

## **Closed Session item: Gene James. v. City of San Clemente.**

I recently learned of this matter being before the Council on Tuesday.

I have not been able to review any document other than the Gene James complaint. On that basis, please understand am providing my insight into this potentially very expensive and legally confusing matter based on my memory from a long time ago.

It appears that the critical legal analysis is whether the City Attorney's coverage opinions and letters to the JPIA, or the JPIA's coverage decision holding that there is no coverage, is correct, i.e. did the City and the JPIA owe a duty to defend Gene James on any grounds. Secondly, are the opinions provided to the JPIA by BB&K binding on the City, i.e. does collateral estoppel so to speak apply?

I am now 71 years old, and do not have a photographic memory. Far from it. But I explained long ago when reading BB&K correspondence to the JPIA and the Arbitration decision denying Gene James insurance coverage, that the present lawsuit would be the results, i.e. a lawsuit by Gene James for coverage of his attorneys' fees based on BB&K arguing James' case and in particular that he was sued by Jim Bieber for actions taken during his Council member's activities. It was obvious to me at the time that the BB&K letters and opinions would be exhibits or arguments to be put forth by Gene James after the JPIA refused coverage.

I will provide background and thoughts, but caution everyone to understand I don't have relevant documents to review and have not performed any legal research. I leave that to the City Attorney and others to be hired by the City, if necessary or beneficial.

I believe, though others might disagree, that the BB&K letters/opinions set-up the City to be required to pay for Gene James' defense. How did the City Attorney allow himself or his law firm to have any involvement in attempting to obtain coverage for Mr. James? Why didn't the City have Mr. James hire his own attorney? Was the Council informed and aware that Mr. Smith was sending these coverage letters to the JPIA? If not, why not. Did the City Council approve Mr. Smith's involvement? If not, why not?

The James' complaint, in paragraph 15, states.:

“The City Attorney, in a letter brief submitted in advance of the October 13, 2021, hearing, took the position with the alleged conduct by James giving rise to the Bieber Litigation was within the scope of his duties as Councilmember.”

The James complaint, in paragraphs 22 and 23, cite the Government Code that the City owes Mr. James a duty to defend based on Government Codes that apply to employees. Thus, another question arises. Was Mr. James a City employee?

Another legal issue is whether Mr. James was a City employee. I don't have the answer. Yet, Mr. Smith informed Laura Ferguson, former Council member, and the entire Council, on two

occasions, that a Council member is not a City employee. One was in closed session. Attorney Kristine Exton, an attorney hired by the City, stated that Laura Ferguson, as a Council member, is not an employee of the City. Allison Borkenheim, a BB&K partner at the time, stated that Laura Ferguson was not a City employee. Does the Government Code cited by Mr. James apply? Research is needed.

Mr. James appears to believe the City is collaterally estopped from denying the truth of the statement(s) by the City Attorney to the effect that Gene James was acting within the scope of his duties as a Council member.

The City Attorney can research the collateral estoppel issue. Were the actions by Gene James complained of in the Bieber Litigation “within the scope” of James’ “duties as Councilmember.” More research is needed by the City.

The City Attorney’s letters to the JPIA can be argued to have made that determination for the City. Are those statements binding, forever, on the City?

While I am far from a Nostradamus, when years ago I reviewed the City Attorney’s (BB&K’s) letters and opinions sent to the JPIA, I informed others the City Attorneys’ letters were problematic because in my opinion based on the communications to the JPIA, and because the JPIA had refused to defend Mr. James, Mr. James would argue that when the JPIA refused a defense/indemnity, the City was on the hook to pay. Now we know that is exactly what Mr. James did .

Here are a few details related to the above.

1. The City Attorney Smith informed Laura Ferguson while she was a Council member, that he represents the City, not Council or its members.
2. The City Attorney Smith informed Laura Ferguson that he had never represented City Council members.
3. When sending these letters to the JPIA regarding coverage for Mr. James, who did Mr. Smith represent? Another legal research issue.
4. Should or did Scott Smith (BB&K) represent Gene James seeking defense and/or indemnity from the JPIA?
5. Why didn’t the City inform Gene James he should have hired his own attorney?
6. Why didn’t the Council, on Scott Smith’s advice, agree to pay for an independent attorney to represent Mr. James’ interest with respect to coverage?
7. Isn’t it true that if the City stayed neutral, the attorney who represented Mr. James would not be binding on the City as to whether Gene James was acting in his capacity as a Council member?
8. Did Scott Smith’s letters to the JPIA seeking coverage for Gene James result in the adage tails Gene James wins, heads Gene James wins? If so, how did that happen?

9. I am not an ethics or malpractice attorney. Are there any ethical or malpractice issues here?
10. Should Scott Smith have been involved in attempting to obtain coverage for Gene James?
11. Is it true that for a few months, Eric Sund and/or Scott Smith hid this coverage issue from the Council? If so, why?
12. Did Gene James request coverage during November 2020?
13. Did the JPIA make its first denial in December 2020?
14. Did the Council first learn of the issue(s) around March 2021? If so, why the delay? Didn't Scott Smith learn that inevitably, a decision by the JPIA to deny coverage could result in a lawsuit against the City by Mr. James, and if so, didn't he have a duty to inform the Council, in closed session?
15. How much was the Council informed, and by whom, before an extension to the statute of limitations was entered into by the parties?

There are so many other factual and legal questions that must be analyzed before the Council is asked to vote on this closed session agenda item.

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