IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

COUNTY OF LOS ANGELES BOARD OF SUPERVISORS, ET AL.,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES,

Respondent.

ACLU OF SOUTHERN CALIFORNIA, ET AL.,

Real Parties in Interest.

2d Civ. No. B257230

Los Angeles Superior Court Case No. BS145753

Honorable Luis A. Lavin
Department 82
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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

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INTRODUCTION[1/]

This writ proceeding presents the question whether the California Public Records Act compels the County of Los Angeles to disclose to the ACLU (and hence, the public) the billing records of its lawyers in six pending lawsuits—despite the County's assertion that the records are protected by the attorney-client privilege on two separate grounds and are exempt from disclosure under the CPRA's "catch-all" provision. The answer to that question will affect all California clients, private parties as well as public entities.

The ACLU fails to grapple with the first-impression issues raised here. It accuses the County of "hiding" behind the attorney-client privilege, but is unable to explain how financial information concerning the representation, transmitted between a lawyer and a client in confidence during their professional relationship, does not fit Evidence Code section 952's definition of a "confidential communication" to a tee. The ACLU's only response is to contort the statutory definition beyond its plain meaning, in violation of the rules of statutory construction, Supreme Court authority, legislative history and common sense.

With respect to the County's privilege argument based on the Business and Professions Code, the ACLU interprets the statutory scheme to mean that the Legislature passed two statutes at the same time, one to confer attorney-client privilege protection on certain financial information required to be included in an attorney's written fee contract, and the other to

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1/ We use the same abbreviations as in the petition for writ of mandate: "The County" refers collectively to petitioners County of Los Angeles Board of Supervisors and the Office of County Counsel. "The ACLU" refers collectively to real parties in interest ACLU of Southern California and Eric Preven. "The CPRA" is the California Public Records Act.

withdraw that protection for the identical information when it appears in the attorney's bill. Naturally, this would permit the public to gain access to privileged information simply by making a CPRA request for the bills, not the contracts—as the ACLU did here. As the County demonstrates, that could not have been the Legislature's intent.

Finally, the ACLU contends that the CPRA's catch-all exemption is inapplicable here because the issue was settled in another appellate decision. But the earlier decision dealt with a different exemption, which requires a completely different analysis than the balancing test mandated by the catch-all exemption. Under the factors relevant to the balancing test (including the significant amount of general information already available to the public concerning the County's legal expenses), the public interest in nondisclosure of billing records in still-pending lawsuits clearly outweighs the public interest in disclosure.

At bottom, this case can be resolved by answering a few simple questions, from the perspective of a client:

(1) You're involved in litigation and see your attorney talking to your neighbor at a party. You hear your neighbor ask how much the litigation is costing you, and your attorney answers. Has your attorney breached a duty to you, her client? If yes, how can the information not be privileged?

(2) At the same party, your attorney is talking to opposing counsel in your case, who says, "I'm not doing much on this, it's a pretty simple case, how about you? How much did you bill your client last month?" Your attorney tells him she billed $175,000 for lots of work.

Opposing counsel responds, "Oh, maybe this case isn't so simple, something must be going on if you're doing that much." Do you think disclosure of that information potentially aided the other side? If yes, the harm would be the same whether the client is a private party or a public entity. And if a public entity, plainly such information is shielded by the CPRA's catch-all provision, with its balancing test that requires courts to weigh the factors that favor nondisclosure and disclosure—including the fact that disclosure might unfairly disadvantage the entity.

For any or all of these reasons, the County's petition should be granted.

I. THE CPRA DOES NOT REQUIRE DISCLOSURE OF THE BILLING RECORDS SOUGHT HERE BECAUSE THEY ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

The parties agree that "'access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state,'" as the Legislature declared in enacting the CPRA. (See County's Petition for Writ of Mandate (PWM)14; ACLU's Brief in Opposition (OB) 9.) But the ACLU overlooks the Legislature's equally clear declaration that public access is not absolute or unlimited: The CPRA does "*not* require disclosure of . . . records" that are "exempted or prohibited pursuant to . . . state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (Gov. Code, § 6254 & subd. (k), emphasis added.)

The records sought in this case fall squarely into this category. Provisions of the Evidence Code and the Business and Professions Code relating to the attorney-client privilege establish that attorney billing records are exempted or prohibited from disclosure under the CPRA.

A. The Records Are Privileged Because They Contain Confidential Communications Between Attorney And Client, And The ACLU Failed To Prove Otherwise.

Recognizing the critical importance of the attorney-client privilege in California jurisprudence, the Legislature understandably carved out an unambiguous exception to the CPRA for records as to which that privilege is claimed. As this Court recently observed, the attorney-client 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.'" (*Edwards Wildman Palmer v. Superior Court* (Nov. 25, 2014, B255182) __ Cal.App.4th __ [2014 WL 6662053 at p. *11] (*Edwards*), quoting *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732 (*Costco*), other interior quotation marks and citations omitted.) The attorney-client privilege is "'fundamental to . . . the proper functioning of our judicial system . . . . If the Legislature had intended to restrict a privilege of this importance, it would likely have declared that intention unmistakably.'" (*Edwards, supra,* p. *17, quoting *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 207, other interior quotation marks omitted.)

The basic principles of the attorney-client privilege are set forth in the Evidence Code:

- "[T]he client [here, the County] has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (Evid. Code, § 954.)

- 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 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." (Evid. Code, § 952, emphasis added.)

- "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 [here, the ACLU] has the *burden of proof to establish that the communication was not confidential.*" (Evid. Code, § 917, subd. (a), emphases added.)

The ACLU misconstrues or ignores these fundamental principles.

1. A "confidential communication" is not limited to an attorney's legal opinion or advice.

The County's petition demonstrated that the billing records sought here satisfy the statutory definition of a "confidential communication," and that the ACLU failed to prove the records were not confidential. (PWM 21-24.)

The ACLU's response is to change the definition of a "confidential communication," contending that it "*must* include an attorney's legal opinion or advice" to qualify for the privilege. (OB 19, emphasis added; 23 ["the attorney-client privilege extends only to *legal advice*"].) Indeed, the ACLU asks this Court to "reaffirm the basic principle that communications that do not contain legal advice or opinion are not privileged," under the "plain language of Evidence Code § 952." (OB 17.)

The ACLU is mistaken. This Court—and others—have repeatedly reaffirmed the basic principle that confidential communications *are* privileged under Evidence Code section 952 whether or not they contain legal advice or opinion. As the late Justice Croskey stated for the Court, although the attorney-client privilege usually involves a communication between attorney and client, *"the statutory language is not so narrow . . . .* [T]he definition of a protected 'confidential communication' *includes* 'a legal opinion formed,'" even if not transmitted to the client. (*Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1273 (*Fireman's Fund*), emphases added.)

The ACLU cites no meaningful authority in support of its novel interpretation of Evidence Code section 952. Its interpretation is without merit, on several grounds:

- It violates the plain language of the statute, contrary to a cardinal rule of statutory construction. (*Head v. Civil Service Com.* (1996) 50 Cal.App.4th 240, 243.) The statute says "includes," not "must include."[2/]

- It is contrary to Supreme Court and other authorities which make clear that an attorney's "legal opinion formed" or "advice given" is a *type* of "confidential communication," not an indispensable requisite of it. (See *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371 (*Roberts*) ["'Confidential communication' is defined as *including* 'a legal opinion formed and the advice given by the lawyer,'" emphasis added]; 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," emphases added].)[3/]

- It is inconsistent with legislative history. Evidence Code section 952 was enacted in 1965 and amended in 1967 to insert the phrase, "a legal opinion formed and the," after "includes" and before "advice

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[2/] The ACLU asserts that the statute would have a different meaning if it said "including but not limited to." (OB 19-20.) Not so; the meaning is the same. (See Black's Law Dict. (9th ed. 2009) p. 831, col. 1 [defining "include" as "[t]o contain as part of something," and noting that some drafters use phrases such as "*including but not limited to*—which mean the same thing"].) For example, the two statements, "my grocery list includes milk" and "my grocery list includes but is not limited to milk," both mean that milk is not the only item on the list.

[3/] See also *Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 345 ["the protected communication may consist of information transmitted between a client and his lawyer, advice given by the lawyer, or a legal opinion formed and given by the lawyer"]; *Fireman's Fund, supra,* 196 Cal.App.4th at p. 1273.

given." The purpose of the amendment was to "preclude a possible construction of this section that would leave the attorney's uncommunicated legal opinion . . . unprotected by the privilege." (Cal. Law Revision Com. com., 1967 Amendment, 29B pt. 3A West's Ann. Evid. Code (2009 ed.) foll. § 952, p. 308.) If a lawyer's "legal opinion" was not part of the original definition of a "confidential communication," it could not have been a required element.

- It changes the definition of a "confidential communication" on the ground that a narrow construction of Evidence Code section 952 is required. (OB 29.) But a narrow construction of an exception that is a statutory privilege can never be narrower than the scope of the privilege itself. In fact, the term "confidential communication" is "'broadly construed'" (*Edwards, supra,* at p. *5, quoting *Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557), just as the attorney-client privilege is "liberally construed" (see PWM 14). (See also *People v. Flores* (1977) 71 Cal.App.3d 559, 565 ["The privilege of confidential communication between client and attorney should not only be liberally construed, but must be regarded as sacred"].) Even outside the privilege context, a narrow or strict construction of a statutory exception must still be "fair and reasonable." (*Fellowship of Friends, Inc. v. County of Yuba* (1991) 235 Cal.App.3d 1190, 1195.) "Strict construction" simply means that statutory language may "be neither enlarged nor extended beyond the plain meaning of the language employed." (*Cedars of Lebanon Hospital v. County of Los Angeles* (1950) 35 Cal.2d 729, 734.) The ACLU's reading of "includes" to mean "must include" flies in the face of the plain statutory language.

- Finally, the ACLU's interpretation defies common sense. Not every "confidential communication" originates with the lawyer. Since a confidential communication can originate with the client (Evid.

Code, § 952), it makes no sense to say that the client's communication must include the lawyer's "legal opinion formed" or "advice given." The ACLU's interpretation also impacts the lawyer's duty to keep confidences. (See Bus. & Prof. Code, § 6068 & subd. (e)(1) ["It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client"].) Suppose a client confides in his lawyer that he's about to lose his job and will not be able to pay further fees, and the lawyer writes a letter to the client about the situation. If the lawyer's letter—which contains no legal advice or opinion—were not privileged, how could the lawyer ensure that the client's confidence will remain inviolate?

2. The ACLU failed to overcome the presumption of confidentiality.

Despite the County's discussion of the presumption of confidentiality and the shifting burden of proof set forth in Evidence Code section 917 (PWM 22-23), the ACLU completely ignores the statute and attempts to evade the point. (See, e.g., OB 24-26 [referring to the presumption of confidentiality as a "proposition" of the County].)

To be clear, the "proposition" was the Legislature's. As our Supreme Court explained:

> The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. (Citations.) Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is *presumed to have been made in confidence* and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply. (Evid. Code, § 917, subd. (a); [Citation].)

(*Costco, supra,* 47 Cal.4th at p. 733, emphases added; *Edwards, supra,* at p. *12.)

The ACLU also fails to come to grips with the role of intent in the exercise of the attorney-client privilege. The County quoted from two Supreme Court cases holding that the privilege applies to communications that are "'intended to be confidential.'" (PWM 21-22, citing *Roberts, supra,* 5 Cal.4th at p. 371 and *City & County of San Francisco v. Superior Court* (1951) 37 Cal.2d 227, 236 (*San Francisco*).) The ACLU dismisses the County's authorities out of hand—factually distinguishing *Roberts* while ignoring what it says about intent, and rejecting *San Francisco* because "it is more than sixty years old and considered a prior, materially different codification of the attorney-client privilege." (OB 23-24.) However, *San Francisco* was good enough authority for the *Roberts* court to cite in 1993 for its holding on intent as well as other principles. (*Roberts, supra,* 5 Cal.4th at pp. 371, 380.)[4/]

In any event, even though the County provided a declaration stating its intent to keep billing records confidential and its practice to confine distribution "to our office alone, and to authorized representatives of the client, who are similarly required to keep the information confidential" (III PE 6, pp. 726-727), it was not obligated to do so. The County demonstrated its prima facie case of privilege by showing that the billing records contained communications made in the course of an attorney-client

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[4/] The Supreme Court has continued to cite *San Francisco* on the attorney-client privilege, as have the courts of appeal. (See, e.g., *People v. Gionis* (1995) 9 Cal.4th 1196, 1207.) With good reason. When section 952 was enacted in 1965, the Law Revision Commission found that it was, for the most part, "in accord with existing law," citing *San Francisco, supra,* 37 Cal.2d 227. (Cal. Law Revision Com. com., 1965 Amendment, 29B pt. 3A West's Ann. Evid. Code, *supra,* foll. § 952, p. 307.)

relationship, meaning the information transmitted was intended to be confidential between the County and its lawyers and any third persons who were present to further the County's interest, transmit the information or accomplish the County's purpose in seeking legal consultation. (Evid. Code, § 952.) The County thereby established the presumption of confidentiality and shifted the burden to the ACLU to prove that the communications were not confidential. (*Costco, supra,* 47 Cal.4th at p. 733.) The ACLU did not meet its burden. The fact that the billing records may also contain non-confidential information such as attorneys' names, addresses and phone numbers (OB 16) is of no moment. "[T]he privilege bars discovery of a privileged communication irrespective of whether it includes unprivileged material; 'when the communication is a confidential one between attorney and client, the entire communication . . . is privileged.'" (*Edwards, supra,* at p. *5, quoting *Costo, supra*, 47 Cal.4th at pp. 734, 736.) This is well-settled law, not the County's "nonsensical" argument, as the ACLU dubs it. (OB 16.) Rhetoric is not a substitute for citation to authority.

3. The ACLU fails to prove that information contained in the County's bills—such as the amount of the bill and the lawyers' rates—is not privileged.

To demonstrate the real-world effect of the ACLU's (and the trial court's) position that no information in attorney bills is confidential and privileged except express legal opinions or advice that can be redacted, the County provided the example of a cocktail party at which a client asks his lawyer—outside the hearing of any third party—two questions: Who's working on my case and how much is this month's bill? The lawyer answers both. (PWM 24.) We concluded that the answers are "confidential

communications" within the meaning of Evidence Code section 952, whether transmitted orally at the party or via a written bill. (*Ibid.*)

The ACLU relegates its response to a footnote, claiming that the County resorted to a hypothetical because it lacks "on-point authority." (OB 25, fn. 8.) That is hardly the case, as shown above. (§§ I.A.1, I.A.2.) And instead of discussing the actual hypothetical, the ACLU changes it—stating that the client asked "several" questions, and addressing only the one about the identity of the lawyers, not the amount of the bill. As to identity, the ACLU notes that courts often require such information to substantiate a privilege log. (OB 25, fn. 8.) Perhaps so. But what a privilege log does not disclose is lawyers' rates and the amount of their bills—the point the ACLU fails to address.

Another hypothetical further underscores the obviously privileged nature of such communications. At the same party, the same client privately asks his lawyer how much she is charging to represent his neighbor, Joe. May the lawyer answer the question? Of course not, because she would be revealing confidential communications between her and her client Joe transmitted in the course of their professional relationship.

It is difficult to imagine anyone—legally trained or not—believing that such information is not confidential between the lawyer and the client. In ducking this point, the ACLU again demonstrates that it did not—because it cannot—meet its burden to show otherwise.

4. The ACLU's waiver arguments are meritless.

In addition to contending that a billing entry indicating that 1.5 hours was spent preparing a reply brief in support of a summary judgment motion would not be privileged because it "does not contain a legal opinion or

advice," the ACLU asserts that "the actual filing of the motion would waive whatever privilege might have existed." (OB 18.) Understandably, the ACLU cites no authority for this strange proposition. The law is just the opposite.

"All case law on the subject of waiver is unequivocal: Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases will be decided against a waiver." (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60, interior quotation marks and citations omitted.) How does a client intentionally relinquish the attorney-client privilege by filing a summary judgment motion? The ACLU doesn't say. Would the ACLU make the same argument about a letter informing the client that the attorney is going to file a summary judgment motion? Would filing the motion destroy the client's privilege in the content of the communication? To ask the questions is to answer them: Of course not.

The ACLU is further concerned that deeming billing records privileged would "wreak havoc" when prevailing parties seek to recover fees under fee-shifting statutes because they would be forced to violate the attorney-client privilege. (OB 26.) The concern is misplaced, for two reasons. First, the privileged status of billing records depends on whether they satisfy the definition of a confidential communication under Evidence Code section 952, not on any consequence a finding of privilege might have. Second, it is routine that when the holder of a privilege puts the privileged matter in issue by initiating a court proceeding, he or she waives the privilege. (See Evid. Code, § 912, subd. (a).) For example, a patient

who brings an action for medical malpractice that puts his medical condition in issue thereby waives the doctor-patient privilege as to any confidential information acquired by the doctor. (*Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 64.) Similarly, an implied waiver of the lawyer-client privilege occurs "where the plaintiff has placed in issue a communication which goes to the heart of the claim in controversy." (*Chicago Title Ins. Co. v. Superior Court* (1985) 174 Cal.App.3d 1142, 1149.) But in neither case does it mean that the privilege never existed.

Finally, the ACLU argues that further havoc will result if billing records are privileged, because fee awards belong to the attorney, not the client. (OB 28.) Therefore, even if the client agrees to waive the privilege, lawyers would have to seek their client's waiver for every single billing entry. (*Ibid.*) And if the client refuses to waive the privilege, the attorney cannot recover fees. (*Id.* at pp. 28-29.) The first worry is easily resolved by the client's providing a blanket waiver of all billing records; the second, by a provision in the attorney's fee contract that should the attorney seek to recover fees, the client will waive the privilege.

None of the ACLU's concerns are relevant to the fundamental question at issue: Are billing records "confidential communications" within the meaning of Evidence Code section 952? If they are, they're privileged.

B. The Billing Records Contain Specific Information That Is Privileged Under The Business And Professions Code[5/] And The Evidence Code.

In 1986, the Legislature enacted provisions requiring, for the first time, that most non-contingency attorney fee contracts be in writing

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[5/] Further unlabeled statutory references in sections I.B. and I.C. of this brief are to the Business and Professions Code.

(§ 6148), and also deeming a "written fee contract" to be "a confidential communication within the meaning of subdivision (e) of section 6068[6/] and of Section 952 of the Evidence Code." (§ 6149.) A "confidential communication" is defined to include "*information* transmitted between a client and his or her lawyer." (Evid. Code, § 952, emphasis added; see § I.A., above.) Since fee contracts, by definition, contain information about fees, as well as other information (e.g., costs, billing rates, payment arrangements, services rendered or to be rendered), section 6149 illustrates the Legislature's intent to protect from disclosure, through the attorney-client privilege, certain *information*—including the kind at issue in this case.

To ensure that the new writing requirement would not cause attorneys previously accustomed to oral agreements to omit important financial information from their written contracts and their bills, the Legislature mandated that certain minimal information be included in both. In contracts, that information is: "(1) Any basis of compensation, including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case[;] (2) The general nature of the legal services to be provided to the client[;] (3) The respective responsibilities of the attorney and the client as to the performances of the contract." (§ 6148, subd. (a).) And in bills, the required information is: "[T]he basis" for the bill and "the amount, rate, basis for calculation, or other method of determination of the attorney's fees and costs." (§ 6148, subd. (b).)

The ACLU argues that the attorney-client privilege extends only to attorney fee contracts, not bills, because section 6149 applies only to

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6/ Section 6068, subdivision (e) obligates the attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

contracts, not bills. (OB 13.) That is an overly-simplistic reading of the statutory scheme. By its terms, section 6149 protects the *information* in the attorney's contracts—which includes some of the same information that section 6148 mandates be included in the attorney's bills. The ACLU's argument would mean that the Legislature took away with one hand what it gave with the other—the protection of the attorney-client privilege for financial *information* transmitted between client and lawyer in the course of their professional relationship. In legal terms, the Legislature would have created "a nullity, thereby violating one of the most elementary principles of statutory construction," a result the law does not permit. (See PWM 20.)

As a practical matter, the ACLU's argument would permit any member of the public to acquire, through the CPRA, financial information the Legislature has deemed a confidential communication subject to the attorney-client privilege, simply by requesting the attorney's bills, not his or her contracts. Moreover, the limitation on the attorney-client privilege the ACLU advocates would affect *all* clients, not just public entities. Private-party clients would be vulnerable, for example, to a litigation adversary's acquiring through discovery confidential financial information contained in their attorneys' billing records. It cannot be assumed that the Legislature intended to permit such a blatant evasion of our state's privilege laws.

C. The ACLU Ignores The Unique Nature Of California's Privilege Laws And Of This Case.

The County demonstrated the uniqueness of California's statutory scheme for protecting the financial information contained in attorney fee contracts and bills, and the paucity of case law on the subject. (PWM 16-19.) This case raises, as the County made clear, issues of first impression, with no decisional law directly on point one way or the other. (PWM 10-

11, 18-19.) Presumably that is at least partly why this Court agreed to consider it. (See *Edwards,* pp. 10-11.) Yet the ACLU twists the County's point, contending that the County is relying on "a single case"—*Smith v. Laguna Sur Villas Community Assn.* (2000) 79 Cal.App.4th 639—"for the idea that the billing records are privileged." (OB 22.) Not at all. The County cited dictum in *Smith*—and dictum in another case—to show that "[n]o California decision has provided a clear answer, and two decisions suggest opposite conclusions." (PWM 10.)

The County also explained, and it is undisputed, that cases from other jurisdictions, including the Ninth Circuit, have held that attorney fee bills and the financial information they contain are not protected by the attorney-client privilege. (PWM 17-18.) Conceding that these cases "are, of course, not binding precedent," the ACLU proceeds to cite and discuss several of them in an effort to persuade this Court to follow "the weight of this authority." (OB 21-22.) Yet none of these "authorities" was decided on the basis of California law.

Finally, the County pointed out a serious flaw in the Ninth Circuit's view that only an attorney's "impressions, conclusions, opinions, legal research or strategy" are privileged. (PWM 17-18.) The County explained that "a lawyer's opinions and strategy can be found not just in obvious forms (e.g., an opinion letter) but in more subtle ones as well." (PWM 18, fn. 6 [citing *Coito v. Superior Court* (2012) 54 Cal.4th 480, for the proposition that information included in attorney billing statements may include clues to the attorney's opinions and strategy].) The ACLU does not respond.

Nor did the ACLU respond to the amicus curiae brief filed by the Association of Southern California Defense Counsel (ASCDC), which

expands on this very point, concluding: "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* or work on certain topics or at certain times during the litigation—will reflect an attorney's theory of the case . . . ." (ASCDC letter brief, pp. 6, 3-4; filed with this Court's permission July 10, 2014, and granting 15 days for response.)

The billing records in this case are privileged under the Evidence Code alone, and under the Business and Professions Code. Nothing in the ACLU's brief supports a different result.

II. THE CPRA DOES NOT REQUIRE DISCLOSURE OF BILLING RECORDS IN STILL-PENDING CASES BECAUSE THE PUBLIC INTEREST IN NONDISCLOSURE CLEARLY OUTWEIGHS THE PUBLIC INTEREST IN DISCLOSURE.

A. The Public Already Has A Significant Amount Of Information About The Cost Of The County's Defense Of Excessive Force Cases.

Under the CPRA's broad "catch-all" or "public interest" provision, a public entity may withhold disclosure of requested records upon showing that the public interest in nondisclosure "clearly outweighs" the public interest in disclosure. (Gov. Code, § 6255, subd. (a).) The County demonstrated that it met that burden with respect to the requested billing records in cases that are not yet final. (PWM 30-33.)

The ACLU disagrees. It contends, "The public is entitled to know how much it is paying the County's attorneys to defend against allegations of excessive force and how its attorneys are spending their billable time in

those actions. Without this information, the public cannot properly evaluate the County's decisions to hire the particular firms that it did and whether those firms are using taxpayer money efficiently." (OB 35.)

However, as shown in the next two paragraphs, significant general information concerning the County's legal expenses in excessive force cases *is already public.* The ACLU does not explain why that information is not sufficient to fulfill its evaluation/monitoring function, and why it must have additional information *now,* instead of waiting until the litigation is completed. (See *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1072-1074 ("*Michaelis*") [applying catch-all provision, rejecting immediate disclosure of information about ongoing negotiations because "[n]o reason appears" why early disclosure "would provide any significantly greater benefit to the public" than "after negotiations are complete"].)

On January 2, 2014, County Counsel provided its litigation cost report for fiscal year 2012-2013 to the Board of Supervisors and posted the report, a public document, on its website. (II PE 351-356; County Counsel, letter to Board of Supervisors, Jan. 2, 2014, at ‹file.lacounty.gov/bos/supdocs/82300.pdf› [as of Dec. 22, 2014].) The report shows that the County paid $89 million in litigation expenses—$35.8 million for judgments and settlements and $53.2 million for attorney fees and costs. (*Id.* at pp. 352-353.) Of the amount for fees and costs, $39.8 million was paid to contract counsel—representing about 45% of the County's total litigation expenses. (*Id.* at p. 353.)

The Sheriff's Department was responsible for almost half of the County's $89 million total litigation expenses—$43 million. (II PE 354.) According to further public information, posted on then-Supervisor Gloria

Molina's website, $20 million was spent on excessive force litigation—$14.6 million on patrol cases, and $5.4 million on custody cases. (II PE 358; ‹gloriamolina.org/2014/01/14/gloria-molina-announces-latest-legal-costs-for-1-a-County-2/› [as of Dec. 22, 2014].)

Thus, general financial information detailing the County's expenditures for private attorney fees and for excessive force litigation is easily available to the public. The issue here is whether the ACLU's desire for *additional* information linking the existing information to "particular firms" *while the cases are still being litigated* tips the balance in favor of disclosure. It does not. In applying the balancing test required by Government Code section 6255, "courts must look not only to the nature of the information requested, but also how directly the disclosure of that information contributes to the public's understanding of government." (*Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222, 242 [holding certain teacher-evaluation scores are exempt from disclosure under Gov. Code § 6255 to the extent they include the teacher's name or identifying characteristics], citing *Humane Society of U.S. v. Superior Court* (2013) 214 Cal.App.4th 1233, 1268.)

Disclosure of the firm-specific billing information the ACLU seeks here, while the litigation is ongoing, would contribute nothing to "the public's understanding of government." At this point, the public interest in nondisclosure clearly outweighs the public interest in disclosure.

B. *Anderson-Barker* Does Not Control The Outcome Here.

Since the beginning of this case, the ACLU has contended that the issue of whether the billing records requested here are exempt from disclosure under the CPRA's catch-all provision was "settled" in favor of disclosure in *County of Los Angeles v. Superior Court* (*Anderson-Barker*) (2012) 211 Cal.App.4th 57. (1 PE 3, p. 79; OB 3, 31 [*Anderson-Barker* "squarely considered and rejected" the argument].) The contention is without merit. While both *Anderson-Barker* and this case deal with CPRA requests for billing records of County attorneys, each turns on a different legal analysis, which, in fact, produces a different result.

Anderson-Barker did *not* consider or reject any argument dealing with the catch-all provision. It dealt solely with the pending-litigation exception. (Gov. Code, § 6254, subd. (b) [exempting "[r]ecords pertaining to pending litigation to which the public agency is a party . . . until the pending litigation or claim has been finally adjudicated or otherwise settled"].) Despite the exception's broad language, case law has established a unique test: if the requested record was specifically prepared for *use* in litigation, the pending-litigation exception applies; if it was prepared for a "tangential" purpose, the exception does not apply; if it was prepared for a "dual purpose," the court must discern the "dominant purpose." (*Anderson-Barker, supra,* 211 Cal.App.4th at pp. 64-65.) If substantial evidence supports the trial court's factual determination as to the purpose or dominant purpose of the record's preparation, the appellate is bound by that finding. (*Id.* at p. 67.) Accordingly, the court in *Anderson-Barker* denied the County's writ petition "because substantial evidence supports the trial court's decision" that "the dominant purpose of the records was not for use in litigation." (*Ibid.*)

In contrast, a public entity's purpose or dominant purpose for preparing a record does not enter into the analysis of the public interest/catch-all provision. (Gov. Code, § 6255, subd. (a) [agency may withhold disclosure by demonstrating "that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served disclosure of the record"].) The focus is on balancing the public interest in disclosure of the record against the public interest in its nondisclosure. Nothing in *Anderson-Barker* aids in the application of that standard. Contrary to the ACLU's assertion (OB 31), *Anderson-Barker* is not "on point" here.[7/]

[7/] In reality, the catch-all provision is not an exemption or an exception to the CPRA, although the case law usually refers to it as such. It appears in a separate statute (Gov. Code, § 6255, subd. (a)), which defines two separate grounds for justifying an agency's withholding of records: [1] "the record in question is exempt under the [thirty] express provisions of this chapter [i.e., Gov. Code, § 6254, subds. (a)-(ad)]," *or* [2] ". . . the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

The distinction is important. CPRA exceptions are "narrowly construed." (*Anderson-Barker, supra*, 211 Cal.App.4th at p. 60.) In fact, a narrow construction of the pending-litigation exception drove the court's analysis in *Anderson-Barker*. (*Id.* at p. 64.) No narrow construction of the catch-all provision is required or even possible. A provision designed to "catch" a variety of situations that may not have been in the Legislature's mind when enacting the CPRA can hardly be narrowly construed. Understandably, the Supreme Court has referred to the catch-all provision as "broad." (*Michaelis, supra*, 38 Cal.4th at p. 1071.) Moreover, by its terms, the catch-all provision mandates a strict burden of proof, permitting nondisclosure only when the agency demonstrates that the balancing of public interests "clearly" favors the agency. (Gov. Code, § 6255, subd. (a).) No narrower construction is necessary.

CONCLUSION

For all these reasons, petitioners respectfully request that this Court grant the County's petition and direct respondent court (1) to vacate the judgment entered on September 18, 2014 and (2) to enter a new judgment finding that the County did not violate the CPRA by withholding the billing records sought by the ACLU in six pending cases.

Dated: December 22, 2014

Respectfully submitted,

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CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204(c)(1), I certify that this Reply Brief In Support Of Petition For Writ Of Mandate contains **6,151** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: December 22, 2014

Barbara W. Ravitz

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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.

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By U.S. Mail: by placing a true copy thereof enclosed in a sealed envelope addressed to the respective address(es) of the party(ies) stated above and placed the envelope(s) for collection and pickup, following our ordinary business practices:

As follows: I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit. The envelope was deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

Executed on **December 22, 2014**.

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

Rebecca E. Nieto