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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

ACT LITIGATION SERVICES, INC., et al., Plaintiffs and Appellants, v. GREENBERG TRAURIG LLP et al., Defendants and Respondents.	B232811 (Los Angeles County Super. Ct. No. BC434825)

APPEAL from an order of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Affirmed.

Law Offices of Ian Herzog, Ian Herzog, and Evan D. Marshall for Plaintiffs and Appellants.

Gaims, Weil, West & Epstein, Alan Jay Weil, Barry G. West, and Jesse J. Contreras for Defendants and Respondents Greenberg Traurig LLP, John A. Sten, and Jason C. Moreau.

DLA Piper, William P. Donovan, Jr., and Rachel E. K. Lowe for Defendant and Respondent FTI Consulting, Inc.

Silver & Freedman and Neil H. Freedman for Defendants and Respondents Michael Miller, Paul Tearen, and Neil Garde.

INTRODUCTION

Appellants ACT Litigations Services, Inc. (ACT), and the Law Offices of Ian Herzog (LOIH) appeal from the trial court's order disqualifying LOIH from continuing to represent ACT in its action against defendants and respondents Greenberg Traurig LLP (GT), John A. Sten, Jason C. Moreau, FTI Consulting, Inc. (FTI), Michael Miller, Paul Tearen, and Neil Garde.[1] Respondents sought the disqualification order because LOIH allegedly received from ACT documents that were clearly protected by the attorney-client privilege and the work product doctrine, and made extensive use of those documents in pursuing this fraud action, including filing some privileged documents in the public record. Respondents also successfully sought a protective order preventing any further use or disclosure of the privileged information.

Appellants contend on appeal that the trial court abused its discretion by ordering LOIH disqualified and issuing the protective order. They assert that respondents waived the privileges, that the crime-fraud exception applies and nullified the privileges, and that other nonstatutory exceptions to the privilege apply. They further assert that disqualification of counsel was overly draconian and unwarranted. As we shall explain, after considering appellants' contentions, we affirm the trial court's order in its entirety.

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[1] Miller, Tearen, Garde, and FTI filed joinders in the respondents' brief filed by GT, Sten, and Moreau.

FACTUAL AND PROCEDURAL BACKGROUND

I. SBC Hires ACT to Provide Litigation Support Services

The factual summary is from the allegations in the complaint and the declarations appellants filed in the trial court.

In mid-2007, Syntax-Brillian Corporation (SBC) retained GT to represent it in an investigation by the Securities and Exchange Commission (SEC) and in shareholder securities litigation. In February 2008, Attorney Jason Moreau of GT contacted ACT, seeking to hire ACT to perform litigation support services.[2] Moreau said he had been referred to ACT by insurer AIG, which was providing a defense to SBC in the SEC and civil securities actions. Moreau said ACT was on AIG's list of approved litigation support vendors.

Moreau and GT attorneys John Sten and Robert Mandel, along with SBC representatives Paul Tearen and Neil Garde, met with ACT account manager Robert Pallasch. Tearen and Garde described the scope of work they sought and identified the data they wanted processed. In short, ACT was to collect a voluminous amount of information from SBC and create and host an electronic database of that information. The SBC representatives stated that the work would be funded by AIG.

Over the ensuing months, the parties negotiated the scope of work involved in the project. The initial drafts of the contract stated that GT was a contracting party, but GT told ACT to instead make SBC the contracting party. A "proposed statement of work," dated April 28, 2008, was signed by SBC general counsel Michael Miller on May 1, 2008. The agreement contained a confidentiality clause, which stated that "Each recipient of 'Confidential Information' (a 'Recipient') agrees to hold such 'Confidential Information' in confidence and not to use such information for purposes other than contemplated hereunder or to disclose such information to any other person [except] as reasonably necessary in connection with the performance or receipt of Services, provided

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[2] At the time GT contacted ACT, SBC was under the control of defendant and respondent FTI , which had been retained by SBC to provide reorganization services.

the Recipient requires such persons or entities to observe the same rules of confidentiality and use with respect to such information as the Recipient is bound to observe hereby."

ACT was given access to SBC's computers and files in order to create the database. The initial estimate for the project was 187 gigabytes of data, at a cost of $77,786. Eventually, however, ACT processed 504 gigabytes of information, amounting to approximately 3.7 million document pages, at a cost of $1,208,909.

ACT sent SBC and GT invoices in May and June 2008. ACT understood that the work was being funded by AIG. ACT had asked Moreau for the name of the responsible AIG claims director on several occasions, but Moreau continually failed to provide it. However, GT undertook responsibility for submitting the invoices to AIG, and Moreau allegedly repeatedly represented to ACT that its invoices had been submitted to AIG and he was merely awaiting action by AIG. ACT was not paid and later learned that no bill was ever submitted to AIG.

On July 8, 2008, SBC filed for chapter 11 bankruptcy. Thereafter, Macyl Burke, ACT's director of marketing, had a series of conversations with Miller, SBC's general counsel, about payment of ACT's invoices. Miller said that SBC had filed a claim with AIG and that it had been rejected. Despite Burke's request for documentary proof that Miller had filed a claim and that AIG rejected it, Miller provided no such proof.

Burke also contacted SBC's coverage counsel and its insurance broker to inquire if ACT could file a claim with AIG or with surplus insurers. They said only SBC could file a claim. Burke contacted Miller again, who said that the "powers that be" had decided that SBC would not file a claim with AIG or the surplus insurer.

The claims director for AIG, Alan Jacobs, told Burke that SBC had never formally submitted a claim for ACT's services prior to SBC's filing for bankruptcy. Jacobs said AIG had never committed to paying for ACT's services. In fact, AIG had declined to provide coverage for the SEC proceedings, which were the principal focus of the support

work done by ACT. National Union Fire Insurance Company[3] and AIG had stated their willingness to fund up to $125,000 of the cost of ACT's services, but only on the condition that lawyers representing SBC's individual officers and directors in the civil actions would be allowed to have access to the database. Specifically, on November 4, 2009, counsel for Miller (SBC's general counsel) provided to ACT's counsel (Fulbright & Jaworski) a letter dated January 12, 2009, demonstrating that GT, Miller, and SBC knew that neither AIG nor any other insurer had committed to fund ACT's work. The letter stated: "As we discussed in National Union's coverage letter dated June 11, 2008, the SEC Investigation involving [SBC] is not a **Claim** that would be afforded coverage under the Policy. As you are aware, National Union had previously agreed to pay 50% of up to $250,000, or up to a total of $125,000 of the expenses incurred by ACT. However, that agreement was contingent on National Union's access to the documents in the ACT database. To date, however, due to the Chapter 11 proceedings involving [SBC], neither National Union nor defense counsel for the individual **Insureds** have not [*sic*] had access to those documents. As such, there is no basis yet for National Union to be paying any of the ACT expenses." GT continued to refuse to allow the individual officers and directors to have access to the database, and therefore the $125,000 was not made available to pay ACT.

II. The Present Litigation

On March 30, 2010, LOIH filed on behalf of ACT a complaint against respondents for negligent misrepresentation, fraud, and deceit. ACT alleged that at the time respondents solicited ACT to provide litigation services and the proposed statement of work was executed, SBC was insolvent and headed towards bankruptcy, and respondents knew and/or had reason to know that fact. According to ACT, respondents knew that ACT would in all probability not be paid for its services by SBC due to its insolvency

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[3] SBC and its officers and directors were insured by National Union Fire Insurance Company of Pittsburgh, Pa. under an "executive and organization liability insurance" policy.

and likely bankruptcy filing, and that no insurer had agreed to pay for most of the work to be provided. Respondents "had been planning the liquidation of [SBC], and retained ACT to provide the aforesaid services when they knew or should have known that the bankruptcy or insolvency of [SBC] would render it incapable of paying for the work to be performed by ACT or result in discharge of liability for such work."

On June 21, 2010, prior to serving the complaint on respondents, LOIH sent GT's general counsel a letter detailing the claims and allegations ACT was making against it and the other respondents. LOIH attached to the letter about 60 pages of documents supporting its allegations, some of which are among the documents for which respondents sought a protective order because they are subject to the attorney-client privilege and/or the attorney work product doctrine. GT did not immediately respond.

On September 23, 2010, Attorney Jesse Contreras of Gaims, Weil, West & Epstein, LLP, the law firm retained to represent respondents, wrote to LOIH, advising it that documents attached to the June 21, 2010 letter LOIH sent to GT contained privileged work product and attorney-client communications. Contreras identified five particular documents and advised LOIH that he was not aware of any waiver of the privileges by either SBC or any authorized privilege holder. He asked that LOIH inform him how it and ACT came to be in possession of the documents, and stated that LOIH had an ethical obligation to return or destroy all copies of the documents.

Attorney Evan Marshall of LOIH wrote to respondents' counsel on September 30, 2010, stating that the documents had been deliberately and voluntarily provided to ACT by SBC and GT as part of the project ACT was hired to perform and that this deliberate disclosure waived the privilege. Marshall further stated that the privilege could not be invoked where the party raising the privilege has breached a duty arising out of its relationship with the party seeking disclosure. He argued that this was a suitable case for application of the crime-fraud exception, as the documents demonstrated that SBC and GT were planning on the bankruptcy of SBC at the same time they were negotiating with ACT to provide support services. In addition, GT and SBC also misled ACT as to AIG's commitment to fund ACT's work.

On September 13, 2010, GT served on ACT a request for production of 70 categories of documents. The request included all documents that refer or relate to wrongdoing alleged against respondents, documents showing that respondents were aware of SBC's insolvency and concerning SBC's planned bankruptcy, and documents referring or relating to respondents' knowledge that there was no insurance coverage for ACT's services.

On October 27, 2010, respondents' counsel wrote to LOIH, denying its assertions that LOIH was free to make use of the privileged documents. Respondents' counsel denied that the privilege had been waived and stated that the crime-fraud exception did not apply because ACT and LOIH could not use SBC's privileged documents to circumvent the privilege and ACT and LOIH did not have any nonprivileged documents that supported their assertions of fraud. Respondents' counsel sought assurance from LOIH that it would agree not to use the privileged communications in any way in this litigation.

On October 29, 2010, LOIH responded to respondents' discovery requests by delivering 559 pages of documents along with a hard drive containing 1.5 million documents drawn from the SBC database. LOIH stated in a letter accompanying the document production that respondents' request for production required it to examine the very documents respondents claimed were privileged. It stated, "The documents in the enclosed hard drive are taken from the [SBC] database, so if you continue to take the position that those materials cannot be used or produced in this litigation, I suggest you return the hard drive forthwith."

Respondents deposed Burke, ACT's marketing director, on November16, 2010. The deposition notice demanded production of the same categories of documents as the prior request for production. During that deposition, GT's counsel identified and attached as an exhibit an unredacted copy of a memorandum dated February 19, 2008, authored by Miller, SBC's general counsel. Respondents later claimed the document was protected attorney work product.

On November 24, 2010, GT's counsel wrote to LOIH, stating that it was preparing a motion for a protective order. Counsel requested that, in the interim, ACT stipulate that it would not disclose to third parties any of the documents or information contained in the documents ACT obtained from SBC pending a ruling by the trial court on the privilege issues. LOIH responded that "we have not and do not intend to disclose any of the documentation obtained from [SBC] to which you take exception except [to] the parties to this proceeding." However, LOIH repeated the assertion that by seeking production of the allegedly protected documents in discovery requests directed at ACT, respondents were acting inconsistently with their claim of privilege. LOIH also questioned the standing of any of the respondents or their counsel to assert a claim of privilege on behalf of SBC.

In mid-December 2010, GT filed a motion to compel further responses to its request for production of documents. ACT filed opposition.

III. SBC General Counsel's Motion to Dismiss for Lack of Personal Jurisdiction

In December 2010, Miller filed a motion seeking his dismissal on the basis of lack of personal jurisdiction, claiming that he had no substantial contacts with California or with the ACT contract.

In support of its opposition, ACT filed a redacted version of a February 19, 2008 memorandum authored by Miller, along with other documents purportedly demonstrating Miller's participation in fraudulent activities. This was the same memorandum GT had identified and attached as an exhibit (unredacted) during the Burke deposition. ACT asserted that the redacted version did not contain attorney work product. Instead, the document was related to Miller's activities in procuring the ACT contract, which he had put at issue by filing his motion to dismiss.

The matter was heard on February 15, 2011. Counsel for Miller had previously filed objections to portions of the opposition on the basis that the material relied upon

was subject to the attorney-client privilege and work product doctrine.[4] The trial court overruled the objections on that basis because there was no sealing order in place and because the matters to which Miller objected were not set forth for the court to examine. The trial court denied the motion to dismiss.

IV. The Motion for Disqualification of ACT's Counsel and for a Protective Order

On January 11, 2011, counsel for GT had obtained a declaration from the SBC liquidation trustee, Geoffrey Berman, giving GT authority to act on his behalf in asserting attorney-client and work product privileges. Berman stated that "As Trustee and the holder of SBC's privileges, I object to any use by ACT of SBC's attorney-client communications or of SBC's legal counsel's work-product. I invoke the attorney-client privilege with respect to all confidential attorney-client communications that were transmitted to ACT pursuant to the Proposed Statement of Work. I also invoke the work-product doctrine for all work product prepared and created by SBC's inside or outside counsel that was transmitted to ACT pursuant to the Proposed Statement of Work. I also join in the invocation by GT of the work-product privilege with respect to any services performed by GT on behalf of SBC." Berman added that he had instructed GT "that it should assert the attorney-client and attorney work-product privileges on behalf of SBC with respect to all such confidential attorney-client communications and attorney work-product in ACT's possession."

On February 7, 2011, GT filed a motion seeking to disqualify LOIH, asserting that LOIH's use and public disclosure of SBC's and its counsel's privileged information was an abuse of the litigation process that could be cured only by the court's disqualifying LOIH and precluding ACT from using the privileged documents or information contained therein in any way. GT also sought a protective order regarding five documents which GT asserted were subject to the attorney-client privilege and the

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[4] ACT points out that counsel for GT was present in the courtroom during this hearing. However, GT's counsel made no appearance in the matter.

attorney work product doctrine.[5] After ACT filed a first amended complaint which contained similar information (in paragraphs 26 and 39) which respondents claimed was subject to the work product doctrine and the attorney-client privilege, GT filed an amended motion in which it sought to permanently seal the first amended complaint, as well as paragraphs 11, 13, and 14 of the Burke declaration and exhibits 3, 6, and 7 thereto. The Burke declaration and related exhibits had been relied upon by ACT in opposition to the Miller motion to dismiss.

In the interim, on February 23, 2011, GT brought an ex parte application to seal paragraphs 11, 13, and 14 of the Burke declaration and exhibits 3, 6, and 7 thereto. The court ordered the documents temporarily sealed, pending hearing on respondents' motion for disqualification and for a protective order.

ACT opposed the motion, contending that any privilege had been waived by SBC's delay in asserting it, especially after the subject documents were attached to the opposition to Miller's motion to dismiss. ACT also asserted waiver on the basis that GT had attached the privileged documents as exhibits to Burke's deposition and demanded ACT produce the very documents it asserted were privileged. In addition, ACT asserted that various exceptions to the privilege existed, most notably that Evidence Code section 956, the crime-fraud exception, applied. LOIH argued that it should not be disqualified because it had acted appropriately: the documents were voluntarily disclosed to ACT and it was justifiably using the documents in order to seek redress of a fraud perpetrated on ACT by respondents after SBC vitiated the contract with ACT by fraudulently inducing ACT to agree to perform the work by representing AIG would pay the costs. ACT further asserted that respondents lacked standing to disqualify its counsel.

The matter was heard on April 14, 2011. The court noted that ACT had signed a confidentiality agreement, and concluded that it had violated that agreement by examining the privileged documents in search of evidence of a crime or fraud and by filing them in the public record. The court stated that it was for the court to determine

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[5] FTI Consulting joined in the motion for disqualification and for a protective order.

whether there was a breach of contract. Because since even the court cannot consult a privileged document in ruling on whether a crime-fraud exception exists, ACT certainly was not permitted to do so. Based on the nonprivileged evidence submitted, the court concluded that the crime-fraud exception did not apply. The court also found that respondents had standing to seek LOIH's disqualification and that LOIH's conduct required its disqualification. The court found no merit in ACT's assertions of waiver. The court also granted respondents' request for a protective order and ordered the documents at issue to be sealed. The court also granted respondents' motion to compel further responses to discovery.

This appeal followed.

DISCUSSION

I. The Legal Standards Governing Privileged Communications Between Attorney and Client, and Attorney Work Product

"In California privileges are created by statute (Evid. Code, § 911) and the means by which privilege may be waived are also controlled by statute (Evid. Code, § 912)." (*Motown Record Corp. v. Superior Court* (1984) 155 Cal.App.3d 482, 492.) Evidence Code section 954 provides: "Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by: [¶] (a) The holder of the privilege; [¶] (b) A person who is authorized to claim the privilege by the holder of the privilege; or [¶] (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure." The client, or its successor, assign, or trustee, is the holder of the attorney-client privilege. (Evid. Code, § 953.) Here, SBC's trustee was the holder of SBC's privileges, with the sole authority to waive them. (*Commodity Futures Trading Com. v. Weintraub* (1985) 471 U.S. 343, 354.) In

addition, GT had the authority and the obligation to assert the attorney-client privilege on behalf of SBC. "The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954." (Evid. Code, § 955.)

Evidence Code section 952 provides that a "'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons *other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted*, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Italics added.) SBC's disclosure and ACT's receipt of the privileged information at issue here undoubtedly fell under the description set forth in the italicized language above. ACT served as part of the SBC's defense team and therefore disclosure to it did not vitiate the confidential nature of the attorney-client communications.

Also instructive here is Evidence Code section 917, which provides as follows: "(a) If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client . . . relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential. [¶] (b) A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication."

In addition, Code of Civil Procedure section 2018.030, which codifies the attorney work product doctrine, provides that: "(a) A writing that reflects an attorney's

impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances. [¶] (b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice."

"[T]he attorney's absolute work product protection continues as to the contents of a writing delivered to a client in confidence." (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1260 (*BP Alaska*).) "[T]he only exception to the absolute work product protection of an attorney's confidential opinion letter to a client is where there has been a waiver of the protection by *the attorney's* voluntary disclosure or consent to disclosure of the writing to a person other than the client." (*Id.* at p. 1261.) Otherwise, disclosure of material which qualifies under the absolute work product cannot be compelled, not even to the client. (*Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264, 274.) In contrast, discovery is allowed of material which falls within the qualified privilege where denial of discovery will unfairly prejudice the party seeking it or result in an injustice. (Code Civ. Proc., § 2018.030, subd. (b).)

II. Waiver of the Privilege

Appellants contend that respondents waived the attorney-client privilege (1) by voluntarily disclosing documents to ACT after fraudulently inducing ACT to enter into the contract; (2) by generally failing to assert a timely objection; (3) by seeking privileged documents in discovery from ACT and attaching a privileged document as an exhibit to Burke's deposition; (4) by failing to object when appellants attached privileged documents to their opposition to Miller's motion to dismiss; and (5) by the failure of SBC's trustee to object to disclosure of the privileged documents to counsel for GT and other respondents. We conclude there was no waiver of the privilege.

A. Disclosure to ACT

Evidence Code section 912, subdivision (a) provides that "Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege."

Appellants contend that SBC and GT voluntarily disclosed privileged information to ACT and could not expect ACT to simply ignore evidence of fraud contained within those documents. We disagree. Even aside from the confidentiality clause contained in the SBC/ACT contract, SBC and GT both had a reasonable expectation that ACT would maintain the confidentiality of SBC's privileged documents. Under the circumstances present here, disclosure of the privileged information to ACT did not waive the privilege. Evidence Code section 912, subdivision (d) provides that "A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege) . . . , when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, is not a waiver of the privilege." (See also Evid. Code, § 952, *supra*.) In addition, ACT promised to hold SBC's information "in confidence and not to use such information for purposes other than contemplated hereunder or to disclose such information to any other person [except] as reasonably necessary in connection with the performance or receipt of Services." ACT's use of the privileged information to search for evidence of fraud by respondents and its sharing of that information with LOIH was a clear violation of the contractual confidentiality clause. There was no waiver of the privilege, notwithstanding ACT's suspicions of fraud, and SBC and GT were entitled to expect ACT to maintain the confidentiality of SBC's privileged information.

B. Timely Assertion of Privilege

In June 2010, before serving ACT's complaint on respondents, LOIH had sent to GT's general counsel a letter detailing the allegations ACT was making against SBC and GT, and attached privileged documents to that letter. Three months later, GT's retained counsel responded by asserting GT's and SBC's privileges, informing LOIH that it objected to its reliance on privileged documents. As the trial court implicitly found, this assertion of privilege was timely, given that the case was newly filed and defense counsel had to be retained. GT's counsel again objected to LOIH's use of privileged information in October 2010 and also in November 2010, when counsel informed LOIH that it planned to file a motion for a protective order and requested that LOIH stipulate not to disclose the privileged information. In January 2011, the SBC liquidation trustee formally asserted the privilege and objected to ACT's and LOIH's use and disclosure of documents protected by attorney-client privilege and the work product doctrine. The following month, respondents filed their motion to disqualify LOIH based on its misuse and deliberate public disclosure of protected documents. Nothing more was required to timely and effectively assert the privilege.

C. Discovery Conduct

ACT further contends that the discovery demands made by respondents were inconsistent with assertion of the attorney-client privilege. Specifically, they argue that GT moved to compel further responses to discovery that required ACT and its counsel to review allegedly confidential material and noticed ACT's persons most knowledgeable to produce confidential documents at deposition. ACT also points out that GT attached as an exhibit to Burke's deposition a work product memorandum authored by Miller, SBC's general counsel, without the benefit of a protective order. However, none of these things constituted public disclosure of the protected documents. Neither discovery responses nor depositions are filed with the court without opportunity by the holder of a privilege to object to public disclosure of confidential material. Respondents were entitled to conduct

discovery and ascertain which documents ACT and LOIH possessed in order to *protect* the assertion of privilege.

D. *Failure to Object to Appellants' Disclosure*

Appellants point out that they attached privileged documents to their opposition to Miller's motion to dismiss and although GT's counsel was present in court during the hearing on the motion, he failed to object. We find no waiver.

Specifically, ACT filed a redacted version of a February 19, 2008 memorandum authored by Miller, along with other documents purportedly demonstrating Miller's participation in fraudulent activities. This was the same memorandum GT had identified and attached as an exhibit (unredacted) during the Burke deposition. ACT asserts that Miller placed in issue his activities in procuring the ACT contract by filing his motion to dismiss. Hearing on the matter took place on February 15, 2011. Miller's counsel filed objections to portions of the opposition on the basis that the material relied upon was subject to the attorney-client privilege and work product doctrine. The trial court overruled the objections because Miller had not provided the court with the relevant documents and because no sealing order was in place. However, as did the trial court ultimately, we conclude no waiver occurred.

By the time of the hearing, the SBC liquidation trustee had already objected to ACT's disclosure of protected documents. Furthermore, Miller properly asserted the attorney-client privilege as to any documents arising out of his representation of SBC as its general counsel and properly asserted that the memorandum he prepared was subject to the work product doctrine. Simply by placing in issue his conduct in procuring the contract with ACT, Miller did not waive any privilege held by SBC's trustee.

E. Trustee's Failure to Object to Disclosure to Other Litigants

Finally, ACT argues that waiver may be found because SBC's trustee failed to object to disclosure of the privileged documents to counsel for GT and other respondents.

The trustee objected only to use by ACT of SBC's protected information. ACT argues that this amounted to disclosure to third parties. We disagree.

As respondents point out, GT and other respondents were all within the privilege as counsel to or managing agents for SBC. Respondents' disclosure of the confidential information to their own lawyers did not serve to waive SBC's privilege because "[a] disclosure that is itself privileged is not a waiver of any privilege." (Evid. Code, § 912, subd. (c).) (Cf. *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229 [waiver found where audit by attorneys retained by corporation to perform internal review of alleged securities fraud shared with SEC because SEC would potentially use information in the event it found violation].)

Having thus concluded that there was no waiver of the attorney-client privilege or of the protection of the work product doctrine, we next consider whether any recognized exceptions to maintenance of SBC's attorney-client privilege are applicable.

III. The Crime-Fraud Exception

The true crux of this case is whether ACT and its attorneys made a prima facie showing of fraud, such that respondents' documents lost their privileged status. In establishing a prima facie case, appellants were required to put forth evidence from which reasonable inferences could be drawn to establish the fact asserted, i.e., the fraud. We conclude that they failed to do so.

"Evidence Code section 956 codifies the common law rule that the privilege protecting confidential attorney-client communications is lost if the client seeks legal assistance to plan or perpetrate a crime or fraud. (*Glade v. Superior Court* (1978) 76 Cal.App.3d 738, 745.)" (*BP Alaska*, *supra*, 199 Cal.App.3d at p. 1249.) "To invoke the Evidence Code section 956 exception to the attorney-client privilege, the proponent must make a prima facie showing that the services of the lawyer 'were sought or obtained' to enable or to aid anyone to commit or plan to commit a crime or fraud. (Evid. Code, § 956.) [Fn. omitted.]" (*BP Alaska*, at p. 1262.) Evidence Code section 956 provides that "[t]here is no privilege under this article if the services of the lawyer were sought or

obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." The proponent of the crime-fraud exception bears the burden of proof of the existence of crime or fraud. (*Geilim v. Superior Court* (1991) 234 Cal.App.3d 166, 174.)

"According to *Nowell v. Superior Court* (1963) 223 Cal.App.2d 652, 657, mere assertion of fraud is insufficient; there must be a showing the fraud has some foundation in fact. *People v. Van Gorden* (1964) 226 Cal.App.2d 634, 636-637, describes a prima facie case as one which will suffice for proof of a particular fact unless contradicted and overcome by other evidence. In other words, evidence from which reasonable inferences can be drawn to establish the fact asserted, i.e., the fraud." (*BP Alaska*, *supra*, 199 Cal.App.3d at p. 1262.) "[B]ecause section 956 applies where an attorney's services are sought to enable a party to plan to commit a fraud, the proponent of the exception need only to prove a false representation of a material fact, knowledge of its falsity, intent to deceive and the right to rely." (*Id.* at p. 1263.)

In making this showing, the proponent of the crime-fraud exception is not permitted to rely upon privileged information. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 740. (*Costco*).) By extension, the trial court is not permitted to conduct an in camera review of the allegedly privileged material in order to determine whether the material is subject to the attorney-client privilege, or to rule on the existence of the crime-fraud exception. "Evidence Code section 915 provides, with exceptions not applicable here, that 'the presiding officer may not require disclosure of information claimed to be privileged under this division . . . in order to rule on the claim of privilege . . . .' (Evid. Code, § 915, subd. (a).) Section 915 also prohibits disclosure of information claimed to be privileged work product under Code of Civil Procedure section 2018.030, subdivision (b), but, as to the work product privilege, if the court is unable to rule on the claim of privilege 'without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing

to have present.' (Evid. Code, § 915, subd. (b).) No comparable provision permits in camera disclosure of information alleged to be protected by the attorney-client privilege. (*Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 45, fn. 19.) [Fn. omitted.]" (*Costco*, *supra*, at p. 736.) "Because a court may order disclosure of information in order to determine whether it is protected by the work product doctrine, but may not order its disclosure to determine if it is subject to the attorney-client privilege, a court should without requiring disclosure first determine if the information is subject to the attorney-client privilege. If the court determines the privilege does not apply, it may then consider whether to order disclosure of the information at an in camera hearing for the purpose of deciding if it is protected work product." (*Id.* at p. 737, fn. 4.)

Here, the parties did not seriously dispute whether the subject documents were protected by the attorney-client privilege or the work product doctrine.[6] In the trial court, appellants essentially conceded that the subject documents would ordinarily be protected either by the attorney-client privilege or the work product doctrine. Instead, appellants argued that the privilege had been waived and that they had established a prima facie case of fraud such that the documents lost their protected status. Therefore, in camera review to determine the protected status of the documents was not necessary or warranted.

In contrast, there are several enumerated exceptions to Evidence Code section 915, namely subdivision (c) of Penal Code section 1524 (issuance of a search warrant for documentary evidence in possession of an attorney), Evidence Code sections 1040 and 1041 (official information and identity of informer) and 1060 (trade secret), and Code of Civil Procedure section 2018.030 (attorney work product). In these cases, it may be necessary and permissible for the judge to conduct an in camera examination of the information claimed to be privileged. The crime-fraud exception found in Evidence Code section 956 is not among the recognized exceptions. Thus, "the Legislature does

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6 Appellants argue that GT was acting as SBC's business agent rather than as counsel. We disagree. The dominant purpose of the relationship was one of attorney-client, and therefore the communications at issue were protected by privilege. (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 51-52 (*Clark*).)

not contemplate disclosure of privileged material in ruling on the crime/fraud exception." (*State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 645 (*State Farm*), citing *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1995) 41 Cal.App.4th 303, 316.)

"The standard of review upon a finding to support the crime/fraud exception is stated in [*BP Alaska*], *supra*, 199 Cal.App.3d at pages 1261-1262: 'The appellate court may not weigh the evidence, resolve conflicts in the evidence, or resolve conflicts in the inferences that can be drawn from the evidence. *If there is substantial evidence in favor of the finding, no matter how slight it may appear in comparison with the contradictory evidence, the finding must be affirmed.* [Citation.]' (Italics added.) Thus, we focus upon whether there is sufficient evidence to support the implied finding of a prima facie case [or lack thereof] to apply the crime/fraud exception: whether the services of the [Law] Firm were retained and utilized to enable [the client] to commit a crime or a fraud; and whether there exists '"a reasonable relationship between the [crime or] fraud and the attorney-client communication. [Citation.]"' (*People v. Superior Court* (*Bauman & Rose*) [(1995)] 37 Cal.App.4th [1757,] 1769.) In that connection, it is the intent of the client upon which attention must be focused and not that of the lawyers. (*Glade v. Superior Court*[, *supra*,] 76 Cal.App.3d [at p.] 746.)" (*State Farm*, *supra*, 54 Cal.App.4th at p. 645.)

Without passing judgment in any way on the truth of the fraud allegations, it is entirely possible that SBC could have planned to commit a fraud when it sought legal advice from GT. SBC could have planned to hire ACT to perform needed litigation support services without having any ability to pay or intention of paying for those services and with knowledge that it had no insurance coverage that would apply to payment of those services. If this was shown, then SBC has forfeited the benefits of the attorney-client privilege. (See *BP Alaska*, *supra*, 199 Cal.App.3d at pp. 1262-1263.)

We turn now to a review of the evidence proffered by appellants in support of the assertion that the crime-fraud exception applied and vitiated respondents' claims of attorney-client privilege. Appellants contend the trial court ignored evidence of fraud

that was demonstrated by nonprivileged information submitted in opposition to the motion to disqualify. Specifically, they allege that without reference to the SBC database, ACT showed the following: (1) AIG had never committed to cover ACT's work; (2) GT's lawyers hid the name of the AIG claims director from ACT, despite multiple requests; (3) SBC and GT never submitted ACT's invoices to AIG; (4) SBC, Miller, and GT lied to ACT about submitting ACT's invoices; (5) SBC and Miller ultimately refused to submit a request for payment, knowing that it would be rejected and thereby disclose that there never was coverage; (6) Miller finally announced to ACT that the "powers that be" had decided that SBC would refuse to submit ACT invoices; and (7) SBC and GT were planning SBC's bankruptcy at the same time they were demanding performance by ACT. As respondents point out, however, appellants do not cite to the record in support of these factual contentions, and therefore may be deemed to have waived this entire argument.

Despite the arguable waiver, we will consider the merits of the issue, given the important interests and concerns that are at stake here—protection of the attorney-client privilege and work product doctrine, and of a client's right to be represented by counsel of its choice.

Robert Pallasch, an ACT account manager, stated in a declaration that GT attorneys (Moreau, Sten, and Robert Mandel) represented at the initial meeting on February 18 or 19, 2008, that the proposed work was to be funded by AIG. However, no evidence was submitted to show that GT or SBC knew the representation was false at the time it was made. The contract between SBC and ACT was dated April 28, 2008, and was signed by SBC on May 1, 2008. ACT produced a nonprivileged letter indicating that AIG did not decline coverage for the SEC investigation until June 11, 2008, four months after the alleged misrepresentation was made. That same document indicated that AIG had conditionally agreed to pay $125,000 toward ACT's services. Indeed, the evidence produced by ACT showed that GT and SBC were attempting to get AIG to pay for ACT's services.

Pallasch further declared that ACT submitted invoices dated May 30, 2008, and June 30, 2008, to SBC and GT and that Moreau told him that the invoices had been submitted to AIG and respondents were awaiting action by AIG. Pallasch requested that Moreau provide him with the name of the AIG claims director, but Moreau did not provide it. Similarly, ACT's marketing director, Burke, stated in a declaration that Miller said "[SBC] had in fact filed a claim with AIG and that the claim had been rejected." Miller later told Burke that "the powers that be" said he could not file a claim with AIG. Jacobs, the AIG claims director, told Burke that SBC did not submit a claim for ACT's services prior to SBC filing for bankruptcy in July 2008.

Thus, at most, appellants established that respondents represented that AIG would provide coverage for ACT's services before they had an agreement from AIG to do so. Respondents misrepresented that they had formally submitted a claim to AIG when they apparently had not. As of June 11, 2008, respondents knew that AIG and National Union had declined to provide coverage for the SEC investigation, although they had agreed to pay up to $125,000 for ACT's services, but only if respondents gave the individual officers and directors access to the ACT-prepared database. However, appellants did not proffer any nonprivileged evidence showing that at the time of the initial meeting with ACT in February 2008, SBC and GT were not only contemplating SBC's bankruptcy but had commenced work necessary to place SBC in bankruptcy. All of the evidence appellants cited to establish these facts was subject to attorney-client privilege or the work product doctrine, as demonstrated by the fact that appellants redacted all such evidence from the record and their briefs on appeal.

In the absence of any nonprivileged evidence showing that GT and SBC contemplated SBC's bankruptcy when they entered into the contract with ACT, appellants cannot convincingly assert that they made a prima facie showing that SBC retained and utilized GT's services to enable SBC to commit a fraud, i.e., hire ACT with no intention of paying for its services, either through payment by AIG or by paying ACT's invoices itself. The contract between SBC and ACT stated that SBC "agrees it shall pay the amounts due and owing on ACT invoices." Even if appellants adequately

established that respondents made material misrepresentations about the existence or likelihood of insurance coverage to pay for ACT's services, without any showing that ACT had no intention or ability to pay directly for the services, there is no prima facie showing of fraud. Appellants implicitly acknowledged that a showing regarding SBC's bankruptcy was required, in addition to the asserted misrepresentations about insurance coverage, by their repeated allegations regarding the planned bankruptcy in their complaint and other documents. As stated by Pallasch in his declaration, "Had the true facts been known—that [SBC] had no coverage for the proposed work *and* that it was planning on bankruptcy to discharge its obligations, ACT would not have entered into the contract with [SBC] as it did." (Italics added.)

The trial court properly refused to consider privileged evidence in determining whether appellants had established a prima facie case of fraud and concluded appellants failed to establish the requisite fraud. Although the trial court did not elaborate on its reasoning, we conclude that substantial evidence supported this conclusion. Appellants failed to submit nonprivileged evidence sufficient to establish SBC sought GT's legal services to perpetrate a fraud against ACT.

We briefly note that, as we previously indicated, attorney work product is not subject to the crime-fraud exception. "[B]y its terms Penal Code section 956 'expressly applies to communications ordinarily shielded by the attorney-client privilege,' while the 'work product rule encompasses a companion but separate document protection.'" (*People v. Superior Court (Bauman & Rose)*, *supra*, 37 Cal.App.4th at p. 1771, quoting *BP Alaska*, *supra*, 199 Cal.App.3d at p. 1249.) Here, the parties did not draw a sharp distinction between documents respondents contended were subject to the attorney work product doctrine, as opposed to the attorney-client privilege.

In any event, we recognize that "[w]ork product is governed by a different statute than attorney-client privilege. Code of Civil Procedure section 2018, subdivision (b) states in part that '. . . the work product of an attorney is not discoverable *unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice*.' Subdivision (c)

provides: 'Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.' (Code Civ. Proc., § 2018, subd. (c).)" (*People v. Superior Court (Bauman & Rose)*, *supra*, 37 Cal.App.4th at p. 1770, italics added.)

However, the same analysis we utilized for the crime-fraud exception leads to the inevitable conclusion that refusal to allow disclosure of the information contained in any documents protected by the qualified attorney work product doctrine would not unfairly prejudice appellants or result in an injustice, where appellants failed to present sufficient nonprotected information indicating respondents planned to defraud ACT. (See *State Farm*, *supra*, 54 Cal.App.4th at p. 650.)

IV. There Are No Nonstatutory Exceptions to the Attorney-Client Privilege

Appellants assert that public policy precludes respondents' reliance on the confidentiality clause contained in the SBC/ACT contract in order to conceal or exempt respondents from fraud or intentional tort. They cite Civil Code section 1668 [contracts which exempt anyone from responsibility for his or her own fraud are against the policy of law], the doctrine that a party who fraudulently induces another to enter into a contract cannot absolve himself or herself of the effects of the fraud by any stipulation in the contract, and the doctrine of unclean hands. In addition, appellants contend that the principles underlying Evidence Code section 958 (which provides there is no privilege as to a communication relevant to an issue of breach, by the lawyer or the client, of a duty arising out of the lawyer-client relationship) precluded the assertion of privilege here as a bar to ACT's use of evidence in its possession. (See *Arden v. State Bar* (1959) 52 Cal.2d 310, 320 [When disclosure of a communication, otherwise privileged, becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him.].) All of these arguments fail for either or both of the following reasons: (1) appellants did not adequately establish fraud such that the contractual confidentiality clause was vitiated, and (2) there are no nonstatutory exceptions to the attorney-client privilege.

Appellants' contentions presuppose that respondents committed a fraud, but as we have concluded, the evidence upon which appellants were permitted to rely did not establish a prima facie case of fraud sufficient to invoke the crime-fraud exception, let alone establish a completed fraud that resulted in abrogation of the contract. As the trial court noted, it was for the court to determine the existence of fraud sufficient to justify ACT's purported rescission of the contract. Appellants could not safely reach that conclusion on their own by examining SBC's privileged documents in search of evidence of fraud, in disregard of the confidentiality clause by which ACT promised to hold SBC's information "in confidence and not to use such information for purposes other than contemplated hereunder or to disclose such information to any other person [except] as reasonably necessary in connection with the performance or receipt of Services." ACT's use of the confidential information to look for evidence of wrongdoing by respondents, and its sharing of that information with LOIH, plainly violated the confidentiality clause.

Furthermore, it is well-established that California courts are powerless to judicially carve out exceptions to the rule of attorney-client privilege. As stated by the Supreme Court in *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 209: "We . . . do not enjoy the freedom to restrict California's statutory attorney-client privilege based on notions of policy or ad hoc justification." (See also *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, 385 [no waiver of attorney-client privilege in shareholder derivative legal malpractice action against outside corporate counsel].)

Evidence Code section 958 is clearly not applicable here. ACT is not a law firm seeking unpaid fees from a client. Section 958 does indeed permit attorneys to divulge confidences when required (but only to the extent necessary) in order to get paid by a client. But ACT cannot rely on that provision by analogy to argue it was entitled to divulge SBC's confidences. In the absence of a specific statutory provision that applies to a vendor such as ACT, the privilege remained intact and ACT was absolutely barred from using its client's confidential information to search for evidence that it had been defrauded when it had agreed not to use the confidential information except in service of

SBC's purposes. It certainly was not permitted to publicly divulge SBC's confidential information in pursuit of payment.

V. Disqualification of ACT's Counsel Was Warranted

Having thus concluded that ACT made improper use of SBC's information subject to the attorney-client privilege and the work product doctrine, that no waiver of the privilege occurred and no exceptions to maintenance of the privilege apply, we next consider whether disqualification of ACT's counsel was warranted. We conclude that disqualification of LOIH was necessary and appropriate.

A. Standing to Bring Motion for Disqualification

ACT contends that respondents did not have standing to bring the motion for disqualification because respondents did not have an attorney-client relationship with LOIH and did not have an expectation of confidentiality in the subject documents nor standing to enforce the confidentiality agreement in the SBC/ACT contract, to which respondents were not a party. We are not persuaded.

Generally, before the disqualification of an attorney is proper, the complaining party must have or must have had an attorney-client relationship with that attorney. Absent an attorney-client relationship, the moving party must have an expectation of confidentiality. (*Great Lakes Construction, Inc. v. Burman* (2010) 186 Cal.App.4th 1347, 1356; *Dino v. Pelayo* (2006) 145 Cal.App.4th 347, 357; *DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 832-833.)

However, as we have previously concluded, both SBC and GT had a reasonable expectation that ACT would abide by the confidentiality agreement it signed, as well as an expectation that ACT and LOIH would not exploit obviously privileged information. ACT was not permitted to search SBC's confidential documents for evidence of fraud, in derogation of the confidentiality agreement, and unilaterally consider the contract to have been voided when it did not have sufficient nonprivileged information demonstrating the purported fraud. Respondents had an expectation of confidentiality and could assert the

privilege on behalf of the privilege holder, SBC's trustee; GT and its attorneys asserted the work product doctrine on their own behalf. Respondents thus had standing to move to disqualify LOIH.

B. Disqualification Was Appropriate

1. The Legal Standards Governing Disqualification and the Standard of Review

"A trial court's authority to disqualify an attorney derives from its inherent power to 'control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.' (Code Civ. Proc., § 128, subd. (a)(5); [*People ex rel. Dept. of Corrections v. SpeeDee Oil Change Systems, Inc.* (1999)] 20 Cal.4th [1135,] 1145 [(*SpeeDee*)]; see also *Oaks Management Corporation v. Superior Court* [(2006)] 145 Cal.App.4th [453,] 462.) 'The power is frequently exercised on a showing that disqualification is required under professional standards governing . . . potential adverse use of confidential information.' (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1723-1724.)

"A disqualification motion involves a conflict between a client's right to counsel of his or her choice, on the one hand, and the need to maintain ethical standards of professional responsibility, on the other. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846.) Although disqualification necessarily impinges on a litigant's right to counsel of his or her choice, the decision on a disqualification motion 'involves more than just the interests of the parties.' (*SpeeDee, supra,* 20 Cal.4th at p. 1145.) When ruling on a disqualification motion, '[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process.' (*SpeeDee,* at p. 1145; see also *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 705-706.)

"The *SpeeDee* court recognized that one of the fundamental principles of our judicial process is the attorney-client privilege: 'Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring "'the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.' [Citation.]" [Quoting *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.]' (*SpeeDee, supra,* 20 Cal.4th at p. 1146.)" (*Clark, supra,* 196 Cal.App.4th at pp. 47-48.)

"A trial court's ruling on a disqualification motion is reviewed under the deferential abuse of discretion standard. [Citations.] 'In exercising its discretion, the trial court must make a reasoned judgment that complies with applicable legal principles and policies.' (*Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1403 (*Strasbourger*); [citation].) 'The order is subject to reversal only when there is no reasonable basis for the trial court's decision.' (*Federal Home Loan Mortgage Corp. v. La Conchita Ranch Co.* (1998) 68 Cal.App.4th 856, 860 (*Federal Home*).)

"'In deciding whether the trial court abused its discretion, "[w]e are . . . bound . . . by the substantial evidence rule."' (*Strasbourger, supra,* 69 Cal.App.4th at p. 1403.) The trial court's order is '"presumed correct; all intendments and presumptions are indulged to support [it]; conflicts in the declarations must be resolved in favor of the prevailing party, and the trial court's resolution of any factual disputes arising from the evidence is conclusive."' (*Ibid.*; [citation].) Hence, we presume the trial court found in [moving party's] favor on 'all disputed factual issues.' (*Strasbourger,* at p. 1403.) Further, 'where there are no express findings, we must review the trial court's exercise of discretion based on implied findings that are supported by substantial evidence.' (*Federal Home, supra,* 68 Cal.App.4th at p. 860.) 'In viewing the evidence, we look only to the evidence supporting the prevailing party. [Citation.] We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the

trier of fact. [Citation.] Where the trial court has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable.' (*Ibid.*) 'If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence.' (*SpeeDee, supra*, 20 Cal.4th at p. 1143; [citation].)" (*Clark, supra*, 196 Cal.App.4th at pp. 46-47.)

2. Analysis

Case law makes clear that "'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 [must (1)] refrain from examining the materials any more than is essential *to ascertain if the materials are privileged*, and [(2)] immediately notify the sender that he or she possesses material that appears to be privileged.'" (*Clark, supra*, 196 Cal.App.4th at p. 48; quoting *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 (*State Fund*). Accord, *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 818 (*Rico*) [extending requirement to attorney work product].) Once examination showed a document had been transmitted between an attorney representing a corporation and either an officer or employee of the corporation, that examination would suffice to ascertain the materials are privileged, and any further examination would exceed permissible limits. (*Clark*, *supra*, at p. 48, citing *Costco*, *supra*, 47 Cal.4th at p. 733.)

Substantial evidence supports the trial court's finding that LOIH excessively reviewed privileged materials, and in fact engaged in "a wholesale violation, without any justification whatsoever, of attorney-client [and] work product that [was] severely aggravated by placing the documents in the public record." Appellants conducted searches of the SBC database in search of attorney-client communications and documents containing obvious indicia of privilege, and used these documents in preparing a pre-litigation demand letter to GT and in preparing their complaint and other publicly filed documents. Appellants did so after they were repeatedly advised by respondents' counsel

that SBC and GT were asserting their privileges and in defiance of the confidentiality agreement.

"*Rico* also addressed the question of remedy when the attorney, having obtained privileged documents, did not comply with those obligations. *Rico* echoed *State Fund's* caution that '"'[m]ere exposure'"' to an adversary's confidences is insufficient, standing alone, to warrant an attorney's disqualification' (*Rico*[, *supra*, 42 Cal.4th] at p. 819, quoting *State Fund*, *supra*, 70 Cal.App.4th at p. 657), because *Rico* agreed such a 'a draconian rule . . . "'[could] nullify a party's right to representation by chosen counsel any time inadvertence or devious design put an adversary's confidences in an attorney's mailbox.'"' (*Rico*, at p. 819.) *Rico* also stated, however, 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."' (*Ibid.*)" (*Clark*, *supra*, 196 Cal.App.4th at pp. 48-49.)

We note that while *State Fund* and *Rico* discuss *inadvertent* receipt of confidential material by an attorney, the essential point is that the privilege holder must not have waived the privilege by intentionally disclosing materials to an adversary such that the privilege holder could have no expectation of continued confidentiality. Here, as we discussed previously, SBC and GT intentionally delivered confidential documents to ACT, but did so in the context of ACT's role as a litigation support provider and with the contractual understanding that the confidential material would not be used by ACT for any other purpose and that ACT would maintain the confidence. Thus, GT and SBC had a reasonable expectation of confidentiality after intentionally disclosing privileged information to ACT. In *Clark*, for example, Clark sued his former employer for wrongful termination and various other causes of action. As part of his employment, Clark had signed a nondisclosure agreement stating he would not remove the employer's confidential or privileged information and would return all such information upon termination of his employment. During discovery, counsel for the employer realized that Clark's counsel was relying on the employer's privileged and confidential information

and demanded its return. Clark's counsel refused and continued to use the information in pursuit of Clark's lawsuit. The employer filed a motion to disqualify Clark's counsel. (*Clark, supra*, 196 Cal.App.4th at pp. 42- 44.) Clark opposed the motion asserting the standards imposed under *State Fund* and *Rico* have no application unless the documents are inadvertently provided to opposing counsel by the attorneys for the party holding the privilege. (*Id.* at p. 44.) The trial court disagreed and granted the motion for disqualification, ordered the documents returned, and enjoined Clark's counsel from discussing the contents of the documents with anyone or providing counsel's work product to either Clark or any representative of Clark's. The court ruled these measures were prophylactic, not punitive, and were necessary to protect the employer's rights as well as the integrity of the judicial proceedings, finding there to be a genuine likelihood that Clark's counsel's misconduct would affect the outcome of the proceedings. (*Id.* at p. 45.) The Court of Appeal upheld the trial court's order in its entirety, concluding substantial evidence supported the trial court's findings and that the lower court properly exercised its discretion.

We conclude that this is clearly an appropriate case in which disqualification was justified. As was the case in *Clark*, "[o]n this record, a trier of fact could conclude [appellants' counsel's] continued representation of [appellant] could trigger doubts over the integrity of the judicial process because whenever [appellants'] advocacy against [respondents] began to touch on matters contained in the privileged documents that [appellants' counsel] retained . . . and excessively reviewed, the inevitable questions about the sources of [appellants'] knowledge (even if [appellants] in fact obtained such knowledge from legitimate sources) could undermine the public trust and confidence in the integrity of the adjudicatory process." (*Clark*, *supra*, 196 Cal.App.4th at p. 55, fn. omitted.) Indeed, appellants continue to assert on appeal that ACT is entitled to share respondents' privileged and confidential information with any future counsel it retains, thus clearly demonstrating that LOIH has no intention or ability to abstain from reliance on the privileged information. Without mentioning *Clark* in their opening brief, appellants insist that ACT had a right to consult LOIH regarding SBC's privileged

information and that counsel's knowledge acquired from a client furnishes no grounds for disqualification. They are incorrect.

The primary case upon which appellants rely for the proposition that ACT properly possessed the privileged matter and was entitled to transmit it to its attorneys is *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294 (*Fox*). There, Paladino, former in-house counsel for a corporation, sued her former employer-client for wrongful termination and admittedly disclosed to her counsel ostensibly confidential and privileged information pertaining to the corporation. The trial court denied the corporation's motion to disqualify Paladino's counsel and the Court of Appeal affirmed. The Court of Appeal stated the issue before it was "whether a former in-house counsel suing her employer for wrongful termination may divulge *to her own attorney* employer confidences obtained during the course of her employment," concluding that the attorney may do so. (*Id*. at p. 308.) The court pointed out it was not deciding "whether the former in-house counsel or her attorney can be held liable to the employer for the public disclosure of those confidences and communications." (*Ibid*.)

Relying on the Supreme Court's decision in *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, the *Fox* court stated that "[i]n-house counsel contemplating a wrongful termination action against her former employer clearly needs to consult with her attorneys on the issue of her former employer's confidences given the Supreme Court's warnings of dismissal and possible disciplinary action if client confidences are breached. [(*General Dynamics*, *supra*, 7 Cal.4th at pages 1190-1191.)] In light of the limitations the court placed on wrongful termination actions against former employers, in-house counsel must consider whether they can assert their claims *without disclosing the employer's confidences or, if not, whether they can assert an applicable exception to the confidentiality requirement*. . . . Indeed, the employer's confidentiality would seem better protected if, early on, in-house counsel consults her own attorney about the ethical issues in a wrongful termination case *rather than risk having confidential communications disclosed inadvertently* in the later stages of the litigation. [Fn. omitted.]" (*Fox*, *supra*, 89 Cal.App.4th at p. 312, italics added.) Thus, the focus in *Fox*

was on counsel's role in assisting in-house counsel in *avoiding* impermissible public disclosure of the employer's confidences in court proceedings. (*Ibid.*) The *General Dynamics* court wished to protect in-house counsel's ability to maintain a suit for breach of contract or wrongful termination against a former employer-client, "'*provided* it can be established without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship.'" (*Fox*, *supra*, at p. 309, quoting *General Dynamics*, *supra*, at p. 1169.) While *Fox* supports the contention that a client may consult an attorney in order to ascertain whether confidential and privileged information in its possession may be disclosed, it certainly does not support the notion that upon receiving documents from a client which are patently privileged and confidential the attorney may extensively review those documents, use them in litigation against the privilege holder, and file them in the public record. There is no authority which so holds and *State Fund*, *Rico*, and *Clark* hold to the contrary.

VI. The Protective Order Prohibiting Any Use or Disclosure Was Not an Abuse of Discretion

At the same hearing at which the trial court ordered LOIH disqualified, the trial court entered the following protective order: "ACT and its former, current and future counsel in this action are prohibited from making any use or disclosure of SBC or its attorneys' privileged attorney client communications or work product provided to ACT pursuant to the 4/28/08 contract." Appellants contend this constituted an abuse of discretion because SBC's liquidation trustee was the only person with standing to seek such an order and he has not been made a party to this matter. They also contend that respondents were not parties to the contract containing the confidentiality clause, which in any event was voided by SBC and GT's fraud.

As already discussed, appellants failed to establish a prima facie case of fraud sufficient to void the attorney-client privilege or support rescission of the contract. The trial court had the inherent authority to control the proceedings before it by ordering that there be no further disclosure of documents and information it found were privileged, as

to which the privilege holders had adequately asserted their respective privileges. (See *Clark, supra*, 196 Cal.App.4th at p. 45.)

DISPOSITION

The trial court's order is affirmed in its entirety. Costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.