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June 18, 2015

VIA FEDERAL EXPRESS

The Honorable Tani Gorre Cantil-Sakauye, Chief Justice,
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: Amicus Curiae letter responding to request for depublication and supporting petition for review (Rules 8.1125(b), 8.500(g))
County of Los Angeles Board of Supervisors v. Superior Court (ACLU of Southern California) (2015) 235 Cal.App.4th 1154
Supreme Court Case No. S226645
Court of Appeal Case No. B257230

Dear Chief Justice Cantil-Sakauye and Associate Justices:

To prevent application of the attorney-client privilege in a way that will create inefficiencies in the adjudication of attorney fee motions, the Los Angeles County Bar Association (LACBA)

respectfully requests that this Court depublish or grant review of the decision in this case.[1]

The Court of Appeal held that attorney billing records, once sent to a client, are categorically protected by the attorney-client privilege, even after confidential information has been redacted. The case arose out of a Public Records Act request by the ACLU for billing statements from private law firms representing Los Angeles County in cases brought by jail inmates alleging misconduct by sheriff's deputies. Although the request specified that the statements could be redacted to delete privileged information, the Court of Appeal ruled that any material sent by an attorney to a client related to a case becomes protected by the attorney-client privilege, which only the client can waive.[2]

In holding that attorney billing records sent to a client are categorically protected by the attorney-client privilege, the Court of Appeal's decision deprives the trial court and counsel of access to the most probative evidence of whether attorney fees claimed are reasonable when the client declines to waive the privilege. The legal analysis underlying the Court of Appeal's holding, moreover, is at best incomplete.

Therefore, while LACBA takes no position on the ultimate disposition of this case, LACBA believes that depublication or review is warranted to prevent the harm likely to result from the Court of Appeal's resolution of the attorney-client privilege issue.

Interest of amicus curiae

LACBA, with more than 21,000 members, is one of the largest metropolitan voluntary bar associations in the United States. In addition to meeting the professional needs of its members, LACBA actively promotes the administration of justice, access to the judicial system, and the role of lawyers to facilitate both. LACBA has consistently recognized the importance of attorney fees awards to encourage the vindication of important public rights. For example, LACBA was a co-sponsor of the private attorney general statute, Code of Civil Procedure section 1021.5, and filed an amicus brief in *Serrano v. Priest* (1977) 20 Cal.3d 25, which established the equitable private attorney general doctrine.

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1 Another amicus filed a request for depublication on June 12, 2015. LACBA's letter is timely under rule 8.1125(b). (See Cal. Rules of Court, rule 8.1125(b) [within 10 days after the Court receives a request for depublication, "any person may submit a response supporting . . . the request"].)

2 Though the particular Public Records Act request in this case was for billing statements in pending cases, the Court of Appeal's holding – that such statements are absolutely privileged – would prevent submission or discovery of time records even after the case is completed.

Why the Court should depublish or grant review

A. The Court of Appeal's decision threatens the ability of trial courts and counsel to resolve attorney fee motions fairly and efficiently.

The Court of Appeal's decision will create practical problems for trial courts and counsel attempting to resolve attorney fee motions. Central to these motions is the trial court's determination of the reasonable amount of attorney time spent on the case. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131-1132 ["a court assessing attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case'"].)

Detailed time records supporting – or opposing – an attorney fee motion can be of great assistance to the trial court in making this determination, even if they are not required. (See Richard M. Pearl, 2 Cal. Attorney Fee Awards (CEB 2015) § 9.83 at p. 9-73 ["Detailed Time Records Not Required But Advisable" (bold omitted)]; see *id.*, §9.82, pp. 9-72 to 9-73 ["A well-documented claim, *including time records* and a thorough explanation of the exigencies of litigating the case, is extremely valuable in persuading a court to compensate counsel for the hours worked on a matter" (italics added)].)

But if a client refuses to waive the attorney-client privilege, the Court of Appeal's decision bars use of the billing records that normally are the most relevant evidence of how much attorney time was spent on the case and whether it was reasonable.

It is easy to see how this result could harm attorneys who seek attorney fees. Yet opponents of fee motions arguably will be even more harmed by the Court of Appeal's opinion. Currently, if the fee applicant does not voluntarily submit time records, fee opponents have the right to request them in discovery. Parties opposing fee motions usually rely on time records to argue that the time is not well documented or too many hours were spent on certain proceedings. Fee applicants who might be vulnerable to such attacks can now resist discovery by invoking the attorney-client privilege as interpreted by the Court of Appeal. Thus, the decision is likely to have a particularly harsh effect on parties opposing fee motions.

Trial courts, in turn, will suffer the institutional harms that result from inefficiency and delay, as the Court of Appeal's decision denies them access to the detailed time records that best enable courts to decide attorney fee motions. Without these records, trial courts will have less information to use in deciding an already difficult question: what is a reasonable fee award?

B. The Court of Appeal applied California's attorney-client privilege to billing records without a thorough legal analysis.

The Court of Appeal dedicated most of its opinion to refuting the proposition that "Evidence Code section 952 applies only to communications that contain a legal opinion or advice." (Typed opn. at p. 19.) But the Court of Appeal's resolution of that issue did not answer the question presented here: does the attorney-client privilege categorically apply to attorney billing records sent to a client, even after specific privileged items have been redacted?

Even if the attorney-client privilege protects more than just opinions and advice, it does not necessarily follow that it protects each and every document sent by a lawyer to her client in the course of the representation. Yet the Court of Appeal concluded that any "communication made in the course of an attorney-client relationship" satisfies a party's prima facie burden of proving the privilege applies. (Typed opn. at p. 20.)

The Court of Appeal's reasoning excludes any consideration of the realities of legal practice in applying the privilege. It cannot be squared with the common professional understanding that, where the purpose of the communication is simply to seek payment and nothing more, and any confidential information is redacted, the policies underlying the attorney-client privilege do not come into play and it should not apply.

Accordingly, amicus LACBA requests that the Court order the Court of Appeal's opinion be depublished or grant review to clarify the law in this area.

Respectfully submitted,

Sally Suchil
Chief Executive Officer

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 1055 West 7th Street, Suite 2700, Los Angeles, CA 90017.

On June 18, 2015, I served true copies of the Los Angeles County Bar Association's (LACBA) **LETTER TO CALIFORNIA SUPREME COURT REQUESTING DEPUBLICATION OR REVIEW** on the interested parties in this action as follows:

SERVICE LIST

County of Los Angeles Board of Supervisors v. Superior Court
COA Case No. B257230 / CASCT Case No. S226645

Court of Appeal of California
Second Appellate District, Division Three
300 South Spring Street
Los Angeles, California 90013

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Californians Aware The Center for Public Forum Rights : Pub/Depublication Requestor	Joseph Terrence Francke CFAC 2701 Cottage Way #12 Sacramento, CA 95825

BY MAIL: I enclosed the document in a sealed envelope 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 LACBA'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 paid.

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

Executed on June 18, 2015, at Los Angeles, California.

Grace Midori Danziger