S226645

No. S_____

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES BOARD OF SUPERVISORS *et al.*,

Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

ACLU OF SOUTHERN CALIFORNIA *et al.*,

Real Parties in Interest.

Review after Order Denying CPRA Request
Second Appellate District, Division Three, Case No. B257230
Los Angeles County Superior Court, Case No. BS145753
(Hon. Luis A. Lavin)

PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

Are invoices for legal services sent to the County of Los Angeles by outside counsel within the scope of the attorney-client privilege, and absolutely exempt from disclosure under the California Public Records Act, even with all references to attorney opinions, advice and similar information redacted?

REQUEST FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

This Petition for Review presents an issue raised by former Chief Justice George in his concurring opinion in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 741-744 ("*Costco*"), but not resolved there: Is *everything* transmitted between attorney and client absolutely privileged, without regard to the content or purpose of the communication? Or does the privilege protect only legal opinions, advice, and other information communicated for the purpose of advancing the legal representation?

In a published opinion, the Court of Appeal for the Second Appellate District, Division Three, held that *everything* transmitted between lawyer and client is absolutely privileged, so long as it is transmitted in confidence. *County of Los Angeles Board of Supervisors v. Superior Court* (2015) 235 Cal.App.4th 1154 ("*County of Los Angeles*"). In doing so, the Court rejected the California Public Records Act ("CPRA")[1] request sent by Petitioners ACLU of Southern California and Eric Preven (collectively,

[1] Gov't Code § 6250, *et seq.*

"ACLU") to the Los Angeles County Board of Supervisors ("Board of Supervisors"), which sought *redacted* copies of outside counsel invoices to the County, holding that even redacted invoices are absolutely privileged.

The Court's decision is contrary to a decision from Division Eight of the Second District, which held that attorney invoices *must* be disclosed under the CPRA. *County of Los Angeles v. Superior Court (Anderson-Barker)* (2012) 211 Cal.App.4th 57, 67 ("*Anderson-Barker*") (invoices not exempt because their dominant purpose is not for use in litigation).

In rejecting *Anderson-Barker* as inapposite (235 Cal.App.4th at 1166-1167), the Court of Appeal overlooked the fundamental difference between invoices – which typically are sent to procure payment for legal services – and other attorney-client communications – which typically are sent to advance the legal representation. The Court also *broadened* the scope of Evidence Code § 952, to include information no published California decision previously has held to be absolutely privileged, notwithstanding the constitutional mandate that courts *narrowly* construe statutes that restrict the public's access to public records. Cal. Const. Art. 1, § 3(b).

As discussed below, attorney invoices are treated differently from advice, opinions and other information transmitted for the purpose of advancing the legal representation, and routinely disclosed in fee litigation. Thus, the Court has created a legal regime in which the only real losers will

be CPRA requesters like the ACLU, who are trying to bring accountability to government use of public funds. Tens of millions of dollars have been spent by the County defending against detainee abuse cases. II PE 5:351-360. Now, however, the public will be unable to fully evaluate that tremendous expenditure – or any other government expenditure for legal fees. If agencies are given carte blanche to decide when and where to disclose invoice information, they will waive privilege and use invoices as a sword when it benefits them – for example, to contend that opposing counsel's requested fees are unreasonable because their lodestar is far larger than what the agency lawyers incurred in the same proceeding – but invoke the privilege as a shield when they have something to hide. The CPRA and Article 1, Section 3(b) of California's Constitution flatly reject that result.

The Court's holding that legal invoices are absolutely privileged also threatens to withdraw from trial courts the most reliable evidence of the reasonableness of a fee request, making a difficult task for trial courts even more challenging. This Court recently acknowledged the importance of connecting fee awards to actual time billed by counsel in granting review in *Lafitte v. Robert Half Int'l, Inc.*, S222996, which presents the issue of whether "*Serrano v. Priest* (1977) 20 Cal.3d 25 ["*Serrano III*"] permit[s] a trial court to anchor its calculation of a reasonable attorney's fees award in a class action on a percentage of the common fund recovered?" The

foundational premise of *Serrano III* – that fee awards begin with a lodestar, calculated based on careful review of attorney time spent on a matter (20 Cal.3d at 48-49) – will be upended if attorney invoices are absolutely privileged and fee movants have complete discretion in deciding whether to submit them to the court.

The Court of Appeal dismissed this concern, believing clients would simply waive the privilege to pursue a fee award, or that fee motions could be supported by something other than the actual invoices. *County of Los Angeles*, 235 Cal.App.4th at 1177. But neither supposition withstands scrutiny. The client may choose not to waive privilege, and because invoices are not strictly necessary for fee motions (*e.g.*, *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698-699), it is unlikely the courts will find implied waiver. The Court of Appeal's Opinion would, however, deny trial courts the right to demand more detailed information, including attorney invoices, to support a fee request. *Cf.*, *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1325 ("*Concepcion*") (affirming order requiring disclosure of invoices).

In addition, offering a substitute – such as attorney time sheets or a detailed declaration – may not be a viable alternative if disclosure of a substantial part of a privileged communication waives the privilege. *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 602-602. And even if the Court is correct, and the underlying information is not privileged, this only

highlights the fact that the Court has exalted form over substance and, in the end, its Opinion will only protect government agencies that hope to evade public scrutiny.

The ACLU respectfully requests that the Court grant review and reverse the Court of Appeal's Opinion, to "secure uniformity of decision" and "settle an important question of law." The appellate court's expansion of the attorney-client privilege will create tremendous uncertainty for trial courts and litigants as they struggle to apply the new, incorrect, standard. It will result in a skewed system in which the public has no right to evaluate the best evidence of the government's huge expenditures on outside counsel, but government agencies retain the right to use those documents in any way they choose, contrary to the very purpose of the CPRA and Article 1, Section 3(b).

STATEMENT OF THE CASE

A. The Excessive Force Litigation against the County.

In December 2013, the United States Attorney's Office for the Central District of California announced it had filed five criminal cases against eighteen current or former Los Angeles County deputy sheriffs for, among other things, unjustified beatings of jail inmates and visitors. III PE 5:687-688. The U.S. Attorney stated the alleged incidents "demonstrated behavior that had become institutionalized." *Id.* Two months later, two

more Los Angeles County Sheriff's deputies were indicted for repeatedly assaulting an inmate without justification. III PE 5:691.

Over the past few years, current and former jail inmates have filed numerous lawsuits against the County and individual sheriff's deputies for alleged excessive force. II PE 5:359. The County has retained a number of law firms to defend against these suits. *E.g.*, II PE 5:455, 5:482; III PE 6:709-710. Some of these firms have been accused of engaging in overly aggressive "scorched earth" litigation tactics and dragging out cases even when a reasonable settlement was possible. II PE 5:424 (describing the County's "aggressive litigation tactics"); *id.* at 5:476 (Court advised counsel, "I'm troubled by [the County's outside counsel's] inability to represent your client at this moment. I'm very deeply troubled.... Have the County Counsel be present because I believe she would be deeply disturbed if she understood what was going on in this case."); III PE 5:694-695 ("Plaintiffs in Jail Force Suits Decry 'Scorched Earth' Defense Tactics," *Daily Journal*, September 17, 2013).

Some cases have resulted in large verdicts for plaintiffs against the County, in addition to punitive damages awards against Sheriff's Department personnel, including former Sheriff Lee Baca. *E.g.*, II PE 5:482-485 ($2.6 million judgment); *id.* at 487-498 (awarding $125,000 in compensatory damages and finding Sheriff liable for punitive damages); *id.*

at 500-505 (awarding $950,000 judgment and finding numerous Sheriff's Department personnel liable for punitive damages).

On January 2, 2014, the Office of County Counsel provided the Board of Supervisors with its *Annual Litigation Cost Report for Fiscal Year 2012-2013* ("*Cost Report*"). II PE 5:351-356. It stated that the County paid *$89 million* in judgments, settlements, and attorneys' fees during the fiscal year. *Id.* at 352. The Sheriff's Department alone was responsible for more than *$43 million* of those litigation expenses. *Id.* at 354. According to additional information released by then-County Supervisor Gloria Molina, the County *paid $20 million in litigation expenses during the 2012-2013 fiscal year solely for excessive force cases*. *Id.* at 358-60. More than $5 million of that amount was to defend against accusations of excessive force while plaintiffs were in custody. *Id.* at 359. Last year, Supervisor Molina highlighted one of the many reasons the multimillion dollar burden of defending against lawsuits alleging the use of excessive force is such an important public issue:

> Every dollar spent on lawsuits is a dollar that could go toward vital public services .... ¶ The $43 million in legal costs stemming from Sheriff's Department mismanagement comprise nearly one-half of the county's total litigation expenditures – and come close to the $46 million cost of litigation for all other departments combined. Excessive force cases alone cost taxpayers $20 million; up $7 million from last year. ...

Id.

B. The County Refuses to Disclose Billing Records.

In light of the importance of understanding how the County spends taxpayer money to defend against accusations of excessive force, on July 1, 2013, the ACLU sent a CPRA request to the County to obtain "[i]nvoices that specify the amounts that the County has been billed by any law firm in connection with nine specific actions brought by inmates that alleged jail violence." I PE 1:5, 13-18.[2]

On July 26, 2013, County Counsel John Krattli responded to the ACLU's CPRA request, stating that his office identified documents responsive to the request for legal invoices in the nine cases identified. *Id.* at 6, 24-27. Mr. Krattli said, however, that the County would produce only redacted invoices for cases that were no longer pending, and would not produce any invoices relating to the cases that were still pending. *Id.* He based his refusal to produce these invoices on Government Code §§ 6254(k) and 6255(a). *Id.*

On September 9, 2013, Mr. Krattli sent a letter enclosing documents purportedly related to the three cases that were no longer pending. *Id.* at 6, 29. The documents were heavily redacted and did not contain any descriptions of work performed by any attorney – only billing rates, hours billed and billing totals. I PE 4:92-93. As Mr. Krattli indicated in his July

[2] The ACLU asked for two other categories of documents; neither is at issue here.

26, 2013 letter, he did not include documents responsive to any other requests. *Id.*

C. The Respondent Court Orders Disclosure of the Billing Records.

On October 31, 2013, the ACLU filed its petition for writ of mandate. I PE 1:1. On June 5, 2014, the respondent court granted the ACLU's petition,[3] finding that Business and Professions Code § 6149 (which provides that attorney *fee agreements* are privileged) did not apply to billing records, as "the statute clearly distinguishes between written fee agreements and billing statements." III PE 10:774. The court further held that the County had "not alleged any specific fact demonstrating why the billing statements, with proper redactions concealing actual attorney-client privileged communications or attorney work-product, would qualify as privileged communications exempt from disclosure under Evidence Code section 952." *Id.* at 775. Finally, the court found that the County had "failed to satisfy its burden of demonstrating a clear overbalance in favor of not disclosing the billing statements" under the so-called "catch-all" exception in Government Code § 6255(a). *Id.* at 776.

The court ordered disclosure of the billing records for the nine lawsuits identified in the ACLU's CPRA request, explaining, "[t]o the extent these documents reflect an attorney's legal opinion or advice, or

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[3] The court denied the petition in part with respect to one argument not at issue in this proceeding.

reveal an attorney's mental impressions or theories of the case, such limited information may be redacted." *Id.* at 778.

D. The Court of Appeal Reverses, Holding that Billing Records Are Absolutely Privileged.

The County filed a petition with the Court of Appeal, seeking a writ of mandate directing the respondent court to vacate its June 5, 2014 Order. On April 13, 2015, a unanimous panel granted the County's petition and directed the Superior Court to vacate its order. *County of Los Angeles*, 225 Cal.App.4th at 1178. The court held that the invoices are exempt from disclosure under the CPRA because they are "confidential communications within the meaning of Evidence Code section 952." *Id.* at 1160. After evaluating the language of Section 952 and Petitioner's discussion of the legislative history for a 1967 amendment to the statute, the Court concluded that under Evidence Code § 952, "confidential communication" encompasses *all* transmittals of information between a lawyer and her client so long as they were made in confidence, not only those containing a legal opinion or advice. *Id.* at 1170-1171.

The Court believed its conclusion was mandated by this Court's decision in *Costco*, which, the Court said, "teaches that the proper focus in the privilege inquiry is not whether the communication contains an attorney's opinion or advice, but whether the communication was confidentially transmitted in the course of that relationship." *Id.* at 1174

(citing *Costco*, 47 Cal.4th at 733). Thus, the Court rejected any suggestion that the nature of the document being transmitted is relevant, concluding that *all confidential transmissions* within the attorney-client relationship are privileged, without regard to content. *Id.*

The ACLU did not file a Petition for Rehearing.

REVIEW IS NECESSARY TO SECURE UNIFORMITY OF DECISION AND SETTLE AN IMPORTANT QUESTION OF LAW

This Court may order review "to secure uniformity of decision or to settle an important question of law." Cal. Rule Ct. 8.500(b)(1). Here, the Court should grant review because the Court of Appeal's broad construction of Evidence Code § 952 – which denied the ACLU access to *redacted* attorney invoices – is contrary to the narrow construction required by the California Constitution and the CPRA, and ignores decades of law treating this information as unprivileged, which has formed the basis of this Court's fee motion jurisprudence. It invites gamesmanship by government agencies, which routinely reveal this non-sensitive information when it suits their purposes, but now can withhold it when they do not want to let the public scrutinize their expenditure of public funds.

A. The Court of Appeal Broadly Interpreted Evidence Code § 952, Contrary to Article 1, § 3(b)'s Narrow Construction Mandate.

The Court of Appeal's decision should be reversed because it did not follow the constitutional mandate to narrowly construe statutes that limit the public's right of access to government records (Cal. Const. Art. 1, § 3(b)), and instead expanded the attorney-client privilege to reach information that has been treated as unprivileged for decades.

Nearly fifty years ago, the California Legislature enacted the CPRA, which declares that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov't Code § 6250. As this Court explained in *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651-652, the CPRA was designed to promote "[m]aximum disclosure of the conduct of governmental operations." *See also Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041, 1045 ("[t]he CPRA embodies a strong policy in favor of disclosure of public records").

In *Int'l Federation of Professional & Technical Engineers v. Superior Court* (2007) 42 Cal.4th 319 ("*Int'l Federation*"), this Court emphasized the importance of public access to government information:

> Openness in government is essential to the functioning of a democracy. Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the

> arbitrary exercise of official power and secrecy in the political process.

Id. at 328-329 (citing *CBS*, 42 Cal.3d at 65).

In 2004, 83 percent of California voters approved Proposition 59, amending the state Constitution to recognize the public's right of access to government information. Article I, § 3(b) of the Constitution now affirms that "[t]he people have the right of access to information concerning the conduct of the people's business," and guarantees that "the writings of public officials and agencies *shall be open to public scrutiny.*" (Emphasis added.) As amended, the Constitution mandates that any statute "that furthers the people's right of access" – such as the CPRA – "shall be broadly construed," while any statute "that limits the right of access" – such as the Evidence Code provisions at issue here – must be "narrowly construed." *Id.; see also Calif. State Univ., Fresno Ass'n v. Superior Court* (2001) 90 Cal.App.4th 810, 831 ("[s]tatutory exemptions from compelled disclosure are narrowly construed").

This Court recently reiterated this fundamental premise, declaring that "[g]iven the strong public policy of the people's right to information concerning the people's business (Gov. Code, § 6250), and the constitutional mandate to construe statutes limiting the right of access narrowly (Cal. Const., art. I, § 3, subd. (b)(2)), *all public records are subject to disclosure unless the Legislature has expressly provided to the*

contrary." *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 166-167 (citations, internal quotes omitted; emphasis added).

The CPRA also ensures the public will have access to as much information as possible by directing that "[a]ny reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law." Gov't Code § 6253(a). Thus, "[t]he fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document." *CBS*, 42 Cal.3d at 653 (citation omitted). Agencies must segregate privileged from non-privileged information, and disclose everything that is not privileged. *Id.*

These principles should have carried the day here. California courts long have insisted that the public has a right to know how government uses – or misuses – taxpayer money. As one court explained, "[i]t is difficult to imagine a more critical time for public scrutiny of its governmental decision-making process than when the latter is determining how it shall spend public funds." *San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955; *accord Copley Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367, 376 ("the public has a legitimate interest in knowing how public funds are spent"). Courts *routinely* require the disclosure of records that provide details regarding how public money is spent. *See, e.g., Int'l Federation*, 42 Cal.4th at 339 (names and salaries of public employees

earning $100,000 or more per year not exempt because "the public has a strong, well-established interest in the amount of salary paid to public employees"); *Sonoma County Employees' Retirement Ass'n v. Superior Court* (2011) 198 Cal.App.4th 986, 1005 (recipients and amounts of pension benefits paid by county retirement system not exempt); *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 909 (county must disclose documents relating to a settlement agreement due to the "public interest in finding out how decisions to spend public funds are formulated and in insuring governmental processes remain open and subject to public scrutiny"); *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 776 (ordering disclosure of documents relating to approval of rate increase under an exclusive contract because it "amounted to a 15 to 25 percent increase in just two years that the public – not the City – would have to pay").

These principles apply with equal force to attorney billing and payment records. Indeed, the public interest in understanding government spending is particularly acute when that money is spent to defend against lawsuits relating to allegations of excessive force by County employees – itself a matter of tremendous public interest. And here, the billing records are particularly important because of the public debate about whether the law firms retained to defend the County have employed "scorched earth"

litigation tactics, which may drive up the defense costs borne by taxpayers without any corresponding benefit in the case. II PE 5:424. The County has also been accused of refusing reasonable settlements, only to have large judgments awarded to plaintiffs. *Id.* *See also* I PE 5:150-153 (discussing ACLU's efforts to focus attention on mistreatment of inmates).

The Court of Appeal did not follow the mandate of Article 1, Section 3(b). Although the Court acknowledged the requirement to narrowly construe statutes that limit the public's right of access, it believed this mandate did not apply because the invoices purportedly "fall within the express parameters of Evidence Code section 952." *County of Los Angeles*, 235 Cal.App.4th at 1176. But in so holding, the Court missed the point. As the Court acknowledged, its interpretation expanded Section 952 to reach a type of information – attorney invoices – that no California court had previously held to be privileged. *Id.* at 1166.

It reached this conclusion against a backdrop of decades of California law assuming that invoices are not themselves privileged, although they may be redacted to remove privileged information. *See* Section B.3, *infra*. And it did not even consider the issue raised by former Chief Justice George in *Costco* – whether "confidential communication" as defined by Evidence Code § 952 is limited to communications intended to further the purpose of the legal representation – which would have provided

the narrow reach the Constitution mandates. *Costco*, 47 Cal.4th at 742; *see* Section B.2, *infra*.

The Court of Appeal's published decision mentions but does not apply the narrow construction requirement in Article 1, Section 3(b), and *expands* the attorney-client privilege to reach a type of information that, as discussed below, has been treated as unprivileged for decades. It should be reversed.

B. The Court of Appeal's Expansion of the Scope of the Attorney-Client Privilege Is Contrary to Decades of Law.

The Court of Appeal's decision upended a long-understood rule in the fee motion context that attorney invoices are not privileged. In dismissing the fundamental difference between an invoice (that is sent for the business purpose of being paid) and a letter or similar communication (that is sent to further the legal representation), the Court created a conflict with a host of cases from this and other California courts, and a standard that will create tremendous problems for courts as they struggle to apply it.

1. The Attorney-Client Privilege Exists to Promote Full and Open Communications.

The Court of Appeal misinterpreted Section 952 in holding that it applies to *every* document transmitted between lawyer and client, without regard to the nature of the document or the purpose of the transmittal. This Court should grant review to reaffirm the basic principle that documents

that do not contain legal advice or opinion, and which are not transmitted to further the legal representation, are not privileged.

Evidence Code § 952 defines a privileged confidential communication between client and lawyer as containing three components:

> As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship ***and*** in confidence ..., ***and*** includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

Id. (emphasis added).

As this Court long ago explained, the fundamental purpose behind the privilege "is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters." *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599; *see also Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451, 457 (same). The Court explained, "[t]he public policy fostered by the privilege seeks to insure '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*." *Mitchell*, 37 Cal.3d at 599 (emphasis added). The privilege extends to some information transmitted between attorney and client, even without advice or opinion, because "it is the actual fact of the transmission which merits protection, since discovery

of the transmission of specific public documents might very well reveal the transmitter's intended strategy." *Id.* at 600.

But it is not true, as the Court of Appeal held, that every piece of information communicated between attorney and client is privileged. In *Willis v. Superior Court* (1980) 112 Cal.App.3d 277, the Court explained:

> Although the attorney-client privilege is couched in broad terms, *not every communication during the attorney-client relationship is deemed matter given in confidence.* Because the privilege tends to suppress otherwise relevant facts, *it is construed so that certain species of information communicated to the attorney may nevertheless be subject to disclosure as nonprivileged.*

Id. at 291 (emphasis added). There, the Court held that details related to the attorney-client relationship were not privileged, and had to be disclosed in discovery. *Id.* at 294-295. *See also Thirteen Committee v. Weinreb* (1985) 168 Cal.App.3d 528, 534 ("the identity of client sources of fees paid to attorney officeholders is not privileged unless the disclosure would reveal client confidences" (citations omitted)).

When the privilege applies, it "is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case." *Costco*, 47 Cal.4th at 732 (citing *Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557). However, "[t]he privilege protects the disclosure of communications between attorney and client. It does not does not protect disclosure of the underlying facts

which were communicated." *Zimmerman v. Superior Court* (2013) 220 Cal.App.4th 389, 398.

California's appellate courts have expressed their understanding that invoices are not privileged, although they may contain privileged information that counsel are entitled to redact. *See Concepcion*, 223 Cal.App.4th at 1326-1327 ("we seriously doubt that all – or even most – of the information on each of the billing records proffered to the court was privileged," and any privilege could be protected by redaction); *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1256 ("In support of its motion, Google presented Quinn Emanuel's invoices, redacted as necessary to protect Google's attorney-client privilege ...."). In contrast, the ACLU is not aware of a single published California decision, other than the Court of Appeal's decision in this case, holding that invoices are absolutely privileged under Evidence Code § 952.

The ACLU acknowledges that to the extent billing records contain legal advice, or reveal an attorney's mental impressions or theories, such information may be protected by the attorney-client privilege or work product doctrine. But nothing supports the Court of Appeal's expansive conclusion that billing records are categorically privileged in their entirety. A simple billing entry – the time spent preparing a reply brief in support of a summary judgment motion, for example – does not contain a legal opinion or advice given by the lawyer in the course of that relationship.

Moreover, to the extent such a time entry would implicitly reveal legal opinion by conveying that the lawyer recommended filing a motion for summary judgment, the actual filing of the motion would waive whatever privilege might have existed. The privilege does not exist to protect "communications" such as invoices.

2. Invoices Are Not Privileged Because Their Purpose Is Not to Further the Legal Representation.

The Court of Appeal believed this Court's decision in *Costco* mandated the broad interpretation of Section 952 that the Court adopted. *County of Los Angeles*, 235 Cal.App.4th at 1174. It erred because as the Court acknowledged, but incorrectly dismissed as irrelevant (*id.*), *Costco* involved an attorney opinion letter, which is the archetypal example of a document that contains an attorney opinion and is therefore privileged. But nothing about this Court's analysis in *Costco* suggests it should extend beyond documents and information that traditionally have been considered privileged. The Court should have followed former Chief Justice George's concurrence raising this precise issue, which made clear that this Court did not intend to expand its decision to reach documents that were not transmitted for the purpose of the legal representation. *Id.* at 741-744.

In *Costco* this Court reiterated the basic premise, discussed above, that the "fundamental purpose" of the attorney-client privilege "'is to safeguard the confidential relationship between clients and their attorneys

so as to promote full and open discussion of the facts and tactics surrounding individual legal matters.'" *Id.* at 732 (citing *Mitchell*, 37 Cal.3d at 599). The Court distinguished, however, cases in which the "dominant purpose" of the relationship was not to provide legal representation. *Id.* (citing *D. I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 737). The Court explained that "[i]f the trial court [] concluded that the dominant purpose of the relationship was not that of attorney and client, the communications would not be subject to the attorney-client privilege and therefore would be generally discoverable" (although the client would be entitled to request *in camera* review to support its claim of privilege). *Costco*, 47 Cal.4th at 740. Thus, the Court recognized that the attorney-client relationship is not black and white, but contains nuance that informs the scope of the privilege.

The same is true of attorney-client communications. Former Chief Justice George wrote separately to raise this very issue. *Id.* at 741-744 (George, C.J., concurring). He explained that "it bears emphasis that to be privileged the communication also must occur 'in the course of' the attorney-client relationship (Evid. Code, § 952) – that is, the communication must have been made for the purpose of the legal representation." *Id.* at 742. "The privilege does not apply outside the context of such a relationship, certainly, but we should not forget that *the*

purpose of the communication also is critical to the application of the privilege." *Id.* (emphasis added).

The concurrence explained that the statutory limitation "'*in the course of* that relationship' ... is consistent with the law as it existed prior to the 1965 enactment of section 952." *Id.* (citing Evid. Code § 952) (emphasis in original). "Prior to the enactment of the statute, it long had been established that, *in order to be privileged, it was necessary that the communication be made for the purpose of the attorney's professional representation, and not for some unrelated purpose.*" *Id.* (citations omitted; emphasis added). He continued:

> When section 952 is viewed as a whole, it is even clearer that the Legislature intended to extend the protection of the privilege solely to those communications between the lawyer and the client *that are made for the purpose of seeking or delivering the lawyer's legal advice or representation.*

Id. at 743 (emphasis added). He explained that under the principle of *ejusdem generis* ("the general term ordinarily is understood as being restricted to those things that are similar to those which are enumerated specifically"), "the information transmitted between the lawyer and the client must be similar in nature to the enumerated examples – namely, the lawyer's legal opinion or advice," to be privileged. *Id.* at 743 (citations omitted). Thus, the "dominant purpose of the communication will [sometimes] be a critical consideration." *Id.* at 744.

The Court of Appeal applied a similar analysis in *Anderson-Barker*, 211 Cal.App.4th at 67, to conclude that attorney fee invoices are not exempt from disclosure under the "pending litigation" exemption to the CPRA, Government Code § 6254(b). It explained that "the records in question were not prepared for use in litigation as that term is explained in the appellate decisions" and that "[t]his is true even though the records in question relate to pending litigation and, indeed, would not have existed but for the pending litigation." *Id.* at 67 (citation omitted). The Court elaborated that the invoices were prepared, at best, for a dual purpose, and therefore that "the trial court was required to determine the dominant purpose for the preparation of the records." *Id.* (citation omitted). In affirming the trial court decision ordering disclosure of the invoices, the Court held:

> [T]he [trial] court concluded the dominant purpose for preparing the documents was not for use in litigation but as part of normal recordkeeping and to facilitate the payment of attorney fees on a regular basis. That such documents may have an ancillary use in litigation – for example, in connection with a request for attorney fees – does not undermine the substantial evidence before the trial court that the dominant purpose of the records was not for use in litigation.

Id.

The same reasoning applies here, and should have led to the conclusion that the attorney-client privilege *does not* apply to invoices sent to procure payment, not to further the purpose of the legal representation.

Tellingly, the County offered no evidence to suggest that the invoices had such a purpose. *See* III PE 6:726-727 (Granbo declaration); III PE 6:729 (Kim declaration). *See also* II PE 5:595-III PE 5:684 (samples of fee invoices to County in other matters, with minimal redactions). To the contrary, the record evidence made clear that invoices to the County were treated as unprivileged business communications, with redactions to "portions of time entries that could reveal information protected by the attorney-client privilege, the attorney work product doctrine, or both." II PE 5:588 (declaration of outside counsel); *see also id.* at 5:588-589 (testimony regarding preparation of invoices, with no suggestion that they were intended to convey legal advice or opinion).

In painting with such a broad brush – treating everything transmitted between attorney and client as privileged, without any inquiry as to the reason for the transmittal – the Court of Appeal broadly expanded the attorney client privilege in California. Its decision is flatly contrary to *Anderson-Barker* and former Chief Justice George's concurrence in *Costco*, as well as California's Constitution. It should be reversed.

3. For Decades, California Courts Have Operated on the Assumption That Invoices Are Not Privileged.

This Court's fee motion jurisprudence is built on the assumption that trial courts will receive thorough information about attorney hours billed in the matter, which the trial courts *must* carefully review to ensure that fee

awards are not arbitrary. As this Court explained in *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311:

> The proper determination and use of the lodestar figure is extremely important. As this court noted in *Serrano III*, "'The starting point of every fee award ... must be a calculation of the attorney's services in terms of the time he has expended on the case. *Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.*'" ...
>
> Ultimately, the trial judge has discretion to determine "the value of professional services rendered in his [or her] court ...." ... However, since determination of the lodestar figures is so "[f]undamental" to calculating the amount of the award, the exercise of that discretion must be based on the lodestar adjustment method. ...

Id. at 322 (citations omitted; emphasis added); *see also Serrano v. Unruh* (1982) 32 Cal.3d 621, 639 & nts. 27, 28 ("[s]ufficient controls inhere in the current system, which *demands that hours be carefully documented*" (emphasis added)); *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 (trial court must specify in writing the basis of its calculation of fee award, for review); *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (lodestar "anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary").

The Court's decision in *Ketchum v. Moses* (2001) 24 Cal.4th 1122, again emphasized the importance of trial courts' receiving detailed documentation to support a fee motion. *Id.* at 1131-1137. After reiterating

the *Serrano III* principles, the Court noted that "'padding' in the form of inefficient or duplicative efforts is not subject to compensation." *Id.* at 1131-1132. The Court then carefully discussed its fee motion cases and the wide application of the lodestar "under a broad range of statutes authorizing attorney fees." *Id.* at 1133-1135 (citations omitted). The Court ultimately adopted the lodestar method as the proper basis for fee awards following a special motion to strike (Cal. Code Civ. Proc. § 425.16), given the long history and implicit legislative approval of the lodestar. *Id.* at 1136.

Under this Court's consistent direction, California's trial and appellate courts have relied heavily on attorney invoices as evidence to support the reasonableness of hours spent and fees incurred when applying the lodestar method. In *Concepcion*, 223 Cal.App.4th at 1320, for example, the court emphasized that attorneys are "not automatically entitled to all hours they claim in their request for fees. They must prove the hours they sought were reasonable and necessary." (Citation omitted.) The Court explained that "[t]he evidence should allow the court to consider whether the case was overstaffed, how much time the attorneys spent on particular claims, and whether the hours were reasonably expended." *Id.* (citation omitted); *see also Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672, 689 (criticizing block billing invoices as not providing information trial court needed to apportion fees); *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1020 ("[t]o that end the Court may

require a prevailing party to produce records sufficient to provide 'a proper basis for determining how much time was spent on particular claims'" (citation omitted)).

Importantly, the Legislature never has acted to alter the Court's fundamental premise in *Serrano III* – that courts and opposing counsel are entitled to carefully review attorney time spent on a matter to fully evaluate any fee claim. To the contrary, "'[t]he Legislature appears to have endorsed the [lodestar adjustment] method of calculating fees, except in certain limited situations.'" *Ketchum*, 24 Cal.4th at 1135 (citation omitted). As the Court explained there, the Legislature's "express restriction on the use of fee enhancements [in a statute] 'can be read as an implicit endorsement of their use in other contexts.'" *Id.* (citation omitted). The Court summarized:

> In the more than 20 [now 40] years since *Serrano III* ... our courts have applied the lodestar adjustment method and our Legislature has enacted numerous fee-shifting statutes, including the one at issue here, presumptively acquiescing in the long-standing use of the lodestar adjustment method by courts determining the amount of fee awards.

Id. at 745 (citation omitted); *see also In re Donald R.* (1993) 14 Cal.App.4th 1627, 1632 n.5 ("[s]ince the statute has not been altered by subsequent legislation, the Legislature has indicated its approval of these constructions" (quoting *Wilkoff v. Superior Ct.* (1985) 38 Cal.3d 345, 353)).

This Court's decision in *Serrano III* has been cited nearly 2,200 times. Petitioner is not aware of a single published decision or legislative statement to suggest that the key evidence that should (and usually does) support a fee motion – attorney invoices – are protected by the attorney-client privilege. No court has engaged in any hand-wringing or careful analysis to assess whether the court can or should require disclosure of the invoices. Instead, California courts have acted on the assumption that if they need detailed invoice information to support a fee motion, they are entitled to demand it. *E.g.*, *Concepcion*, 223 Cal.App.4th at 1325 (when trial court concluded that evidence presented to support fee motion was insufficient, "it was certainly within the trial court's discretion to request additional information to allow it to determine the number of hours reasonably worked for inclusion in the lodestar calculation").

Finally, the Court of Appeal's decision creates a conflict for attorneys who practice in federal courts, which hold that attorney invoices are *not* protected by the attorney-client privilege. *E.g.*, *Tornay v. U.S.* (9th Cir. 1988) 840 F.2d 1424, 1426 ("fee information generally is not privileged"). In federal courts, documentary evidence such as attorney invoices is critical to determine "the number of hours spent, and how [the trial court] determined the hourly rate(s) requested." *McCown v. City of Fontana* (9th Cir. 2009) 565 F.3d 1097, 1102. Parties may not rely on bare representations about hours worked. *See, e.g.*, *Davis v. Los Angeles W.*

Travelodge (C.D. Cal. Dec. 21, 2009) 2009 WL 5227897, *1 ("[a]lthough Defendant may redact confidential information contained in such invoices, Defendant must provide some evidence to corroborate the number of hours specified in Defendant's Motion").

The Court of Appeal dismissed these and other federal authorities as irrelevant "[b]ecause in California the attorney-client privilege is a creature of statute and governed by California law ...." 235 Cal.App.4th at 1168 n.3. But the Court overlooked the fact that the attorney-client privilege is an ethical obligation, as well as a rule of evidence. Cal. R. Prof. Cond. 3-100. Thus, California attorneys who practice in federal court are required by federal law to submit evidence that their ethical obligations may prohibit them from disclosing. This cannot be the law.

Invoices have never been treated as privileged because they are not. The Court of Appeal's Opinion ignored the routine disclosure of invoices for decades in California – evidence that they are not the type of sensitive information that the attorney-client privilege protects – and broadly expanded the scope of the privilege.

4. The Court of Appeal's Reasons for Rejecting ACLU's Arguments Do Not Withstand Scrutiny.

The Court of Appeal dismissed ACLU's concerns about the practical implications of holding that invoices are privileged, concluding that the client could simply waive the privilege. 235 Cal.App.4th at 1177. The

Court also opined that substitute information could be provided, such as the underlying task detail, without providing the actual invoices sent to clients. *Id.* These are not solutions to the dilemma the Court created.

First, the Court overlooked the many problems that inevitably will arise from a rule that gives the client the right to decide whether or not to waive privilege in the invoices. Under California's fee-shifting statutes, attorneys' fee awards belong to the attorney, not the client. *See, e.g., Folsom v. Butte County Ass'n of Gov'ts* (1982) 32 Cal.3d 668, 682 n.26 (interpreting Code Civ. Proc. § 1021.5); *Flannery v. Prentice* (2001) 26 Cal.4th 572, 590 (interpreting Gov't Code § 12965). Even if a client refuses to seek attorneys' fees, attorneys have a separate right to seek those fees. *See, e.g., Lindelli v. Town of San Anselmo* (2006) 139 Cal.App.4th 1499 (attorneys acting on their own behalf can intervene in client's lawsuit and move for attorneys' fees). The Court of Appeal's decision is incompatible with these cases because it would allow clients to invoke their privilege and prevent attorneys from proving their fees.

Nor will trial courts be able to fill this gap by relying on the "implied waiver" theory to adopt an assumption that clients in fee-shifting cases should be automatically deemed to have waived privilege in the invoices. The implied waiver theory is too narrow for such an assumption; the attorney-client privilege is waived only if "the client has put the otherwise privileged communication directly at issue and that disclosure is essential

for a fair adjudication of the action." *Southern Cal. Gas Co. v. Public Util. Com.* (1990) 50 Cal.3d 31, 37. It is not waived "where the substance of the protected communication is not itself tendered in issue, but instead simply represents one of several forms of indirect evidence in the matter." *Mitchell*, 37 Cal.3d at 606 (content of plaintiff's communication to her attorneys was protected by privilege where it was not directly relevant); *see also Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 125, 129 (narrowly interpreting implied waiver; attorney client privilege "'is one of the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme'"; courts may not "add to the statutory privileges or imply unwritten exceptions" (citations omitted)). In the fee motion context, because invoices are not strictly necessary to support a fee motion (*Concepcion*, 223 Cal.App.4th at 1324 (citation omitted)) – and so, they are "one of several forms of indirect evidence in the matter" – this Court's decision in *Mitchell* would preclude a finding of implied waiver. 37 Cal.3d at 606.

In addition, the Court of Appeal's opinion overlooks the fact that counsel opposing a fee motion has the right to evaluate the fees requested to provide a substantive challenge on the merits. *E.g.*, *Concepcion*, 223 Cal.App.4th at 1325-1326 ("[u]nder our adversarial system of justice, once class counsel presented evidence to support their fee request, [the opponent] was entitled to see and respond to it and to present its own arguments as to

why it failed to justify the fees requested" (citations omitted)). If fee movants have the discretion to decide what they will submit to support their fee motion – protected by the cover of a privilege they cannot be forced to waive – fee opponents will not have the information they need to evaluate and respond to the fee request. They, along with the court, will be left to guesswork and conjecture to evaluate an unsubstantiated fee demand.

Second, attorneys may not be able to circumvent this problem by submitting substitute information to the court, such as the underlying task detail, because the privilege may extend to that information as well. A party is deemed to have waived the attorney-client privilege where that party or their attorney "substantially discloses" a "significant part of the [protected] communication." *Mitchell*, 37 Cal.3d at 602-603 (plaintiff's acknowledgement that she had discussed chemical warnings with her attorney was insufficient to waive her attorney-client privilege) (citing *Travelers Ins. Cos. v. Superior Ct.* (1983) 143 Cal.App.3d 436 (attorney's preliminary and foundational answers to interrogatories were too vague to have waived privilege)). The waiver determination hinges on whether the disclosure was "wide enough in scope and deep enough in substance to constitute 'a significant part of the communication.'" *Travelers Ins. Cos.*, 143 Cal.App.3d at 444. In the fee motion context, however, a disclosure detailed enough to satisfy this Court's oft-repeated requirements could be considered "a significant part of the communication," and waive the

privilege in the invoices (other than redacted information, such as attorney advice and opinions).

The intersection of these different lines of cases highlights the fundamental point that the Court of Appeal overlooked. No reason exists to extend to invoices, a privilege that the Legislature created to protect attorney advice and opinions. Invoices do not need the protection that other privileged information receives because once privileged information is redacted, they reveal nothing about the legal representation that is entitled to an absolute presumption of confidentiality. The Court of Appeal's decision exalts form over substance, protecting documents that have no good reason to be protected.

C. The Appellate Opinion Turns the CPRA and Constitutional Presumptions of Access Upside Down.

The Court of Appeal's decision turns on its head the heavy presumption of access underlying Article 1, Section 3(b) and the CPRA. Agencies will disclose invoices when they choose, but invoke the privilege to withhold invoices when they would prefer not to let details about the conduct of their counsel – and the amount billed to the public – become public knowledge.

The County does not hesitate to reveal its attorneys' invoices to support its own fee motions, and has recognized in that context that invoices are not privileged, although some entries may be redacted because

they reflect privileged information. *See, e.g.,* II PE 5:586-III PE 5:684 (attaching almost ninety pages of lightly redacted invoices to support fee motion). The County also has argued that to recover attorneys' fees, prevailing parties bear the burden of "provid[ing] a useful accounting of the claimed hours" including descriptions of the time spent by counsel. II PE 5:529; *see also* II PE 5:539 (arguing that "Plaintiff's counsel's billing statement is too vague to support their claimed fees," and "plaintiff's request here should be denied due to inadequate documentation").

This Court has rejected a statutory interpretation that would permit agencies to control which documents must be disclosed under the CPRA. *E.g., Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 290-291. As the Court explained in *Int'l Federation*, "[t]he Act should apply in the same way to comparable records maintained by comparable governmental entities." 42 Cal.4th at 336. Similarly, the County should not be allowed to claim a privilege in information at its whim – withholding attorney invoices when it chooses, but using them as a sword against opponents when it believes that use will be to its advantage

The Court of Appeal's decision will diminish, rather than enhance, the privilege. By applying the privilege to invoices, which do not further the purpose of the legal representation, the Court of Appeal has created a category of information that necessarily will receive less protection, for all

of the reasons discussed above. Trial and appellate courts will be forced to find ways to compel disclosure of invoices – within the constraints of the well-developed California law that provides broad protection to privileged communications – to ensure that they have the information they need. In the end, the law that will develop around attorney invoices – to ensure that they remain available in fee disputes – will either weaken the protections that other privileged materials enjoy, or it will become *sui generis*, limited to invoices alone. The result will be a category of information that is treated differently from other privileged communications, and without the careful protection that attorney advice and opinions receive. But in the CPRA context, perversely, the public will have no right of access. Evidence Code § 952 will have its *broadest* reach, contrary to the constitutional mandate to interpret statutes *narrowly* to further the public's right of access. This result turns the CPRA and the Constitution upside down.

CONCLUSION

The Court of Appeal's decision elevates form over substance in concluding that attorney invoices are absolutely privileged, without regard to their purpose or the reason they are transmitted. The Court's *expansion* of the attorney-client privilege to reach invoices is contrary to California law, including this Court's extensive fee motion jurisprudence.

The ACLU respectfully requests that the Court grant review in this matter, reverse the Court of Appeal's decision, and direct that Court to deny the County's petition for writ of mandate.

Respectfully Submitted this 26th day of May, 2015

ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
Peter J. Eliasberg

DAVIS WRIGHT TREMAINE LLP
Jennifer L. Brockett
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Colin D. Wells

By: /s/ Rochelle L. Wilcox
Rochelle L. Wilcox

Attorneys for Real Parties in
Interest ACLU OF SOUTHERN
CALIFORNIA and ERIC PREVEN

COMPLIANCE CERTIFICATE

I am an attorney in the law firm of Davis Wright Tremaine LLP. I certify that pursuant to Rule of Court 8.504(d), the attached Petition for Review is proportionately spaced, has a typeface of 13 points, and according to the word processing systems used to prepare this Petition contains 8,383 words, including footnotes, but excluding the caption, tables, this certificate, and signature blocks.

Dated: May 26, 2015

DAVIS WRIGHT TREMAINE LLP

By: _____
Colin D. Wells

Filed 4/13/15

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

COUNTY OF LOS ANGELES BOARD OF SUPERVISORS et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; ACLU OF SOUTHERN CALIFORNIA et al., Real Parties in Interest.	No. B257230 (Los Angeles County Super. Ct. No. BS145753)

ORIGINAL PROCEEDINGS in mandate. Luis A. Lavin, Judge. Petition granted.

John F. Krattli and Mark J. Saladino, County Counsel, Roger H. Granbo, Assistant County Counsel, Jonathan McCaverty, Deputy County Counsel; Greines, Martin, Stein & Richland, Timothy T. Coates and Barbara W. Ravitz for Petitioners.

Horvitz & Levy, Lisa Perrochet, Steven S. Fleischman and Jean M. Doherty for Association of Southern California Defense Counsel as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Peter J. Eliasberg for Real Parties in Interest ACLU of Southern California and Eric Preven.

Davis Wright Tremaine, Jennifer L. Brockett and Nicolas A. Jampol for Real Party in Interest ACLU of Southern California.

The question we resolve in this writ proceeding is whether billing invoices sent by an attorney to a client must be disclosed pursuant to the California Public Records Act (CPRA), or whether they are protected by the attorney-client privilege. Both the CPRA and the attorney-client privilege advance public policies of the highest order: the CPRA fosters transparency in government, and the attorney-client privilege enhances the effectiveness of our legal system. In the instant matter, these two interests collide. We conclude that, because the CPRA expressly exempts attorney-client privileged communications from the CPRA's reach, the tension must here be resolved in favor of the privilege. Because the invoices are confidential communications within the meaning of Evidence Code section 952, they are exempt from disclosure under Government Code section 6254, subdivision (k). Accordingly, we grant the writ petition.

FACTUAL AND PROCEDURAL BACKGROUND

In the wake of several publicized investigations into allegations that the Los Angeles County Sheriff's Department used excessive force on inmates housed in the Los Angeles County jail system, real parties in interest the ACLU of Southern California and Eric Preven (collectively, the ACLU) submitted a CPRA request to petitioners the Los Angeles County Board of Supervisors and the Office of the Los Angeles County Counsel (collectively, the County) for invoices specifying the amounts that the County of Los Angeles had been billed by any law firm in connection with nine different lawsuits "brought by inmates involving alleged jail violence." It also sought disclosure of service agreements between the County and two consultants and an "implementation monitor." The ACLU sought the documents to enable it to " 'determine what work was being done on the lawsuits, the scope of that work, the quality of the representation, and the efficiency of the work.' "

The County agreed to produce copies of the requested documents related to three such lawsuits, which were no longer pending, with attorney-client privileged and work product information redacted. It declined to provide billing statements for the remaining six lawsuits, which were still pending. It averred that the "detailed description, timing, and amount of attorney work performed, which communicates to the client and discloses attorney strategy, tactics, thought processes and analysis" were privileged and therefore exempt from disclosure under Government Code section 6254, subdivision (k), as well as under the CPRA's "catchall" exemption, Government Code section 6255, subdivision (a). It contended the service agreements were also protected by, inter alia, Business and Professions Code sections 6149 (which deems written fee contracts confidential communications) and 6148.

The ACLU filed a petition for writ of mandate in the superior court, seeking to compel the County to "comply with the [CPRA]" and disclose the requested records for all nine lawsuits. The ACLU averred: "Current and former jail inmates have brought numerous lawsuits against the County and others for alleged excessive force. The County has retained a number of law firms to defend against these suits. It is believed that the selected law firms may have engaged in 'scorched earth' litigation tactics and dragged out cases even when a settlement was in the best interest of the County or when a settlement was likely. Given the issues raised by the allegations in these complaints and the use of taxpayer dollars to pay for the alleged use of scorched earth litigation tactics, the public has a right and interest in ensuring the transparent and efficient use of taxpayer money." The ACLU argued that the billing records were not generally protected by the attorney-client or work product privileges, or by the Business and Professions Code sections, and did not fall within any of the statutory exceptions to the CPRA. The ACLU acknowledged that "to the extent that a particular billing description reflects an attorney's legal opinion and advice to the County, or reveals the attorney's mental impressions or theories of the case, such information may properly be redacted under the attorney-client privilege or work product doctrine." However, the ACLU

expected that such entries would be "few in number, and the remainder of an attorney's billing records is not protected from disclosure at all."

The County responded by reiterating that the billing records were protected by the attorney-client privilege; that the Business and Professions Code sections demonstrated information about financial arrangements and services was privileged and confidential; and that the billing records were protected from disclosure under the CPRA's catchall exemption.

In a thoughtful decision, the superior court granted the petition for writ of mandate insofar as it pertained to the billing records.[1] The court held that the County had failed to show the billing records were attorney-client privileged communications exempt from disclosure. It reasoned that Evidence Code section 952, which defines attorney-client privileged communications, "does not automatically apply to any communication between an attorney and his or her client." The party claiming the privilege must assert specific facts demonstrating how the challenged document qualifies as a privileged communication. In the court's view, the County had "not alleged any specific fact demonstrating why the billing statements, with proper redactions concealing actual attorney-client privileged communications or attorney work product, would qualify as privileged communications exempt from disclosure under Evidence Code section 952 . . . ." Further, the County had failed to produce any "actual evidence concerning the contents of the billing statements, including whether they were produced for a litigation-related purpose."

The court also rejected the County's argument that the billing statements should be considered confidential in light of Business and Professions Code sections 6148 and 6149. The court observed that Business and Professions Code section 6148, subdivisions

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1 By the time of the hearing below, the requests for two of the service agreements were no longer at issue. The superior court denied the ACLU's petition insofar as it sought the agreement between the County and the implementation monitor, and denied the ACLU's motion for reconsideration. Those rulings are not before us.

(a) and (b), describes what types of information should be included in fee agreements and billing statements, respectively. However, Business and Professions Code section 6149 deemed only fee agreements to be confidential communications for purposes of the attorney-client privilege. Applying the standard canons of statutory construction, the court concluded the Legislature did not intend the information in billing statements to be deemed confidential.

Finally, the court found the billing statements were not exempt from disclosure under the CPRA's "catchall" exemption, because the County had failed to demonstrate a clear overbalance in favor of nondisclosure justifying withholding the requested records.

Accordingly, the court ordered the County to release "all invoices issued by the County's outside attorneys in the nine cases specified" in the CPRA request. However, "[t]o the extent any documents that are responsive to the Requests reflect an attorney's legal opinion or advice, or reveal an attorney's mental impressions or theories of the case, such limited information may be redacted."

The County then filed the instant petition for writ of mandate, challenging the trial court's ruling. The Association of Southern California Defense Counsel, as amicus curiae, filed a letter in support of issuance of the writ. We issued an order to show cause.

DISCUSSION

1. *Standard of review*

A superior court's ruling under the CPRA, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is "immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." (Gov. Code, § 6259, subd. (c); *MinCal Consumer Law Group v. Carlsbad Police Dept.* (2013) 214 Cal.App.4th 259, 263-264; *Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, 708.) We independently review a trial court's interpretation of the CPRA and its application of the CPRA to undisputed facts, but uphold its express or implied factual findings if based on substantial evidence. (*County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 62 (*Anderson-*

Barker); *Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041, 1045; *Consolidated Irrigation Dist. v. Superior Court,* at pp. 708-709.)

2. *The statutes*

a. *The CPRA*

"The California Legislature in 1968, recognizing that 'access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state' (Gov. Code, § 6250), enacted the California Public Records Act, which grants access to public records held by state and local agencies (Gov. Code, § 6253, subd. (a))." (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 66-67 (*Long Beach Police*).) "As the result of an initiative adopted by the voters in 2004, this principle is now enshrined in the state Constitution: 'The people have the right of access to information concerning the conduct of the people's business, and therefore, . . . the writings of public officials and agencies shall be open to public scrutiny.' (Cal. Const., art. I, § 3, subd. (b)(1).)" (*International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 329 (*International Federation*).)

The CPRA's purpose is to increase freedom of information by providing public access to information in the possession of public agencies. (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425; *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370; *Anderson-Barker, supra,* 211 Cal.App.4th at p. 63; *Consolidated Irrigation Dist. v. Superior Court, supra,* 205 Cal.App.4th at p. 708.) To implement this policy, Government Code section 6253, subdivision (a) provides all persons with the right to inspect any public record maintained by state or local agencies, subject to various enumerated exemptions. (*Long Beach Police, supra,* 59 Cal.4th at p. 67; *Anderson-Barker*, at p. 63; *Consolidated Irrigation Dist.*, at p. 708.) The act "broadly defines ' "[p]ublic records" ' as including 'any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency . . . .' (Gov. Code, § 6252, subd. (e).)" (*Long Beach Police,* at p. 67; *Consolidated Irrigation Dist.*, at p. 708.) Here, it is undisputed that the County is such a

local agency, and that the billing records at issue are public records within the meaning of the CPRA.

The CPRA embodies a strong policy in favor of disclosure. (*Bakersfield City School Dist. v. Superior Court, supra,* 118 Cal.App.4th at p. 1045.) Because the CPRA furthers the people's right of access, it must be construed broadly. (Cal. Const., art. I, § 3, subd. (b)(2); *Anderson-Barker, supra,* 211 Cal.App.4th at p. 63.)

The people's right of access is not absolute, however. (*Humane Society of U.S. v. Superior Court* (2013) 214 Cal.App.4th 1233, 1254.) The CPRA contains over two dozen express exemptions. (Gov. Code, § 6254; *International Federation, supra,* 42 Cal.4th at p. 329; *Humane Society of U.S.*, at pp. 1254-1255.) "The 2004 initiative that amended the state Constitution to include a right of access to public records explicitly preserves such statutory exceptions. (Cal. Const., art I, § 3, subd. (b)(5).)" (*International Federation*, at p. 329, fn. 2.) The exemptions are to be construed narrowly. (*Humane Society of U.S.*, at p. 1254; *Anderson-Barker, supra,* 211 Cal.App.4th at p. 60.)

Relevant here is subdivision (k) of Government Code section 6254, which provides an exemption for "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Pursuant to this subdivision, documents protected by the attorney-client privilege are not subject to CPRA disclosure. (*Anderson-Barker, supra,* 211 Cal.App.4th at p. 64; *Roberts v. City of Palmdale, supra,* 5 Cal.4th at p. 370 ["By its reference to the privileges contained in the Evidence Code . . . the Public Records Act has made the attorney-client privilege applicable to public records"]; *Sanchez v. County of San Bernardino* (2009) 176 Cal.App.4th 516, 527 ["The Public Records Act does not require the disclosure of a document that is subject to the attorney-client privilege"].)

Additionally, Government Code section 6255, subdivision (a), sometimes referred to as the "public interest" or "catchall" exemption, allows a public agency to " 'justify withholding any record by demonstrating that . . . on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest

served by disclosure of the record.' " (*Long Beach Police, supra,* 59 Cal.4th at p. 67; *International Federation, supra,* 42 Cal.4th at p. 329; *Bakersfield City School Dist. v. Superior Court, supra,* 118 Cal.App.4th at p. 1045.) This provision contemplates a case-by-case balancing process, and the proponent of nondisclosure must demonstrate a "clear overbalance on the side of confidentiality." (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071.)

A public entity opposing disclosure bears the burden to show the requested information falls within the parameters of a specific exemption. (*Long Beach Police, supra,* 59 Cal.4th at p. 67; *International Federation, supra,* 42 Cal.4th at p. 329; *Anderson-Barker, supra,* 211 Cal.App.4th at p. 63; Gov. Code, § 6255, subd. (a) ["The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter"].) "Unless one of the exceptions stated in the Act applies, the public is entitled to access . . . ." (*International Federation,* at p. 329.)

b. *The attorney-client privilege*

The attorney-client privilege is embodied in Evidence Code section 950 et seq. and protects confidential communications between a client and his or her attorney made in the course of an attorney-client relationship. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732 (*Costco*); *Roberts v. City of Palmdale, supra,* 5 Cal.4th at p. 371.) " '[T]he fundamental purpose of the attorney-client privilege is the preservation of the confidential relationship between attorney and client [citation], and the primary harm in the discovery of privileged material is the disruption of that relationship . . . .' [Citation.]" (*Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1272.) 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*, at p. 732.) "[T]he public policy fostered by the privilege seeks to insure '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.]"

(*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599; *Roberts v. City of Palmdale,* at p. 380.) " 'Although exercise of the privilege may occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship. As [our Supreme Court] has stated: "The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence." [Citations.]' " (*Costco,* at p. 732.)

Evidence Code section 952 broadly defines "confidential communication." (*Fireman's Fund Ins. Co. v. Superior Court, supra,* 196 Cal.App.4th at p. 1273.) Section 952 provides that a confidential communication means "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence," by confidential means, and "includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." "The term 'confidential communication' is broadly construed, and communications between a lawyer and his [or her] client are presumed confidential, with the burden on the party seeking disclosure to show otherwise." (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557.) Discovery of a privileged communication is barred irrespective of whether it includes unprivileged material. (*Costco, supra,* 47 Cal.4th at p. 734.)

Where no enumerated exception applies (see Evid. Code, §§ 956-962), " '[t]he privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case.' [Citation.]" (*Costco, supra,* 47 Cal.4th at p. 732.)

3. *Are billing statements covered by the attorney-client privilege under California law?*

We begin our analysis with the dispositive question of whether billing statements qualify as privileged communications under Evidence Code section 952. While several cases have touched on the fringes of this question, none have squarely decided it.

In *Anderson-Barker,* a colleague of attorneys who represented the plaintiffs in a pending civil rights suit brought against the County made a CPRA request for billing records of law firms that represented the County in the lawsuit. The CPRA request sought the firms' invoices, attorney time records, and the County's payment records. (*Anderson-Barker, supra,* 211 Cal.App.4th at pp. 60-61.) The County asserted that the documents were attorney-client privileged and work product communications not subject to disclosure, and were also exempt under the CPRA's "pending litigation" exemption. (Gov. Code, § 6254, subd. (b);[2] *Anderson-Barker*, at p. 61.) The trial court ruled the documents were not attorney-client privileged communications. It ordered the records redacted to protect portions containing attorney work product, and ordered disclosure of the information that was " 'not work product—the hours worked, the identity of the person performing the work, and the amount charged.' " (*Anderson-Barker,* at p. 61.) The trial court concluded the CPRA's "pending litigation" exemption did not apply, because it pertained only to records specifically prepared for *use* in litigation. (*Id.* at p. 62.) The County challenged the latter aspect of the trial court's ruling via a writ petition, but did "*not* challenge the trial court's ruling with respect to the attorney-client and work product privileges." (*Ibid.*) The appellate court upheld the trial court's ruling that, given the narrow construction of CPRA exemptions, the pending litigation exemption did not apply because although the billing records related to the litigation, they were not specifically prepared for use in the litigation. (*Id.* at pp. 64, 67.) Here, the pending litigation exemption is not at issue; the County does not aver that the records fall within that exemption. Thus, because cases are not authority for propositions not considered (*McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626), *Anderson-Barker* does not answer the question before us.

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2 The pending litigation exemption excepts from disclosure records " 'pertaining to pending litigation to which the public agency is a party . . . until the pending litigation . . . has been finally adjudicated or otherwise settled.' " (*Anderson-Barker, supra,* 211 Cal.App.4th at p. 60; Gov. Code, § 6254, subd. (b).)

In *Smith v. Laguna Sur Villas Community Assn.* (2000) 79 Cal.App.4th 639, two condominium associations retained a law firm to bring a construction defect action against the developer. A dissident group of residents demanded to review the law firm's work product and legal bills. (*Id.* at p. 642.) The association objected that the documents were protected by the attorney-client and work product privileges. The appellate court affirmed the trial court's holding that the association was the holder of the attorney-client privilege and individual homeowners could not demand the production of privileged documents, except as allowed by the association. (*Id.* at p. 643.) *Smith* assumed without discussion that the legal bills in question were protected by the privilege. Again, because the case did not directly consider the issue, it does not answer the question before us.

The primary issue in *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, was whether a trial court could, when awarding attorney fees, rely on records not provided to the defendant. There, in several coordinated class actions, plaintiffs alleged that Party City improperly recorded zip code information during credit card transactions. After the trial court approved a settlement of the cases, the plaintiffs sought attorney fees. (*Id.* at pp. 1312-1314.) Party City opposed the motion on the ground the fees claimed were excessive and duplicative, among other things. (*Id.* at p. 1316.) The trial court requested detailed time records, which most of the class counsels had offered to provide, for in camera review. After considering the time records in camera, the court awarded the requested fees. On appeal, our colleagues in Division Seven agreed with Party City that it was improper for the court to rely upon billing information that Party City had no opportunity to challenge. (*Id.* at p. 1312.) In arguing against that conclusion, the plaintiffs had "suggest[ed] class counsel's billing records contain[ed] privileged information, thus justifying in camera review." (*Id.* at p. 1326.) *Concepcion* rejected this argument, explaining, "we seriously doubt that all—or even most—of the information on each of the billing records proffered to the court was privileged. Certainly the trial court made no such finding. Nor is there any explanation why the supplemental information requested by the court could not have been provided by filing—and serving on Party City—redacted copies of the bills deleting any privileged

information." (*Id.* at pp. 1326-1327.) While *Concepcion* was skeptical of the notion that the billing records were privileged on the wholly different facts of that case, the court offered no analysis of the basis for its view.[3]

Accordingly, we turn to analysis of Evidence Code section 952.

a. *A communication between attorney and client, arising in the course of representation for which the client sought legal advice, need not include a legal opinion or advice to qualify as a privileged communication.*

The trial court's written ruling suggests it believed that to establish the preliminary facts necessary to support a claim of attorney-client privilege, a party must do more than demonstrate that a document is a confidential communication between attorney and client, made in the course of the representation. It reasoned: "Evidence Code section

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3 The ACLU points out that the Ninth Circuit, and courts in other jurisdictions, have held the attorney-client privilege does not categorically protect billing records. (See, e.g., *Clarke v. American Commerce Nat. Bank* (9th Cir. 1992) 974 F.2d 127, 129-130 [under the federal common law, the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege; correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege]; *DiBella v. Hopkins* (2d Cir. 2005) 403 F.3d 102, 120 ["In New York, attorney time records and billing statements are not privileged when they do not contain detailed accounts of the legal services rendered"]; *Beavers v. Hobbs* (S.D. Iowa 1997) 176 F.R.D. 562, 565 [generally, billing records that do not reveal confidential information are subject to discovery and not protected by the attorney-client privilege]; *Tipton v. Barton* (Mo.App. 1988) 747 S.W.2d 325, 330-332.) Other non-California authorities hold differently. (See *State ex rel. Dawson v. Bloom-Carroll Local School Dist.* (Ohio 2011) 131 Ohio St. 3d 10 [959 N.E.2d 524, 529] [" 'While a simple invoice ordinarily is not privileged, itemized legal bills necessarily reveal confidential information and thus fall within the [attorney-client] privilege' "]; *Progressive American Ins. Co. v. Lanier* (Fla.App., 1st Dist. 2001) 800 So.2d 689, 690 [billing statements were absolutely privileged as attorney-client communications].) Because in California the attorney-client privilege is a creature of statute and governed by California law (see *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 206-209), these out-of-state authorities are of limited utility.

952 does not automatically apply to any communication between an attorney and his or her client. . . . Rather, the party claiming the privilege must assert specific facts, usually via declarations, demonstrating how the challenged document qualifies as a privileged communication." The ACLU takes this approach a step further, and avers that it is a "basic principle" that "communications that do not contain legal advice or opinion are not privileged." We disagree.

As noted, Evidence Code section 952 defines "confidential communication" for purposes of the attorney-client privilege. It states: "As used in this article, '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."

The parties disagree about the meaning of the final clause, "and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." The ACLU reads this phrase to mean that only communications containing legal advice or opinion qualify as confidential communications. The County, on the other hand, contends it means that a confidential communication includes, but is not limited to, a communication incorporating the lawyer's legal opinions or advice.

When interpreting a statute, our goal is to effectuate the Legislature's intent. (*Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 630; *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 677.) We begin with the plain, commonsense meaning of the language used by the Legislature. (*Riverside County Sheriff's Dept.*, at p. 630.) If the language is susceptible to more than one reasonable construction, we may look to extrinsic aids, such as the legislative history, the purpose of the statute, and public policy. (*Holland v. Assessment Appeals Bd. No. 1*

(2014) 58 Cal.4th 482, 490; *Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1107.) We avoid any construction that would lead to an unreasonable, impractical, or arbitrary result. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 388; *Roger Cleveland Golf Co., Inc.*, at p. 678.)

Here, the question is whether "includes" in the final clause of the statute is a requirement, or denotes examples of the types of information that may be included in a confidential communication. To the extent the statutory language is ambiguous, the County argues that the statute's legislative history suggests an answer. Evidence Code section 952 was enacted as part of the original Evidence Code in 1965, and replaced the former codification of the privilege in Code of Civil Procedure section 1881, subdivision 2. As originally enacted, the clause at issue stated "and includes advice given by the lawyer in the course of that relationship." (Stats. 1965, ch. 299, art. 3, pp. 1325-1326.) It was amended in 1967 to read "and includes a *legal opinion formed* and the advice given by the lawyer in the course of that relationship." (Stats. 1967, ch. 650, § 3, p. 2006, italics added.) This change has been explained as follows: " 'The comment of the Law Revision Commission to the 1967 amendment makes clear the scope of the amendment. "The express inclusion of 'a legal opinion' in the last clause will preclude a possible construction of this section that would leave the attorney's uncommunicated legal opinion—which includes his impressions and conclusions—unprotected by the privilege. Such a construction would virtually destroy the privilege." ' [Citation.]" (*Fireman's Fund Ins. Co. v. Superior Court, supra,* 196 Cal.App.4th at p. 1273; *Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 345 [the "express inclusion of a 'legal opinion' in the last clause of section 952 precludes inquiry into the lawyer's uncommunicated impressions and conclusions concerning the case"].) Thus, the County avers, the challenged language was not included to limit the privilege to only those communications encompassing the attorney's legal opinion; if a legal opinion was not part of the original definition of confidential communication, it cannot have been a required element. We agree. The Legislature's intent in amending Evidence Code section 952 was clearly not

to *restrict* privileged communications to those containing a legal opinion, but to *protect* uncommunicated opinions. Although the 1967 amendment does not definitively suggest what was intended by the original use of the phrase "includes advice given by the lawyer," the amended statute's use of the conjunctive "and" to link "a legal opinion formed" with "the advice given" does not readily suggest a communication is privileged only if it contains an attorney's advice. Certainly, nothing in the California Law Revision Commission's comments to Evidence Code section 952, as originally enacted, suggests such an intent. (See Cal. Law Revision Com. com., reprinted at 29B pt. 3A West's Ann. Evid. Code (2009 ed.) foll. § 952, pp. 307-308.)[4]

Moreover, we must construe Evidence Code section 952 to avoid absurd results and effectuate the Legislature's intent. As the County points out, the construction suggested by the ACLU would be problematic when a communication originates with the client. A client's letter or email to his or her attorney is unlikely to contain a legal opinion or legal advice, yet there is little doubt most such communications would fall within the statutory definition. Further, the "fundamental purpose behind the privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters." (*Mitchell v. Superior Court, supra,* 37 Cal.3d at p. 599; *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 912 [the "purpose of the attorney-client privilege is to enhance the effectiveness of our adversarial legal system by encouraging full and candid communication between lawyers and clients"].) These goals would not be furthered if clients and attorneys were uncertain whether their communications contained sufficient advice or opinion to qualify as confidential communications. Such a constricted view of Evidence Code section 952 would chill, rather than encourage, robust

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4 The Law Revision Commission's comments reflect the Legislature's intent in enacting Evidence Code section 952. (*Arellano v. Moreno* (1973) 33 Cal.App.3d 877, 884; Assem. Com. on Judiciary, Rep. on Assem. Bill No. 333 (1965 Reg. Sess.) 1 Assem. J. (1965 Reg. Sess.) p. 1712; Sen. Com. on Judiciary, Rep. on Assem. Bill No. 333 (1965 Reg. Sess.) 2 Sen. J. (1965 Reg. Sess.) p. 1573.)

discussion between clients and their lawyers. And, the ACLU's proposed construction of Evidence Code section 952 appears impractical in light of Evidence Code section 915. Unlike in many other jurisdictions, absent the client's consent, in California a trial court is generally not permitted to require disclosure of materials assertedly protected by the attorney-client privilege for in camera review in order to rule upon the claim of privilege. (*Costco, supra,* 47 Cal.4th at p. 736; *Citizens for Ceres, supra,* at p. 911.) Thus, if the parties disagree about whether communications are protected by the attorney-client privilege, it is unclear how their claims could be adequately adjudicated if resolution of the issue turned on the content of the disputed communications.[5]

In any event, the interpretation advanced by the ACLU does not comport with existing authority. "During the course of the attorney-client relationship, the protected communication may consist of information transmitted between a client and his lawyer, advice given by the lawyer, or a legal opinion formed and given by the lawyer in the course of that relationship." (*Benge v. Superior Court, supra,* 131 Cal.App.3d at p. 345; *Mitchell v. Superior Court, supra,* 37 Cal.3d at p. 601 [warnings to plaintiff from her attorney about the effects of chemical exposure were privileged even though they involved factual information as opposed to legal advice]; *People v. Bolden* (1979) 99 Cal.App.3d 375, 379 [Evidence Code section 952 "uses 'legal opinion' to specify one type of information protected"]; 2 Witkin, Cal. Evidence (5th ed. 2012) Witnesses, § 111, p. 409 ["The protected communication may be either 'information transmitted between a client and his or her lawyer' or 'advice given by the lawyer' " or " 'a legal opinion

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5 Of course, a litigant might be required to reveal some information in camera to enable the court to determine whether a communication is subject to the attorney-client privilege. (*Costco, supra,* 47 Cal.4th at p. 737.) Evidence Code section 915 "does not prohibit disclosure or examination of *other* information to permit the court to evaluate the basis for the claim" of privilege, such as whether the privilege is held by the party asserting it, whether the attorney-client relationship existed at the time the communication was made, or whether the client intended the communication to be confidential. (*Costco*, at p. 737.) And, a party is free to *request* an in camera review of the communications at issue to aid the court. (*Id.* at p. 740.)

formed' even though not communicated to the client"].) The ACLU cites no authority in which a communication between attorney and client, arising out of the attorney's legal representation of the client, was held to be outside the scope of Evidence Code section 952 because it did not contain a legal opinion or advice.

Costco compels rejection of the ACLU's position. There, Coscto retained a law firm to provide legal advice on whether some of its managers were exempt from California's wage and overtime laws. The firm's attorney, Hensley, confidentially interviewed two Costco managers, and, based in part on those interviews, produced an opinion letter for Costco. Subsequently, certain Costco employees filed a class action claiming that Costco had misclassified and underpaid its managers. In the course of that litigation plaintiffs sought to compel discovery of Hensley's opinion letter. Costco asserted the attorney-client privilege and the work product doctrine. Over Costco's objection the trial court ordered an in camera review of the opinion letter to determine the merits of Costco's claims of privilege. It subsequently ordered disclosure. Portions of the letter containing Hensley's impressions, observations, and opinions were redacted, but portions concerning factual information about various employees' job responsibilities were disclosed. (*Costco*, *supra*, 47 Cal.4th at pp. 730-371.)

The California Supreme Court held this was error: "the attorney-client privilege attach[ed] to Hensley's opinion letter in its entirety, irrespective of the letter's content." (*Costco*, *supra*, 47 Cal.4th at p. 731.) The court explained: "The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. [Citations.] Once that party establishes facts necessary to support a prima facie claim of privilege, 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 the communication was not confidential or that the privilege does not for other reasons apply." (*Id.* at p. 733.) "That Costco engaged Hensley to provide it with legal advice and that the opinion letter was a communication between Costco's attorney (Hensley) and Costco are undisputed. The letter was 'confidential,' defined as 'information transmitted between a

client and his or her lawyer in the course of [the attorney-client] relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons . . . .' " (*Ibid.*) "That Hensley's opinion letter may not have been prepared in anticipation of litigation is of no consequence; the privilege attaches to any legal advice given in the course of an attorney-client relationship." (*Ibid.*) Accordingly, Costco had made out a prima facie claim of privilege. (*Ibid.*)

The court went on to explain: "The attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication irrespective of whether it includes unprivileged material." (*Costco, supra*, 47 Cal.4th at p. 734.) Pointing to *Mitchell v. Superior Court, supra,* 37 Cal.3d 591, the court observed: " 'Neither the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between "factual" and "legal" information.' " (*Costco*, at p. 734.) "[W]hen the communication is a confidential one between attorney and client, the entire communication, including its recitation or summary of factual material, is privileged. . . . [If] the factual material referred to or summarized in Hensley's opinion letter is itself unprivileged it may be discoverable by some other means, but plaintiffs may not obtain it by compelling disclosure of the letter." (*Id.* at p. 736.)

Costco then turned to analysis of whether the trial court had erred by ordering in camera review of the letter. The court concluded such review was improper in light of Evidence Code section 915. (*Costco, supra*, 47 Cal.4th at pp. 736-739.) Significant for our purposes here, *Costco* reasoned: "[B]ecause the privilege protects a *transmission* irrespective of its content, there should be no need to examine the content in order to rule on a claim of privilege." (*Id.* at p. 739.)

Finally, the court disapproved an earlier decision, *2,022 Ranch v. Superior Court* (2003) 113 Cal.App.4th 1377. At issue there were communications transmitted to an insurer from in-house claims adjusters, who were also attorneys. The insurer claimed all the communications were privileged as involving legal advice from its attorneys, whereas the petitioner asserted the attorneys had been acting as claims adjusters, not counsel.

(*Costco, supra,* 47 Cal.4th at p. 739.) The appellate court had distinguished communications reporting the results of factual investigations from those reflecting the rendering of legal advice, and held only the latter were privileged. (*Ibid.*) *Costco* held this was error: "The proper procedure would have been for the trial court first to determine the dominant purpose *of the relationship* between the insurance company and its in-house attorneys, i.e., was it one of attorney-client or one of claims adjuster-insurance corporation . . . ." (*Id.* at pp. 739-740.) "If the trial court determined the communications were made during the course of an attorney-client relationship, the communications, including any reports of factual material, would be privileged, even though the factual material might be discoverable by some other means." (*Id.* at p. 740.)

Costco teaches that the proper focus in the privilege inquiry is not whether the communication contains an attorney's opinion or advice, but whether the relationship is one of attorney-client and whether the communication was confidentially transmitted in the course of that relationship. *Costco* did not state, when describing the requisite preliminary showing, that the party claiming the privilege had to show the communication contained an opinion, advice, or indeed any particular content; rather, the preliminary facts necessary were "a communication made in the course of an attorney-client relationship." (*Costco, supra,* 47 Cal.4th at p. 733.) *Costco* appears to have disapproved a content-based test for determination of the attorney-client privilege, in that it did not distinguish between the factual or legal aspects of the communications. Instead, the inquiry turned on whether there was an attorney-client relationship between the parties to the communication. Of course, in *Costco*, the communication at issue was an opinion letter, which by definition must have contained the attorney's legal opinions. But *Costco*'s analysis did not hinge upon this circumstance; instead, it made clear that the privilege protects a "*transmission* irrespective of its content." (*Id.* at pp. 739, 731.) *Costco* is therefore fatal to the claim that Evidence Code section 952 applies only to communications that contain a legal opinion or advice.

b. *Application here*

We turn, then, to the question of whether the County met its burden of establishing the preliminary facts necessary to support application of the privilege, that is, a communication made in the course of an attorney-client relationship. (*Costco, supra,* 47 Cal.4th at p. 733; see *Citizens for Ceres v. Superior Court, supra,* 217 Cal.App.4th at p. 911.) That the law firms in question were retained to provide the County with legal advice in the matters to which the invoices pertained is undisputed; indeed, the fact of the representation was the reason the ACLU made the CPRA requests. There is also no dispute that the invoices constituted information transmitted by the law firms to the County in the course of the representation. (See *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 123 [where underlying facts were undisputed, petitioners met their burden to show preliminary facts necessary to support a prima facie claim of privilege].)

Appended to the County's brief in answer to the petition below was the declaration of Roger H. Granbo, an Assistant County Counsel in the Law Enforcement Division of the Los Angeles County Counsel's Office. Granbo declared, under penalty of perjury, that his duties included supervising outside counsel in their representation of the County and other public agencies for which the Board was the governing body. His duties included processing billing invoices, and he was familiar with the manner of their processing. He believed such invoices were subject to the attorney-client privilege and kept "these documents and the information they contain, confidential." He further declared that "we make every effort to confine distribution of this material and information to our office alone, and to authorized representatives of the client, who are similarly required to keep the information confidential. That is our intent and policy as a general matter and in this particular matter." The trial court did not expressly rule on whether the declaration established the requisite confidentiality, but neither the court nor the ACLU appear to question its sufficiency. Thus, the invoices were confidential communications between attorney and client within the meaning of Evidence Code section 952.

The trial court's contrary ruling stated that the County had to do more than claim the documents were confidential, because "Evidence Code section 952 does not automatically apply to any communication between an attorney and his or her client." In support, the court cited *People v. Gionis* (1995) 9 Cal.4th 1196, 1210. The court was certainly correct that not all communications involving an attorney are ipso facto privileged. As *Gionis* explained: "We cannot endorse the . . . view that the attorney-client privilege applies whenever issues touching upon legal matters are discussed with an attorney. That has never been the law. Significantly, a communication is not privileged, even though it may involve a legal matter, if it has no relation to any professional relationship of the attorney with the client. [Citation.] Moreover, it is not enough that the client seek advice from an attorney; such advice must be sought from the attorney 'in his professional capacity.' " (*Id.* at p. 1210.) In *Gionis,* the defendant's statements to his friend, an attorney, were all made after the attorney had declined to represent him, and thus were not privileged. (*Id.* at pp. 1210-1212.) The privilege also does not apply "when the attorney acts merely as a negotiator for the client or is providing business advice [citation]; in that case, the relationship between the parties to the communication is not one of attorney-client." (*Costco, supra,* 47 Cal.4th at p. 735.) But none of these circumstances were present here. It is undisputed that the County engaged the law firms to represent it in the lawsuits, and the invoices arose from those very lawsuits.

The trial court's ruling also stated that the County had failed to assert specific facts demonstrating "how the challenged document qualifies as a privileged communication." Presumably, the trial court meant the County had to do more to show the content of the communications was privileged. However, as *Costco* explained, "because the privilege protects a *transmission* irrespective of its content, there should be no need to examine the content in order to rule on a claim of privilege." (*Costco, supra,* 47 Cal.4th at p. 739.) The court also reasoned that the County had failed to show how, with proper redactions, the billing statements would qualify as privileged communications. But, "when the

communication is a confidential one between attorney and client, the entire communication" is privileged. (*Id.* at p. 736.)

The ACLU argues that the CPRA must be broadly construed, and the exemptions to it must be narrowly construed. (Cal. Const., art. I, § 3, subd. (b)(2) [a statute "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access"]; *Anderson-Barker, supra,* 211 Cal.App.4th at p. 60; *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1262.) But, the CPRA expressly exempts from disclosure records that are privileged under the relevant provisions of the Evidence Code. The attorney-client privilege is also anchored in public policy (*Roberts v. City of Palmdale, supra,* 5 Cal.4th at p. 380; *Citizens for Ceres v. Superior Court, supra,* 217 Cal.App.4th at p. 913). As we have explained, the invoices in question fall within the express parameters of Evidence Code section 952. We may not disregard the plain application of the statute under the guise of narrow construction. A narrow construction of an exception that is a statutory privilege cannot reasonably be construed to be narrower than the scope of the privilege itself.

The ACLU also contends that public access to the billing records in question is a matter of utmost public importance. It urges that the "public has a right to know how its government is using—or misusing—taxpayer money, especially when that money is being used to defend against lawsuits relating to allegations of excessive force by County employees, which itself is of public interest." They point to authority observing that "[i]t is difficult to imagine a more critical time for public scrutiny of its governmental decision-making process than when the latter is determining how it shall spend public funds." (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955.) We agree that significant public interests are involved. But, as noted, our Supreme Court has observed that where the attorney-client privilege applies, disclosure may not be ordered, without regard to relevance, necessity or the particular circumstances of the case. (*Costco, supra,* 47 Cal.4th at p. 732.) And, while the invoices themselves are privileged, information that is not otherwise privileged does not become so merely by being transmitted to, or in this case from, an attorney. " ' "While the privilege fully covers

communications as such, it does not extend to subject matter otherwise unprivileged merely because that subject matter has been communicated to the attorney." ' " (*Id.* at p. 735; *Edwards Wildman Palmer LLP v. Superior Court* (2014) 231 Cal.App.4th 1214, 1234.) Therefore, to the extent the information the ACLU seeks is available in a nonprivileged source, the fact the invoices are privileged does not necessarily protect the information itself.[6]

Next, the ACLU urges that application of the attorney-client privilege to billing records will "wreak havoc with the procedures for seeking fees under state and federal fee shifting statutes. If an attorney's billing descriptions are categorically privileged, . . . statutes, cases, and courts' procedural requirements would, in effect, *require* prevailing parties to routinely violate the attorney-client privilege and work product doctrine to recover" fees to which they are entitled. We believe this concern is overstated. The Evidence Code provides an exception to the privilege when there has been a breach of duty arising out of the lawyer-client relationship. (See Evid. Code, § 958; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 227-228 ["It is an established principle involving the relationship of attorney and client that an attorney is released from those obligations of secrecy which the law places upon him whenever the disclosure of the communication, otherwise privileged, becomes necessary to the protection of the attorney's own rights"].) Detailed billing statements are not always necessary to support a fee award. (See *Concepcion v. Amscan Holdings, Inc., supra*, 223 Cal.App.4th at p. 1324, and authorities cited therein ["It is not necessary to provide detailed billing timesheets to support an award of attorney fees under the lodestar method"].) And, of course, a client is free to waive the attorney-client privilege, thereby allowing his or her attorneys to provide detailed time records when necessary to support a

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6 Because we conclude the attorney-client privilege precludes discovery of the billing records, we express no opinion as to whether the information contained in the billing records might be discoverable by some other means.

request for attorney fees. (See Evid. Code, § 912, subd. (a) [privilege is waived if the holder "has consented to disclosure made by anyone"].)

Because we conclude the County met its preliminary burden to show the requested records were confidential communications within the meaning of Evidence Code section 952, we grant the County's petition and order the superior court to vacate its order compelling disclosure. In light of our conclusion, we do not reach the parties' contentions regarding application of the CPRA's "catchall" exemption or Business and Professions Code sections 6149 and 6148.

DISPOSITION

The petition is granted. The superior court is directed to vacate its order compelling the County to disclose the records requested in the ACLU's July 1, 2013 CPRA request.

CERTIFIED FOR PUBLICATION

ALDRICH, J.

We concur:

EDMON, P. J.

KITCHING, J.

PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is Davis Wright Tremaine LLP, 505 Montgomery Street, Suite 800, San Francisco, California 94111-6533.

On May 26, 2015, I served the foregoing document(s) described as:

PETITION FOR REVIEW

on the interested parties in this action as stated below:

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☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on May 26, 2015, at San Francisco, California.

☒ State I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Marcus Hidalgo
Print Name


Signature

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