No. S226645

**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)

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# REPLY IN SUPPORT OF PETITION FOR REVIEW

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## INTRODUCTION

There can be no serious dispute that the Court of Appeal's published decision is unprecedented and contrary to the long-standing understanding of this and other California courts that attorney invoices are not privileged. For four decades, this understanding has formed the basis of this Court's fee motion jurisprudence, which requires careful examination of attorney time spent on a matter to support a fee award, and has been implicitly approved by the Legislature, as this Court recognized in *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1136. The County ignores this long line of cases, essentially conceding that it cannot refute them.

There also can be no serious dispute – and the County concedes (Answer at 9) – that the Court of Appeal should have asked whether the invoices were transmitted *for the purpose of the legal representation.* If the appellate court had asked that question, it would have reached a different result in this case. As former Chief Justice George explained in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 ("*Costco*"), properly interpreted, the attorney client privilege applies "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 (George, C.J., conc.). Attorney invoices, however, do not satisfy this requirement – and therefore must be disclosed under the California Public Records Act ("CPRA") – because their

dominant purpose is not for use in litigation. *County of Los Angeles v. Superior Court (Anderson-Barker)* (2012) 211 Cal.App.4th 57, 67 ("*Anderson-Barker*").

The Court of Appeal ignored this key limiting requirement and held that *all* communications made in confidence in the course of an attorney-client relationship are privileged, and absolutely exempt from disclosure, without regard to their content or purpose. *County of Los Angeles v. Superior Court* (2015) 235 Cal.App.4th 1154, 1173-1174 ("*County of Los Angeles*"); *see also id.* at 1174 ("*Costco* appears to have disapproved a content-based test for determination of the attorney-client privilege"). This is not the law in California, as even the County concedes. Answer at 9. The appellate Opinion vastly expands this Court's decision in *Costco* and must be corrected.

Contrary to the County's claim (Answer at 1), this case does not present a novel factual situation. For years, lawyers and their clients have freely submitted invoices to support or oppose fee motions. And for years, public records advocates have requested and received redacted copies of invoices reflecting attorney services billed to government agencies for payment by taxpayers. *E.g.*, June 9, 2015, a*micus* letter by Los Angeles Times Communications LLC and others, at 1, 3-4. The only novel aspect of this case is the appellate court's decision to deny the ACLU this information, which goes to the heart of the public's right to hold

government agencies accountable. As this Court explained in *Int'l Fed. of Professional & Technical Eng. Local 21 v. Superior Court* (2007) 42 Cal.4th 319, 334, "[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 finds."

The Court of Appeal paid no heed to this strong interest. It chose instead to eliminate the public's ability to monitor government spending in this fundamentally important area – which costs Los Angeles County taxpayers alone tens of millions of dollars each year (*e.g.*, II PE 5:352) – with ***no*** corresponding benefit to the government, other than the freedom to function in secret. At the same time, it adopted a rule that will wreak havoc on the fee motion process (which already demands too much time by overworked trial courts), by removing the court's ability to demand invoices to support fee motions, and injecting difficult privilege issues into fee motion adjudication. And it ignored the myriad of unforeseen consequences that will flow from extending the privilege far beyond the public policy interests that underlie the privilege. Even if the Court of Appeal is correct, and the problems created by its decision can be resolved, it is impossible to know how long it will take California courts to work their way through those problems, and how much ink will be spilled in the process. The ACLU, therefore, respectfully requests that the Court grant review and reverse the Court of Appeal's Opinion.

## THE COUNTY'S ANSWER BRIEF ONLY HIGHLIGHTS THE IMPORTANCE OF THIS COURT'S REVIEW

### A. The Court Should Grant Review To Ensure That Appellate Courts Follow The Constitutional Mandate To Narrowly Interpret Statutes That Limit Access To Public Records.

The County tries to defend the Court of Appeal's broad interpretation of the attorney-client privilege – contrary to the narrow interpretation requirement in Article 1, Section 3(b) of California's Constitution – by urging an interpretation that would render that constitutional provision meaningless. Answer at 17-18. Under the Constitution, "[a] statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." Cal. Const. Art. 1, § 3(b)(2). This constitutional mandate recognizes that many statutes – embodied both within and outside of the CPRA – exempt records from the CPRA's disclosure requirements, and it directs courts to narrowly interpret those statutes when the statutory language permits.

The fact that the Constitution preserves existing exemptions does not mean, as the County contends, that courts may ignore the Constitution in their interpretation of the applicable statute. Answer at 17. It means that if the statute is ambiguous – as Evidence Code § 952 is here – the Court must choose the most narrow interpretation available. This is simply one

application of the well-established rule that "'[i]f the rule's language,' when [] viewed in context, 'is clear and unambiguous, it governs.' ... If the rule's language is ambiguous, 'courts may consult appropriate extrinsic sources to clarify the drafters' intent.'" *In re Alonzo J.* (2014) 58 Cal.4th 924, 933 (citations omitted). The Constitution is the extrinsic source the Court of Appeal should have consulted in deciding whether to *expand* the scope of the attorney client privilege to reach a category of documents that no published California decision had previously held to be privileged.

This Court used that approach in *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157. There, as here, the Court interpreted a statute that limits the public's right of access to public records, Gov't Code § 6254.9. *Id.* at 167. The Court noted that "[i]f the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." *Id.* at 166 (citation omitted). The Court explained that in that case, its "usual approach to statutory construction [wa]s supplemented by" the constitutional directive to narrowly construe statutes that limit the public's right of access. *Id.* The Court rejected one possible interpretation of the exemption the public agency invoked – which the Court found was "not ***compelled*** by the ordinary meaning of" the statutory language (*id.* at 167 (emphasis added)) – and chose instead a narrow interpretation, that

expanded the public's right of access to public records. *Id.* at 170-171. The Court concluded:

> Any remaining doubt about the proper interpretation of section 6254.9 in this case is dispelled by the interpretive rule in article I, section 3, subdivision (b)(2), of the California Constitution.... ¶ To the extent that the term "computer mapping system" is ambiguous, the constitutional canon ***requires*** us to interpret it in a way that maximizes the public's access to information unless the Legislature has expressly provided to the contrary. As explained above, we find nothing in the text, statutory context, or legislative history of the term "computer mapping system" that allows us to say the Legislature ***clearly*** sought to exclude GIS-formatted parcel data from the definition of a public record when it can be disclosed without any accompanying software. Applying the interpretive rule set forth in article I, section 3, subdivision (b)(2) of the Constitution, we ***must*** conclude [that the records are not exempt from disclosure].

*Id.* at 175-176 (citation, internal quotes omitted; emphasis added).

The Court of Appeal did not follow this Court's directions from *Sierra Club*. Instead, in holding that "an exception that is a statutory privilege cannot reasonably be construed to be narrower than the scope of the privilege itself" (*County of Los Angeles*, 235 Cal.App.4th at 1176), the Court of Appeal essentially rendered the constitutional mandate meaningless. The Court was *required* to narrowly interpret the attorney client privilege because it limits the people's right of access to public records, and the Legislature has not *expressly* provided that attorney invoices are privileged. *See Sierra Club*, 57 Cal.4th at 166-167. To the contrary, as discussed in the Petition for Review and below, properly

interpreted, Evidence Code § 952 applies only to legal opinions, advice, and similar communications that are exchanged between attorney and client for the purpose of the legal representation, not to all communications that relate in some way to the subject of the representation, as the Court of Appeal held.

Finally, the cases the County cites to urge a liberal interpretation of the attorney client privilege support the ACLU, not the County, because they anchor the privilege to its purpose of protecting open communications between attorney and client – an interest that does not exist here. Answer at 16 (citing *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 380; *Musser v. Provencher* (2002) 28 Cal.4th 274, 283). In *Roberts*, the Court held that the privilege applies to communications between government agencies and counsel because of the need to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." 5 Cal.4th at 380 (citation omitted).

In *Musser*, the Court cited an appellate decision calling for liberal interpretation of the privilege. 28 Cal.4th at 283 (citing *Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4th 1537, 1545). *Kroll*, like *Roberts*, liberally construed the privilege to support the public policy of "promot[ing] a full and free relationship between the attorney and the client by safeguarding disclosures and advice." *Kroll*, 72 Cal.App.4th at 1545.

The invoices served a business purpose, and the County offered no evidence to the contrary. *See* III PE 6:726-727 (Granbo declaration); III PE 6:729 (Kim declaration). Because none of the policy reasons for liberally interpreting the attorney client privilege exists here, *Roberts*, *Musser* and *Kroll* provide no support for the County's position.

The Court of Appeal's dismissal of the constitutional mandate is flatly contrary to this Court's decision in *Sierra Club* and will dramatically weaken a guiding interpretive principle adopted a decade ago by a unanimous legislature and 83 percent of California voters. *See* Ballotpedia, California Proposition 59, the "Sunshine Amendment" (2004), available at http://ballotpedia.org/California_Proposition_59,_the_%22Sunshine_Amendment%22_(2004). This Court should grant review and ensure that California's appellate courts properly apply Article 1, Section 3(b).

## B. The Court Should Grant Review To Ensure That The Attorney Client Privilege Remains Limited To Documents That Are Communicated For The Purpose Of The Legal Representation.

### 1. The Court Of Appeal Overlooked The Limitation That The Privilege Only Applies To Information Transmitted For The Purpose Of The Legal Representation.

Both parties agree that "the purpose of the communication ... is critical to the application of the [attorney client] privilege" (Answer at 9 (citing *Costco*, 47 Cal.4th at 742 (George, C.J., conc.))), yet the Court of Appeal failed to apply this fundamental component of the privilege analysis. It erred, skewing California law, by interpreting the Court's

*Costco* decision as requiring nothing more than a showing that "the relationship is one of attorney-client and [] the communication was confidentially transmitted in the course of that relationship." *County of Los Angeles*, 235 Cal.App.4th at 1174 (citing *Costco*, 47 Cal.4th at 733). The Court should grant review to address this important question of law and resolve the conflict between the Court of Appeal's Opinion and the decision in *Anderson-Barker*, 211 Cal.App.4th 57.

As the ACLU explains in its Petition for Review, former Chief Justice George's concurrence addressed this question, which was not resolved in the majority opinion because the issue was not presented there. *E.g.*, Pet. at 2.[1] This component of the privilege analysis is essential to ensure that the attorney-client privilege does not become severed from the public policy that underlies the privilege. The Court of Appeal's published decision eliminates this requirement, fundamentally expanding the scope of the attorney client privilege in California, contrary to California law. None

[1] Thus, the ACLU does not argue "that the Court of Appeal erred by relying on *Costco*" and it *instead* should have relied on the concurrence, as the County claims. Answer at 11. As the ACLU explains in its Petition, "nothing about this Court's analysis in *Costco* suggests it should extend beyond documents and information that traditionally have been considered privileged." Pet. at 22. The document at issue in *Costco* – a legal opinion letter from attorney to client – clearly fell within the privilege and the public policy underlying the privilege, and so the majority did not have to address the issue raised by the concurrence. There is no conflict between the majority and concurring opinions.

of the County's responses should dissuade this Court from granting review. Answer at 12-13.

*First*, the County is simply wrong in arguing that the ACLU has improperly narrowed the scope of the privilege as recognized in Chief Justice George's concurrence. Answer at 12. As Chief Justice George explained in his concurrence, "[w]hen 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***." *Costco*, 47 Cal.4th at 743 (George, C.J., conc.) (emphasis added). The County plays with words in claiming that "neither the limiting phrase 'advancing the legal representation' nor the concept behind it appears" in the concurrence. Answer at 12. The "concept" indisputably appears in the concurrence, in its explanation that the privilege applies only to communications that are intended to solicit or relay "legal advice or representation."[2] Invoices do not even arguably fit into this category of information.

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[2] Contrary to the County's claim, the Court in *Costco* did not "expressly reject" the question of whether the "dominant purpose" of a communication can ever determine if the privilege applies. Answer at 10 n.4. *Costco* held that an *opinion letter* is privileged in its entirety. The Court disapproved *2,022 Ranch v. Superior Court* (2003) 113 Cal.App.4th 1377 to the extent it required *in camera* review of opinions, advice, and similar communications between an insurance company and its claims adjusters, who also were attorneys. *Id.* at 739-740. It said nothing to

Tellingly, the County provides no response to Chief Justice George's explanation that privileged communications are limited to those similar to attorney advice and opinions under the doctrine of *ejusdem generis*, which provides that "the general term ordinarily is understood as being restricted to those things that are similar to those which are enumerated specifically." 47 Cal.4th at 743 (George, C.J., conc.). *See* Pet. at 24. This principle is well established in California law. As the Court held in *Sierra Club*, "[w]hen a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. In accordance with this principle of construction, a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list." 57 Cal.4th at 169 (citing *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1011-1012). The County does not and cannot claim that invoices are similar in nature and scope to attorney opinions and advice.

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suggest that its analysis should apply beyond such paradigmatic attorney-client communications. *See also Costco*, 47 Cal.4th at 743 (George, C.J., conc.) (the Court's analysis in *Roberts*, 5 Cal.4th at 371, "was not restricted to an examination of the purpose of the attorney-client relationship, but rather considered whether the nature of the communication itself fell within the bounds of the statute")

*Second*, the County also is wrong in arguing that the invoices at issue here satisfy the requirement recognized in Chief Justice George's concurrence. Answer at 12-13. As the ACLU explains in its Petition, this argument was squarely refuted by the Second District Court of Appeal in *Anderson-Barker*, 211 Cal.App.4th at 67, which recognized that invoices have a business purpose and are not communicated for use in the litigation. Pet. at 24-25. The County's connect-the-dots attempt to convince the Court that invoices are protected by the attorney client privilege ignores this fundamental point. There can be no dispute that the invoices at issue here – as with most invoices – were sent to procure payment, not to seek or deliver legal advice or representation. Neither of the County's declarants claims to the contrary. *See* III PE 6:726-727 (Granbo declaration); III PE 6:729 (Kim declaration); *see also* II PE 5:588-589 (testimony regarding preparation of invoices in different case, with no suggestion that they were intended to convey legal advice or opinion).

*Third*, the County ignores the facts of this case to argue that invoices may convey information that reflects an attorney's tactics, strategy or opinions. Answer at 13-14. Even if this is true, there is no evidence that the invoices at issue here contained such information, or that the information could not be redacted as needed to protect privileged information. In litigation, much of the work done will be disclosed on the court docket, or in communications between counsel. The few entries that

have not already been revealed outside of the attorney-client relationship can be redacted, as the County has done in the past. *E.g.*, II PE 5:595-III PE 5:684 (samples of fee invoices to County in other matters, with minimal redactions); II PE 5:588 (declaration of outside counsel).

More fundamentally, the County's argument misses the point of ACLU's Petition for Review. The Court of Appeal held that all invoices are privileged so long as they are communicated confidentially between attorney and client. *County of Los Angeles*, 235 Cal.App.4th at 1174. It did not analyze the facts of the case – which would have led it to a different conclusion – and instead read this Court's *Costco* decision as broadly applying the privilege to all such communications, without regard to their content or purpose. *Id.* at 1173-1174. This expansion of the attorney-client privilege will apply without regard to the facts of the particular case. This Court's review is necessary to ensure that the appellate court's Opinion does not rewrite privilege law.[3]

[3] The County attacks a straw man in claiming that review should be denied because the privilege extends to factual matters communicated between lawyer and client. Answer at 10. The ACLU agrees, and does not raise this as an issue for review. Pet. at 19-20. This principle supports the ACLU, because the Court's reason for extending the privilege to factual matters focused on the policy reasons underlying the privilege – to protect the transmitter's intended strategy. *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 600. Again, that policy is not implicated here.

### 2. The Problems That Will Flow From The Appellate Court's Opinion Demonstrate The Need For This Court's Review.

The County tries to derail this Court's review by dismissing the problems that will result from the Court of Appeal's Opinion. Answer at 18-21. The many *amicus* letters supporting review that already have been sent to the Court amply refute the County's arguments. *See, e.g., amicus* letter submitted by Los Angeles County Bar Association, dated June 18, 2015 (urging review because Court of Appeal's Opinion will "create inefficiencies in the adjudication of attorney fee motions," which will deny trial courts information they need to decide a difficult question). The widespread concerns about the appellate Opinion indisputably support this Court's review because they demonstrate the importance of the issue presented. None of the County's arguments should dissuade this Court from granting review.

*First*, in arguing that clients will waive the privilege, and that any problems can be resolved by retainer agreements (Answer at 18-20), the County ignores the cases in which fee disputes did arise between attorneys and their clients. *See, e.g.*, Pet. at 32 (citing *Flannery v. Prentice* (2001) 26 Cal.4th 572, 590; *Lindelli v. Town of San Anselmo* (2006) 139 Cal.App.4th 1499). Plainly, disputes arise between contracting parties and demand the use of scarce judicial resources. Injecting difficult privilege issues into the fee resolution process will make a hard job for trial courts even more

challenging. And while the County may be correct that most attorneys will adjust by including appropriate language in their retainer agreements, there can be little doubt that many disputes will arise for resolution by busy trial courts before that practice becomes uniform.

*Second*, the County also overlooks the fact that trial courts and fee motion opponents currently can compel disclosure of fee information that a fee movant may not want to disclose, so that they can better evaluate and oppose the fee request. *See* Pet. at 33-34 (citing *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1325-1326). The Court of Appeal's Opinion invites gamesmanship by giving fee movants *carte blanche* to reject these demands when they have something to hide, protected by a privilege that they cannot be forced to waive.

*Finally*, if the ACLU is correct that the Court of Appeal erred – and, as demonstrated in the Petition for Review and above, it is – the appellate court's Opinion has created significant problems that the Legislature never intended. Tellingly, the County ignores this Court's fee motion jurisprudence and the Legislature's implicit approval of that long line of cases, both of which demonstrate that the Legislature never intended the privilege to extend to attorney invoices. *See* Pet. at 26-30. The ACLU does not argue that the Court should create an exception to the attorney client privilege, as the County contends. Answer at 21. The ACLU urges this Court to grant review and hold that the privilege does not apply to

attorney invoices in the first instance, because they are not communicated "for the purpose of seeking or delivering the lawyer's legal advice or representation." *Costco*, 47 Cal.4th at 743 (George, C.J., conc.).

## CONCLUSION

The County's Answer raises more questions than it answers. It interprets Article 1, Section 3(b) of California's Constitution as being essentially meaningless, contrary to this Court's decision in *Sierra Club*, which made clear that the Constitution's narrow-construction mandate is a rule of statutory interpretation that courts must follow. 57 Cal.4th at 175-176. The Court of Appeal's conclusion that Article 1, Section 3(b), has no impact *at all* on statutory privileges (235 Cal.App.4th at 1176), plainly misconstrues California law.

In addition, the County agrees with the ACLU that "an important element of the attorney-client privilege" is whether the communication relates "to the *purpose* for which the lawyer was hired" (Answer at 9), and it provides no meaningful response to ACLU's explanation that the Court of Appeal overlooked this key component in its Opinion. Indeed, the Court of Appeal's published Opinion concluded that a communication is privileged, irrespective of its content, so long as "the relationship is one of attorney-client and [] the communication was confidentially transmitted in the course of that relationship." *County of Los Angeles*, 235 Cal.App.4th at

1174. This is flatly contrary to the recognition by both parties that some analysis of the content and purpose of the communication is required.

The appellate Opinion has skewed California law in two important ways. This Court should grant review and ensure that the Court of Appeal's Opinion does not become law in California.

Thus, for all of the reasons enunciated in the Petition for Review and above, the ACLU respectfully requests that the Court grant its Petition for Review.

Respectfully submitted this 25th day of June, 2015

ACLU FOUNDATION OF
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## 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 Reply in Support of 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 4,001 words, including footnotes, but excluding the caption, tables, this certificate, and signature blocks.

Dated: June 25, 2015

DAVIS WRIGHT TREMAINE LLP

By: _____
Colin D. Wells

## 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 June 25, 2015, I served the foregoing document(s) described as:

**REPLY IN SUPPORT OF 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 San Francisco, 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 June 25, 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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