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)

OPENING BRIEF ON THE MERITS OF REAL PARTIES IN INTEREST ACLU OF SOUTHERN CALIFORNIA AND ERIC PREVEN

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I. 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 exempt from disclosure under the California Public Records Act, even with all references to attorney opinions, advice and similar information redacted?

II. SUMMARY OF ARGUMENT

The attorney-client privilege long has been recognized in California to ensure that lawyers and clients can communicate freely with each other, and that clients need not fear that information they reveal to their lawyer, or their lawyer's advice to them, will be subject to compelled disclosure. By protecting these communications, California advances the "social good derived from the proper performance of the functions of lawyers acting for their clients," which "is believed to outweigh the harm that may come from the suppression of the evidence in specific cases." Motion for Judicial Notice ("MJN") Ex. A at 1282.[1] This legislative intent lies at the heart of the decisions of this and other courts interpreting the attorney-client privilege in California. *E.g.*, *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599. It helps to define the scope of the communications protected by

[1] California Law Rev. Comm'n, "Tentative Recommendation and a Study relating to The Uniform Rules of Evidence; Art. V. Privileges," Feb. 1964, at 381.

the privilege. *E.g.*, *id.* at 600 (privilege protects information transmitted between attorney and client because fact of transmission "might very well reveal the transmitter's intended strategy").

The Court of Appeal in this case, however, did not pay heed to the reason that California grants an *absolute* privilege to certain attorney-client communications, and the limitations on the privilege inherent in that legislative intent. In a published opinion, the Court held that *everything* transmitted between lawyer and client is absolutely privileged, so long as it "arose" from the matter on which the lawyer was retained, and was transmitted in confidence. Court of Appeal Opinion ("Op.") at 19, 21. In doing so, the Court rejected the California Public Records Act ("CPRA")[2] request sent by Petitioners ACLU of Southern California and Eric Preven (collectively, "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 exempt from disclosure.

The Court of Appeal erred, and its decision should be reversed. Initially, the appellate opinion largely ignores the constitutional mandate that courts narrowly construe statutes that limit the public's right of access to public records. Cal. Const. Art. I, § 3(b). As this Court recently held,

[2] Gov't Code § 6250, *et seq.*

this constitutional mandate means that "all public records are subject to disclosure unless the Legislature has *expressly* provided to the contrary." *See Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 166-167 ("*Sierra Club*") (ordering disclosure of database of information about land parcels). Thus, California courts may not exempt public records from disclosure unless the Legislature clearly intended to withhold those records from the public. *Id.* at 175-176. Section IV.A., *infra.*

The Legislature never intended the broad privilege that the Court of Appeal adopted here. In expansively interpreting the attorney-client privilege, the appellate court severed the privilege from its purpose of ensuring free communication of information, advice and opinions between lawyer and client. Section IV.B.1., *infra.* It also overlooked the legislative history underlying Evidence Code § 952, which establishes a legislative intent to protect information relayed to advance the purpose of the legal representation, but *not* information relayed for other reasons, such as to advance a business purpose. Section IV.B.2., *infra.*

Contrary to the narrow construction required by the Constitution, the Court *broadened* the scope of Evidence Code § 952 to include information that no published California decision previously has held to be absolutely privileged, and which many decisions have concluded is not privileged. Indeed, barely a month ago, this Court explained that "[i]f privileged information ... is included in counsel's billing records [at issue

in the case], it can be redacted for purposes of assessing whether counsel's bills are reasonable." *Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C.* (2015) 61 Cal.4th 988, 1005-1006 ("*Hartford*"). *See also Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1327 ("*Concepcion*") (privilege claim did not exempt attorney billing records from disclosure because they could be redacted to remove protected information); *see also 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).

The Court of Appeal rejected *Concepcion* and *Anderson-Barker* as inapposite (Op. at 10-12), but in doing so it 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 of Appeal believed that its decision was required by this Court's decision in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 741-744 ("*Costco*"). But in *Costco*, the Court held that the archetypal form of privileged information – an opinion letter from lawyer to client – was protected from disclosure. This Court's decision in *Costco* did not purport to reach documents such as invoices, which routinely are voluntarily and coercively disclosed in California courts. Section IV.B.3., *infra*.

The Court's holding that legal invoices are absolutely privileged 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. For decades, California courts have been required to anchor their fee awards in a lodestar, calculated based on careful review of attorney time spent on a matter and whether the time spent was reasonable in light of the results achieved. *E.g.*, *Serrano v. Priest* (1977) 20 Cal.3d 25, 48-49 ("*Serrano III*"); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131-1137. This long line of cases will be upended if attorney invoices are absolutely privileged and fee movants have complete discretion in deciding whether to submit them to the court. Section IV.B.4., *infra*.

The Court of Appeal dismissed these concerns, 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. Op. at 23-24. 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 would 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*, 223 Cal.App.4th at 1325 (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*, 37 Cal.3d at 602-603. Section IV.B.5., *infra*.

The appellate opinion exalts form over substance. The Court of Appeal 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. Every year, the County spends tens of millions of dollars defending against detainee abuse cases. II PE 5:351-360. But under the Court of Appeal's opinion, the public cannot 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 lawyers representing the agency 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. Section IV.C, *infra*.

The Court of Appeal's expansion of the attorney-client privilege would create tremendous uncertainty for trial courts and litigants as they struggled to apply the new, incorrect standard. It would 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). The ACLU, therefore, respectfully requests that the Court reverse the Court of Appeal's Opinion and order that Court to deny the County's petition for writ of mandate.

III. FACTUAL AND PROCEDURAL BACKGROUND

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 Sheriff's officials 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.[3]

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

C. The Trial 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 trial court granted the ACLU's

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

petition,[4] holding 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 concluded 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 reveal an attorney's mental impressions or theories of the case, such limited information may be redacted." *Id.* at 778.

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

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. Op. at 25. 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 2. 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 from lawyer to client so long as they "arose" from the matter on which the lawyer was retained, and were transmitted in confidence – and not only those containing a legal opinion or advice. *Id.* at 16-17.

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 19 (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. This Court granted review on July 8, 2015, on the single issue raised by the Petition.

IV. THE ATTORNEY CLIENT PRIVILEGE DOES NOT EXTEND TO ATTORNEY INVOICES

The Court of Appeal's broad construction of Evidence Code § 952, denying the ACLU access to *redacted* attorney invoices, is contrary to the narrow construction required by the California Constitution and the CPRA, and ignores the fact that for decades, this Court's fee motion jurisprudence has treated this information as unprivileged. 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 651).

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 provision 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*, 57 Cal.4th at 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 exempt from non-exempt information, and disclose everything that is not exempt. *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 (documents relating to settlement agreement not exempt 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 (documents relating to approval of rate increase under an exclusive contract not exempt 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. The billing records at issue here will contribute meaningful information to 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 public benefit. II PE 5:424. The County also has been accused of refusing reasonable settlements, only to have juries award large judgments to plaintiffs after costly trials. *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 dismissed this rule

of statutory construction because the invoices purportedly "fall within the express parameters of Evidence Code section 952." Op. at 22. It reasoned that "[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." *Id.* But in so holding, the Court missed the point.

As this Court explained in *Sierra Club*, "[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." 57 Cal.4th 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: "we find nothing in the text, statutory context, or legislative history of the term [at issue] that allows us to say the Legislature ***clearly*** sought to exclude [the records at issue] from the definition of a public record .... 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 (citations omitted; emphasis added).

The Court of Appeal acknowledged that its interpretation expanded Section 952 to reach a type of information – attorney invoices – that no California court had previously held to be privileged. Op. at 9. 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.4, *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.3, *infra*.

The Court of Appeal's opinion mentions but does not apply the narrow construction requirement in Article 1, Section 3(b). Contrary to this Court's direction in *Sierra Club*, the opinion overlooks interpretations that would narrow the reach of the attorney-client privilege, and instead *expands* the 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 Attorney-Client Privilege Is Contrary to the Language of the Statute, its Legislative History, and 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 an opinion letter – the document at issue in *Costco* – 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. 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*, 37 Cal.3d at 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). 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).

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." *Mitchell*, 37 Cal.3d at 600. However, 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)).

California's appellate courts, including this Court, have expressed their understanding that invoices are not privileged, although they may contain privileged information that counsel are entitled to redact. *See Hartford*, 61 Cal.4th at 1005-1006 ("[i]f privileged information on these subjects is included in counsel's billing records, it can be redacted for purposes of assessing whether counsel's bills are reasonable" (citing *Concepcion*, *Banning*); *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); *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 454 (rejecting claim that bills submitted by opposing party in child custody dispute that were redacted to protect privileges "left

him unable to challenge the reasonableness of the fees"); *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, as these cases held, billing records that contain legal advice or reveal an attorney's mental impressions or theories may be redacted to protect 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. And to the extent that a time entry implicitly reveals 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. The Legislature Did Not Intend the Broad Privilege Advocated by the County.

The legislative history of the attorney-client privilege in California establishes that the Legislature never intended the definition of "confidential communication" to extend to every word or writing exchanged between lawyer and client, regardless of content, context or purpose. The privilege has a long tradition in this State, dating back at least to its codification in 1872 as former Code Civ. Proc. § 1881. While the privilege has been amended many times – including the legislation that adopted an Evidence Code in California, and moved the privilege to Evidence Code § 950, *et seq.* – the scope of the privilege as it relates to the issue before this Court has remained largely unchanged.

As originally codified, the attorney-client privilege was defined as follows:

> 2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

Motion for Judicial Notice ("MJN") Ex. A at MJN001283 n.2 (fmr. Code Civ. Proc. § 1881, subd. 2). Although the statute at the time did not specifically define "communication," the language limited the scope of protected communications to (1) those made by the client to his or her attorney, and (2) the attorney's *advice* to the client "in the course of professional employment." *Id.* Between 1872 and 1965, the language

codifying the attorney-client privilege remained virtually unchanged and intact, except for an extension of the privilege to include the attorney's secretary, stenographer or clerk. MJN Ex. A at MJN001282-MJN001283.

In January 1965, Assembly Bill 333 was introduced to adopt an Evidence Code in California. MJN Ex. A at MJN000003-MJN000050. Leading up to the new bill, the California Law Revision Commission had spent several years researching and drafting a proposed Evidence Code based in large part on the Revised Uniform Rules of Evidence at the time. MJN Ex. A at MJN001051.[5] The Commission proposed to add an updated version of the attorney-client privilege to the newly-enacted Evidence Code. MJN Ex. A at MJN001056-MJN001059, MJN001075-MJN001076.

The Evidence Code § 952 language that was proposed by the Commission and introduced in January 1965 was virtually identical to the language from Revised Uniform Rules of Evidence § 26(1)(b), although former Code of Civil Procedure § 1881(2) also was cited as a substantive source for the statutory language. MJN Ex. A at MJN000017, MJN001075, MJN001116, MJN001213, MJN001282-MJN001283. In the entire history of study and preparation leading up to the Commission's proposal of the

[5] The California Law Review Commission was directed by the Legislature to study "whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference." MJN Ex. A at MJN001051.

new Evidence Code in January 1965, the Commission neither discussed nor proposed substantive changes to the original iteration of the attorney-client privilege as embodied in former Code of Civil Procedure § 1881(2). *See, e.g.*, MJN Ex. A at MJN001282-MJN001292.

The new code section read as follows:

> 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 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 advice given by the lawyer in the course of that relationship.

MJN Ex. A at MJN000255.

The Law Review Commission Report reflected the intent of that body – which was adopted by the Legislature (MJN Ex. A at MJN000281-MJN000282) – that the definition of "confidential communication" would not extend to all communications between lawyer and client. MJN Ex. A at MJN001283. Importantly, the Report recognized a different level of protection depending on whether the lawyer or the client communicated the information, explaining that both rules giving rise to the proposed Evidence Code § 952 "cover 'communications' by the client to the lawyer. *Both also*

cover the lawyer's 'advice' to the client." *Id.* (emphasis added).[6] In addition, the Report explained that "[b]oth rules *require as a condition of privilege that the client's communication and the lawyer's advice be in the course of the professional lawyer-client relationship.*" *Id.* (emphasis added). Finally, "the section is limited by construction to confidential communications." *Id.*

The Report made clear that, as is relevant here, prior California law interpreting the privilege "would in no way be affected." *Id.* at MJN001285. The Report explained:

> As stated in *Ferguson v. Ash* [(1915) 27 Cal.App. 375], the governing principle is as follows:
>
> > There are many cases in which an attorney is employed in business not properly professional and where the same might have been transacted by another agent. In such cases the fact that the agent sustains the character of an attorney does not render the communication attending it privileged and that may be testified to by him as by any other agent.
>
> The application of this standard has produced a considerable body of precedent. If Rule 26 were adopted, these cases would be germane to the question of what constitutes communication "in the course of [lawyer-client] relationship" in the sense of Rule 26.

Id. (footnotes omitted). Through these discussions of the scope of the privilege, the Law Review Commission – and the Legislature that adopted

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[6] As discussed below, the statute was amended in 1967 to clarify that the privilege also protects attorney opinions not yet communicated to the client.

its recommendations – made clear that when applied to communications by a lawyer, the privilege should be limited to communications made in his or her role as a lawyer, and should *not* extend to communications made for a business purpose.

Assembly Bill 333 was revised five times before it was passed in May 1965. MJN Ex. A at MJN000003-MJN000277. However, the statutory language and comments first introduced as Section 952 remained unchanged throughout the legislative process and were enacted as such. MJN Ex. A at MJN000017, MJN000066, MJN000104, MJN000142, MJN000180, MJN000218, MJN000255-MJN000256. The legislative history consistently declared that the new statute was intended to effect *no change* in the prior law, other than in discrete areas not at issue here. MJN Ex. A at MJN000339, MJN000345, MJN000465, MJN001056, MJN001075-MJN001076, MJN001292- MJN001293. Thus, although the language defining a confidential communication changed with the 1965 bill, the substantive meaning remained the same. The language from former Code of Civil Procedure § 1881 and Evidence Code § 952 as adopted in 1965 both limited the privilege to confidential communications between client and lawyer "in the course of" the professional relationship.

In 1967, the language in Evidence Code § 952 was amended again for the narrow purpose of precluding "a possible construction of this section that would leave the attorney's uncommunicated legal opinion ...

unprotected by the privilege." MJN Ex. B at MJN001495. The amendment added the phrase "a legal opinion formed and the" after the word "includes" in Section 952. MJN Ex. B at MJN001366, MJN001495. The analysis by the Senate Committee on Judiciary explained that "[t]he suggested amendments to [Evidence Code §§ 952, 992 and 1012] would also protect a professional opinion or diagnosis that has been formed on the basis of the protected communications." MJN Ex. B at MJN001373. This sentiment was echoed by the Assembly Committee on Judiciary. MJN Ex. B at MJN001391. The legislative history for the 1967 amendment does not indicate any legislative intent to expand the attorney-client privilege, other than in this narrow respect.

The import of this early legislative history is clear. Nothing in the history of the 1965 or 1967 bills suggests that the privilege was intended to change the attorney-client privilege law as it had been interpreted by California courts for decades, so that it would cover all communications between lawyer and client, regardless of their content, context or purpose. The Legislature did not adopt such a broad privilege. Assembly Bill 333 merely modernized the privilege by incorporating it in the newly-adopted Evidence Code. Thus, cases interpreting the attorney-client privilege prior to 1965 remain relevant and reflective of legislative intent.

3. 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. Op. at 19. It erred because as the Court acknowledged but incorrectly dismissed as irrelevant (*id.*), *Costco* involved an attorney opinion letter, which is the paradigmatic 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 the privilege to reach documents that were not transmitted for the purpose of advancing the legal representation. *Costco*, 47 Cal.4th 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).

Chief Justice George 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 cases cited in the concurrence demonstrate that before the enactment of Section 952, this Court repeatedly held that a communication was privileged only if it was "made for the purpose of seeking or delivering the lawyer's legal advice or representation." *Costco*, 47 Cal.4th at 743 (C.J. George, concurring). For example, in *McKnew v. Superior Court of San Francisco* (1943) 23 Cal.2d 58, 65-66, the Court explained that former Code of Civil Procedure § 1881 "expressly relates only to communications

made to an attorney 'in the course of professional employment.'" Based on this interpretation, the Court held that a conversation witnessed by an attorney was not privileged because the evidence showed that the client "neither asked [the attorney] for any legal advice nor did [the attorney] purport to give [the client] any legal advice respecting the transaction here involved." *Id.*

Similarly, in *Solon v. Lichtenstein* (1952) 39 Cal.2d 75, 79-80, the Court held that a communication which "had no relation to any 'professional employment' of [the attorney] by the deceased ... or his status as an attorney" was not privileged because to be privileged, a communication "must have been made to an attorney acting in his professional capacity toward his client." *Id.* at 80. *See also Carroll v. Sprague* (1881) 59 Cal. 655, 660 (conversation regarding property was not privileged because the party asserting the privilege failed to present any evidence as to "whether any professional counsel, advice, or aid had been solicited or given in relation to this particular property"); *Satterlee v. Bliss* (1869) 36 Cal. 489, 509 (statements made by an attorney were not privileged because his knowledge about the events at issue was not acquired "through any confidential communication. Knowledge acquired

during the time he is attorney is not privileged, unless it is acquired in the course *and for the purposes* of his employment" (emphasis added)).[7]

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

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[7] *See also Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1, 32 (communications between lawyer and client in connection with labor negotiations "were not privileged unless the dominant purpose of the particular communication was to secure or render legal service or advice"); *Chicago Title Ins. Co. v. Superior Court* (1985) 174 Cal.App.3d 1142, 1151 ("It is settled that the attorney-client privilege is inapplicable where the attorney merely acts as a negotiator for the client, gives business advice or otherwise acts as a business agent"); *Ong v. Cole* (1920) 46 Cal.App. 63, 72-73 (adopting the following rule for attorney-client privilege: "'(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relevant to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected from disclosure by himself or by the legal adviser, (8) except the client waives the protection'" (quoting Wigmore, Evidence Sec. 2292)).

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 that were 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 – although the particular facts of this case should not matter in analyzing the "dominant purpose" of attorney invoices. *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 expanded the attorney client privilege in California. Its decision is flatly contrary to *Anderson-Barker* and former Chief Justice George's concurrence in *Costco* and the many cases cited there, as well as California's Constitution. It should be reversed.

4. 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*, 24 Cal.4th 1122, 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.

The Court's decision issued barely a month ago in *Hartford*, 61 Cal.4th 988, underscores the importance of ensuring that billing records remain available to help courts determine the reasonableness of counsel's fees. There, the Court held that an insurer could sue Cumis counsel directly for reimbursement of defense fees and costs pursuant to a court order that preserved the insurer's right to recover "unreasonable and unnecessary" amounts billed by counsel. *Id.* at 998-1000. In doing so, the Court rejected the argument that a direct claim would interfere with counsel's independence, explaining that "[i]n numerous settings in our legal system, the attorneys representing their clients know they will later have to justify their fees to a third party – including cases brought under fee-shifting statutes, class action settlements, probate, and bankruptcy." *Id.* at 1002 (citation omitted).

Implicitly rejecting the County's arguments here, the Court also explained that a direct claim would not interfere with the insured's attorney-client privilege because "an objective assessment of the litigation as a whole to determine whether counsel's bills appear fundamentally reasonable is unlikely to involve an examination of individual attorney-client communications or the minute details of every litigation decision." *Id.* at 1005. And "*[i]f privileged information on these subjects is included in counsel's billing records, it can be redacted for purposes of assessing whether counsel's bills are reasonable.*" *Id.* at 1005-1006 (citations

omitted; emphasis added). Thus, the Court recognized that invoices are not privileged in their entirety, although they may contain privileged information that can be redacted for production.

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. The ACLU 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 – is 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. And although this Court issued *Costco* nearly six years ago, no subsequent California decision had suggested that the Court altered California law governing access to attorney invoices in *Costco*. Instead, California courts have continued to act on the understanding 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").[8] 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

[8] The attorney-client privilege was intended to extend beyond state court civil litigation to other forums. "*Division 8–Privileges.* Division 8 covers the subject of privileges and, unlike most of the other provisions of the code, applies to all proceedings where testimony can be compelled to be given – not just judicial proceedings." MJN Ex. A at MJN001058 .

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 ...." Op. at 12 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. It should be reversed.

5. 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. Op. at 23-24. 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. This Court's recent decision in *Hartford* is a perfect example. There, the Court held that an insurance company could sue Cumis counsel directly for allegedly excessive fees, and that the client need not be drawn into that litigation. 61 Cal.4th at 1005. In doing so, it rejected the law firm's concerns that the insureds may refuse to waive attorney-client privilege, which would "prevent[] counsel from effectively defending against an insurer's claims for reimbursement." *Id.* As discussed above, the Court reasoned that invoices are not privileged, and any privileged information can be redacted. *Id.* (citing *Concepcion*, 223 Cal.App.4th at 1327). Yet under the Court of Appeal's decision, the invoices would be privileged in their entirety – and therefore, the client could prevent the parties from relying on them in the collateral litigation – creating the very concerns enunciated by the insurance company in *Hartford.*

In addition, 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 information relayed by a client to an attorney, and attorney advice and

opinions. MJN Ex. A at MJN001283. Invoices do not need the protection that other privileged information receives because once privileged information is redacted, the invoices 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. It should be reversed.

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 to avoid making arbitrary fee awards.

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 there, 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 expansion of the attorney-client privilege to reach invoices is contrary to the mandate of California's Constitution, requiring courts to narrowly interpret statutes that limit the public's right of access to public records, in order to maximize access to public records. It ignores the language and history of Evidence Code § 952 as well as a long line of cases built on the understanding that invoices are not privileged. And it serves no purpose other than to provide cover to agencies intent on preventing the public from examining the agency's use of public funds on retained counsel – an expense of tens of millions of dollars every year by the County alone.

For all of these reasons, the ACLU respectfully requests that the Court reverse the Court of Appeal's decision, and direct that Court to deny the County's petition for writ of mandate.

Respectfully Submitted this 8th day of September, 2015

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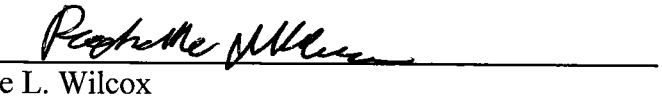
By: 
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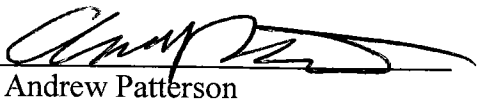
COMPLIANCE CERTIFICATE

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 "Opening Brief On The Merits Of Real Parties In Interest ACLU Of Southern California And Eric Preven" is proportionately spaced, has a typeface of 13 points, and according to the word processing systems used to prepare this Brief contains 11,398 words, including footnotes, but excluding the caption, tables, statement of issues, this certificate, and signature blocks.

Dated: September 8, 2015

DAVIS WRIGHT TREMAINE LLP

By: 
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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 September 8, 2015, I served the foregoing document(s) described as:

OPENING BRIEF ON THE MERITS OF REAL PARTIES IN INTEREST ACLU OF SOUTHERN CALIFORNIA AND ERIC PREVEN

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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 September 8, 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.

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