



**Association of Defense
Counsel of Northern
California and Nevada**



June 28, 2016

Via TrueFiling

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

Re: *City of Petaluma v. Superior Court (Waters)*
Court of Appeal Case No. A 145 437
Letter in Support of Petition for Review

Honorable Justices:

Pursuant to Rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Southern California Defense Counsel ("ASCDC") and Association of Defense Counsel of Northern California and Nevada ("ADCNCN") write to jointly urge the Court to order publication of its opinion in *City of Petaluma v. Superior Court (Waters)*, A 145 437 ("*City of Petaluma*").

The ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. The ASCDC is comprised of over 1,000 attorneys in Central and Southern California. The ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialize continuing legal education, representation in legislative matters, and multifaceted support, including a form for the exchange of information and ideas. It has appeared as *amicus curiae* in numerous cases before both the California Supreme Court (e.g., *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541; *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512) and the Courts of Appeal (e.g., *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524).

ADCNCN is an association of approximately 900 attorneys primarily engaged in the defense of civil actions. ADCNCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally, including employment matters. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California. ADCNCN has filed briefs as *amicus curiae* in numerous cases before the California Supreme Court and Courts of Appeal across the state.

The two Associations are separate organizations, with separate memberships and governing boards. They coordinate from time to time on some matters of shared interest, such as this letter in support of publication of the *City of Petaluma* opinion.

The decision in *City of Petaluma* is important to the ASCDC and ADCNCN, not only because many of their members practice employment law, but also because the organizations are particularly interested in development of the law relating to evidentiary and summary judgment standards in this area.

The Court's opinion in *City of Petaluma* meets the standards for publication because it "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions" (Cal. Rules of Court, rule 8.1105(c)(2)), "explains ... an existing rule of law" (*id.*, rule 8.1105(c)(3)), and "[i]nvolves a legal issue of continuing public interest" (*id.*, rule 8.1105(c)(6)). Thus, publication of this opinion would be appropriate at this time.

The Court's opinion is of the utmost importance to employers in California given the frequently litigated questions regarding the discoverability of employee complaint investigations and the applicability of the attorney-client privilege and work product doctrine. These issues arise in hundreds, if not virtually all, of employment-related cases across the state each year.

Here, the Court found that an investigation conducted by retained outside counsel to be privileged, even though it expressly did not include the rendering of legal advice as to recommended action. The Court's clear and thoughtful analysis of *Evidence Code* § 954 (privilege), *Code of Civil Procedure* § 2018.010 *et seq.* (work product) and the "dominant purpose" test as established by *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 provides a clear roadmap for attorney investigators (both in-house and outside counsel) as to the steps needed to maintain investigatory privilege while expressly distinguishing and differentiating pre-termination investigations.

The opinion clarifies that *Evidence Code* § 954 requires the provision of legal service *or* advice in order for an attorney-client relationship to be established, not both. Thus, the failure to render an ultimate legal opinion or recommended remedial action does not transmute the retention of an outside attorney investigation into a simple non-privileged "fact finder." In fact,


the Court expressly notes that fact finding which pertains to the provision of legal advice is privileged. In this regard, the Court clarifies the opinion in *Wellpoint Health Networks, Inc. v. Superior Court* (1997) ("*Wellpoint*") 59 Cal.App.4th 110 and the instances where attorney-led investigations were or were not subject to privilege. The Court's analysis of the *Wellpoint* burden-shifting analysis is likewise noteworthy since the City of Petaluma met its *prima facie* case based on the evidence and declarations submitted regarding the intent and purpose of the City in retaining outside counsel, and the actions consistent with that retention by the investigator. The Plaintiff failed to present any relevant evidence to rebut this showing.

Additionally, the Court further found that an employer does not waive any privilege or protection afforded to such an investigation by raising the avoidable consequences doctrine as an affirmative defense where the investigation occurs post-termination. The Associations believe that the Court's opinion is the first to consider the impact of raising these defenses in this context.

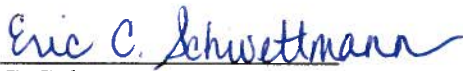
In sum, the opinion is an excellent review of the case authority in this area of the law and is especially relevant for the employment bar in virtually every case. The court does an excellent job of analyzing the privilege and discoverability issues and explaining when an investigation will be subject to discovery, when it will not be, and how to protect against disclosure on a practical basis. These issues are of a continual and ongoing public interest. For the reasons presented above, the ASCDC and ADCNCN urge this Court to order publication of its *City of Petaluma* opinion.

Respectfully submitted,

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 500 North Brand Boulevard, Twentieth Floor, Glendale, CA 91203-9946, USA.

On June 28, 2016, I hereby certify that I electronically filed the foregoing **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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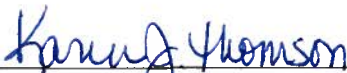
I further certify that participants in this case who are not registered TrueFiling users are served by mailing the foregoing document by First-Class Mail, postage prepaid, to the following non-TrueFiling participant(s):

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[Respondent / Case No. SCV-256309]

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

Executed on June 28, 2016, at Glendale, California.



Karen J. Thomson