Case 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.

After a Decision by the Court of Appeal
Second Appellate District, Division Three, Case No. B257230

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

This is a rare and perhaps unique case in which the Question Presented itself spells defeat for the party petitioning for review—here, real parties in interest ACLU of Southern California and Eric Preven (collectively, ACLU). ACLU asks whether the invoices it seeks from petitioners—the Los Angeles County Board of Supervisors and the Office of County Counsel (collectively, the County)—are within the scope of the attorney-client privilege, "even with all references to attorney opinions, advice and similar information redacted." Thus, ACLU necessarily concedes that attorney invoices can and do contain privileged information. That fact alone renders the whole document privileged. As this Court held in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 735 (*Costco*), when a confidential document is transmitted between lawyer and client within the course of that relationship, the *entire* document is privileged, even if it includes information that would not otherwise be privileged and may be obtainable from other sources.

Moreover, the concession that invoices contain privileged information decimates ACLU's position that invoices are irrelevant to the attorney-client relationship, that they have only a "business" purpose and do nothing to "advance" the legal representation. In fact, the very notion that financial matters and communications are irrelevant to the representational relationship between attorneys and clients flatly ignores the realities of modern legal practice.

Most clients no longer receive omnibus bills "for services rendered." Today's invoices typically contain not only the amounts billed and paid in the course of ongoing litigation, but the identity and specialty of the lawyers working on the case and when they performed their work—details that

necessarily provide insight into the attorney's opinions, tactics and strategy concerning the very matters the lawyer was retained to pursue.

Cost is indisputably a fundamental factor in the attorney's representation of a client. It informs, and often dictates, basic decisions concerning who will represent the client, the tactics to be employed, and ultimately whether to continue the fight or to settle. As a result, clients would be shocked to learn that the invoices they receive from their attorneys and any exchanges of information about them are not absolutely confidential and privileged. They would be aghast that their lawyers—who owe them the highest fiduciary duties of loyalty and confidentiality—may freely disclose every detail of their financial arrangements to anyone who asks, including an opposing party. Yet that would be the result of ACLU's position that invoices and other financial transmissions enjoy no privilege whatsoever.

ACLU is well aware that invoices themselves—even if devoid of specific attorney opinions, advice and similar information—are not mere pieces of paper but potentially powerful tactical and strategic weapons. That's the very reason ACLU wants the County's invoices in this case. As it candidly admits: "The [redacted] 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" or whether the County has "refus[ed] reasonable settlements . . . ." (BOM 17.) ACLU—a frequent litigant and seeker of attorney fees against the County—knows exactly what tactical ends of its own may be served by getting ahold of the County's invoices at issue in this case. After all, these are invoices in ongoing cases

(the County having voluntarily disclosed the invoices sought by ACLU in completed cases).

The conclusion that invoices are within the scope of the attorney-client privilege follows not only from plain and unambiguous statutory language but also from basic principles underlying the attorney-client relationship. To conclude otherwise does violence to the fundamental purpose of the attorney-client privilege: "'[T]o 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.'" (*Costco*, *supra*, 47 Cal.4th at p. 732.)

This Court should reject ACLU's efforts to rewrite the attorney-client privilege to make every client in California—whether private party or public entity—vulnerable to exposure of sensitive financial information that the client had every right to believe would remain confidential.

RELEVANT BACKGROUND[1/]

A. ACLU's PRA Request And The County's Response.

ACLU submitted a PRA request to the County seeking invoices specifying the amounts the County had been billed by any law firm in connection with nine lawsuits brought by jail inmates alleging violence. (I PE 1:5.)

The County agreed to produce redacted invoices for the three completed lawsuits, but declined to provide invoices for the remaining six, which were still pending. (I PE 1:6, 26, 29.) The County asserted that the "detailed description, timing, and amount of attorney work performed, which communicates to the client and discloses attorney strategy, tactics, thought processes and analysis, are exempt from disclosure" under Government Code section 6254, subdivision (k) (records exempt under law, including Evidence Code provisions relating to privilege). (I PE 1:26.) The County also asserted the documents were exempt from disclosure under the PRA's "public interest" or "catch-all" exemption. (Gov. Code, § 6255, subd. (a); I PE 1:26.)

B. Superior Court Proceedings.

ACLU petitioned the superior court for a writ of mandate, seeking to compel the County to disclose the billing records for all nine lawsuits.

[1/] We use the following additional abbreviations:

"BOM": ACLU's Opening Brief On The Merits;

"MJN": ACLU's Motion for Judicial Notice;

"Opn.": Slip opinion in *County of Los Angeles Board of Supervisors et al. v. Superior Court* (*ACLU*) (Apr. 13, 2015, B257230);

"PE": Exhibits accompanying the County's Petition for Writ of Mandate in the Court of Appeal; cited by volume number, exhibit number and page number, e.g., III PE 10:770;

"PR": ACLU's Petition For Review;

"PRA": California Public Records Act, Gov. Code, § 6250 et seq.

(I PE 1:1, 7.) In response, the County reiterated that the billing records were protected by the attorney-client privilege and the "public interest" or "catch-all" exemption. (I PE 2:58, 62.)

The court granted ACLU's petition, concluding that the County had not shown the billing records were attorney-client privileged communications exempt from disclosure. (III PE 10:773-775.) The court reasoned that the County had failed to "assert specific facts . . . demonstrating how the challenged document qualifies as a privileged communication" or to produce any "actual evidence concerning the contents of the billing statements, including whether they were produced for a litigation-related purpose." (III PE 10:774, 775.) It also rejected the County's other arguments. (III PE 10:774-776.)

Accordingly, the court ordered the County to disclose the billing statements in all nine cases, except for redaction of information that "reflect[s] an attorney's legal opinion or advice, or reveal[s] an attorney's mental impressions or theories of the case." (III PE 10:778.)

The County filed a petition for writ of mandate challenging the trial court's ruling on all grounds, and the Court of Appeal issued an order to show cause. (Opn., p. 5.)

C. Appellate Proceedings.

The Court of Appeal granted the County's petition. In a unanimous published decision, the court concluded that billing statements are protected by California's attorney-client privilege (Evid. Code, § 952), according to the "plain, commonsense meaning of the language used by the Legislature" and other factors. (Opn., pp. 9-25, 13.)

Contrary to ACLU's assertion (BOM 11, fn. 4), the court did not deny the petition as to the other issues raised by the County but instead *expressly declined to address them* given its disposition of the privilege

issue, thus leaving them for determination in the event of remand. (Opn., p. 24 ["we *do not reach* the parties' contentions regarding application of the CPRA's 'catchall' exemption . . . ."], emphasis added.)

This Court granted review on the following issue: "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 Public Records Act, even with all references to attorney opinions, advice and similar information redacted?"

ARGUMENT

I. ATTORNEY INVOICES TRANSMITTED TO A CLIENT FALL WITHIN THE SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE.

A. Attorney Invoices Are Privileged "Confidential Communications" Under The Plain, Unambiguous Language Of The Evidence Code.

1. The fundamental importance of the attorney-client privilege.

The attorney-client privilege is central to our system of justice. As this Court has stated, the privilege "has been a hallmark of Anglo-American jurisprudence for almost 400 years. Its fundamental purpose 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. . . . The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence. *The privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case*." (*Costco*, *supra*, 47 Cal.4th at p. 732, emphasis added, interior quotation marks and citations omitted.)

The availability and scope of the attorney-client privilege are strictly governed by statute. (Evid. Code, §§ 911, 950 et seq.)[2/] Indeed, "privilege 'is one of the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme.'" (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 (*Roberts*), quoting Cal. Law Revision Com.,

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[2/] Undesignated statutory references are to the Evidence Code.

West's Ann. Evid. Code, § 911, p. 488.) Courts may neither expand the privilege (as ACLU accuses the Court of Appeal of doing) nor narrow it (as ACLU urges this Court to do). (BOM 19.) Their task is to discern its meaning, and the Legislature's intent, through the usual tools of statutory interpretation.

2. The statutory scheme: The PRA and the Evidence Code.

In enacting California's Public Records Act in 1968, the Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250.) At the same time, and with equal clarity, the Legislature exempted over two dozen types of records from disclosure, declaring that "this chapter does not require the disclosure of" the exempted records. (§ 6254 & subds. (a)-(ad).) The Legislature has continued to add exemptions to the PRA.[3/] Thus, the PRA "is clear that the Legislature intended to restrict the public's access to some material." (*Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 400.)

Not surprisingly, the Legislature created an express exemption for statutory privileges. Government Code section 6254, subdivision (k), applies to "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." "By its reference to the privileges contained in the Evidence Code, therefore, the [PRA] has made the attorney-client privilege applicable to public records." (*Roberts*, *supra*, 5

[3/] See Government Code sections 6254.4, 6254.6, 6254.9, 6354.10, 6254.11, 6254.14, 6254.15, 6254.16, 6254.17, 6254.18, 6254.20, 6254.21, 6254.22, 6254.23, 6254.25, 6254.26, 6254.27, 6254.28, 6254.29, 6254.30.

Cal.4th at pp. 370, 380 [in enacting the PRA, the Legislature intended "to afford public entities the attorney-client privilege as to writings to the extent authorized by the Evidence Code"].) As this Court observed, "[S]ubdivision (k) is not an independent exemption. It merely incorporates other prohibitions established by law." (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 656.)

Under the Evidence Code, "[T]he client . . . has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (§ 954.) In turn, a "confidential communication between client and lawyer" is defined as:

> [I]nformation transmitted between a client and his or her 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.

(§ 952.) The privilege extends to communications made even to third parties "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." (*Ibid.*)

The Evidence Code also creates a presumption governing the burden of proof: "If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client . . . relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential." (§ 917, subd. (a); *Costco*, *supra*, 47 Cal.4th at p. 733.)

Finally, the Code prohibits judicial officers, when ruling on a claim of attorney-client privilege, from requiring even in camera disclosure of information claimed to be privileged. (§ 915, subd. (a); *Costco*, *supra*, 47 Cal.4th at p. 736.)

3. The plain meaning of section 952 controls; there is no ambiguity.

In interpreting statutory language, the courts' objective is "to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." (*In re Marriage of Davis* (2015) 61 Cal.4th 846, 851 (*Davis*), interior quotation marks and citations omitted.) "This principle is especially important in construing a statute" within a system that "itself is a 'creature of statute.'" (*Ibid.*) As this Court remarked in connection with the PRA's exemption for the attorney-client privilege,

> Our deference to the Legislature is particularly necessary when we are called upon to interpret the attorney-client privilege, because the Legislature has determined that evidentiary privileges shall be available only as defined by statute. (Evid. Code, § 911.) Courts may not add to the statutory privileges . . . nor may courts imply unwritten exceptions to existing statutory privileges.

(*Roberts*, *supra*, 5 Cal.4th at p. 373.)

Courts employ other important guidelines in interpreting the attorney-client privilege: If is there is any doubt about its application, "'we will construe it liberally'" (*Musser v. Provencher* (2002) 28 Cal.4th 274, 283) "to promote a full and free relationship between the attorney and the client by safeguarding disclosures and advice" (*Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4th 1537, 1545). Similarly, the term "confidential communication" in section 952 is "broadly construed." (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557.) As one court put it, "The privilege of confidential communication between client and attorney should not only be liberally construed, but must be regarded as sacred." (*People v. Flores* (1977) 71 Cal.App.3d 559, 565.)

The first step in statutory interpretation is to examine "the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent. The plain meaning controls if there is no ambiguity in the statutory language." (*Davis*, *supra*, 61 Cal.4th at pp. 851-852, interior quotation marks and citations omitted.)

Although ACLU indirectly acknowledges the plain-meaning rule in a heading (BOM 20 ["The Court of Appeal's Expansion of the Attorney-Client Privilege Is Contrary to the Language of the Statute . . ."]), it doesn't discuss the rule or contend that any language, word or phrase in section 952 is in any way ambiguous.

With good reason. The language of section 952—which defines the phrase, "confidential communication between client and lawyer" is plain and direct.[4/] As established by case law and the undisputed evidence, the invoices sent to the County by its lawyers in this case are confidential communications within the meaning of section 952. Specifically,

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[4/] Section 952 reads in full:

> As used in this article, "confidential communication between client and lawyer" means **information transmitted** between a **client** and his or her **lawyer in the course of that relationship** and **in confidence** by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is **reasonably necessary** for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and **includes a legal opinion formed and the advice given by the lawyer in the course of that relationship**. (Bold added.)

- The County is a "**client**" (§ 951 [defined as "a person who . . . consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity . . . ."]);
- The County retained "**lawyers**" (§ 950 [defined as persons "authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation"];
- "**Information**" (i.e., invoices documenting the performance and timing of work performed, plus the fees and costs incurred) was "**transmitted"** to the County by its lawyers;
- The transmissions occurred "**in the course of that [lawyer-client] relationship**" (i.e., during the relationship);[5/] and
- The information was transmitted "**in confidence**," and, so far as the County was aware, was not disclosed to any third persons except those to whom disclosure was "**reasonably necessary**." (See III PE 6:724-727.)

Finally, the definition of a privileged "confidential communication" **"*includes* a legal opinion formed and the advice given by the lawyer in the course of [the lawyer-client] relationship."** (§ 952, emphasis added.) This means the privilege is not restricted to communications that convey a legal opinion or advice or even "legal" information. As this Court has stated, "Confidential communications *include* information transmitted between attorney and client, *and* a 'legal opinion formed *and* the advice

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[5/] "[T]he plain meaning of . . . [t]he phrase 'in the course of' 'is often' just a wordy way of saying '*during* or *while*.'" (*People v. Sinohui* (2002) 28 Cal.4th 205, 215 [interpreting phrase "in the course of" in § 972, subd. (e)(2), an exception to the privilege not to testify against one's spouse; quoting Garner, Dict. of Modern American Usage (1998) p. 382].)

given by the lawyer in the course of that relationship.'" (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 779, emphases added; *Roberts*, *supra*, 5 Cal.4th at p. 371 ["'Confidential communication' is defined as *including* 'a legal opinion formed and the advice given by the lawyer,'" emphasis added].)[6/] Significantly, "'[n]either the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between "factual" and "legal" information.'" (*Costco*, *supra*, 47 Cal.4th at p. 734, quoting *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 601 (*Mitchell*).)

Based on these and other authorities, the Court of Appeal determined that the invoices at issue here fell squarely within the Evidence Code's definition of a confidential communication. (See Opn., p. 12 ["A communication between attorney and client, arising in the course of representation for which the client sought legal advice, need not include a legal opinion or advice to qualify as a privileged communication"].) The court rejected ACLU's argument to the contrary. (Opn., p. 17 ["ACLU cites no authority in which a communication between attorney and client, arising out of the attorney's legal representation of the client, was held to be outside the scope of Evidence Code section 952 because it did not contain a

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[6/] See also *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1273 (although the attorney-client privilege usually involves a communication between attorney and client, "the statutory definition is not so narrow . . . . [T]he definition of a protected 'confidential communication' includes a legal opinion formed,'" even if not transmitted to the client); *People v. Bolden* (1979) 99 Cal.App.3d 375, 379 (section 952 "uses 'legal opinion' to specify one type of information protected"); 2 Witkin, Cal. Evidence (5th ed. 2012) Witnesses, § 111, p. 409 ("The protected communication may be either 'information transmitted between a client and his or her lawyer' or 'advice given by the lawyer'" or "'a legal opinion formed' even though not communicated to the client").

legal opinion or advice."].)[7/] The court concluded it was "undisputed" that "the law firms in question were retained to provide the County with legal advice in the matters to which the invoices pertained" and that "the invoices constituted information transmitted by the law firms to the County in the course of the representation." (Opn., p. 20.)

The court's conclusion that section 952 evidences a clear legislative intent to include invoices within the attorney-client privilege is reinforced by other statutes demonstrating the Legislature's understanding that such information deserves the highest level of confidentiality. (See Bus. & Prof. Code, §§ 6149 [declaring "a written fee contract" to be "a confidential communication" within the meaning of section 952], 6148, subd. (a) [requiring such contracts to include, among other provisions, the "basis of compensation" (hourly rates, etc), and "the general nature of the legal services to be provided to the client"] and 6148, subd. (b) [requiring all "bills rendered by an attorney to a client" to "clearly state the basis thereof," including "the amount, rate, basis for calculation," and the identification and amount of costs and expenses].) There was no need for the Legislature to expressly declare bills "confidential communications" under section 952

[7/] ACLU equivocates as to whether a confidential communication under section 952 must contain the attorney's legal opinion or advice. (Compare PR 19/BOM 21 ["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 . . . .'"] with PR 21-22/BOM 23 [concluding that "[t]he privilege does not exist to protect 'communications' such as invoices" because "[a] simple billing entry . . . does not contain a legal opinion or advice given by the lawyer in the course of that relationship"] and PR 35/BOM 46-47 [Legislature created privilege "to protect information relayed by a client to an attorney, and attorney advice and opinions"].)

(as it did with retainer agreements) because bills so obviously met that provision's definition of communications *transmitted* to a client.[8/]

B. Even If Section 952 Were Subject To Interpretation, No Extrinsic Source Suggests The Legislature Intended To Exclude Communications Concerning Financial Aspects Of The Attorney-Client Relationship From The Privilege's Protection.

As demonstrated, if a statute contains no ambiguity, its plain meaning controls. "If, however, the statutory language may reasonably be given more than one interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*Davis*, *supra*, 61 Cal.4th at p. 852, interior quotation marks and citations omitted.)

Without pointing to any ambiguity in the language of section 952, ACLU contends that the statute's legislative history and purpose, as well as case law, demonstrate "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." (BOM 3; see also 20 [claiming there is a "fundamental difference between an invoice (that is sent for the business purpose of being paid) and an opinion letter . . . or similar communication (that is sent to further the legal representation)"];

[8/] Indeed, construing section 952 as not encompassing invoices would allow a party to circumvent Business & Professions Code section 6149 by obtaining bills and simply reconstructing the retainer agreement's fee provisions. (Cf. *Wheeler v. Board of Administration* (1979) 25 Cal.3d 600, 605-606 ["it seems highly unlikely that the Legislature intended that the application of [one statute] should accomplish indirectly a result which, under [a related statute] clearly could not be directly achieved"].)

19, 30 [suggesting privilege limited to information "transmitted for the purpose of advancing the legal representation"].)

Yet, the term "business purpose" has been invented by ACLU out of whole cloth, and nowhere does ACLU define the term. Nor does ACLU explain why information concerning costs—the "business" aspect of practice—does not "advance the legal representation." No one who has ever employed an attorney, and no attorney who has been employed by a paying client, could seriously contend that communications from an attorney concerning the cost of litigation do not "advance" or are irrelevant to "legal representation." Cost is always a fundamental concern, dictating decisions to change tactics, change counsel, or both, or to maintain or ultimately settle an action. Tell an opponent what you are spending for litigation and you grant them insight into how long you may be able to maintain the fight, your commitment to the case, or overall litigation goals ("why are you spending so much with so little in damages at stake?"), all of which allow them to better assess if or when to make a run at settlement, or raise the stakes by altering their own tactics.

Aside from cost, most invoices provide clients with specific details concerning the representation, including the identity of the attorneys performing the tasks and the amount of time expended. In the hands of an adversary such information provides a road map as to how the matter is being litigated, or may be litigated in the future. A rise in the number of hours, even if the specific tasks were redacted, could alert an adversary to a potential motion, or trigger assessment of their own efforts in light of what is being expended by the other side. ("Am I spending too much time? Too little?" "Why is there a copyright attorney who hasn't formally appeared in the case?" "What do they see that I don't see?")

Nor is there any practical way to draw the distinction ACLU urges. What about a document that contains both billing elements and outright opinions? Is a formal opinion letter from an attorney containing one paragraph of an opinion and nine paragraphs detailing work performed and demanding payment, privileged, or not? ACLU concedes that invoices often contain information reflecting what even it considers to be privileged under its narrow definition, i.e., an attorney's opinions or legal advice. If 90% of the contents of an invoice must be redacted because the billing entries reflect an attorney's opinions, legal theories or other matter even ACLU deems privileged, would it fall outside of the privilege as a document transmitted for a "business purpose" because it also contains a single charge for attorney services?

The Legislature rejected such fine and ultimately impractical distinctions. By its plain terms, Evidence Code section 952 provides broad protection to all communications between attorneys and clients related to an attorney's representation of the client, and nothing in the legislative history suggests otherwise.

1. Legislative history.

ACLU has requested judicial notice of more than 1,500 pages of the legislative history of California's attorney-client privilege, covering well over a century. (See BOM 24-29.) However, nothing in that history even hints that attorney invoices are outside the scope of the privilege.

ACLU asserts the legislative history demonstrates 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." (BOM 28, original emphasis.) Yet nowhere in the case law or legislative history does the phrase "business purpose" appear.

To be sure, the privilege is intended to protect confidential communications transmitted between a client and a lawyer who is acting in his or her legal capacity, not in some other capacity. That is the meaning of the statutory limitation, "in the course of [the lawyer-client] relationship"—used twice in section 952. (See fns. 4, 5.) The legislative history and the case law it references make this point perfectly clear, as ACLU seems to acknowledge:

> 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 . . . .

(BOM 27, quoting "Report" from legislative history (6 MJN 1285), which in turn quotes *Ferguson v. Ash* (1915) 27 Cal.App. 375, 377-378 [attorney's testimony not privileged where he was not acting as attorney but as notary and agent].)

The report notes that the above standard "has produced a considerable body of precedent. [Fn]." (6 MJN 1285 & fn. 3 [citing cases rejecting privilege when attorney was performing a function *unrelated* to any legal representation, i.e., *Estate of Perkins* (1925) 195 Cal. 699, 710 [attorney gave business advice regarding proposed loan, not legal advice]; *Deiger v. Jacobs* (1912) 19 Cal.App. 197, 203 ["attorney acted 'rather as a scrivener than attorney'"]; *McKnew v. Superior Court* (1943) 23 Cal.2d 58, 62 [attorney's witnessing client's bank deposit could have been done as well by layman]].)

Nothing in the legislative history or the case law it references (and certainly not the language of the statute) supports ACLU's contention that when a lawyer, acting as such in the matter for which he or she was retained, transmits to his or her client a confidential communication

concerning financial information relevant to the representation, that communication is not protected by the attorney-client privilege. ACLU cites no authority for this proposition—and we are aware of none. (See *Costco*, *supra*, 47 Cal.4th at pp. 739-740 [application of attorney-client privilege depends on "the dominant purpose *of the relationship* between the [client] and its [attorneys]," not on the dominant purpose of the communication; original emphasis].) "If the Legislature had intended to restrict a privilege of this importance, it would likely have declared that intention unmistakably, rather than leaving it to courts to find the restriction by inference and guesswork . . . ." (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 207.)

To the extent ACLU still maintains that a privileged communication must contain the lawyer's opinion or advice (see above, fn. 7), the legislative history repudiates that theory. As enacted in 1965, section 952 stated that a confidential communication "includes advice given by the lawyer in the course of that relationship." (7 MJN 1495.) The Legislature amended the statute in 1967 to insert the phrase, "a legal opinion formed and the," after "includes" and before "advice given." (*Ibid.*) It did so to "preclude a possible construction of this section that would leave the attorney's uncommunicated legal opinion . . . unprotected by the privilege. Such a construction would virtually destroy the privilege." (*Ibid.*) Although ACLU acknowledges this history (BOM 28-29), it ignores the necessary conclusion to be drawn from it: If a lawyer's "legal opinion" was not part of the original definition of a "confidential communication," the Legislature could not have intended to make it a required element. As the Court of Appeal concluded, the intent of the 1967 amendment "was clearly not to *restrict* privileged communications to those containing a legal opinion, but to *protect* uncommunicated opinions." (Opn., pp. 14-15.)

In sum, according to the legislative history of section 952 and the case law, the vital distinction in privilege law has always been between a lawyer acting as a lawyer and a lawyer acting in some other capacity—not between "business" and "legal" communications.

2. Decisional law.

ACLU's invocation of case law to buttress its argument that "invoices are not privileged because their purpose is not to further the legal representation" (BOM 30-36, capitalization normalized) is also unavailing. ACLU relies primarily on this Court's decision in *Costco* (the unanimous majority opinion and Chief Justice George's concurrence) and on *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57 (*Anderson-Barker*). Neither opinion, nor any other, supports ACLU's argument.

a. *Costco*—majority opinion.

This Court held in *Costco* that an attorney's entire opinion letter to a client was protected by the attorney-client privilege—not just the legal opinion itself, but also the factual information contained in the letter. That is because "the attorney-client privilege attaches to [the] opinion letter in its entirety, irrespective of the letter's content." (*Costco*, *supra*, 47 Cal.4th at p. 731; see also p. 739 ["the privilege protects a *transmission* irrespective of its content," original emphasis]; p. 734 ["'it is the actual fact of the transmission which merits protection, since discovery of the transmission . . . might very well reveal the transmitter's intended strategy,'" quoting *Mitchell*, *supra*, 37 Cal.3d at p. 600]; p. 735 ["because the privilege protects the *transmission* of information, if the communication is privileged, it does not become unprivileged simply because it contains material that could be discovered by some other means," original emphasis].)

As the Court of Appeal here concluded, "*Costco* compels rejection of ACLU's position" that a privileged communication must "contain a legal opinion or advice." (Opn., p. 17.) The court explained, "*Costco* teaches that the proper focus in the privilege inquiry is not whether the communication contains an attorney's opinion or advice, but whether the relationship is one of attorney-client and whether the communication was confidentially transmitted in the course of that relationship. . . . *Costco* appears to have disapproved a content-based test for determination of the attorney-client privilege, in that it did not distinguish between the factual or legal aspects of the communication." (Opn., p. 19.)

Sidestepping *Costco's* clear language and holding, ACLU attempts to distinguish the decision on the ground that it involved an opinion letter—"the archetypal form of privileged information"—as opposed to "documents such as invoices." (BOM 4, 20, 30.) But no fair reading of *Costco* would suggest it turned on such a distinction. (See Opn., p. 19 ["*Costco*'s analysis did not hinge upon this circumstance; instead, it made clear that the privilege protects a '*transmission* irrespective of its content'"].)

ACLU acknowledges *Costco*'s holding that the privilege does not apply if "'the dominant purpose of the relationship was not that of attorney and client.'" (BOM 31, quoting *Costco*, *supra*, 47 Cal.4th at p. 740.) But that unremarkable conclusion simply follows from section 952's requirement that the transmission occur "during the course of an attorney-client relationship." (*Costco*, *supra*, 47 Cal.4th at p. 740.) The "dominant purpose" inquiry has no bearing here, since it is undisputed that the sole relationship between the County and its outside counsel was that of client and attorney.

b. *Costco*—concurring opinion.

ACLU's true focus is not on the *Costco* majority opinion, but rather Chief Justice George's concurring opinion, in which ACLU purports to find support for its contention that a "'confidential communication' as defined by Evidence Code, § 952 is limited to communications intended to further [or advance] the purpose of the legal representation." (BOM 19, 30 [privilege attaches only to documents "transmitted for the purpose of advancing the legal representation"]; see PR 2 [privilege protects "only legal opinions, advice, and other information communicated for the purpose of advancing the legal representation"].)

ACLU asserts that the Court of Appeal "should have followed" the concurrence in this regard, rather than the majority opinion. (BOM 30.) But ACLU's description of the concurrence bears little resemblance to what it actually says. Indeed, neither the limiting phrase "advancing [or furthering] the legal representation" nor the underlying concept appears in the concurrence. Moreover, if the concurrence advocated such a drastic, non-statutory limitation to the attorney-client privilege, it would conflict directly with the majority opinion—which was obviously not intended, since Chief Justice George joined it.

In his concurrence, Chief Justice George first confirmed his *agreement* with the majority that the opinion letter at issue, "sent by outside counsel to corporate counsel, containing both factual recitations and legal advice, is protected by the attorney-client privilege"; that "the trial court erred in requiring disclosure of the letter"; that "the Court of Appeal erred in declining to grant extraordinary relief . . ."; and that "'[t]he attorney-client privilege attaches to a confidential communication between the attorney and the client.'" (*Costco*, *supra*, 47 Cal.4th at pp. 741-742.)

Chief Justice George explained that he wrote separately to clarify and emphasize that "to be privileged, the communication . . . 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." (*Costco*, *supra*, 47 Cal.4th at p. 742.) In other words, it must have been transmitted "for the purpose of the attorney's professional representation, and not for some unrelated purpose." (*Ibid.* [citing cases].)[9/]

ACLU invokes what Chief Justice George described as "the principle of statutory construction known as '*ejusdem generis.*'" (BOM 32; *Costco*, *supra*, 47 Cal.4th at p. 743.) Under that principle, "'[I]f a statute contains a list of specified items followed by more general words, the general words are limited to those items that are similar to those specifically listed.'" (*Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193,

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[9/] Citing *Solon v. Lichtenstein* (1952) 39 Cal.2d 75, 80 ("'A communication to be privileged must have been made to an attorney acting in his professional capacity toward his client'"); *McKnew v. Superior Court* (1943) 23 Cal.2d 58, 64-65 (attorney called to witness business transaction between his client and third party was not acting in capacity of attorney); *Carroll v. Sprague* (1881) 59 Cal. 655, 659-660 (statement to attorney regarding disputed property not privileged where no evidence showed speaker was seeking professional counsel in that matter); *Satterlee v. Bliss* (1869) 36 Cal. 489, 509-510 (no privilege where nothing in attorney's testimony indicated "in the remotest degree" any confidential communication); *Chicago Title Ins. Co. v. Superior Court* (1985) 174 Cal.App.3d 1142 ("'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'"); *Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1, 32 ("communications necessary to 'secure or render legal service or advice' are privileged").

ACLU discusses these cases at BOM 32-34 & fn. 7.

1202.)[10/] Chief Justice George read section 952 as identifying a "general term" ("confidential communication") followed by "enumerated examples" ("the lawyer's legal opinion or advice"), from which he concluded that "to be privileged, 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." (*Costco*, *supra*, 47 Cal.4th at p. 743.)[11/]

With all respect to Chief Justice George, the principle of *ejusdem generis* is inapplicable in the context of section 952 for several reasons:

- First, *ejusdem generis* plays no role when the Legislature's intent is clear. The "fundamental rule" that the purpose of statutory construction "is to ascertain and effectuate the underlying legislative intent . . . **overrides** the *ejusdem generis* doctrine . . . if application of the doctrine . . . would frustrate the intent underlying the statute." (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1012, bold added.) That is because *ejusdem generis* is merely a rule of construction that may be "helpful" where "no better indication of legislative intent is available." (*In re Corrine W.* (2009) 45 Cal.4th 522, 531.) Here, such indication is readily available. Both the plain language of section 952 and its legislative history make clear that the attorney-client privilege was intended to extend to all confidential information transmitted between an

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[10/] The list of specific items can either follow or precede the general words. (*People v. Arias* (2008) 45 Cal.4th 169, 180.)

[11/] In adopting Chief Justice George's *ejusdem generis* reasoning, ACLU necessarily concedes that the enumerated terms "legal opinion" and "advice given" are, in fact, "examples" of the broader term, "confidential communication." (BOM 32.) This concession directly contravenes ACLU's position below (and arguably in this Court) that a privileged communication *must* include a legal opinion or advice. (ACLU's Brief in Opposition in the Court of Appeal, p. 17 ["communications that do not contain legal advice or opinion are not privileged"]; and see fn. 7, above.)

attorney and client in the course of that relationship, *and* the attorney's legal opinions (communicated and uncommunicated), *and* any advice given. *Ejusdem generis* is irrelevant.

- Second, in applying *ejusdem generis* to limit the scope of the privilege to items "similar in nature to . . . the lawyer's legal opinion or advice," the concurrence overlooks the significance of the statute's critical word, "includes,"[12/] in contravention of the rule that when interpreting statutes, "significance must be given to every word . . . ." (*Agnew v. State Bd of Equalization* (1999) 21 Cal.4th 310, 330.) In a statutory definition, "the word 'includes' [is] ordinarily a term of enlargement rather than limitation." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101; *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 717 (*Hassan*) [same for word "including"]; *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774 ["The 'statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions'"].)

- Third, if the privilege applied only to communications that are "similar in nature to . . . the lawyer's legal opinion or advice" (*Costco*, *supra*, 47 Cal.4th at p. 743), then on what basis would a client's communication to his or her lawyer be privileged? What information could a client communicate to his or her lawyer that would be "similar to the lawyer's opinion or advice?" Restricting the privilege in this way would completely eliminate the privilege for information transmitted from the client to the lawyer—a result directly contrary to the statute's plain language and legislative intent. Judicial construction must not render part

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[12/] "'[C]onfidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence . . . and *includes* a legal opinion formed and the advice given by the lawyer in the course of that relationship." (§ 952, emphasis added.)

of a statute "'meaningless or inoperative.'" (*Hassan*, *supra*, 31 Cal.4th at pp. 715-716.)

- Fourth, section 952 cannot be said to include a "list" of enumerated examples; there are just two ("a legal opinion formed and the advice given by the lawyer"). Most important, when originally enacted, the statute included only *one* example, i.e., "the advice given by the lawyer." (*Supra*, § I.B.1.) We are aware of no authority applying the *ejusdem generis* doctrine to a "list" of one, and there is no indication that was the Legislature's intent here.

There is no basis to depart from *Costco*'s clear holding that the attorney-client privilege "protects a *transmission* irrespective of its content," so long as the communication is made in the course of the relationship. (47 Cal.4th at p. 739, emphasis in original.)

c. *Anderson-Barker.*

From the beginning, ACLU has asserted that the outcome of this case is controlled by *Anderson-Barker*, *supra*, 211 Cal.App.4th 57, and it continues to do so here. (See BOM 34-35; PR 3, 6, 12, 25-26 [seeking review "to secure uniformity of decision" partly on ground of conflict between Court of Appeal decision and *Anderson-Barker*].) ACLU is mistaken. While both cases involved PRA requests for invoices and billing records sent to the County by its outside counsel, each case turns on a different PRA exemption and therefore on a different legal analysis, which necessarily produces a different result. As the Court of Appeal recognized, "[B]ecause cases are not authority for propositions not considered [citation], *Anderson-Barker* does not answer the question before us." (Opn., p. 10.)

The present case deals solely with the PRA exemption for records protected by "provisions of the Evidence Code relating to privilege." (Gov. Code, § 6254, subd. (k).) Subdivision (k) was not at issue in

Anderson-Barker. (211 Cal.App.4th at p. 64.) Rather, *Anderson-Barker* dealt with the "pending litigation" exemption, which excepts from disclosure "[r]ecords pertaining to pending litigation to which the public agency is a party . . . until the pending litigation . . . has been finally adjudicated . . . ." (Gov. Code, § 6254, subd. (b).) Subdivision (b) is of no help in analyzing a case turning on subdivision (k), as this Court pointed out nearly two decades before *Anderson-Barker* was decided. (*Roberts*, *supra*, 5 Cal.4th at pp. 371-372 ["subdivision (b) does not purport to define the scope of the privilege for the purpose of the Public Records Act"].) Indeed, *Anderson-Barker* itself (which dealt only with subdivision (b)), distinguished *Roberts* on the ground that "its holding as to the CPRA is founded on subdivision (k)." (211 Cal.App.4th at p. 66.)

For our purposes, the fundamental difference between the two exemptions is that while subdivision (k) statutorily defines the term "privilege" by specific reference to the Evidence Code—leaving no room for judicial interpretation (see *Roberts*, *supra*, 5 Cal.4th at p. 373)—subdivision (b) contains no definition of the term "pending litigation," thus leaving the courts free to construe it (see *Anderson-Barker*, *supra*, 211 Cal.App.4th at p. 64 ["The road to understanding the pending litigation exemption has been well traveled by appellate decisions"]).

As a result, despite subdivision (b)'s broad language suggesting it pertains to all "pending litigation," case law has given the term a "more restrictive reading." (*Anderson-Barker*, *supra*, 211 Cal.App.4th at p. 64.) The pending-litigation exemption applies only if the requested record was specifically prepared for *use in litigation*; if it was not, the exception does not apply; if it was prepared for a "dual purpose," the court must discern the "dominant purpose." (*Id*. at pp. 64-65, 67 [denying County's writ petition

because "the dominant purpose of the records was not for use in litigation"].)[13/]

In contrast, a public entity's purpose or dominant purpose for preparing a record does not enter into the analysis of subdivision (k). The record is privileged if it meets the Evidence Code's definition of a "confidential communication." (§ 952.) Period.

ACLU thus errs in asserting that the "same reasoning" employed in *Anderson-Barker* "applies here." (BOM 35.)

C. Whether Invoices Are Privileged Confidential Communications Is Answered By Section 952, Not By Implied "Assumptions" Or "Understandings" In Cases That Do Not Address The Issue.

Indisputably, the Court of Appeal's opinion in this case is the first to "squarely decide[]" the "dispositive question of whether billing statements qualify as privileged communications under Evidence Code section 952." (Opn., p. 9.) No prior California case even cursorily addressed the question.[14/]

[13/] While, as noted above, *Anderson-Barker*'s analysis of the role of invoices in litigation is confined to its interpretation of a specific statutory phrase relevant only to the pending-litigation exception, its underlying premise that invoices and fee information is not relevant to core litigation decisions is patently untenable.

[14/] As the Court of Appeal observed, some non-California authorities have held that invoices are privileged. (Opn., p. 12, fn. 3 [citing *State ex rel. Dawson v. Bloom-Carroll Local School Dist.* (Ohio 2011) 131 Ohio St. 3d 10 [959 N.E.2d 524, 529] ["'While a simple invoice ordinarily is not privileged, itemized bills necessarily reveal confidential information and thus fall within the [attorney-client] privilege'"]; *Progressive American Ins. Co. v. Lanier* (Fla.App. 2001) 800 So.2d 689, 690 [billing statements were "absolutely privileged as attorney-client communications"].) The (continued...)

Implicitly acknowledging this lack of authority, ACLU falls back on decisions it contends have *assumed* or *understood* that invoices or billing statements are not privileged. (See, e.g., BOM 19 [Court of Appeal found invoices privileged despite "decades of California law *assuming* that invoices are not themselves privileged"], 20 ["Court of Appeal's decision upended a *long-understood* rule . . . that invoices are not privileged"]; 22 [California courts "have expressed their *understanding* that invoices are not privileged"]; 36 ["For decades, California courts have operated on the *assumption* that invoices are not privileged"]; 49 [Court of Appeal ignored "a long line of cases built on the *understanding* that invoices are not privileged"], all emphases added.) ACLU even states that many decisions have "concluded" that invoices are not privileged. (BOM 3.)

ACLU cites and discusses several of these cases (BOM 36-42), without mentioning any case that makes the contrary assumption—that invoices *are* privileged. (See, e.g., *Smith v. Laguna Sur Villas Community Assn.* (2000) 79 Cal.App.4th 639, 642-643 [assuming without discussion that a law firm's legal bills are "privileged documents" that may not be produced in discovery if the client/privilege holder objects]; see Opn., p. 11.) But because none of these decisions directly (or even indirectly) considered the issue, they of course "are not authority for propositions not considered." (*Davis*, *supra*, 61 Cal.4th at p. 862.)

Moreover, simply because an appellate court refers to the production or examination of invoices in the fee-litigation context does not necessarily mean the court "assumed" or "understood" or was following a "rule" that

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[14/] (...continued)
Court of Appeal found these and other out-of-state authorities "of limited utility" because in California, the privilege "is a creature of statute and governed by California law." (Opn., p. 12, fn. 3.)

invoices are not privileged. The privilege may have been waived, expressly or implicitly, a fact that would be irrelevant to the court since no issue relating to privilege was raised.

Typical is this Court's recent decision, *Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C.* (2015) 61 Cal.4th 988 (*Hartford*), which figures prominently in ACLU's brief. (BOM 4, 22, 38-39, 43.) There, the Court held that an insurer, under court order to defend its insured and to fund the insured's independent *Cumis* counsel, could recoup any "unreasonable and unnecessary" amounts billed directly from counsel, instead of from the insured. (*Id.* at p. 992.) The Court rejected counsel's contention that such a holding would violate its due process rights "if the insureds' refusal to waive [the] attorney-client privilege prevents counsel from effectively defending against an insurer's claims for reimbursement." (*Id.* at p. 1005.) The Court deemed that concern "hypothetical," as counsel "does not contend that the defense of its bills in *this* litigation hinges on any issue that implicates the attorney-client privilege." (*Ibid.*)

There are good reasons the privilege was not an issue in *Hartford*. The fee litigation there took place *after* counsel's bills had been submitted to and paid by the insurer. (*Id*. at pp. 994-995.) Obviously, any privilege had been waived, at least as to the amount of the bills. Moreover, there is no indication the client ever received a bill; counsel submitted its bills directly to the insurer, as ordered. (*Id*. at p. 994.) Thus, there may have been no "confidential communication" transmitted between lawyer and client to which the attorney-client privilege could attach. (See below, § II.B.)

The Court also stated that the type of broad investigation required in *Hartford* "is unlikely to involve an examination of individual attorney-client communications or the minute details of every litigation decision," but "[i]f

privileged information . . . is included in counsel's billing records, it can be redacted for purposes of assessing whether counsel's bills are reasonable." (*Hartford Casualty*, *supra*, 61 Cal.4th at pp. 1005-1006.) Because the client had already waived any privilege as to the amount of the bills, the Court was necessarily referring to any *other* privileged information that might be included in them. But even if the Court's comment could be read to suggest that bills are never privileged (see BOM 38-39), it is not authority for that proposition because the question was not considered.

The same is true of the other decisions relied on by ACLU as authority for the "assumption" that invoices are not privileged (BOM 36-42); they simply do not address the issue. (See, e.g., BOM 39, citing *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1326-1327 (*Concepcion*) [court notes it "seriously doubt[s] that all—or even most—of the information on each of the billing records proffered to the court was privileged"]; BOM 22, citing *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 454 [rejecting argument of father in custody case that mother's bills, redacted to protect privileges, "left him unable to challenge the reasonableness of the fees"].)

ACLU states it "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 . . . careful analysis to assess whether the court can or should require disclosure of the invoices." (BOM 40-41.) ACLU, of course, overlooks the Court of Appeal's unanimous, published decision this case. That court squarely addressed the issue, and decided it correctly.

D. The California Constitution Does Not Permit—Let Alone Require—A "Narrow" Construction Of The Attorney-Client Privilege.

The gravamen and oft-repeated theme of ACLU's brief is that this case is governed by "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)." (BOM 2; see also 3, 6, 13, 14, 15, 17, 18, 19, 36, 49.) ACLU contends that the Court of Appeal erred by "ignor[ing] the constitutional mandate," and it urges this Court to follow the mandate by "narrow[ing] the reach of the attorney-client privilege." (BOM 2, 19.)

ACLU misperceives the nature of the constitutional provisions and the relevant case law, and it completely omits any reference to the constitutional mandate that courts *preserve existing statutory exceptions* to the right of access. Nor does ACLU suggest any ambiguity in either the PRA exemption at issue here or in section 952 that might support a narrow construction of the attorney-client privilege.

1. General principles.

In 2004, the voters adopted Proposition 59, which added the following provisions (among others) to Article I of the state Constitution:

- Section 3, subdivision (b)(1): "The people have the right of access to information concerning the conduct of the people's business, and therefore . . . the writings of public officials and agencies shall be open to public scrutiny."
- Section 3, subdivision (b)(2): "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."

- Section 3, subdivision (b)(5): "This subdivision [b] does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records . . . that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records."[15/]

Proposition 59 did nothing to change well-settled law that "all public records are subject to disclosure *unless the Legislature has expressly provided to the contrary*." (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 166-167 (*Sierra Club*), emphasis added, interior quotations omitted; *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 329 ["*Unless one of the exceptions stated in the Act applies,* the public is entitled to access . . . ."; emphasis added]; *Sutter's Place v. Superior Court* (2008) 161 Cal.App.4th 1370, 1382 ["Proposition 59 is simply a constitutionalization of the CPRA. As such, the proposition did not change existing law except as can be gleaned from its language"].)[16/]

[15/] We sometimes refer to these provisions as "subdivision (b)(1)," "subdivision (b)(2)" and "subdivision (b)(5)."

[16/] The Courts of Appeal are in accord that Proposition 59 is simply declarative of existing law. (See, e.g., *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 750 [amendment's broad/narrow construction provision "was the law prior to the amendment's enactment"]; see also *Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577, 587, fn. 11; *American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 67, fn. 2; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1320; *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759, 765.)

(continued...)

With specific respect to Proposition 59's preservation of existing exceptions, this Court stated: "[I]n light of article I, section 3, subdivision (b)(5), *we may not countermand the Legislature's intent to exclude or exempt information from the PRA's disclosure requirements where that intent is clear.*" (*Sierra Club*, *supra*, 57 Cal.4th at p. 166, emphasis added.) As demonstrated, the Legislature made its intent crystal clear to exclude attorney-client privileged communications from the reach of the PRA—by crafting an exemption for "provisions of the Evidence Code relating to privilege" (Gov. Code, § 6254, subd. (k)), thus linking the exemption to the Legislature's precise statutory definition of the privilege (§ 952). As the Court of Appeal here affirmed, "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." (Opn., p. 22.)

These fundamental principles were recently applied in a case involving the very PRA exemption at issue here—Government Code section 6254, subdivision (k). In *St. Croix v. Superior Court* (2014)

[16/] (...continued)

The California Attorney General has consistently come to the same conclusion. (See, e.g., 87 Ops.Cal.Atty.Gen. 181, *5 (2004) [subdivision (b)(2)'s narrow-construction requirement is "the same requirement imposed by prior case law"]; 88 Ops.Cal.Atty.Gen. 16, *5 (2005) [pre-existing exception to right of access "remains in full force and effect despite the recent adoption of Proposition 59"]; 89 Ops.Cal.Atty.Gen. 204, *5 (2006); 90 Ops.Cal.Atty.Gen. 40, *4 (2007).)

Attorney General opinions are entitled to "'considerable weight.'" (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 716, fn. 14; *California Assn. Of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17 [Attorney General opinions, "'while not binding, are entitled to great weight'"].) Indeed, in *Sierra Club*, this Court noted that its interpretation of the relevant PRA exemption was consistent with an Attorney General opinion letter. (57 Cal.4th at p. 176.)

228 Cal.App.4th 434, a city resident made a PRA request to the city's ethics commission for documents that included written communications between the commission and the city attorney's office. (*Id*. at p. 439.) Reversing the trial court, the Court of Appeal held that disclosure was not required because the city charter established an attorney-client relationship between the city attorney and the commission, to which the attorney-client privilege necessarily attached. (*Id.* at p. 444.) The court rejected the resident's argument that subdivision (b)(2) required it to "construe the charter narrowly to avoid any limitation on the public's right of access." (*Ibid.*) The court explained that its conclusion "does not result from a broad construction of the charter's provisions . . . and would not be altered by adopting a narrower construction of those provisions; instead, our holding just reflects the well-established centrality of the privilege to the attorney-client relationship." (*Id.* at p. 209 & fn. 7 [noting Proposition 59 did not repeal or nullify "the preexisting statutory exemption for privileged materials," citing subdivision (b)(5), section 954 and Gov. Code, § 6254, subd. (k)].)

2. The narrow-construction requirement applies only when legislative intent is ambiguous; here, it is crystal clear.

This Court and others have made clear that the constitutional requirement to narrowly construe a statute that limits the people's right of access applies *only* when the statute (and legislative intent) is *ambiguous.* In this Court's words:

> *[T]o the extent that legislative intent is ambiguous*, the California Constitution requires us to "broadly construe[]" the PRA to the extent "it furthers the people's right of access" and to "narrowly construe[]" the PRA to the extent "it limits the right of access."

(*Sierra Club*, *supra*, 57 Cal.4th at p. 166, emphasis added; see also *POET, LLC v. California Air Resources Board* (2013) 218 Cal.App.4th 681, 750 ["when a court is confronted with resolving a statutory ambiguity related to the public's access to information, the California Constitution requires the court to construe the ambiguity to promote the disclosure of information to the public"]; *Sonoma County Employees' Retirement Ass'n v. Superior Court* (2011) 198 Cal.App.4th 986, 993 ["In the particular context of the CPRA, if there is any ambiguity about the scope of an exemption from disclosure, we must construe it narrowly. . . ."].)

ACLU disregards this critical distinction when it faults the Court of Appeal for not following "this Court's direction in *Sierra Club*" to "narrowly construe statutes that limit the public's right of access." (BOM 18-19.) But, unlike the Court of Appeal here, the Court in *Sierra Club* was faced with an *ambiguous* PRA provision, Government Code section 6254.9, which excludes "computer software" from the definition of a "public record," and defines "computer software" to include "computer mapping systems." (Gov. Code, § 6254.9, subds. (a), (b).)[17/] The primary question before the Court was whether a particular database of information about land parcels maintained by Orange County constituted a "computer mapping system" exempt from disclosure under the PRA. (*Sierra Club*, *supra*, 57 Cal.4th at pp. 161-162.)

[17/] Government Code section 6254.9 provides, in relevant part:

"(a) Computer software developed by a state or local agency is not itself a public record under this chapter. The agency may sell, lease, or license the software for commercial or noncommercial use.

(b) As used in this section, 'computer software' includes computer mapping systems, computer programs, and computer graphics systems."

The Court reviewed the general rules of statutory construction and the supplemental "rule of interpretation" mandated by Proposition 59, concluding, as noted above, that a narrow construction is constitutionally required when "legislative intent is ambiguous" but not when it is clear. (*Id.* at pp. 165-166.) After examining the language of the relevant exemption, the Court focused on the ambiguity of the term "computer mapping systems," noting that "neither party has offered any standard definition of the term," that "dictionary definitions provide little help," that the Court of Appeal's interpretation, "though reasonable, is not compelled by the ordinary meaning" of the statutory language, that the term "is susceptible of either [side's] interpretation," and that the legislative history "does not reveal anything decisive on the issue before us." (*Id.* at pp. 167-168, 171.) The Court concluded that "although the term 'computer mapping systems' by itself is ambiguous, the ordinary meaning of 'computer software'" supports the contention that the PRA exemption for computer mapping systems does not cover databases like the one at issue. (*Id.* at pp. 170-171, 175.)

The Court explained that its conclusion was buttressed by the Proposition 59 provisions:

> 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. [Citation.] 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 [the type of database at issue] from the definition of a public record.

(*Sierra Club*, *supra*, 57 Cal.4th at p. 175, emphasis in original.)

This case is entirely different. *Everything* in the text of the PRA's privilege exemption and in section 952, in the context of both statutory schemes, and in the legislative history makes it clear that the Legislature sought to exempt statutorily-defined "confidential communications" between clients and their lawyers from disclosure to the public. ACLU points to not one word, one phrase, or one sentence that suggests any ambiguity in the statutes or the Legislature's intent.[18/]

3. Acceptance of ACLU's narrow-construction argument would lead to absurd results: section 952 would mean one thing in a PRA case, and another in all other contexts.

As demonstrated, no sound legal theory would permit this Court to "narrow the reach of the attorney-client privilege," as ACLU urges. (BOM 19). There is a further reason to reject ACLU's request—it would lead to absurd results. The Evidence Code provision defining the attorney-client privilege would mean one thing in the context of the PRA, and something else in all other contexts.

ACLU advocates for a narrow interpretation of section 952 on the basis of the constitutional mandate to narrowly construe statutes—such as PRA exemptions—that limit public access to public documents. (BOM 2-3, 13-15, 19.) Under this theory, section 952 would be narrowly construed only in PRA cases. Thus, ACLU would require the public disclosure of information that the Legislature has deemed confidential and that would

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[18/] In the passage from *Sierra Club* quoted above, ACLU quotes from the second sentence ("we find nothing . . ."), but omits the first sentence ("To the extent that the term . . . is ambiguous . . . ."). (BOM 18.) Although ACLU discusses *Sierra Club* throughout its brief, it makes no mention of this Court's express distinction between clear and ambiguous legislative intent.

remain confidential in all non-PRA contexts. In addition, ACLU fails to explain how its proposed interpretation would square with settled California law holding that the attorney-client privilege is to be "liberally" construed, and that the term "confidential communication" in section 952 is to be "broadly" construed. Under ACLU's argument, identical statutory language would produce diametrically opposed results, depending on whether the privilege is asserted in a PRA or a non-PRA context.

Courts reject interpretations of statutes that lead to absurd results. (*Big Creek Lumber Co. v. County of Santa Clara* (2006) 38 Cal.4th 1139, 1156; *State Office of Inspector General v. Superior Court* (2010) 189 Cal.App.4th 695, 707.)

For this additional reason, the Court should reject ACLU's request to narrowly interpret the attorney-client privilege in PRA cases.

II. RECOGNITION THAT ATTORNEY INVOICES ARE PRIVILEGED COMMUNICATIONS UNDER SECTION 952 COMPORTS WITH, AND WILL NOT DISRUPT, LONG-ESTABLISHED PRESENT PRACTICES.

ACLU asserts that adopting the reasoning of the Court of Appeal decision will produce a host of practical and legal problems. These arguments are baseless.

A. No One Contends The Privilege Extends To Every Word Or Writing Exchanged Between Lawyer And Client.

ACLU asserts that the reasoning of the Court of Appeal decision means that "every piece of information communicated between attorney and client is privileged." (BOM 21, see also 2, 12-13, 20, 24, 36.) Not so.

The Court of Appeal acknowledged that "not all communications involving an attorney are ipso facto privileged." (Opn., p. 21, citing *People v. Gionis* (1995) 9 Cal.4th 1196, 1210 ["'We cannot endorse the . . . view

that the attorney-client privilege applies whenever issues touching upon legal matters are discussed with an attorney. . . . [A] communication is not privileged, even though it may involve a legal matter, if it has no relation to any professional relationship of the attorney with the client. Moreover,'" any advice sought by the client "'must be sought from the attorney "in his professional capacity"'"].)

In other words, a transmission between attorney and client—including an invoice—is privileged only if it meets the Legislature's definition of a "confidential communication," i.e., "information transmitted" to or from a statutorily-defined "client" (a person who consults a statutorily-defined "lawyer" in the lawyer's "professional capacity"), "in the course of [the attorney-client] relationship and in confidence." (§ 952.) A "confidential communication" also "includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (*Ibid.*; *Calvert v. State Bar*, *supra*, 54 Cal.3d at p. 799.) As discussed, the attorney-privilege "protects a *transmission* irrespective of its content." (*Costco*, *supra*, 47 Cal.4th at p. 739, emphasis in original.)

The Legislature intended to extend the attorney-client privilege to any transmission of information, or any legal opinion or advice, that satisfies the elements of section 952. The Court of Appeal did not hold otherwise.

B. Only "Communications" Are Privileged; The Same Information May Be Available From Other Sources.

The fact that a lawyer's invoices transmitted to a client are "communications" subject to the attorney-client privilege means just that. It doesn't mean that the same information, existing in some form other than an attorney-client communication, is necessarily privileged as well. As this Court has made perfectly clear, if "factual material referred to or

summarized" in a confidential communication "is itself unprivileged it may be discoverable by some other means, but plaintiffs may not obtain it by compelling disclosure of the [communication]." (*Costco*, *supra*, 47 Cal.4th at p. 736; *id*. at p. 735 ["because the privilege protects the *transmission* of information, if the communication is privileged, it does not become unprivileged simply because it contains material that could be discovered by some other means"]; see *In re Jordan* (1974) 12 Cal.3d 575, 580 [privilege attached to copies of cases and law review articles transmitted by attorney to client].)

By the same token, it will not always be true that privileged factual material contained in a confidential communication will be discoverable by other means. There may be other privileges or doctrines that apply to prevent disclosure of the material. The important point is that the information may not be obtained by compelling disclosure of a confidential communication transmitted between lawyer and client.

As the Court of Appeal concluded, "to the extent the information ACLU seeks is available in a nonprivileged source, the fact that the invoices are privileged does not necessarily protect the information itself." (Opn., p. 23 & fn. 6 [expressing "no opinion as to whether the information contained in the billing records might be discoverable by some other means"].)

C. ACLU's Contention That Recognition Of The Privilege For Attorney Invoices Will Have Practical Implications In Litigating Fee Requests Is Both Irrelevant And Patently Unfounded.

ACLU contends that the Court should reject application of the attorney-client privilege to fee information in invoices because doing so would have various practical implications for litigating fee requests.

(BOM 5, 36-47.) As a threshold matter, as this Court has recognized, if a communication is privileged under the statute, disclosure is prohibited, no matter what the practical implications. (*Costco*, *supra*, 47 Cal.4th at p. 732.)

But in any event, the "parade of horribles" ACLU posits is sheer invention, with no foundation in reality, logic or law.

1. Clients have every incentive to submit the strongest evidence necessary to support a fee claim, lest courts reject the claim for inadequate documentation and refusal to submit evidence concerning a matter placed at issue.

The bulk of ACLU's arguments are based on the wholly illogical premise that a party seeking fees has neither the desire nor the incentive to submit fee invoices to assure a proper award. But the reality is that clients *want* their attorneys' fees paid. To quote ACLU, "This Court's recent decision in *Hartford* [*supra*, 61 Cal.4th 988] is a perfect example." (BOM 43.) Although ACLU views *Hartford* as exemplifying "the many problems that inevitably will arise" if clients have the right to waive the privilege in invoices (*ibid.*), in fact, *Hartford* illustrates why the privilege is not generally at issue in fee cases: clients have a strong motivation to waive the privilege when it means someone else is going to pay their attorneys' bills. There is no economic incentive to withhold the strongest possible evidence in support of a fee claim by asserting the privilege.

Indeed, a party that holds back its best evidence of the fees it incurred risks the severe consequence of having the court draw an adverse inference from the failure to supply such evidence. (Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the

evidence offered should be viewed with distrust"]; *Largey v. Intrastate Radiotelephone, Inc.* (1982) 136 Cal.App.3d 660, 672 [where exact date of corporate meeting was critical, "[a] jury could well find corporate records . . . to be much stronger and more satisfactory than the recollection several years later of persons who attended such meeting," citing § 412].)

Thus, ACLU's contention that allowing parties to assert the privilege as to invoices will impair the opposing party's ability to contest a fee claim (BOM 45) is absurd. If documentation is inadequate, the party seeking fees suffers the consequences, and any remotely competent adversary would exploit that failure and invoke section 412 as compelling rejection of the requested fees.

ACLU's assertion that if invoices are privileged, trial courts will be denied the ability to demand "detailed invoice information to support a fee motion" if they need it (BOM 41, 5) is similarly untenable. If a court believes such information is essential and the party seeking fees refuses to supply it, the likely result is denial or reduction of the fee claim. What rational client would risk that? And if they do, they suffer the consequences. Indeed, while ACLU cites *Concepcion*, *supra*, 223 Cal.App.4th 1309, as an "example" of California courts "rely[ing] heavily on attorney invoices . . . when applying the lodestar method" (BOM 39), and as "affirming [an] order requiring [the] disclosure of invoices" (BOM 5), it in fact does no such thing and actually underscores the real-world litigation of fee claims.

In *Concepcion*, class counsel sought attorney fees following settlement of the damages claim. (*Concepcion*, *supra*, 223 Cal.App.4th at p. 1314.) Counsel initially submitted declarations itemizing the claim hours and fees, but *offered* to submit more detailed daily billing records (not invoices) if the court thought it necessary. (*Id*. at p. 1316 ["Mr. Stonebarger

and all but one of the other declarants *offered* to provide their firms' daily billing records for in camera review if the court requested them"; "Class counsel filed a reply memorandum, arguing they had adequately supported their fee application and repeating the *offer* to submit detailed billing records for in camera review," emphases added].) In a tentative ruling, the court indicated it was inclined to find some fees duplicative unless more detailed records were submitted and directed class counsel to submit the promised additional documentation. Not surprisingly, facing potential denial of full fees, counsel did so—albeit only to the trial court for *in camera* review. (*Id*. at pp. 1317-1318, 1325.)[19/]

That is how things work in the real world—clients submit whatever is necessary (or whatever a court tells them is necessary) to support a fee claim, or face the consequences.

Moreover, to the extent invoices are "vital to a fair adjudication" of a fee claim or "essential" for its determination (a dubious proposition since, as we discuss below, it is well-established in California that such claims can be litigated without providing invoices), the party seeking fees would be subject to a claim of implied waiver by placing attorney fees at issue in the

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[19/] As a result, the defendant appealed the trial court's subsequent award of full fees on the ground that it had not been allowed to review and potentially rebut the material submitted *in camera* to the trial court; the Court of Appeal agreed, reversing the award. (223 Cal.App.4th at pp. 1325-1327.) The court dismissed any claim of privilege, expressing doubt (without analysis of Evidence Code section 952) that all material in the billing records was privileged, and observing that in any event the privilege had likely been waived when the material was voluntarily submitted to the trial court and its contents put in issue, though it found it unnecessary to decide the issue. (*Id*. at p. 1327 ["Finally, to the extent class counsel made the judgment they needed to offer their full, unredacted billing records to support their request for fees, they may well have impliedly waived any privilege that otherwise protected them"].)

case. (*Southern California Gas Co. v. Public Utilities Comm.* (1990) 50 Cal.3d 31, 40, 43 (*SoCal Gas*).)

Indeed, ACLU pays only lip service to the uniform case authority from both this Court and the lower appellate courts holding that the privilege is waived when the client puts the material subject to the privilege at issue in the case. (*SoCal Gas*, *supra*, 50 Cal.3d at p. 40 [privilege may be waived where party asserts advice of counsel defense, but noting no such defense raised in instant case]; *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 727 ["The defense of advice of counsel generally waives the attorney-client privilege as to communications and documents relating to the advice"]; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 128 [assertion of defense of adequate investigation waives privilege as to investigation undertaken by an attorney: "The employer's injection into the lawsuit of an issue concerning the adequacy of the investigation where the investigation was undertaken by an attorney or law firm must result in waiver of the attorney client privilege and work product doctrine"].) Indeed, as noted, the *Conception* court recognized the relevance of this doctrine to fee claims. (223 Cal.App.4th at p. 1327.)

ACLU asserts that courts will not find a waiver, because it is unnecessary to submit invoices to support a fee claim, given that it is well-established that such claims can be established by other evidence. (BOM 44-45.) But ACLU cannot have it both ways. If invoices are "vital" or "essential" to determination of a fee claim, courts will find a waiver; if they are not, and proof by other means is satisfactory, application of the privilege to invoices will have no meaningful impact on litigation fee claims. In the real world, rules have developed to address any concerns regarding assertion of the statutory privilege.

ACLU's contention that vindictive clients will assert the privilege to prevent their attorneys from claiming fees to which they're entitled also fails the "real world" test. To the extent this is a widespread problem (which is neither readily apparent, nor explained), it can be avoided by a simple provision in the retainer agreement requiring the client to cooperate in any effort by the attorney to seek fees. That is, after all, how the matter is handled in the federal courts, where, although fee invoices are admissible, the client alone has the right to fees. (*Evans v. Jeff D.* (1986) 475 U.S. 717, 730-732 [attorney fees under 42 U.S.C. § 1988 are awarded to the client, not the attorney; hence, the client can waive the fee claim as a condition of settlement]; *Venegas v. Mitchell* (1990) 495 U.S. 82, 88 ["And just as we have recognized that it is the party's entitlement to receive the fees in the appropriate case, so have we recognized that . . . it is the party's right to waive, settle, or negotiate that eligibility"]; *Pony v. County of Los Angeles* (9th Cir. 2006) 433 F.3d 1138, 1145 [plaintiff may contractually transfer to attorney her right to collect fees under § 1988]; *Gillbrook v. City of Westminster* (9th Cir. 1999) 177 F.3d 839, 875 [affirming § 1988 fee award made directly to prevailing plaintiffs because they "did not enter into a retainer agreement with [their attorneys] providing that any monies awarded to plaintiffs as 'prevailing parties' under § 1988 would be assigned to [their attorney]"].)

2. California does not require invoices or even time records to recover fees.

Applying the privilege to invoices will also have minimal (if any) impact on fee proceedings because California law has long permitted attorneys to submit proof in a form other than invoices or even detailed billing statements. "'California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of

counsel describing the work they have done and the court's own view of the number of hours reasonably spent.'" (*Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698, quoting Pearl, *Cal. Attorney Fee Awards* (Cont.Ed.Bar 3d ed. 2014 supp.) § 9.83, p. 9-70; see also, e.g., *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 487-488 [party "can carry its burden of establishing its entitlement to attorney fees by submitting a declaration from counsel instead of billing records or invoices"]; *In re Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 [trial court properly "accept[ed] [summary] declarations of counsel attesting to the hours worked"]; *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375-1376 [declarations are sufficient and detailed billing records are not required].)

While ACLU concedes that "invoices are not strictly necessary for fee motions" (BOM 5), it seems to contend that the lodestar method, used by California courts to calculate fees, requires the submission of invoices. (BOM 5 [asserting that a "long line of [lodestar] cases will be upended if attorney invoices are absolutely privileged. . . ."].) Yet, if "[i]t is not necessary to provide" even "detailed billing timesheets to support an award of attorney fees under the lodestar method" (*Concepcion*, *supra*, 223 Cal.App.4th at p. 1324, citing numerous cases), it certainly is not necessary to provide invoices.[20/] ACLU confuses the *methodology* for calculating fees with the *evidence* necessary for recovering fees. In fact, not one of the

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[20/] The parties agree that an "invoice" requires a transmission of information from attorney to client. (BOM 4 [invoices "typically are *sent* to procure payment for legal services," emphasis added]; see Black's Law Dict. (9th ed. 2009) p. 904, col. 2 [defining "invoice" or "bill" as "[a]n itemized list of goods or services *furnished by a seller to a buyer*, usually specifying the price and terms of sale; a bill of costs," emphasis added].)

cases cited by ACLU in which this Court upheld or discussed the lodestar method suggests that invoices are r*equired* to support a fee claim.[21/]

ACLU suggests that using non-invoice information to prove fees may be problematic if invoices are privileged because "the privilege may extend to that information as well," on the theory that a "'significant part of the [protected] communication'" has been "'substantially disclose[d].'" (BOM 46; see § 912, subd. (a).) But, as just demonstrated, an attorney declaration documenting the relevant facts of the case and the nature of the work necessary is sufficient. Moreover, it is not "information" that is privileged but only "confidential communications," such as invoices. Proffering information from other sources cannot affect the privilege because there has been no disclosure of "a significant part of the *communication*." (§ 912, subd. (a), emphasis added; and see above, § II.B.)

D. There Is Nothing Improper, Let Alone Perverse, About A Public Entity's Assertion Of A Privilege Recognized By The PRA.

ACLU contends that courts will "find ways to compel disclosure of invoices . . . to ensure that they remain available in fee disputes" (BOM 48-49), but that because invoices would be shielded from disclosure under the PRA, "perversely, the public will have no right of access." (BOM 49.) ACLU doesn't says *how* courts will compel disclosure of invoices; they can't, absent waiver. And the fact that waiver may make such information available in fee litigation does not change the fact that the privilege would insulate invoices from disclosure in all other litigation circumstances.

[21/] See BOM 5, 36-37, 39-41 (citing *Serrano v. Priest* (1977) 20 Cal.3d 25; *Ketchum v. Moses* (2001) 24 Cal.4th 1122; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311; *Serrano v. Unruh* (1982) 32 Cal.3d 621; *Maria P. v. Riles* (1987) 43 Cal.3d 1281; *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084).

There is nothing "perverse" about application of the ordinary rules concerning privilege, which is a necessary consequence of the Legislature's express intention "to afford public entitles the attorney-client privilege as to writings to the extent authorized by the Evidence Code." (*Roberts*, *supra*, 5 Cal.4th at pp. 370, 380.)

The reality is that public entities do voluntarily waive the privilege in response to PRA requests in the interest of public disclosure, as the County did here with respect to invoices as to closed cases. That the County insisted on invoking its privilege while engaged in active litigation where disclosure could potentially do the most harm, means it simply acted as would any litigant, public or private, in accordance with it rights under the law.

E. Recognition That Invoices Are Privileged Creates No Ethical Conflict For Counsel Practicing In Federal Court.

ACLU argues that fee invoices should not be subject to the attorney-client privilege because California attorneys would somehow be subject to potential professional discipline when required to disclose invoices in federal courts, pursuant to the federal rules of privilege, which do not shield such documents from disclosure. (BOM 41-42.) The contention is flatly untenable.

ACLU ignores the fact that under state law, retainer agreements are specifically covered by the privilege as confidential communications. (Bus. & Prof. Code, § 6149.) Yet, it is equally clear that under federal law, retainer agreements are not privileged. "[T]he Ninth Circuit has repeatedly held retainer agreements are not protected by the attorney-client privilege or work product doctrine." (*Hoot Winc, LLC v. RSM McGladrey Fin. Process Outsourcing, LLC* (S.D.Cal., Nov. 16, 2009, No. 08CV1559 BTM (WMC)) 2009 WL 3857425, at *2, citing *Ralls v. United States* (9th Cir. 1995) 52

F.3d 223, 225 ["Generally, the attorney-client privilege does not safeguard against the disclosure of either the identity of the fee-payer or the fee arrangement."]; *United States v. Blackman* (9th Cir. 1995) 72 F.3d 1418, 1424 ["As a general rule, client identity and the nature of the fee arrangement between attorney and client are not protected from disclosure by the attorney-client privilege"].) Is ACLU seriously contending that the Legislature's express declaration that retainer agreements are privileged communications under Evidence Code section 952 is somehow trumped by federal rules governing admissibility of evidence in federal court, because otherwise attorneys disclosing such agreements in federal proceedings would supposedly be subject to discipline by the State Bar?

Such a result would be nonsensical. But that is essentially the argument ACLU is making as to invoices. The fact is that state and federal rules concerning privilege often conflict, with each court system applying its own law. (*Agster v. Maricopa County* (9th Cir. 2005) 422 F.3d 836, 839 [refusing to apply Arizona's peer review privilege: "Where there are federal question claims and pendent state law claims present, the federal law of privilege applies"]; *Wilcox v. Arpaio* (9th Cir. 2014) 753 F.3d 872, 876 [refusing to apply Arizona privilege for communications in mediation: "'[W]e are not bound by Arizona law' on privilege" and "federal privilege law governs."].)

Conspicuously, ACLU cites not a single instance in which a lawyer has been disciplined for complying with an order requiring disclosure of information a court has held not to be privileged. This is not surprising, because compelled disclosure could never be a basis for discipline—attorneys are required to adhere to both state and federal law (Bus. & Prof. Code, § 6068, subd. (a)) and to obey court orders (Bus. & Prof. Code, §§ 6068, subd. (b) & 6103).

Recognizing that Evidence Code section 952 bars disclosure of attorney invoices creates no ethical quandary.

CONCLUSION

Clients, both private parties and public entities, have a right to expect that their fee arrangements with their lawyers—fiduciaries of the highest order—and all the questions and concerns they may express to their lawyers about them, are held in strictest confidence. Yet ACLU would destroy that confidentiality and trust, leaving clients vulnerable to exposure of sensitive financial information, even in the midst of contentious litigation—a result never intended by the Legislature.

The judgment of the Court of Appeal should be affirmed.

DATED: November 23, 2015

Respectfully submitted,

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CERTIFICATION

Pursuant to California Rules of Court, Rule 8.504(d)(1), I certify that this **ANSWER BRIEF ON THE MERITS** contains **13,989** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

DATED: November 23, 2015

Barbara W. Ravitz

S226645

COUNTY OF LOS ANGELES BOARD OF SUPERVISORS v. S.C. (ACLU OF SOUTHERN CALIFORNIA)

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **November 23, 2015**, I served the foregoing document described as **Answer Brief On The Merits** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes as stated below.

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I placed the envelope(s) for collection and mailing on the date stated above, at Los Angeles, California, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

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Executed on **November 23, 2015**, at Los Angeles, California.

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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Subject:	Case s226645, County of Los Angeles Boar, Submitted 11-23-2015 06:08 PM
Date:	Monday, November 23, 2015 6:08:41 PM

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Case Type: Civil

Case Number: s226645

Case Name: County of Los Angeles Board of Supervisors, et al. v. Superior Court (ACLU)

Name of Party: County of Los Angeles Board of Supervisors, et al.

Type of Document(s):
Answer Brief on the Merits

Name of Attorney or Self-Represented Party Who Prepared Document: Barbara W. Ravitz

Bar Number of Attorney: 86665

List of Attachment(s):

s226645_S226645_ABM_COLA.pdf