2 Cal.5th 282
Supreme Court of California.

LOS ANGELES COUNTY BOARD OF SUPERVISORS et al., Petitioners,
v.
The SUPERIOR COURT of Los Angeles County, Respondent;
ACLU of Southern California et al., Real Parties in Interest.

S226645
|
Filed 12/29/2016

**Synopsis**

**Background:** After county produced copies of records from cases that were no longer pending, with alleged attorney-client privileged and work-product information redacted, pursuant to request submitted by civil liberties organization under **Public Records Act** (PRA), seeking **invoices** specifying amounts that county had been **billed** by any law firm in connection with lawsuits brought by inmates involving alleged jail violence, organization filed petition for writ of mandate, seeking to compel county to disclose records for all lawsuits, not just those that were no longer pending. The Superior Court, Los Angeles County, No. BS145753, Luis A. Lavin, J., granted petition insofar as it pertained to **billing** records. County filed petition for writ of mandate, challenging trial court's ruling. The Court of Appeal granted county's petition. Civil liberties organization petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

**Holdings:** The Supreme Court, Cuéllar, J., held that:

[1] attorney-client privilege does not categorically shield everything in a **billing invoice** from PRA **disclosure**;

[2] attorney-client privilege protects the confidentiality of **invoices** for work in pending and active **legal** matters; and

[3] attorney-client privilege may not encompass attorney fee totals in **legal** matters that concluded long ago.

Reversed and remanded.

Opinion, 185 Cal.Rptr.3d 842, superseded.

Werdegar, J., filed dissenting opinion, in which Cantil-Sakauye, C.J., and Corrigan, J., joined.

West Headnotes (15)

**[1] Records**
In general;freedom of information laws in general

**Public Records Act** (PRA) was enacted for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies. Cal. Gov't Code § 6250 et seq.

1 Cases that cite this headnote

**[2] Records**
Evidence and burden of proof

In determining the propriety of an agency's reliance on the **Public Records Act's** (PRA) catchall provision to withhold **public records**, the burden of proof is on the agency "to demonstrate a clear overbalance" in favor of nondisclosure. Cal. Gov't Code § 6255(a).

1 Cases that cite this headnote

**[3] Records**
In general;request and compliance

The fact that parts of a requested document fall within the terms of a **Public Records Act** (PRA) exemption does not justify withholding the entire document. Cal. Gov't Code §§ 6253(a), 6254, 6255.

Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**

Purpose of privilege

Fundamental purpose of attorney-client privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and frank discussion of the facts and tactics surrounding individual **legal** matters. Cal. Evid. Code §§ 950, 954.

1 Cases that cite this headnote

[5] **Statutes**

Purpose and intent

In all questions of statutory interpretation, Supreme Court's foremost task is to give effect to the Legislature's purpose.

2 Cases that cite this headnote

[6] **Statutes**

Context

In construing a statute, courts analyze the statute's text in its relevant context, as text so read tends to be the clearest, most cogent indicator of a specific provision's purpose in the larger statutory scheme.

4 Cases that cite this headnote

[7] **Statutes**

Construction based on multiple factors

In construing a statute, courts interpret relevant terms in light of their ordinary meaning, while also taking account of any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose.

7 Cases that cite this headnote

[8] **Records**

Internal memoranda or letters;executive privilege

Attorney-client privilege does not categorically shield everything in a public entity's attorney's **billing** **invoice** from **Public** **Records** **Act** (PRA) **disclosure**. Cal. Evid. Code §§ 952, 954; Cal. Gov't Code § 6254(k).

Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**

Professional Character of Employment or Transaction

The attorney-client privilege does not apply to every single communication transmitted confidentially between lawyer and client; rather, the heartland of the privilege protects those communications that bear some relationship to the attorney's provision of **legal** consultation. Cal. Evid. Code § 952.

7 Cases that cite this headnote

[10] **Privileged Communications and Confidentiality**

Client information;retainer and authority

The extent of an organization's resistance to public **disclosure** of its **legal** **bills** does not dictate the scope of the attorney-client privilege. Cal. Evid. Code §§ 952, 954.

1 Cases that cite this headnote

[11] **Privileged Communications and Confidentiality**

Communications from client to attorney and from attorney to client

The fact that the information communicated by an attorney to his or her client may have some ancillary bearing on the attorney's relationship to a client does not end the inquiry into whether the attorney-client privilege applies, nor does the fact that an attorney would prefer to keep the information confidential. Cal. Evid. Code §§ 952, 954.

7 Cases that cite this headnote

  

**[12] Privileged Communications and Confidentiality**

Client information;retainer and authority

The attorney-client privilege protects the confidentiality of **billing** information in an attorney's **invoices** to a client if the information is conveyed for the purpose of **legal** representation, or if the information comes close enough to the heartland of the attorney-client privilege to threaten the confidentiality of information directly relevant to the attorney's distinctive professional role. Cal. Evid. Code §§ 952, 954; Cal. Bus. & Prof. Code § 6149.

9 Cases that cite this headnote

**[13] Privileged Communications and Confidentiality**

Client information;retainer and authority

When a **legal** matter remains pending and active, the attorney-client privilege encompasses everything in an attorney's **invoice** to a client, including the amount of aggregate fees. Cal. Evid. Code §§ 952, 954; Cal. Bus. & Prof. Code § 6149.

7 Cases that cite this headnote

**[14] Privileged Communications and Confidentiality**

Client information;retainer and authority

The attorney-client privilege may not encompass attorney fee totals in **legal** matters that concluded long ago, because a cumulative fee total for a long-completed matter does not always reveal the substance of **legal** consultation. Cal. Evid. Code §§ 952, 954; Cal. Bus. & Prof. Code § 6149.

Cases that cite this headnote

**[15] Privileged Communications and Confidentiality**

Constitutional and statutory provisions

The Evidence Code was meant to incorporate prior law on the attorney-client privilege. Cal. Evid. Code § 952.

*See* 2 Witkin, Cal. Evidence (5th ed. 2012) Witnesses, § 100 et seq.

Cases that cite this headnote

****774** *****109** Ct.App. 2/3 B257230, Los Angeles County Super. Ct. No. BS145753

**Attorneys and Law Firms**

John F. Kratli, Mark J. Saladino and Mary C. Wickham, County Counsel, Roger H. Granbo, Assistant County Counsel, Jonathan McCaverty, Deputy County Counsel; Greines, Martin, Stein & Richland, Timothy T. Coates, Los Angeles, and Barbara W. Ravitz for Petitioners.

Horvitz & Levy, Lisa Perrochet, Encino, Steven S. Fleischman and Jean M. Doherty, Encino, for Association of Southern California Defense Counsel as Amicus Curiae on behalf of Petitioners.

Jennifer B. Henning for California State Association of Counties and League of California Cities as Amici Curiae on behalf of Petitioners.

****775** Keith J. Bray, Long Beach; Dannis Woliver Kelley, Sue Ann Salmon Evans, Long Beach, and William B. Tunick, Sacramento, for Education **Legal** Alliance of the California School Boards Association as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Peter J. Eliasberg, Los Angeles; Davis Wright Tremaine, Jennifer L. Brockett, Nicolas A. Jampol, Los Angeles,Rochelle L. Wilcox, Colin D. Wells, San Francisco, and Diana Palacios, Los Angeles, for Real Parties in Interest.

Reuben Raucher & Blum and Stephen L. Raucher, Los Angeles, for Beverly Hills Bar Association as Amicus Curiae on behalf of Real Parties in Interest.

Tom Myers and Arti Bhimani for AIDS Healthcare Foundation as Amicus Curiae on behalf of Real Parties in Interest.

Ram, Olson, Cereghino & Kopczynski and Karl Olson, San Francisco, for Los Angeles Times Communications LLC, McClatchy Newspapers, Inc., Gannett, First Amendment Coalition, California Broadcasters Association and California Newspapers Publishers Association as Amici Curiae on behalf of Real Parties in Interest.

Arthur S. Pugsley, Melissa Kelly; Joshua R. Purtle and Jaclyn H. Prange, San Francisco, for Los Angeles Waterkeeper and Natural Resources Defense Council as Amici Curiae on behalf of Real Parties in Interest.

Law Office of Chad D. Morgan and Chad D. Morgan, Corona, for Leane Lee, Nevada City, and Coalition of Anaheim Taxpayers for Economic Responsibility as Amici Curiae on behalf of Real Parties in Interest.

**Opinion**

Cuéllar, J.

***288** This case implicates both the public's interest in transparency and a public agency's interest in confidential communications with its **legal** counsel. The specific question we must resolve is whether **invoices** for work on currently pending litigation sent to the County of Los Angeles by an outside law firm are within the scope of the attorney-client privilege, and therefore exempt from **disclosure** under the California **Public Records Act** (PRA; Gov. Code, § 6250 et seq.). What we hold is that the attorney-client privilege does not categorically shield everything in a **billing invoice** from PRA **disclosure**. But **invoices** for work in pending and active **legal** matters are so closely related to attorney-client communications that they implicate the heartland of the privilege. The privilege therefore protects the confidentiality *****110** of **invoices** for work in pending and active **legal** matters.

## I. BACKGROUND

On July 1, 2013, following several publicized inquiries into allegations of excessive force against inmates housed in the Los Angeles County jail system, the ACLU of Southern California and Eric Preven (collectively, the ACLU) submitted a PRA request to the Los Angeles County Board of Supervisors and the Office of the Los Angeles County Counsel (collectively, the County). The request sought "**invoices**" specifying the amounts that the County had been **billed** by any law firm in connection with nine different lawsuits alleging excessive force against jail inmates.

In a letter dated July 26, 2013, the County agreed to produce copies of the requested **invoices** related to three such lawsuits that were no longer pending, with attorney-client privileged and work product information redacted. The ***289** County declined to provide **invoices** for the remaining six lawsuits, which were still pending. According to the County, "the detailed description, timing, and amount of attorney work performed, which communicates to the client and discloses attorney strategy, tactics, thought processes and analysis" were privileged under the Evidence Code and therefore exempt from **disclosure** under Government Code section 6254, subdivision (k) (all undesignated cites hereafter are to the Government Code). The requested **invoices**, the County continued, were also exempt under the PRA's catchall provision, section 6255, subdivision (a), "because the public interest served by not disclosing the records at this time clearly outweighs the public interest served by **disclosure** of the records."

On October 31, 2013, the ACLU filed a petition for writ of mandate in the superior court, seeking to compel the County to "comply with the [PRA]" and disclose the requested records for all nine lawsuits. The ACLU framed its request for the **invoices** as follows: ****776** "Current and former jail inmates have brought numerous lawsuits against the County and others for alleged excessive force. The County has retained a number of law firms to defend against these suits. It is believed that the selected law firms may have engaged in 'scorched earth' litigation tactics and dragged out cases even when a settlement was in the best interest of the County or when a settlement was likely. Given the issues raised by the allegations in these complaints and the use of taxpayer dollars to pay for the alleged use of scorched earth litigation tactics, the public has a right and interest in ensuring the transparent and efficient use of taxpayer money." Defending such lawsuits, the plaintiffs estimated, could cost tens of millions of dollars. After a hearing on June 5, 2014, the court granted the ACLU's petition. The court held that the County had failed to show the **invoices** were attorney-

  

client privileged communications. As a result, the court ordered the County to release "the billing statements for the nine lawsuits identified in the July 1, 2013 [ ]PRA request." But "[t]o the extent these documents reflect an attorney's legal opinion or advice, or reveal an attorney's mental impressions or theories of the case," the court held that "such limited information may be redacted."

The County then filed its own petition for writ of mandate in the Court of Appeal, which granted the County's petition and vacated the superior court's order. The Court of Appeal found that "the invoices are confidential communications within the meaning of Evidence Code section 952," and therefore "are exempt from disclosure under Government Code section 6254, subdivision (k)." Relying on our decision in ***111** *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 101 Cal.Rptr.3d 758, 219 P.3d 736 (*Costco*), the appellate court concluded that "the proper focus in the privilege inquiry is not whether the communication contains an attorney's opinion or advice, but whether the relationship is one of attorney-client and whether the ***290** communication was confidentially transmitted in the course of that relationship." And " 'because the privilege protects a *transmission* irrespective of its content,' " the Court of Appeal held that "the invoices"—which "constituted information transmitted by the law firms to the County in the course of the representation" and in confidence—were confidential communications within the meaning of Evidence Code section 952. Given this conclusion, the Court of Appeal did not reach the parties' contentions regarding application of the PRA's catchall provision or Business and Professions Code sections 6148 and 6149. We then granted review.

## II. DISCUSSION

The primary question raised in this case is whether invoices for legal services transmitted to a government agency by outside counsel are categorically protected by the attorney-client privilege and therefore exempt from disclosure under the PRA, and if not, whether any of the information sought by the ACLU is nonetheless covered by the privilege.

### A. Statutory Scheme

#### *1. PRA*

**[1]** The PRA and the California Constitution provide the public with a broad right of access to government information. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 164, 158 Cal.Rptr.3d 639, 302 P.3d 1026.) The PRA, enacted in 1968, grants access to public records held by state and local agencies. (§ 6250 et seq.) Modeled after the federal Freedom of Information Act (5 U.S.C. § 552 et seq.), the PRA was enacted for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies. (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425, 121 Cal.Rptr.2d 844, 49 P.3d 194.) Such "access to information concerning the conduct of the people's business," the Legislature declared, "is a fundamental and necessary right of every person in this state." (§ 6250.) Consistent with the Legislature's purpose, the PRA broadly defines "public records" to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (§ 6252, subd. (e).)

****777** As the result of a 2004 initiative, Proposition 59, voters enshrined the PRA's right of access to information in the state Constitution: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, ... the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1).) As ***291** amended by the initiative, the Constitution also directs that statutes "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(2).)

**[2]** Despite the value assigned to robust public disclosure of government records both in the California Constitution and in the PRA, two statutory exceptions nonetheless exist. The first is section 6255(a), the PRA's catchall provision allowing a government agency to withhold a public record if it can demonstrate that "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." In ***112** determining the propriety of an agency's reliance on the catchall provision to withhold public records, the burden of proof is on the agency "to demonstrate a clear overbalance" in

favor of nondisclosure. (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071, 44 Cal.Rptr.3d 663, 136 P.3d 194.) The second is section 6254, which lists certain categories of records exempt from PRA **disclosure**. These exemptions are largely concerned with protecting " 'the privacy of persons whose data or documents come into governmental possession.' " (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282, 48 Cal.Rptr.3d 183, 141 P.3d 288.) [1]

Section 6254(k) is the PRA exemption at issue in this case. This provision allows agencies to withhold "[r]ecords, the **disclosure** of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (§ 6254(k).) [2] By "its reference to the privileges contained in the Evidence Code," section 6254(k) "has made the attorney-client privilege applicable to **public records**." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370, 20 Cal.Rptr.2d 330, 853 P.2d 496 (*Roberts*).) This exemption, we have explained, emphasizes the Legislature's purpose of affording "public entities the attorney-client privilege as to writings to the extent authorized by the Evidence Code." (*Id.* at p. 380, 20 Cal.Rptr.2d 330, 853 P.2d 496, footnote omitted.)

***292** **[3]** As with any of the PRA's statutory exemptions, "the fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document." (*CBS, Inc. v. Block*, *supra*, 42 Cal.3d at p. 653, 230 Cal.Rptr. 362, 725 P.2d 470.) What the PRA appears to offer is a ready solution for records blending exempt and nonexempt information: "Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law." (§ 6253, subd. (a).) While this provision does not dictate which parts of a **public record** are privileged, it requires public agencies to use the equivalent of a surgical scalpel to separate those portions of a record subject to **disclosure** from privileged portions. At the same time, the statute places an express limit on this surgical approach: public agencies are not required to attempt selective **disclosure** of records that are not "reasonably segregable." (*Ibid.*) To the extent this standard is ambiguous, the PRA must be construed in " 'whichever way will further the people's right of ****778** access.' " (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1190, 199 Cal.Rptr.3d 743, 366 P.3d 996; see also Cal. Const., art. I, § 3, subd. (b)(2).)

*2. Evidence Code*

**[4]** The attorney-client privilege incorporated into the PRA by section 6254(k) is described in *****113** Evidence Code section 950 et seq., enacted in 1965. (See Evid. Code, div. 8, ch.4, art. 3 ["Lawyer-client Privilege"].) This privilege no doubt holds a special place in the law of our state. (See *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, 208 Cal.Rptr. 886, 691 P.2d 642 (*Mitchell*) ["The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for almost 400 years."].) And for good reason: its "fundamental purpose ... is to safeguard the confidential relationship between clients and their attorneys so as to promote full and frank discussion of the facts and tactics surrounding individual **legal** matters." (*Ibid.* ["the public policy fostered by the privilege seeks to insure 'the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense' "].)

To this end, Evidence Code section 954 confers a privilege on the client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." A "confidential communication," moreover, is defined as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom **disclosure** is reasonably necessary for the transmission of the information or the accomplishment of the purpose for ***293** 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.)

**B. Application to County's Invoices for Legal Services**

**[5]** **[6]** **[7]** As with all questions of statutory interpretation, our foremost task is to give effect to the Legislature's purpose. (See *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037, 175 Cal.Rptr.3d 601, 330 P.3d 912.) In doing so, we analyze the statute's text in its relevant context, as text so read tends to be the clearest, most cogent indicator of a specific provision's purpose in the larger

  

statutory scheme. We interpret relevant terms in light of their ordinary meaning, while also taking account of any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose. (See *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 378, 33 Cal.Rptr.2d 63, 878 P.2d 1275.)

**[8]** Not surprisingly, the primary purpose of the Evidence Code provisions at issue in this case is to protect the confidential relationship between client and attorney to promote frank discussion between the two. (See *Mitchell*, *supra*, 37 Cal.3d at p. 599, 208 Cal.Rptr. 886, 691 P.2d 642.) These provisions do so by prohibiting **disclosure** of any "confidential communication between client and lawyer." (Evid. Code, § 954.) The Evidence Code also states that " 'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence ..., and includes a **legal** opinion formed and the advice given by the lawyer in the course of that relationship." (*Id.*, § 952; see also *Costco*, *supra*, 47 Cal.4th at p. 733, 101 Cal.Rptr.3d 758, 219 P.3d 736 ["the privilege attaches to any **legal** advice given in the course of an attorney-client relationship"].) The key question, then, is this: Would treating **invoices** as sometimes nonprivileged undermine the fundamental purpose of the attorney-client privilege?

***114** The ACLU says no. Merely sending **invoices** to a client, the ACLU contends, does not always "further the purpose of **legal** representation." Rather, **invoices** are meant to help a service provider secure payment for services rendered. The mere fact that an attorney chose to transmit his or her **invoices** in confidence is of no moment, according to **779** the ACLU. Such **invoices** further a separate business purpose that is merely incidental to the attorney-client relationship. We agree —but only up to a point. The attorney-client privilege only protects communications between attorney and client made for the purpose of seeking or delivering the attorney's **legal** advice or representation. Evidence Code section 952 twice states that the privilege **294** extends only to those communications made "in the course of [the attorney-client] relationship," a construction suggesting a nexus between the communication and the attorney's professional role.[3] The Evidence Code also repeatedly refers to "consultation" between the attorney and client. (See *id.*, § 951 [defining a "client" as someone who "consults a lawyer for the purpose of retaining the lawyer or securing **legal** service or advice from him in his professional capacity"]; *id.*, § 952 [defining "confidential communication between client and lawyer" as "information transmitted in confidence by a means which ... discloses to no third persons other than those who are present to further the interest of the client in the consultation or to those to whom **disclosure** is reasonably necessary for ... the accomplishment of the purpose for which the lawyer is consulted"].)

**[9]** These references underscore that the privilege does not apply to every single communication transmitted confidentially between lawyer and client. Rather, the heartland of the privilege protects those communications that bear some relationship to the attorney's provision of **legal** consultation. (See *Roberts*, *supra*, 5 Cal.4th at p. 371, 20 Cal.Rptr.2d 330, 853 P.2d 496 [explaining that "under the Evidence Code, the attorney-client privilege applies to confidential communications *within the scope of* the attorney-client relationship" (italics added) ]; see also *Costco*, *supra*, 47 Cal.4th at p. 743, 101 Cal.Rptr.3d 758, 219 P.3d 736 (conc. opn. of George, C.J.) [Evid. Code § 952 "identifies a ' "confidential communication" ' in general terms as meaning 'information transmitted between a client and his or her lawyer in the course of that relationship,' but the provision also supplies more specific examples of what is meant by adding that a confidential communication 'includes a **legal** opinion formed and the advice given by the lawyer in the course of that relationship' " (italics omitted) ].)

Justice Werdegar's dissenting opinion suggests that the Evidence Code's definition of the attorney-client privilege forecloses any inquiry into whether a communication is related to **legal** consultation. Yet the Evidence Code's definition of the privilege concerns not only the manner in which information is transmitted, but the nature of the communication. The statute treats the term "confidential communication between client and lawyer" as one that requires further definition, and the definition it provides extends only to that information transmitted "*in the course of* [the attorney-client] relationship." (Evid. Code, § 952, italics added.) The same definition also refers to "those who are present to *further the interest of the client in the consultation*" and "the *accomplishment of the purpose* for which the lawyer is consulted." ***115** (*Ibid.* italics added.) A similar focus is plain in related definitions of the Evidence Code. For example, the statute defines "client"

  

as someone who "consults a lawyer for the purpose of retaining the lawyer or securing **legal** *295 service or advice from him in his professional capacity." (*Id.*, § 951.) And a "confidential communication between client and lawyer," according to the statute, "includes a **legal** opinion formed and the advice given by the lawyer in the course of that relationship." (*Id.*, § 952.) These references cut against an understanding of the privilege in this context as encompassing every conceivable communication a client and attorney share, and instead link the privilege to communications that bear some relationship to the provision of **legal** consultation.

**Invoices** for **legal** services are generally not communicated for the purpose of **legal** consultation. Rather, they are communicated for the purpose of **billing** the client and, to the extent they have no other purpose or **780 effect, they fall outside the scope of an attorney's professional representation. (See *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 67, 149 Cal.Rptr.3d 324 [explaining that "the dominant purpose for preparing the [**invoices** to the county] was not for use in litigation but as part of normal record keeping and to facilitate the payment of attorney fees on a regular basis"]; cf. *Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1, 32, 173 Cal.Rptr. 856 [labor negotiations, which could have been conducted by a nonattorney, "were not privileged unless the dominant purpose of the particular communication was to secure or render **legal** service or advice"].) While **invoices** may convey some very general information about the process through which a client obtains **legal** advice, their purpose is to ensure proper payment for services rendered, not to seek or deliver the attorney's **legal** advice or representation.

This distinction is relevant because, as our opinion in *Costco* confirmed, not every communication between attorney and client is privileged solely because it is confidentially transmitted. Costco had retained a law firm to advise it on whether certain managers were exempt from wage and overtime laws. An attorney at the firm interviewed two Costco managers and then sent the company a confidential 22-page opinion letter. Several years later, some Costco employees filed a lawsuit claiming that Costco had misclassified and underpaid its managers. As part of that litigation, the plaintiffs tried to compel discovery of the attorney's opinion letter. Over Costco's objection, the trial court ordered **disclosure** of the letter, allowing portions of it containing the attorney's impressions, observations, and opinions to be redacted. (*Costco*, *supra*, 47 Cal.4th at pp. 730–731, 101 Cal.Rptr.3d 758, 219 P.3d 736.) The confidential opinion letter at issue in *Costco* was indisputably privileged, and the plaintiffs never claimed otherwise. (See *id.* at pp. 735–736, 101 Cal.Rptr.3d 758, 219 P.3d 736 [the plaintiffs "never disputed" that Costco retained the law firm to provide Costco with "**legal** advice," which was provided in the form of the opinion letter].)

**[10]** In ruling that Costco did not need to turn over this opinion letter, we took care to explain that the same rule would not apply to all communications *296 between a lawyer and his or her client. The privilege, for example, "is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice [citation]; in that case, the relationship between the parties to the communication is not one of attorney-client." (*Costco*, *supra*, 47 Cal.4th at p. 735, 101 Cal.Rptr.3d 758, 219 P.3d 736.) The same is true when a lawyer is **billing** his or her client: the relationship ***116 evokes an arm's-length transaction between parties in the market for professional services more than it does the diligent but discreet conveyance of facts and advice that epitomizes the bond between lawyer and client. An organization may strongly oppose, and sternly resist, public **disclosure** of its **legal** **bills**, just as a business adviser or public relations consultant might do the same. But the extent of this resistance does not dictate the scope of the attorney-client privilege.

What *Costco* also reaffirmed is the longstanding principle that "a client cannot protect unprivileged information from discovery by transmitting it to an attorney," though we noted that this "concern [was] not present here." (*Costco*, *supra*, 47 Cal.4th at p. 735, 101 Cal.Rptr.3d 758, 219 P.3d 736; see also *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 397, 15 Cal.Rptr. 90, 364 P.2d 266 [" 'Knowledge which is not otherwise privileged does not become so merely by being communicated to an attorney.' "].) *Costco* thus recognized that not all communications between attorney and client become privileged solely by virtue of the mode of communication (confidential versus not). And though *Costco* made this point with regard to information sent from client to attorney, we see no reason why the reverse situation would require a different rule. After all, a lawyer may well send a government client an e-mail that has

nothing to do with **legal** advice. For example, a lawyer might e-mail details about a firm's efforts to move to a newly constructed office building or host a political fundraiser. Even if these communications are confidential (as would be true for any e-mail communication), they are not made for the ****781** purpose of **legal** consultation and are therefore not protected by the attorney-client privilege.

**[11]** The same is true for **billing** **invoices**. While a client's fees have some ancillary relationship to **legal** consultation, an **invoice** listing amounts of fees is not communicated for the purpose of **legal** consultation. The mere fact that an attorney transmitted a communication to his or her client confidentially (in the sense that no one other than the recipient could see the communication) does not end the inquiry into whether the communication's contents are protected by the attorney-client privilege. After all, just about every communication between a lawyer and client is intended to be kept private, regardless of whether the communication has any connection to **legal** consultation at all. Even the fact that the information communicated may have some ancillary bearing on an attorney's relationship to a client (as information about an office move or political fundraiser might have) does not end our inquiry into whether the attorney-client privilege applies. Nor does the fact that an ***297** attorney would prefer to keep the information confidential (as most people would prefer for their emails).

What the inquiry turns on instead is the link between the content of the communication and the types of communication that the attorney-client privilege was designed to keep confidential. In order for a communication to be privileged, it must be made for the purpose of the **legal** consultation, rather than some unrelated or ancillary purpose. As Chief Justice George put it in his concurring opinion in *Costco*: "the communication also must occur 'in the course of' the attorney-client relationship (Evid. Code, § 952)—that is, the communication must have been made for the purpose of the **legal** representation." (*Costco*, *supra*, 47 Cal.4th at p. 742, 101 Cal.Rptr.3d 758, 219 P.3d 736 (conc. opn. of George, C.J.).) Considering Evidence Code section 952 "as a whole," continued Chief Justice George, it becomes "even clearer that the Legislature intended to extend the protection of *****117** the privilege solely to those communications between the lawyer and the client that are made for the purpose of seeking or delivering the lawyer's **legal** advice or representation." (*Costco*, 47 Cal.4th at p. 743, 101 Cal.Rptr.3d 758, 219 P.3d 736 (conc. opn. of George, C.J.).) While Chief Justice George's views are expressed in a concurring opinion, the opinion emphasizes a crucial distinction that is relevant here, between the opinion letter at issue in that case and the **invoices** at issue here. Unlike an opinion letter, a **billing** **invoice** is not "made for the purpose of the **legal** representation." (*Id.* at p. 742, 101 Cal.Rptr.3d 758, 219 P.3d 736.)

**[12]** **[13]** But while **billing** **invoices** are generally not "made for the purpose of **legal** representation," the information contained within certain **invoices** may be within the scope of the privilege. To the extent that **billing** information is conveyed "for the purpose of **legal** representation"—perhaps to inform the client of the nature or amount of work occurring in connection with a pending **legal** issue—such information lies in the heartland of the attorney-client privilege. And even if the information is more general, such as aggregate figures describing the total amount spent on continuing litigation during a given quarter or year, it may come close enough to this heartland to threaten the confidentiality of information directly relevant to the attorney's distinctive professional role. The attorney-client privilege protects the confidentiality of information in both those categories, even if the information happens to be transmitted in a document that is not itself categorically privileged. When a **legal** matter remains pending and active, the privilege encompasses everything in an **invoice**, including the amount of aggregate fees. This is because, even though the amount of money paid for **legal** services is generally not privileged, an **invoice** that shows a sudden uptick in spending "might very well reveal much of [a government agency]'s investigative efforts and trial strategy." (*Mitchell*, *supra*, 37 Cal.3d at p. 610, 208 Cal.Rptr. 886, 691 P.2d 642.) Midlitigation swings in spending, for example, could reveal an impending filing or outsized concern about a recent event.

***298** **[14]** The same may not be true for fee totals in **legal** matters that concluded long ago. In contrast to information involving a ****782** pending case, a cumulative fee total for a long-completed matter does not always reveal the substance of **legal** consultation. The fact that the amounts in both cases were communicated in an **invoice** transmitted confidentially from lawyer to client does not automatically make this information privileged. Instead, the privilege turns on whether those amounts

  

reveal anything about **legal** consultation. Asking an agency to disclose the cumulative amount it spent on long-concluded litigation—with no ongoing litigation to shed light on the context from which such records are arising—may communicate little or nothing about the substance of **legal** consultation. But when those same cumulative totals are communicated during ongoing litigation, this real-time **disclosure** of ongoing spending amounts can indirectly reveal clues about **legal** strategy, especially when multiple amounts over time are compared.

Justice Werdegar is concerned that our opinion suggests the "scope of the privilege somehow wanes with the termination of the subject litigation." But the question at issue here is not, as Justice Werdegar suggests, whether privileged material remains privileged when "the attorney-client relationship has ended." (Dis. opn., *post*, 212 Cal.Rptr.3d at p. 112, 386 P.3d at p. 778.) Even while the scope of the attorney-client privilege remains constant over time, the same *information* (for example, the cumulative amount of money that was ***118** spent on a case) takes on a different significance if it is revealed during the course of active litigation. During active litigation, that information can threaten the confidentiality of **legal** consultation by revealing **legal** strategy. But there may come a point when this very same information no longer communicates anything privileged, because it no longer provides any insight into litigation strategy or **legal** consultation.

**[15]** Our conclusion that the privilege turns on content and purpose, not form, fits not only with the terms of the statute but also the law as it existed before the Evidence Code was enacted. The Evidence Code was meant to incorporate prior law on the attorney-client privilege. (See Cal. Law Revision Com. com., 29B pt. 3A West's Ann. Evid. Code (2009 ed.) foll. § 952, p. 307 ["The requirement that the communication be made in the course of the lawyer-client relationship and be confidential is in accord with existing law."].) Before 1965, the long-established rule in California was that the attorney-client privilege—then set forth in the Code of Civil Procedure [4]—protected communications made for the purpose of the attorney's professional representation. (See, e.g., *Solon v. Lichtenstein* (1952) 39 Cal.2d 75, 80, 244 P.2d 907 ***299** ["A communication to be privileged must have been made to an attorney acting in his professional capacity toward his client."].)

Further support for this conclusion comes from the language and structure of a related statutory scheme. Business and Professions Code section 6148, subdivision (a), describes the information that a contract for **legal** services (i.e., a fee agreement) must generally contain. Subdivision (b), on the other hand, describes the information that attorney **billing** statements (such as **invoices**) must generally contain. (See *id.*, § 6148, subd. (b).) But Business and Professions Code section 6149 states that only *fee agreements* "shall be deemed to be a confidential communication within the meaning of ... Section 952 of the Evidence Code." This section makes no mention of **billing** statements or **invoices**. The Legislature's decision to define both fee agreements and **billing** statements in one section, while in the very next section subjecting only the former to the attorney-client privilege, suggests that the privilege was not intended to protect both fee agreements and **invoices** in the exact same way. (See *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576, 273 Cal.Rptr. 584, 797 P.2d 608 ["When the Legislature 'has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.' "].) [5]

**783 These arguments help explain why California courts have generally presumed that **invoices** for **legal** services are *not* categorically privileged. (See, e.g., *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1326–1327, 168 Cal.Rptr.3d 40 ["we seriously doubt that all—or even most—of the information on each of the **billing** records proffered to the court was privileged"].) Indeed, **disclosure** of **billing** ***119** **invoices** is the norm in the federal courts in California, where "[f]ee information is generally not privileged." (*Federal Sav. & Loan Ins. Corp. v. Ferm* (9th Cir. 1990) 909 F.2d 372, 374; see also *Tornay v. U.S.* (9th Cir. 1988) 840 F.2d 1424, 1426 ["Payment of fees is incidental to the attorney-client relationship, and does not usually involve **disclosure** of confidential communications arising from the professional relationship."].) Our holding today is consistent with that approach—an approach with which the County, a frequent litigant in federal court, is undoubtedly familiar.

None of the County's remaining arguments supports the conclusion that all information in attorney **invoices** is categorically privileged. In particular, the County observes that **disclosure** of **invoices** can provide adversaries a window **300** into litigation strategies—"a road map

as to how the matter is being litigated, or may be litigated in the future." We are sensitive to the County's concern here, but this concern does not require the rule that Court of Appeal established and that the County insists on, which is a categorical bar on **disclosure** of a government agency's expenditures for any **legal** matter, past or present, active or inactive, open or closed. Though the PRA carves out an exemption for privileged portions of government records, "[t]he fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document." (*CBS, Inc. v. Block*, *supra*, 42 Cal.3d at p. 653, 230 Cal.Rptr. 362, 725 P.2d 470.) Instead, government agencies must disclose "[a]ny reasonably segregable portion" of a **public record** "after deletion of the portions that are exempted by law." (§ 6253, subd. (a).)

## III. CONCLUSION

The imperative of protecting privileged communications between attorney and client—and thereby promoting full and frank discussion between them—is a defining feature of our law. This imperative does not require us to conclude—as the Court of Appeal did here—that everything in a public agency's **invoices** for **legal** services is categorically privileged. Instead, the contents of an **invoice** are privileged only if they either communicate information for the purpose of **legal** consultation or risk exposing information that was communicated for such a purpose. This latter category includes any **invoice** that reflects work in active and ongoing litigation. Accordingly, we reverse the judgment of the Court of Appeal and remand for proceedings consistent with our opinion.

We Concur:

Chin, J.

Liu, J.

Kruger, J.

DISSENTING OPINION BY WERDEGAR, J.

The importance of the attorney-client evidentiary privilege to the proper functioning of the **legal** system in this state cannot be overstated. "The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for almost 400 years. [Citations.] The privilege authorizes a client to refuse to disclose, and to prevent others from disclosing, confidential communications between attorney and client. (Evid. Code, § 950 et seq.) Clearly, the fundamental purpose behind the privilege 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. [Citation.] In other words, the public policy fostered by the privilege seeks ****784** to insure 'the right of every person to freely and *****120** fully confer and confide in one having knowledge of 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, 208 Cal.Rptr. 886, 691 P.2d 642, fn. omitted.) "Although exercise of the privilege ***301** may occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship." (*Ibid.*)

With today's decision, a majority of the court undermines this pillar of our jurisprudence, finding **legal invoices** sent from a law firm to its client, although initially protected by the attorney-client privilege, may lose such protection once the subject litigation is concluded. This conclusion finds no support in the plain meaning of the words of the attorney-client privilege as set forth in Evidence Code section 954, [1] and are in fact contrary to a recent decision by this court interpreting the scope of the privilege. I respectfully dissent.

## I.

The attorney-client privilege is set forth in section 954 and provides in pertinent part that a "client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer...." The phrase " 'confidential communication between client and lawyer' " is, as relevant here, defined in section 952 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." No question exists that the **invoices** at issue in this case comprise "information transmitted" between a law firm and its

client, the Los Angeles County Board of Supervisors,[2] that the information was generated within the course of the attorney-client relationship, and that the **invoices** were prepared and ***302** transmitted in confidence. As such, the **invoices** are privileged, and thus not subject to **disclosure** under the **Public Records Act**. (Gov. Code, § 6254, subd. (k).)[3]

*****121** The majority reaches a different conclusion by embellishing the words of the statutory privilege to discover a heretofore hidden meaning. According to the majority, the "key question" is: "Would treating **invoices** as sometimes nonprivileged *undermine the fundamental purpose* of the attorney-client privilege?" (Maj. opn., *ante*, 212 Cal.Rptr.3d at p. 113, 386 P.3d at p. 778, italics added.) The opinion then reasons the privilege protects only those "communications between attorney and client *made for the purpose of seeking or delivering the attorney's* ***legal*** *advice or representation*." (*Ibid.* italics added.) Therefore, concludes the majority, "the privilege ****785** does not apply to every single communication transmitted confidentially between lawyer and client. Rather, the heartland of the privilege protects those communications *that bear some relationship to the attorney's provision of* ***legal*** *consultation*." (*Id.* at p. 114, 386 P.3d at p. 779, italics added.)

The majority's decision to add consideration of a communication's purpose as an additional, nonstatutory element to the Legislature's definition of a "confidential communication" is unsupported in law. Absent those rare situations in which the attorney-client privilege facilitates a person's constitutional rights under the Sixth Amendment,[4] the evidentiary privilege at issue in this case is statutory only. As we have recognized, "[o]ur deference to the Legislature is particularly necessary when we are called upon to interpret the attorney-client privilege, because the Legislature has determined that evidentiary privileges shall be available only as defined by statute. (Evid. Code, § 911.) Courts may not add to the statutory privileges except as required by state or federal constitutional law [citations], *nor may courts imply unwritten exceptions to existing statutory privileges*." (*Roberts v. City of Palmdale*, *supra*, 5 Cal.4th at p. 373, 20 Cal.Rptr.2d 330, 853 P.2d 496, italics added.) As the California Law Revision Commission has commented, "privileges are not recognized in the absence of statute," and "[t]his is one of the few instances where the Evidence Code ***303** precludes the courts from elaborating upon the statutory scheme." (Cal. Law Revision Com. com., 29B pt. 3A West's Ann. Evid. Code, foll. § 911, at p. 219.)

This court recently spoke to the scope of the attorney-client privilege in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 101 Cal.Rptr.3d 758, 219 P.3d 736 (*Costco*). In *Costco*, the issue, as in the instant case, concerned a communication between a lawyer and client that arguably contained both confidential information (in the form of **legal** opinions) and nonconfidential information (such as facts obtained from witnesses). The *Costco* plaintiffs contended they were entitled to discovery of the nonprivileged portions of a letter **legal** counsel sent to the defendant. Interpreting sections 952 and 954, this court unanimously rejected the claim, explaining that "[t]he attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication *irrespective of whether it includes unprivileged material*. As we explained in *Mitchell v. Superior Court*, *supra*, 37 Cal.3d at page 600, 208 Cal.Rptr. 886, 691 P.2d 642: '[T]he privilege covers the transmission of documents which are available to the public, *****122** and not merely information in the sole possession of the attorney or client. In this regard, *it is the actual fact of the transmission which merits protection*, since discovery of the transmission of specific public documents might very well reveal the transmitter's intended strategy.' " (*Costco*, *supra*, at p. 734, 101 Cal.Rptr.3d 758, 219 P.3d 736, italics added.) Further, " '[n]either the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between "factual" and "**legal**" information.' " (*Ibid.*)

The majority seemingly embraces the notion that courts may parse a **legal** communication to permit **disclosure** of those parts that were not "made for the purpose of **legal** consultation" (maj. opn., *ante*, 212 Cal.Rptr.3d at p. 116, 386 P.3d at p. 780), but strains to distinguish *Costco*, *supra*, 47 Cal.4th 725, 101 Cal.Rptr.3d 758, 219 P.3d 736, unconvincingly suggesting that when an attorney **bills** a client for **legal** services rendered, he or she steps outside the role of a lawyer and into the role of accountant. (Maj. opn., *ante*, at p. 116, 386 P.3d at p. 780 ["the relationship evokes an arm's-length transaction between parties in the market for professional services more than

it does the diligent but discreet conveyance of facts and advice that epitomizes the bond between lawyer and client"].) Accordingly, reasons the majority, **legal billing invoices** may fall outside the protection of the attorney-client ****786** privilege because they "are not made for the purpose of **legal** consultation." (*Id.* at p. 116, 386 P.3d at p. 780.) But this is not a situation in which an attorney is acting as something other than a **legal** representative, such as a real estate agent or business advisor; the **invoice** in question was for **legal** services rendered.

More to the point, the majority's line of analysis ignores the core reasoning of *Costco* that section 954 prohibits courts from parsing a communication ***304** between lawyer and client in order that those parts not involving a **legal** opinion or advice can be disclosed. As *Costco* explained, despite what might be the dominant purpose of a communication, "when the communication is a confidential one between attorney and client, *the entire communication, including its recitation or summary of factual material, is privileged*." (*Costco, supra,* 47 Cal.4th at p. 736, 101 Cal.Rptr.3d 758, 219 P.3d 736, italics added.) *Costco*'s analysis, applied here, leads inexorably to the conclusion that the **legal invoices** at issue are privileged under sections 952 and 954. [5]

Even more pernicious than the majority's improper addition of a nonstatutory prerequisite to the attorney-client privilege, and its unconvincing attempt to distinguish *Costco*, *supra*, 47 Cal.4th 725, 101 Cal.Rptr.3d 758, 219 P.3d 736, is its suggestion that the protective scope of the privilege somehow wanes with the termination of the subject litigation. Thus, the *****123** majority opines that "[w]hen a **legal** matter remains pending and active, the privilege encompasses everything in an **invoice**—including the amount of aggregate fees." (Maj. opn., *ante*, 212 Cal.Rptr.3d at p. 117, 386 P.3d at p. 781.) But the majority then suggests a more limited rule of privilege may apply once the litigation ends, saying that "[t]he same may not be true for fee totals in **legal** matters that concluded long ago." (*Ibid.*) That the majority fails to cite any language in sections 952 or 954 supporting such a rule is unsurprising, for nothing in the Evidence Code supports the notion that the reach of the attorney-client privilege is different for pending litigation versus **legal** matters that have concluded.

Indeed, **legal** authority is to the contrary. In *Littlefield v. Superior Court* (1982) 136 Cal.App.3d 477, 186 Cal.Rptr. 368, a defendant in a criminal case sought a writ of mandate to force his codefendant to testify and reveal confidential conversations he had with his lawyer, the Los Angeles County Public Defender. (It was the defendant's contention the public defender had disclosed facts about the alleged murders to the codefendant, which allowed him to fabricate testimony detrimental to the defendant.) Although the defendant acknowledged the communications were presumptively protected by the attorney-client privilege, he argued "that privilege may be deemed attenuated because the attorney/client relationship is 'near an end.' " (*Id.* at p. 481, 186 Cal.Rptr. 368.) The appellate court properly disagreed, explaining that "the ***305** attorney/client privilege continues even after the end of threat of punishment" (*id.* at p. 482, 186 Cal.Rptr. 368), and that "[n]othing in the statutes controlling the privilege suggests it is to be limited or diminished in importance as a function of the continuance of the relationship that existed at the time of the confidential communications herein sought" (*ibid.*). In other words, the protective power of the attorney-client privilege is not reduced simply because the attorney-client relationship has ended or is about to end. (Cf. *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 66, 24 Cal.Rptr.3d 199, 105 P.3d 560 [attorney-client privilege continues to ****787** protect covered communications until no person or entity exists who is statutorily authorized to assert it].)

Secondary sources are even more pointed. The attorney-client privilege "attaches upon the initial consultation ... and continues beyond the end of the attorney-client relationship for so long as a 'holder' is in existence." (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2003) ¶ 7:265, p. 7-114 (Aug. 2016 Update).) "The right to claim the attorney-client privilege is not limited to the litigation or controversy in the course of which a protected communication was made. *It survives the termination of litigation* and continues even after the threat of liability or punishment has passed." (*Id.*, ¶ 7:269, p. 7-115, italics added.)

The majority's suggestion the protective power of the attorney-client privilege under section 954 "may not" (maj. opn., *ante*, 212 Cal.Rptr.3d at p. 117, 386 P.3d at p. 781) continue to encompass all portions of a document that previously qualified as a "confidential communication" under section 952 is mischievous in

the extreme. Following today's decision, attorneys in this state must counsel their clients that confidential communications between lawyer and client, previously protected by the attorney-client privilege, may be forced into the open by interested parties once the subject litigation has concluded. If a limiting principle applies to this new rule, it is not perceptible to me. [6]

***124 Nor is it any saving grace that "disclosure of billing invoices is the norm in the federal courts in California, where '[f]ee information is generally not privileged.' " (Maj. opn, *ante*, 212 Cal.Rptr.3d at p. 119, 386 P.3d at p. 783.) Although by this argument the majority suggests that a strong weight of legal opinion backing its views exists in the federal universe, such support is ephemeral. The cases cited by the majority rely on Federal Rule of Evidence 501, which *306 simply incorporates federal common law. [7] By contrast, the scope of the attorney-client privilege in California state courts is governed by the detailed and specific definition of a "confidential communication" as set forth in section 952. The majority's comparison of apples to oranges is thus unpersuasive.

**II.**

As noted above, the conclusion reached by the majority today is inconsistent with our interpretation of section 952 in *Costco*, *supra*, 47 Cal.4th 725, 101 Cal.Rptr.3d 758, 219 P.3d 736. But even setting *Costco* aside, this court is simply not free to add elements and prerequisites to a statutory rule of evidentiary privilege. Whether it might be wise policy to find a "confidential communication" within the meaning of section 952 must be one "made for the purpose of seeking or delivering the attorney's legal advice or representation" (maj. opn., *ante*, 212 Cal.Rptr.3d at p. 114, 386 P.3d at p. 779), is a question more properly consigned to the discretion of the Legislature and not this court.

I dissent.

We Concur:

**788 Cantil-Sakauye, C.J.

Corrigan, J.

**All Citations**

2 Cal.5th 282, 386 P.3d 773, 212 Cal.Rptr.3d 107, 2016 Daily Journal D.A.A.R. 12,740

Footnotes

1 The 2004 voter initiative preserved these exemptions. (See Cal. Const., art. I, § 3, subd. (b)(5); see also *International Federation of Professional and Technical Engineers, Local 21, AFL–CIO v. Superior Court* (2007) 42 Cal.4th 319, 329, fn. 2, 64 Cal.Rptr.3d 693, 165 P.3d 488.)

2 As first enacted in 1968, section 6254(k) read: "Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (§ 6254(k), as enacted by Stats. 1968, ch. 1473, § 39, p. 2947.) In 1981, the Legislature used identical language when repealing and reenacting section 6254(k). (Stats. 1981, ch. 684, §§ 1, 1.5, pp. 2484-2491.) The Legislature has since amended this subdivision only once, deleting the first use of the phrase "provisions of" in 1991. (Stats. 1991, ch. 607, § 4, p. 2758.)

3 The phrase "in the course of that relationship" has appeared unchanged in Evidence Code section 952 since its enactment in 1965.

4 "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." (Code Civ. Proc., former § 1881, subd. 2, enacted in 1872 and repealed by Stats. 1965, ch. 299, § 2, p. 1297 [enacting Evid. Code].)

5 The reason for this discrepancy, according to the County, is that invoices "so obviously met [Evidence Code section 952's] definition of communications" that the Legislature saw no need to specify that they were privileged. We are not convinced. As explained above, we do not think Evidence Code section 952 categorically protects invoices. And, in any event, whether it does is far from "obvious[ ]."

1 All statutory references are to the Evidence Code unless otherwise stated.

2 Although we may presume for purposes of argument the fee **invoices** considered here do not include a "**legal** opinion formed" or "advice given" within the course of that relationship, section 952's use of the term "includes" means that the scope of the privilege is *not limited* to **legal** opinions and advice. " '[I]ncludes' [is] ordinarily a term of enlargement rather than limitation." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101, 17 Cal.Rptr.2d 594, 847 P.2d 560.) "The 'statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.' " (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774, 117 Cal.Rptr.2d 574, 41 P.3d 575.) The majority does not dispute that the attorney-client privilege covers more than just **legal** opinions and advice, but nevertheless asserts language in various sub-clauses of section 952 mean the attorney-client privilege covers only "communications that bear some relationship to the provision of **legal** consultation." (Maj. opn., *ante*, 212 Cal.Rptr.3d at p. 115, 386 P.3d at p. 779.) As I explain, *post*, this interpretation of sections 954 and 952 is far too narrow and contrary to existing authority.

3 Government Code section 6254, subdivision (k) states that the **Public Records Act** does not require **disclosure** of the following records: "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*." (Italics added.) "By its reference to the privileges contained in the Evidence Code, therefore, the **Public Records Act** has made the attorney-client privilege applicable to **public records**." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370, 20 Cal.Rptr.2d 330, 853 P.2d 496.)

4 See, e.g., *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 751, 157 Cal.Rptr. 658, 598 P.2d 818 ("if an accused is to derive the full benefits of his [constitutional] right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney"), relying on *Fisher v. United States* (1976) 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39.

5 To the extent the majority relies on former Chief Justice George's concurring opinion in *Costco* (maj. opn, *ante*, 212 Cal.Rptr.3d at p. 116–117, 386 P.3d at p. 780–781), it mischaracterizes his views. (*Costco*, *supra*, 47 Cal.4th at pp. 741–744, 101 Cal.Rptr.3d 758, 219 P.3d 736 conc. opn. of George, C.J.). In a separate opinion, former Chief Justice George distinguished the situation in which information is transmitted between the client and the lawyer in the course of the attorney-client relationship, which information is privileged, from the situation in which information is communicated to an attorney outside the context of an attorney-client relationship, which information is unprivileged. "[A] communication in the context of section 952 need not concern litigation; rather it suffices that the communication consist of information transmitted between the client and the lawyer *within the scope* of the attorney-client relationship." (*Id.* at p. 743, 101 Cal.Rptr.3d 758, 219 P.3d 736 (conc. opn. of George, C. J.).)

6 The majority confusingly asserts "the scope of the attorney-client privilege remains constant over time," but that, after an undetermined period of time, privileged "*information* ... takes on a different significance" (maj. opn., *ante*, 212 Cal.Rptr.3d at p. 117, 386 P.3d at p. 782, italics added), such that it can lose its confidential status. But if the scope of the privilege is constant over time, how information—once privileged—nevertheless loses its protected status is unexplained by the majority. If the majority is saying that a court may refuse to recognize the privileged status of once-privileged information if it determines the information is no longer of strategic value to a litigant, I disagree, and further observe the majority cites no authority for this remarkable position.

7 Rule 501 of the Federal Rules of Evidence (28 U.S.C.) states in pertinent part: "The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court."

But the same rule goes on to suggest the primacy of state law rules of privilege, providing that, "in a civil case, *state law governs privilege regarding a claim or defense for which state law supplies the rule of decision*." (*Ibid*. italics added.)