S223876

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

ESTUARDO ARDON, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED
Plaintiff,

v.

CITY OF LOS ANGELES
Defendant

DEFENDANT CITY OF LOS ANGELES' REPLY BRIEF ON THE MERITS

On Review of a Decision of the
Second District Court of Appeal
Case No. B252476

Affirming a Judgment of the Superior Court of
the State of California for the County of Los Angeles, Lead Case No. BC363959
Honorable Lee Smalley Edmon, Judge Presiding

[Related to Case Nos. BC406437; BC404694; and BC363735]

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INTRODUCTION

In a case directly on point released just weeks ago, the First District recognized that "[w]hen two statutes potentially conflict, our first task is not to declare a winner, but instead to find a way, if possible, to avoid the conflict." (*Newark Unified School District v. Superior Court (Brazil)* (July 31, 2015, A142963) ___ Cal.App.4th ___ [2015 WL 4594095 at p. *8] (*Newark*).) Thus:

> Twenty years of consistent judicial interpretation of Evidence Code section 912 hold that the inadvertent production of privileged documents does not effect a waiver of the privilege. That statute cannot, at this late date, be interpreted to the contrary. Accordingly, if we were to adopt [Respondent's] interpretation of [Government Code] section 6254.5, the two statutes would dictate diametrically, and irreconcilably, opposed results ... . Because reconciling the statutes would be impossible, it would become necessary to choose between them.

(*Id.* at p. *10.)

Of course this is not the preferred method for resolving apparent statutory conflicts, and to harmonize the Public Records Act with Evidence Code section 912, this Court should approve *Newark's* holding that inadvertent disclosure of

attorney-client privileged materials does not work waiver under Government Code section 6254.5 as selective disclosure does.

Harmonizing these statutes does not undermine the legislative intent of section 6254.5. As *Newark* recognizes, "the target of section 6254.5 was 'selective' disclosure: picking and choosing by an agency of the members of the public to whom documents will be released." (*Newark, supra,* ___ Cal.App.4th ___ [2015 WL 4594095 at p. *7].) "Selection" inherently involves knowing and deliberate action, and it is absurd to suggest a public agency sought to selectively disclose privileged materials to its adversaries in high-stakes litigation. Only inadvertent disclosure can account for the facts here.

Other than the appellate opinion on review here ("Opinion"), no published authority has ever held inadvertent disclosure of materials subject to the attorney-client privilege or the work product rule results in waiver — much less in litigation in which a defendant public agency has fought successful discovery battles to protect its privileges. This Court should therefore reject the Opinion's attempt to distinguish litigation privileges in this context and recognize that both Evidence Code section 912 ["Waiver of privilege"] and Code of Civil Procedure section 2031.285 ["Electronically stored information"] are silent on the present facts. Like *Newark,* this Court should harmonize the Public Records Act with the

Evidence Code, which the former explicitly cross-references in subdivision (k) of Government Code section 6254, and protect privilege from waiver by inadvertent disclosure, whether in discovery or pursuant to the Public Records Act.

REVIEW IS DE NOVO, NOT FOR ABUSE OF DISCRETION

Plaintiff Eduardo Ardon ("Ardon") argues this Court should review the trial court's decision for abuse of discretion. To do so, he confuses the standard of review of findings of fact with that for review for matters of law. The central issue here is, of course, legal, as this Court does not sit to review errors of fact. Ardon misspeaks to state "[a]s the City concedes, a trial court's decision on a motion for disqualification is reviewed for abuse of discretion." (Answer Brief at p. 11.) While Defendant City of Los Angeles ("City") agrees that conclusions based on findings of fact are generally reviewed for abuse of discretion, where there are no material disputed factual issues, an appellate court reviews the trial court's determination de novo. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159 ["As to the trial court's conclusions of law ... review is de novo"].)

Nor does *Federal Home Loan Mortgage Corporation v. La Conchita Ranch Co.* (1998) 68 Cal.App.4th 856 support Ardon's claimed deferential standard of review —that appeal reviewed implied findings of fact. (*Id.* at p. 860 ["Thus, even where there are no express findings, we must review the trial court's exercise of

discretion based on implied findings that are supported by substantial evidence"].) Here, no one disputes how Ardon's counsel obtained the privileged documents or that she failed to immediately notify the City that privileged documents had been inadvertently disclosed by a low level City employee. Nor is there dispute that she refused to return the documents as repeatedly requested, and persists in claimed entitlement to retain them. Thus, Ardon's argument for abuse of discretion review fails; this Court's review here is de novo.

Moreover, even if the abuse of discretion standard applied (which it does not), mistake of law is always an abuse of discretion. Both the trial court and the Second District erred to assert a statutory basis for the common law rule that privilege is not waived by inadvertent disclosure in discovery, and then using that nonexistent legislation to distinguish the Public Records Act, which — like the Discovery Act — also provides no statutory exception to waiver under these circumstances. (Opinion at p. 4.)

The Answer brief fails to address this glaring error. This court may take that silence as impotence — Ardon simply has no answer.

I. INADVERTENT DISCLOSURE DOES NOT WAIVE PRIVILEGE UNDER THE PUBLIC RECORDS ACT'S PROHIBITION OF SELECTIVE DISCLOSURE

Ardon's Answer brief asks this Court to distinguish well-established standards of professional conduct that apply to

privileged documents inadvertently produced in discovery from privilege rules under the Public Records Act, as though these were entirely independent sources of privilege. As discussed below, however, this Court should harmonize the discovery and public records statutes as *Newark* recently did. (*Newark, supra,* ___ Cal.App.4th ___ [2015 WL 4594095 at pp. *8–9].)

A. The Public Records Act Can Be Harmonized with the Evidence Code

Ardon argues Public Records Act exceptions to waiver set forth under Government Code section 6254.5 do not include inadvertent disclosure. That no exception under section 6254.5 explicitly states inadvertent disclosure among the detailed list of materials protected by sections 6254 and 6254.7 does not end the inquiry. Rather, subdivision (k) of section 6254 does except documents subject to attorney-client privilege and expressly cross-references the Evidence Code and invites harmonization of that Code with the Public Records Act.

If attorney-client privilege were waived in all settings unless an express statutory exception applies, there would be no exception for the inadvertent disclosure of privileged documents in discovery. Evidence Code section 912 states only that attorney-client privilege is waived "if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." Uncoerced, inadvertent "disclosure"

would amount to waiver under that language read in isolation. Yet courts uniformly recognize that:

> When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged.

(*State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657 (*State Fund*).) [1]

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[1] The federal cases Ardon cites for his claim the rule does not apply when a privilege holder inadvertently turns over a document to an attorney for production pre-date *State Fund* and are not California authority in any event. (Answer at p. 20, fn. 13 [citing *Underwater Storage, Inc. v. United States Rubber Co.* (D.D.C. 1970) 314 F.Supp. 546 and *D'Ippolito v. Cities Service Co.* (S.D.N.Y. 1965) 39 F.R.D. 610].) California and federal evidence law are, of course, distinct. (*E.g., Cloud v. Superior Court* (1996) 50 Cal.App.4th 1552, 1558 [rejecting "self-critical analysis privilege" recognized by federal courts].)

The common law gloss on the Evidence Code, which excepts inadvertent disclosure from waiver and imposes an ethical obligation on counsel to refrain from exploiting an adversary's inadvertence, must be harmonized with the Public Records Act:

> It has long been the rule in this State that statutes relating to the same subject matter are to be construed together and harmonized if possible. In other words, it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear by either express declaration or by necessary implication.

(*Rich v. Schwab* (1998) 63 Cal.App.4th 803, 814 [internal quotations and citation omitted].)

Moreover, when a legislative body re-enacts a statute, it is understood to incorporate settled interpretations of the re-enacted statute. (*Barratt American v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 704 ["Under the 'reenactment rule' of statutory interpretation, the unamended portion of the statute is reenacted with the enactment of the amendment, so that the statute is deemed to have been acted on as a whole"]; *Pierce v. Underwood* (1988) 487 U.S. 552, 567 ["reenactment, of course, generally includes the settled judicial interpretation"]; Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) pp. 320–322 ["Canon of Imputed

Common Law Meaning"] ("[W]ords undefined in a statue are to be interpreted and applied according to their common-law meanings.").)

Thus, the Legislature is presumed to have been aware of the common law interpretation of the Evidence Code provisions relating to inadvertent disclosure in discovery on each of the several occasions when it amended Government Code sections 6254 and 6254.5 since *State Fund* was decided, and there is no indication the Legislature intended to abrogate its rule.[2] Therefore, the trial court and Court of Appeal both erred in failing to harmonize subdivision (k) of Government Code section 6254 with Evidence Code sections it expressly cross-references.

By contrast, the First District harmonized Section 6254.5 with the Evidence Code in *Newark:*

> In order to harmonize section 6254.5 with Evidence Code section 912, which has been construed not to effect a waiver of the attorney-client and work product privileges from an inadvertent disclosure, we construe

---

[2] Government Code section 6254 has been amended no less than 24 times since *State Fund* was decided in 1999, most recently by Stats. 2014, ch. 31, § 2. Similarly, Government Code section 6254.5 has been amended 3 times since 1999, most recently by Stats. 2014, ch. 401, § 35.

section 6254.5 not to apply to an inadvertent release of privileged documents.

(*Newark, supra,* ____ Cal.App.4th ____ [2015 WL 4594095 at p. *1].)

Newark's facts are strikingly similar to those here. There, a citizen and two community organizations made Public Records Act requests of the Newark Unified School District ("District"). The District inadvertently included in its response more than 100 documents protected by the attorney-client privilege. (*Newark, supra,* ___ Cal.App.4th ___ [2015 WL 4594095 at pp. *1–3].) The District soon realized its error and asked the recipients — including a lawyer for one of the community organizations — to return the documents. They refused, like Ardon's counsel, claiming Government Code, section 6254.5 waived the privilege.

Newark rejected that position, as this Court should do here:

> Although inadvertent disclosures were not within the contemplation of the Legislature when it enacted section 6245.5, that does not require us to interpret the statute to exclude them, since inadvertent disclosures are within a reasonable interpretation of the statutory language and are not inconsistent with the Legislature's purpose. Rather, we are compelled to interpret section 6254.5 to exclude inadvertent disclosures in order to avoid a conflict with Evidence Code section 912.

(*Newark, supra,* ____ Cal.App.4th ___ [2015 WL 4594095 at p. *8].)

Newark correctly recognized that "[w]hen two statutes potentially conflict, our first task is not to declare a winner, but instead to find a way, if possible, to avoid the conflict." (*Ibid.*) Indeed, *Newark* cites this Court's recent decision of *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955–956 (*DPH*), in support.

> We have recently emphasized the importance of harmonizing potentially inconsistent statutes. A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. This rule applies although one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject. Thus, when two codes are to be construed, they must be regarded as blending into each other and forming a single statute. Accordingly, they must be read together and so construed as to give effect, when possible, to all the provisions thereof. Further, all presumptions are against a repeal by implication. Absent an express declaration of legislative intent, we will find an implied repeal only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant,

and so inconsistent that the two cannot have concurrent operation.

(DPH, supra, (2015) 60 Cal.4th at 955–956, internal quotations and citations omitted.)

Applying that standard, *Newark* concluded: "section 6254.5 can plausibly be interpreted to exclude the inadvertent release of documents from its scope" and "[b]y adopting this interpretation, we avoid any potential conflict with Evidence Code section 912." (*Newark, supra,* ____ Cal.App.4th ____ [2015 WL 4594095 at p. *9].) This rationale is sound, supported by ample precedent regarding statutory interpretation and preserves both the Legislature's intent in adopting and re-enacting section 6254.5, as well as the long established practice of courts protecting the attorney-client and work product privileges in the face of inadvertent disclosure. (*Ibid.* ["The privilege of confidential communication between client and attorney should be regarded as sacred. It is not to be whittled away by means of specious argument that it has been waived. Least of all should the courts seize upon slight and equivocal circumstances as a technical reason for destroying the privilege "] [internal quotations and citations omitted].)

B. *Newark*'s Harmonization is Consistent with Section 6254.5's Intent to Bar Selective Disclosure

Ardon relies upon distinguishable case law in an unpersuasive effort to dismiss legislative history of Government Code, section 6254.5. In *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, the governor's nominee for Treasurer cited a staff report stating that "[i]t is understood that the author will submit amendments" that comported with plaintiff's interpretation of the statute at issue in that case. The Court rejected this evidence, because:

> the 'understanding' of an unnamed staff member of a legislative committee, derived from an unnamed source, as to the anticipated contents of a forthcoming amendment to a bill, is not admissible as an indication of the Legislature's intent in ultimately enacting the measure.

(*Id.* at p. 742.)

Moreover, this Court's rejection of the contested staff report in *Lungren* was supported by a declaration of the author of the quoted language, stating proposed amendments were commonly changed before committee hearings, and that committee staff anticipate an amendment does not mean it will in fact be submitted. (*Lungren, supra,* 45 Cal.3d at p. 742, fn. 17.) The declarant also stated that, when the amendment in issue was introduced, it was substantially different from the language he had anticipated. Thus, under the facts

presented there, this Court concluded the staff report's speculation did not evidence the intent of the Legislature as to the statute it ultimately adopted.

Lungren is no help to Ardon here, however. The legislative reports discussed in Appellant's Opening Brief involving Government Code section 6254.5 are neither speculative nor unreliable. Rather, the legislative materials consistently reflect intent to prevent selective disclosure of privileged documents in concert with *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645 (*Kehoe*), of which the Legislature was presumed to be aware:

> The Public Records Act denies public officials any power to pick and choose the recipients of disclosure. When defendants elect to supply copies of complaints to collection agencies the complaints become public records available for public inspection.

(*Kehoe, supra,* 42 Cal.App.3d at pp. 656–657 [footnote omitted].)

Therefore, as both contemporaneous case law and the committee reports discussed in the City's Opening Brief (at pp. 18–20) indicate, section 6254.5 was intended to prevent selective disclosure rather than to abrogate long-standing rules that preserve attorney-client privilege in cases of inadvertent disclosure.

Again, *Newark* provides the apt analysis:

> Language in legislative history documents, in addition to stating section 6254.5 was intended to codify the

> holding of *Kehoe,* repeatedly characterized the statute's purpose in language taken from *Kehoe.* ... The Legislature's purpose in enacting section 6254.5, then, was to prevent government officials from manipulating the PRA exemptions by asserting them against some members of the public while waiving them as to others. The statute, in essence, was intended to require agencies to maintain an applicable exemption as to all members of the public or not at all.

(*Newark, supra,* ____ Cal.App.4th ____ [2015 WL 4594095 at p. *7].) Because inadvertent release "does not involve an attempt to assert the exemption as to some, but not all, members of the public, the problem section 6254.5 was intended to address" is absent. (*Ibid.*)

In short, there is no unequivocal indication of legislative intent to distinguish attorney-client privilege under the Evidence Code and the Public Records Act. To the contrary, Government Code section 6254.5 was intended only to prevent intentional selective disclosure, which is not at issue here.

C. Disclosure Was Inadvertent Here

Ardon devotes but one paragraph of his answer Brief to his argument the City's disclosure was not inadvertent, claiming these documents were reviewed by a clerk in the Office of the City Administrator. (Answer Brief at pp. 28–29.) While the City

Administrator is authorized to release documents under the Public Records Act, this does not empower the City Administrator, much less a clerk in his office, to waive the City's attorney-client privilege or the work product privilege held by the City's attorneys. Those counsel, of course, had no knowledge of Ms. Rickert's Public Records Act request because they were deliberately kept out of the loop..

Moreover, any argument the City knowingly and voluntarily disclosed the privileged documents is belied by its consistent efforts to preserve privilege, as evidenced by its successful motion to quash Ardon's subpoena demanding disclosure of the League of California Cities Memo analyzing the legal issues in the underlying lawsuit here, which was designated in the City's privilege log along with the Fujioka Memo and the Michaelson Letter — the other privileged material in issue here. (1 CT 154–155 [Declaration of Holly Whatley, ¶¶ 8, 10, 11]; 1CT 196].) This assertion also ignores the City's prompt and repeated demand for the return of these documents when its counsel learned of the inadvertent disclosure (1 CT 155–156 [Declaration of Holly Whatley, ¶¶ 12, 14] 1 CT 213–215; 1 CT 222–223), and the prompt filing of the April 30, 2013 Motion to Disqualify — six days after Ardon's counsel refused the City's demand. (1 CT 121 [Motion to Disqualify]; 1 CT 211 [April 24, 2013 Rickert letter refusing to return the privileged documents].)

Finally, the undisputed evidence shows the City Administrator neither waived privilege nor authorized anyone else to do so. (1 CT 147–148 [Declaration of Miguel Santana, ¶¶ 3–5].) Nor did the City Council waive attorney-client privilege. (1 CT 150–151 [Declaration of Noreen Vincent, ¶¶ 4, 5].) Nor did the City Attorney's office waive the attorney work product privilege. (1 CT 151 [Declaration of Noreen Vincent, ¶ 6].) Nor has the League of California Cities waived its work product rights, as Judge Mohr recognized when he granted the League's Motion to Quash. (1 CT 153 [Declaration of Holly Whatley at ¶ 5]; 1 CT 177.)

Ardon nevertheless seeks to describe City staff's error as "consent," asserting a material distinction between inadvertent disclosure by an attorney and by a client. The effort fails in light of law, policy and the unrefuted facts summarized above. First, Ardon concedes "Section 912 explicitly requires the privilege holder's consent before waiver by another can occur." (Answer Brief, pp. 28–29, fn. 19.) Thus, Ardon concedes the law requires the City Council's consent before disclosure of the city's attorney-client privileged materials can constitute waiver. But here, as noted above, the City Council did not consent to the disclosure, and no evidence to the contrary exists. Thus, there is no waiver here under what Ardon concedes to be the law.

Second, Ardon's contention, and the lower courts' rulings here, collapse the distinction between the City Council and low-level

City employees for purposes of waiver of privilege. Doing so would have the consequences detailed in the City's Opening Brief (at pp. 33–34), such as empowering a document clerk to waive by inadvertence what an elected council member could not do deliberately. Moreover, this would effect a sea change in public policy by shifting power from elected legislators to low-level staff . Further still, even assuming both the City Council and the City employees hold the privilege — which the City does not concede — waiver by an employee can not constitute waiver as to the City Council or other holders of the privilege because the Evidence Code explicitly states that waiver by one joint holder of privilege does not waive it as to another. (See, Evid. Code § 912, subd. (b).)

Finally, again, *Newark* undermines Ardon's arguments. Disclosure in *Newark* was by an employee, just as here. (*Newark, supra,* ____ Cal.App.4th ____ [2015 WL 4594095 at p. *1].) Under Ardon's view, waiver arises from errors of any but attorneys. Surely, this turns logic on its head — why would inadvertence by lawyers, trained and licensed in the law, have less consequence than inadvertence by those of lesser education? *Newark* did not so hold. Rather, it protected privileged documents inadvertently disclosed by non-attorney staff. (*Id.* at p. *9.) It refused to hold District employees to a level of perfection not demanded of attorneys. For these persuasive reasons, this Court should reverse here.

D. *Newark* Protects Public Agency Privilege under the Public Records Act Just as in Discovery

Ardon argues that protection for inadvertently produced documents in discovery cannot be extended to responses to Public Records Act requests because "the PRA does not provide any mechanism for the 'clawback' of any documents disclosed pursuant to a PRA request ... ." (Answer Brief at p. 22.) Although this was the conclusion of the lower courts here, it is error because the Discovery Act has long been interpreted to allow such a clawback under *State Fund,* even absent express legislative authorization. What is not required under the Discovery Act is not required under the Public Records Act — common law may protect privilege in the absence of statutory language in either context. The Opinion's erroneous assumption that Evidence Code section 912 does expressly authorize clawback simply compounds the error.

Newark illustrates the point —privilege is protected even when litigation is not pending and outside circumstances governed by the Civil Discovery Act. Rather, a public agency can recover inadvertently disclosed material on suit for injunction. (*Newark, supra,* ____ Cal.App.4th ____ [2015 WL 4594095 at pp. *11–12].) *Newark* was "unwilling to adopt an interpretation of the PRA that would leave a public agency with no means to recover improperly released documents." (*Id.* at p. *11.) Rather than "preemptively denying relief in all circumstances," the Court of Appeal left trial courts to decide such suits on a case-by-case basis. (*Id.* at p. *12.)

Accordingly, that the Public Records Act has no express provision for recovery of inadvertently disclosed privileged materials does not bar protection of those privileges by the tools of equity.

E. The Documents in Issue are Privileged

1. The Fujioka Letter is privileged

Ardon argues his counsel did not obtain the September 18, 2006 letter the City identifies as the "Michaelson Letter," but instead obtained a letter dated September 28, 2006 ("Fujioka Letter") from William Fujioka, City Administrative Officer, to David Michaelson, Chief Assistant City Attorney, responding to the Michaelson Letter. (Answer Brief at pp. 9–10.)

While the City has no way of knowing whether Ardon's counsel has the Michaelson Letter, it is clear that Ms. Rickert is the source of any confusion. First, Ardon admits that in her letter dated April 24, 2013 "Ms. Rickert mistakenly implied that she possessed the September 18, 2006 letter." (2 CT 251–252, fn. 6; 1 CT 218.) Second, Ms. Rickert stated in her April 3, 2013 letter that "I have obtained a copy of a document responsive to [the Michaelson Letter] and which discloses [its] contents," (1 CT 206.) Thus, even assuming she does not have the Michaelson letter, she admits possession of a response to it "which discloses [its] contents." (*Ibid.*) Moreover, the distinction between the Michaelson Letter and the Fujioka Letter responding to it is irrelevant. Both documents are confidential

communications between an attorney and his client and therefore subject to attorney-client privilege. (Evid. Code, §§ 952, 954.) Moreover, Ardon cannot shield his counsel's ethical breach with confusion created by his own attorney.

2. The League Memo is privileged

Ardon next argues Judge Mohr limited his order sustaining the City's and the League's motions to quash to list-serve emails and therefore did not address the League Memo. (Answer Brief at p. 28.) However, the declaration of League General Counsel Patrick Whitnell discussing the League Memo was indisputably before Judge Mohr when he ruled[3] and his ruling did not exclude the League Memo. (1 CT 177–181 [order granting League's motion to quash].)

Moreover, the analysis underlying Judge Mohr's determination that list-serve emails are privileged applies equally to the League Memo, as it was distributed via the list-serve to assist public agency counsel in defending cases like the underlying suit here. As noted in the City's and the League's motion to quash, the League operates a confidential list serve for attorneys representing

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[3] The City's Opening Brief details the record evidence that establishes Judge Mohr's earlier ruling recognized the League Memo as privileged. (Opening Brief at p. 43, fn. 6.)

public agencies. (2 CT 321–322 [2007 Whitnell Decl. at ¶ 5].) Documents in the city's possession responsive to Ardon's subpoena included the League Memo, which was distributed to the list serve, in which counsel for the City participate. (2 CT 321 [2007 Whitnell Decl. at ¶ 3].) The list serve is a confidential forum in which attorneys can share legal impressions, conclusions, opinions, research with qualified attorneys with like interests. (2 CT 321–322 [2007 Whitnell Decl. at ¶ 5].) Moreover, all members of the list serve agree to maintain the confidentiality of list serve communications. (2 CT 322–323 [2007 Whitnell Decl. at ¶¶ 6, 10].) Accordingly, the League Memo is subject to both the work product privilege and the attorney-client privilege. And, indeed, Judge Mohr so ruled.

a. The League Memo is work product

The protection afforded attorney work product from discovery is set forth in Code of Civil Procedure, §§ 2018.010 et seq. Section 2018.030(a) states: "A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." The League Memo reflects League attorneys' legal analysis of disputes like the underlying suit here and was distributed by a confidential list serve in which public agency counsel alone participate in confidence. As such, the League Memo is a communication among attorneys on issues of common concern and therefore work product. That the League Memo was exchanged among a group of attorneys with a

common interest does not result in waiver, because each member of the list serve was subject to its confidentiality agreement and the League Memo was shared only through that list serve. (2 CT 321 [2007 Whitnell Decl. at ¶ 3].)

Code of Civil Procedure § 2018.020, entitled "Policy of the state," establishes the following attorney work product policy:

> It is the policy of the state to do both of the following:
>
> (a) Preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases.
>
> (b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts.

In BP Alaska Exploration, Inc. v. Superior Court (1998) 199 Cal.App.3d 1240, the Court of Appeal rejected argument that an attorney waived work product protection by delivering writings to the client. That court held waiver would result only by the attorney's "voluntary disclosure or consent to disclosure of the writing to a person other than the client **who has no interest in maintaining the confidentiality of the contents of the writing.**" (*Id.* at p. 1261 [emphasis added].) As the court noted:

> the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.

(*Id.* at p. 1256.) Accordingly, Judge Mohr did not allow Ardon's counsel to poach legal theories from League attorneys and counsel for its member cities. Instead, he required Ardon's counsel to do her own research, develop her own theories, and reach her own conclusions.

Thus, the League Memo is work product and its protection from disclosure is supported both by the policy of the work product doctrine and the public interest in allowing public agency counsel to collaborate on issues of common concern.

b. The League Memo is attorney-client privileged

Evidence Code, section 954 establishes the lawyer-client privilege and empowers a client to refuse to disclose, and to prevent others from disclosing, confidential communications between client and lawyer. In relevant part, Evidence Code, section 951 defines "client" as:

> a person who, directly or through an authorized representative, consults a lawyer for the purpose of

retaining the lawyer or securing legal service or advice from him in his professional capacity.

Here, every member of the list serve, including attorneys representing the League and the City of Los Angeles, act as clients with respect to other members from whom legal service and advice are secured; compensation is not required. (Evid. Code, § 950 [defining "lawyer"].) Similarly, city attorneys who received the League Memo secured legal advice, and were therefore clients of the attorneys who prepared it. Thus, the League Memo is attorney-client privileged.

Nor has this privilege been waived by disclosure to attorneys representing public agencies. As noted above, all members of the list serve agree to preserve confidentiality of list-serve communications, and the League Memo was shared only via the list serve.

Evidence Code, section 952 states:

> As used in this article, "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 by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the

> accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

ate Resources California LLC v. Superior Court (2004) 115 Cal.App.4th 874 ("*OXY*") thus finds no waiver when attorney-client-privileged documents and work product are disclosed among parties to a joint defense agreement such that the parties reasonably expect the communications to be maintained in confidence and disclosure is reasonably necessary to further the purpose of the legal consultation.

OXY discusses the "common interest" or "joint defense" doctrines. Although these doctrines have been held to have independent existence in other states, under California law, the common interest doctrine is a non-waiver rule:

> Applying these waiver principles in the context of communications among parties with common interests, it is essential that participants in an exchange have a reasonable expectation that information disclosed will remain confidential... In addition, disclosure of the information must be reasonably necessary for the purpose for which the lawyer was consulted... . Thus, for the common interest doctrine to attach, most courts seem to insist that the two parties have in common an

> interest in securing legal advice related to the same matter — and that the communications be made to advance their shared interest in securing legal advice on that common matter.

(*OXY, supra,* 115 Cal.App.4th at p. 891 [internal quotations omitted].)

The joint defense agreement in *OXY* evidenced a reasonable expectation of confidentiality. So, too, the confidentiality agreement for the list serve — because all its participants agree to confidentiality. In fact, breach of that agreement is likely not just breach of contract but also cause for discipline under Rules of Professional Conduct, rule 3-100, which requires attorneys to maintain client confidences. Moreover, sharing legal theories and advice among list-serve members is necessary to the purpose for which list-serve members consult one another — in fact, shared legal advice is the very purpose of the list serve. List-serve participants are attorneys representing public entities with common an interest in securing legal advice relating to municipal revenues and the League Memo was drafted to serve that shared interest.

The League Memo is therefore attorney-client privileged and its distribution via the list serve does not waive that privilege.

II. ARDON'S COUNSEL'S REFUSAL TO COMPLY WITH THEIR ETHICAL DUTIES HAS TAINTED THIS CASE

Having litigated this case since 2006, Ardon's counsel

understood the privileged nature of the material she received in response to her Public Records Act request and knew equally well the City's long-standing claim of privilege as to those documents that lay out the city's defense analysis of the underlying suit here. Therefore, Ardon cannot credibly maintain that the production of the privileged documents in response to a PRA request, of which the City's attorneys had no notice, was a deliberate waiver of the very privilege the City fought long and hard to protect.

Ardon attempts to minimize his counsel's conduct, arguing:

> Plaintiff has not used the three documents at issue ... Indeed, as Judge Mohr, the original trial judge, stated, had it not settled, this action will likely be decided based upon stipulated facts and/or upon facts already admitted to by the City.

(Answer Brief, p. 4.) He also claims no harm was done as the underlying class action has settled.

These arguments fail for at least five reasons. First, Ardon need not actually cite any of the privileged documents or seek to admit them into evidence to make use of opposing counsel's impressions and litigation strategy, which is now indelibly in the hands (and minds) of his counsel. As the City's Opening Brief notes, a requirement to show actual injury would further prejudice the City, because it would entail revealing precisely how opposing counsel's possession of the privileged documents has prejudiced the

City's case. The City cannot harmlessly respond to Ardon's bald assertion "[t]he Three Documents do not implicate Defendant's trial strategy or analyze the potential testimony of any witness, nor will Plaintiff's counsel's review of the Three Documents affect the outcome of these proceedings." (Answer Brief at p. 33.) How can Ardon's counsel know this? How could the City rebut it except by further describing what opposing counsel is unentitled to know? The conundrum here is not of the City's making and the law should not impose on the City a duty to resolve it. Ardon's counsel caused this harm; she should bear the burden to redress it.

Second, if the privileged documents are really so worthless, why has counsel repeatedly refused return the originals, destroy copies, and refrain from using these materials in this litigation? (1 CT 155–156 [Declaration of Holly Whatley, ¶¶ 11–14]; 1 CT 211; 1 CT 213-215; 1 CT 218–220; 1 CT 222–223.) If the ill-gotten gain were worthless, she would have returned it long ago rather than litigated in three courts her asserted right to keep it. Indeed, the very fact counsel has not only refused to return the privileged documents but has gone so far as to demand reproduction of the privileged documents in discovery (in addition to other documents identified in the City's privilege log) demonstrates their value. (1 CT 203–209 [April 13, 2013 letter from Ms. Rickert to Ms. Whatley demanding

production of the privileged documents].)[4]

Incredibly, Ardon's counsel maintains her disingenuous posture in this Court, claiming: "At the end of this litigation, Plaintiff's counsel will, if requested, return or destroy the Three Documents at the City's option." (Answer Brief, p. 11.) When this case is resolved, the documents, of course, will be of much less interest to the parties here — the League's interests aside. Moreover, the City has already repeatedly demanded return and destruction of the documents at issue yet Ardon's counsel persists in her refusal. Protection of inadvertently disclosed privileged material cannot depend on generosity of those who wrongly hold them; they alone cannot decide what is privileged and when to return it. Their conduct must be guided by clear statements of the law enforceable by courts.

Third, rather than stating that this case would likely be decided upon stipulated or undisputed facts (Respondent's Brief at p. 3; pp. 21–22), Judge Mohr said:

> Let me tell you my guess is that you're going to be able to try this case on stipulated facts. I may be wrong about that. My guess is that's where you're going to go.

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[4] Nor can the City be made whole by simply requesting a copy of the CD that Ardon's counsel received in response to her records request, as the Answer Brief suggests at p. 27, fn. 18.

(2 CT 284: 6–9 [Jan. 10, 2008 transcript].) However, even if Judge Mohr's "guess" had been correct, trial on stipulated or undisputed facts would do nothing to diminish the strategic value of the privileged documents prepared by defense counsel to analyze the very legal issues disputed here. Moreover, in citing Judge Mohr's speculation, Ardon well knows that the City cannot respond by discussing the contents of the privileged documents. The attorney-client privilege in Ardon's hands has become a one-way street binding the City's counsel but not Ardon's, a tool to impair the City's access to able counsel rather than to preserve it, with no basis in law or justice.

Fourth, Ardon would distinguish the City's authorities as involving bad faith assertedly not in evidence here. (Answer Brief at p. 33.) However, *Rico v. Mitsubishi Motors* (2007) 42 Cal.4th 807 did not involve findings of bad faith, but instead privileged materials obtained in uncertain circumstances. (*Id.* at p. 812.) This Court ordered disqualification there to "respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." (*Id.* at p. 818 [citations and internal quotations omitted].) Moreover, the City is not persuaded Ms. Rickert acted in good faith reliance upon her interpretation of the Public Records Act, because after obtaining the privileged documents, she held them in secret for weeks before demanding the City produce them in discovery in an apparent effort to avoid the taint associated with privileged

materials that had been inadvertently disclosed. (1 CT 154 [Declaration of Holly Whatley, ¶ 8]; 1 CT 203.)

Additionally, that the Public Records Act request itself was lawful neither endorses or excuses counsel's conduct after the privileged documents were inadvertently disclosed. Moreover, a discovery request which leads to inadvertent disclosure of privileged material need not be unauthorized for the recipient to be obliged to return it.

Fifth and finally, that the trial court has preliminarily approved a settlement in this matter[5] does nothing to mitigate the continuing harm to the City and the League from opposing counsel's continued possession of the privileged documents. First, the impact of Ardon's unauthorized possession of the City's defense analysis of this case on settlement cannot be known. Further, while settlement arguably cures harm to those who allegedly overpaid telephone tax to the City, the injury to the City remains. Every day counsel continues in possession of the privileged material compounds the damage. Once information is divulged, the harm occasioned by its release cannot be undone; some bells cannot be unrung. And counsel's self-serving claim that they did not use the documents at issue in their motion to certify the class (Answer Brief at p. 35) must be taken with a grain of salt. Even if true, they cannot

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[5] The trial court preliminarily approved settlement on August 13, 2015 — after the City filed its Opening Brief on the merits here.

not remedy the loss of the City's and the League's privileges.

III. CO-COUNSEL SHARE ETHICAL OBLIGATIONS UPON INADVERTENT RECEIPT OF OBVIOUSLY PRIVILEGED MATERIAL

Ardon seeks by footnote to insulate co-counsel from Ms. Rickert's refusal to comply with her ethical obligations under *State Compensation Ins. Fund v. WPS* (1999) 70 Cal.App.4th 644. (See, Answer Brief, p. 36, fn. 28.) The fourth sentence of that footnote states "[t]he Cuneo and Tostrud firms were not given copies of the PRA documents," but — unlike every other factual assertion in the footnote — is unsupported by citation to the record. Even were there record evidence to support the claim, co-counsel need not have received copies of the privileged documents to learn of their content and the nature of co-counsel relationships is such that they likely did. It is for this reason, disqualification is mandatory for all lawyers on the case. (See e.g., *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 850-54 [disqualifying entire city Attorney's office because City Attorney represented adverse party as private counsel before election]; *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1154 ["This close, fluid, and continuing relationship, with its attendant exchanges of information, advice, and opinions, properly makes the of counsel attorney subject to the conflict imputation rule, regardless of whether that attorney has any financial stake in a particular

matter.") Of course, all Ardon's counsel have a financial stake in this contingency class action matter, making the rule of vicarious disqualification all the more necessary.

IV. ARDON'S COUNSEL MUST RETURN THE PRIVILEGED DOCUMENTS AND DESTROY ALL COPIES

The City's original motion sought both the return of the privileged material and disqualification of counsel. Thus, even if this Court concludes disqualification is not warranted, based on either the underlying facts or in light of the recent preliminary approval of a settlement by the trial court, reversal is appropriate to order Ardon's counsel to return the privileged documents, destroy all copies — including electronic copies — and refrain from disclosing any portion of such documents or using them on behalf of any client to the detriment of the City or any member of the League. The return of the documents cannot depend on the "grace" of Ardon's counsel.

V. CONCLUSION

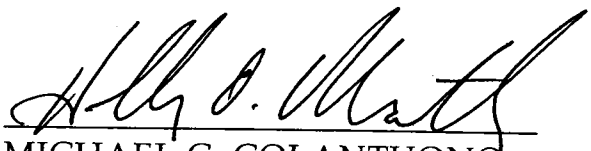
For the foregoing reasons, the City respectfully requests that this Court to order the Superior Court to vacate its order and to issue a new order compelling Ardon's counsel to the return the privileged documents, destroy all copies, and refrain from disclosing the contents or using these materials on behalf of any client to the

detriment of the City or of any member of the League. Further, if, at the time of this Court's decision on the matter, final approval of the pending settlement has been denied, the City requests that this Court order the Superior Court to disqualify plaintiff's counsel from further representation of the class.

DATED: August 26, 2015

Respectfully submitted,

COLANTUONO, HIGHSMITH & WHATLEY, PC



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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8. 520(c)(1) of the California Rules of Court, the enclosed brief of Appellant and Defendant City of Los Angeles is produced using 13-point Palatino Linotype including footnotes and contains approximately 7,657 words, which is less than the 8,500 words permitted by that rule. Counsel relies on the word count of Word 2010, the word-processing software used to prepare this brief.

DATED: August 26 , 2015

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CERTIFICATE OF SERVICE

I, Bernadette V. Morgan, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the State of California, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 300 S. Grand Ave., Suite 2700, Los Angeles, California 90071.

2. That on August 26, 2015, declarant served Defendant's REPLY BRIEF ON THE MERITS in *Ardon v. City of Los Angeles,* No. S223876 via electronic mail to the parties listed on the attached Service List. I electronically transmitted a copy of the within document in a pdf or word processing format to those persons noted at their respective electronic mailbox addresses provided to Lexis File & ServeXpress pursuant to California Rules of Court, rule 2.251, subd. (g) on the date set forth above.

3. That there is regular communication between the parties.

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

Executed on this 27th day of August, 2015 at Los Angeles, California.

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