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June 24, 2016

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The Honorable Presiding Justice
and Associate Justices
Court of Appeal
First Appellate District, Division Three
350 McAllister Street
San Francisco, CA 94102-7421

Re: **Request for Publication** (California Rules of Court, rule 8.1120)
*City of Petaluma v. The Superior Court of Sonoma County*
*(Andrea Waters – Real Party in Interest)*
Case No. A145437 – Opinion Filed June 8, 2016

Dear Presiding Justice McGuiness and Associate Justices Pollak and Jenkins:

We write on behalf of the League of California Cities to respectfully request that the Court publish its June 8, 2016 opinion in *City of Petaluma v. The Superior Court of Sonoma County (Andrea Waters – Real Party in Interest)*, Case No. A145437, pursuant to California Rules of Court, rule 8.1120.

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

The League believes that publication of the opinion in this case is warranted for all of the same reasons stated by the City of Petaluma in its June 17, 2016 Request for Publication of Opinion.[1] The League writes separately to underscore that the opinion in this case "[i]nvolves a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105(c)(6).)

[1] A copy of the City of Petaluma's Request for Publication of Opinion is attached for the Court's convenience, as the League does not seek to duplicate the arguments set forth in that letter, but to incorporate them by reference in the interest of efficiency and judicial economy.

As noted in the *amicus curiae* brief joined by the League supporting the City of Petaluma in this matter, thorough and impartial workplace investigations serve the continuing and vital public interests of facilitating both sound decision-making by public officials who are fully apprised of the totality of the facts and the eradication of discriminatory employment practices. These interests must also be balanced with the public interest in affording public entities the opportunity to defend themselves in litigation in order to protect the public fisc and avoid wasting taxpayer dollars. The clear discussion in the opinion of the circumstances under which a workplace investigation will remain protected by the attorney-client privilege and the attorney work product doctrine strikes a careful balance between these interests, and will thus serve as a useful guide for cities that may find themselves subjects of claims of harassment, discrimination, and/or retaliation in the workplace.

The League of California Cities, therefore, respectfully requests that the Court publish the opinion for the reasons set forth in the City of Petaluma's Request for Publication, and for the further reasons set forth in this letter.

Respectfully submitted,

RENNE SLOAN HOLTZMAN SAKAI LLP

By: _____

Ivan Delventhal
Attorneys for
League of California Cities

cc: Corrie Manning, League of California Cities

Attachments: City of Petaluma's June 17, 2016 Request for Publication of Opinion

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June 17, 2016

Presiding Justice William R. McGuiness
Associate Justice Stewart R. Pollack
Associate Justice Martin J. Jenkins
California Court of Appeal
First Appellate District, Division Three
350 McAllister Street
San Francisco, California 94102

Re: *City of Petaluma v. Superior Court of Sonoma County* (*Waters*)
Court of Appeal Case No. A145437
Request for Publication of Opinion

Honorable Justices:

The City of Petaluma, defendant and petitioner in this case, submits this request for publication of the Court's opinion, filed on June 8, 2016.

As an employer in California, the City has a strong interest in ensuring that this Court's carefully reasoned analysis is available to guide employers, employees, and judges on questions regarding the application of the attorney-client privilege and work product doctrine in the context of workplace investigations, and the effect on those protections of an employer's assertion of the avoidable consequences defense in its answer.

Rule 8.1105 of the California Rules of Court provides, in part, that an appellate opinion may be published if it "[e]stablishes a new rule of law," "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions," "explains . . . an existing rule of law," or "[i]nvolves a legal issue of continuing public interest." (Cal. Rules of Court., rule 8.1105(c)(1)-(3), (6).) The opinion satisfies all of these criteria.

In this case, this Court held that:

(1) an employer's pre-litigation factual investigation undertaken by outside counsel is protected by the attorney-client privilege and work product doctrine, even though the role of outside counsel "[is] limited to a factual investigation and [does] not extend to providing legal advice as to which course of action to take based upon the results of the investigation" (Opn., 8); and

(2) "an employer does not waive any applicable privileges associated with an investigation conducted *after* the employee leaves his or her employment when the employer asserts an available consequences defense" (Opn., 11, original emphasis).

The opinion is significant and merits publication for the following reasons:

- The opinion applies the Supreme Court's analysis in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 for the first time in the context of an employer's investigation into employee claims for violation of the Fair Employment and Housing Act ("FEHA"), to make clear to trial courts and litigants that "[i]n assessing whether a communication is privileged, the initial focus of the inquiry is on the 'dominant purpose of the relationship' between attorney and client and not on the purpose served by the individual communication." (Opn., 7, citing *Costco*, *supra*, 47 Cal.4th at pp. 739-740.) An investigation into the factual basis of an employee's claims of workplace harassment and discrimination is a common and recurring event. Investigations are frequently conducted by attorneys. The opinion brings needed clarity as to whether and when such an investigation, conducted by an attorney, may be protected by the attorney-client privilege and work product doctrine: when the dominant purpose of the attorney's representation is to provide professional legal services by "us[ing] her legal expertise to identify the pertinent facts, synthesize the evidence, and come to a conclusion as to what actually happened." (Opn., 10.)

- The opinion clarifies that an attorney may "provide [] a legal service without also providing advice. The rendering of legal advice is not required for the privilege to apply." (Opn., 9.) In so doing, the opinion notes that it is consistent with *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, in which the reviewing court concluded there was no "blanket rule excluding attorney investigations of employer discrimination from attorney-client and work product protection" and rejected the notion that an employee can overcome such protections "by simply asserting . . . that [the attorney] was engaged in a fact-finding mission." (*Id*. at pp. 122, 124; Opn., 10.) But the opinion takes a step beyond *Wellpoint* by virtue of its basis in more fully-developed facts that demonstrated the attorney here was retained to use her legal expertise to conduct the factual investigation that would be the basis of another attorney's advice (here, the City Attorney's) to the client. The trial court misread *Wellpoint*. The opinion clarifies exactly what *Wellpoint* did or did not hold on the issue of privilege, and its publication will prevent such misreadings in the future.

- Prior to the opinion in this case, no California court had ever addressed the avoidable consequences defense in the context of a post-employment investigation. Publication of the opinion will enhance the understanding of courts and litigants on both sides of the issue as to the exact nature of this defense and as to how that nature precludes waiver when the defense is asserted post-employment. *Wellpoint*, a case involving an investigation undertaken *during* the plaintiff's employment, is the only prior California case addressing the issue of whether injecting the adequacy of an investigation into a claim of hostile work environment under FEHA by the assertion of the avoidable consequences defense constitutes waiver. On this issue, *Wellpoint* is dicta: It is an advisory opinion insofar as no complaint or answer were yet on file in the case after the sustaining of a demurrer. (*Id*. at p. 129.) The court thus explained that the question of waiver could not properly be answered until they were on file. (*Ibid*.) The question of waiver has been answered here, for the first time, in the context of a post-employment investigation. And it is now established that *when* the investigation took place—during employment or, as here, after employment—is an essential factor in the analysis.

In sum, the Court's opinion provides a clear discussion, critical to both judges and practitioners, about the availability of the attorney-client privilege and work product doctrine in the context of an employment investigation. It also provides a needed discussion about the operation of the avoidable consequences defense. Without the direction set forth in this decision, these issues will likely be litigated repeatedly. For these reasons, the City of Petaluma respectfully requests that the opinion be certified for publication.

Respectfully submitted,

THE CITY ATTORNEY'S OFFICE
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By: _____
Alison M. Turner
Defendant and Petitioner CITY OF PETALUMA

AMT:plh
cc: Service List

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On June 17, 2016, I hereby certify that I electronically filed the foregoing **PETITIONER'S REQUEST FOR PUBLICATION** through the Court's electronic filing system, TrueFiling.

I certify that participants in the case who are registered TrueFiling users will be served by the electronic filing system pursuant to California Rules of Court, rule 8.70:

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I further certify that participants in this case who are not registered TrueFiling users are served by mailing the foregoing document by First-Class Mail, postage prepaid, to the following non-TrueFiling participant(s):

Honorable Elliot Lee Daum
SONOMA COUNTY SUPERIOR COURT
3035 Cleveland Avenue, Suite 200
Courtroom 16
Santa Rosa, California 95403
**[Respondent / Case No. SCV-256309]**

I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal Service or Federal Express on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on June 17, 2016 at Los Angeles, California.

/s/ Pauletta L. Herndon
Pauletta L. Herndon

## PROOF OF SERVICE

I, the undersigned, am employed by Renne Sloan Holtzman Sakai LLP. My business address is 350 Sansome Street, Suite 300, San Francisco, California 94104. I am readily familiar with the business practices of this office. I am over the age of 18 and not a party to this action.

On June 24, 2016, I served the following document(s):

**LEAGUE OF CALIFORNIA CITIES' REQUEST FOR PUBLICATION**

by the following method(s):

☑ **Electronic Mail.** By electronically mailing a true and correct copy, pursuant to California Rules of Court, rule 8.70 through the court's electronic filing system operated by TrueFiling

| | |
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☑ **United States Mail**. I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses on the attached Service List and deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

| | |
|---|---|
| Honorable Elliot Lee Daum<br>Judge of the Sonoma County Superior Court<br>Courtroom 16<br>3035 Cleveland Ave., Ste. 200<br>Santa Rosa, CA 95402 | |

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 24, 2016, at San Francisco, California.

By: 

Rochelle Redmayne