that had been exchanged among various of the defendants' executives during the plaintiff's tenure at the company. The defendant's counsel immediately demanded that the plaintiff return all company documents, including any privileged information—a demand that was ignored by the plaintiff's attorney. (*Id.* at pp. 42-43.) Almost a year later, however, the plaintiff's counsel produced many plainly privileged documents in discovery, and although he later promised that he would return or destroy them, he did not do so. The plaintiff admitted that he had used the privileged documents to support his lawsuit's claims. (*Id.* at pp. 43-44.)

Following the rule announced in *Rico*, the Court of Appeal upheld the trial court's determinations, on disputed facts, that the specified documents were privileged, that the

plaintiff's counsel had reviewed them far more extensively than was required to determine that they were privileged, and that even after defendant's counsel had learned of the plaintiff's possession of the documents and had promptly demanded their return, plaintiff's counsel had used the documents "to question witnesses" and "to craft a claim against VeriSign . . . ." (*Clark, supra,* 196 Cal.App.4th at pp. 53-54.) Finding that there "'"exists a genuine likelihood that the . . . misconduct of [counsel] will affect the outcome of the proceedings before the court,'" the trial court in *Clark* disqualified the plaintiff's counsel from further participation in the case, ordered return of specified documents that it found were privileged, and enjoined the plaintiff's attorney from discussing the contents of the privileged documents or providing his work product to the plaintiff or the plaintiff's representatives. (*Id*. at p. 45, italics omitted.)

Here, the facts do not support the disqualification remedy imposed in *Clark*. It had been Proulx's former attorneys who had initially used the documents; if there was a duty to disclose their possession of the potentially privileged documents at that time (and perhaps there was), the failure to do so was their ethical breach, not Hadsell Stormer's. Hadsell Stormer breached no ethical duty. Its attorneys had reviewed the documents in connection with their engagement and preparation for the mediation (and they have not contended that the potentially privileged character of the documents was not then apparent). However, upon their review of the documents they had concluded—as Evidence Code section 912, subdivision (a) provides—that waiver was apparent from Inter-Con's failure to assert any privilege during the many months (or perhaps even longer) during which it had the opportunity to do so, as well as from its own apparently intentional production of similarly privileged documents during discovery (the claw-back documents), while at the same time identifying some other documents as privileged. And when Inter-Con belatedly asserted its privilege and sought to recover the documents,

Hadsell Stormer did not continue using them, but immediately sequestered the documents and examined them no further, pending the issue's resolution by the court.[12]

These undisputed facts do not support the trial court's implied holding that Hadsell Stormer breached its ethical duties by failing to disclose its possession of the potentially privileged documents to Inter-Con earlier, or that Inter-Con was prejudiced by its failure to do so. After all, Proulx's possession of the documents had already long been disclosed to Inter-Con, without effect; it is not clear why a new disclosure was required when Hadsell Stormer entered the case.

However, even if Hadsell Stormer's conduct could be found to have breached its ethical obligations, its disqualification would nevertheless be unjustified. Nothing in the record shows a likelihood that Hadsell Stormer's review of the documents could substantially affect the outcome of the proceeding—a finding essential to support disqualification. (See *Bell v. 20th Century Ins. Co.* (1989) 212 Cal.App.3d 194, 198 [trial court's discretion is subject to reversal where record shows no reasonable basis for disqualification].) Although the documents reviewed by Hadsell-Stormer contained or referred to Inter-Con's attorney-client consultations (to which Proulx and other attorney and non-attorney employees of Inter-Con had been parties), there is no evidence that they revealed Inter-Con's trial strategy with respect to the issues raised in the litigation, or that Proulx's knowledge of their contents was in any way wrongful. As far as the record shows, Proulx had been the author or an intended recipient of all of the communications, and he had received them in the course of his employment. When Hadsell Stormer encountered the documents, Proulx rightfully possessed knowledge of their existence and

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[12] Hadsell Stormer's attorneys explained that in light of the passage of time, the pleadings' allegations, the parties' apparently intentional production of privileged documents, and Inter-Con's lack of objections to the documents' use, "it never occurred to [them] that the documents that had been sent to and from Proulx during his employment at Inter-Con would be deemed privileged." Rather, it appeared to them clear that "any potential privilege that might once have existed had long been waived."

contents, even whether or not his actual possession of the documents violated his contractual duties.[13]

In *Rico*, the court cited with approval the rule that "'"[m]ere exposure"'" to an adversary's confidences is insufficient, standing alone, to warrant the attorney's disqualification, without resulting prejudice. (*Rico, supra*, 42 Cal.4th at p. 819; *State Fund, supra*, 70 Cal.App.4th at p. 657; *Neal v. Health Net, Inc., supra*, 100 Cal.App.4th 831, 842-843.) "The purpose of a disqualification must be prophylactic; an attorney may not be disqualified purely as a punitive or disciplinary measure." (*Neal v. Health Net, Inc., supra*, 100 Cal.App.4th at p. 844.)

Yet the record in this case shows nothing to establish that, even if Inter-Con's privilege had not been waived, Hadsell Stormer's exposure to the documents would have any lasting impact on the litigation, that Inter-Con would be prejudiced by Hadsell Stormer's exposure to the documents, or that Inter-Con would be protected by Hadsell Stormer's disqualification.

DISPOSITION

The trial court's order of December 12, 2011 is reversed. Petitioner is awarded his costs.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J. JOHNSON, J.

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13 We deny Inter-Con's motion for judicial notice of amended pleadings filed in *Clark v. VeriSign*, San Diego Superior Court Case No. 37-2009-00081864, because this opinion does not rely on or address the issue for which it is offered.