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MPT-1: *Phoenix Corporation v. Biogenesis, Inc.*

RULE 4.4 OF THE FRANKLIN RULES OF PROFESSIONAL CONDUCT

Rule 4.4. Inadvertent disclosure of attorney-client document

An attorney who receives a document relating to the representation of the attorney's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

HISTORY

Adopted by the Franklin Supreme Court, effective July 1, 2002.

COMMENT

[1] Rule 4.4, which was adopted by the Franklin Supreme Court in 2002 in response to *Indigo v. Luna Motors Corp.* (Fr. Ct. App. 1998), recognizes that attorneys sometimes receive documents that were mistakenly sent or produced by opposing parties or their attorneys. If an attorney knows or reasonably should know that such a document was sent inadvertently, then this rule requires the attorney, whether or not the document is protected by the attorney-client privilege, to promptly notify the sender in order to permit that person to take protective measures.

[2] Rule 4.4 provides that if an attorney receives a document the attorney should know was sent inadvertently, he or she must promptly notify the sender, but need do no more. *Indigo v. Luna Motors Corp.*, which predated this rule, concluded that the receiving attorney not only had to notify the sender (as this rule would later require), albeit only as to a document protected by the attorney-client privilege, but also had to resist the temptation to examine the document, and had to await the sender's instructions about what to do. In so concluding, *Indigo v. Luna Motors Corp.* conflicted with this rule and, ultimately, with the intent of the Franklin Supreme Court in adopting it.

[3] Rule 4.4 does not address an attorney's receipt of a document sent without authorization, as was the case in *Mead v. Conley Machinery Co*. (Fr. Ct. App. 1999). Neither does any other rule.

Mead v. Conley Machinery Co., which also predated this rule, concluded that the receiving attorney should review the document—there, an attorney-client privileged document—only to the extent necessary to determine how to proceed, notify the opposing attorney, and either abide by the opposing attorney's instructions or refrain from using the document until a court disposed of the matter. The Franklin Supreme Court, however, has declined to adopt a rule imposing any ethical obligation in cases of unauthorized disclosure.

Indigo v. Luna Motors Corp.
Franklin Court of Appeal (1998)

The issue in this permissible interlocutory appeal is whether the trial court abused its discretion by disqualifying plaintiff's attorney for improper use of attorney-client privileged documents disclosed to her inadvertently. We hold that it did not. Accordingly, we affirm.

I

Plaintiff Ferdinand Indigo sued Luna Motors Corporation for damages after he sustained serious injuries when his Luna sport utility vehicle rolled over as he was driving.

In the course of routine document production, Luna's attorney's paralegal inadvertently gave Joyce Corrigan, Indigo's attorney, a document drafted by Luna's attorney and memorializing a conference between the attorney and a high-ranking Luna executive, Raymond Fogel, stamped "attorney-client privileged," in which they discussed the strengths and weaknesses of Luna's technical evidence. As soon as Corrigan received the document, which is referred to as the "technical evidence document," she examined it closely; as a result, she knew that it had been given to her inadvertently. Notwithstanding her knowledge, she failed to notify Luna's attorney. She subsequently used the document for impeachment purposes during Fogel's deposition, eliciting damaging admissions. Luna's attorney objected to Corrigan's use of the document, accused her of invading the attorney-client privilege, and demanded the document's return, but Corrigan refused.

In response, Luna filed a motion to disqualify Corrigan. After a hearing, the trial court granted the motion. The court determined that the technical evidence document was protected by the attorney-client privilege, that Corrigan violated her ethical obligation by handling it as she did, and that disqualification was the appropriate remedy. Indigo appealed.

II

It has long been settled in Franklin that a trial court may, in the exercise of its inherent power, disqualify an attorney in the interests of justice. *See*, *e.g.*, *In re Klein* (Fr. Ct. App. 1947). Ultimately, disqualification involves a conflict between a client's right to an attorney of his or her choice and the need to maintain ethical standards of professional responsibility. The paramount concern, however, must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to an attorney of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process.

Appellate courts review a trial court's ruling on disqualification for abuse of discretion. A court abuses its discretion when it acts arbitrarily or without reason. As will appear, we discern no arbitrary or unreasonable action here.

A

Indigo's first claim is that the trial court erred in determining that Corrigan violated

an ethical obligation by handling the technical evidence document as she did.

From the Franklin Rules of Professional Conduct and related case law, we derive the following, albeit implicit, standard: An attorney who receives materials that on their face appear to be subject to the attorney-client privilege, under circumstances in which it is clear they were not intended for the receiving attorney, should refrain from examining the materials, notify the sending attorney, and await the instructions of the attorney who sent them.

Under this standard, Corrigan plainly violated an ethical obligation. She received the technical evidence document; the document appeared on its face to be subject to the attorney-client privilege, as it was stamped "attorney-client privileged"; the circumstances were clear that the document was not intended for her; nevertheless, she examined the document, failed to notify Luna's attorney, and refused to return it at the latter's demand.

B

Indigo's second claim is that the trial court erred in determining that disqualification of Corrigan was the appropriate remedy in light of her violation of her ethical obligation.

The trial court predicated Corrigan's disqualification on the threat of incurable prejudice to Luna. Such a threat has long been recognized as a sufficient basis for disqualification. *See*, *e.g.*, *In re Klein.* We find it more than sufficient here. Corrigan used the technical evidence document during the deposition of Luna executive Fogel, eliciting damaging admissions. Even if Corrigan were prohibited from using the document at trial, she could not effectively be prevented from capitalizing on its contents in preparing for trial and perhaps obtaining evidence of similar force and effect.

III

The trial court concluded that disqualification was necessary to ensure a fair trial. It did not abuse its discretion in doing so.

Affirmed.

Mead v. Conley Machinery Co.
Franklin Court of Appeal (1999)

The issue in this permissible interlocutory appeal is whether the trial court abused its discretion by disqualifying plaintiff's attorney on the ground that the attorney improperly used attorney-client privileged documents disclosed to him without authorization. *Cf. Indigo v. Luna Motors Corp.* (Fr. Ct. App. 1998) (inadvertent disclosure). We hold that it did and reverse.

I

Dolores Mead, a former financial consultant for Conley Machinery Company, sued Conley for breach of contract. Without authorization, she obtained attorney-client privileged documents belonging to Conley and gave them to her attorney, William Masterson, who used them in deposing Conley's president over Conley's objection.

Conley immediately moved to disqualify Masterson. After an evidentiary hearing, the trial court granted the motion. Mead appealed.

II

In determining whether the trial court abused its discretion by disqualifying Masterson, we ask whether it acted arbitrarily or without reason. *Indigo*.

III

At the threshold, Mead argues that the trial court had no authority to disqualify Masterson because he did not violate any specific rule among the Franklin Rules of Professional Conduct. It is true that Masterson did not violate any specific rule—but it is *not* true that the court was without authority to disqualify him. With or without a violation of a specific rule, a court may, in the exercise of its inherent power, disqualify an attorney in the interests of justice, including where necessary to guarantee a fair trial. *Indigo.*

IV

Without doubt, there are situations in which an attorney who has been privy to his or her adversary's privileged documents without authorization must be disqualified, even though the attorney was not involved in obtaining the documents. By protecting attorney-client communications, the attorney-client privilege encourages parties to fully develop cases for trial, increasing the chances of an informed and correct resolution.

To safeguard the attorney-client privilege and the litigation process itself, we believe that the following standard must govern: An attorney who receives, on an unauthorized basis, materials of an adverse party that he or she knows to be attorney-client privileged should, upon recognizing the privileged nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how to proceed; he or she should notify the adversary's attorney that he or she has such materials and should either follow instructions from the adversary's attorney with respect to the disposition of the materials or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

Violation of this standard, however, amounts to only one of the facts and circumstances that a trial court must consider in deciding whether to order disqualification. The court must also consider all of the other relevant facts and circumstances to determine whether the interests of justice require disqualification. Specifically, in the exercise of its discretion, a trial court should consider these factors: (1) the attorney's actual or constructive knowledge of the material's attorney-client privileged status; (2) the promptness with which the attorney notified the opposing side that he or she had received such material; (3) the extent to which the attorney reviewed the material; (4) the significance of the material, i.e., the extent to which its disclosure may prejudice the party moving for disqualification, and the extent to which its return or other measure may prevent or cure that prejudice; (5) the extent to which the party moving for disqualification may be at fault for the unauthorized disclosure; and (6) the extent to which the party opposing disqualification would suffer prejudice from the disqualification of his or her attorney.[1]

Some of these factors weigh in favor of Masterson's disqualification. For example, Masterson should have known after the most cursory review that the documents in question were protected by the attorney-client privilege. Nevertheless, he did not notify Conley upon receiving them. Also, it appears that he thoroughly reviewed them, as he directly referenced specific portions in his response to Conley's disqualification motion. Finally, Conley was not at fault, since Mead copied them covertly.

Other factors, however, weigh against Masterson's disqualification. The information in the documents in question would not significantly prejudice Conley, reflecting little more than a paraphrase of a handful of Mead's allegations. The court may exclude the documents from evidence and thereby prevent any prejudice to Conley—all without disqualifying Masterson. Exclusion would prevent ringing for the jury any bell that could not be unrung. To be sure, it would not erase the documents from Masterson's mind, but any harm arising from their presence in Masterson's memory would be minimal and, indeed, speculative. In contrast, Mead would suffer serious hardship if Masterson were disqualified at this time, after he has determined trial strategy, worked extensively on trial preparation, and readied the matter for trial. In these circumstances, disqualification may confer an enormous, and unmerited, strategic advantage upon Conley.

In conclusion, because the factors against Masterson's disqualification substantially outweigh those in its favor, the trial court abused its discretion in disqualifying him.

Reversed.

[1] In *Indigo v. Luna Motors Corp.*, we recently considered the issue of disqualification in the context of *inadvertent* disclosure of a document protected by the attorney-client privilege as opposed to *unauthorized* disclosure. The analysis set out in the text above renders explicit what was implicit in *Indigo*, and is generally applicable to disqualification for inadvertent disclosure as well as unauthorized disclosure. Although we found the threat of "incurable prejudice" decisive in *Indigo*, it is neither a necessary nor a sufficient condition for disqualification.