Case No. S226645

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES BOARD OF SUPERVISORS, et al.,
Petitioners,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

ACLU OF SOUTHERN CALIFORNIA, et al.,
Real Parties in Interest.

Review After Order Denying CPRA Request
Second Appellate District, Division Three, Case No. B257230
Los Angeles County Superior Court, Case No. BS145753
The Honorable Luis A. Lavin

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF PETITIONERS COUNTY OF LOS ANGELES BOARD OF SUPERVISORS, ET AL.

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I. Motion for Leave to File Amicus Brief

The California State Association of Counties ("CSAC") and League of California Cities ("League") seek leave to file the attached amicus brief.[1]

II. Interests of Amici Curiae

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League is an association of 473 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

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[1] No party or counsel for a party authored the attached brief, in whole or in part. No one made a monetary contribution intended to fund the preparation or submission of this brief.

III. Reasons Why Filing an Amicus Curiae Brief is Desirable

In particular, this Court will consider whether and to what extent attorney billing records and invoices are protected by the attorney-client privilege when such records are sought under the Public Records Act. Real Party in Interest, ACLU of Southern California, seeks to overturn an appellate court decision that both recognized the privileged nature of the information contained in such records, and declined to create a narrower version of the attorney-client privilege for public entities than private parties. Thus, the issues presented in this case directly impact the ability of cities and counties to obtain frank and open legal guidance for their lawyers, and to keep such guidance privileged.

Counsel for amici has reviewed the party briefing in this case, and does not duplicate those arguments here. Rather, the proposed amicus brief provides this Court with practical examples of how even redacted attorney invoices and billing records reveal the type of information that the attorney-client privilege is intended to protect. The brief also explains why the ACLU's invitation to this Court to narrowly interpret the attorney-client privilege in the context of the Public Records Act would result in a two-tier system, placing public entities at a distinct disadvantage in litigation and settlements, which is directly contrary to both the Evidence Code and the Public Records Act.

For the foregoing reasons, CSAC and the League respectfully request that this Court accept the accompanying amicus curiae brief.

Dated: Feb. 11, 2016

Respectfully submitted,

/s/

By: _____

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League of California Cities

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I. INTRODUCTION

This case presents a question of central importance to public agencies throughout the State, which rely heavily on attorneys to help do the public's business: Whether attorney invoices and billing records – which, directly or indirectly, will reflect the time lawyers have spent on a matter – are privileged attorney-client communications, and therefore exempt from disclosure under the California Public Records Act. The answer is yes.

In reaching this conclusion, Amici acknowledge that the Public Records Act is a critical feature of self-government in California, and a cornerstone in establishing trust between the people and their government. But in certain respects, the Act limits the public's right of access to records for reasons the Legislature has deemed equally important to the functioning of government. Among those limits is an exception to disclosure for records protected by the attorney-client privilege. In creating that exception – and placing no limitations on the exception – the Legislature has determined that the ability of public officials and employees to freely seek advice of counsel, and of public entities to engage opposing parties in litigation on a level playing field, outweighs the public's interest in accessing privileged records.

As the Answer Brief of Petitioners ("the County") amply demonstrates, the Court of Appeal correctly held that the Public Records Act does not require public entities to disclose redacted attorney invoices and billing records. We need not reiterate the County's arguments. Rather, we emphasize two points that reinforce the Court of Appeal's holding.

First is the practical reality that attorney invoices and billing records, even when redacted, can, by inference, convey information about an attorney's thoughts, advice, strategy, and tactics, and also indirectly indicate the substance of attorney-client communications. Requiring the disclosure of such records will thus undercut the confidentiality of the attorney-client relationship. This Court should not ignore that reality and treat a lawyer's recorded time or billing as mere accounting details.

Second, assuming this Court recognizes as a general principle that attorney invoices and billing records, even when redacted, are communications encompassed within the attorney-client privilege, it should reject any argument that such records must be disclosed in response to a Public Records Act request. The Act does not, in any way, diminish or narrow the attorney-client privilege. It incorporates the privilege in its entirety. This Court should not intrude on the legislative domain and sanction a two-tiered privilege system that is foreign to the Act.

For these reasons, and those ably advanced by the County, the Court of Appeal's opinion should be affirmed.

II. ARGUMENT

A. An Attorney's Invoices and Billing Records, Even When Redacted, are Privileged Attorney-Client Communications.

The fundamental purpose of the attorney-client privilege is to protect the confidential relationship between clients and their lawyers "so as to promote full and open discussion of the facts and tactics surrounding individual legal matters." (*Solin v. O'Melveny Meyers* (2001) 89 Cal.App.4th 451, 460.) It is based on the public policy served by providing every person the right "to freely and fully confer and confide in one having knowledge in the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.) The privilege is a fundamental part of our justice system, and has been "a hallmark of Anglo-American jurisprudence for almost 400 years." (*Ibid.*)

Like individuals and private entities, public entities enjoy the protection of the attorney-client privilege, both for communications between counsel and administrators and other staff, as well as communications between counsel and the entity's legislative body and other elected officials. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371-372; *STI Outdoor v. Superior Court* (2001) 91 Cal.App.4th 334, 341.) This privilege is not dependent on the existence of pending or threatened litigation, but is applicable to all communications in the course of the

attorney-client relationship that are intended to be confidential. (*Roberts, supra,* 5 Cal.4th at pp. 371-372.)

ACLU contends that attorney invoices or billing statements are not privileged because their dominant purpose is not to further legal representation. (ACLU Opening Br., pp. 30-36.) This reasoning is faulty, as the "dominant purpose" test is not used to determine whether an individual communication is confidential. Rather, since Evidence Code section 952 defines a confidential communication between a lawyer and a client as one made *in the course of* the attorney-client relationship, courts evaluate the "dominate purpose" of the relationship between attorney and client to determine whether an attorney-client relationship has been established. (*Costco v. Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 734-735.) For this reason, for example, the transmission between a lawyer and a client in the course of their professional relationship of copies of newspaper or law review articles or other publicly available materials is privileged. (*Ibid.*) "[I]t is the actual fact of the transmission which merits protection, since the discovery of the transmission of specific public documents might very well reveal the transmitter's intended strategy." (*Mitchell, supra,* 37 Cal.3d at p. 600.)

More fundamentally, however, ACLU's argument is flawed because it is simply not true that attorney invoices and billing records, even when redacted of information about specific tasks performed, are nothing more

than an accounting statement reflecting a business transaction. To the contrary, such documents can reveal strategy and tactics in litigation, or even the general nature of legal advice provided by an attorney to a governmental client.

Ironically, ACLU acknowledges this fundamental point. It acknowledges that it is seeking records in this instance – records pertaining to existing litigation in which the County is a defendant – to see what it can find out about the County's approach to defending and settling cases. ACLU states directly to this Court that it seeks the billing records to better understand the County's litigation tactics (ACLU Opening Br., p. 17), while at the same time arguing that such records reveal nothing of substantive value. But ACLU's candor in stating what it hopes to glean from the County's redacted invoices and billing records is telling. Through a review of invoices and billing records, it wants to learn about the County's defense and settlement strategy and tactics in pending cases.

And this case is not an isolated illustration of how invoices and billing records of attorneys, even when redacted, can provide insight into an attorney's thinking, and can indirectly reveal the content of communications between attorneys and public entities. Other illustrations abound. For example:

- Redacted invoices or billing records can reveal an attorney's judgment and confidential advice to a public entity about

whether a case, or an incident or transaction that might give rise to a claim, presents serious potential financial liability for the public entity. At attorney's hefty bill, reflecting a seemingly disproportionate amount of time devoted to a "minor" personal injury case, "small" tax refund claim, or "technical" contract dispute, might convey the message that the particular issue poses a much greater threat to the public fisc than would otherwise be recognized. That knowledge, in turn, would function as an open invitation to attorneys representing actual or potential plaintiffs to aggressively pursue an issue, broaden a claim, or create or expand a class action against the public entity.

- In a similar vein, redacted invoices or billing records can reveal assumptions about a public entity's potential liability that would increase the settlement value of a claim against the public entity by highlighting the amount of money the entity has spent on the litigation. This information would telegraph to attorneys for actual or potential plaintiffs the assessment by the public entity and its attorneys of the value of the claim. A redacted invoice or billing record can convey a message, though not expressly in words, that a claim has a dollar value

within a certain range, based on the number of dollars or hours billed by the attorney.

- Redacted invoices or billing records can reflect a public entity's efforts to fight false and fraudulent claims, and disclosure of such documents can undermine those efforts. For example, a plaintiff might claim serious injuries from an accident at a recreation center, when in fact the injuries were minor. Uncovering these types of fraudulent claims can require an attorney's extensive investigation, meeting with witnesses, and surveillance, all of which cost money and would be indicated in some manner on even redacted invoices or billing records. Disclosure of such records would reveal that the public entity, through counsel, is gathering evidence to prove fraud, at or before trial.
- Redacted invoices or billing records can reveal strategic or tactical decisions made in litigation. For example, attorney invoices can include costs from outside experts or consultants, which could point to a particular weakness in an adversary's case. If the public entity has hired an appellate specialist, that can reveal consideration of an appeal, and the amount of time billed by the appellate specialist may well

reflect the degree of effort and resources the public entity is devoting to considering or preparing an appeal.

- The frequency, duration, amount, and nature of contact between a public entity and its counsel, as reflected in redacted invoices and billing records, standing alone, can reveal significant information about a particular case or matter. This information can show how strenuously the public entity is defending itself, or preparing to defend itself, to avoid litigation. If the entity is not in touch with its attorney regarding a particular matter, or if the degree of contact between them or the work performed by the attorney regarding the matter is minimal, others may presume that the public entity or its attorney do not perceive – and may be missing – that the entity has a legal vulnerability regarding the matter. Similarly, an invoice can show whether a senior partner is involved, or whether legal interns or law clerks are doing all of the work on a matter, again reflecting the relative value the entity or the attorney places on the matter.
- The activity being billed, or even the timing of the billing, as reflected on an attorney's invoice or billing record, can also indirectly reveal privileged information. For example, research time can show whether a motion is being considered

versus witness preparation, which, again, looks different from document preparation. And even if those categories of work were redacted from a bill, the timing of the bill or the timing of the work stated in a bill, may be revealing. A huge spike in attorney time expended following a press conference by a putative plaintiff, or in advance of a settlement conference mandated by a court, can telegraph to others the likely subject of the attorney's work. Similarly, travel expenses on an invoice might indicate that an attorney is interviewing particular witnesses, or visiting particular sites, as part of an investigation.

- In most cities and counties, in-house lawyers track their time and often have invoices and billing records that will also be subject to this Court's ruling. Release of these records, even in redacted form, would reveal the dates and frequency with which employees of a particular department consulted with counsel, exposing precisely when an employee became aware of a potential legal issue and the level of concern the attorney had about the significance of that legal issue.

These examples are an illustrative, not exhaustive, list. They show that attorney billing records and invoices, even with information redacted that directly reveals substantive communication between a public entity and

its attorney, are not merely an administrative mechanical tool for payment of bills due. Rather, they can indirectly reveal the "who, what, when, where, or why" of the work an attorney does for a public entity, and the communications between the attorney and the public entity, within the context of an established attorney-client relationship. It belies reality to suggest that attorney invoices and billing records, even when redacted, do not reveal the types of information that the attorney-client privilege was intended to protect.

B. The Attorney-Client Privilege Recognized in the Public Records Act is Identical to the Attorney-Client Privilege Otherwise Recognized in State Law.

Section 6254(k) of the Public Records Act states:

> [N]othing in this chapter shall be construed to require disclosure of records that are any of the following: ….(k) Records, 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.

(Govt. Code, § 6254, subd. (k).) The attorney-client privilege, found in the Evidence Code, is one of many privileges and confidentiality protections that Section 6254(k) effectively cross-references.

ACLU asks this Court to apply a narrow construction to Section 6254(k), arguing that statutory exemptions from compelled disclosure should be narrowly construed to further the purpose of the Act. (ACLU Opening Br., pp. 13-19.) However, none of the cases cited by ACLU apply

a narrow construction to Section 6254(k), or to any of the state laws encompassed within Section 6254(k) – and for good reason.

First, ACLU's argument directly contradicts the statutory text. Section 6254(k), on its face, is obviously designed to accomplish one thing: to preserve existing provisions of law that protect certain types of records – including records of privileged attorney-client communications. It neither expands nor contracts those protections.

Second, ACLU's argument disregards the special role of Section 6254(k) within the structure of the Public Records Act. Section 6254(k) is fundamentally different from all other exemptions in the Act. It "is not an independent exemption at all. It simply incorporates other exemptions or prohibitions provided by law." (*Cook v. Craig* (1976) 55 Cal.App.3d 773, 783; accord, *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 656 [citing *Cook* with approval]; *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1283; *Long Beach Police Officers Ass'n v. City of Long Beach* (2014) 59 Cal.4th 59, 67.) Whatever arguments may exist for narrowly construing other exemptions in the Act, to do so here would be to rewrite, in one fell swoop, not only the contours of the attorney-client privilege, but of many other privileges and confidentiality provisions effectively cross-referenced in Section 6254(k), whose content and meaning derive not from the Act but from myriad other sources of state law.

Third, ACLU's argument ignores case law that recognizes that the attorney-client privilege is as vital to public entities as it is to individuals and private entities. (*Sacramento Newspaper Guild v. Sacramento County Bd of Supervisors* (1967) 255 Cal.App.2d 51, 54 ["Public agencies face the same hard realities as other civil litigants"]; *St. Croix v. Superior Court* (2014) 228 Cal.App.4th 434, 443 ["the privilege's protections of confidentiality of written attorney-client communication is fundamental to the attorney-client relationship, in the public sector as well as the private sector"].) That the courts have recognized the importance of the privilege for public entities is unsurprising, for the interest of the public is advanced when public officials and employees can communicate freely with their legal counsel in developing and implementing public policy. (*Roberts, supra*, 5 Cal.4th at pp. 380-81 ["The public interest is served by the privilege because it permits local government agencies to seek advice that may prevent the agency from becoming embroiled in litigation, and it may permit the agency to avoid unnecessary controversy with various members of the public."].) By the same token, the privilege serves the interests of the public – including protection of the public fisc – in many litigation contexts. (*Sacramento Newspaper Guild, supra,* 263 Cal.App.2d at pp. 55-56.)

Fourth, ACLU's argument ignores case law that strongly presumes against any diminution of the attorney-client privilege, absent a very clear

expression of legislative intent. (E.g., *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 913 [rejecting contention that provisions in California Environmental Quality Act defining the administrative record abrogates the privilege]; *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 204, 207 [declining to infer a limitation on trustee's attorney-client privilege based on trustee's duties to beneficiary]; *Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93, 99 [declining to infer a stockholder's exception to the attorney-client privilege between a corporate client and corporate counsel].) This Court and others have rejected arguments that open government laws should be construed to restrict the attorney-client privilege, absent a clear legislative intent to do so. (E.g., *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 [declining to infer that written communications between counsel and public bodies are unprivileged based on Brown Act provision limiting closed session meetings of such bodies with counsel]; *Sacramento Newspaper Guild, supra*, 255 Cal.App.2d at p. 54 [declining to infer that absence of a closed session provision in earlier version of the Brown Act precluded a public body from having a closed session meeting with its attorney to receive confidential legal advice].)

Fifth, the two-tiered system of attorney-client privilege that ACLU favors, with public entities afforded a narrower privilege than individuals and private entities, is bad public policy. Public entities exist to serve their constituent citizens, businesses, and institutions. It is those constituencies

that ultimately suffer if government officers and employees are not afforded the full range of protection of the attorney-client privilege, even when "the adversary in litigation may wrap himself in the banner of the public's right to know." (*Sacramento Newspaper Guild, supra*, 263 Cal.App.2d at p. 56, fn. 13 [noting that if attorney-client confidences were not maintained for public entities, litigation opponents would take advantage of the available documents, to the public entities' detriment].) A two-tiered system of privilege would invite gamesmanship and sharp practices by attorneys or others, who could use the Public Records Act to obtain records of attorney-client communications that would not be obtainable in discovery, and then use such records to gain a litigation advantage.

In light of all of the above, to accept the ACLU's argument favoring a two-tiered system of attorney-client privilege, this Court should require the strongest indication that the voters, in adopting Proposition 59 in 2004 to constitutionalize existing open government laws by adding Article I, section 3(b) to the California Constitution, had such an intent. No such evidence of legislative intent – much less compelling evidence of such an intent – exists. Accordingly, assuming this Court recognizes as a general principle that attorney invoices and billing records, even when redacted, are communications encompassed within the attorney-client privilege, it should reject any argument that such records must be disclosed in response to a public records request.

III. CONCLUSION

ACLU's argument is premised on two points: (1) attorney invoices and billing records, redacted of detailed information, are merely administrative and do not reveal attorney-client privileged information; and (2) to the extent the attorney-client privilege can be read to include redacted attorney invoices and billing records, the privilege should be read narrowly in the context of a Public Records Act, and disclosure should be required. Both points should be rejected. As evidenced by the examples set forth in this brief, even redacted attorney invoices and billing records can reveal important information that is properly within the attorney-client privilege. Further, reading the privilege narrowly for purposes of the Public Records Act is contrary to the statute and case law, and would disadvantage public agencies, to the detriment of the constituents those agencies serve.

For these reasons, this Court should affirm.

Respectfully Submitted,

/s/

Date: Feb. 11, 2016 _____

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CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 3,182 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 11 day of February, 2016 in Sacramento, California.

Respectfully submitted,

/s/

By: _____
JENNIFER B. HENNING
Attorney for Amici Curiae

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County of Los Angeles Board of Supervisors v. Superior Court
Case No. S226645

I, Mary Penney, declare:

That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the within action; and I am employed in the County of Sacramento, California, within which county the subject mailing occurred. My business address is 1100 K Street, Suite 101, Sacramento, California, 95814. I served the within **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF PETITIONERS COUNTY OF LOS ANGELES BOARD OF SUPERVISORS, ET AL.** by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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/s/

MARY PENNEY