

CITY OF OAKLAND

OFFICE OF THE CITY ATTORNEY

Memorandum Re: Public Legal Opinion

TO: Council President Rebecca Kaplan and Members of the City Council

FROM: Barbara J. Parker
City Attorney

CC: Mayor Libby Schaaf
Interim City Administrator Steven Falk
Assistant City Administrator Maraskeshia Smith
Assistant City Administrator Ed Reiskin
Deputy City Administrator Betsy Lake

DATE: April 24, 2020

RE: **Public Legal Opinion - City Attorney's Authority to Execute Joint
Defense/Common Interest Agreements without Council Approval**

Dear President Kaplan and Members of the City Council:

Attached is the public legal opinion requested by the Council on the referenced subject.

This is a public opinion because this issue requires interpretation of the City Charter, regarding the relative powers of the City Council and the City Attorney related to joint defense/common interest agreements.

Like all public opinions, this opinion will be posted on the City Attorney's web site at www.oaklandcityattorney.org.

Very truly yours,



BARBARA J. PARKER
City Attorney

MEMORANDUM

VIA EMAIL

TO: Barbara J. Parker, Oakland City Attorney

FROM: Karen Getman *KGetman*

DATE: April 20, 2020

RE: City Attorney's Authority to Enter Into Joint Defense and/or Common Interest Agreements with Co-Defendants in Litigation

QUESTION PRESENTED

May the City Attorney, without prior approval from the City Council, enter into joint defense and/or common interest agreements with co-defendants in litigation where the City is a named defendant?

SHORT ANSWER

Yes. Under the City Charter, the City Attorney “shall act as Counsel in behalf of the City or any of its officers, boards, commissions, or other agencies in litigation involving any of them in their official capacity.” Oakland City Charter, § 401(6) (emphasis added). In doing so, the City Attorney must maintain the attorney-client privilege “pursuant to state law.” *Id.* Under the Charter and the California Rules of Professional Conduct, which establish standards of legal ethics and professional responsibility for attorneys, once the City becomes a party to litigation, the City Attorney is empowered to determine and implement litigation strategy. That includes decisions such as whether to enter into a common interest or joint defense agreement with co-defendants.

ANALYSIS

The Oakland City Charter delineates certain powers and duties of the City Attorney, but it does not describe the sum total of her authority. See Public Legal Opinion dated March 7, 2018 regarding City Attorney's Authority to Bring Public Nuisance Suits Under State Law, available at www.oaklandcityattorney.org. Among other things, the Charter requires the City Attorney to represent the City in any litigation in which it or its officers, boards or

commissions are named as parties. Charter § 401(6). In doing so, the City Attorney “as counsel, shall assert and maintain the attorney-client privilege, pursuant to state law.” *Id.*

California Evidence Code section 952 codifies the attorney-client privilege. It protects confidential communications between an attorney and client provided they are disclosed to no third parties except to further the purpose for which the attorney was consulted and as “reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted” *Id.* However, as a practical matter, it is common for litigants on the same side of a lawsuit, either as co-plaintiffs, co-defendants or intervenors, to want to share through their attorneys some confidential communications regarding legal strategy when doing so is in the best interests of their respective clients. For example, the attorneys may desire to coordinate when drafting briefs to avoid unnecessary duplication, or share the identities of potential witnesses or evidentiary materials that further their shared litigation goals. They cannot do so, however, without sufficient assurance that the communication does not constitute a waiver of the attorney-client or work product privileges.

California recognizes this duality through the “common interest” or “joint defense” doctrine. The doctrine provides that “parties who possess common legal interests may share privileged information without losing the protection afforded by the privilege.” *Seahaus La Jolla Owners Assn. v. Superior Court*, 224 Cal. App 4th 754, 760 (2014), citing *OXY Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874, 887-88 (2004). The doctrine provides a qualified privilege, recognizing that the parties may have adversarial interests on some matters while sharing common interests on others, and protecting only the sharing of otherwise privileged communications regarding those common interests. *Seahaus*, 224 Cal. App. 4th at 770, citing *OXY*, 115 Cal. App. 4th at 896. It allows counsel for multiple parties to communicate with one another regarding litigation strategy without waiving their various attorney-client privileges. It does not constitute a waiver of any other privilege or defense that may be asserted on the client’s behalf. It does not commit the parties to being aligned on all issues.

With respect to litigation involving the City of Oakland, the Charter requires the City Attorney to represent the City. Oakland Charter § 401(6). With certain exceptions not relevant here, the City Council may direct the City Attorney to commence litigation and it may authorize the settlement or dismissal of litigation when the City is a party.¹ *Id.* Once the City is

¹ The City Attorney’s authority to independently initiate litigation in some instances is discussed in the March 7, 2018 Public Opinion cited above. The Council also has delegated to the City Attorney the authority to settle claims up to the amount of \$25,000. Resolution No. 86476 C.M.S.

a party to a lawsuit, however, the authority to make legal strategy decisions and handle procedural matters resides in the City Attorney, subject to her ethical obligations to her client.

This concept is embodied in the Rules of Professional Conduct governing attorneys. Rule 1.2, captioned “Scope of Representation and Allocation of Authority,” states that

a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter.²

This rule “confers upon the client the ultimate authority to determine the purposes to be served by legal representation,” but authorizes the attorney retained by the client “to act on behalf of the client, such as in procedural matters and in making certain tactical decisions” provided that the lawyer does not “impair the client’s substantive rights or the client’s claim itself.” Rule 1.2, Comment [1].

The seminal California Supreme Court case that fleshes out this issue is *Blanton v. Womancare, Inc.*, 38 Cal. 3d 396 (1985), which held in pertinent part:

The attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action “In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred, and among these is included the authority to enter into stipulations and agreements in all matters of procedure during

² Subdivision (e)(1) of Business and Professions Code section 6068 codifies the lawyer’s core obligation to preserve the confidences of her client; Rule 1.6 of the Rules of Professional Conduct reinforces that principle. Rule 1.4 of the Rules of Professional Conduct requires the attorney to “reasonably consult with the client about the means by which to accomplish the client’s objectives in the representation” and “keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents.” Rule 1.4(a)(2), (3).

the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client.”

Id. at 403-04 (internal citations omitted).

The attorney is not authorized, however, to “impair the client’s substantial rights or the cause of action itself,” or “stipulate to a matter which would eliminate an essential defense.” *Id.* at 404.

Applying these principles here, it is apparent that execution of a joint defense agreement is a tactical or procedural matter that rests within the discretion of the City Attorney as she conducts the litigation. It does not diminish the City’s substantive rights or its defenses, but simply facilitates effective communication among counsel while preserving the confidential nature of the City’s attorney-client communications.

CONCLUSION

Consistent with the Rules of Professional Conduct and her obligations as counsel for the City under the City Charter, the City Attorney can make and execute a joint defense or common interest agreement to preserve the City’s confidential attorney-client communications while facilitating communications among counsel regarding their clients’ common interests. Her decision to do so does not waive the City’s defenses or privileges, nor commit it to a particular course of action. Nothing in the Charter or the Rules of Professional Conduct requires the City Attorney to secure approval from the City Council prior to executing such an agreement.