ASCDC
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

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July 7, 2014

BY PERSONAL DELIVERY

Honorable Joan D. Klein, Presiding Justice
and Associate Justices
California Court of Appeal
Second Appellate District, Division Three
300 So. Spring Street, 2nd Floor
Los Angeles, CA 90013

Re: ***ACLU of Southern California v. County of Los Angeles Board of Supervisors***
Los Angeles County Superior Court Case No. BS145753
Court of Appeal Case No. B257230
Amicus curiae letter in support of petition for writ of mandate

Dear Presiding Justice Klein and Associate Justices:

We respectfully request leave to submit this amicus curiae letter on behalf of the Association of Southern California Defense Counsel (ASCDC), urging this court to issue an alternative writ or order to show cause and address the issues raised in the petition for writ of mandate on the merits. Interlocutory review of the trial court's order requiring disclosure of attorney billing records will provide much needed clarification of the California Public Records Act, California Government Code section 6250 et seq. (CPRA). Contrary to the trial court's ruling, the CPRA does not authorize, let alone mandate, the disclosure of attorney billing records, because such billing records are protected by the attorney-client privilege. But unless this court grants writ review, the protected status of client confidences reflected in attorney billing records will be in doubt.

Public entity litigants are not the only ones who will be harmed by the uncertainty. Attorneys, including members of the ASCDC, represent public entities against healthcare claims, vehicle accidents, employment and a host of other routine tort cases. The trial court's ruling raises the question whether the CPRA requires disclosure in those cases. If so, attorneys will have to choose between fully and forthrightly describing their legal services in client invoices, or providing cryptic and incomplete descriptions to avoid the risk of disclosing privileged information. And attorneys negotiating settlements in these cases will be seriously disadvantaged, as their opponents will be marking every expenditure while facing no similar disclosure requirement. Attorneys, including ASCDC members, will unquestionably be impaired in their ability to meet their obligations to their clients.

INTEREST OF AMICUS CURIAE

The ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It is comprised of approximately 2,000 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts on issues of interest to its members, and provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

ASCDC has participated as amicus curiae in numerous cases involving application of the attorney-client privilege and/or the work product doctrine. (See, e.g., *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 (*Costco*) [attorney-client privilege]; *Coito v. Superior Court* (2012) 54 Cal.4th 480 (*Coito*) [work product]; *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263 [work product].) This is another such case.

ASCDC members include hundreds of trial lawyers who prepare and try cases. Attorneys engaged in litigation (particularly under hourly billing arrangements) and transactional lawyers alike need to provide itemized invoices to their clients that reflect what the attorney has done and why, in advancing the clients' interests. And when preparing those invoices, they need to know whether and to what extent these communications with their clients are protected from disclosure to their adversaries, as well as to third parties who are not participants in the litigation, and who are thus not subject to the trial court's ability to control dissemination of confidences revealed through disclosure of the invoices. ASCDC therefore asks that this court grant writ review of the trial court's ruling that the CPRA mandates disclosure of attorney billing records.

The pending petition not only involves an issue of first impression (the interplay between the CPRA and the attorney-client privilege) but is also an issue of widespread interest beyond the parties to this action. Therefore, writ review is appropriate. (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 558 ["Here, the issue of statutory construction raised by the superior court's ruling and presented by the Regents's petition has not previously been addressed by an appellate court and, based on the amici curiae submissions we have received, appears to be of widespread interest. Accordingly, writ review is appropriate"].) Indeed, the Supreme Court's recent grant of review in another public records case confirms that application of the CPRA raises issues of statewide importance. (*City of San Jose v. Superior Court* (2014) 225 Cal.App.4th 75, review granted June 25, 2014, S218066.)

WHY WRIT RELIEF SHOULD BE GRANTED

The trial court erred in holding the California Public Records Act requires disclosure of billing records that, in the court's view, are not protected by the attorney-client privilege. The CPRA by its express terms, however, does not apply to documents privileged under the Evidence Code and, as California appellate decisions have recognized, attorney invoices are privileged under the Evidence Code.

Evidence Code section 954 provides that "the client . . . has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer[. . . .]" A confidential communication is defined as "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." (Evid. Code, § 952.)

Billing records constitute information transmitted between an attorney and their client which reveal—often very explicitly—the attorney's legal opinions, theories and advice. These records explain the topics of legal research that was undertaken. They reveal the fact that phone calls, meetings and correspondence have taken place, and identify the names of people involved in those exchanges. They outline court filings that are being drafted, and may tellingly identify documents that were prepared but never actually served and filed. They discuss whether settlement strategies have been explored, whether consultants have been retained, and whether the attorney is responding to client instructions and questions. (Even the *lack* of a billing entry reveals confidences by showing what work has *not* taken place; a client may prefer to keep to itself that its counsel is *not*

working on a dispositive motion and *not* retaining certain types of experts, for example.)

Clients deserve, and many demand, a high level of detail in billing entries. And even a very general billing entry, when coupled with an adversary's knowledge of the procedural status of the case on the date of the entry, can speak volumes regarding litigation planning and strategy. Moreover, clients expect their attorneys to keep the amount a client is paying for representation confidential. Legal bills, put simply, comprise some of the most important communications between lawyers and clients. Clearly, billing records are thus confidential communications within the meaning of section 952.

California courts have recognized that billing statements implicate the attorney-client privilege. *Smith v. Laguna Sur Villas Community Assoc.* (2000) 79 Cal.App.4th 639, 642-644 (*Smith*) is instructive. In that case, plaintiff condominium owners brought an action against a condominium association for declaratory and injunctive relief. (*Id.* at pp. 642-643.) Plaintiffs sought to review the association's legal materials, including its attorneys' work product and legal bills, concerning the defendant's construction defect lawsuit against a developer. (*Id.* at p. 642.) The association objected on the grounds of attorney client and work product privileges. (*Ibid.*)

The Court of Appeal affirmed the trial court's ruling that the association, not its individual members, was the client in the construction defect action. (*Smith, supra,* 79 Cal.App.4th at p. 643.) Accordingly, the association could invoke the attorney-client privilege to withhold documents—including its legal bills—from its members. Necessary to the court's holding was its implicit finding that that the legal bills were privileged. (*Id.* at pp. 643-644; accord, *Progressive American Ins. Co. v. Lanier* (Fla. 2001) 800 So.2d 689, 690 ["our review of [the documents] and Progressive's privilege log satisfies us that most of these documents, which consist mainly of communications to and from Progressive's attorneys and billing statements, are absolutely privileged as attorney-client communications"].)

Smith is highly analogous to this case. Both cases involved attempts to obtain information about a defendant's legal expenses in litigation to which those requesting disclosure were not parties. Indeed, the plaintiffs' interests in *Smith* in obtaining information about the amount spent on the underlying litigation was more compelling than the ACLU's interests here, since the plaintiffs in *Smith*, as members of the homeowners association, had a personal stake in how the association's was spending their dues. Here, the ACLU is purporting to represent the public interest at large, and its members have no direct pecuniary interest in

the underlying litigation. For the same reasons that the *Smith* court recognized the association's right to withhold its counsel's bills from association members, the trial court here should have recognized the County defendant's right to withhold its counsel's bills from the ACLU.

Neither *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309 (*Concepcion*) nor *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57 (*Anderson-Barker*) support the trial court's conclusion that the billing records provided to the County by its counsel are not privileged. Although, as the County notes in its petition (Petition 19), the court in *Concepcion* presumes legal bills are not privileged, it did not squarely face the issue currently before the court. Rather, it remarked—without explanation—that it "seriously doubt[s] that all—or even most—of the information on each of the billing records proffered to the court was privileged." (*Concepcion, supra*, 223 Cal.App.4th at pp. 1326-1327.) As the County explains, *Concepcion* did not "consider California's unique statutory scheme of 'deeming' certain information to be confidential communications between lawyer and client." (Petition 19.)

And *Anderson-Barker* did not decide any issue regarding privilege, dealing only with the CPRA's "pending litigation" exemptions (Gov. Code, § 6254, subd. (b)), which are not at issue in this case. (*Anderson-Barker, supra*, 211 Cal.App.4th at pp. 64-66.) Cases are not authority for propositions not decided. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332.)

Because billing records are protected by the attorney-client privilege, they are unequivocally protected from disclosure under the CPRA. It is well-settled that the attorney-client privilege can be limited only by statutory exceptions. (Evid. Code, § 954 [the privilege applies " '[s]ubject to Section 912 and except as otherwise provided *in this article . . .*' " (emphasis added)].) As the California Supreme Court has held, the attorney-client 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.)

The CPRA does not create a statutory exception to the attorney-client privilege. To the contrary, it expressly provides that privileged records are exempt from its disclosure requirements. (Gov. Code, § 6254, subd. (k) [permitting withholding of "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law," including "provisions of the Evidence Code relating to privilege"].) As the court said in *Sanchez v. County of San Bernardino* (2009) 176 Cal.App.4th 516, 527, "The Public Records Act does not require the disclosure of a document that is subject to the attorney-client privilege." (Accord,

State ex rel. Dawson v. Bloom-Carroll Local School Dist. (Ohio 2011) 131 Ohio St. 3d 10, 16, 959 N.E.2d 524, 529-530, quoting *In re Horn* (9th Cir. 1992) 976 F.2d 1314, 1318 [under the Ohio Public Records Act, which is similar to California's Public Records Act, school district had no duty to provide access to itemized attorney-fee bills, and the request for such bills amounted to an "unjustified intrusion into the attorney-client relationship"].)[1]

Cases applying the CPRA in similar contexts have confirmed that privileged records are not subject to disclosure as public records. The Supreme Court held in *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 367, 373 that a city council could assert the attorney-client privilege in the face of a Public Records Act request, to withhold a letter written by the city attorney and distributed to council members concerning a matter pending before council. Similarly, *STI Outdoor v. Superior Court* (2001) 91 Cal.App.4th 334, 339-341 approved the withholding of legal memoranda and other materials prepared by county counsel, as preparation of those documents was reasonably necessary to further the represented parties' interests in finalizing negotiations. The attorney-client privilege was thus not waived by transmittal among the entities negotiating a license agreement, and the documents were not subject to disclosure under the CPRA. The same should be true of the billing records at issue here.

Finally, the trial court's vague directive to redact the records to the extent they "reflect an attorney's legal opinion or advice, or reveal an attorney's mental impressions or theories of the case" (Order at p. 9) will not solve the problems created by disclosure of the records. Unless an attorney submits a wholly inadequate block-billed periodic invoice "for services rendered," every aspect of an attorney's itemized billing records—from items as specific as the descriptions of work performed to items as general as the presence *or even absence* of work on certain topics or at certain times during the litigation—will reflect an attorney's theory of the case, and are thus protected against disclosure both as an attorney-client communication (Evid. Code, § 952 [privileged communications include "legal opinion[s] formed and the advice given"]) and as work product (Code Civ. Proc., § 2018.030, subd. (a); *Coito, supra,* 54 Cal.4th at p. 488).

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[1] As the County argues in its petition (Petition 25-35), even if the billing records were not privileged, they should be protected from disclosure under the CPRA's broad public interest exception. (Gov. Code, § 6255, subd. (a).)

CONCLUSION

The trial court's order creates uncertainty and confusion not only for public entity litigants, but also for the counsel who advise public entities in all types of litigation. The order even casts doubt as to the privilege available in litigation involving only private parties, because it suggests that no privilege exists to protect against an opponent's demand for all communications about the subject matter of the litigation. This court should therefore issue an alternative writ or order to show cause and grant the petition for writ relief.

Respectfully submitted,

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cc: See attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On July 7, 2014, I served true copies of the following document(s) described as **ASCDC AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR WRIT OF MANDATE DATED JULY 7, 2014** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on July 7, 2014, at Encino, California.

Jo-Anne Novik

SERVICE LIST

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